

# DIGEST OF INSURANCE LAW

## MISSISSIPPI

Courtesy of  
[Wells Marble & Hurst, PLLC](#)  
Jackson, Mississippi

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Justice Courts. Jurisdiction limited to cases in which amount involved or value of property does not exceed \$3,500. M.C.A. § 9-11-9.

County Courts. Concurrent jurisdiction with Justice Court in all matters; jurisdiction otherwise limited to cases where amount involved or value of property does not exceed \$200,000, and within these limits jurisdiction is concurrent with Circuit and Chancery Courts. Sits only in certain counties. M.C.A. § 9-9-21.

Chancery Court. Court of equity of original and general jurisdiction as to all matters of equity. Miss. Const. Art. VI § 159.

Circuit Court. Has original jurisdiction of all actions where amount exceeds \$200, and of all causes not exclusively cognizable in some other court. M.C.A. § 9-7-81.

#### Appellate Courts

Courts of Appeals. If County Court exists, it has appellate jurisdiction of appeals from Justice Court. M.C.A. § 11-51-85. Chancery and Circuit Courts have appellate jurisdiction of matters appealed from County Court, and where none, from Justice Court. M.C.A. §§ 11-51-79 and 11-51-85. On appeal from Justice of the Peace Court, case is entered and tried de novo in Circuit Court. M.C.A. § 11-51-91. If new trial is granted on appeal from County Court to Circuit Court, cause shall be remanded to docket of such Circuit Court and new trial shall be taken de novo. M.C.A. § 11-51-79.

The State of Mississippi Court of Appeals is comprised of ten appellate judges presided over by a Chief Judge. M.C.A. §§ 9-4-1 and 9-4-7 (3). Court of Appeals has power to determine or otherwise dispose of any appeal or other proceeding assigned to it by Supreme Court. M.C.A. § 9-4-3. Jurisdiction of the Court of Appeals is limited to those matters which have been assigned to it by the Supreme Court. *Id.* However, Supreme Court shall retain appeals in cases imposing death

penalty, or cases involving utility rates, annexations, bond issues, election contests, or a statute held unconstitutional by the lower court. *Id.* Decisions of Court of Appeals are final and are not subject to review by Supreme Court, except by writ of certiorari. Supreme Court may grant certiorari review only by affirmative vote of four (4) of its members. *Id.* At any time before final decision by Court of Appeals, Supreme Court may, by order, transfer to Supreme Court any case pending before Court of Appeals. *Id.* The Court of Appeals shall have jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition or any other process when this may be necessary in any case assigned to it by the Supreme Court. *Id.*

Supreme Court. It is composed of nine justices who sit in three panels, each of which is presided over by chief justice or presiding justice, or en banc under special circumstances. Appeals from Circuit and Chancery Courts are to Supreme Court. M.C.A. § 11-51-3. Eminent domain cases are appealed directly from County Court, if one exists; otherwise from Circuit Court. M.C.A. § 11-27-29. It is court of last resort, and its decisions are final except in cases involving Federal Constitution.

### LAW

#### Abbreviations

A.L.R.—American Law Reports.  
Am. St. Rep. — American State Reports.  
F. Supp. — Federal Supplement.  
F.2d — Federal Reporter, Second Series.  
F.3d — Federal Reporter, Third Series.  
M.C.A. — Reference to statute is to Mississippi Code, 1972, Annotated (Recodified).  
M.R.E. — Mississippi Rules of Evidence.  
M.R.P.C. — Mississippi Rules of Professional Conduct  
Miss. — Mississippi Reports.  
So. — Southern Reporter.  
So. 2d — Southern Reporter, Second Series.



**ACCIDENT AND HEALTH INSURANCE**

See "ACCIDENTAL MEANS" and "DISABILITY."

**Cancellation.** After July 1, 1971, each individual accident and health policy must give notice that insured can return policy within not less than 10 days after delivery and have premium refunded if insured is not satisfied with it for any reason. M.C.A. § 83-9-25.

**Renewal.** Generally, accident and health insurance policy is not renewable without consent of insurer, but general rule may undergo modification when particular provisions of policy so require. *Benefit Trust Life Ins. Co. v. Lee*, 248 Miss. 715, 160 So. 2d 909 (1964). Insurer cannot avoid liability under accident and health policy for claim which has come into being under terms of policy by declining to accept renewal premiums tendered after accrual of the claim. *Id.* at 916, (citing *Prescott v. Mut. Benefit Health & Accident Ass'n*, 133 Fla. 510, 183 So. 311 (1938)).

Where health and accident policy was renewable at option of insurer only, and insurer refused to renew until insured signed waiver of any claim for indemnity for hospital and surgical expenses incurred thereafter on account of any disorder of rectum, insurer was not liable for hospital and surgical expenses incurred during the renewal term. *Nat'l Bankers Life Ins. Co. v. Cabler*, 229 Miss. 118, 90 So. 2d 201 (1956).

Renewal of lifetime major medical policy by payment of monthly premium was merely a continuation of the original policy, rather than a new and independent contract. *Oates v. Equitable Assur. Soc'y*, 717 F. Supp. 449 (S.D. Miss. 1988).

**Disease Induced by Accident.** Insurer liable for death resulting from latent disease set in motion by accident. *USF&G v. Hood*, 124 Miss. 548, 87 So. 115 (1921), distinguished by *Mut. of Omaha Ins. Co. v. Deposit Guaranty Bank & Trust Co.*, 246 Miss. 640, 151 So. 2d 816 (1963). Proof held insufficient to establish death caused by accident and not from existing disease. *Equitable Life Assurance Soc'y of United States v. Askew*, 194 Miss. 347, 11 So. 2d 441 (1943), distinguished by *Mut. of Omaha Ins. Co. v. Deposit Guar. Bank & Trust Co.* (see above for parallel citation). See *Crenshaw, infra*.

Illness or disability is deemed to have inception when insured first had outward manifestation or when disease first becomes "manifest or active" and not from date medical diagnosis shows cause of disease may have started. *Union Bankers Ins. Co. v. May*, 227 Miss. 881, 87 So. 2d 264 (1956).

**Excepted Risks.** Defense that illness preexisted effective date of health policy is generally affirmative de-

fense. *Thompson v. Commercial Ins. Co. of Newark*, 344 So. 2d 135 (Miss. 1977); distinguished by *Ross v. W. Fid. Ins.*, 872 F.2d 665 (5th Cir. 1989).

Policy clause which excludes or limits liability in case of disease originating before certain time stated in policy is valid. *Mutual of Omaha v. Walley*, 251 Miss. 780, 171 So. 2d 358 (1965). See also 94 A.L.R.3d 990, distinguished by *Ross v. Western Fidelity Ins. Co.*, 872 F.2d 665 (5th Cir. 1989). Preexisting condition exclusion is only valid for 12 months after the effective date of an insurance policy issued or delivered after January 1, 1994. M.C.A. § 83-9-49.

There is liability under policy of accident insurance containing contractual stipulation to effect that there shall be no liability for death unless caused independently and exclusively of all other causes, by accidental injury, and not directly or indirectly by disease or bodily infirmity, if accidental injury is proximate cause of death. *USF&G v. Smith*, 249 Miss. 873, 164 So. 2d 462 (1964). Special note should be given to *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988), which addressed validity of traditional policy provision defining injury as "bodily injury causing loss while this policy is in force, directly and independently of all other causes and effected solely through accidental bodily injury to insured person." Court held such provision was "deceptive" and "invalid." *Crenshaw* opinion also raises other similar questions as to status of Mississippi law and should be consulted when dealing with matters in this area.

**Notice and Proof of Loss.** Written notice of claim must be given within thirty days after occurrence or commencement of loss, or as soon thereafter as reasonably possible. M.C.A. § 83-9-5 (1) (e). A clause in an accident policy requiring written notice to be given to insurer within twenty days after accident was held void under M.C.A. § 15-1-5, which prohibits contractual modifications of statute of limitations. *Nat'l Cas. Co. v. Mitchell*, 162 Miss. 197, 138 So. 808 (1932). Proof of loss forms and modifications thereof must conform to uniform claims forms prescribed by Commissioner of Insurance. M.C.A. § 83-9-13 (Supp.).

**Double Indemnity.** In double indemnity contract with provision that coverage should not be effective if death of insured resulted from any violation of law by him, insurer must show substantial causal connection between violation of law and injury to avoid liability. *Standard Life Ins. Co. of the S. v. Hinton*, 247 Miss. 838, 157 So. 2d 486 (1963).



## ACCIDENTAL MEANS

“Accidental bodily injuries” means “undesigned, unintended, unexpected, or unpremeditated.” *N. Amer. Acc. Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528 (1937). For coverage under “bodily injury accidentally sustained” or “sustained through accidental means,” means must be accidental; and “when one is injured while performing an act which he intended to do...the fact that the ultimate injurious result was unexpected does not make out a case of an injury accidentally suffered.” *USF&G v. Wilson*, 184 Miss. 823, 185 So. 802 (1939), distinguished by *Byrd v. Reserve Life Ins. Co.*, 215 Miss. 761, 65 So. 2d 249 (1953). If policy does not define “accident,” determination is made from insured’s viewpoint. *Virginia Ins. Reciprocal v. Forrest County Gen. Hosp.*, 814 F. Supp. 535 (S.D. Miss. 1993). Although means are intentional, and acts carried out as intended and without deflection therefrom, policy for “accidental bodily injuries” covers accidental result. *Byrd v. Reserve Life Ins. Co.*, 217 Miss. 761, 65 So. 2d 249 (1953).

Death by lynching covered. *Fid. & Cas. Co. v. Johnson*, 72 Miss. 333, 17 So. 2 (1894). Where public taxi cab tire blew out simultaneously with collision with curbing, “wreck” occurred within passenger’s accident policy. *Nat’l Cas. Co. v. Mitchell*, 162 Miss. 197, 138 So. 808 (1932). Where accident from external means results in internal injuries, case is within terms of accident policy insuring against loss effected solely, directly and independently of all other causes by bodily injuries sustained through external violent and accidental means. See *Crenshaw, supra*, 483 So. 2d 254. Intentional killing of insured is not accidental within policy expressly excluding it, but evidence of extreme drunkenness of person shooting insured, with testimony that he acted as if he did not know what he was doing, raised question for jury as to whether or not shooting was intentional. *Hutson v. Continental Cas. Co.*, 142 Miss. 388, 107 So. 520 (1926). See also *Provident Life & Accident Ins. Co. v. McWilliams*, 146 Miss. 298, 112 So. 483 (1927). But see, *Holmes v. Am. Nat’l*, 142 Miss. 636, 107 So. 867 (1926). Where insured is killed by robber and policy fails to exclude death intentionally inflicted by another, death of insured is accidental and compensable. *Roberts v. Interstate*, 232 Miss. 134, 98 So. 2d 632 (1957). Where insured is killed as result of own misconduct, insurer is liable for accidental death. *Taylor v. Ins Co. of N. Amer.*, 263 So. 2d 749 (Miss 1972). See also *Freed v. Protective Life Ins. Co.*, 405 F. Supp. 175 (D.C. Miss. 1975), *aff’d*, 551 F.2d 861 (5th Cir. 1977).

Injury to truckman sustained by slipping while stepping from truck to loading platform held accident by

accidental means. *N. Amer. Acc. Ins. Co. v. Henderson*, 180 Miss. 395, 177 So. 528 (1937).

There is rebuttable presumption against suicide. *Jefferson Standard Life Ins. Co. v. Jefcoats*, 164 Miss. 659, 143 So. 842 (1932). Presumption arises that death ensued by accidental means where death is caused by external and violent means. *Britt v. All Amer. Assurance Co. of Louisiana*, 333 So. 2d 629 (Miss. 1976).

Death from over-dose of medicine taken without suicidal intent held effected by “external, violent and accidental cause.” *New York Life Ins. Co. v. Wood*, 182 Miss. 233, 180 So. 819 (1938).

## ADJUSTERS

Must pay privilege tax. M.C.A. § 27-15-97.

“Adjuster” means any person who, as independent contractor, or as employee of independent contractor, adjustment bureau, association, insurance company or corporation, managing general agent or self-insured, investigates or adjusts losses on behalf of either insurer or self-insured, or any person who supervises handling of claims. M.C.A. § 83-17-401 (amended July 1, 2011 to include “any person who is a multi-peril crop insurance adjuster”).

Adjuster must pass license examination prescribed by Insurance Commissioner. M.C.A. § 83-17-417 (Supp.).

Any unlicensed person posing as adjuster is guilty of a misdemeanor. M.C.A. § 83-17-403 (Supp.).

Adjuster employed by insurer is not liable to insured for simple negligence in adjusting claim, but can incur independent liability when conduct constitutes gross negligence, malice, or reckless disregard for rights of insured. *Bass v. California Life Ins. Co.*, 581 So. 2d 1087, 1090 (Miss. 1991), limitation of holding recognized by *Gray ex rel. Rudd v. Beverly Enterprises - Mississippi, Inc.*, 390 F.3d 400 (5th Cir. 2004); distinguished by *Whatley v. National Fire & Marine Ins. Co.*, 1998 WL 378378 (N.D. Miss. 1998).

## AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE.”

Age of majority. See M.C.A. § 15-3-11.

## AGENTS AND BROKERS

Definition of. Statute provides that an agent is any person required to be licensed under the laws of the state to sell, solicit, or negotiate insurance. M.C.A. § 83-17-1. Statute held not to change general laws of agency.



*American Bankers' Ins. Co. v. Lee*, 161 Miss. 85, 134 So. 836 (1931). See also *McPherson v. McLendon*, 221 So. 2d 75 (Miss. 1969).

When M.C.A. § 83-17-1 is sought to establish authority of agent, same is applicable only to his acts before and up to and including consummation of insurance, and after that all other matters and things are governed by common law. *Old Colony Ins. Co. v. Fagan Chevrolet Co.*, 246 Miss. 725, 150 So. 2d 172 (1963).

For Whom. General agent held authorized to bind fire insurer on binder though binder not delivered to insurer. *Connecticut Fire Ins. Co. v. Harrison*, 173 Miss. 84, 161 So. 459 (1935). Binder executed by general agents held effective though not delivered to insured. *New England Ins. Co. v. Cummings*, 164 F. Supp. 553 (S.D. Miss. 1958), *rev'd on other grounds*, 266 F.2d 888 (5th Cir. 1959). Local agent who is furnished by fire insurer with blank policies to be filled in, countersigned and issued by him, has powers of general agent when issuing and delivering policies and may waive any of provisions of policies. *Liverpool & London & Globe Ins. Co. v. Delaney*, 190 Miss. 404, 200 So. 440 (1941). Agent who took application was agent of insurer notwithstanding policy provided that he was agent of applicant. *Suggs v. Pan Am. Life Ins. Co.*, 847 F. Supp. 1324 (S.D. Miss. 1994). When life policy contained military exclusion clause, insurer not liable for full amount of policy upon death of insured while in military service, though insurer's agent, when collecting premiums, represented that full amount would be paid in case of death while in military service, where policy expressly denied collecting agent's authority to amend policy. *White v. Standard Life Ins. Co.*, 198 Miss. 325, 22 So. 2d 353 (1945). Clear and unequivocal acts must call the limit of an agent's scope of authority to the insured's attention. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss. 1990); disagreed with by *Estate of Wesson v. US*, 843 F. Supp. 1119 (S.D. Miss. 1994).

Oral contract of insurance by agent may be binding on insurer if agent is clothed with authority to make such contracts. *Canal Ins. Co. v. Bush*, 247 Miss. 87, 154 So. 2d 111 (1963). But see *Motors Ins. Corp. v. Stanley*, 237 Miss. 681, 115 So. 2d 678 (1959). See also *Smith Trucking Inc. v. Cotton Belt Ins.*, 556 F.2d 1297 (5th Cir. 1977).

Knowledge of Agents. If within general scope of authority, imputed to insurer. *World Ins. v. Bethea*, 230 Miss. 765, 93 So. 2d 624 (1957). See also *Jefferson Life v. Johnson*, 238 Miss. 878, 120 So. 2d 160 (1960). Where agent completes insurance application as applicant supplies answers, insurer is not liable on theory that information was determined by insurer's agent. *Tisdale v. Jefferson Standard Life*, 244 Miss. 839, 147 So. 2d

122 (1962). Insurance agent representing eight insurance companies cannot obligate any of said companies by oral insurance contract without specifying which company is to be insurer. *Employers Fire Ins. Co. v. Speed*, 242 Miss. 341, 133 So. 2d 627 (1961). Insurance company cannot delegate to one certain duties and then deny agency because written contract between them limited agent's activities in other matters. *Napp v. Liberty Nat'l Ins. Co.*, 248 Miss. 320, 159 So. 2d 164 (1963), distinguished by *Entente Mineral Co. v. Parker*, 956 F.2d 524 (5th Cir. 1992).

Defense attorneys hired by carrier are its agents, and their duty is to fully disclose conflict of interest to both parties and inform insured of his possible need for his own counsel. *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988), overruling *Farmers Gin Co. v. St. Paul Mercury Indem. Co.*, 186 Miss. 747, 191 So. 415 (1939).

Liability of Agent. Agent owes principle duty to procure policies with reasonable diligence and good faith. *Taylor Mach. Works v. Great Amer. Surplus Lines Ins.*, 635 So. 2d 1357 (Miss. 1994); distinguished by *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804 (S.D. Miss. 2002); *Curry v. State Farm*, 599 F. Supp. 734 (S.D. Miss. 2009). Duty owed is to provide the level of skill in procuring insurance reasonably expected of one in that profession. *Taylor Mach. Works*, 635 So. 2d at 1362.

Agent can incur independent liability in tort when his conduct constitutes gross negligence, malice or reckless disregard for rights of the insured. *Bass v. California Life Ins. Co.*, 581 So. 2d 1087 (Miss. 1991), limitation of holding recognized by *Gray ex rel. Rudd v. Beverly Enterprises - Mississippi, Inc.*, 390 F.3d 400 (5th Cir. 2004). Agent who negligently fails to procure insurance after agreeing to do so may be forced to assume the position of insurer. *Hancock Bank v. Travis*, 580 So. 2d 727 (Miss. 1991).

For Insolvent Company. Insurer's liquidator sued safekeeping agent, which held assets set aside to ensure reinsurer's performance under its reinsurance contracts with insurer, alleging that agent failed to monitor account in which assets were placed. *Todd v. Deposit Guar. Nat'l Bank*, 849 F. Supp. 1149 (S.D. Miss. 1994). Liquidator's recovery was precluded by insurer's signing of releases that, upon agent's return of assets in question, absolved agent of any liability relative to reinsurer's alleged unauthorized transfers from that account. *Id.*

Licensing and Regulation. See M.C.A. § 83-21-(1-27) and § 83-21-(51-89). State can revoke license to operate insurance agency on finding of misconduct detri-

mental to insurer. License is privilege only. *Davis v. Shepperd*, 243 Miss. 519, 139 So. 2d 668 (1962).

### ARBITRATION

Arbitration agreements are binding on parties and controlled by State law. See M.C.A. § 11-15-(1-37). However, no uninsured motorist endorsement shall contain a provision requiring arbitration of any claim thereunder. M.C.A. § 83-11-109. Exclusionary clause in uninsured motorist provision rendering coverage conditional is invalid. *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971). Ambiguity of scope of arbitration clause is resolved in favor of arbitration. *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117 (N.D. Miss. 1995), *disagreed with*, see *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998). Party to contract cannot be forced to submit dispute to arbitration unless he has contracted for such. *Torrence v. Murphy*, 815 F. Supp. 965 (S.D. Miss. 1993). Party may waive right to arbitration by participation in lawsuit or other inconsistent actions. *Cox v. Howard*, 619 So. 2d 908 (Miss. 1993); *distinguished by Johnson v. 21st Mortg. Corp.*, 2008 WL 906817 (S.D. Miss. 2008). However, waiver is not a favored finding. It creates heavy burden on party seeking waiver. *Univ. Nursing Assocs., PLLC v. Phillips*, 842 So. 2d 1270 (Miss. 2003), *distinguished by Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030 (Miss. 2004); *Dominguez v. Palmer*, 970 So. 2d 737 (Miss. Ct. App. 2007).

### ATTORNEYS

Appointment and Authority. Attorney shall consult with client as to matters of representation and “abide by a client’s decisions concerning the objectives of representation,” subject to enumerated limitations. See M.R.P.C. Rule 1.2.

Conflict of Interest. See M.R.P.C. Rules 1.7 - 1.9.

Legal Malpractice. Sanctions provided for attorney’s misconduct. Miss. R. Civ. P. 11 (b). In addition to other sanctions, court shall award attorney’s fees if attorney brings action without substantial justification. M.C.A. § 11-55-5.

To establish prima facie case for legal malpractice, plaintiff must prove lawyer-client relationship exists and negligence on part of lawyer which is proximate cause of injury. Attorney has duty to use reasonable care in providing services and exercising knowledge, skill and ability ordinarily possessed by professionals similarly situated. *Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987), *distinguished by Singleton v. Stegall*, 580 So. 2d 1242 (Miss. 1991); see also *Stewart v. Walls*, 534 So. 2d

1033 (Miss. 1988); *Terrain Ent. v. Mockbee*, 654 So. 2d 1122 (Miss. 1995).

Fees. Attorney shall charge a reasonable fee for services. See M.R.P.C. Rule 1.5.

### AUTOMOBILES

See “NEGLIGENCE” and “NO-FAULT INSURANCE.”

Operator’s license required. M.C.A. § 63-1-5. Mississippi employs a graduated licensing system. A driver’s license shall not be issued to any person under the age of 18, except as otherwise provided. § 63-1-9(1)(a). A temporary driving permit may be issued to any person who is at least 15 years old. M.C.A. § 63-1-9(2)(a). An intermediate license may be issued to anyone who is at least 16 years old and held a temporary driving permit for at least 1 year without a conviction for DUI or a moving violation. § 63-1-9(2)(b). A driver’s license may be issued to any person who is at least 16.5 years old who has held an intermediate license for 6 months without a conviction for DUI or a moving violation. § 63-1-9(2)(c).

The holder of a temporary license may operate a vehicle only when accompanied by a licensed operator who is at least 21 years old and who is occupying the seat beside the driver. § 63-1-21(2). The holder of an intermediate license may drive unsupervised from 6:00 a.m. to 10:00 p.m., Sunday through Thursday and 6:00 a.m. to 11:30 p.m. Friday and Saturday, and allows unsupervised driving any time for a person traveling directly to or from work. At all other times, the holder must be accompanied by a licensed driver who is at least 21 years old. M.C.A. § 63-1-21(3) (amended 2009).

If any license is issued to person under age of 17, then parent (or both parents, if living and have custody) or other responsible person must assume, in writing, responsibility for negligent and willful acts on part of minor. § 63-1-(23-25).

Agency. Generally, automobile not dangerous instrumentality which would render owner liable for negligence of operator unless he was on owner’s business. *Vicksburg Gas Co. v. Ferguson*, 140 Miss. 543, 106 So. 258 (1925), *disagreed with*, see *Necaise v. Chrysler Corp.*, 335 F.2d 562 (5th Cir. 1964). However, owner may be held liable if he knows or should know that operator is reckless or incompetent driver. *Petermann v. Gary*, 210 Miss. 438, 49 So. 2d 828 (1951). See *Dixie Drive It Yourself Sys. Jackson Co. v. Matthews*, 212 Miss. 190, 54 So. 2d 263 (1951) (holding owner liable where employee known to habitually drink intoxicating liquor, occasionally to excess, and could be expected to drive while intoxicated). Employer held not liable for injuries sustained in collision involving employee who



was driving truck leased by employer where evidence established that employee had deviated from his employment which required him to return truck to his home, and instead visited bars and became intoxicated. *Seedkem South, Inc. v. Lee*, 391 So. 2d 990 (Miss. 1980).

Subject to applicable statutes, person is liable for injury from automobile only if he operates or controls it, or is master or principal of person who occasions injury. *West Bros., Inc. v. Herrington*, 244 Miss. 1, 139 So. 2d 842 (1962).

Employer's vehicle driven by employee raises presumption that vehicle is being used on employer's business; burden is on employer to prove vehicle not being used for his benefit. *Pennebaker v. Parker*, 232 Miss. 725, 100 So. 2d 363 (1958). Husband's driving of automobile of wife when his own automobile had flat tire is within "temporary substitute automobile" provision of husband's policy. *Caldwell v. Hartford Accident & Indem. Co.*, 248 Miss. 767, 160 So. 2d 209 (1964).

**Comparative/Contributory Negligence.** Contributory negligence no bar to recovery of damages; jury may diminish damages. M.C.A. § 11-7-15. Although plaintiff acted negligently, may still recover from defendant whose negligence contributed to plaintiff's injuries. *Blackmon v. Payne*, 510 So. 2d 483 (Miss. 1987). Jury may reduce award due to contributory negligence in only two situations: where proper jury instructions given on such or where evidence so justifies. *City of Jackson v. Copeland*, 490 So. 2d 834 (Miss. 1986).

**Compulsory Insurance Coverage.** Under M.C.A. § 63-15-4, motor vehicles must maintain proof of liability limits required by M.C.A. § 63-15-3(j) (was amended in 2005 (became effective in 2006) and changed required minimum insurance levels, which are \$25,000 liability, \$50,000 bodily injury and \$25,000 property. Failure to comply is punishable by \$500 fine and possible license suspension for one year. M.C.A. § 63-15-4. If proof of insurance produced at hearing, then punishment reduced to \$100. *Id.* If owner proves that insurance was in effect at the time of the citation, then fine and other court costs waived. *Id.*

**Alcohol/DWI.** It is unlawful for driver to operate vehicle under influence of intoxicating liquor. See M.C.A. §§ 63-11- (30-32).

**Damages.** For personal injuries, it is largely within discretion of trier of fact, but should not exceed reasonable compensation for loss sustained. In reaching judgment amount, trier of fact shall consider: reasonable medical expenses and medical expenses reasonably certain to be incurred, type and duration of injuries and likely effect on quality of life, present and future impairment, and effect on earning capacity. *Dogan v.*

*Hardy*, 587 F. Supp. 967 (N.D. Miss. 1984), distinguished by *Phan v. Denley*, 915 So. 2d 504 (Miss. Ct. App. 2005).

Punitive damages are proper when injury results from aggression or insult, malice or gross negligence, indicative of wanton disregard for rights of others. *Aldridge v. Johnson*, 318 So. 2d 870 (Miss. 1975), distinguished by *Walker v. Smitty's Supply, Inc.*, 2008 U.S. Dist. LEXIS 37949 (S.D. Miss. 2008).

**Family Purpose Doctrine.** Not adhered to. *Houston v. Holmes*, 202 Miss. 300, 32 So. 2d 138 (1947).

**Guests.** Gratuitously transported passenger assumes risk of obvious dangers such as weather conditions. *Shields v. Easterling*, 676 So. 2d 293 (Miss. 1996), disagreed with by *Buford v. Riverboat Corp. of Mississippi-Vicksburg*, 756 So. 2d 765 (Miss. 2000). Guest chargeable with own negligence in not remonstrating with driver when negligence or carelessness of driver is or should be apparent to him. *Chapman v. Powers*, 150 Miss. 687, 116 So. 609 (1928), distinguished by *Gower v. Strain*, 169 Miss. 334, 145 So. 244 (1933). See also *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (Miss. 1947) (if operator's intoxication should be obvious to guest). Passenger is limited to uninsured motorist coverage for that automobile and not allowed to stack additional policies sold to insured owner of automobile. *Meadows v. Mississippi Farm Bureau Ins. Co.*, 634 So. 2d 108 (Miss. 1994), overruled by *Meyers v. Amer. States Ins. Co.*, 914 So. 2d 669 (Miss. 2005).

**Imputed Negligence/Joint Enterprise.** Negligence is not imputed where plaintiff has no control over conduct of tortfeasor giving rise to cause of action. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988). Mississippi Rule does not impute husband's negligence to his wife merely because of marriage. *Wright v. Standard Oil Co., Inc.*, 470 F.2d 1280 (5th Cir. 1972), reh'g denied, 471 F.2d 650 (5th Cir. 1973), cert. denied, 412 U.S. 938 (1973). In order to require imputing negligence of husband driver of truck to wife passenger there must be showing of joint enterprise or joint venture. *Woodard v. St. Louis-San Francisco R.R.*, 418 F.2d 1305 (5th Cir. 1969). Negligence of superintendent not imputable to worker he was supervising. *Anderson v. Hensley-Schmit, Inc.*, 530 So. 2d 181 (Miss. 1988), distinguished by *Jackson v. Ball*, 562 So. 2d 1267 (Miss. 1990). Driver is considered to be "in charge of automobile" even though owner is with him in car. *Wyse v. Dixie Fire & Cas. Co.*, 242 Miss. 508, 136 So. 2d 578 (1962).

**Last Clear Chance.** Doctrine did not preclude recovery for death of on-coming automobile driver who collided with defendant's gravel truck which made left turn on country road in front of automobile in time that

pulp wood truck, which had been ahead of gravel truck, was still in other lane preventing automobile driver from using that lane to avoid accident. *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637 (Miss. 1968). Not distinguished for this point of law.

Ownership/Titles. See M.C.A. § 63-21 (1-77).

Pedestrians. See M.C.A. § 63-3- (1101-1113).

Motorized Bicycles. Motorcycle defined. M.C.A. § 63-3-103.

Seat Belts. Mississippi requires that safety belts installed be approved by Department of Public Safety. M.C.A. § 63-7-63. Every operator, every front seat passenger and every child under seven (7) years of age, who is not in a restraint device or booster seat, regardless of the seat that child occupies, shall wear a properly fastened safety seat belt system. M.C.A. § 63-2-1. However, failure to provide or use a seat belt will not be considered contributory or comparative negligence. M.C.A. § 63-2-3.

Service of Process. Operation by non-resident of motor vehicle in state is deemed equivalent to appointment by such non-resident of Secretary of State of Mississippi as his attorney upon whom may be served any process, in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating motor vehicle in state. Service is had by delivering summons to Secretary of State. Notice of such service and copy of process must be sent by registered mail, restricted for delivery to addressee only, to each non-resident defendant, and defendant's return receipt must be filed in court where such action is pending. Action survives against legal representative of deceased non-resident owner or operator and process may be had in same manner on legal representatives. M.C.A. § 13-3-63.

Speed Limit. See M.C.A. § 63-3-(501-517).

Trailers/Weight Limits. See M.C.A. § 63-5-(25-35).

Uninsured Endorsements. No automobile liability insurance policy shall be issued unless it contains provision undertaking to pay insured all sums which he shall be legally entitled to recover as damages for property damage, bodily injury or death from owner or operator of uninsured motor vehicle within limits not less than those set forth in M.C.A. § 63-15-(1-75) and M.C.A. § 83-11-101.

"Uninsured motor vehicle" defined: M.C.A. § 83-11-103. Tortfeasor does not become uninsured motorist when multiple claimants excluding defendant exhaust available proceeds under policy. *Cossitt v. Federated Guar. Mut. Ins. Co.*, 541 So. 2d 436 (Miss. 1989). Pay-

ment received under driver's liability coverage does not increase scope of "uninsured motor vehicle" definition increasing injured's recovery. *Washington v. Georgia Am. Ins. Co.*, 540 So. 2d 22 (Miss. 1989).

Insurer paying claim under uninsured motorist provision shall be subrogated to right of insured to whom claim was paid against person causing injury, death or damage to extent payment was made. M.C.A. § 83-11-107.

No uninsured motorist provision shall require arbitration of any claim arising thereunder. M.C.A. § 83-11-109.

Purpose of uninsured motorist provision is to give insured means of collecting that to which he is legally entitled for bodily injuries caused by accident arising from use of uninsured automobile, and if insurer of defendant driver of automobile lawfully denied coverage because of refusal of defendant driver to co-operate in defense of suit, plaintiff entitled to recover from her insurer under uninsured motorist provision of her liability policy defining uninsured automobile as one with respect to which there is no bodily injury bond or policy applicable at time of injury. *Hodges v. Canal Ins. Co.*, 223 So. 2d 630 (Miss. 1969). Uninsured motorist statute is construed liberally in favor of insured. In re *Guardianship of Lacy v. Allstate Ins. Co.*, 649 So. 2d 195 (Miss. 1995).

See *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971), for decision interpreting several sections of Uninsured Motor Vehicles Act. A presumption arises that coverage of multi-vehicles in one policy, where separate premiums were paid for each endorsement of uninsured motorist coverage, is same as if such coverage was provided in separate policies covering same vehicles. *Gov't Employees Ins. Co. v. Brown*, 446 So. 2d 1002 (Miss. 1984), distinguished by *Scott v. Transport. Indem. Co.*, 513 So. 2d 889 (Miss. 1987), *Szumigala v. Nationwide Ins. Co.*, 853 F.2d 274 (5th Cir. 1988); *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092 (Miss. 1995), distinguished by *Thomas v. Allstate Ins. Co.*, 969 F. Supp. 1352 (S.D. Miss. 1996). A Class 2 occupancy insured is entitled to stack the coverages held by the named insured under his uninsured motorist policy. *Brown v. Maryland Cas. Co.*, 521 So. 2d 854 (Miss. 1987). (Overruled to the extent it entitled Class II insureds to uninsured motorist benefits beyond those for which a named insured contracted. *Meyers v. Amer. States Ins. Co.*, 914 So. 2d 669 (Miss. 2005)). Stacking is permissible in small commercial policy. *Cossitt v. Nationwide Mut. Ins. Co.*, 551 So. 2d 879 (Miss. 1989). (Overruled to the same extent as *Brown, supra*).

For purposes of determining whether or not tortfeasor is uninsured motorist, stacking of owner's coverages is allowed. *Wickline v. USF&G*, 530 So. 2d 708 (Miss. 1988). (Overruled to the same extent as *Brown, supra*). If he is injured while riding as a passenger, uninsured motorist coverage of vehicle in which he is riding, in addition to that of his own vehicles, is applicable to injured person. *Id.* There is no distinction between commercial fleet policy and regular auto policy where stacking of benefits is concerned. *Davis v. USF&G*, 837 F. Supp. 206 (S.D. Miss. 1993)

Uninsured Motorist Act does not require that uninsured motorist coverage provision of automobile liability policy cover punitive damages that insured would be legally entitled to collect from uninsured motorist. *State Farm Mut. Auto. Ins. Co. v. Daughdrill*, 474 So. 2d 1048 (Miss. 1985)

### AVIATION

Uniform Act. See 49 U.S.C.A. § 44301 *et seq.* See also M.C.A. § 61-1-1 *et seq.*

Action for Wrongful Death. See M.C.A. § 11-7-13 (amended). Because Mississippi Wrongful Death Act altered common law, statute must be strictly construed. Airplane engine manufacturer not liable in wrongful death action in absence of proof that engine components and related parts were defectively designed or incorrectly manufactured, or that such defect was proximate cause of crash. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979).

Limits to Liability. Airplane component manufacturer's liability in tort for defective design may not be limited to first purchaser of product but extends to all subsequent users. *Breedlove v. Beech Aircraft Corp.*, 334 F. Supp. 1361 (N.D. Miss. 1971)

Service of Process. See general rules for service of process. M.C.A. § 13-3- (41-63).

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

State banks required to carry adequate insurance protection against robbery and burglary. M.C.A. § 81-5-15. School district authorized to insure school property against burglary. M.C.A. § 37-7-303.

Where policy does not contain definition of theft, term includes unlawfully taking possession of and damaging property. *Nat'l Fire Ins. Co. of Hartford v. Slayden*, 227 Miss. 285, 85 So. 2d 916 (1956), *distinguished by Hartford Ins. Co. of Midwest v. Miss. Valley Gas Co.*,

181 Fed. App. 465 (5th Cir. 2006). See also *Aetna Cas. & Sur. Co. v. Day*, 487 So. 2d 830 (Miss. 1986). Compare *Peerless Ins. Co. v. St. Laurent*, 247 Miss. 134, 154 So. 2d 135 (1963).

### CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contract."

With regard to accident and health insurance, M.C.A. § 83-9-5 (2) (e) provides: Insurer may cancel at any time by written notice delivered to insured, or mailed to his last address as shown by records of insurer, stating when, not less than five (5) days thereafter, such cancellation shall be effective; and after policy has been continued beyond its original term insured may cancel at any time by written notice delivered or mailed to insurer, effective upon receipt or on such later date as may be specified in such notice. In event of cancellation, insurer will return promptly unearned portion of any premium paid. If insured cancels, earned premium shall be computed by use of short-rate table last filed with state official having supervision of insurance in state where insured resided when policy was issued. If insurer cancels, earned premium shall be computed pro rata. Cancellation shall be without prejudice to any claim originating prior to effective date of cancellation.

With regard to automobile insurance, M.C.A. § 83-11-3 provides Insurer can cancel policy only for: 1) non-payment of premiums, 2) revocation or suspension of drivers license or motor vehicle registration of certain named persons, or 3) failure to pay dues or maintain membership in organization when original policy or renewal thereof was dependent on such membership. Notice of cancellation not effective unless mailed or delivered to named insured and to any named creditor loss payee at least 30 days prior to effective date thereof (at least 10 days where there is a named creditor loss payee). M.C.A. § 83-11-5. Proof of mailing sufficient to satisfy notice requirement for cancellation for nonpayment of premium. *State Farm v. Gay*, 526 So. 2d 534 (Miss. 1988). But see *Branch v. State Farm*, 759 So. 2d 430 (Miss. 2000).

### CHATTEL MORTGAGE

See "FIRE INSURANCE."

### CONSTRUCTION OF POLICY

Ambiguity of Terms. Insurance policies, like other written contracts, are construed most strongly against drafter, and any ambiguity in insurance policy is construed against insurer and in favor of insured. *Brander v.*

*Nabors*, 443 F. Supp. 764 (N.D. Miss. 1978), *aff'd*, 579 F.2d 888 (5th Cir. 1978); *Harrison v. Allstate*, 662 So. 2d 1092 (Miss. 1995).

**Conditional Receipt of Application.** Policy of life insurance for which decedent had applied on July 25, never became effective where record revealed that conditions of conditional receipt were not completely fulfilled, policy was never issued, where insurer tendered first monthly premium to deceased widow on Sept. 27, and where evidence showed that insurer was amply justified in finding that deceased was not insurable. *Franklin Life v. Hamilton*, 335 So. 2d 119 (Miss. 1976).

**Inconsistent Policy Terms and Endorsements.** Where conflict exists between typed and printed provisions in liability policy, typed provisions govern over printed. *Travelers Ins. v. Gen. Refrigeration*, 218 So. 2d 724 (Miss. 1969). In case of any repugnancy or conflict between printed portion and written portion of insurance policy, written portion prevails. *Williams v. Reserve Life*, 223 Miss. 698, 78 So. 2d 794 (1955).

**Oral Binder.** Oral contract of insurance is valid and enforceable. *St. Louis Fire & Marine Ins. v. Lewis*, 230 So. 2d 580 (Miss. 1970). Where general agent of insurer and insured carrier enter into oral contract stating that collision insurance on tractor-trailer should cover rented tractor, contract held binding upon original tractor becoming disabled. *Southern Ins. v. Ryder Truck Rental*, 240 So. 2d 283 (Miss. 1970). Oral Contract must be specific as to subject matter, period, rate, and amount of insurance. *Mississippi Farm Bureau Mut. v. Todd*, 492 So. 2d 919 (Miss. 1986), *distinguished by Drummond v. Buckley*, 627 So. 2d 264 (Miss. 1993).

## DAMAGES

**Appellate Review.** Supreme Court or any other court of record in case in which money damages were awarded may overrule motion for new trial or affirm on direct or cross-appeal, upon condition of an additur or remittitur, if Court finds that damages are excessive or inadequate for reason that jury or trier of fact was influenced by bias, prejudice or passion or that damages awarded were contrary to overwhelming weight of credible evidence. M.C.A. § 11-1-55.

**Comparative Negligence.** Mississippi employs a "pure" comparative negligence system. M.C.A. § 11-7-15. If person is injured and contributed in some way to damages, damages shall be diminished by jury in proportion to amount of negligence attributable to person injured. M.C.A. § 11-7-15. Therefore plaintiff may still recover from defendant whose negligence proximately caused or contributed to plaintiff's injury even though

plaintiff was negligent. *Blackmon v. Payne*, 510 So. 2d 483 (Miss. 1987).

**Indemnification.** Possible right of indemnity exists only in favor of party not actively at fault against active wrongdoer. *Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968), *distinguished by T & S Express, Inc. v. Liberty Mut.*, 847 So. 2d 270 (Miss. 2003); *Long Term Care v. Jesco*, 560 So. 2d 717 (Miss. 1990); *Home Ins. v. Atlas Tank Mfg.*, 230 So. 2d 549 (Miss. 1970). Where parties are "in pari delicto," neither is entitled to seek indemnity from other. *Reid v. United States*, 558 F. Supp. 686 (N.D. Miss. 1983).

**Mental Suffering.** Damages may be recoverable without physical impact. *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980). However, absent physical manifestations of injury from intentional inflicted emotional distress, defendant's act must evoke outrage or revulsion before recovery will be allowed. *Burroughs v. FFP Operating Partners*, 28 F.3d 543 (5th Cir. 1994). To receive damages for intentional infliction of emotional distress, there must be showing of malice or intent. *McDaniel v. Mississippi Baptist Med. Ctr.*, 877 F. Supp. 321 (S.D. Miss. 1995); *aff'd*, 74 F.3d 1238 (5th Cir. 1995). A plaintiff may not recover emotional distress damages resulting from ordinary negligence without proving some sort of physical manifestations of injury or demonstrable physical harm. *Amer. Bankers Ins. v. Wells*, 819 So. 2d 1196 (Miss. 2001), called into doubt by *Morris Newspaper v. Allen*, 932 So. 2d 810 (Miss. App. 2005).

**Punitive Damages.** In any action in which punitive damages are sought, punitive damages may not be awarded if claimant does not prove by clear and convincing evidence that defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences willful, wanton or reckless disregard for safety of others, or committed actual fraud. M.C.A. § 11-1-65(1)(a).

In any action in which the claimant seeks award of punitive damages, trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages. M.C.A. § 11-1-65(1)(b).

If, but only if, award of compensatory damages has been made against party, court shall promptly commence evidentiary hearing before same trier of fact to determine whether punitive damages may be considered. M.C.A. § 11-1-65(1)(c).

Court shall determine whether issue of punitive damages may be submitted to trier of fact; and, if so, trier of fact shall determine whether to award punitive damages and in what amount. M.C.A. § 11-1-65(1)(d).

In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the various statutory caps provided in M.C.A. § 11-1-65(3)(a).

In all cases involving award of punitive damages, fact finder, in determining amount of punitive damages, shall consider, to extent relevant, the following: defendant's financial condition and net worth; nature and reprehensibility of the defendant's wrongdoing, for example, impact of defendant's conduct on the plaintiff, or relationship of defendant to plaintiff; the defendant's awareness of amount of harm being caused and defendant's motivation in causing such harm; duration of defendant's misconduct and whether defendant attempted to conceal such misconduct; and any other circumstances shown by evidence that bear on determining proper amount of punitive damages. Trier of fact shall be instructed that primary purpose of punitive damages is to punish wrongdoer and deter similar misconduct in future by defendant and others while purpose of compensatory damages is to make plaintiff whole. M.C.A. § 11-1-65(1)(e).

Before entering judgment for an award of punitive damages, trial court shall ascertain that award is reasonable in its amount and rationally related to purpose to punish what occurred giving rise to award and to deter its repetition by defendant and others. In determining whether award is excessive, the court shall consider whether there is a reasonable relationship between punitive damage award and harm likely to result from defendant's conduct as well as harm that actually occurred; degree of reprehensibility of defendant's conduct, duration of that conduct, defendant's awareness, any concealment, and existence and frequency of similar past conduct; financial condition and net worth of defendant; and in mitigation, imposition of criminal sanctions on the defendant for its conduct and existence of other civil awards against defendant for same conduct. M.C.A. § 11-1-65(1)(f).

Seller of a product other than manufacturer shall not be liable for punitive damages unless seller exercised substantial control over that aspect of design, testing, manufacture, packaging or labeling of product that caused harm for which recovery of damages is sought; seller altered or modified product, and alteration or modification was a substantial factor in causing harm for which recovery of damages is sought; seller had actual knowledge of defective condition of product at time he supplied same. M.C.A. § 11-1-65(2).

Punitive damages are recoverable for breach of contract if such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of

independent tort. *Progressive Cas. v. Keys*, 317 So. 2d 396 (Miss. 1975); *Peoples Bank & Trust v. Cermack*, 658 So. 2d 1352 (Miss. 1995). Not overruled on this point of law. In *Standard Life v. Veal*, 354 So. 2d 239 (Miss. 1977), punitive damages were allowed against insurer, where evidence showed that insurer refused to pay claim which was due and based its refusal to honor claim on reason clearly contrary to express provisions of its own policy. Punitive damages are now allowed in Chancery Court. *Tideway Oil Programs v. Serio*, 431 So. 2d 454 (Miss. 1983), *superseded on other grounds by Am. Bankers Ins. Co. v. Booth*, 830 So. 2d 1205 (Miss. 2002).

Insured cannot recover punitive damages if insurer had legitimate or arguable reason for failing to pay claim. *Gulf Guaranty Life v. Kelley*, 389 So. 2d 920 (Miss. 1980), *distinguished by Allgood v. Metropolitan Life Ins. Co.*, 543 F. Supp. 2d 591 (S.D. Miss. 2008). Insurer who relied on insured's physician's statement to deny benefits had arguable reason for denying disability benefits and was not liable for punitive damages. *Life & Cas. v. Bristow*, 529 So. 2d 620 (Miss. 1988). Punitive damages may be awarded to insured where insurer unnecessarily delays payment of policy proceeds. Where insurer has no notice of impropriety of its conduct, punitive damages award not supported. *Harrison v. Allstate*, 662 So. 2d 1092 (Miss. 1995).

Insurance company has duty to make reasonably prompt investigation of all relevant facts. It has further duty, after adequate investigation and realistic evaluation of claim, to tell insured, its customer, plain truth. And, if insurance company cannot give its insured valid reason for denying claim, it has final duty to promptly honor it. *Bankers Life v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988).

Supreme Court upheld punitive damages award against insurer based upon imputed knowledge of its agents, even though agent had misrepresented to company that he had such knowledge. Case also imposed duty on insurer to fully investigate facts and circumstances surrounding taking of application in material misrepresentation case. *National Life v. Miller*, 484 So. 2d 329 (Miss. 1985), *questioned on other grounds by Shaw v. Shaw*, 603 So. 2d 287 (Miss. 1992).

Punitive damages are not necessarily mandated by absence of arguable reason because denial of claim could be result of honest mistake or oversight, ordinary or simple negligence, or not reaching heightened status of independent tort. *State Farm v. Simpson*, 477 So. 2d 242 (Miss. 1985). *Simpson* "clearly sets forth Mississippi law on insurance contract punitive claims." *Aetna v. Day*, 487 So. 2d 830 (Miss. 1986).

It is function and responsibility of trial court to determine whether insurer had reasonably arguable basis, either in law or in fact, to refuse to pay claim. If court finds that reasonably arguable basis existed, then jury may not consider any "bad faith" award against insurance company. *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So. 2d 833 (Miss. 1984). If legitimate or arguable reason does not exist trial court must still determine whether insurer has committed willful or malicious wrong, or acted with reckless disregard for insured's rights before issue of punitive damages may be presented to jury. *Pioneer Life v. Moss*, 513 So. 2d 927 (Miss. 1987).

Automobile liability policy providing that insurer would pay on behalf of insured all sums which he became legally obligated to pay as damages due to bodily injuries resulting from accident, covered punitive damages awarded to pedestrian who was struck by vehicle driven by insured while intoxicated. *Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981).

Other Damages. Mississippi now recognizes that extra-contractual damages may be awarded in cases involving a failure to pay on insurance contract without arguable reason, even where circumstances are not such that punitive damages are proper. *Universal Life v. Veasley*, 610 So. 2d 290 (Miss. 1992), compare to *Amer. Bankers v. Wells*, 819 So. 2d 1196 (Miss. 2001), called into question by *Greer v. Burkhardt*, 58 F.3d 1070 (5th Cir. 1995). In *Veasley* the Court upheld assessment of actual damages caused by anxiety resulting from delay, without arguable reason, of payment of policy proceeds in death benefit case. *Id.*

Collateral Source Rule. Proving that plaintiff has received compensation from independent collateral source does not entitle tortfeasor to reduction of damages for which he or she is otherwise liable. *Preferred Risk Mut. v. Courtney*, 393 So. 2d 1328 (Miss. 1981), overruled on other grounds by *Robinson Prop. v. Mitchell*, 7 So. 3d 240 (Miss. 2009).

Statutory Cap on Awards. Mississippi Tort Claims Act provides the following limits for damage awards recoverable against governmental entity: 1) between July 1, 1993 and July 1, 1997, \$50,000; 2) between July 1, 1997 and July 1, 2001, \$250,000; 3) on or after July 1, 2001, \$500,000. M.C.A. § 11-46-15.

## DEATH

See Law Digest Tables.

Abatement and Survival. At common law, original suit abated by death of natural person. *Torry v. Robertson*, 24 Miss. 192 (Miss. 1852). "Personal actions" now survive death. M.C.A. § 91-7-237. A "Personal action"

which survives is action brought for recovery of personal property, for enforcement of contract, or to recover damages for breach thereof, or for recovery of damages for commission of injury to person or property. *Sovereign Camp, W.O.W. v. Durr*, 192 So. 45 (Miss. 1939). Punitive damages cannot be recovered for personal wrong after wrongdoer's death in action against his representative. *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (Miss. 1891), overruled on other grounds, *Glaskox v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

Action for Wrongful Death. See M.C.A. § 11-7-13, which allows for damages of every kind to be recovered as determined by the jury. However, see M.C.A. § 11-1-69 which prohibits recovery for loss of enjoyment of life caused by death. When parent brings wrongful death action on behalf of all statutory beneficiaries of deceased child, elements of damages properly allowable are: gratuities that parent has a reasonable expectation of receiving, loss of deceased's society and companionship, and sums child might have received as present net value of own life expectancy. *Dickey v. Parham*, 295 So. 2d 284 (Miss. 1974). Recoverable damages in wrongful death action included punitive damages, funeral and medical expenses, pain and suffering of deceased and damages that deceased's heirs might have suffered because of personal relationship with deceased, such as loss of support and companionship. *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So. 2d 1023 (Miss. 2000).

If deceased is survived by multiple statutory beneficiaries, only one suit can be maintained for benefit of all entitled to share in damages awarded. M.C.A. § 11-7-13. Statutory beneficiaries include spouses, children, siblings and parent. *Id.* Statute of limitations begins to run on date that injured discovers facts or cause of death that entitles them to bring action. *Sweeney v. Preston*, 642 So. 2d 332 (Miss. 1994).

Unexplained Absence. Any person who shall remain beyond sea, or absent himself from this state, or conceal himself in this state, for seven years successively without being heard of, shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time; but any property or estate recovered in any such case shall be restored to person evicted or deprived thereof, if, in subsequent action, it shall be proved that person so presumed to be dead is living. M.C.A. § 13-1-23.

Burden of proof is on party attempting to prove death at time prior to expiration of statutory period. *New York Life Ins. Co. v. Brame*, 112 Miss. 828, 73 So. 806 (1917).

More than 7 years after man disappeared, his wife married insured. After insured's death, first husband

found to be alive. Held, presumption rebutted and marriage to insured void. Dissenting judges hold statutory presumption of death should be conclusive in such case. *Frank v. Frank*, 193 Miss. 605, 10 So. 2d 839 (1942).

M.C.A. § 13-1-25 provides that written finding of presumed death or official written report or record that person is missing, interned, captured, etc., or duly certified copy thereof, made by officer or employee of United States authorized to make such finding or report pursuant to Federal law (5 USC § 5561-5568, 37 USC § 551-558), shall be received as prima facie evidence that subject member of military or naval services is dead, missing, captured, etc. Presumption that signature of certifying officer or employee has been affixed pursuant to law and within scope of authority.

### DISABILITY

Classifications. Insured not totally and permanently disabled where he had been regularly employed for more than a year and had performed in substantial manner all duties required of him and had received compensation equal to or more than he had ever received in any other employment, even though evidence showed that he suffered from pain. *Mut. Life Ins. Co. v. Baker*, 197 Miss. 438, 19 So. 2d 739 (1944); *Lamar Life Ins. Co. v. Shaw*, 502 So. 2d 323 (Miss. 1987).

Insured indemnified for loss of eye and broken leg held entitled to also recover for total disability resulting from such injuries. *Eminent Household v. Bunch*, 115 Miss. 512, 76 So. 540 (1917). Insured is totally disabled notwithstanding fact that occasionally he is able to perform some single act in connection with his occupation. Insured is "totally disabled" if he is prevented from doing substantial acts required of him in his occupation, or if ordinary care required that he cease all work. *Am. Bankers Ins. Co. v. White*, 171 Miss. 677, 158 So. 346 (1935). See *Shipp v. Metropolitan Life*, 146 Miss. 18, 111 So. 453 (1927); *Life & Cas. Ins. Co. v. Jones*, 112 Miss. 506, 73 So. 566 (1917); *Nat'l Life & Acc. Ins. Co. v. King*, 102 Miss. 470, 59 So. 807 (1912). Person may be totally disabled even though he takes some exercise outdoors and visits physician provided he is unable to work. *Bedwell v. Auto. Owners Ass'n Ins. Co.*, 240 Miss. 312, 127 So. 2d 432 (1961). Provision of policy requiring attendance of physician at least once every seven days is not applicable in cases of total permanent disability. *Am. Life Ins. Co. v. Byrd*, 210 Miss. 50, 48 So. 2d 614 (1950). See *World v. McKenzie*, 212 Miss. 809, 55 So. 2d 462 (1950). Construction of "total loss of time" determined by same rules applicable to construction of "total disability," and when there is "total disability" there is consequent "total loss of time," notwithstanding performance of minor and incidental duties pertaining to

business. *Mut. Benefit Health & Acc. Ass'n v. Mathis*, 169 Miss. 187, 142 So. 494 (1932). Because functions of Postmaster are supervisory and require no physical labor, insured is not entitled to permanent disability benefits under policy which requires permanently continuing prevention from engaging in any occupation whatsoever for remuneration or profit. *New York Life Ins. Co. v. McGehee*, 193 Miss. 549, 10 So. 2d 454 (1942).

Proof of Conditions. Where proof of disability is made condition precedent to waiver of premium, insanity, and resultant inability to make proof thereof, will not operate to keep policy in force so as to entitle recovery by beneficiary upon subsequent death of insured. Contract is not contrary to public policy. Statute of limitations has no application. If proof not furnished while policy in force, there is no waiver of premium. *Berry v. Lamar Life Ins. Co.*, 165 Miss. 405, 142 So. 445 (1932). Where insured visited store daily, though not attending to business, he may not recover on policy indemnifying for period during which insured was confined within house by illness. *Am. Life & Acc. Ins. Co. v. Nirdlinger*, 113 Miss. 74, 73 So. 875 (1917).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Insurance Coverage."

### FIRE INSURANCE

Arson. Any person who wilfully and with intent to injure or defraud insurer sets fire to or burns or attempts so to do or who causes to be burned or who aids, counsels or procures burning of any building, structure or personal property, of whatsoever class or character, whether property of himself or of another, which shall at time be insured by any person, company or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to penitentiary for not less than one nor more than ten years. M.C.A. § 97-17-11.

Insured held to have right to recover when home destroyed by another in act of criminal vandalism although general rule is that fire having been set by insured or insured's agent constitutes legitimate reason for denying insured's claim under homeowner's policy. *Davidson v. State Farm Fire & Cas. Co.*, 641 F. Supp. 503 (N.D. Miss. 1986). Burden of proof for civil arson is clear and convincing evidence. *McGory v. Allstate Ins. Co.*, 527 So. 2d 632 (Miss. 1988), distinguished by *Dill v. S. Farm Bureau Life Ins. Co.*, 797 So. 2d 858 (Miss. 2001).

Appraisal. Appraisers appointed pursuant to provisions of policies are empowered only to estimate amount

of and value of property damage, and have no power to determine cause of damage, or to arbitrate dispute between insured and insurers. *Munn v. Nat'l Fire Ins. Co.*, 237 Miss. 641, 115 So. 2d 54 (1959), *distinguished by Kuehn v. State Farm Fire & Cas. Co.*, 2009 US Dist. LEXIS 74691 (S.D. Miss. 2009).

**Assignment.** Assignment of policy as collateral security for debt is not such assignment as will invalidate policy, and is not violation of provision prohibiting assignment of policy before loss without consent of insurer. *Aetna Ins. Co. v. Smith, McKinnon & Son*, 117 Miss. 327, 78 So. 289 (1918). Provisions of policies regarding assignments are solely for benefit of insurer and do not affect validity as between assignor and assignee. *Stokes v. Am.*, 211 Miss. 584, 52 So. 2d 358 (1951). *See also Camden Fire Ins. Ass'n v. Koch*, 216 Miss. 576, 63 So. 2d 103 (Miss. 1953), *distinguished by Booker v. Petty*, 770 So. 2d 39 (Miss. 2000).

**Binder.** Insurer obligated to pay face value of written binder for fire policy and was not allowed to argue that value of property destroyed by fire was actually less than amount for which property was insured. *Miss. Farm Bureau Ins. Co. v. Todd*, 492 So. 2d 919 (Miss. 1986).

**Cancellation.** See "CANCELLATION."

**Mortgage Clause.** Fire insurance policy on building, taken out by mortgagor or grantor in deed of trust, shall have attached statutory mortgage clause, which is New York Standard Clause. Rights of trustee of vendor's lien not forfeited by breach of warranty by vendee. *Scottish Union & Nat'l Ins. Co. v. Warren Gee Lumber Co.*, 118 Miss. 740, 80 So. 9 (1918), *cf. Tolar v. Bankers Trust Sav. & Loan Ass'n*, 363 So. 2d 732 (Miss. 1978). *See M.C.A. § 83-13-9* for statutory mortgage clause.

M.C.A. § 83-13-9 provides that mortgagee shall notify insurer of any change of ownership or occupancy or increase of hazard which shall come to mortgagee's knowledge, and mortgagee shall, on demand, pay premium for increased hazard, otherwise policy shall be void is for manifest purpose of allowing insurer to protect itself against increased risk by increasing premiums due, and where there is no increase of risk, there is no justification for forfeiture of policy for failure of mortgagee to notify insurer of change of ownership or occupancy. *See Peerless Ins. Co. v. Bailey Mortgage Co.*, 345 F.2d 14 (5th Cir. 1965). For case dealing with several aspects of statutory mortgage clause, *see Tolar v. Bankers Trust Sav. & Loan Ass'n*, 363 So. 2d 732 (Miss. 1978).

Duty imposed on fire insurer by fire insurance policy that loss on building items was payable to mortgagee was separate and independent contract between insurer and mortgagee, and when insurer delivered its settlement

draft to cover fire losses to mortgagor only, insurer was liable to mortgagee for such amount after mortgagor converted proceeds for his own use. *Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118 (Miss. 1980).

Renewal of mortgage known by agents to have existed at time he issued policy, which prohibited mortgages or other liens, on penalty of forfeiture, was held not to avoid policy. *Ga. Home Ins. Co. v. Stein*, 72 Miss. 943, 18 So. 414 (1895).

**Reformation.** As with other contracts, insurance policies may be reformed in appropriate circumstances. *Johnson v. Consol. Am. Life Ins. Co.*, 244 So. 2d 400 (Miss. 1971). If proper in other respects, fire policy held subject to reformation as to name of building insured. *Brower v. State*, 217 Miss. 425, 64 So. 2d 576 (1953).

**Excepted Risk.** Distinction as to whether item constitutes fixture or personal chattel is determinative of whether properly excluded from coverage. Ceiling fans and electric chandeliers held to be fixtures because they could not be readily removed without damaging or defacing the building. *Fidelity-Phenix Fire Ins. Co. v. Redmond*, 144 Miss. 749, 111 So. 366 (1926), *distinguished on different grounds by Mich. Millers Mut. Ins. Co. v. Lindsey*, 285 So. 2d 908 (Miss. 1973).

**Ownership.** Trust resulting to wife from purchase of property by husband in his name gives title to wife in equity and is sufficient to support requisite of ownership in insured. *Ford v. Am. Home Fire Ins. Co.*, 192 Miss. 277, 5 So. 2d 416 (1942), *distinguished by Howell v. Gen. Contract Corp.*, 91 So. 2d 831 (Miss. 1957).

**Proof of Loss.** In case of destruction or damage by fire where property is insured against fire, it is duty of insurance company liable on policy, within reasonable time after notice thereof, to furnish insured proper blanks to make required proof of loss with full directions as to proof required, and if company neglects to do so, failure of insured to make proof of loss prior to suit is no defense to suit on policy, and in all cases insured shall have reasonable time to make proof after blanks and directions are received. *Newark Fire Ins. Co. v. McMullen*, 142 Miss. 369, 107 So. 523 (1926). *See also M.C.A. § 83-13-13.*

When insured and insurer failed to agree on amount of fire loss making appraisal clause operative, report of appraisers did not constitute arbitration and award, but, merely was determination of value of destroyed property, and insured should have filed declaration on fire policy, rather than motion to confirm arbitration and award loss under policy. *Hartford Fire Ins. Co. v. Jones*, 235 Miss. 37, 108 So. 2d 571 (1959).

Repair. Susceptibility of building to reasonable repairs and reconstruction is requisite to damages constituting only a "partial loss." *Home Ins. Co. v. Greene*, 229 So. 2d 576 (Miss. 1969).

Concurrent Insurance. "No insurance company shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds a fair value of the property..." M.C.A. § 83-13-5. However, when multiple companies knowingly issued concurrent policies to insured, each insurer held liable for full amount of its policy. *W. Assurance Co. v. Phelps*, 77 Miss. 625, 27 So. 745 (1900).

Where fire policy prohibits other insurance unless total amount is inserted on attachment, insurer is not liable for loss if insured obtains other insurance without so listing. *Am. Ins. Co. v. Prine*, 244 Miss. 69, 140 So. 2d 284 (1962).

Clause in fire policy prohibiting other insurance is reasonable and valid provision and violation of such clause will void policy although policy does not expressly provide that violation should void policy. *Zepponi v. Home Ins. Co.*, 248 Miss. 828, 161 So. 2d 524 (1964).

There would not be forfeiture of policy where policy contains provision making additional insurance without knowledge of insurer ground for forfeiture of policy, and insurance is obtained by third person without knowledge or consent of insured, on same interest as that of insured, and without acquiescence in or ratification by insured; neither can insured be held responsible for not disclosing such insurance, taken out by other without his knowledge. *Merchants' Fire Assurance Co. v. Cantrell*, 220 Miss. 877, 72 So. 2d 143 (1954).

Contribution. Where policy prohibited subsequent insurance without notice and insured secured policy from another company, which provided that insured may not recover any greater proportion of loss than the amount insured bears as to whole sum insured on property, and without reference to solvency or liability of other insurers, latter company is entitled to have liability fixed by prorating, regardless of whether there is liability on first policy or not. *Cassity v. New Orleans Ins. Ass'n*, 65 Miss. 49, 3 So. 138 (1887).

Excessive Policies. Defense of overinsurance upheld in realm of fire policies. *Scottish Union & Nat'l Ins. Co. v. Warren Gee Lumber Co.*, 118 Miss. 740, 80 So. 9 (1918). Preventing insurance companies from issuing excessive fire insurance coverage on property was one purpose of Mississippi's valued policy statute. *Foremost Ins. Co. v. Lowery*, 617 F. Supp. 521 (S.D. Miss. 1985) (citing M.C.A. § 83-13-5).

Severable Contracts. Schedule fire policy insuring various items and fixing amounts of insurance on each is separable, and fact that policy is void as to one item for insured's false swearing does not render it void as to all. *Claxton v. Fid. & Guar. Fire Corp.*, 179 Miss. 556, 175 So. 210 (1937).

Subrogation. Attempted subrogation between fire insurer and mortgagee invalid where insurer denied liability to insured upon fire loss because of mortgages on property, and admitted liability to mortgagee only on condition that upon payment, mortgagee would issue to insurer subrogation receipt; payment by insurer to mortgagee had effect of fully liquidating mortgage debt so that insured was entitled to cancellation of mortgage and subrogation receipt. *Home Ins. Co. of N.Y. v. Northington*, 198 Miss. 650, 23 So. 2d 537 (Miss. 1945).

Where fire insurer was not liable to insured, under statutory subrogation clause of policy, insurer, when it paid loss to mortgagee, would automatically be subrogated to all rights of mortgagee. *Great Am. Ins. Co. v. Smith*, 252 Miss. 62, 172 So. 2d 558 (1965).

Under statutory subrogation clause judgment, creditor's lien has priority over insurer's subrogation lien so that judgment creditor is entitled to full satisfaction of its judgment out of bankrupt's estate before insurer is entitled to subrogation. *Dunnam v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668 (Miss. 1979).

Windstorm. Appraisers appointed pursuant to provisions of storm policy are empowered only to estimate amount of and value of property damage, and have no power to determine cause of damage, or to arbitrate disputes between insured and insurers. *Munn v. Nat'l Fire Ins. Co.*, 237 Miss. 641, 115 So. 2d 54 (1959).

To recover on windstorm policy, it is sufficient to show that wind was proximate cause or efficient cause of loss, notwithstanding that other factors contributed to loss. *Grace v. Lititz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972).

## GUEST CASES

See "AUTOMOBILES, Guests."

## HOSPITALS

Evidence-Records. May be admissible under M.R.E. 803 or, in event privilege is waived, M.R.E. 503.

Liens. Written instrument executed by minor's mother agreeing to pay hospital bill out of insurance settlement or judgment did not constitute valid lien against minor's estate because mother did not obtain Chancery Court approval necessary to bind minor's estate. *Meth-*



*odist Hosp. of Memphis v. Guardianship of Marsh*, 518 So. 2d 1227 (Miss. 1988).

Liability. See M.C.A. § 11-46-1 *et seq.*

### HUSBAND AND WIFE

Community Property. State of Mississippi does not recognize community property. M.C.A. § 27-7-85; *Chamblee v. Chamblee*, 637 So. 2d 850 (Miss. 1994).

Interspousal Immunity. Under M.C.A. § 13-1-5, spouse may be compelled to testify against other spouse in following situations: 1) for criminal act against any child, 2) for contributing to neglect or delinquency of child, 3) for abandoning child, or 4) for desertion or non-support of child under age of sixteen years. However, in all other situations involving spouse as litigant, both spouses must consent before spouse can be introduced as witness or required to answer interrogatories.

Loss of Consortium. "A married woman shall have a cause of action for loss of consortium through negligent injury of her husband." M.C.A. § 93-3-1. See *Tribble v. Gregory*, 288 So. 2d 13 (Miss. 1974), distinguished by *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988). Loss of consortium is wholly dependent on recovery of primary claim of injured spouse. *Lindsey v. Sears Roebuck & Co.*, 846 F. Supp. 501 (S.D. Miss. 1993). Defense against personal injury claim is also available for loss of consortium claim. *Byrd v. Matthews*, 571 So. 2d 258 (Miss. 1990).

### INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

### INLAND MARINE

Policy which assumes risk of legal liability of ship repairs for loss or damage to vessels "which are in their care, custody, or control for the purpose of alteration or repair at locations within the United States or while such vessels or craft are being shifted and/or moved...not in excess of 15 miles...." covered vessel that had previously been moved in excess of 15 miles where vessel sank while in insured's possession for extensive repairs and while repairs were actually being performed at location within United States. *Monarch Ins. Co. of Ohio v. Cook*, 336 So. 2d 738 (Miss. 1976), distinguished by *Hartford Ins. Co. v. Sheffield*, 808 So. 2d 891 (Miss. 2001).

### LIABILITY INSURANCE

Cancellation. Notice of cancellation of policy which had been in effect for at least sixty days at time

notice was mailed or delivered would only be effective if: 1) premiums were not paid, 2) insured failed to make timely payment of dues or maintain membership in good standing where membership was a condition of gaining insurance coverage, or 3) driver's license or motor vehicle registration of insured, member of insured's household, or common user of insured's vehicle has been suspended or revoked during policy period, unless within seven days from date of cancellation, insured signs written waiver excluding that person from coverage under insurance policy. M.C.A. § 83-11-3. If insured has made misrepresentations prior to issuance of policy, sixty day limit on cancellation will not apply to insurer seeking to cancel policy. *Chapman v. Safeco Ins. Co.*, 722 F. Supp. 285 (N.D. Miss. 1989).

In order for cancellation of insurance policy to be effective, notice must be mailed or delivered to insured and to any named creditor loss payee at least thirty days prior to effective date cancellation, unless there is a named creditor loss payee or cancellation is due to non-payment of premium, in which case, only ten days notice is required. M.C.A. § 83-11-5. In determining whether cancellation notice was timely given, measurement of time period should begin with date cancellation notice was received by insured, rather than mailed by insurer. *Black v. Fid. & Guar. Ins. Underwriters, Inc.*, 582 F.2d 984 (5th Cir. 1978). Mailing notice of cancellation to address shown on policy constitutes sufficient proof of notice. M.C.A. § 83-11-9. Proof of mailing to address shown on policy notice requirement, even if insured claims notice was never received. *State Farm Ins. Co. v. Gay*, 526 So. 2d 534 (Miss. 1988), called into doubt by *Branch v. State Farm Fire & Cas. Co.*, 759 So. 2d 430 (Miss. 2000). Production of certificate of mailing creates rebuttable presumption of receipt of notice, mere denial of receipt is insufficient to create issue of fact. *Carter v. Allstate Indem. Co.*, 592 So. 2d 66 (Miss. 1991).

Reason for cancellation must accompany or be included in notice or notice must inform insured that reason for cancellation will be specified upon written request not less than fifteen days prior to effective date of cancellation. M.C.A. § 83-11-5. This section does not apply to nonrenewal unless there is a named creditor loss payee. *Id.* Insurer must give insured at least 30 days advance notice of its intention not to renew policy to the insured and to the named creditor loss payee, with certain exceptions set forth in statute. M.C.A. § 83-11-7. Renewal of policy is not waiver or estoppel with respect to grounds for cancellation existing before the effective date of renewal. *Id.* Notice of cancellation other than for nonpayment of premium or notice of intent not to renew liability policy must be accompanied by statement to insured that he may be eligible for insurance through "Assigned Risk Plan." M.C.A. § 83-11-11. M.C.A.

§§ 83-11-17 through 83-11-21 sets out procedure for contesting cancellation or non-renewal of policy. When policy requires five days notice to insured for cancellation, such notice is necessary unless waived by insured. *Conn. Fire Ins. Co. v. Harrison*, 173 Miss. 84, 161 So. 459 (1935).

Insurer cannot avoid liability under health and accident insurance policy by attempting to cancel policy prior to due date of premium which insurer has expressly agreed in policy to waive on account of total disability of insured. *Provident Life & Acc. Ins. Co. v. Cumbest*, 325 So. 2d 569 (Miss. 1976) (holding that provision of group policy requiring insured to submit annual proof of continued disability or continued waiver of premium was valid).

Where policy required insurer to “give” written notice of cancellation to insured, actual receipt of cancellation by insured was preconditioned to cancellation. *Nelson v. Phoenix of Hartford Ins. Co.*, 318 So. 2d 839 (Miss. 1975). *See also, Black v. Fid. & Guar. Ins. Underwriters, Inc.*, 582 F.2d 984 (5th Cir. 1978) (construing M.C.A. § 83-11-5).

When proof shows that insured no longer intended to pay premiums on policy of insurance and acquiesces in cancellation of said policy, insured is bound by his acts even though cancellation was wrongfully made. *Chatham v. Occidental Life*, 248 Miss. 328, 158 So. 2d 735 (1963).

**Compromise of Claims. Duty to Act in Good Faith.** Where claim covered by liability insurance policy is for amount exceeding policy limits and settlement offer is made within policy limits, insurer has fiduciary responsibility to insured to make knowledgeable, honest and intelligent evaluation of claim. *Hartford Acc. & Indem. v. Foster*, 528 So. 2d 255 (Miss. 1988), distinguished on other grounds by *Hartford Cas. Ins. Co. v. Halliburton*, 826 So. 2d 1206 (Miss. 2001). Recovery of judgment in excess of automobile liability policy limits does not, within itself, constitute bad faith on part of insurer for failure to settle within limits of policy, but insurer must balance its interest with interest of insured. *Nichols v. State Farm Mut. Auto. Ins.*, 345 F. Supp. 212 (N.D. Miss. 1972).

**Right of Insurer to Settle.** Under Mississippi Law, liability insurer cannot be found liable in excess of its policy limits for failing to settle action unless its refusal to settle was so arbitrary and unreasonable as to constitute fraud. *Martin v. Travelers Indem. Co.*, 450 F.2d 542 (5th Cir. 1971).

**Contribution between Joint Tortfeasors.** Effective September 1, 2004, for causes of action based on fault filed on or after September 1, 2004, liability for damages

caused by two or more persons shall be several only. Each joint tortfeasor shall be liable only for the amount of damages allocated in direct proportion to his percentage of fault. M.C.A. § 85-5-7(2). As a result, joint and several liability has been largely eliminated, except that it 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. M.C.A. § 85-5-7(4). Any person held jointly and severally liable under this subsection shall have a right of contribution from his fellow defendants acting in concert. M.C.A. § 85-5-7(4).

Fault is defined as an act or omission of a person which is a proximate cause of injury. Actions based on fault include, but are not limited to, negligence, malpractice, strict liability, absolute liability and failure to warn. Actions based on fault shall not include torts committed with a specific wrongful intent. M.C.A. § 85-5-7(1).

In actions involving joint tortfeasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tortfeasor is immune from damages. M.C.A. § 85-5-7(5). Fault allocated to an immune tortfeasor or a tortfeasor whose liability is limited by law shall not be reallocated to any other tortfeasor. M.C.A. § 85-5-7(5). In determining percentages of fault, an employer and the employer's employee or a principal and the principal's agent shall be considered as one defendant when liability of such employer or principal has been caused by the action of the employee or agent. M.C.A. § 85-5-7(2).

Manufacturer and car dealer not subject to separate suit brought by insurer for contribution to judgment obtained against insured arising from automobile accident, where neither defendant was party to original lawsuit and for contribution, judgment must be joint and several. *Hartford v. Mitchell Buick-Pontiac & Equip. Co.*, 479 F. Supp. 345 (N.D. Miss. 1979).

**Cooperation of Insured.** Where insured failed to cooperate with insurer in accordance with policy provision requiring forwarding of summons to insurer, insurer was not liable to third party passenger for amount of judgment without knowledge of suit or that third party passenger had gained default judgment against insured. *Courtney v. Stapp*, 232 Miss. 752, 100 So. 2d 606 (1958). *But see Monarch Ins. Co. v. Cook*, 336 So. 2d 738 (Miss. 1976) (discussed below).

Defendant in suit brought by her father failed to comply with cooperation clause of policy by giving testimony at trial contrary to her written and oral statements prior to trial. *Employers Mut. Cas. Co. v. Ainsworth*, 249 Miss. 808, 164 So. 2d 412 (1964).

Insured's admission of liability, which was contrary to cooperation clause of policy, did not preclude cover-

age under liability policy in absence of allegation or proof of collusion or fraud. Cooperation clause did not require insured to falsify any facts or put up sham defense. *Monarch Ins. Co. v. Cook*, 336 So. 2d 738, (Miss. 1976), distinguished by *Hartford Ins. Co. v. Sheffield*, 808 So. 2d 891 (Miss. 2001).

Coverage—Construction of Terms. See “CONSTRUCTION OF POLICY.” Garageman’s alleged legal liability for defective mechanical work performed on motor vehicles was not within coverage of policy stating that such policy agreed to pay on behalf of insured sums that garageman became legally obligated for liability arising from and because of damage “caused by accident,” and insurer was not liable for reimbursement for money spent in successful defense of suit for alleged imperfect mechanical work. *Womack v. Employers Mut. Liab. Ins. Co.*, 233 Miss. 110, 101 So. 2d 107 (1958).

Standard Provisions. Insurer must defend insured against all actions brought against him on allegations of facts and circumstances covered by policy, even though such suits may be groundless, false or fraudulent. *State Farm Mut. Auto. Ins. Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970).

Where policy was to insure all dependent children living with insured, and insurer accepted family rates even though insured’s children were not living with insured, insurer was found to have waived provision. *Crawley v. Am. Pub. Life Ins. Co.*, 603 So. 2d 835 (Miss. 1992).

Where contractor’s employee accidentally damaged pipeline lying close to highway right of way and within its boundaries but not under traveled part of road, such damage was not excluded from coverage by exception clause in contractor’s public liability policy providing that injury occurring to pipes during excavation on highways was not covered by policy. *Am. Hardware Mut. Ins. Co. v. Union Gas Co.*, 238 Miss. 289, 118 So. 2d 334 (1960).

Under liability policy, medical coverage was to extend to insured while riding in auto described in policy and any other auto not regularly furnished for his use; held that where insured used any one of ten trucks furnished by his employer, although insured did not regularly use any particular one, this use precluded recovery of medical expenses by insured when injured while driving one of trucks, since this was “regular use.” *Moore v. State Farm Mut. Auto. Ins. Co.*, 239 Miss. 130, 121 So. 2d 125 (1960), distinguished by *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 754 So. 2d 1203, 1205 (Miss. 2000). Chiropractic expenses are within definition of medical expenses and recoverable under liability policy. *State Farm v. Gregg*, 526 So. 2d 554 (Miss. 1988).

Where auto liability policy contained provision that there would be no coverage when auto was towing trailer, insurer was not liable for injuries which occurred while auto was towing trailer which came loose and struck another vehicle even though agent knew that trailers would be used. *Hartford Accident & Indem. Co. v. Lockard*, 239 Miss. 644, 124 So. 2d 849 (1960), distinguished by *Smith Trucking, Inc. v. Cotton Belt Ins. Co.*, 556 F.2d 1297, 1303 (5th Cir. 1977); *Canal Ins. Co. v. Bush*, 154 So. 2d 111, 121 (Miss. 1963); *Travelers Fire Ins. Co. v. Bank of New Albany*, 146 So. 2d 351, 354 (Miss. 1962).

There is no valid reason why insurance companies should not have the right, by contract, to avoid coverage for those in the family circle, who, because of their close intimacy, may be expected to be riding at frequent intervals in insured automobiles. *Perry v. S. Farm Bureau Cas. Ins. Co.*, 251 Miss. 544, 170 So. 2d 628 (1965).

Under M.C.A. § 83-11-103, if family member is not resident of same household as insured, uninsured motorist coverage will be denied. However, a person may have more than one residence. Where children were temporarily residing at parent’s home to await a move to Arkansas, for purposes of insurance, they were “residing” with insured. *Johnson v. Preferred Risk Auto. Ins. Co.*, 659 So. 2d 866 (Miss. 1995), overruled in part on other grounds, *Upchurch Plumbing, Inc. v. Greenwood Util. Comm’n*, 964 So. 2d 1100 (Miss. 2007).

Where parties have claims against each other, insurer is not entitled to benefit from setoff reducing liability of insurer. *Pham v. Welter*, 542 So. 2d 884 (Miss. 1989), distinguished by *DePriest v. Barber*, 798 So. 2d 456, 459 (Miss. 2001).

Omnibus Provisions. See M.C.A. § 63-15-43, minor deviation by permissive user of vehicle will not effect limitation on permittee’s insurance coverage. *Travelers Ins. Co. v. Watkins*, 209 So. 2d 630 (Miss. 1968). Where insured gives unrestricted permission to first permittee to use insured vehicle, and first permittee allows second permittee to use insured vehicle to serve purpose of first permittee, second permittee is covered under Omnibus clause. *Int’l Svc. Ins. Co. v. Ballard*, 216 So. 2d 535 (Miss. 1968). See also *Vaughn v. State Farm Mut. Auto. Ins. Co.*, 359 So. 2d 339 (Miss. 1978), overruled on other grounds, *State Farm Mut. Auto. Ins. Co. v. Mettetal*, 534 So. 2d 189 (Miss. 1988) (M.C.A. § 63-15-43 only applies to policies certified as to proof of financial responsibility).

Direct Action Against Insurer. There is no right of direct action against insurer. However, an insurer may be named as a party to an action to obtain a declaratory

judgment on the question of coverage. *Jackson v. Daley*, 739 So. 2d 1031 (Miss. 1999).

**Duty to Defend.** Insurer was required to defend claim which, if established, would not have been covered by policy. *Mavar Shrimp & Oyster Co. v. USF&G*, 187 So. 2d 871 (Miss. 1966), *distinguished by Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326 (5th Cir. 1999). *See also, State Farm Mut. Auto. Ins. Co. v. Taylor*, 233 So. 2d 805 (Miss. 1970).

Insurer's liability under policy of any kind must be raised and decided in action on contract brought against insurance company, and question of insurer's liability cannot be raised and answered in tort action against tortfeasor alone. *Mallette v. Hurt*, 383 So. 2d 503 (Miss. 1980).

**Liability Between Insurers—Primary and Excess.** Where a policy issued by lessor's insured provided that its insurance was primary except when stated to apply in excess of or contingent upon absence of other insurance and policy contained no excess or contingent clause as it pertains to basic personal and property damage insurance, policy issued by lessee is insurer stated insurance provided to be excess to any other valid and collectable insurance, liability of lessor's insurer for motor vehicle collision involving lease tractor trailer rig was primary and liability of lessee's insurer was excess, particularly where driver of rig was lessor's driver who had been furnished to lessee with truck. *Transport Indem. Co. v. Paxton Nat'l Ins. Co.*, 657 F.2d 657 (5th Cir. 1981). Where lender of automobile is insured to protect borrower's use of car, and borrower also has policy to protect him against liability while using substitute automobile, lender's policy will have primary obligation and borrower's policy is secondary and may be liable only for excess damage accruing over and above obligation of lender's policy. *Int'l Svc. Ins. Co. v. Ballard*, 216 So. 2d 535 (Miss. 1968).

**Exclusions—Intentional Acts.** Where an insured is intentionally injured or killed and where such injury or death is not result of misconduct of insured, injury or death is labeled as "accidental" within meaning of accident insurance policy. *Freed v. Protective Life Ins. Co.*, 405 F. Supp. 175 (S.D. Miss. 1975), *aff'd*, 551 F.2d 861 (5th Cir. 1977). An insurance company may exclude liability for intentional injuries even if injury is accidental as to insured. *Holmes v. Am. Nat'l Ins. Co.*, 142 Miss. 636, 107 So. 867 (1926).

**Assault.** Assault by taxi driver outside of cab not covered by indemnity bond required as prerequisite to "operating of any taxi cab in City of Jackson." *Nat'l Mut. Cas. Co. v. Clark*, 193 Miss. 27, 7 So. 2d 800 (1942). Injury sustained as result of assault and battery

without any provocation by insured is "accidental injury" within meaning of liability policy. *W. Cas. & Sur. Co. v. Aponaug Mfg. Co.*, 197 F.2d 673 (5th Cir. 1952).

**Violations of Law.** Automobile liability policy void for fraud where alleged insured applied for policy when he knew that vehicle had previously been involved in accident and alleged insured concealed fact from agent, later reporting accident as occurring at date after issuance of policy. *State Farm v. Calhoun*, 236 Miss. 851, 112 So. 2d 366 (1959).

**Waiver.** See "WAIVER AND ESTOPPEL."

**Infants.** To render infant liable on ground of fraud or tort, he must have arrived at such years of discretion that fraud may fairly be imputed to him. *Ferguson v. Bobo*, 54 Miss. 121 (1876).

Infant cannot be held in tort for omission when duty to act otherwise must find its basis in an agreement by infant. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945). Child engaged in adult activity, such as driving a motor vehicle, is held to adult standard of care. *Davis v. Waterman*, 420 So. 2d 1063 (Miss. 1982).

**Insolvency of Insurer.** For those insurers not issuing only assessable fire insurance policies, insurer is insolvent if it is unable to pay its obligations when they are due, or when its admitted assets do not exceed liabilities plus greater of (a) capital and surplus required by law for its organizations, or (b) total par or stated value of its authorized and issued capital stock. M.C.A. § 83-24-7(k) (ii) - (iii).

If insurer is insolvent or if risk of loss to creditors or policyholders would be increased if insurer attempted to rehabilitate, Commissioner may petition court for order of liquidation. Court may order estate of insurer to pay costs necessary to defend insurer against petition. M.C.A. §§ 83-24-31(1) and 83-24-33.

Within 120-days after court makes a final determination of insolvency of insurer and assets become available, liquidator shall apply to court for approval of a proposal to disburse these assets in payment of obligations owed to guaranty associations due to insolvency. If no assets are available to disburse, liquidator shall file application stating reasons for lack of assets available for disbursement. M.C.A. § 83-24-67 (1).

**Notice.** Notice need not be given to insurer until some claim within coverage is presented. *State Mut. Ins. Co. v. Watkins*, 181 Miss. 859, 180 So. 78 (1938). Provision in accident policy requiring written notice to insurer within 15 days after accident is void. *Standard Accident Ins. Co. v. Broom*, 111 Miss. 409, 71 So. 653 (1916), *distinguished by Brander v. Nabors*, 443 F. Supp. 764 (N.D. Miss. 1978).

Where insured gave lengthy report of accident to company which collected premiums and delivered policy and insurer had actual notice of suit, held proper notice existed. *Fleming v. Travelers Ins. Co.*, 206 Miss. 284, 39 So. 2d 885 (1949). Verbal notice of collision loss to insured's local agent and district agent held sufficient. *State Farm v. McKay*, 209 Miss. 706, 48 So. 2d 349 (1950).

Words "as soon as practicable," contained in insurance policy in regard to notice to insurer, are not words of precise and definite import, but provide more or less free play, are ambulatory and subject to impact of particular facts on particular cases. Where notice was not given for two days, and there was no showing of actual prejudice to insurer from delay, there was no breach of requirement of notice. *Young v. Travelers Ins. Co.*, 119 F.2d 877 (5th Cir. 1941). See also *Hague v. Liberty Mut. Ins. Co.*, 571 F.2d 262 (5th Cir. 1978).

Fact that insured does not have to give notice of accident until he has knowledge thereof will not excuse him for failing to give notice when, in fact, he was informed of accident but made no effort to ascertain facts and comply with reasonable notice clause required by policy as condition precedent to recovery. *Harris v. Am. Motorist*, 240 Miss. 262, 126 So. 2d 870 (1961), distinguished by *First Pentecostal Church of Jackson v. Bhd. Mut. Ins. Co.*, 2010 U.S. Dist. LEXIS 71386 (S.D. Miss. 2010).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Limitations in Contract. General statute of limitations on contracts has been changed from six to three years for actions accruing on or after July 1, 1989, amending M.C.A. § 15-1-49. Applicable statute of limitations shall not be changed in any way by contract between parties, and any change in limitation made by contract stipulations whatsoever is absolutely void, since object of statute is to make period of limitation for various causes of action same for all litigants. M.C.A. § 15-1-5. Provision in policy that suit could not be brought except after twelve months from loss was held void in *Stuyvesant Ins. Co. v. A.C. Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575 (1924). But see *Metro. Life Ins. Co. v. Lindsey*, 184 Miss. 359, 185 So. 573 (1939).

Except as otherwise provided in the U.C.C., actions on unwritten contract, whether expressed or implied, shall have three year statute of limitation, but if action is based on unwritten employment contract, statute of limitation shall be one year M.C.A. § 15-1-29. But see *Paul O'Leary Lumber Corp. v. Mill Equip., Inc.*, 332 F. Supp.

1144 (S.D. Miss. 1971), *aff'd*, 448 F.2d 536 (5th Cir. 1971) (action based on implied warranty arises out of written contract between parties; M.C.A. § 15-1-29 not applicable).

Accrual. See generally M.C.A. §§ 15-1-1 to 15-1-79. In actions which involve latent injury or disease and no period of limitation is prescribed, cause of action begins to accrue when plaintiff discovers injury, or should have discovered injury by reasonable diligence. M.C.A. § 15-1-49(2).

In absence of agreement to the contrary, right of partner to account of his interest in partnership shall accrue at date of dissolution. M.C.A. § 79-12-85 (law in force only until January 1, 2007).

Tolling. Statute of Limitations shall be tolled during period of time that a person is prohibited by law, restrained, or enjoined by process of Court from bringing action. M.C.A. § 15-1-57. If disability of infancy or mental incompetency exists at time person is entitled to commence personal action, statute of limitations prescribed in bringing action is tolled until disability is removed, but action will never be tolled longer than 21 years. M.C.A. §§ 15-1-59. Statute of Limitations will be tolled during time period person is absent from state if cause of action previously accrued against that person in the state. M.C.A. § 15-1-63.

Waiver. Statute of Limitations may be waived. See *Bd. of Supervisors, Prentiss County v. McRee*, 185 Miss. 726, 189 So. 95 (1939); *Bowmar v. Peine*, 64 Miss. 99, 8 So. 166 (1886).

Statute of Limitations. Actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, menace, slander or libel shall be commenced within one year. M.C.A. § 15-1-35. *Norman v. Bucklew*, 684 So. 2d 1246 (Miss. 1996), overruled in part by *Jones v. Fluor Daniel Servs. Corp.*, 32 So. 3d 417 (Miss. 2010) (tort of intentional infliction of emotional distress has a one-year statute of limitations). Actions for malpractice arising from medical or other professional services shall be commenced within two years from date of alleged act; however, limitation period begins to run from date plaintiff could reasonably be held to have knowledge of injury itself, cause of injury, and conduct of the practitioner. *Fortenberry v. Mem'l Hosp. at Gulfport, Inc.*, 676 So. 2d 252 (Miss. 1996). But see M.C.A. § 15-1-36 which provides that lawsuits for claims accruing on or after July 1, 1998 must be filed within two years from date of act, omission or neglect or two years from time act, omission or neglect should have been discovered using reasonable diligence but no more than seven years after alleged act, omission or neglect occurred. Two exceptions to the seven-year maximum time



limitation are in event a foreign object is left in patient's body or if fraud was used to conceal cause of action from the person. M.C.A. § 15-1-36(2). All actions for which no statute of limitation is prescribed shall be commenced within three years after the claim accrued. M.C.A. § 15-1-49(1).

Discovery Rule. See "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION, Accrual." Statute of limitations begins to run when defendant knows of injury or with reasonable diligence should have known of injury. M.C.A. § 15-1-49(2).

Fraud. See generally M.C.A. § 15-3-1 *et seq.* If a person is liable to another for personal action and fraudulently conceals cause of action from that person, then cause of action shall not begin to accrue until fraud is discovered or should have been discovered with reasonable diligence. M.C.A. § 15-1-67. See *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988).

### MALPRACTICE

Medical. Statutory Requirements and Limitations. Statute of limitations for tort cause of action, accruing on or before June 30, 1998, against licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death is 2 years from the date the alleged act, omission or neglect was first discovered or should have been discovered with reasonable diligence. M.C.A. § 15-1-36(1). For any claim accruing on or after July 1, 1998, claim must be brought within two years from date alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered and no more than seven years from date alleged act, omission or neglect occurred unless claim arises from act, omission or neglect resulting in foreign object left in patient or unless claim was fraudulently concealed in which case seven year limit does not operate. M.C.A. § 15-1-36(2). Statute of limitations shall be tolled for minor or person claiming through minor if disability of infancy or unsoundness of mind exists at time in which the cause of action was or should have been discovered with reasonable diligence. M.C.A. § 15-1-36 (3), (5). Action is tolled until disability is removed or person to whom claim accrues shall have died. *Id.* For this section only, disability of infancy shall be removed at earlier of when minor reaches his sixth birthday or dies. M.C.A. § 15-1-36(7). If at time the cause of action begins to accrue, minor does not have a parent or legal guardian, then within two year period after minor shall have parent or legal guardian or shall die, which ever occurs first, minor or person making claim through the minor may commence action. M.C.A. § 15-1-36(4). Note that explicit two year limitations period in this statute is ex-

pressly limited to one year by M.C.A. § 15-1-55 in case of deceased minor or mentally disabled person. M.C.A. § 15-1-36(6).

Expert Testimony. Person who is licensed as doctor of medicine in this state or some other state may qualify as expert witness in determining appropriate medical standard of care, in any contract or tort action against a physician. M.C.A. § 11-1-61.

Informed Consent. Objective test, which is based on patient's need, is used in determining what information physician must disclose and whether he has obtained informed consent from patient to perform certain medical procedures. Patient must be informed of those risks which would be material to a prudent patient in deciding whether to consent to and undergo suggested medical treatment. *Hudson v. Parvin*, 582 So. 2d 403 (Miss. 1991). In situations involving life or death emergency, doctor may not be required to inform patient of risks involved, nor obtain patient's consent. *Palmer v. Biloxi Reg'l. Med. Ctr.*, 564 So. 2d 1346 (Miss. 1990).

Standard of Care. Standard of care for physicians in Mississippi is based upon a national standard of care, which considers the standard of care exercised by minimally competent physicians which have available to them the same general facilities, services equipment and options. *Palmer v. Biloxi Reg. Med. Ctr.*, 564 So. 2d 1346; see also *Trapp v. Cayson*, 471 So. 2d 375 (Miss. 1985); *Todd v. Turnbull*, 469 So. 2d 71 (Miss. 1985).

Hospital. Charitable Immunity/Limitations. Charitable hospital was liable for injuries resulting from negligence of laboratory technician to same extent as it would have been had hospital failed to exercise due care in hiring and retaining technician. *Mississippi Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951); See M.C.A. §§ 41-13-11, § 11-46-1(f).

Physicians and Certified Nurse Practitioners who treat persons without expectation of payment are immune from liability based on negligence, provided there is a written waiver of liability executed by patient of medical services rendered in an emergency. M.C.A. § 73-25-38, amended by Miss. Laws ch. 428 (S.B. 2234) (2007). However, this immunity does not extend to will-full or gross negligence. *Id.*

Damages. In action at law against licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor to recover damages based upon professional negligence theory, complaint or counterclaim shall not specify amount of damages claimed, but shall only state that damages claimed are within jurisdictional limits of court to which pleadings are addressed and whether or not amount of such damages is ten thousand (\$10,000) or more, or such other

minimum amount as shall be necessary to invoke federal jurisdiction if action is brought in federal court. M.C.A. § 11-1-59.

Informed Consent. See “MALPRACTICE, Medical-Informed Consent.”

Standard of Care. See “MALPRACTICE, Medical-Standard of Care.”

Legal. See “ATTORNEYS, Legal Malpractice.”

## NEGLIGENCE

See Law Digest Tables.

Age. Measurement of standard of care for child old enough to be charged with negligence action is standard of care that would be exercised under similar circumstances by a “child of his age, capacity and experience.” *Portera v. City of Brookhaven*, 95 Miss. 774, 49 So. 617 (1909). It is a rebuttable presumption that a child under the age of 14 is incapable of contributory negligence. *Steele v. Holiday Inns, Inc.*, 626 So. 2d 593 (Miss. 1993).

Attractive Nuisance. Doctrine discussed. *Skelton v. Twin County Rural Electric Ass’n*, 611 So. 2d 931 (Miss. 1992); *Goodwin v. Jackson*, 484 So. 2d 1041 (Miss. 1986); *McGill v. City of Laurel*, 252 Miss. 740, 173 So. 2d 892 (1965); *Shemper v. Cleveland*, 51 So. 2d 770 (Miss. 1951); *Vincent v. Barnhill*, 203 Miss. 740, 34 So. 2d 363 (1948); *Maxedon v. City of Corinth*, 155 Miss. 588, 124 So. 795 (1929); *Hughes v. Star Homes, Inc.*, 379 So. 2d 301 (Miss. 1980).

Assumption of Risk. Doctrine of assumption of risk “is subsumed in our comparative fault doctrine.” *Horton v. Am. Tobacco Co.*, 667 So. 2d 1289 (Miss. 1995). Employee shall not be considered to have assumed risks of his employment in negligence action brought against his employer for personal injury or death. This rule doesn’t apply to conductors or locomotive engineers voluntarily operating dangerous cars. M.C.A. § 11-7-19.

Comparative Negligence. Doctrine approved. *Gulf Refining Co. v. Brown*, 196 Miss. 131, 16 So. 2d 765 (1944); *Burton v. Barnett*, 615 So. 2d 580 (Miss. 1993); M.C.A. § 11-7-15. Because damages can be determined through comparative negligence, “the open and obvious defense” for negligence is no longer a complete bar to recovery. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994); *Materials Transp. Co. v. Newman*, 656 So. 2d 1199 (Miss. 1995).

Contributory Negligence. Diminishes damages. M.C.A. § 11-7-15. Minor children who are seven to fourteen years old are rebuttably presumed to lack capacity to make them guilty of contributory negligence.

*Glorioso v. YMCA of Jackson*, 556 So. 2d 293 (Miss. 1989).

Damages. See “DAMAGES.”

Definition/Duty. Negligence arises if person fails to perform duty; therefore, cause of action for negligence cannot exist if there was no legal duty to plaintiff. *Stanley v. Morgan & Lindsey, Inc.*, 203 So. 2d 473 (Miss. 1967). In determining negligence, consideration should always be given to what an ordinary prudent person may do under same or similar circumstances. *Edwards v. Murphree*, 249 Miss. 78, 160 So. 2d 689 (1964). When a responsible person should reasonably have foreseen that injury might occur as proximate consequence of negligent circumstances, failure of that person to use reasonable degree of care to prevent that injury creates cause of action for negligence. *Chadwick v. Bush*, 174 Miss. 75, 163 So. 823 (1935), distinguished by *Cooper v. Missey*, 881 So. 2d 889, 893 (Miss. Ct. App. 2004) (“*Chadwick* in no way supports the notion that a social host has a duty to render aid to a guest.”).

Governmental Immunity. See generally M.C.A. §§ 11-46-1 to 11-46-23.

All governmental entities and political subdivisions are required to participate in a comprehensive plan of self-insurance and/or one or more policies of liability insurance administered by the Department of Finance and Administration. This plan provides coverage to each of such governmental entities for every risk for which it is determined that the respective governmental entities to be liable in the event of a claim or suit for injuries, including claims or suits for injuries from the use or operation of motor vehicles; provided, however, that the plan is allowed to contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to governmental entities. M.C.A. § 11-46-17(2), (3).

Any governmental entity of the state may purchase liability insurance to cover claims in excess of the amounts provided for in Section 11-46-15 and may be sued by anyone in excess of the amounts provided for in Section 11-46-15 to the extent of such excess insurance carried; provided, however, that the immunity from suit above the amounts provided for in Section 11-46-15 shall be waived only to the extent of such excess liability insurance carried. M.C.A. § 11-46-17(4).

Suit brought against a government entity or its employees shall not exceed \$50,000 (per occurrence) for acts or omissions occurring on or after July 1, 1993, but before July 1, 1997; \$250,000 on or after July 1, 1997, but before July 1, 2001; \$500,000 for acts or omissions occurring on or after July 1, 2001. No judgment shall



include exemplary or punitive damages. M.C.A. § 11-46-15.

**Imputed Negligence.** See “AUTOMOBILES, Imputed Negligence.” No imputed negligence if plaintiff does not have control over tortfeasor’s conduct. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988). Under Mississippi law, husband’s negligence will not be imputed to wife simply on basis of marriage. *Wright v. Standard Oil Co.*, 470 F.2d 1280 (5th Cir. 1972), *cert. denied*, 412 U.S. 938, *distinguished by Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988).

**Liquor Liability/Dram Shop Action.** See generally M.C.A. §§ 67-1-1 to 67-1-99 (Local Option Alcoholic Beverage Control); M.C.A. §§ 67-3-1 to 67-3-46 (Sale of Light Wine, Beer, and Other Alcoholic Beverages); M.C.A. §§ 67-5-1 to 67-5-14 (Native Wines) (M.C.A. § 67-5-15 has been repealed).

**Joint and Several Liability.** Under Mississippi law, when concurrent negligence of two tortfeasors produces single indivisible injury, victim may hold both tortfeasors equally liable and collect damages from either of them. *Allstate Ins. Co. v. Hilbun*, 703 F. Supp. 533 (S.D. Miss. 1988); see also *Gallo v. Crocker*, 321 F.2d 876 (5th Cir. 1963); *Howard v. Gen. Motors Corp.*, 287 F. Supp. 646 (N.D. Miss. 1968).

**Last Clear Chance.** Mississippi recognizes doctrine of last clear chance. *Ill. Cent. R.R. Co. v. Underwood*, 235 F.2d 868 (5th Cir. 1956), *cert. denied*, 352 U.S. 1001 (1957).

**Negligence Per Se.** Seat belt statute requires passengers to wear seat belts, but failure to do so does not constitute negligence. See M.C.A. § 63-2-1 *et seq.* It is negligence per se to make a flying switch at railroad crossing on a street in a town which is frequently traveled. *Alabama & V.R. v. Summers*, 68 Miss. 566, 10 So. 63 (1891). It is negligence per se for railroad company to block road crossing in violation of statute. *Jarrell v. New Orleans & N.E.R.*, 109 Miss. 49, 67 So. 659 (1915).

**Premises Liability.** For slip and fall invitee, plaintiff must establish that 1) dangerous condition was caused by landowner’s own negligence, or 2) landowner had actual or constructive knowledge of its presence. *Waller v. Dixie Land Food Stores*, 492 So. 2d 283 (Miss. 1986), *distinguished by Elston v. Circus Circus Mississippi, Inc.*, 908 So. 2d 771 (Miss. Ct. App. 2005). Landowner has no duty to keep land or premises safe, or give warnings as to hazardous conditions to those people entering land for hunting, fishing, trapping, camping, water sports, hiking or sightseeing. M.C.A. § 89-2-23. This limitation of liability shall not apply to causes of action if there was: (a) Willful or malicious failure to guard or warn against hazardous condition, use, structure or activ-

ity; (b) Injuries suffered in any case where permission to hunt, fish, trap, camp, hike, sightsee or engage in any other lawful activity was granted for a consideration other than the consideration, if any, paid to landowner by State of Mississippi, federal government, or other governmental agency; or (c) Injuries to third persons or to persons to whom landowner owed a duty to keep land or premises safe or to warn of danger, which injuries were caused by acts of persons to whom permission to hunt, fish, camp, hike, sightsee or engage in any other lawful activity was granted. M.C.A. § 89-2-27.

**Proximate Causation.** *Mauney v. Gulf*, 193 Miss. 421, 9 So. 2d 780 (1942); called into doubt by *Glover v. Jackson State*, 968 So. 2d 1267 (2007).

**Res Ipsa Loquitur.** Three elements of doctrine of res ipsa loquitur are: 1) defendant must have exclusive control of instrumentality causing damage; 2) in ordinary course of things, occurrence would not have happened if due care had been exercised by those in control; and 3) occurrence must not be caused by voluntary act on behalf of plaintiff. *Read v. Southern Pine Elec. Power Ass’n*, 515 So. 2d 916 (Miss. 1987). Doctrine does not apply to suits involving a slip and fall accident. *Douglas v. Great Atl. & Pac. Tea*, 405 So. 2d 107 (Miss. 1981).

**Sudden Emergency.** Doctrine of sudden emergency in negligence cases abolished. *Knapp v. Stanford*, 392 So. 2d 196 (Miss. 1980).

**Privity of contract** is not necessary in suit by consumer against manufacturer. M.C.A. § 11-1-63. *State Stove Mfg. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *superseded by statute as stated in Huff v. Shopsmith*, 786 So. 2d 383 (Miss. 2001). See also *Hattiesburg Coca-Cola Bottling v. Barrett*, 497 So. 2d 809 (Miss. 1986).

As of April 27, 1976, “[i]n all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under provisions of U.C.C., privity shall not be a requirement to maintain said action.” M.C.A. § 11-7-20; *Hargett v. Midas*, 508 So. 2d 663 (Miss. 1987).

## NO-FAULT INSURANCE

As of July, 2011, Mississippi has not adopted any statutes relating to No-Fault Insurance.

## PENALTY AND ATTORNEY’S FEES

See “ATTORNEYS.”

Any person, either principal or agent, who solicits, examines or inspects any risk, or who adjusts any loss, or who receives or collects premiums, or does any other act with reference to contract of insurance, other than

authorized by Mississippi insurance statutes, is deemed guilty of misdemeanor. M.C.A. § 83-17-19.

“Any person who shall do or perform any of the acts or things mentioned in the laws governing insurance companies, the doing or performing of which is there provided, shall constitute such person the agent of the company, for any insurance company not organized under or incorporated by laws of this state, without such company having first complied with the requirements of the laws of this state or having received the certificate of authority from the commissioner of insurance, as required by law, shall be guilty of a misdemeanor, and, on conviction, be fined five hundred dollars and be imprisoned in the county jail not exceeding twelve months, or by either; but penalties of this section shall not apply to an adjuster of a loss, if the insurance could not have been obtained from a company which had complied with the laws of this state, or if the insurance was given at rate fully one-half of one percent less than that charged by such companies.” M.C.A. § 97-23-31.

For violation of any provisions of Mississippi insurance laws, where penalty not specifically provided, offender shall be guilty of misdemeanor and subject to fine of not more than \$5,000. M.C.A. § 83-5-85.

In addition to other sanctions, court shall award attorney's fees if attorney brought an action or asserted defense without substantial justification. M.C.A. § 11-55-5. In absence of applicable statute, attorney's fees are not recoverable, unless facts are of such gross or willful wrong as to justify infliction of punitive damages. *Cooper v. USF&G*, 186 Miss. 116, 188 So. 6 (1939).

### PRIVILEGED COMMUNICATIONS

Attorney-Client Privilege. *See* M.R.E. 502.

Priest-Penitent Privilege. *See* M.R.E. 505.

Doctor-Patient. For definitions of “patient,” “physician,” “psychotherapist,” and “confidential communication” *see* M.R.E. 503(a)(1-4).

Generally, “a patient has a privilege to refuse to disclose and to prevent any other person from disclosing (a) knowledge derived by physician or psychotherapist by virtue of his professional relationship with patient, or (b) confidential communications made for purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in diagnosis or treatment under direction of physician or psychotherapist, including members of patient's family.” M.R.E. 503(b). “The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased

patient.” M.R.E. 503(c). Privilege applies to consulting doctors. *Provident v. Champman*, 152 Miss. 747, 118 So. 437 (1928). Nurses and other medical personnel who learned confidential matters while assisting doctor in examination or treatment of patient may be bound by privilege. *Ramon v. State*, 387 So. 2d 745 (Miss. 1980). Privileged information must be gained pursuant to a professional relationship for purposes of diagnosis or treatment. *Hardy v. Riser*, 309 F. Supp. 1234 (N.D. Miss. 1970).

Waiver. For exceptions to General Rule of Privilege, *see* M.R.E. 503(d)(1-3). “In an action commenced or claim made against a person for professional services rendered or which should have been rendered, delivery of written notice of such claim or filing of such an action shall constitute a waiver of privilege under this rule.” M.R.E. 503(e). “Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives privilege otherwise recognized by this rule.” M.R.E. 503(f). *See Hardy v. Riser, supra; Fishboats, Inc. v. Welzbacher*, 413 So. 2d 710 (Miss. 1982); *Knighton v. Knighton*, 253 So. 2d 846 (Miss. 1971); *Dennis v. Prisock*, 254 Miss. 574, 181 So. 2d 125 (1965), distinguished by *Sessums v. McFall*, 551 So. 2d 179 (Miss. 1989).

Spousal. *See* M.R.E. 504.

### PRODUCTS LIABILITY

Products liability rules became fully effective July 1, 1994, and additional rules were added September 1, 2004. *See generally* M.C.A. § 11-1-63, *et seq.* Three theories of products liability recovery in Mississippi are negligence, strict liability and warranty.

In any action for damages caused by product, except for commercial damage to product itself, manufacturer or seller of product shall not be liable if claimant does not prove by preponderance of evidence that at time product left control of manufacturer or seller either 1) product was defective because it deviated in a material way from manufacturer's specifications or from otherwise identical units manufactured to same manufacturing specifications, or 2) product was defective because it failed to contain adequate warnings or instructions, or 3) product was designed in a defective manner, or 4) product breached an express warranty or failed to conform to other express factual representations upon which claimant justifiably relied in electing to use product and 1) defective condition rendered product unreasonably dangerous to user or consumer; and 2) defective and unreasonably dangerous condition of product proximately

caused damages for which recovery is sought. M.C.A. § 11-1-63(a).

Product is not defective in design or formulation if harm for which claimant seeks to recover compensatory damages was caused by inherent characteristic of product which is a generic aspect of product that cannot be eliminated without substantially compromising product's usefulness or desirability and which is recognized by ordinary person with ordinary knowledge common to community. M.C.A. § 11-1-63(b).

In any action alleging that product is defective because it failed to contain adequate warnings or instructions, manufacturer or seller shall not be liable if claimant does not prove by preponderance of evidence that at time product left control of manufacturer or seller, manufacturer or seller knew or in light of reasonably available knowledge should have known about danger that caused damage for which recovery is sought and that ordinary user or consumer would not realize its dangerous condition; or in case of a prescription drug or other product that is intended to be used only by physician or other licensed professional, taking into account ordinary knowledge common to physician or other professional. M.C.A. § 11-1-63(c).

In action alleging that a product is defective, manufacturer or seller shall not be liable if claimant 1) had knowledge of a condition of product that was inconsistent with his safety; 2) appreciated danger in condition; and 3) deliberately and voluntarily chose to expose himself to danger in such a manner to register assent on continuance of dangerous condition. M.C.A. § 11-1-63(d).

In action alleging that a product is defective because it failed to contain adequate warnings or instructions, manufacturer or seller shall not be liable if danger posed by product is known or is open and obvious to user or consumer of product, or should have been known or open and obvious to user or consumer of product, taking into account characteristics of, and ordinary knowledge common to, persons who ordinarily use or consume product. M.C.A. § 11-1-63(e). Unless claimant proves that at time product left control of manufacturer or seller that 1) he knew or should have known about danger that caused damage, and 2) product failed to function as expected and there existed a feasible design alternative that would have prevented the harm without impairing the utility usefulness, practicality or desirability of product, then manufacturer or seller is not liable. M.C.A. § 11-1-63(f).

Manufacturer of a product who is found liable for defective product, pursuant to paragraph (a), shall indemnify product seller for costs of litigation, reasonable expenses, reasonable attorney's fees and damages

awarded by trier of fact unless seller exercised substantial control over that aspect of design, testing, manufacture, packaging or labeling of product that caused harm for which recovery of damages is sought; seller altered or modified product, and alteration or modification was a substantial factor in causing harm for which recovery of damages is sought; seller had actual knowledge of defective condition of product at time he supplied same; or seller made an express factual representation about aspect of product which caused harm for which recovery of damages is sought. In order to assert indemnification, seller must have given prompt notice of suit to manufacturer within ninety (90) days of filing of complaint against seller. M.C.A. § 11-1-63(g).

In any action alleging that a product is defective pursuant to paragraph (a), the seller of a product other than the manufacturer shall not be liable unless the seller exercised substantial control over 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 the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; or the seller had actual or constructive knowledge of the defective condition of the product at the time he supplied the product. It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead mere conduits of a product. M.C.A. § 11-1-63(h).

Nothing in this section shall be construed to eliminate common law defense to action for damages caused by product. M.C.A. § 11-1-63(i).

**Negligence.** Where defendant's alleged negligent design of meat grinder conformed to following criteria, there was held to be no negligent design of product: 1) conformity of defendant's design to practices of other manufacturers in its industry at time of manufacture; 2) open and obvious nature of alleged danger; and 3) extent of claimant's use of alleged dangerous product and period of time of such use of product before injury occurred. *Ward v. Hobart Mfg.*, 450 F.2d 1176 (5th Cir. 1971). *See also Harrist v. Spencer-Harris Tool*, 244 Miss. 84, 140 So. 2d 558 (1962). Effect of M.C.A. § 11-1-63 upon common-law theories of negligence is yet to be determined.

**Strict Liability.** Conditions under which manufacturer or other seller may be held strictly liable in tort are: 1) seller must be engaged in business of selling such product, 2) he must sell it in defective condition unreasonably dangerous to user or consumer, and 3) product must be expected to reach and must reach consumer without substantial change. *State Stove Mfg. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912,

superseded by statute. See also *Early-Gary, Inc. v. Walters*, 294 So. 2d 181 (Miss. 1974). While M.C.A. § 11-1-63 eliminated the common law strict liability laid out in *State Stove Mfg.*, the concept of strict liability is alive in the statute and *State Stove Mfg.*'s principles are a driving force in products liabilities actions. See *Huff v. Shopsmith, Inc.*, 786 So. 2d 383 (Miss. 2001). Plaintiff has burden to produce best proof available on issue of whether defect existed at time product left manufacturer's hands, or account on record for its failure to do so. *Fruehauf Corp. v. Trustees of First United Methodist Church*, 387 So. 2d 106 (Miss. 1980).

Doctrine of strict liability in tort was applied against manufacturer for injuries resulting from collapse of steering wheel of pick-up truck which was being driven fifty to sixty miles per hour; court found no need to prove that manufacturer was negligent since product was not reasonably safe for its intended use. *Ford Motor v. Adams*, 223 So. 2d 638 (Miss. 1969). See also *Ford Motor v. Cockrell*, 211 So. 2d 833 (Miss. 1968); *Hattiesburg Coca-Cola Bottling v. Barrett*, 497 So. 2d 809 (Miss. 1986). Exploding bottle: Strict liability applied where beer bottle exploded causing loss of plaintiff's eye; evidence revealed quality or condition of container in which product was sold was unreasonably dangerous. *Falstaff Brewing v. Williams*, 234 So. 2d 620 (Miss. 1970). Used product: Seller of used product is not liable for damages under doctrine of strict liability in tort. *Pridgett v. Jackson Iron & Metal*, 253 So. 2d 837 (Miss. 1971). Retailer: Seller liable if 1) plaintiff injured by product, 2) injury resulted from defect in property which rendered it unreasonably dangerous, and 3) defect existed at time it left seller. *Coca Cola Bottling v. Reeves*, 486 So. 2d 374 (Miss. 1986), superseded by statute, abrogation recognized, *Batts v. Tow-Motor Forklift*, 153 F.R.D. 103, 106-07 (N.D. Miss. 1994), rev'd on other grounds, 66 F.3d 743 (noting Mississippi's abandonment of consumer expectation test as applied in *Reeves*, and Mississippi's adoption of risk utility analysis). Strict liability not extended to retailers and other distributors where product defects are latent. *Johnson v. Ellis & Sons*, 604 F.2d 950, 955 (5th Cir. 1979), opinion amended on denial of rehearing by 609 F.2d 820. See also M.C.A. § 11-1-63.

Automobile owner brought action against manufacturer for injuries suffered when rear-end collision caused gasoline to erupt from tank, spill into passenger compartment and ignite. Held that automobile owner stated valid cause of action based on negligence and strict liability; question of causation more properly addressed to instrumentality causing enhanced injury, not that which caused collision. *Toliver v. General Motors*, 482 So. 2d 213 (Miss. 1985), overruling *Walton v. Chrysler Motors*,

229 So. 2d 568 (Miss. 1969), and subsequent cases based thereon. See also M.C.A. § 11-1-63.

Warranty, Breach of. In order for plaintiff to recover under theory of breach of warranty, he must prove goods were unfit for normal use at time of sale, and he was injured as proximate result of defect. *Cather v. Catheter Technology*, 753 F. Supp. 634 (S.D. Miss. 1991); see also M.C.A. §§ 11-1-63, 75-2-715.

Implied. Products liability cases may also be brought under warranty provisions of M.C.A. § 75-2-313-318, which is Mississippi's adoptive version of U.C.C. See also M.C.A. § 75-2-715. Where seller is cognizant of particular purpose for which goods were required and seller delivered goods which were unfit for that particular purpose, seller was liable to buyer for damages under implied warranty of fitness for particular purpose. *Garner v. S & S Livestock Dealers*, 248 So. 2d 783 (Miss. 1971). Buyer's damages limited to purchase price where no proof of consequential damages introduced. *Guerdon Indus., Inc. v. Gentry*, 531 So. 2d 1202 (Miss. 1988).

Disclaimer. 1976 Mississippi Legislature amended M.C.A. §§ 75-2-314, 75-2-315, 75-2-719 of Mississippi's U.C.C. to expressly preclude disclaimer of liability with respect to implied warranty of merchantability or fitness for particular purpose and to prohibit limitation of remedies which would deprive buyer of remedy to which he may be entitled for breach of implied warranty of merchantability or fitness for particular purpose. Mississippi has never adopted § 2-316 of U.C.C. which deals with exclusion or modification of warranties. Up until the 1976 legislative pronouncement, there was some confusion as to whether or not disclaimer and limitation of implied warranties were permitted. It was opinion of some learned authorities in State that law dealing with disclaimers of warranty could be based on pre-Code Mississippi cases. Prior to enactment of U.C.C. in 1968, Mississippi recognized validity of non-warranty clause; e.g., *Stribling Bros. Mach. v. Girod Co.*, 239 Miss. 488, 124 So. 2d 289 (1960). New 1976 amendments have apparently precluded this use of pre-Code law as to implied warranties by deleting phrase "unless excluded or modified" from subsections (1) and (3) of M.C.A. § 75-2-314, and by enacting M.C.A. § 11-7-18, which provides as follows: "[T]here shall be no limitation of remedies or disclaimer of liability as to implied warranty of merchantability or fitness for a particular purpose." Phrase "unless excluded or modified under Section 75-2-317" was also deleted from M.C.A. § 75-2-315 by 1976 amendments. 1976 amendments added following language to M.C.A. § 75-2-719(4): "Any limitation of remedies which would deprive the buyer of remedy to which he may be entitled for breach of an implied war-

ranty of merchantability or fitness for a particular purpose shall be prohibited.” See *Van Den Broeke v. Bel-lanca Aircraft*, 576 F.2d 582 (5th Cir. 1978). See also M.C.A. § 11-1-63.

A 1998 amendment to M.C.A. § 75-2-314(5) added the following provision: “Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.”

Builder-vendor of home may be held liable pursuant to theories of negligence or breach of implied warranty to second or subsequent purchaser of home. There is no privity requirement in such actions. *Keyes v. Guy Bailey Homes*, 439 So. 2d 670 (Miss. 1983), called into doubt on other grounds by *Manning v. State*, 929 So. 2d 885 (Miss. 2006); M.C.A. § 11-7-20.

Duty to Warn. Drug company liable for injuries resulting from use of drugs because of its negligent failure to give common and adequate warning to public and prescribing physicians of possible side effect of drug. *Kershaw v. Sterling Drug*, 415 F.2d 1009 (5th Cir. 1969). But see *Ward v. Hobart*, 450 F.2d 1176 (5th Cir. 1971), in which court held that where dangerous condition of product is open and obvious, as opposed to latent or hidden, there is no duty upon manufacturer to warn of such danger. See also M.C.A. § 11-1-63.

Damages. Compensatory. See “DAMAGES.”

Indemnification. Distributor must be liable to buyer before manufacturer can be held liable to distributor. *Curry v. Sile Distr.*, 727 F. Supp. 1052 (N.D. Miss. 1990). See also M.C.A. § 11-1-63.

Punitive. See “DAMAGES, Punitive.” See also M.C.A. § 11-1-65.

Instructions for punitive damages for breach of warranty actions are discretionary with judge. *Guerdon v. Gentry*, 531 So. 2d 1202 (Miss. 1988). See also M.C.A. § 11-1-65.

Defenses. Mississippi has adopted principle of strict liability in tort for products liability cases. *Toliver v. Gen. Motors*, 482 So. 2d 213, 216 (Miss. 1985). Plaintiff must prove only that 1) plaintiff was injured by product, 2) injury resulted from defect in product which rendered it unreasonably dangerous and 3) defect existed at time it left hands of manufacturer. *Id.* Whether product is unreasonably dangerous is determined by whether standard of design is below that contemplated by ultimate consumer. This may be proved by introducing evidence of

industry standards or deviations from those standards. *Id.* at 218.

Assumption of Risk. Doctrine of assumption of risk is applicable in proper cases that are based on strict liability in tort. *Nichols v. Western Auto*, 477 So. 2d 261 (Miss. 1985); see also *Hedgepeth v. Fruehauf*, 634 F. Supp. 93 (S.D. Miss. 1986), *aff'd*, 813 F.2d 405 (5th Cir. 1987). See also M.C.A. § 11-1-63. Assumption of risk is defense in products liability case when two elements are established: 1) knowledge on part of injured party of condition inconsistent with his safety, 2) appreciation by injured party of danger of the condition; and 3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition. *Little v. Liquid Air*, 37 F.3d 1069, 1079 (5th Cir. 1994).

Alteration. When, after an event, measures are taken which if taken previously, would have made event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with event. M.R.E. 407. This exclusion does not apply in cases where evidence is offered for impeachment or to prove ownership, control, or feasibility of precautionary measures, if controverted. *Id.*

Comparative/Contributory Negligence. See “NEG-LIGENCE, Comparative Negligence and Contributory Negligence”; “AUTOMOBILES, Comparative/Contributory Negligence.”

Privity of Contract. Mississippi Courts have held that privity is not a requirement to maintain action for personal injury or other damage under theories of negligence, strict liability or breach of warranty. Mississippi Legislature codified this rule in M.C.A. § 11-7-20: “In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under provisions of [U.C.C.] privity shall not be a requirement to maintain said action.” See also M.C.A. § 11-1-63.

Privity of contract is not necessary in suit by consumer against manufacturer since manufacturer, by placing cattle or product upon market, assumes responsibility to consumer, resting not upon contract but upon relation arising from his purchase, together with foreseeability of harm if proper care is not used. *State Stove v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967), *superseded by* M.C.A. § 11-1-63. Rule removing privity as requirement has now been codified in M.C.A. § 11-7-20 quoted above. For exceptions to privity of contract in food and beverage cases prior to above ruling, see *Biedenharn v. Moore*, 184 Miss. 721, 186 So.

628 (1939); *Coca Cola v. Lyons*, 145 Miss. 876, 111 So. 305 (1927). See also M.C.A. § 11-1-63.

### RELEASE

See Law Digest Tables.

Consideration. Payment of hospital and doctor's bills plus \$57.50 was adequate consideration for release signed by injured employee where doctor dismissed him from hospital after three days. *Aponaug v. Collins*, 207 Miss. 460, 42 So. 2d 431 (1949).

When possession of property is surrendered before foreclosure, this constitutes sufficient consideration for release from personal liability. *Gilliam v. McLemore*, 141 Miss. 253, 106 So. 99 (1925).

Covenant Not to Sue. Covenant not to sue constitutes a release. *Stebbins v. Niles*, 25 Miss. 267 (1852). But see *Berry v. Pullman*, 249 F. 816 (5th Cir. 1918). Agreement by passenger not to sue railroad company, while reserving right of action against sleeping car company for injuries incurred in sleeping car, was held to be a covenant not to sue rather than release; therefore, passenger was not barred from bringing action against sleeping car company. *Id.*

Jury found that plaintiffs had been fully compensated in death action against one joint tortfeasor when covenant not to sue had been obtained, but it did not constitute release of other tortfeasor. *Bogdahn v. Pascagoula St. Ry. & Power*, 118 Miss. 668, 79 So. 844 (1918).

Fraud and Misrepresentation. Fraud vitiates release. *St. Louis & S.F.R. v. Ault*, 101 Miss. 341, 58 So. 102 (1912). Release was rendered void where employee was fraudulently induced by employer to sign release. *Hackler v. Natchez & Ry.*, 157 Miss. 432, 128 So. 325 (1930).

Where adjuster misrepresented law to beneficiary, release so obtained was void. *Penn v. Nunnery*, 176 Miss. 197, 167 So. 416 (1936).

Release for \$25, executed by person permanently injured, while relying upon representations of insurer's agent, whose principal was not disclosed, and not knowing her rights or what party was being released, together with other factors, voided. *Tate v. Robinson*, 223 Miss. 461, 78 So. 2d 461 (1955).

While inadequacy of consideration for release does not per se constitute fraud, it is factor to be considered in determining whether or not injured party was deceived. *Parker v. Howarth*, 340 So. 2d 434 (Miss. 1976); see also *Alexander v. Myers*, 219 So. 2d 160 (Miss. 1969).

Accord and Satisfaction. Where beneficiary endorsed and cashed check, which stated payment received was in full settlement and release of all claims and liabilities under policy, effective release of all claims, as well as valid accord and satisfaction resulted, notwithstanding secret mental reservations beneficiary may have had. *Colonial v. Cook*, 374 So. 2d 1288 (Miss. 1979). No accord and satisfaction where memorandum stating that check was in full satisfaction and accord of claim was received after check cashed. *Metro. Life v. Perrin*, 187 Miss. 37, 192 So. 12 (1939).

Infants/Capacity. Contracts executed by minors are voidable, not void. *Bell v. Smith*, 155 Miss. 227, 124 So. 331 (1929), distinguished by *CitiFinancial v. Brown*, 2001 WL 1530352 (N.D. Miss. 2001). See also *Joyce v. Brown*, 304 So. 2d 634 (Miss. 1974).

Joint Tortfeasors. In order for release of one joint tortfeasor from liability for damages injured party must intend compensation received to be full and total satisfaction of entire injury. *Smith v. Falke*, 474 So. 2d 1044 (Miss. 1985), distinguished by *J&J Timber Co. v. Broome*, 982 So. 2d 1 (Miss. 2006); *Weldon v. Lehmann*, 226 Miss. 600, 84 So. 2d 796 (1956); *Waterman-Fouke v. Miles*, 135 Miss. 146, 99 So. 759 (1924). *Smith* was also distinguished by *Scott v. Gammons*, 985 So. 2d 872 (Miss. Ct. App. 2008).

Mistake. Mutual mistake could not be claimed when plaintiff later discovered that his injuries were more serious than originally thought when he executed release to adjuster. *Pearson v. Weaver*, 252 Miss. 724, 173 So. 2d 666 (1965), distinguished by *Parker v. Howarth*, 340 So. 2d 434 (Miss. 1976); *Whitehead v. Johnson*, 797 So. 2d 317 (Miss. Ct. App. 2001).

Jury found there was no mutual mistake when plaintiff injured in automobile accident signed general release because she was fully aware of her actions. *McCorkle v. Hughes*, 244 So. 2d 386 (Miss. 1971), distinguished by *Whitehead v. Johnson*, 797 So. 2d 317 (Miss. Ct. App. 2001).

### REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Generally, M.C.A. §§ 75-2-312 to 75-2-318.

Misrepresentations/Materiality. Warranty must be literally true whether material or not. *Springfield v. Nix*, 162 Miss. 669, 138 So. 598 (1932). Failure of insured, through misunderstanding, to disclose prior fire losses not covered by insurance held to prevent recovery where it was provided that false answers in application would void policy. *Home Ins. v. Cavin*, 162 Miss. 1, 137 So. 490 (1931). Unless policy expressly provides that statements of insured in application are warranted, they are



considered representations. *Citizens v. Swords*, 109 Miss. 635, 68 So. 920 (1915). Representations must be substantially true and, if not material to risk, in absence of fraud, falsity will not invalidate policy. *Id.*

Statements made by insured in applications for insurance which were false and material to risk invalidate policy. *Coffey v. Standard Life*, 238 Miss. 695, 120 So. 2d 143 (1960).

In application for credit life policy, erroneous statement as to good health to best of applicant's knowledge and belief does not render policy void if made in good faith. Question of whether statement made in good faith is for jury. *John Hancock v. Rouse*, 231 So. 2d 786 (Miss. 1970).

Where applicant makes positive statement of fact, insurer not liable if statement is false, in fact, and material to risk assumed, and good faith of applicant is immaterial. *Prudential v. Russell*, 274 So. 2d 113 (Miss. 1973).

Insured's husband made oral application for fire policy and was not asked by agent about existing deeds of trust on property and was not required to sign written application. Held, insurer liable on ground of no concealment of deeds of trust. *Liverpool v. Delaney*, 190 Miss. 404, 200 So. 440 (1941). *See Buffalo v. Borden*, 211 Miss. 47, 50 So. 2d 895 (1951).

Record warranty clause discussed. *Stewart v. Am. Home*, 211 Miss. 523, 52 So. 2d 30 (1951). *See also Michigan Millers Mut. v. Lindsey*, 285 So. 2d 908 (Miss. 1973).

Rescission. Rescission or reformation of contract for mutual mistake will not be prevented simply because party negligently failed to contract to know or discover facts as to which both parties were mistaken. *Cox v. Hartford*, 172 Miss. 841, 160 So. 741 (1935).

Reformation. In order to reform contract on ground of mistake, mistake must be one of fact and must be mutual, and reformed contract must represent real agreement between contracting parties. *Sunshine v. USF&G*, 270 F.2d 777 (5th Cir. 1959); *see USF&G v. Gough*, 289 So. 2d 925 (Miss. 1974).

### SERVICE OF PROCESS

Upon Corporations. Upon domestic or foreign corporation or upon partnership or other unincorporated association which is subject to suit under common name, by delivering a copy of summons and of complaint to an officer, a managing or general agent, or to agent authorized by appointment or by law to receive service of process. M.R.P.C. 4 (d)(4).

Upon Insurance Commissioner. Actions against insurance companies, groups of insurance companies or insurance association may be brought in county in which a loss may occur, or, if on life policy, in county in which beneficiary resides, and process may be sent to county, to be served as directed by law. Such actions may also be brought in county where principal place of business of such corporation or company may be. In case of foreign corporation or company, such actions may be brought in county where service of process may be had on agent of such corporation or company or service of process in suit or action, or other legal process, may be served upon Insurance Commissioner of State of Mississippi, and such notice will confer jurisdiction on any court in any county in the state where suit is filed, provided suit is brought in county where loss occurred, or in county in which plaintiff resides. M.C.A. § 11-11-3, M.C.A. § 83-5-11, M.C.A. § 85-7-195, and M.C.A. § 13-3-49; *see Blackledge v. Scott*, 530 So. 2d 1363 (Miss. 1988). *But see Wal-Mart v. Johnson*, 807 So. 2d 382 (Miss. 2001) (stating that *Blackledge* was not a case about when a cause of action accrues, but was about fraudulent joinder and lack of jurisdiction).

Upon Nonresident Motorists. *See* "AUTOMOBILES."

Personal Service. Service may be made upon some other person of defendant's family above age of 16 who is willing to receive service and by thereafter mailing a copy of summons and complaint to person to be served at place where a copy of summons and of complaint were left. M.R.P.C. 4(d)(1)(A).

### SUBROGATION

In General. Grant by Legislature of general power to insure includes within it right of subrogation. *See also* M.R.P.C. 17. M.C.A. § 37-7-303 empowers school boards to bring and maintain suits to collect proceeds of insurance policies.

Insurer who paid loss to school district, which could not sue because not empowered to do so by legislature, was allowed to subrogate claim against third party tortfeasor and sue third party. *Grimes v. Am. Heating*, 188 Miss. 577, 191 So. 819 (1939).

Policy excluded liability while cotton in possession of carrier liable for loss. Insurer agreed however to loan amount represented by loss. Bill of lading provided that carrier should have benefit of insurance effected by owner. Carrier's claim against owner's insurer denied. Held that when loan is made under such agreement, recovery by owner against carrier inures to benefit of owner's insurer. *Staple v. Yazoo*, 189 Miss. 387, 197 So. 828 (1940).

Inapplicable where it would be prejudicial to unpaid claim of county. *USF&G v. Sunflower County*, 194 Miss. 680, 12 So. 2d 142 (1943).

Parties to Action. Those persons whose equities are affected must be made a party to subrogation proceeding in order to enforce right of subrogation. Creditors are necessary parties to proceeding if party seeks to be subrogated to rights of that creditor. *Doty v. Enter. Timber*, 114 Miss. 872, 75 So. 602 (1917).

Liability Insurance. Insurance company that settled a claim against employee arising out of automobile accident without consent of employer or employee, was not subrogated to employer's right of indemnity against employee, nor could insurance company bring suit against employee in employer's name. *Crowson v. Bridges*, 227 Miss. 73, 85 So. 2d 810 (1956).

Collision Insurance. Insurer paying claim under uninsured motorist provision entitled to subrogation. M.C.A. § 83-11-107. However, insured is entitled to fully recover amount of judgment against assets of uninsured motorist judgment debtor before insurer is entitled to subrogation. *Dunnam v. State Farm*, 366 So. 2d 668 (Miss. 1979).

Under collateral source rule, insurer could not recover from tortfeasor under subrogation clause in its policy amount paid to its insured where insurer did not secure assignment from insured for amounts paid and tortfeasor settled with insured after notice of subrogation claim. *Preferred Risk v. Courtney*, 393 So. 2d 1328 (Miss. 1981), distinguished by *Geske v. Williamson*, 945 S. 2d 429 (Miss. Ct. App. 2006).

Fire Insurance. Attempted subrogation between fire insurer and mortgagee invalid where insurer denied liability to insured upon fire loss because of mortgages on property and admitted liability to mortgagee only on condition that upon payment mortgagee would issue to insurer subrogation receipt; payment by insurer to mortgagee had effect of fully liquidating mortgage debt so that insured was entitled to cancellation of mortgage and subrogation receipt. *Home Ins. v. Northington*, 198 Miss. 650, 23 So. 2d 537 (1945).

Where fire insurer was not liable to insured, under statutory subrogation clause of policy, insurer, when it paid loss of mortgagee, would automatically be subrogated to all right of mortgagee. *Great Am. v. Smith*, 252 Miss. 62, 172 So. 2d 558 (1965).

Subrogation. Employer or compensation insurer who shall have paid compensation benefits under this chapter for injury or death of employee shall have right to maintain an action at law against any party responsible for such injury or death, in the name of such injured

employee or his beneficiaries, or in the name of such employer or insurer, or any or all of them. If reasonable notice and opportunity to be represented in such action by counsel shall have been given to compensation beneficiary, all claims of such compensation beneficiaries shall be determined in such action, as well as claim of employer or insurer. If recovery shall be had against such other party, by suit or otherwise, compensation beneficiaries shall be entitled to amount recovered over and above amount that employer and insurer shall have paid or are liable for in compensation or other benefits, after deducting reasonable costs of collection. Mississippi Supreme Court has held that such claim may not be brought against fellow servant of injured employee. *McCluskey v. Thompson*, 363 So. 2d 256, 259 (Miss. 1978). Nor may claim be brought against employee's own personal health or accident insurance carrier. *Bowen v. Magic Mart of Corinth*, 441 So. 2d 548, 550 (Miss. 1983).

Under statutory subrogation clause, judgment creditor's lien has priority over insurer's subrogation lien so that judgment creditor is entitled to full satisfaction of its judgment out of bankrupt's estate before insurer is entitled to subrogation. *Dunnam v. State Farm*, 366 So. 2d 668 (Miss. 1979).

Surety. Under Mississippi law, a surety has an equitable right of subrogation to indemnify it for all losses incurred as a result of having given its bond. Right of subrogation begins as of date of execution of bond. *Kimberly-Clark v. Alpha Building*, 591 F. Supp. 198 (N.D. Miss. 1984). See M.C.A. § 75-3-415; *Murray v. Payne*, 437 So. 2d 47 (Miss. 1983).

## WAIVER AND ESTOPPEL

In General. Clear and convincing evidence is required to establish waiver of important provisions of insurance contract. *New Hampshire Ins. v. Smith*, 357 So. 2d 119 (Miss. 1978).

Waiver by Agent. Statement of general agent to assured that insurer knew of loss and had arranged for adjustment, held waiver of written notice of loss. *Newark v. McMullen*, 142 Miss. 369, 107 So. 523 (1926). See *New York v. O'Dom*, 100 Miss. 219, 56 So. 379 (1911); *Continental v. Clanton*, 149 Miss. 289, 115 So. 569 (1928); *Liverpool v. Sheffy*, 71 Miss. 919, 16 So. 307 (1894). See also *Home v. Williamson*, 183 F.2d 572 (5th Cir. 1950).

Where insurer's agent had knowledge of vacancy of property when policy was effected, occupancy clause of fire policy was waived by issuance of policy. *Travelers v. Bank of New Albany*, 244 Miss. 788, 146 So. 2d 351 (1962).



General agent issuing fire policies on oral application may waive policy provisions. *Buffalo v. Borden*, 211 Miss. 47, 50 So. 2d 895 (1951).

Non-waiver agreements are recognized as valid by Mississippi Supreme Court. See *Taylor v. Fireman's Fund*, 306 So. 2d 638, 645 (Miss. 1974). However, like all agreements, non-waiver agreements may be waived by insurer. *Charles Stores v. Aetna*, 428 F.2d 989, 993 (5th Cir. 1970). Thus insurer may not rely on agreement to prejudice rights of insured. *Id.*

Premiums. Retention of premiums may, under certain circumstances, constitute waiver of age provision respecting eligibility for insurance. *Afro-Amer. v. Williams*, 180 Miss. 14, 176 So. 725 (1937); *Boult v. Maryland*, 111 F.2d 257 (5th Cir. 1940), cert. denied, 311 U.S. 672 (1940). Insurer, by accepting premiums on life policy containing military exemption clause with knowledge that insured was in military service, did not waive exemption from liability for death while in such service, where there was nothing inconsistent between payment of premiums and existence of exemptions. *White v. Standard*, 198 Miss. 325, 22 So. 2d 353 (1945). See also *Ford Life Ins. v. Shannon*, 328 So. 2d 342 (Miss. 1976). Waiver of one of two alternative conditions of fire policy cannot be construed as waiver of both. *World F&M v. King*, 187 Miss. 699, 191 So. 665 (1939).

Insurance company may waive an age termination provision in policy by continuing to accept premiums past time specified in termination provision. *Minnesota Mut. v. Larr*, 567 So. 2d 239 (Miss. 1990), distinguished by *Smith v. Medical Life Ins. Co.*, 910 So. 2d 48 (Miss. Ct. App. 2005).

Acceptance of premiums by insurer does not estop insurer from setting up defense based on ill health of insured, in absence of proof of knowledge of insured's condition. *Standard v. Baldwin*, 199 Miss. 302, 24 So. 2d 360 (1946).

Proof of Loss. Failure of insurer to divulge information necessary for insured to file proof of loss upon request constitutes waiver of proof of loss requirement. *Soso Trucking v. Central Ins.*, 236 So. 2d 398 (Miss. 1970), distinguished by *Thornton v. Gen. Motors*, 521 F. Supp. 1050 (N.D. Miss. 1981).

Insurer not estopped to deny liability under policy where agent had damaged vehicle towed to garage for repairs before completing investigation, and insurer did not deny liability until 4 months after accident, unless insured was harmed or misled by such action. *Hartford v. Lockard*, 239 Miss. 644, 124 So. 2d 849 (1960), distinguished by *Canal Ins. Co. v. Bush*, 247 Miss. 87, 154 So. 2d 111 (Miss. 1963); *Smith Trucking, Inc. v. Cotton Belt Ins. Co.*, 556 F.2d 1297 (5th Cir. 1977).

Insurer not estopped to deny liability under policy by withdrawing from defense of action if such conduct does not result in prejudice to insured. *Id.*; *Southern Farm Bureau v. Logan*, 238 Miss. 580, 119 So. 2d 268 (1960), distinguished by *Liberty Mut. Fire Ins. Co. v. Canal Ins. Co.*, 177 F.3d 326 (5th Cir. 1999).

Doctrine of waiver and estoppel cannot be used to extend coverage of insurance policy or create primary liability, but may only affect rights reserved in it. An insurance contract, under guise of waiver, cannot be reformed to create liability for condition excluded by specific terms of policy. *Frank Gardner Hardware v. St. Paul*, 245 Miss. 320, 148 So. 2d 190 (Miss. 1963).

## WORKERS' COMPENSATION

Statutory Reference. See generally M.C.A. § 71-3-1 et seq. Adjudication of compensation is determined by Workers' Compensation Commission. Final award of Commission shall be conclusive and binding unless either party to controversy, within thirty days, appeals to circuit court of county in which injury occurred. M.C.A. § 71-3-51.

Benefits. Compensation means money allowance payable to an injured worker or his dependents and includes funeral benefits provided therein. M.C.A. § 71-3-3(j). For minimum and maximum wage recovery, see M.C.A. § 71-3-13. Employer must furnish medical services and supplies for such period as nature of injury or process of recovery may require. M.C.A. § 71-3-15. Compensation for disability is determined by M.C.A. § 71-3-17, and compensation for death is determined by M.C.A. § 71-3-25.

Employment Defined. An employee may be an independent contractor as to certain work and yet be mere servant as to other work for same employer. Employer, however, is responsible in damages only if worker was injured while performing that portion of work in which he was an employee. In certain situations where worker co-exists as an independent contractor and an employee and said worker acts in his work for employer, benefits are awarded or denied according to relationship of worker at time of injury. *Mills v. Jones' Estate*, 56 So. 2d 488, 490 (Miss. 1952), overruled on other grounds, *Railway Exp. Agency v. Hollingsworth*, 221 Miss. 688, 75 So. 2d 639 (1954). Employee is person in service of an employer under contract of hire or apprenticeship, written or oral, express or implied. M.C.A. § 71-3-3 (d).

Exclusive Remedy. Liability of employer to pay compensation shall be exclusive and in place of all liability of such employer to employee and to anyone otherwise entitled to recover damages at common law or



otherwise on account of such injury or death. M.C.A. § 71-3-9. Worker's Compensation carrier cannot reduce benefits to employee by amount paid to employee through her own personal policy, whether health and accident or uninsured motorist. *Nationwide Mut. Ins. v. Garriga*, 636 So. 2d 658 (Miss. 1994) *declined to extend by Welborn v. State Farm Mut. Auto. Ins. Co.*, 480 F.3d 685 (5th Cir. 2007).

**Occupational Disease.** Occupational disease shall be deemed to arise out of and in the course of employment when there is evidence that there is a direct causal connection between work performed and occupational disease. M.C.A. § 71-3-7.

**Arising Out of and in the Course of Employment.** An injury arises out of employment when there is a causal connection between work and injury. *Earnest v. Interstate*, 238 Miss. 648, 119 So. 2d 782 (1960). Work need only be a substantial contributing cause, not sole cause, for injury to arise out of employment. *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888 (Miss. 1980), *distinguished by Evans v. Marko Planning, Inc.*, 447 So. 2d 130 (Miss. 1984). Injury arises in the course of employment when it takes place within time period of employment at place where employee may reasonably be in performance of his duties and while he is fulfilling duties or engaged in doing something incidental thereto, or is engaged in furtherance of employer's business. *Bivens v. Marshall R. Young Drilling*, 251 Miss. 261, 169 So. 2d 446 (1964). Activity is related to employment if it carries out employer's purposes or advances his interests either directly or indirectly. *M & W Constr. v. Bugg*, 241 Miss. 133, 129 So. 2d 631 (1961). Claimant's susceptibility to aggravation of preexisting disease cannot be weighed against claimant in determining whether injury arose out of employment. *Hedge v. Leggett & Platt*, 641 So. 2d 9 (Miss. 1994), *distinguished by Ellis v. Salem Sportswear*, 755 So. 2d 26 (Miss. Ct. App. 1999).

**Mental Injury.** Where injury is mental or emotional, clear proof of causation is required. Although treating psychiatrist was of the opinion that claimant's suicide resulted from stress of the job, Workers' Compensation Commission was warranted in denying benefits based on report of consulting psychiatrist who has never examined claimant but had benefit of four years of claimant's medical records and was of the opinion that an inadequate personality caused suicide. *Estate of Babb v. GTE Sylvania*, 417 So. 2d 545 (Miss. 1982). It is not required that mental injury be related to physical injury. Where a claimant suffered hysterical conversion (condition where emotions become so intense that the person cannot control them, and the body converts these emotions into physical symptoms) as result of being promised promo-

tion and then being denied that promotion, court held that, under appropriate circumstances, employee can be compensated for mental/nervous injuries not immediately caused by physical trauma. To be compensable, such injury must have been caused by something more than ordinary instances of employment such as an untoward event, unusual occurrence, accident or injury incident to claimant's employment. *Brown & Root Constr. v. Duckworth*, 475 So. 2d 813, 815 (Miss. 1985).

**Pre-existing Injury.** Where preexisting physical handicap, disease, or lesion is shown by medical findings to be material contributing factor in results following injury, compensation which, but for his paragraph, would be payable shall be reduced by that proportion which such preexisting physical handicap, disease, or lesion contributed to production of results following injury. M.C.A. § 71-3-7. However, an employer takes an employee as he finds him. Where employee may perform her work despite an existing defect and suffers an injury which aggravates existing defect, thereafter causing a loss of her functional ability, then compensation must be awarded as long as functional loss continues. In sum, when injury causes loss of functional ability, it is compensable. *Bolton v. Catalytic Constr.*, 309 So. 2d 167 (Miss. 1975); *Stuart's, Inc. v. Brown*, 543 So. 2d 649 (Miss. 1989), *distinguished by Mitchell Buick v. Cash*, 592 So. 2d 978 (Miss. 1991); *City of Laurel v. Blackledge*, 755 So. 2d 573 (Miss. Ct. App. 2000).

**Fellow Employee Rule.** If employee is injured while acting within scope and course of her employment, workers' compensation is her exclusive remedy as to her employer and co-workers. Workers' Compensation Act grants immunity from common law suits to employer and co-employees. Consequently, acts of fellow employee, other than those of willful negligence, merge into and remain solely act of employer. *Sawyer v. Head*, 510 So. 2d 472 (Miss. 1987). However, where injury is caused by willful act of employee acting in course and scope of his employment and in furtherance of his employer's business, Workers' Compensation Act is not exclusive remedy available to injured party. *Miller v. McRae's, Inc.*, 444 So. 2d 368 (Miss. 1984), *distinguished by Bevis v. Linkous Constr. Co.*, 856 So. 2d 535 (Miss. Ct. App. 2003); *modification recognized by Goodman v. Coast Materials Co.*, 858 So. 2d 923 (Miss. Ct. App. 2003).

**Borrowed Employee Rule.** Person in employ of one person or company whose services are loaned by his employer to another company or person becomes servant of latter company. *Northern Electric v. Phillips*, 660 So. 2d 1278 (Miss. 1995), *distinguished by Russell v. Orr*, 700 So. 2d 619 (Miss. 1997). Where such employee is employed by more than one employer, both employers

may gain immunity from common-law negligence actions, under exclusive provision of Workers' Compensation Act. *Id.* See M.C.A. § 71-3-9. Workers' Compensation Act immunity extends to both general contractors and sub-contractors. *Crowe v. Brasfield & Gorrie Gen. Contractors*, 688 So. 2d 752 (Miss. 1996), distinguished by *Culpepper v. Double R., Inc.*, 269 F. Supp. 2d 739 (S.D. Miss. 2003).

**Liens.** No claim for legal services or for other services rendered in respect of claim or award for compensation, to or on account of person, shall be valid unless approved by commission or, if proceedings for review of order of commission in respect of such claim or award

are had before any court, unless approved by such court. Any claim so approved shall, in manner and to the extent fixed by commission or such court, be a lien upon such compensation. M.C.A. § 71-3-63(1).

**Attorney's Fee.** Attorney's fees must be approved by commission. M.C.A. § 71-3-63(1). In no instance shall amount recovered by attorney for an appearance before commission exceed twenty-five percent (25%) of total award of compensation. Such limitations, however, shall not be construed as applying to a fee awarded for additional services by superior court. In all instances, fees shall be awarded on basis of fairness to both attorney and client. M.C.A. § 71-3-63(3).