MISSISSIPPI

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I. MECHANIC'S LIEN BASICS.

In 2014, the Mississippi Legislature revised Mississippi's lien laws in response to the Fifth Circuit's decision in *Noatex Corp. v. King Construction of Houston, L.L.C.*, 732 F.3d 479 (5th Cir. 2013). The Fifth Circuit found the prior lien statutes to be unconstitutional. The new statutory scheme is set forth in Section 87-5-401 *et. seq.* (hereinafter the "Act").

A. Requirements.

A party filing a lien must strictly follow the enumerated requirements of Section 85-7-405(1), or the lien will be rendered ineffective or unenforceable:[i]

1. The lien claimant must have substantially complied with the provisions of the contract, subcontract, or purchase order in the provision of work, services, or materials provided.[ii]

2. The lien must be filed within 90 days following the claimant's (a) last work on the project, (b) labor, services or materials provided to the project, (c) the furnishing of architectural services, or (d) the furnishing of surveying or engineering services.[iii]

3. The lien must state that it will expire within 180 days of filing if no payment action is filed during that time period and that the owner has the right to contest the lien under Mississippi law.[iv]

4. Within two (2) days of filing the lien, the claimant must send a copy of the lien by registered or certified mail or statutory overnight delivery to the owner, and when the claimant is not the prime contractor, the claimant must also send a copy of the lien to the prime contractor.[v]

5. A payment action for recovery of the lien amount may be commenced in county, circuit, or chancery court, and said payment action must be filed within 180 days of the filing of the lien. Additionally, a *lis pendens* notice must be filed with the commencement of the payment action, and a copy of the *lis pendens* notice must be provided to the owner and contractor.[vi]

6. The lien must state the amount of the lien and the date that it became due.[vii]

7. With the exception of some specifically identified smaller projects, the lien claimant must hold a valid license with the Mississippi Board of Contractors, if one is required of him by law.[viii]

B. Enforcement and Foreclosure

After a claim has been properly filed and noticed, the claimant has 180 days in which to file a payment action. The payment action must be commenced by filing a summons and complaint,[ix] and it may be made in the form of a lawsuit, proof of claim in a bankruptcy case, or binding arbitration.[x] In addition, a *lis pendens* notice must be filed at the time the payment action is commenced, and a copy of the notice must be given to the owner and contractor.[xi]

If the payment action is commenced by way of a lawsuit, the lawsuit may be commenced in the county in which the property subject to the lien is situated.[xii] In proceedings against an owner to enforce a lien, parties who have contracted with the owner are not necessary parties but may be made parties, and design professionals or contractors may intervene in the proceedings at any time prior to judgment.[xiii] Any party to the action may put in issue the fact of indebtedness or the existence of the lien and may assert other defenses or join counterclaims to the action.[xiv] A judgment may be entered against the responsible party(ies) for the lien amount, plus interest and costs.[xv] The court has the discretion to award costs and attorneys' fees to the prevailing party.[xvi]

Priority between different liens is generally based on the order of filing, but a construction lien has priority over all non-tax liens filed after the date the construction lien is filed.[xvii] Priority of liens is not affected by the amendment, restatement, or assignment of the lien, but instead, those changes generally relate back to the date of the original filing for priority purposes.[xviii]

Enforcement of a construction lien shall not affect any prior liens, and a purchaser, in connection with the enforcement of a construction lien, takes the property subject to the prior liens or encumbrances of which the purchaser has actual or constructive notice on the date of the purchase.[xix] Foreclosure of any prior deeds of trust or other liens terminates and extinguishes a subordinate construction lien or other interest as to the land and the buildings and improvements thereon, whether or not at the time of the foreclosure the construction lien or interest was perfected in accordance with the Act, and the subordinate lienholder has the right to any excess proceeds received by the foreclosing lienholder as provided by law.[xx]

C. Ability to Waive and Limitations on Lien Rights

Forms for an Interim Waiver and Release Upon Payment and a Waiver and Release Upon Final Payment are included in the Act. Substantial compliance is necessary in completing the forms. The Act expressly states that lien rights may not be waived in advance of the furnishing of labor, services, or materials, and any purported waiver or release of lien executed or made in advance of furnishing labor, services, or materials is null, void, and unenforceable.[xxi] However, the Act does not prohibit lien waivers as part of the settlement of a bona fide fee dispute, nor does it prevent a claimant from entering into a subordination agreement.[xxii]

II. PUBLIC PROJECTS CLAIMS

Mississippi does not allow liens on public projects.[xxiii] Those seeking payment on a public project must look to the applicable bond(s).

A. State and Local Public Work

See above. There are no lien rights available in Mississippi on public projects.

i. Notices and Enforcement

See above. Those seeking relief for nonpayment on a public project must make a claim on the applicable bond(s).

B. Claims to Public Funds

Any person entering into a construction or construction-related contract with the State, with any county, city, or political subdivision thereof, or with any other public authority, must furnish performance and/or payment bonds, with certain exceptions on small projects.[xxiv] Persons seeking payment do not have lien rights on public projects but instead must look to the applicable bond(s) for payment.

i. Notices and Enforcement

See above.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

The time limits associated with payment actions are outlined in Section I above.

Mississippi Code Section 15-1-41 contains a six year statute of repose for all actions for injury to property or 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" and for all actions for contribution or indemnity against "any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property." The period of limitations / repose begins to run upon written acceptance of the work or actual occupancy or use, whichever occurs first. *Id.* Section 15-1-41 further provides that no action may be brought beyond the six-year period for contribution or indemnity against "any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property" for damages sustained on account of such injury, except by prior written agreement. *Id.*

Section 15-1-41 specifically covers claims against designers and contractors involved in construction activities for improvements to real property for public or private owners. While the

language of the statute does not limit the class of persons protected, case law interpreting the statute has limited the classes of persons protected by the statute to "architects, engineers, and contractors" and has excluded from protection manufacturers of industrial equipment installed in a building.[xxv]

By its own terms, Section 15-1-41 only applies to claims for deficiencies in "improvements" to real property. The term "improvements" is not defined in the statute. The meaning of that term has been explored in related jurisprudence, most notably *Ferrell v. River City Roofing, Inc.*[xxvi] *and Air Comfort Systems, Inc. v. Honeywell, Inc.*[xxvii]

There are two notable exceptions to the protection afforded by Section 15-1-41. First, the statute does not apply to any person or entity "in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury." Second, Section 15-1-41does not apply to actions for wrongful death. The statute further specifically limits its applicability to those causes of action accruing after January 1, 1986.

There has been some erosion of the protection ostensibly afforded by the statute to contractors and design professionals. In the case of *Wyndham v. Latco,*[xxviii] the Mississippi Supreme Court held that a defendant may be equitably estopped from raising the bar of Section 15-1-41 if the plaintiff can prove that the defendant fraudulently concealed the claim of defective construction; alternatively, the court held the provisions of Section 15-1-67 regarding the tolling effect of fraudulent concealment of a cause of action apply to causes of action under Section 15-1-41. However, the court limited the effect of its decision by stating "that application of *Mississippi Code Annotated Section 15-1-41* is not barred if the fraudulent concealment was known, or with diligence could have been discovered, within the six-year repose period."[xxix]

B. Statutes of Repose and Limitations on Application of Statutes

See above.

C. Other - Contract Actions

Except for those breach of contract actions which fall within the provisions of Section 15-1-41 concerning deficiencies in the design and construction of an improvement to real property, actions for breach of a written contract under Mississippi law, including actions for breach of construction contracts, must be brought within three years of the date the cause of action accrued. See Miss. Code Ann. § 15-1-49, which applies to all causes of action for which no other period of limitation is prescribed, including actions on a written contract. Actions for breach of an unwritten contract are covered by Section 15-1-29, which also provides a three-year statute of limitations.[xxx]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

A. Pre-Suit Notice on Bond Suits filed by Remote Subs and Suppliers.

Mississippi has a public bond statute[xxxi] and a private bond statute.[xxxii] The provisions of the public bond statute (or "Little Miller Act") protect only those persons who are (a) first tier subcontractors and material suppliers, i.e., subcontractors and material suppliers to the prime contractor, (b) second tier subcontractors and material suppliers, i.e., a sub-subcontractor or a material supplier to a subcontractor, who give the required notice of claim to the contractor or surety within 90 days of last performing labor or supplying materials, and (c) laborers with wage claims who have performed work on the project site.[xxxiii] The public bond statute does not protect persons who supply rental or leased equipment to a contractor or subcontractor except in the case of road construction contracts.[xxxiv]

The public bond statute requires sub-subcontractors and material suppliers to subcontractors to give written notice of the claim to the contractor or surety within ninety days of last providing labor or materials to the project. The written notice must state "with substantial accuracy the amount claimed and the name of the party to whom the material was furnished... or for whom the labor was performed." A second tier claimant who fails to provide the required notice on a timely basis is barred from suing on the bond.[xxxv]

Mississippi does not require bonds on private projects, nor does it require a subcontractor on a public project to provide a performance bond. However, if a contractor or a subcontractor on a private project does provide a performance bond or if a subcontractor provides a performance bond on a public project, Mississippi Code Annotated § 85-7-185 provides that "such bond shall also be subject to the additional obligations that such contractor or subcontractor shall promptly make payments to all persons furnishing labor or material or rental or lease equipment under said contract." Although it would be prudent for a subcontractor or supplier to give notice of a claim against a private bond as soon as possible, the private bond statute does not require a claimant to give notice before filing suit. If the obligee on the bond (i.e., the owner) has not filed suit on the bond within six months of completion and final settlement of the contract, a claimant under the bond may file suit on the bond.[xxxvi]

The public bond and private bond statutes both contain a one year statute of limitations for suits under the bond.[xxxvii]

B. Pre-Suit Notice of the Statutory Mechanic's or Contractor's Lien

As previously noted, the Act's lien requirements are very detailed and specific. Accordingly, before seeking relief, claimants should consult the Act. In addition to the general requirements of the Act, prior to filing a lien on a single-family residential project, subcontractors, materialmen, and design professionals not in privity of contract with the owner must provide the owner with a pre-lien written notice at least 10 days before filing a lien.[xxxviii] Moreover as to all liens, claimants must provide notice to the owner and contractor of the lien no later than two (2) days after it is filed.[xxxix]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Standard commercial general liability ("CGL") policy language typically provides coverage for "property damage" caused by an "occurrence." The latter term is usually defined to include an "accident." In the absence of an "occurrence," as that term is used in the policy, there is no coverage.

In *ACS Construction Company of Mississippi, Inc., v. CGU*, the United States Court of Appeals for the Fifth Circuit, interpreting Mississippi law, held that negligent workmanship in the installation of a waterproofing membrane resulting in leaks did not constitute an "occurrence" under the policy and that there was no coverage for the property damage which resulted from the leaks.[xl] The precedential value of the *Erie* guess of the Fifth Circuit was short lived. In *Architex Association, Inc. vs. Scottsdale Insurance Company*, the Mississippi Supreme Court rejected the reasoning of the *ACS Construction* case and held:

> The subject policy unambiguously extends coverage to Architex for unexpected or unintended "property damage" resulting from negligent acts or conduct of a subcontractor, if not excluded by other applicable terms and conditions of the policy not at issue in this appeal. By failing to consider the policy as a whole, the circuit court erred in its "occurrence" analysis. Under Scottsdale's CGL policy, the term "occurrence" cannot be construed in such a manner as to preclude coverage for unexpected or unintended "property damage" resulting from work "performed on [Architex's] behalf by a subcontractor."[xli]

B. Trigger of Coverage

A standard CGL policy provides coverage for those amounts which the insured is legally liable to pay because of damage to persons or property that occurs during the applicable policy period. If the events giving rise to the covered loss occur over a period of time involving policies issued by multiple insurers, an issue may arise as to which insurer or insurers is/are obligated to cover the loss. An additional problem of a gap in coverage may arise when a "claims made" policy is followed by an "occurrence" policy. Such issues are addressed through tail insurance.

A "claims made" policy protects the holder only against claims made during the life of the policy, while an "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect. The two types are distinguishable in that a "claims made" policy covers losses caused by any wrongful action taking place at any point in time as long as the claim is made during the period the policy is in effect. Conversely, an "occurrence" policy only protects against liability for wrongful acts which occurred during the term of the policy, i.e., the policyholder is protected by an "occurrence" policy even if a claim is made against the holder after expiration of the policy if the wrongful act took place while such policy was in effect. A gap in coverage may occur if a "claims made" policy is followed by an "occurrence" policy and either (1) a wrongful act occurred during the term of the "claims made" policy but no claim was filed before expiration of the policy;

or (2) a wrongful act occurred after expiration of the "claims made" policy but before inception of the "occurrence" policy. "Tail insurance" bridges the gap.[xlii]

In a "claims made" policy, a carrier agrees to assume liability for any errors, including those made before the inception of the policy, as long as the claim is made during the policy period.[xliii] The making of the claim within the policy period triggers the coverage. An "occurrence" policy provides coverage for any acts or omissions which arise during the policy period even though the claim is made after the policy has expired.[xliv]

C. Allocation Among Insurers

Allocation among insurers at the same coverage level will be prorated between the two insurance policies in the ratio which the limits of liability fixed in each policy bears to the total limits in all policies covering the risk.[xlv]

D. Issues with Additional Insurance

See above.

VI. <u>CONTRACTUAL INDEMNIFICATION</u>

Mississippi law permits the enforcement of indemnification provisions in construction contracts with the significant limitation that indemnity provisions purporting to require indemnification of the indemnitee's own negligence are void *ab initio.* Mississippi Code § 31-5-41 provides:

> With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, 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.
>
> This section does not apply to construction bonds or insurance contracts or agreements.

This provision only applies to limit indemnification provisions in construction contracts, leaving the scope of allowable indemnification unaffected in other kinds of contracts.[xlvi]

In 2005, the Mississippi Court of Appeals ruled that the statute rendered void an indemnity clause obligating a subcontractor to indemnify a general contractor for the latter's negligence. In *Accu-Fab & Construction, Inc. v. Ladner,* the Court held that the indemnity agreement in question was void as against public policy under Section 31-5-41 because the indemnitee was seeking indemnity for its own actions.[xlvii]

The anti-indemnity statute specifically excludes "construction bonds or insurance contracts or agreements" from the scope of its operation. This exclusion could be interpreted to allow a contractor to obtain insurance for its own negligence through the requirement of "additional insurance" by the subcontractor. In *Roy Anderson Corp. v. Transcontinental Ins. Co.,* the United States District Court for the Southern District of Mississippi addressed whether such an "end around" the anti-indemnity statute is permissible.[xlviii] The decision of the district court noted that "[b]ased upon the Fifth Circuit's holding in *Crosby [v. Gen. Tire & Rubber Co.],* a contractor cannot enforce an agreement by a subcontractor to provide insurance coverage for indemnification for the contractor's own negligence."[xlix] The district court reasoned, however, that where the insurance agreement was not linked to the indemnity provision itself, then Miss. Code Ann. §31-5-41 would not void the insurance coverage. The Mississippi Supreme Court has not yet addressed that issue and it remains unclear how that court would decide it.

Mississippi law also recognizes common law indemnity. In *Hartford Casualty Insn. Co. v. Halliburton Co.,* the Supreme Court noted that non-contractual implied indemnity may be asserted if two elements are proven: (1) that the damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) that the claimant did not actively or affirmatively participate in the wrong.[l]

In the event that the party seeking indemnity settles the underlying claim, all claims of indemnity, whether by common law or by contract, require a showing of the following elements:

(1) that the indemnitee was legally liable to the injured third party;
(2) that the indemnitee paid under compulsion; and
(3) that the amount paid by the indemnitee was reasonable.[li]

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

Mississippi permits pay-when-paid, pay-if-paid, and no-damage-for-delay contingent payment agreements, provided certain requirements for each are met.

B. Requirements

i. Pay-if-Paid: Mississippi will recognize a pay-if-paid contingency payment provision only when the contract clearly and unambiguously shifts the risk of payment by the owner to the subcontractor.[lii]

ii. Pay-when-Paid: Mississippi recognizes a pay-when-paid clause, but finds that such clauses only permit a contractor a "reasonable amount of time to pay [the subcontractor] for work done pursuant to the subcontract."[liii]

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

Mississippi follows the rule of law adopted in a many states and by the United States Supreme Court that claims sounding in tort for negligence or strict product liability are barred by the economic loss rule where the only damage is to the product itself.[liv] Although there is no Mississippi case applying the economic loss rule to a fact situation involving construction of improvements to real property, the Mississippi decisions on this general subject rely indirectly on such decisions from other jurisdictions. The Mississippi Court of Appeals, in its opinion in the *State Farm Mutual* case,[lv] cited the case of *Virginia Transformer Corp. v. P. D. George Co.*, 932 F. Supp. 156, 160 (W.D. Va. 1996), as authority for its holding that damage to the remainder of the car from the defective oil seal was not damage to "other property" which would preclude the applicability of the economic loss rule. The *Virginia Transformer* opinion, in turn, relied on *Sensenbrenner v. Rust, Orling & Neale*, 374 S.E.2d 55 (Va. 1988), a case which involved a suit by homeowners against both the architect retained by the contractor to design the home and pool and the subcontractor who built the pool. The plaintiffs alleged that due to negligent design and supervision by the architect and negligent construction by the pool subcontractor, the pool settled, causing water pipes to break; that water from the broken pipes eroded the soil under the pool and the foundation of the house, causing the house to crack as a result of the erosion. Plaintiffs sued the architect and the pool subcontractor in negligence for the cost of repairs to the pool and the house. In answer to a certified question from the United States Court of Appeals for the Fourth Circuit, the Virginia Supreme Court held that the plaintiffs could not recover in tort for the economic losses which they had sustained "suffered as a result of a breach of duties assumed only by agreement."[lvi]

B. Attorney Fee Shifting and Limitations on Recovery

Under Mississippi law, the general rule is that attorney's fees may not be awarded as an element of damages unless provided by statute or by contract or unless the losing party's conduct was so outrageous as to warrant imposition of punitive damages.[lvii] However, in *Universal Life Insurance Co. v. Veasely*, an action against an insurer for wrongful failure to pay a claim, the Mississippi Supreme Court held that attorney's fees (and other extra-contractual damages) were recoverable because it was foreseeable to the insurer that the insured would incur attorney's fees in pursuing its breach of contract action.[lviii] The Mississippi Supreme Court has struggled to limit the reasoning in the *Veasley* case since shortly after it was handed down, but the case is probably limited to bad faith actions against insurance carriers. In 2005, the Mississippi Supreme Court declined to review the decision of the Mississippi Court of Appeals in the *Punzo* case that it is not proper to award attorney's fees for breach of contract simply because they are foreseeable.[lix]

The Litigation Accountability Act of 1988 also permits an award of attorney's fees as extra-contractual damages when a court finds that a claim or defense was raised for purposes of harassment or delay or that a party acted to unreasonably protract the proceedings.[lx]

C. Consequential Damages

Mississippi allows for consequential and indirect damages for breach of a construction contract. "In general, the court's purpose in establishing a measure of damages [for breach of contract] is to

restore the injured party to the financial position he would have been in had there been no breach."[lxi] "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of the bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."[lxii]

Mississippi also allows expectation damages for lost profits. As noted by the Court in *Southeastern Medical Supply, Inc. v. Boyles, Moak & Brickell Insurance, Inc.:*

> The standard applied in considering consequential damages in the nature of lost profits is one of "reasonable certainty." *Lovett v. E. L. Garner, Inc.* 511 So. 2d 1346, 1353 (Miss.1987); *Missouri Bag Co. v. Chemical Delinting Co.,* 214 Miss. 13, 58 So. 2d 71, 76 (1952). This standard requires that both the existence of lost profits damages as well as the showing that the cause of the lost profits is due to the breach must be shown with reasonable certainty. *Id.* at 78.[lxiii]

D. Delay and Disruption Damages

Mississippi permits parties to recover for damages caused by delays and disruptions on construction projects. Mississippi courts generally enforce liquidated damages clauses for these types of damages so long as they are "reasonable and proper in light of the circumstances of the case." *Hovas Constr., Inc. v. Board of Trustees of Western Line Consol. Sch. Dist.*, 111 So. 3d 663 (Miss. Ct. App. 2013). The Mississippi Court of Appeals held in *Hovas* that "an agreement for liquidated damages will be held valid in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive, or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of agreement." *Id.*

E. Economic Loss Doctrine

See above.

F. Interest

Regarding post-judgment interest, Mississippi Code Section 75-17-7 states, as follows:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Accordingly, the amount of interest which may be awarded in connection with a judgment in Mississippi is left to the discretion of the trial court unless the interest rate is set by contract.

As for pre-judgment interest, Mississippi courts have stated the law, as follows:

Where there is no provision in the parties' contract concerning payment of interest, the law in Mississippi regarding an award of prejudgment interest is clear. Such an award is discretionary with the trial judge but is available only if the money due was liquidated and there was no legitimate dispute that the money was owed.[lxiv]

G. Punitive Damages

Mississippi has enacted a statute limiting the recoverability of punitive damages. Specifically, Mississippi Code Section 11-1-65 states that punitive damages may not be recovered in any action absent clear and convincing evidence that the defendant acted with "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." The statute requires that the trier of fact must determine whether to award compensatory damages and in what amount prior to addressing the issue of punitive damages. In the event that the jury does award punitive damages, then the trial court must ascertain, based on factors enumerated in the statute, whether the award is excessive. The statute prohibits an award of punitive damages against a seller of a product other than a manufacturer unless the seller "exercised substantial control of that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought" or unless the seller substantially altered the product or had actual knowledge of the defective condition of the product at the time of sale.

The punitive damages statute places a sliding scale cap on punitive damages, based on the net worth of the defendant, with a maximum of $20 million and a minimum cap of 2% of net worth for defendants with a net worth less than $50 million.

H. Liquidated Damages

Mississippi common law permits enforceability of liquidated damages provisions in certain situations. The contractor may avoid the imposition of all or part of the liquidated damages assessment by proving that the delay was the fault of the owner.[lxv]

Mississippi courts will review liquidated damages provisions to determine if they are reasonable under the circumstances. The amount of liquidated damages sought to be recovered from the defendant must be proportionate to the loss sustained and cannot constitute a penalty. "Consequently, if such are not a reasonable pre-estimate of damages, but are unreasonable or constitute a penalty, their provision is unenforceable."[lxvi]

I. Other Damage Limitations

i. Mental Anguish

Mississippi law allows recover of damages for mental anguish in actions involving personal injury.[lxvii] In contract actions, Mississippi had followed the traditional rule that recovery of mental anguish damages required proof of an independent intentional tort separate from the breach of contract. In 1992, Mississippi abandoned the traditional rule and adopted a "reasonable

foreseeabilty" standard.[lxviii] Under that rule, damages for mental anguish may be recovered in an action for breach of contract where the mental anguish is reasonably foreseeable by the defendant and the plaintiff also proves that he or she actually suffered mental anguish.[lxix] No proof of physical manifestation of the mental anguish is necessary, even in simple negligence cases.[lxx]

IX. Case Law and Legislation Update

Mississippi has not seen a substantial change in construction legislation or case law in the last several years. The most substantial change in recent times revolved around the adoption of the lien law scheme outlined in detail above.

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[i] Mississippi Code Ann. § 85-7-405(1).
[ii] Mississippi Code Ann. § 85-7-405(1)(a).
[iii] Mississippi Code Ann. § 85-7-405(1)(b).
[iv] Mississippi Code Ann. § 85-7-405(1)(b).
[v] Mississippi Code Ann. § 85-7-405(1)(b).
[vi] Mississippi Code Ann. § 85-7-405(1)(c)(i).
[vii] Mississippi Code Ann. § 85-7-415(3).
[viii] Mississippi Code Ann. § 85-7-403 (5).
[ix] Mississippi Code Ann. § 85-7-405(1)(c)(ii).
[x] Mississippi Code Ann. § 85-7-401(d).
[xi] Mississippi Code Ann. § 85-7-405(1)(c)(i).
[xii] Mississippi Code Ann. § 85-7-405(1)(c)(i).
[xiii] Mississippi Code Ann. § 85-7-405(3)(a).
[xiv] Mississippi Code Ann. § 85-7-405(b).
[xv] Mississippi Code Ann. § 85-7-405(b).
[xvi] Mississippi Code Ann. § 85-7-405(b).
[xvii] Mississippi Code Ann. § 85-7-405(2)(a), (b).
[xviii] Mississippi Code Ann. § 85-7-405(2)(a).
[xix] Mississippi Code Ann. § 85-7-405(b).
[xx] Mississippi Code Ann. § 85-7-405(b).
[xxi] Mississippi Code Ann. § 85-7-419(1).
[xxii] Mississippi Code Ann. § 85-7-419(4).
[xxiii] *See, e.g., Toler v. Love*, 154 So. 711 (1934).
[xxiv] Miss. Code Ann. § 31-5-51
[xxv] *McIntyre v. Farrell Corp*., 680 So. 2d 858 (Miss. 1996).
[xxvi] 912 So. 2d 448 (Miss. 2005) (a new roof qualifies as an "improvement to real property') (definition of the phrase follows the "plain and ordinary meaning of the terms in the statute").
[xxvii] 760 So. 2d 43 (Miss. App., 2000) (suit by one subcontractor against another for failure to install American-made equipment as specified was not a claim for injury to person or to property arising out of a defect in construction; rather it was a claim for breach of contract subject to the three year statute of limitations for actions for breach of contract).
[xxviii] 972 So. 2d 608 (Miss. 2008).
[xxix] *Id.* at 615.
[xxx] Miss. Code Ann. § 15-1-29.
[xxxi] Mississippi Code Ann. §§ 31-5-51 to 31-5-57.
[xxxii] Mississippi Code Ann. §§ 85-7-181 to 85-7-195.
[xxxiii] Mississippi Code Ann. § 31-5-(4).
[xxxiv] Mississippi Code Ann. § 31-5-31 (Persons leasing, renting or selling equipment to a subcontractor for use in a road construction contract are covered by the general contractor's payment and performance bond if the requisite notice is given as provided in the statute).
[xxxv] Mississippi Code Ann. § 31-5-(3).
[xxxvi] Mississippi Code Ann. § 85-7-187.
[xxxvii] Mississippi Code Ann. § 85-7-191 (private bonds); § 31-5-53 (public bonds).
[xxxviii] Mississippi Code Ann. § 85-7-409.
[xxxix] Mississippi Code Ann. § 85-7-405(1)(b).
[xl] *ACS Construction Company of Mississippi, Inc. v. CGU,* 332 F. 3d 885 (5th Cir. 2003).

[xli] *Architex Association, Inc. vs. Scottsdale Insurance Company*, 27 So. 3d 1148, 1162 (Miss. 2010).
[xlii] *Jones v. Baptist Memorial Hospital - Golden Triangle, Inc.,* 735 So. 2d 993, 999 - 1000 (Miss. 1999).
[xliii] *Id.*
[xliv] *Id.*
[xlv] *Blue Cross and Blue Shield of Mississippi, Inc. v. Larson,* 485 So. 2d 1071, 1073 (Miss. 1986); *Continental Cas. Co.* v. *Coregis Ins. Co.,* 213 F. Supp. 2d 673 (S.D. Miss. 2002).
[xlvi] *Eagle Pacific Ins. Co. v. Quintanilla,* 923 So. 2d 266 (Miss. 2006) (statute did not apply to supplier's agreement to indemnify contractor where contract only provided that supplier would provide laborers to work at direction of contractor); *Heritage Cablevision* v. *New Albany Electric Power System, 646* So. 2d 1305 (Miss. 1994) (statute did not apply to licensing agreement which was not a construction contract).
[xlvii] *Accu-Fab* & *Construction, Inc. v. Ladner,* 970 So. 2d 1276 (Miss. App. 2000); affirmed on other grounds, 778 So. 2d 766 (Miss. 2001).
[xlviii] *Roy Anderson Corp. v. Transcontinental Ins. Co.,* 358 F. Supp. 2d 553, 2005 U.S. Dist. LEXIS 3173 (S.D. Miss. 2005).
[xlix] *Id.* at 565, quoting *Crosby v. Gen Tire* & *Rubber Co.,* 543 F.2d 1128 (5th Cir. 1976).
[l] *Hartford Casualty Ins. Co. v. Halliburton Co.,* 826 So. 2d 1206, 1216 (Miss. *2002), citing Home Ins. Co. v. Atlas Tank Mfg.,* 230 So. 2d 549, 551 (Miss. 1970).
[li] *Id*., citing *Certain Underwriters at Lloyd's of London v. Knostman,* 783 So. 2d 694 (Miss. 2001).
[lii] *See, e.g., Lafayette Steel Erectors, Inc. v. Roy Anderson Corp.*, 71 F. Supp. 2d 582, 588 (S.D. Miss, 1997) ("However, of interest to this Court is the fact that the majority of courts from other jurisdictions which have addressed the question of whether or not a particular agreement could shift the burden for obtaining payment from the owner from the contractor to the subcontractor, have so found only when the language of the subcontract unequivocally sets out such").
[liii] *Id.* At 588-89. *See also Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.,* 695 F.2d 839, 843 (5th Cir. 1983).
[liv] *State Farm Mutual Automobile Ins. Co. v. Ford Motor Co.,* 736 So. 2d 384 (Miss. App. 1999); *East Mississippi Electric Power Assoc. v. Porcelain Products Co., 729 F. Supp. 512 (S.D. Miss. 1990)* and *Lee v. General Motors Corp., 950 F. Supp. 170 (S.D. Miss. 1996); Bayvue Properties v. Townhouse Mills, Inc.*, 1995 U.S. Dist. Lexis 21579 (N.D. Miss. 1995).
[lv] *State Farm Mutual Automobile Ins. Co. v. Ford Motor Co.,* 736 So. 2d 384 (Miss. App. 1999).
[lvi] 374 S.E. 2d at 58.
[lvii] *Greenlee v. Mitchell*, 607 So. 2d 97, 108 (Miss. 1992)*; Sports Page Incorporated. v. Punzo,* 900 So. 2d 1193 (Miss. App. 2004).
[lviii] *Universal Life Insurance Co. v. Veasley,* 610 So. 2d 290 (Miss. 1992).
[lix] *Sports Page Incorporated v. Punzo,* 900 So. 2d 1193 (Miss. App. 2004), *cert. denied*, 901 So. 2d 1273 (Miss. 2005).
[lx] Mississippi Code Ann. § 11-55-5.
[lxi] *Leard v. Breland* 514 So. 2d 778, 782 (Miss. 1987).
[lxii] *J. O. Hooker* & *Sons, Inc. v. Roberts Cabinet Co.,* 683 So. 2d 396, 405 (Miss. 1996) (quoting 22 Am Jur. 2d *Damages* § 45).
[lxiii] *Southeastern Medical Supply, Inc. v. Boyles, Moak* & *Brickell Insurance, Inc.,* 822 So. 2d 323, 328 (Miss. 2002). *See also J. O. Hooker* & *Sons, Inc. v. Roberts Cabinet Co., Inc.,* 683 So. 2d 396 (Miss. 1996) (allowing lost profit damages in a construction context).
[lxiv] *Tupelo Redevelopment Agency v. Abernathy,* 913 So. 2d 278 (Miss. 2005).
[lxv] *O J Stanton and Company, Inc. v. Mississippi State Highway Commission,* 370 So. 2d 909, 914 (Miss. 1979).
[lxvi] *Board of Trustees of State Institutions of Higher Learning v. Johnson,* 507 So. 2d 887, 890 (Miss. 1987).
[lxvii] *Jackson Public School Dist. v. Smith,* 875 So. 2d 1100 (Miss. App. 2004) ("The amount of physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity, sex, age and health of the injured plaintiff are all variables to be considered by the fact-finder in determining the amount of damages to be awarded").
[lxviii] *Universal Life Ins. Co. v. Veasley,* 610 So. 2d 290, 295 (Miss. 1992).
[lxix] *Morris Newspaper Corp. v. Allen,* 932 So. 2d 810 (Miss. 2006).
[lxx] *Id.*