

IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI

APPEAL NO. 2008-CA-00640

APPEAL FROM

THE CIRCUIT COURT OF HANCOCK COUNTY

**LOIS KAIGLER on behalf of herself and her minor child, LESHAN
KAIGLER**

PLAINTIFFS/APPELLANTS

V.

CIVIL ACTION NO. 04-0121

HANCOCK COUNTY, THE CITY OF BAY ST. LOUIS and VCJ GYM

DEFENDANTS/APPELLEES

ORIGINAL APPELLANT'S BRIEF

Submitted by:
MATTHEW L. PEPPER
10536E Automall Parkway
D'Iberville, MS 39540
(601) 427-1061
Fax(228) 863-1175
Attorney For Plaintiffs/Appellants
Lois Kaigler and Leshan Kaigler

IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI

APPEAL NO. 2008-CA-00640

APPEAL FROM

THE CIRCUIT COURT OF HANCOCK COUNTY

LOIS KAIGLER on behalf of herself and her minor child, LESHAN
KAIGLER

PLAINTIFFS/APPELLANTS

V.

CIVIL ACTION NO. 04-0121

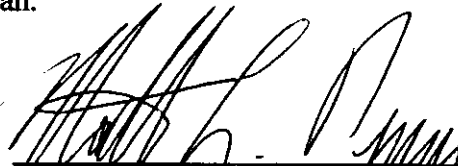
HANCOCK COUNTY, THE CITY OF BAY ST. LOUIS and VCJ GYM

DEFENDANTS/APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of appeals may evaluate possible disqualification or recusal.

1. Leshan Kaigler -primary plaintiff (Minor)
2. Lois Kaigler- Natural Mother of primary Plaintiff and natural guardian.



MATTHEW L. PEPPER
10536E Automall Parkway
D'Iberville, MS 39540
(601) 427-1061
Fax(228) 863-1175
Attorney For Plaintiffs/Appellants
Lois Kaigler and Leshan Kaigler

TABLE OF CONTENTS

I.	TABLE OF CASES/STATUTES	p.4
II.	STATEMENT OF THE ISSUES.....	p.5
III.	STATEMENT OF THE CASE.....	p.5
IV.	SUMMARY OF THE ARGUMENT.....	p.8
V.	ARGUMENT.....	p.10
VI.	CONCLUSION.....	p.28

I. TABLE OF CASES/STATUTES

Cases

<i>Brown v. Credit Center, Inc.</i> 444 So2d. 358 (Miss 1983)	p. 12,13
<i>Collins v. Tallahacie County</i> 876 So2d. 284 (Miss 2004)	p. 24,27,28
<i>Cook v. Payless Shoesource</i> '06 U.S. Dist LEXIS 33151 (SD Miss 2006).p. 14,15,24,28	
<i>Corley v. Evans</i> 835 So2d 30 (Miss 2003).....	p. 16
<i>Delmont v. Harrison Cty. Sch. Dist.</i> 944 So.2d. 131 (Miss Ct. App 2006).....	p.13
<i>Dotts v. Harrison Waterway Dist.</i> (Mss Ct. App 2006).....	p.19
<i>Foster v. Noel</i> 715 So2d. 174 (Miss 1998).....	p.12
<i>Franklin v. Thompson</i> 722 So2d. 688 (Miss 1998).....	p.11
<i>Glorioso v. YMCA</i> 540 So2d. 638(Miss1989).....	p. 16
<i>Hall v. Cagle</i> 773 So2d 928	p.17
<i>Henderson v. Simpson Cty Sch. Dist</i> 847 So2d856(Miss 2003).....	p.21
<i>Hoffman v. Planters Gin</i> 358 So2d.1008 (Miss 1978).....	p.16
<i>Howard v. City of Biloxi</i> 949 So2d 751 (Miss Ct. App 2006).....	p.12,14
<i>Langford v. Mercurio</i> 183 So2d 150 (Miss1966).....	p.16
<i>Leffler v. Sharp</i> 891 So.2d. 152 (Miss 2004).....	p. 16
<i>Leflore Cty. v. Givens</i> 754 So2d 1223 (Miss 2000).....	p. 17,18,24
<i>L.W. v. McComb Sep. Mun. Sch. Dist.</i> 754 So2d. 1136 (Miss 1999).....	p.21
<i>Martin v. BP Exploration & Oil Co.</i> 769 So2d 261 (Miss App 2000).....	p.18
<i>Mayfield v. The Hairbender</i> 903 So2d 733 (Miss 2005).....	p. 21,22,23,28
<i>Palmer v. Anderson Infirmary</i> 656 So2d. 790 (Miss 1995).....	p.13
<i>Palmer v. Biloxi Reg. Med. Ctr.</i> 564 So2d 1346 (Miss 1990).....	p. 12
<i>Partin v. North Miss. Med. Ctr.</i> 929 So2d 924 (Miss Ct. App 2005).....	p.10,12, 13
<i>Richmond v. Benchmark Corp.</i> 692 So.2d 60 (Miss 1997).....	p.12
<i>Schepens v. City of Long Beach</i> 924 So2d 620 (Miss Ct. App 2006).....	p.13
<i>Skelton v. Twin Cty Rural Elec. Assn.</i> 611 So2d 931 (Miss 1992).....	p.14
<i>Summers v. St. Andrews Episcopal Sch.</i> 759 So2d 1203 (Miss 2000).....	p.21
<i>Tharpe v. Bunge Corp.</i> 641 So2d 20 (Miss 1994)	p.22
<i>Thompson v. Chic-Fil-A</i> 923 So2d 1049 (Miss Ct. App 2006).....	p.14,15,24
<i>White v. Miss Power & Light</i> 196 So2d 343 (Miss 1967).....	p.16
<i>Wright v. Caffey</i> 123 So2d 841 (Miss 1960).....	p. 16

Statutes/Codes

Mississippi Fire Prevention Code.....	8,10,21,27
Miss. Code Ann 11-46-9	14,15,17,19,28
Miss Code Ann 17-1-1	16
Miss Code Ann 45-11-101	24
Miss Rules of Civil Procedure 56	11
Life Safety Code	25,26,27

II. STATEMENT OF THE ISSUES

- 1. WHETHER THERE WERE STILL GENUINE ISSUES OF MATERIAL FACT TO PRECLUDE THE GRANTING OF SUMMARY JUDGMENT**
- 2. WHETHER THE DEFENDANT WAS ENTITLED TO STATUTORY IMMUNITY IN LIGHT OF THE MISSISSIPPI FIRE PREVENTION CODE**
- 3. WHETHER THE DEFENDANT BREACHED ITS DUTY OF ORDINARY CARE IF STATUTORY IMMUNITY IS FOUND NOT TO BE APPLICABLE- NORMALLY A QUESTION OF FACT**

III. STATEMENT OF THE CASE

NOW INTO COURT, through undersigned counsel , come plaintiffs/appellants, Lois Kaigler, on behalf of herself and her minor child , Leshan Kaigler, who submit this original appellate brief in support of their appeal from the lower court's rendition of Summary Judgment against them and would show to this Honorable Court the following:

1. CASE STATUS

A. Facts

The facts in this case are largely not in dispute by either side.

On December 11, 2002, Leshan Kaigler, who was 12 years old at the time, tagged along with his older sister to her basketball practice at the VCJ Gym in Bay St. Louis, Hancock County, Mississippi. Leshan had taken his basketball with him in the hope that he would have the opportunity to shoot some hoops.

According to Leshan, while he was waiting for his sister and her team to finish practice with the coach, two older boys, Danny Dorsey and Demerik Williams came and took his basketball.

Leshan tried to retrieve it. The boys ran to an area of the gym which was in general disrepair, threw the basketball back and forth, and then Danny Dorsey threw the basketball through an opening between the roof and the drop down ceiling tiles. The basketball came to rest on top of the ceiling tiles.

At Leshan's request, Danny retrieved the ball only to throw it to Dermerik; Dermerik then threw the ball onto the drop down ceiling tiles again. Both Danny and Dermerik refused to get it so Leshan climbed up and onto the drop down ceiling tiles to retrieve his basketball, fell through the ceiling tiles to the floor below, and sustained a severe injury to his cervical spine and neck which has required two surgeries so far and has ended up restricting his mobility for life.

According to the Bay St. Louis Police Department in the Narrative Report completed by Officer Isreal Neff on December 11, 2002, as supplemented by the investigation of Officer Ernes Taylor and set forth in his Narrative Report, Derreck Lewis threw Kaigler's basketball on top of the false ceiling and Danny Dorsey went and got it for Kaigler. Then "Jr." took the ball from Kaigler and threw it on the ceiling. When Dorsey didn't immediately go get the ball, Kaigler "climbed on top of a box and pulled

himself over the top of the wall" and began crawling on the ceiling tile, the ceiling tile broke and Leshan fell 10 - 12 feet before landing head first on the concrete floor in the hallway next to the water fountain. The incident occurred at approximately 6:14 p.m. on December 11, 2002.

B. Procedural Status

Plaintiffs filed suit on March 26, 2004 asserting that the injuries suffered by Leshan Kaigler were due to the negligence of Hancock County, the City of Bay St. Louis and VCJ Gym as follows:

- a. allowing a dangerous condition to exist for an unreasonable length of time;
- b. failing to repair and/or renovate the property;
- c. defendant knew or should have known of the dangerous hazard of the building
- d. failure to adequately maintain premises in a safe condition; *and*
- e. failure and/or lack of supervision.

On August 3, 2004, the City of Bay St Louis and the VCI Gym timely filed an Answer and Defenses and propounded discovery. Hancock County was dismissed without prejudice by Order dated August 4, 2005. Only the depositions of Leshan and Lois Kaigler have been completed and Plaintiffs have responded to Defendant's Requests for Production and Interrogatories.

Defendants set forth the affidavits of Eddie Farve, Buzz Olsen and Gus McCay in an attempt to support their Motion for summary judgment. They were submitted in attempt to mislead the Court *“that there were no statutes, regulations or ordinances that were in effect on December 11, 2002, or at any other time that imposed a duty or otherwise directed The City of Bay St. Louis on how to maintain or operate the VCJ Gym.”*

Nothing could be further from the truth. Since The City of Bay St. Louis is a political subdivision of the State of Mississippi, they are subject to ensuring compliance with the Mississippi Fire Prevention Code (hereinafter “MFPC”). The MFPC is absolutely clear that the City had an affirmative duty to keep the premises of the VCJ Gym in compliance with the “MFPC” and the facts indicate that they did not.

Accordingly , since they were under a statutory duty to maintain the VCJ Gym they are not entitled to immunity under the Mississippi Torts Claims act. At summary judgment the lower court ignored the defendant’s *negligence per se* and ruled against plaintiffs. Plaintiffs then perfected this appeal.

IV. SUMMARY OF ARGUMENT

The fact that the Bay St. Louis VCJ Gym was owned and maintained by the City of Bay St. Louis does not free it from liability even under the Mississippi Torts Claims Act. Defendant’s claim that the plaintiff’s cannot defeat the alleged statutory immunity is ridiculous and not supported by Mississippi case law.

The Kaiglers can easily defeat this statutory immunity because plaintiffs have

made a *prima facie* showing of Leshan's status as an *invitee* therefore the City of Bay St. Louis cannot hide behind statutory immunity without the Court hearing the genuine issue of material fact regarding whether or not the City breached its *statutory duty of ordinary care* owed to the plaintiffs. Defendants had a duty under the MFPC to maintain the facility in accordance with the Code, and they simply did not. Accordingly, they had a duty to provide ordinary care and failed to exercise *ordinary care*. Leshan was injured due to a dangerous condition in the VCJ Gym which the City of Bay St. Louis caused by omission of action in this particular case, which was negligent and/or wrongful conduct, or of which Bay St. Louis had known for years and failed remedy the situation or to warn or take any action on. This was the proximate cause of plaintiff's injury.

Leshan was injured after he fell from the spare room ceiling which was suspended 12 feet above the level of the floor. The ceiling at issue was in a room which was in general disrepair and served as storage for old furniture, office equipment and trash, presenting an attractive nuisance and unsafe condition for minors. Had a door to this room been put in place or the entrance been walled up the public would not have had free access to it. This would have been *ordinary care* of a dangerous condition. ***After Leshan's injury took place, this is in fact what the City actually did.*** (Exhibit "C" of original opposition memo). They had known about the room for years yet they did absolutely nothing, (Exhibit "D" of original opposition memo.) and the notion that they did not have adequate time to do anything about the problem is ludicrous. Further, the action that had to be taken to render the area safe was so easy that omitting to do anything

borders on gross negligence and was definitely was the proximate cause of Leshan's injury. In light of the affirmative duties imposed on the City by the MFPC their inaction was *negligence per se*.

V. ARGUMENT

Plaintiffs do not have to prove all the elements of their case in order to defeat summary judgment. All they need to do is demonstrate that there are genuine issues of material fact. *Partin v. North Mississippi Medical Center* 929 So. 2^d 924 (Miss App 2005). Plaintiffs will prove at trial that the injuries Leshan suffered on December 11, 2002 were due to the negligence of the Defendants under the theories of negligent supervision and/or premises liability.

The liability of the defendant in this case is premised ultimately on Leshan's status while he was at the VCJ Gym. This is true because of the Mississippi Torts Claims Act which protects the State of Mississippi and its governmental subdivisions from liability and it sets the standard of care to which the defendants will be held liable to. This standard of care also determines whether or not the City of Bay St. Louis will be entitled to statutory immunity. Defendant admits first that plaintiff was an *invitee* then attempts to convince the Court without supporting facts that somehow he was able to change his legal status as to the defendants yet they claim there are no genuine issues of material facts.

As for genuine issues of material fact, nearly every ground sought by defendant in support of summary judgment in their favor has already been determined by precedent to

be genuine issues of material fact therefore precluding summary judgment. The lower court ignored such long established precedent and plaintiff will so demonstrate.

1. LAW

A.

Summary Judgment Standard

The Mississippi Rules of Civil Procedure authorize the granting of summary judgment

where there are no genuine issues of material fact as set forth in pertinent part in Rule 56(c), as

follows:

... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

Miss. R. Civ. P. 56(c).

A party against whom a claim is asserted may move with or without supporting affidavit for summary judgment in his favor, so long as the motion is served at least ten days before the time fixed for the hearing. *Miss. R. Civ. P. 56*. Initially, the party moving for a summary judgment bears the responsibility of providing the court with the basis of its motion and identifying the portions of the record in the case which establish the absence of a genuine issue of material fact. *Franklin v. Thompson*, 722 So.2d 688, 691

(Miss. 1998); *Howard v City of Biloxi*, 949 So.2d 751 (Miss. Ct. App. 2006).

However, once the moving party has properly supported his motion for summary judgment, the non-moving party must respond by setting forth specific facts showing there is a genuine issue for trial. *Brown v. Credit Ctr. Inc.*, 444 So.2d 358, 36~ (Miss.1983).

The party opposing the motion must be diligent and may not rest upon allegations or denials in the pleadings, but must by allegations or denials set forth specific facts showing that there are genuine issues for trial. *Richmond v. Benchmark Construction Corp.*, 692 So.2d 60,61 (Miss. 1997). In other words, "when a motion for summary judgment is filed, the nonmoving party must rebut by producing significant probative evidence showing that there are indeed genuine issues for trial." *Foster v. Noel*, 715 So.2d 174, 180 (Miss. 1998) (*citations omitted*). "Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or arguments and assertions in briefs or legal memoranda." *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1356 (Miss. 1990).

All the non moving party needs to do in order to defeat a motion for summary judgment is to establish a genuine issue of material fact. The non moving party does not have to prove all the elements of its case in order to survive a pretrial summary judgment motion; rather the non moving party only has to demonstrate that there are genuine issues of material fact. *Partin v. North Mississippi Medical Center* 929 So. 2nd 924 (Miss 2005)

Primarily, the trial court must carefully review all evidentiary matters in the light most favorable to the non-moving party. *Delmont v Harrison County School District*, 944 So. 2d 131 (Miss. Ct. App. 2006); *Brown v. Credit Ctr., Inc.*, 444 So. 2d at 362. Summary judgment should be viewed with a skeptical eye, and in questionable cases, the trial court should deny the motion *Partin: supra*.

The Mississippi Supreme Court has stated that summary judgment is not favored and should only be granted with great caution. *Palmer v. Anderson Infirmary* 656 So. 2nd 790(Miss 1995).

B.

Negligence

The elements of negligence are: duty, breach of duty, proximate cause and damages, *Schepens v City of Long Beach*, 924 So. 2d 620, 623(Miss. Ct. App. 2006). In a negligence action where summary judgment is at issue , the plaintiff must rebut the defendant's claim(i.e. that no genuine issues of material fact exists) by producing supportive evidence of significant and probative value; this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of his injury. *Palmer, supra*.

C.

Premises Liability

Mississippi applies a three step process in determining premises liability: first, the

injured party must be classified as an invitee, licensee or trespasser; second, the duty of the business or landowner owes the injured party is determined; and, third, a determination is made as to whether the business or landowner breached its duty. *Thompson v Chick-Fil-A, Inc.*, 923 So. 2d 1049 (Miss. Ct. App. 2006); *Cook v Pay less Shoesource, Inc.*, 2006 U.S. Dist. LEXIS 33151 (S. D. Miss. 2006). The duty owed by the Defendants to Plaintiff depends upon their relationship to each other. *Skelton v Twin County Rural Electric Assoc.*, 611 So. 2d 931, 936 (Miss. 1992).

D.

Miss. Code Ann. §11-46-9 - Mississippi Tort Claims Act

The City of Bay St. Louis owns the municipal building that houses the VCJ Gym, the police station and the fire station, which are all connected thus the Mississippi Tort Claims Act provides the exclusive remedy available to the Plaintiff. *Howard v City of Biloxi*, 943 So. 2d 751, 754(Miss. Ct. App, 2006). For purposes of this Motion, the pertinent provisions of Miss. Code Ann. § 11-46-9 Annotated as follows:

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for

the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

Miss. Code Ann. §11-46-9 (1972, as amended).

A governmental entity and its employees shall not be liable for any claim:

(b) Arising out of any act or omission of an employee or governmental entity *exercising ordinary care* in reliance upon , or in the execution of performance of , or in the failure to execute or perform , a statute ordinance , regulation, whether or not the statute , ordinance or regulation be valid;

Miss Code Ann Sec 11-46-9(1)(b)(as amended 1999)

(1). Established Premises Liability Doctrine and the Status of The Plaintiff Determines the Standard of Care which, in turn, determines the viability Defendant's Defense of Sovereign Immunity.

Generally, Mississippi applies a three step process in determining premises liability. First the injured party must be classified as an invitee, a licensee or a trespasser. Second the duty of the business or landowner owed the injured party is determined and, third a determination is made as to whether the business or land owner breached his duty. *Thompson v Chick-Fil-A, Inc.*, 923 So. 2d 1049 (Miss.

App. 2006); *Cook v Pay less Shoesource, Inc.*, 2006 U.S. Dist. LEXIS 33151 (S. D. Miss. 2006).

Was Leshan an invitee, a licensee or a trespasser at the time of his fall?

The parameters of these three classifications were reaffirmed by the

Mississippi Supreme Court in *Leffler v Sharp*, as follows:

... an *invitee* is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage . . . A *licensee* is one who enters upon the property of another for his own convenience, pleasure, or benefit pursuant to the license or implied permission of the owner whereas a *trespasser* is one who enters upon another's premises without license, invitation, or other right." *Corley v. Evans*, 835 So. 2d 30,37 (Miss. 2003) (emphasis added) (citing *Hoffman v. Planters Gin Co.*, 358 So. 2d 1008, 1011 (Miss. 1978) (citing *Langford v. Mercurio*, 254 Miss. 788, 183 So. 2d 150 (1966)); [**8] *Wright v. Caffey*, 239 Miss. 470, 123 So. 2d 841 (1960)). The Court has added that a trespasser enters another's property "merely for his own purposes, pleasure, or convenience, or out of curiosity, and without any enticement, allurement, inducement or express or implied assurance of safety from the owner or person in charge." *Titus*, 844 So. 2d at 459 (citing *White v. Miss. Power & Light Co.*, 196 So. 2d 343,349 (Miss. 1967)).

Leffler v Sharp, 891 So. 2d 152, 156 - 157(Miss. 2004).

In Mississippi, a person using municipal property is generally considered an invitee *Glorioso v YMCA*, 540 So. 2d 638, 641(Miss. 1989) Pursuant to Miss. Code Ann § 17 -1-1, et. seq., In as much as Leshan was an *invitee* at the VCJ Gym he was entitled to the ordinary standard of care. Even defendants so admit. Without getting into the issue of

whether the operation and maintenance of the VCJ Gym was a *discretionary* function of the City of Bay St. Louis for purposes of the Mississippi Torts Claims Act, lets just assume that it was for the sake of argument. That notwithstanding, *a duty of ordinary care is imposed on all discretionary duties* by Miss Code Ann. 11-46-9(1)(b). *Leflore County v. Givens* 754 So2d 1223 (Miss 2000). Mississippi Code Ann Sec. 11-46-9(1)(b) reads in pertinent part:

A governmental entity and its employees shall not be liable for any claim:

(b) Arising out of any act or omission of an employee or governmental entity exercising ordinary care in reliance upon , or in the execution of performance of , or in the failure to execute or perform , a statute ordinance , regulation, whether or not the statute , ordinance or regulation be valid;

Miss Code Ann Sec 11-46-9(1)(b)(as amended 1999)

To the extent that defendants want to cast Leshan in any light other than that of an invitee, the facts as to status are hotly disputed by the parties. This in and of itself is a question and genuine issue of material fact which can only be determined at trial in the matter therefore making summary judgment in appropriate.

Mississippi case law is clear on this issue. Where a plaintiff has made a *prima facie* showing that he was an *invitee* on the premises of the defendant , that is sufficient to defeat an attempt by the defendants to dismiss the case on summary judgement. *Hall v. Cagle* 773 So2d 928. The Mississippi Supreme Court has embraced the definitions of *invitee* as provided in the Restatement of Torts (2d) Sec. 332 (1965) which provides that :

(2) a public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is open to the public.

Martin v. B.P. Exploration & Oil Co. 769 So2d 261(Miss App 2000)

In the case at bar defendants admit that Leshan *was* an *invitee*. The deposition testimony indicates clearly he was an invitee. Under these definitions plaintiff has adequately demonstrated that he has a *prima facie* case that he was a *public invitee* and therefore, was entitled to the ordinary standard of care required by Miss Code Ann. 11-46-9(1)(b). As such, defendant's immunity under the MTCA is not impervious, but is subject to the Court's scrutiny at trial as to whether that duty of care was breached and to dismiss the case at this point would not be treating the facts in a light most favorable to the plaintiff. Where the state actor fails to use ordinary care, there is no shield of immunity. *Leflore* at 1227.

(2). Unresolved Sub Questions Pretermittting Summary Judgment in Defendant's Favor

(a) WAS THE OPERATION AND MAINTENANCE OF THE VCJ GYM TRULY A DISCRETIONARY FUNCTION OF THE CITY OF BAY ST. LOUIS?

To determine whether a decision made by a governmental entity was discretionary, the Mississippi Supreme Court employs a two-part public policy function test reviewing first (1) : whether the activity involves an element of choice or judgment, and, if yes, then (2)

whether the choice or judgment involves social, economic, or political policy. *Dotts v Pat Harrison Waterway District*, 933 So. 2d 322, 326(Miss. Ct. App. 2006)(internal citations omitted). There is no deposition testimony in this case from any city official involved in the operation of the VCJ Gym offered by movants. The facts on this aspect of the case have not yet been developed nor does defendant demonstrate by any affidavit or other evidence that the City of Bay St. Louis acted in its discretionary capacity in operating and maintaining the VCJ Gym.

Defendants do not offer evidence only conclusions as to what the status of the decision may appear to be. Accordingly, where there is a genuine issue of material fact as to whether the City of Bay St. Louis entity was acting in a *discretionary* capacity and where defendant has submitted no proof, only mere allegations and conclusions, versus a *ministerial* capacity summary judgment is improper.

(b) WERE ANY DECISIONS CONCERNING ADULT SUPERVISION
OF YOUTH RELATED ACTIVITIES DISCRETIONARY?

Defendants base their position on this issue on their own self made determination that the operation of the Gym itself was discretionary and then attempt to hide behind the alleged statutory immunity of Miss. Code Ann. §11-46-9(1)(d). *As plaintiff has demonstrated earlier, such a reliance on that immunity is misplaced given that plaintiff has made a prima facie case that he was an invitee and therefore entitled to the*

reasonable standard of ordinary care.

On December 11, 2002, when Leshan was injured, Leshan was at the gym with his sister for her basketball practice. She was on a team sponsored by the Bay City Youth Basketball League. The League is neither organized nor operated by the City of Bay St. Louis. Yet the City of Bay St. Louis advertises on its web site that youth related activities there are supervised. The League was organized and operated and otherwise managed by a group of parent volunteers. At the time of the accident at issue, at least one volunteer League Coach was present and supervising Tywana's basketball practice. Defendant's allege that "as a matter of law, Plaintiffs cannot establish that Leshan suffered his injuries due to the lack of supervision by these Defendants because these Defendants simply had no statutory duty to supervise." Again, *assuming arguendo*, that the decision to operate the Gym was a *discretionary* one, the City still cannot hide behind the defense of statutory immunity. Allowing the public use of the VCJ Gym for supervised youth activities, akin to public school premises, subjected the City to the ordinary care standard.

"Public officers and administrators are protected by sovereign immunity, if and only if, they used ordinary care in controlling and disciplining youth in their care and control. The issue of ordinary care is a fact question. The trial Court confronted with all the relevant facts, should then under our law decide whether or not those responsible used ordinary care as required by the

statute. If the trial judge concludes that they have failed , neither they nor the school are immune from liability.” Henderson v. Simpson County School District 847 So.2d 856 (Miss 2003) citing L.W. v. McComb Separate Mun School District 754 So2d 1136 (Miss 1999).

Further , a public entity, although not an insurer of public safety has an obligation to supervise adequately the youth related activities it sponsors and it will be held liable for a foreseeable injury proximately related to the absence of supervision. *Summers v. St. Andrews Episcopal School 759 So2d 1203*(Miss 2000). Accordingly, the sub question of adequate supervision is a fact question related to *ordinary care* and is improper for summary judgment.

(c). WAS THE CONDITION OF THE SPARE ROOM AN UNSAFE CONDITION?

The room in which Leshan’s injuries took place was in general disrepair and had been in that condition for a long time. In Mississippi, a landowner owes an *invitee* the duty to keep the premises in a reasonably safe and when not reasonably safe to warn only where there is a hidden danger or peril that is not in open view. *Mayfield v. The Hairbender 903 So2d 733* (Miss 2005). In the instant case the spare room in which

Leshan was ultimately injured was off the main floor of the Gym. It was in fact off one of the corridors to an alternate entrance to the gym which was kept locked. No warnings or other "Keep Out" signs were posted in this area. Regardless of any incumbent duty to warn, the Mississippi Supreme Court abolished the "*open and obvious*" theory as an absolute defense in premises liability cases. *Mayfield* supra. Defendants would have this Court believe otherwise.

The "*open and obvious*" standard is simply a comparative negligence defense used to compare the negligence of the plaintiff to the negligence of the defendant .

"If the defendant was not negligent , it makes no difference if the dangerous condition was open and obvious to the plaintiff since the plaintiff must prove some negligence on the part of the defendant before recovery may be had. On the other hand if the defendant and the plaintiff were both at fault in causing or attributing to the harm , then damages can be determined through the comparative negligence of both. Mayfield supra. The Mayfield Court, citing Tharp v. Bunge Corp. 641 So2d 20 (Miss 1994)

The *Mayfield* Court further opined that in explaining why a defendant should not be shielded from all liability for injuries caused by open and obvious hazards, the *Tharp*

Court stated:

It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff then it surely is obvious to the defendant as well. The defendant accordingly should alleviate the danger. Mayfield supra at 739.

Accordingly, the *Mayfield* Court held that even when such dangerous conditions are open and obvious , viewing the facts in a light most favorable to the plaintiff a genuine issue of material fact existed as to whether defendants negligently failed to maintain its premises in a reasonably safe condition. Once again defendant's reliance on the "*open and obvious*" defense is misplaced for the purpose of summary judgment.

(3). Established Premises Liability Doctrine, The Mississippi Fire Prevention Code and the Status of The Plaintiff Determines the Standard of Care which, in turn, determines the viability Defendant's Defense of Sovereign Immunity.

Generally, Mississippi applies a three step process in determining premises liability. First the injured party must be classified as an invitee, a licensee or a trespasser. Second the duty of the business or landowner owed the injured party is determined and,

third a determination is made as to whether the business or land owner breached his duty. *Thompson v Chick-Fil-A, Inc.*, 923 So. 2d 1049 (Miss. App. 2006); *Cook v Pay less Shoesource, Inc.*, 2006 U.S. Dist. LEXIS 33151 (S. D. Miss. 2006).

By citing *Collins v. Tallahacie County* 876 So.2nd 284 (2004) defendants try to convince the Court that the plaintiff's reliance on *Leflore County* case was no longer viable. ***This simply is not true. The Collins case is easily distinguishable as it involved the duty of the State to protect individuals from the actions of single minded criminals. The is no such fact pattern in this case.***

The facts in this case are in fact governed by Miss. Statutes Ann. 45-11-101 which states in pertinent part:

(1) The State Fire Marshall shall promulgate the Mississippi Fire Prevention Code which shall apply to :

(a) All buildings owned by the state or state agencies;

The State Fire Marshall's office is part of the Mississippi Insurance Department and is governed by that office as well. A visit to their website provides the viewer with a downloadable copy of the MFPC. The code states in pertinent part as to which buildings

are covered by the code:

Section 203

(G) Buildings or Public Assemblies

- 1. All buildings owned by the State or State Agencies or political subdivisions, Sec 45-11-101(a), Mississippi Code Ann. 1972;*

The Mississippi Fire Prevention Code adopted as its code the Standard Fire Prevention Code as published by the Southern Building Code Congress International's Code which was promulgated in 1991. Since that time the publisher of the official fire prevention code of the State of Mississippi which now makes up the MFPC , is the National Fire Protection Association "Life Safety Code" 8th edition. A copy of the pertinent parts of the "Life Safety Code" are attached hereto in the addendum. Under section 3.2.6 of the Life Safety Code "*shall*" indicates a mandatory requirement.

The VCJ Gym is defined as an "assembly occupancy" by the Code. The Code lists various examples of "assembly occupancies" in Section 6.1.2.1 and Section A.6.1.2.1. Clearly listed is "gymnasium". Under Chapter 13 of the Code "New and Existing Assembly Occupancies" section 13.3.1 of the code states;

"13.3.1 Protection of Vertical Openings"

"Any vertical opening shall be enclosed or protected in accordance with 8.2.5"

Section 8.2.5.1 states further *that "every floor that separates*

stories in a building shall be constructed as a smoke barrier to provide a degree of compartmentalization. Further Sec. A.3.3.20 of the code defines a "smoke barrier" as follows:

"A smoke barrier might be vertically or horizontally designed such as a wall, floor or ceiling assembly. A smoke barrier might or might not have a fire resistance rating. Application of smoke barrier criteria where required elsewhere in the code should be in accordance with Section 8.3"

Therefore, in accordance with the Code the suspended ceiling of the VCJ Gym in the area where the accident occurred is defined as a "smoke barrier".

Reading this provision with Section 8.3.2 "Continuity"

"Smoke barriers required by this code shall be continuous from an outside wall to an outside wall, from a floor to a floor, or from a smoke barrier to a smoke barrier or a combination thereof. Such barriers shall be continuous through all concealed spaces, such as those found above a ceiling, including interstitial spaces."

Now that it is clear that the City of Bay St. Louis had a statutory duty to comply with the *Mississippi Fire Prevention Code* which is embodied by the adoption of the *Life Safety Code* published by the *National Fire Protection Association* which specifically

requires that the “*Assembly Occupancy*” VCJ Gym provide protection in the form of *smoke barriers*, specifically, *the suspended ceiling at issue* in this case and required that it *shall* be *continuous*. And as if to point out the City’s deficiency straight out the Code specifically states in section 4.5.7 “Maintenance” :

4.5.7 Maintenance

Whenever or wherever any device , equipment , system, condition arrangement level of protection or any other feature is required for compliance with the provisions of this code, such device, equipment, system, condition arrangement, level of protection or other feature shall thereafter be maintained unless the code exempts such maintenance.

Defendants continue to maintain that the missing ceiling tiles were not a “dangerous condition” even when confronted with the Mississippi Fire Prevention Code’s *specific provisions*. The code even provides that the city *shall maintain* the “*smoke barrier*” *suspended ceiling*. According to Mrs. Kaigler the City left the ceiling in that condition for almost 15 years.

Clearly plaintiff’s have demonstrated that the defendants were under a clear duty under the Mississippi Fire Prevention Code to maintain the smoke barrier suspended ceiling. As such even under the specific ruling of the *Collins* court the defendants cannot hide from liability under statutory immunity. Clearly the City had a duty under the MFPC and breached its duty. The City fathers made it abundantly clear that they didn’t even know about their duty under the MFPC. The City’s lack of

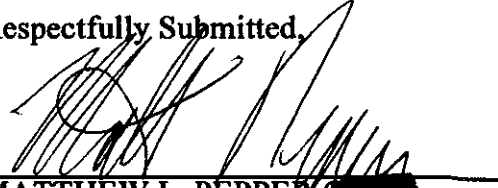
action indicates they breached the code, or , alternatively it creates a question of material fact to be determined at trial. *Thompson v Chick-Fil-A, Inc.*, 923 So. 2d 1049 (Miss. App. 2006); *Cook v Pay less Shoesource, Inc.*, 2006 U.S. Dist. LEXIS 33151 (S. D. Miss. 2006).

VI. CONCLUSION

Take away the defendant's statutory immunity defense and their case for summary judgment falls apart like a house of cards and it becomes clear that the lower Court erred. The sub question of whether the City of Bay St. Louis was acting in a discretionary authority in operating and maintaining the VCJ Gym, however resolved, does not allieve defendants of the obligation of *ordinary care*. The City had a *statutory duty* to maintain the suspended ceiling under the Mississippi Fire Prevention Code. Therefore, defendants' reliance on the Mississippi Torts Claims Act, (Miss. Code Ann. Sec. 11-46-9) to provide immunity and/or the ruling in *Collins is both hopeless and irresponsible*. Plaintiff has established that it has a *prima facie* case that Leshan was in fact an invitee on defendant's premises and therefore was entitled to *ordinary care* and as such is entitled to proceed to trial. *Ergo*, defendants owed plaintiff *the duty of ordinary care*. *Ordinary care* and the breach thereof are genuine issues of material fact which have not been resolved and are not suitable topics for summary judgment. Defendant's "*open and obvious*" defense fails as well under scrutiny as the *Mayfield* Court points out that even if the danger was *open and obvious*, it still does not answer the question if the defendants failed to adequately maintain its premises in a reasonably safe condition to an invitee. Defendants have

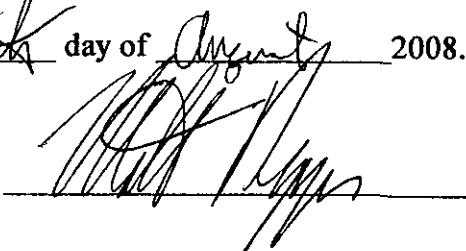
“jumped the gun” on their statutory immunity defense, exposed their negligence of the Mississippi Fire Prevention Code, shirked their statutory duty to maintain the VCJ Gym and without the statutory immunity from liability, the defendants Motion for Summary Judgment should have been denied by the lower Court. Accordingly, plaintiffs respectfully request that this Court reverse the lower Court’s granting of summary judgment and send this matter to trial.

Respectfully Submitted,


MATTHEW L. PEPPER
10536E Automall Parkway
D'Iberville, MS 39540
(601) 427-1061
Fax(228) 863-1175
Attorney For Plaintiffs/Appellants
Lois Kaigler and Leshan Kaigler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served on all counsel of record by placing same in the United States Mails properly addressed postage prepaid or by hand delivery this the 25th day of August 2008.



CERTIFICATE OF SERVICE FOR TRIAL JUDGE

I hereby certify that a copy of the original brief and record excerpts was served on the judge by sending same properly addressed at his published address, postage prepaid, this 5th day of September, 2008.



A handwritten signature in black ink, appearing to read "W. R. Faye", is written over a horizontal line.

APPENDIX

A. Mississippi Code Annotated 45-11-101

B. Mississippi Fire Prevention Code

C. Excerpts - Life Safety Code

D. Mississippi Code Annotated 11-46-9

§ 2-2-101. Promulgation; buildings to which code applies; plans for construction of private correctional facilities housing state inmates to be submitted to State Fire Marshal's office to ensure compliance with Mississippi Fire Prevention Code; examination of local fire prevention codes.

(1) The State Fire Marshal shall promulgate the Mississippi Fire Prevention Code which shall apply to:

(a) All buildings owned by the state or state agencies;

(b) All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code; however, the State Fire Marshal or his authorized representative shall perform investigations or inspections of such buildings only when advised by interested persons of a danger or hazardous inflammable condition existing in any building that would tend to impair the safety of persons or property, or when the State Fire Marshal or his authorized representative believes the investigation or inspection is in the interest of public safety. The investigation or inspection shall be made in accordance with

(c) All buildings, the permits for the construction of which are issued subsequent to the effective date of ~~the code~~ through ~~the code~~ and which are not less than seventy-five (75) feet in height; provided, however, that in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code;

(d) All buildings, the permits for construction of which are issued subsequent to July 1, 2004, constructed as private correctional facilities that house state inmates. Before such construction, construction plans must be submitted for review and approval to the State Fire Marshal's Office to ensure compliance with the Mississippi Fire Prevention Code; however, in any county or municipality that has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply instead of the Mississippi Fire Prevention Code. All private correctional facilities may be inspected as required by the State Fire Marshal or his duly authorized representative. Inspection fees and expenses authorized by ~~the State Fire Marshal or his duly authorized representative~~ shall be assessed for each inspection conducted by the State Fire Marshal's Office and shall be paid to the State Fire Marshal's Office;

(e) Any buildings, the permits for construction of which are issued subsequent to July 1, 2004, upon the request of any interested person. The interested person may submit the construction plans to the State Fire Marshal's Office for review and approval before construction to ensure compliance with the Mississippi Fire Prevention Code; however, in any county or municipality that has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply instead of the Mississippi Fire Prevention Code. Inspection fees and expenses authorized by ~~the State Fire Marshal or his duly authorized representative~~ shall be assessed for each inspection conducted by the State Fire Marshal's Office and shall be paid to the State Fire Marshal's Office;

(f) All buildings, the permits for construction of which are issued subsequent to July 1, 2005, constructed as private fraternity and sorority houses located on state property. Before such construction, construction plans shall be submitted for review and approval to the State Fire Marshal's Office to

ensure compliance with the Mississippi Fire Prevention Code. All private fraternity and sorority houses located on state property may be inspected as required by the State Fire Marshal or his duly authorized representative. All fraternity and sorority houses located on state property shall be equipped with an approved fire alarm and smoke detector system to be in compliance with the National Fire Code (NFPA) Standard 72 as published by the National Fire Protection Association and as same may be revised or amended. All fraternity and sorority houses constructed on state property after the effective date of House Bill No. 1132, 2005 Regular Session, shall be equipped with an approved automatic fire sprinkler system to be in compliance with the National Fire Code (NFPA) Standard 13 as published by the National Fire Protection Association and as same may be revised or amended.

(2) The State Fire Marshal shall annually examine the fire prevention codes adopted by counties and municipalities within the State of Mississippi and prepare a list thereof specifying which codes have provisions not less stringent than those of the Mississippi Fire Prevention Code.

Sources: Laws, 1978, ch. 502, § 1; Laws, 1992, ch. 328, § 2; Laws, 2004, ch. 359, § 1; Laws, 2005, ch. 527, § 1, eff from and after passage (approved Apr. 20, 2005.)

MISSISSIPPI



**RULES AND REGULATIONS
FOR THE
MISSISSIPPI FIRE PREVENTION CODE
AS ADOPTED, PURSUANT TO THE
ADMINISTRATIVE PROCEDURES ACT,
SECTION 25-41-1, MS CODE, 1972, ANNOTATED
MONDAY, AUGUST 17, 1992**

**GEORGE DALE
COMMISSIONER OF INSURANCE
AND STATE FIRE MARSHAL**

**MILLARD D. MACKEY
STATE CHIEF DEPUTY FIRE MARSHAL**

**STATE FIRE MARSHAL'S OFFICE
P.O. BOX 22542
JACKSON, MS 39225-2542
TELEPHONE NUMBER (601) 359-1061
FAX NUMBER (601) 359-1370**

TABLE OF CONTENTS

RULES AND REGULATIONS

MISSISSIPPI FIRE PREVENTION

I.	PROMULGATION AND PURPOSE	1
	Section 100 - General	1
II	DEFINITIONS	1
	Section 200 - Code Document - Section 45-11-103, Mississippi Code	1
	Section 201 - State Fire Officials	2
	Section 202 - Local Fire Officials	2
	Section 203 - Buildings and Public Assemblies	3
	Section 204 - Permits	4
III.	APPLICABILITY	4
	Section 300 - Scope	4
IV.	HIGH RISE BUILDINGS: SPRINKLER SYSTEMS AND PLAN REVIEW	5
	Section 400 - Sprinkler Systems	5
	Section 401 - Plan Review	5
V.	ENFORCEMENT	6
	Section 500 - Stipulations of Enforcement	6
	Section 501 - State Enforcement	6
	Section 502 - Local Enforcement	7
	Section 503 - Delegation of Inspections	7
	Section 504 - Permit Requirements	7
	Section 505 - Types of Permits	9
	Section 506 - Fire Investigations	9
VI.	ANNUAL REPORTING	10
	Section 600 - Local Fire Codes	10
VIII.	ALTERNATE SYSTEMS	10
	Section 700 - Minimum Requirements	10
VIII.	CODE REVISIONS	11
	Section 800 - Updating of Code	11
IX.	APPEALS	11
	Section 900 - Board of Adjustments and Appeals	11
	Section 901 - State Board of Adjustments and Appeals	11
	Section 902 - Local Board of Adjustments and Appeals	11
X.	PUBLIC ASSEMBLIES	12
	Section 1000 - Inspection of Exits	12
	Section 1001 - Announcements	12
	Section 1002 - Records	12
XI.	PENALTIES	13
	Section 1100 - Code Violation	13
	Section 1101 - Criminal Violation	13

- C. The State Fire Marshal shall have the authority to deviate from the minimum requirements of such Standard Fire Prevention Code when the imposition and enforcement of a specific requirement would cause undue hardship or when such deviation would enable builders to take advantage of new methods, materials or equipment which is of recognized adequacy.

Section 201 – State Fire Officials

- D. The inspection authority of the State Fire Marshal's Office is defined as follows:

1. The Commissioner of Insurance is by virtue of his office the State Fire Marshal.
2. The Commissioner of Insurance/State Fire Marshal shall appoint the State Chief Deputy Fire Marshal who along with his State Deputy Fire Marshal's shall be designated as a division of the Insurance Department.
3. The State Chief Deputy Fire Marshal and State Deputy Fire Marshals shall mean the inspecting and enforcing authority appointed by the State Fire Marshal.
4. "State Inspector" shall mean an authorized Inspector in the employ of the State Fire Marshal under the direction of the State Chief Deputy Fire Marshal.
5. "Special State Inspector" shall mean an authorized Inspector in the employ of other State or County Agencies of the State of Mississippi who has met the requirements of Section A101.4.2 "Inspector Qualifications" as set forth in Appendix A of the 1991 Edition of the Standard Fire Prevention Code and may be appointed at the discretion of the State Chief Deputy Fire Marshal to conduct inspections of buildings owned by the State of Mississippi or its political subdivisions. "Special State Inspectors" appointed under Section 201-D-5 are not entitled to receive additional compensation from the State Fire Marshal's Office for performing inspection duties under this section.

Section 202 – Local Fire Official

- E. The Local Fire Official is defined as a member of a county or municipal paid or volunteer fire department.
- F. "Duly Authorized Representative" shall mean "Special Local Inspector" who has met the requirements of Section A101.4.2 of the 1991 Edition of the

Standard Fire Prevention Code and may be appointed at the discretion of the State Chief Deputy Fire Marshal to conduct inspections of buildings owned by the State of Mississippi or its political subdivisions. "Special Local Inspectors" appointed under Section 202-F are not entitled to receive additional compensation from the State Fire Marshal's Office for performing inspection duties under this section.

Section 203 – Buildings and Public Assemblies

G. Buildings or Public Assemblies are defined as:

1. All buildings owned by the State or State Agencies or political subdivisions, Section 45-11-101 (a), Mississippi Code, 1972, Annotated;
2. All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, Section 45-11-101 (b), Mississippi Code, 1972, Annotated;
3. All buildings, the permits for the construction of which are issued subsequent to the effective date of Sections 45-11-101 through 45-11-111 and which are not less than seventy-five (75) feet in height; provided, however, that in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code, Section 45-11-101 (c), Mississippi Code, 1972, Annotated;
4. Large Public Assembly (A-1, 1991 Edition, Standard Fire Prevention Code) shall include theaters and places of assembly having a capacity of 1000 or more persons. Also, Large Assemblies shall include theaters and places of assembly having a working stage and having a capacity of 700 or more persons except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;
5. Small Public Assembly (A-2, 1991 Edition, Standard Fire Prevention Code) shall include theaters and places of public assembly with or without a legitimate stage having a capacity of 100 or more persons but having a capacity less than designated for Large Assembly except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;

Section 204 – Permits

- H. Permit applications are forms provided by the State Fire Marshal's Office for places of public assembly located outside the jurisdiction of counties or municipalities which have adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code.
- I. The Permit for Public Assemblies is a permit to ensure that said assemblies are in compliance with the Mississippi Fire Prevention Code.
- J. The Permit for State Properties is to ensure that said State Properties are in compliance with the Mississippi Fire Prevention Code.

III. APPLICABILITY

Section 300 – Scope

Section 45-11-105, Mississippi Code, 1972, Annotated, states that "The Mississippi Fire Prevention Code shall be enforced by the State Fire Marshal and such other persons as authorized thereby, including for this reason any county or municipal fire prevention personnel. The State Fire Marshal is authorized and empowered to promulgate rules and regulations for the enforcement of the Mississippi Fire Prevention Code." The Mississippi Fire Prevention Code applies to:

- A. All buildings owned by the State or State Agencies;
- B. All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;
- C. All high-rise buildings over seventy-five (75) feet in height, the permits for the construction of which are issued subsequent to the effective date of Sections 45-11-101 through 45-11-111; however, that in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code.

IV. HIGH-RISE BUILDINGS: SPRINKLER SYSTEMS AND PLAN REVIEW

Section 400 – Sprinkler Systems

- A. The Mississippi Fire Prevention Code, Section 45-11-103 of the Mississippi Code, 1972, Annotated, requires that sprinkler systems be installed in all high-rise buildings as follows:

1. All buildings over seventy-five (75) feet in height, the permits for the construction of which are issued subsequent to 1 July, 1978;
2. All existing buildings over seventy-five (75) feet in height in which twenty-five (25%) percent or more of the floor space is being reconstructed or added thereto.
3. Exception: Public utility company buildings in which water would cause severe damage to equipment such as telephone equipment, computers or electric services, and silos, grain elevators and other structures used solely for the storage of agricultural products are exempt from the provisions of this act.

Section 401 – Plan Review

- B. All buildings over seventy-five (75) feet in height that require sprinkler systems shall submit plans to the State Fire Marshal, except that in any county or municipality which has adopted a fire prevention with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code.
- C. Plans submitted for review by the State Fire Marshal shall bear an architects or engineers seal verifying compliance with the Mississippi Fire Prevention Code.

V. ENFORCEMENT

Section 500 – Stipulation of Enforcement

- A. The State Chief Deputy Fire Marshal or his State Deputy Fire Marshal or his duly authorized representative shall enforce the Mississippi Fire Prevention Code pertaining to the prevention, inspection or investigation of fires, Section 45-11-105, Mississippi Code, Annotated:
 1. Whenever the State Chief Deputy Fire Marshal has probable cause to believe that there exists in any building or upon any premises any condition or code violation which makes such building or premises unsafe, dangerous, or hazardous.
 2. Whenever required to meet provisions of state agency license requirements.

3. Whenever a citizen reports an alleged violation.
 4. Whenever the chief of a fire department or other law enforcement authority of any county or municipality reports an alleged violation.
- B. The Mississippi Fire Prevention Code shall be enforced on the state and local levels of government as defined under Sections 501 and 502.

Section 501 – State Enforcement

- A. The State Chief Deputy Fire Marshal or his State Deputy Fire Marshal or his duly authorized representative shall be charged with the enforcement of the Mississippi Fire Prevention Code in those areas in buildings specified in Section 45-11-101, (a), (b), and (c) Mississippi Code, 1972, Annotated.
- B. The Fire Code Enforcement and Inspection Division of the State Fire Marshal's Office shall carry out the duties and responsibilities of the Mississippi Fire Prevention Code in those areas in buildings specified in Section 45-11-101, (a), (b) and (c) Mississippi Code, 1972, Annotated.
- C. The State Chief Deputy Fire Marshal and State Deputy Fire Marshals shall have the status and power of a law enforcement officer in performing their duties pertaining to the prevention, inspection, or investigation of fires under the Mississippi Fire Prevention Code, Section 45-11-105, Mississippi Code, 1972, Annotated.

Section 502 – Local Enforcement

- A. Municipalities which have adopted a Fire Prevention Code not less stringent than the Mississippi Fire Prevention Code shall enforce the provisions of said codes in their respective jurisdictions, except for buildings owned by the State or State Agencies.
- B. Counties which have adopted a fire prevention code not less stringent than the Mississippi Fire Prevention Code shall enforce the provision of said code in their respective jurisdictions, except for buildings owned by the State or State Agencies.

Section 503 – Delegation of Inspections

- A. The State Chief Deputy Fire Marshal may at his discretion designate qualified local fire prevention officials to perform inspections of buildings owned by the State of Mississippi or its political subdivisions, Section 45-11-105, Mississippi Code, 1972, Annotated.

- B. Local Fire Officials, who meet the requirements of Section A101.4.2 "Inspector Qualifications" as set forth in Appendix A of the 1991 Edition of the Standard Fire Prevention Code, may be appointed at the discretion of the State Chief Deputy Fire Marshal, Section 45-11-105, Mississippi Code, 1972, Annotated.**
- C. Local fire officials, designated as Inspectors by the State Chief Deputy Fire Marshal to conduct inspections of buildings owned by the State or State Agencies, shall submit copies of all inspection reports on forms provided by the State Fire Marshal's Office.**
- D. Implementation and enforcement of the Mississippi Fire Prevention Code as provided by Section 45-11-105 of the Mississippi Code, 1972, Annotated, shall be the responsibility of the State Chief Deputy Fire Marshal or his State Deputy Fire Marshals.**

Section 504 – Permit Requirements

- E. Permits are required for commercial places of Public Assembly as follows:**
 - 1. Permits are required for commercial places of public assembly as defined in Section 203—Buildings and Public Assemblies of these Rules and Regulations, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, Mississippi Code, 1972, Annotated, as amended effective July 1, 1992.**
 - a. Large Public Assembly (A-1, 1991 Edition, Standard Fire Prevention Code) shall include theaters and places of assembly having a capacity of 1000 or more persons. Also, Large Assemblies shall include theaters and places of assembly having a working stage and having a capacity of 700 or more persons except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;**
 - b. Small Public Assembly (A-2, 1991 Edition, Standard Fire Prevention Code) shall include theaters and places of public assembly with or without a legitimate stage having a capacity of 100 or more persons but having a capacity less than designated for Large Assembly except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code.**
 - 2. The State Fire Marshal shall establish permit requirements for commercial places of Public Assembly, except in any county or municipality which**

has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, Mississippi Code, 1972, Annotated, as amended effective July 1, 1992.

3. Permit applications for commercial places of public assembly shall be filed on forms provided by the State Fire Marshal.
4. Permit fees of not less than one hundred dollars (\$100.00) which shall include but not be limited to: (a) each on-site inspection; (b) attorney fees; (c) architect or engineer plan review fees; (d) any other fees; and reasonable and necessary travel expenses shall be assessed for each inspection conducted by the State Chief Deputy Fire Marshal or his State Deputy Fire Marshals or his duly authorized representative and shall be paid to the Office of the State Fire Marshal.
5. Permit applications for safety inspections shall be filed with the Office of the State Fire Marshal for commercial places of Public Assembly defined under the 1991 edition of the Standard Fire Prevention Code A-1, Large Assembly, and A-2, Small Assembly.
6. Plans submitted for review for places of public assembly by the State Fire Marshal shall bear an architects or engineers seal verifying compliance with the Mississippi Fire Prevention Code.
7. Inspection fees and expenses authorized under Section 45-11-105, Mississippi Code, 1972, subsection (2) shall not be assessed for the inspection of buildings owned by the State of Mississippi or its political subdivisions or for inspections conducted by local fire departments or other local agencies with authority to conduct inspection or for the inspection of buildings used for religious assemblies.

Section 505 – Types of Permits

F. Temporary Permit—The State Fire Marshal shall issue a temporary permit for:

- (a) All buildings owned by the state or state agencies;
- (b) All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;
- (c) All buildings, the permit for the construction of which are issued subsequent to the effective date of Sections 45-11-101 through 45-11-111 and which are not less than seventy-five (75) feet in height;

provided, however, that in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code.

- (d) The period of time for which the temporary permit is issued shall be at the discretion of the State Fire Marshal, but shall not exceed one year unless so specified.

G. Permit—The State Fire Marshal shall issue a regular permit when all conditions and requirements have met compliance.

Section 506 – Fire Investigations

H. It shall be the duty of the State Chief Deputy Fire Marshal to investigate by himself or his deputy, fire occurring within the State as required by the Mississippi Fire Prevention Code Section 45-11-103, Mississippi Code, 1972, as set forth by 1.04 of the Standard Fire Prevention Code, 1976 edition, as follows:

1. All buildings owned by the State or State Agencies.
2. All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code.

I. It shall also be the duty of the State Chief Deputy Fire Marshal to investigate by himself or his deputy the origin of every fire occurring within the State as required by Section 45-11-1, Mississippi Code, 1972, as follows:

1. to which his attention is called by the chief of the fire department,
2. or other law enforcement officials of any county or municipality, and
3. or by any party in interest whenever, in his judgement, there be sufficient evidence or circumstances indicating that such fire may be of incendiary origin.

VI. ANNUAL REPORTING

Section 600 – Local Fire Codes

A. In accordance with Section 45-11-101, Mississippi Code, 1972, each county or municipality which has adopted a fire prevention code shall file an annual report as required by the State Fire Marshal's Office on said code.

- B. A list of codes adopted by counties and municipalities will be reviewed and a list will be compiled showing which codes have provisions not less stringent than the Mississippi Fire Prevention Code.

VII. ALTERNATE SYSTEMS

Section 700 – Minimum Requirements

- A. The State Fire Marshal shall have the authority to deviate from the minimum requirements of the Mississippi Fire Prevention Code.
- B. Deviations may occur when enforcement of a specific requirement would cause undue hardship.
- C. Deviations may also occur when changes would be permitted allowing the use of new materials, technology, or equipment which are approved by the Standard Fire Prevention Code or other recognized national standards.

VIII. CODE REVISIONS

Section 800 – Updating of Code

- A. The State Fire Marshal shall annually review the amendments and new editions of the Standard Fire Prevention Code as published by the Southern Building Code Congress International. [Section 45-11-101, Mississippi Code, 1972, Annotated]
- B. Upon review new amendments and editions, which are in compliance with the intent of the Mississippi Fire Prevention Code, shall be adopted, Section 45-11-103, Mississippi Code, 1972, Annotated.

IX. APPEALS

Section 900 – Board of Adjustments and Appeals

The Board of Adjustments and Appeals is a board appointed to hear grievances filed on orders issued by fire officials. The Board shall be appointed in accordance with Chapter 1, Section 105, of the Standard Fire Prevention Code, 1991 Edition.

Section 901 – State Board of Adjustments and Appeals

- A. The State Board of Adjustments and Appeals shall be appointed by the State Fire Marshal to hear grievances filed on orders issued by the State Chief

Deputy Fire Marshal, State Deputy Fire Marshals, and his duly authorized representative

B. The State Board shall be appointed by the State Fire Marshal in accordance with Chapter 1, Section 501, Board of Adjustments and Appeals of the Standard Fire Prevention Code, 1991 Edition.

Section 9-2 Local Board of Adjustments and Appeals

C. Municipalities having adopted a fire prevention code not less stringent than the Mississippi Fire Prevention Code shall appoint a local board of adjustments and appeals to hear grievances on orders issued by local fire officials.

D. The local board of adjustments and appeals shall not hear grievances on orders issued by the State Fire Marshal.

X. PUBLIC ASSEMBLIES

Section 9-3 Inspection of Exits

A. Inspection of exits shall be conducted not more than ninety (90) minutes prior to the assembly commencing or any non continuous activity, event, performance, show, meeting, function, or other occasion for which persons will be admitted to Class A or B commercial place of assembly as defined in the 1988 edition of the Life Safety Code - NFPA No. 101.

B. The owner or his designee pursuant of written authority, instructions, or provisions shall inspect every required exit way of appropriate design and way of egress to determine the egress.

C. If an inspection reveals that any required means of egress is obstructed, unusable, locked, blocked, damaged, or otherwise unsound for immediate use, the scheduled program shall not begin, nor shall admission to the place of assembly be permitted, until necessary corrective action has been completed.

Section 9-4 Assembly Areas

D. If any (30) or more persons prior to the start of the program, the owner or his designee shall notify all agencies concerning the location of the assembly area in case of fire or other emergencies.

E. The design team with the State Fire Marshal shall be responsible to ensure that the assembly area is safe and that the exit is clear of any obstruction.

ways or paths of egress from this building in the event of an emergency.

Please take a moment to locate the exit nearest your seat. Should an emergency arise, please move in an orderly fashion through the nearest exit way.

Thank you for your attention."

Section 1002 – Records

- F. Accurate records of all inspections, corrections, and notifications shall be kept and retained for at least two (2) years in the offices of the respective building owners. The records shall contain:
1. A brief description of each activity, event, performance, etc., including date, time, and location;
 2. The name and signature of the person who performed each requirement; and
 3. The date and time when each requirement was performed.
- G. Such records shall be made available upon request of the State Fire Marshal.

XI. PENALTIES

Section 1100 – Code Violation

- A. Any person, firm, or corporation who shall knowingly and willfully violate the terms or provisions of the Mississippi Fire Prevention Code, shall be guilty of a misdemeanor and upon conviction therefore shall be sentenced to pay a fine not to exceed one thousand dollars (\$1,000.00).
- B. In cases of continuing violations without reasonable effort on the part of the defendant to correct same, each day the violation continues thereafter shall be a separate offense.

Section 1101 – Criminal Violation

- C. In accordance with Sections 97-17-01 through 97-17-14, Mississippi Code, 1972, any person, who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any buildings or properties, upon conviction, shall be guilty of arson as set forth in the above cited Sections.
-

**STATE OF MISSISSIPPI
SECTIONS 45-11-101 – 45-11-111, MS CODE, 1972
MISSISSIPPI FIRE PREVENTION CODE**

45-11-101. Promulgation; buildings to which code applies; examination of local fire prevention codes.

The State Fire Marshal shall promulgate the Mississippi Fire Prevention Code which shall apply to:

- (a) All buildings owned by the state or state agencies;**
- (b) All buildings utilized for public assembly, except in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code;**
- (c) All buildings, the permits for the construction of which are issued subsequent to the effective date of Sections 45-11-101 to 45-11-111 and which are not less than seventy-five (75) feet in height; provide however, that in any county or municipality which has adopted a fire prevention code with standards not less stringent than the Mississippi Fire Prevention Code, the provisions and enforcement mechanism thereof shall apply and not the Mississippi Fire Prevention Code. The State Fire Marshal shall annually examine the fire prevention codes adopted by counties and municipalities within the State of Mississippi and prepare a list thereof specifying which codes have provisions not less stringent than those of the Mississippi Prevention code.**

SOURCES: Laws, 1978, ch. 502, 1, eff from and after July 1, 1992. Cross References—

As to interlocal cooperation of governmental units relating to fire protection and safety, see, 17-113-1.

As to powers of municipalities in regard to fire prevention, see, 21-19-21.

As to State Fire Marshal generally, see, 45-11-1 et seq.

Research and Practice References —

13 Am Jur 2d, Buildings, 18 et seq.

45-11-103. Standards; deviation from standards; automatic sprinkler systems.

The standards embodied in said code shall be based upon and shall be not less stringent than the standards established by the standard fire prevention code as promulgated by the Southern Building Code Congress International, Inc., and as the same may be revised or amended; however, the State Fire Marshal shall have the authority to deviate from the minimum requirements of such Standard Fire Prevention Code when the imposition and enforcement of a specific requirement of the Standard Fire Prevention Code would cause unnecessary hardship or when such deviation would enable builders to take advantage of new methods, materials or equipment which is of recognized adequacy.

The Mississippi Fire Prevention Code shall include provisions that every new building over seventy-five (75) feet in height in the State of Mississippi for which a permit is issued after the passage of Sections 45-11-101 to 45-11-111 shall be equipped throughout the building with a totally automatic sprinkler system designed for life safety and fire prevention and protection. This provision shall include every building over seventy-five (75) feet in height constructed after the effective date of Sections 45-11-101 to 45-11-111, or to any existing building in which twenty-five percent (25%) or more of the floor space is being reconstructed or added thereto. However, public utility company buildings in which water would cause severe damage to equipment such as telephone equipment, computers or electric services, and silos, grain elevators and other structures utilized solely for the storage of agricultural products are exempt from the automatic sprinkler system provisions of the code.

SOURCES: Laws, 1978, ch. 502,2, eff from and after July 1, 1992.

Cross references—

as to State Fire Marshal generally, see, 45-11-1 et seq.

As to Rules and Regulations relating to hotels, schools and other public buildings generally, see, 45-11-21 et seq.

Research and Practice References—

13 Am Jur 2d, Buildings, 25

Prevention and control of fires, 8 Am Jur legal Forms 2d, 117.11 et seq.

45-11-105. Enforcement of code; rules and regulations.

(1) The Mississippi Fire Prevention Code shall be enforced by the State Fire Marshal and such other persons as authorized thereby, including for this reason any county or municipal fire prevention personnel, pertaining to the prevention, inspection or investigation of fires. The State Chief Deputy Fire Marshal and State Deputy Fire Marshals shall have the status and powers of a law enforcement officer in performing their duties under the Mississippi Fire Prevention Code as authorized by standards set by Section 45-11-103, Mississippi code of 1972. The State Chief Deputy Fire Marshal and State Deputy Fire Marshals serving under permanent appointment on January 1, 1992 shall not be required to meet any requirements of Section 45-6-11 of the Mississippi Code of 1972. The State Fire Marshal is authorized and empowered to promulgate rules and regulations for the enforcement of the Mississippi Fire Prevention Code.

(2) Applications for fire safety inspections shall be filed with the Office of the State Fire Marshal. An inspection fee of not less than one hundred dollars (\$100.00) and reasonable and necessary travel expenses as provided under Section 25-3-41, Mississippi Code of 1972, shall be assessed for each inspection conducted by the Office of the State Fire Marshal and shall be paid to the Office of the State Fire Marshal.

(3) The inspection fee and expenses authorized under subsection (2) shall not be assessed for the inspection of buildings owned by the State of Mississippi or its political subdivisions or for inspections conducted by local fire departments or other local agencies with authority to conduct inspections or for the inspection of buildings used for religious assemblies.

SOURCES: Laws, 1978, ch. 502, 3, eff from and after July 1, 1992.

Cross references—

As to State Fire Marshal generally, see 45-11-1 et seq.

Research and Practice References—

13 AM Jur 2d, Buildings, 18 et seq.

45-11-107. Application of Sections 45-11-101 to 45-11-111.

Unless otherwise provided, Sections 45-11-101 to 45-11-111 shall apply to new or remodeled buildings, installations, equipment or conditions; however Sections 45-11-101 to 45-11-111 shall also apply to existing buildings, installations, equipment, conditions and occupancies where safety to life requires compliance with Sections 45-11-101 to 45-11-111, as determined by the State Fire Marshal.

SOURCES: LAWS, 1978, CH. 502, 4, eff from and after July 1, 1992.

Cross references--

As to Rules and Regulations relating to hotels, schools and other public building generally, see, 45-11-21 et seq.

Research and Practice References--

13 Am Jur 2d, Buildings, 18 et seq.

45-11-109. Actions or proceedings to remedy prohibited acts.

In case any building is constructed or reconstructed or any building is used in violation of the Mississippi Fire Prevention Code or of any ordinance or other regulation made under authority conferred hereby, the State Fire Marshal or the proper local authorities of any county or municipality in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful construction or reconstruction, to restrain, correct or abate such violation or to prevent the occupancy of said building.

SOURCES: Laws, 1978, ch. 502, 5, eff from and after July 1, 1992.

Cross references--

As to State Fire Marshal generally, see, 45-11-1 et seq.

As to Rules and Regulations relating to hotels, schools and other public buildings generally, see, 45-11-21 et seq.

45-11-111. Penalties.

Any person, firm or corporation, who shall knowingly and willfully violate the terms or provisions of the Mississippi Fire Prevention Code, shall be guilty of a misdemeanor and upon conviction therefor shall be sentenced to pay a fine of not to exceed one thousand dollars (\$1,000), and in case of continuing violations without reasonable effort on the part of the defendant to correct same, each day the violation continues thereafter shall be a separate offense.

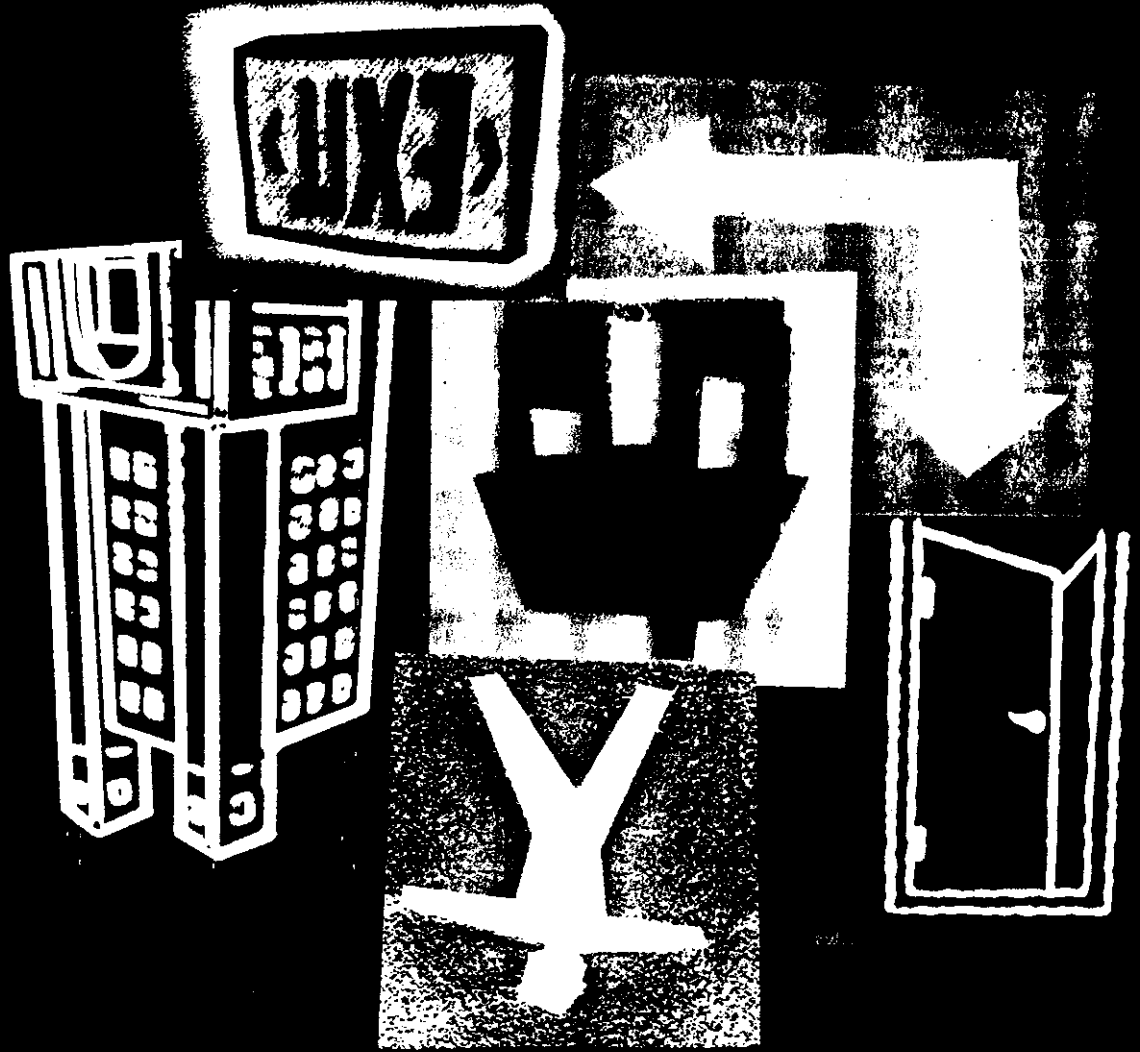
SOURCES: Laws, 1978, ch. 502, 6, eff from and after July 1, 1992.

Cross references--

As to Rules and Regulations relating to hotels, schools and other public buildings generally, see, 45-11-21 et seq.



Ron Cote, P.E., Editor
Eighth Edition



Life Safety Code® HANDBOOK

Life Safety Code Handbook

EIGHTH EDITION

EDITED BY

Ron Côté, P.E.

With the complete text of the 2000 edition of NFPA 101®, *Life Safety Code*®



National Fire Protection Association, Quincy, Massachusetts

to more than one occupancy. Terms applicable only to one occupancy were typically defined within the chapters addressing that occupancy. Cross-references were maintained so that a user looking for an occupancy-specific definition in Chapter 3—and finding only the term without its definition—would be directed to the occupancy chapter for the full definition.

In this edition of the *Code*, all defined terms and their definitions appear in Chapter 3. Where the term has particular applicability to a specific chapter or occupancy, the term—without definition—appears in the definitions subsection of that chapter and a cross-reference sends the user to Chapter 3 for the full definition.

The one exception to the rule—that full definitions appear only in Chapter 3—occurs in Chapter 6, *Classification of Occupancy and Hazard of Contents*. The definitions of each of the occupancies (for example, assembly, educational, health care, residential) appear in their entirety in Chapter 3 and are repeated in their entirety in Chapter 6. The repetition is desirable so that a user attempting to classify an occupancy has access to all the definitions for purposes of comparison. If the user had to rely solely on the definitions of Chapter 3 when considering occupancy classification, the task would be more difficult.

Section 3.2 Official NFPA Definitions

3.2.1* Approved. Acceptable to the authority having jurisdiction.

A.3.2.1 Approved. The National Fire Protection Association does not approve, inspect, or certify any installations, procedures, equipment, or materials; nor does it approve or evaluate testing laboratories. In determining the acceptability of installations, procedures, equipment, or materials, the authority having jurisdiction may base acceptance on compliance with NFPA or other appropriate standards. In the absence of such standards, said authority may require evidence of proper installation, procedure, or use. The authority having jurisdiction may also refer to the listings or labeling practices of an organization that is concerned with product evaluations and is thus in a position to determine compliance with appropriate standards for the current production of listed items.

3.2.2* Authority Having Jurisdiction. The organization, office, or individual responsible for approving equipment, materials, an installation, or a procedure.

A.3.2.2 Authority Having Jurisdiction. The phrase “authority having jurisdiction” is used in NFPA documents in

a broad manner, since jurisdictions and approval agencies vary, as do their responsibilities. Where public safety is primary, the authority having jurisdiction may be a federal, state, local, or other regional department or individual such as a fire chief; fire marshal; chief of a fire prevention bureau, labor department, or health department; building official; electrical inspector; or others having statutory authority. For insurance purposes, an insurance inspection department, rating bureau, or other insurance company representative may be the authority having jurisdiction. In many circumstances, the property owner or his or her designated agent assumes the role of the authority having jurisdiction; at government installations, the commanding officer or departmental official may be the authority having jurisdiction.

3.2.3* Code. A standard that is an extensive compilation of provisions covering broad subject matter or that is suitable for adoption into law independently of other codes and standards.

A.3.2.3 Code. The decision to designate a standard as a “code” is based on such factors as the size and scope of the document, its intended use and form of adoption, and whether it contains substantial enforcement and administrative provisions.

3.2.4 Labeled. Equipment or materials to which has been attached a label, symbol, or other identifying mark of an organization that is acceptable to the authority having jurisdiction and concerned with product evaluation, that maintains periodic inspection of production of labeled equipment or materials, and by whose labeling the manufacturer indicates compliance with appropriate standards or performance in a specified manner.

3.2.5* Listed. Equipment, materials, or services included in a list published by an organization that is acceptable to the authority having jurisdiction and concerned with evaluation of products or services, that maintains periodic inspection of production of listed equipment or materials or periodic evaluation of services, and whose listing states that either the equipment, material, or service meets appropriate designated standards or has been tested and found suitable for a specified purpose.

A.3.2.5 Listed. The means for identifying listed equipment may vary for each organization concerned with product evaluation; some organizations do not recognize equipment as listed unless it is also labeled. The authority having jurisdiction should utilize the system employed by the listing organization to identify a listed product.

3.2.6 Shall. Indicates a mandatory requirement.

3.2.7 Should. Indicates a recommendation or that which is advised but not required.

- a. It shall be made on either side of the smoke partitions.
- b. It shall be made by an approved device that is designed for the specific purpose.

8.2.5.2 Openings located at points where smoke partitions meet the outside walls, other smoke partitions, smoke barriers or fire barriers of a building shall meet one of the following conditions:

- a. They shall be filled with a material that is capable of limiting the transfer of smoke.
- b. They shall be made by an approved device that is designed for the specific purpose.

8.2.5.3* Air transfer openings in smoke partitions shall be provided with approved dampers designed to limit the transfer of smoke. Dampers in air transfer openings shall close upon detection of smoke by approved smoke detectors installed in accordance with NFPA 72, *National Fire Alarm*

Code. If a duct or pipe runs to a smoke partition, pierces the partition, and continues its run on the other side of the partition, no transfer opening exists. Given that a transfer opening is present, there is no requirement for a smoke leakage-rated damper. If such a duct or pipe runs through a smoke partition, and HVAC systems without dampers are to spread smoke, smoke spread will occur via migration, because the provisions of NFPA 90A, *Standard for the Installation of Air-Conditioning and Ventilating Systems*, require the shutdown of most of the fans that would otherwise push and pull smoke through the ductwork.

8.2.5.4 An air transfer opening as defined in NFPA 90A, *Standard for the Installation of Air-Conditioning and Ventilating Systems*, is an opening designed to allow the movement of environmental air between two contiguous spaces.

Vertical Openings.

Defective or improperly protected vertical openings have consistently been major contributing factors in multiple-death fires. This is particularly well illustrated by the two deadliest hotel fires in recent years in the U.S. and its possessions.²²

The unprotected vertical opening between the ground level, where fire originated in the 1986 Duquesne Plaza Hotel in which 97 people died in San Juan, Puerto Rico, and the casino level, where nearly all the deaths occurred, would not be allowed by the Code. Given the lack of other fire protection design features of that area.²³

In the 1980 MGM Grand Hotel fire in Las Vegas, Nevada, where 85 people died, smoke spread occurred via unprotected vertical openings (concealed spaces, elevator shafts) and insufficiently protected exit stair enclosures.²⁴ Many factors contributed to the vertical smoke spread, including the following:

- (1) Unprotected seismic joint shafts and elevator hoistways
- (2) Insufficiently fire resistance-rated construction used in interior stair enclosures
- (3) Exposure of exit stair and exit passageway spaces to casino level plenum air
- (4) Heating, ventilating, and air conditioning systems with fire dampers that did not operate

Most of the hotel and motel fires of recent decades that have resulted in 10 or more fatalities have involved unprotected vertical openings, typically unenclosed interior stairs.

8.2.5.1 Every floor that separates stories in a building shall be constructed as a smoke barrier to provide a basic degree of compartmentation. (See 3.3.182 for definition of *Smoke Barrier*.)

Exception: This requirement shall not apply where otherwise specified by 8.2.5.5, 8.2.5.6, or Chapters 11 through 42.

Although the Code requires that every floor be constructed as a smoke barrier, the intent of the requirement is tempered to emphasize that a basic degree of compartmentation be provided. The reference to the definition of *smoke barrier* in 3.3.182 provides the user with the information that such barriers might have protected openings. Thus, it is not the Code's intent that every floor must restrict the passage of smoke to the same degree as that of a required smoke barrier in accordance with the provisions of Section 8.3. Even required smoke barriers, which must comply with Section 8.3, are afforded the use of Exception No. 4 to 8.3.5.1, which allows smoke dampers to be omitted where ducts penetrate floors that serve as smoke barriers. See commentary on Exception No. 4 to 8.3.5.1.

8.2.5.2* Openings through floors, such as stairways, hoistways for elevators, dumbwaiters, and inclined and vertical conveyors; shaftways used for light, ventilation, or building services; or expansion joints and seismic joints used to allow structural movements shall be enclosed with fire barrier walls. Such enclosures shall be continuous from floor

to limit the production of toxic products to a level that is not life threatening.

The requirement for separated rooms or spaces can be met on an otherwise undivided floor by enclosing the elevator lobby with ordinary glass or other simple enclosing partitions that are smoke resisting.

For some occupancies, one accessible room or space is permitted.

3.3.14.1 Area of Refuge, Accessible. An area of refuge that complies with the accessible route requirements of CABO/ANSI A117.1, *American National Standard for Accessible and Usable Buildings and Facilities*.

3.3.15 Assembly Occupancy. See 3.3.134.2, *Occupancy, Assembly*.

3.3.16 Atmosphere, Common. The atmosphere that exists between rooms, spaces, or areas within a building that are not separated by an approved smoke barrier.

3.3.17 Atmosphere, Separate. The atmosphere that exists between rooms, spaces, or areas that are separated by an approved smoke barrier.

3.3.18* Atrium. A large-volume space created by a floor opening or series of floor openings connecting two or more stories that is covered at the top of the series of openings and is used for purposes other than an enclosed stairway; elevator hoistway; escalator opening; or utility shaft used for plumbing, electrical, air-conditioning, or communications facilities.

A.3.3.18 Atrium. As defined in NFPA 92B, *Guide for Smoke Management Systems in Malls, Atria, and Large Areas*, a large-volume space is an uncomparted space, generally two or more stories in height, within which smoke from a fire either in the space or in a communicating space can move and accumulate without restriction. Atria and covered malls are examples of large-volume spaces.

3.3.19 Automatic. That which provides a function without the necessity of human intervention.

3.3.20* Barrier, Smoke. A continuous membrane, or a membrane with discontinuities created by protected openings, where such membrane is designed and constructed to restrict the movement of smoke.

A.3.3.20 Barrier, Smoke. A smoke barrier might be vertically- or horizontally-aligned, such as a wall, floor, or ceiling assembly. A smoke barrier might or might not have a fire resistance rating. Application of smoke barrier criteria where required elsewhere in the *Code* should be in accordance with Section 8.3.

3.3.21* Barrier, Thermal. A material that limits the average temperature rise of an unexposed surface to not more

than 250°F (139°C) for a specified fire exposure complying with the standard time-temperature curve of NFPA 251, *Standard Methods of Tests of Fire Endurance of Building Construction and Materials*.

A.3.3.21 Barrier, Thermal. Finish ratings, as published in the *UL Fire Resistance Directory*, are one way of determining thermal barrier.

3.3.22* Birth Center. A facility in which low-risk births are expected following normal, uncomplicated pregnancies, and in which professional midwifery care is provided to women during pregnancy, birth, and postpartum.

A.3.3.22 Birth Center. A birth center is a low-volume service for healthy, childbearing women, and their families, who are capable of ambulation in the event of fire or fire-threatening events. Birth center mothers and babies have minimal analgesia, no general or regional anesthesia, and are capable of ambulation, even in second-stage labor.

3.3.23 Bleachers. A grandstand in which the seats are not provided with backrests.

3.3.24 Board and Care. See 3.3.163, *Residential Board and Care Occupancy*.

3.3.25* Building. Any structure used or intended for supporting or sheltering any use or occupancy.

A.3.3.25 Building. The term *building* is to be understood as if followed by the words *or portions thereof*. (See also *Structure*, A.3.3.197.)

3.3.25.1* Building, Apartment. A building containing three or more dwelling units with independent cooking and bathroom facilities.

A.3.3.25.1 Building, Apartment. The *Code* specifies, that wherever there are three or more living units in a building, the building is considered an apartment building and is required to comply with either Chapter 30 or 31, as appropriate. Townhouse units are considered to be apartment buildings if there are three or more units in the building. The type of wall required between units in order to consider them to be separate buildings is normally established by the authority having jurisdiction. If the units are separated by a wall of sufficient fire resistance and structural integrity to be considered as separate buildings, then the provisions of Chapter 24 apply to each townhouse. Condominium status is a form of ownership, not occupancy; for example, there are condominium warehouses, condominium apartments, and condominium offices.

3.3.25.2 Building, Bulk Merchandising Retail. A building in which the sales area includes the storage of combustible materials on pallets, in solid piles, or in racks in excess of 12 ft (3.7 m) in storage height.

A.8.3.1 Wherever smoke barriers and doors therein require a degree of fire resistance as specified by requirements in the various occupancy chapters (Chapter 12 through Chapter 42), the construction should be a fire barrier that has been specified to limit the spread of fire and restrict the movement of smoke. (See 8.2.3.2.)

It is imprecise to refer to a "1-hour smoke barrier." It is more accurate to refer to a "smoke barrier that additionally has a 1-hour fire resistance rating." A barrier with only a fire resistance rating does not necessarily make an effective smoke barrier. For example, a fire barrier, if rated at less than 2 hours, would not be required to have either a fire damper or smoke damper where ductwork penetrates the barrier. A smoke barrier, in accordance with Section 8.3, would have ducted penetrations protected by smoke dampers per 8.3.5.1. For additional information on fire barrier testing, rating, and installation, see the commentary following 8.2.3.1.1 and 8.2.3.2.4.1.

8.3.2* Continuity.

Smoke barriers required by this *Code* shall be continuous from an outside wall to an outside wall, from a floor to a floor, or from a smoke barrier to a smoke barrier or a combination thereof. Such barriers shall be continuous through all concealed spaces, such as those found above a ceiling, including interstitial spaces.

Exception: A smoke barrier required for an occupied space below an interstitial space shall not be required to extend through the interstitial space, provided that the construction assembly forming the bottom of the interstitial space provides resistance to the passage of smoke equal to that provided by the smoke barrier.

A.8.3.2 To ensure that a smoke barrier is continuous, it is necessary to seal completely all openings where the smoke barrier abuts other smoke barriers, fire barriers, exterior walls, the floor below, and the floor or ceiling above.

It is not the intent to prohibit a smoke barrier from stopping at a fire barrier if the fire barrier meets the requirements of a smoke barrier (that is, the fire barrier is a combination smoke barrier/fire barrier).

In occupancies where evacuation is a last resort or is expected to be otherwise delayed, smoke barriers and doors therein will require a degree of fire resistance as specified by the requirements found in the *Code's* occupancy chapters (Chapters 12 through 42).

Other openings in smoke and fire barriers must

be protected as well. Heating, air conditioning, and ventilation ducts provide a ready path for smoke and fire to travel from one area to another unless carefully protected. Penetrations in walls and ceiling construction for utility lines and other building services must be firestopped to prevent fire spread. The hidden spaces behind suspended ceilings and attic spaces are out of sight and easily overlooked.

The exception to 8.3.2 must be used with care. Several chapters require the smoke barrier to be fire resistance rated and, therefore, the smoke barrier would be permitted to terminate at the ceiling only if the ceiling were of the same rating (see commentary on 8.2.2.2). Also, even if no fire resistance rating were required, it is difficult to ensure that a ceiling is smoketight unless it is of monolithic construction without air-handling penetrations. However, this kind of construction is often found in apartment buildings, hotels, and dormitories; consequently, the exception can be useful.

8.3.3 Fire Barrier Used as Smoke Barrier.

A fire barrier shall be permitted to be used as a smoke barrier, provided that it meets the requirements of 8.3.4 through 8.3.6.

8.3.4 Doors.

8.3.4.1* Doors in smoke barriers shall close the opening leaving only the minimum clearance necessary for proper operation and shall be without undercuts, louvers, or grilles.

A.8.3.4.1 The clearance for proper operation of smoke doors is defined as $\frac{1}{8}$ in. (0.3 cm). For additional information on the installation of smoke-control door assemblies, see NFPA 105, *Recommended Practice for the Installation of Smoke-Control Door Assemblies*.

NFPA 105, *Recommended Practice for the Installation of Smoke-Control Door Assemblies*, acknowledges that a nationally recognized test for the measurement of smoke leakage does not exist.³¹ However, NFPA 105 recommends that Underwriters Laboratories, UL 1784, *Air Leakage Tests of Door Assemblies*, can be used to measure ambient and warm air leakage rates of door assemblies.³²

UL 1784 should determine satisfactory performance if recognized design features are also taken into account, such as close-fitting assemblies, limited deflections, and the use of gasketing and sealing materials. The document then provides performance criteria for determining maximum air leakage rates

- (4) Fire protection available
- (5) Height and type of construction of the building or structure
- (6) Other factors necessary to provide occupants with a reasonable degree of safety

4.5.3 Means of Egress.

4.5.3.1 Number of Means of Egress. Two means of egress, as a minimum, shall be provided in every building or structure, section, and area where size, occupancy, and arrangement endanger occupants attempting to use a single means of egress that is blocked by fire or smoke. The two means of egress shall be arranged to minimize the possibility that both might be rendered impassable by the same emergency condition.

4.5.3.2 Unobstructed Egress. In every occupied building or structure, means of egress from all parts of the building shall be maintained free and unobstructed. No lock or fastening shall be permitted that prevents free escape from the inside of any building other than in health care occupancies and detention and correctional occupancies where staff are continually on duty and effective provisions are made to remove occupants in case of fire or other emergency. Means of egress shall be accessible to the extent necessary to ensure reasonable safety for occupants having impaired mobility.

4.5.3.3 Awareness of Egress System. Every exit shall be clearly visible, or the route to reach every exit shall be conspicuously indicated. Each means of egress, in its entirety, shall be arranged or marked so that the way to a place of safety is indicated in a clear manner.

4.5.3.4 Lighting. Where artificial illumination is needed in a building or structure, egress facilities shall be included in the lighting design.

4.5.4* Occupant Notification.

In every building or structure of such size, arrangement, or occupancy that a fire itself might not provide adequate occupant warning, fire alarm facilities shall be provided where necessary to warn occupants of the existence of fire.

A.4.5.4 Fire alarms alert occupants to initiate emergency procedures, facilitate orderly conduct of fire drills, and initiate response by emergency services.

4.5.5 Vertical Openings.

Every vertical opening between the floors of a building shall be suitably enclosed or protected, as necessary, to afford reasonable safety to occupants while using the means of egress and to prevent spread of fire, smoke, or fumes through

vertical openings from floor to floor before occupants have entered exits.

4.5.6 System Design/Installation.

Any fire protection system, building service equipment, feature of protection, or safeguard provided for life safety shall be designed, installed, and approved in accordance with applicable NFPA standards.

4.5.7 Maintenance.

Whenever or wherever any device, equipment, system, condition, arrangement, level of protection, or any other feature is required for compliance with the provisions of this *Code*, such device, equipment, system, condition, arrangement, level of protection, or other feature shall thereafter be maintained unless the *Code* exempts such maintenance.

Section 4.6 General Requirements

4.6.1 Authority Having Jurisdiction.

The authority having jurisdiction (AHJ) is the person or office enforcing the *Code*. In cases where the *Code* is to be legally enforced, the AHJ is usually a fire marshal or building official. The AHJ can also be a safety office, insurance engineering department, accreditation service, other agency, or specified personnel within those groups, especially where the *Code* is to be enforced at other than a governmental level. It is common for multiple authorities having jurisdiction to review the same project while enforcing this *Code* and/or other codes. For example, under the *Code* several agencies, such as state and local fire marshals; federal, state, and local health care licensing agencies; Joint Commission on Accreditation of Healthcare Organizations (JCAHO) accreditation personnel; insurance inspectors; and building inspectors, perform inspections in health care facilities.

4.6.1.1 The authority having jurisdiction shall determine whether the provisions of this *Code* are met.

4.6.1.2 Any requirements that are essential for the safety of building occupants and that are not specifically provided for by this *Code* shall be determined by the authority having jurisdiction.

The provisions of Section 4.6 give the authority having jurisdiction the final determination of whether adequate life safety is provided in a building. When the

uses horizontal movement and compartmentation. It recognizes that the occupants are to be provided enough protection to enable them to survive the fire by remaining in the structure, at least temporarily.

(e) *Detention and Correctional.* Detention and correctional occupancies, as in the case of health care occupancies, house occupants who are incapable of self-preservation. In detention and correctional occupancy, however, the incapability for self-preservation is due to the security imposed on the occupants. Because doors are not unlocked to allow free egress to the public way, the defend-in-place design strategy is used.

(f) *Residential.* Residential occupancies are characterized by occupants who are asleep for a portion of the time they occupy the building. Thus, they might be unaware of an incipient fire and might be trapped before egress can occur. This occupancy group is further divided into one- and two-family dwellings, lodging and rooming houses, hotels and dormitories, apartment buildings, and board and care facilities. Each occupancy in the group has characteristic needs that differ from the others. For this reason, separate chapters address each of these subgroups.

(g) *Mercantile.* Mercantile occupancies, as in the case of assembly occupancies, are characterized by large numbers of people who gather in a space that is relatively unfamiliar to them. In addition, mercantile occupancies often contain sizable quantities of combustible contents and use circuitous egress paths that are deliberately arranged to force occupants to travel around displays of materials that are available for sale.

(h) *Business.* Business occupancies generally have a lower occupant density than mercantile occupancies, and the occupants are usually more familiar with their surroundings. However, confusing and indirect egress paths are often developed due to office layouts and the arrangement of tenant spaces. The *Code* requirements address the needs of visitors unfamiliar with the building.

(i) *Industrial.* Industrial occupancies expose occupants to a wide range of processes and materials of varying hazard. Special purpose industrial occupancies, which are characterized by large installations of equipment that dominate the space, are addressed separately from general purpose industrial facilities, which have higher densities of human occupancy.

(j) *Storage.* Storage occupancies are characterized by relatively low densities of human occupancy and

by varied hazards associated with the materials stored.

6.1.1 General.

6.1.1.1 Occupancy Classification. The occupancy of a building or structure, or portion of a building or structure, shall be classified in accordance with 6.1.2 through 6.1.13. Occupancy classification shall be subject to the ruling of the authority having jurisdiction where there is a question of proper classification in any individual case.

Because the appropriate occupancy classification is not always easily determined, the *Code* assigns the authority having jurisdiction the responsibility for determining whether the designer, owner's representative, or other applicable person has correctly classified the occupancy.

6.1.1.2 Special Structures. Occupancies in special structures shall conform to the requirements of the specific occupancy Chapters 12 through 42, except as modified by Chapter 11.

The provision of 6.1.1.2 clarifies that placing an occupancy in a special structure—such as a windowless, underground, water-surrounded, or high-rise building—does not create a unique occupancy. Rather, the occupancy is classified as one of those addressed by Chapters 12 through 42. Chapter 11 is then consulted to find any permitted modifications that apply to the unusual structure.

6.1.2 Assembly.

For requirements, see Chapters 12 and 13.

6.1.2.1* Definition—Assembly Occupancy. An occupancy (1) used for a gathering of 50 or more persons for deliberation, worship, entertainment, eating, drinking, amusement, awaiting transportation, or similar uses; or (2) used as a special amusement building, regardless of occupant load.

A.6.1.2.1 Assembly Occupancy. Assembly occupancies might include the following:

- (1) Armories
- (2) Assembly halls
- (3) Auditoriums
- (4) Bowling lanes

CHAPTER 12 • New

Section 12.3 Protection**12.3.1 Protection of Vertical Openings.**

Any vertical opening shall be enclosed or protected in accordance with 8.2.5.

Exception No. 1: Stairs or ramps shall be permitted to be unenclosed between balconies or mezzanines and main assembly areas located below, provided that the balcony or mezzanine is open to the main assembly area.*

A.12.3.1 Exception No. 1 The exception presumes the balcony or mezzanine complies with the other provisions of the Code, such as travel distance to exits in accordance with 12.2.6 and numbers of exits in accordance with 12.2.4. For the purposes of this exception, a balcony with glazing that provides a visual awareness of the main assembly area is considered open.

Exception No. 2: Exit access stairs from lighting and access catwalks, galleries, and gridirons shall not be required to be enclosed.

Exception No. 3: Assembly occupancies protected by an approved, supervised automatic sprinkler system in accordance with Section 9.7 shall be permitted to have unprotected vertical openings in accordance with 8.2.5.8.

12.3.2 Protection from Hazards.**12.3.2.1 Service Equipment, Hazardous Operations or Processes, and Storage Facilities.**

12.3.2.1.1 Rooms containing high-pressure boilers, refrigerating machinery of other than the domestic refrigerator type, large transformers, or other service equipment subject to explosion shall not be located directly under or abutting required exits. All such rooms shall be separated from other

CHAPTER 13 • Existing

Section 13.3 Protection**13.3.1 Protection of Vertical Openings.**

Any vertical opening shall be enclosed or protected in accordance with 8.2.5.

Exception No. 1: Stairs or ramps shall be permitted to be unenclosed between balconies or mezzanines and main assembly areas located below, provided that the balcony or mezzanine is open to the main assembly area.*

A.13.3.1 Exception No. 1 The exception presumes the balcony or mezzanine complies with the other provisions of the Code, such as travel distance to exits in accordance with 13.2.6 and numbers of exits in accordance with 13.2.4. For the purposes of this exception, a balcony with glazing that provides a visual awareness of the main assembly area is considered open.

Exception No. 2: Exit access stairs from lighting and access catwalks, galleries, and gridirons shall not be required to be enclosed.

Exception No. 3: Assembly occupancies protected by an approved, supervised automatic sprinkler system in accordance with Section 9.7 shall be permitted to have unprotected vertical openings in accordance with 8.2.5.8.

Exception No. 4: Use of the following alternative materials shall be permitted:

- (a) Existing wood lath and plaster
- (b) Existing 1/2-in. (1.3-cm) gypsum wallboard
- (c) Existing installations of 1/4-in. (0.6-cm) thick wired glass that are, or are rendered, inoperative and fixed in the closed position
- (d) Other existing materials having similar fire resistance capabilities

All such assemblies shall be in good repair and free of any condition that would diminish their original fire resistance characteristics.

13.3.2 Protection from Hazards.**13.3.2.1 Service Equipment, Hazardous Operations or Processes, and Storage Facilities.**

13.3.2.1.1 Rooms containing high-pressure boilers, refrigerating machinery of other than the domestic refrigerator type, large transformers, or other service equipment subject to explosion shall not be located directly under or abutting required exits. All such rooms shall be separated from other

- (5) Club rooms
- (6) College and university classrooms, 50 persons and over
- (7) Conference rooms
- (8) Courtrooms
- (9) Dance halls
- (10) Drinking establishments
- (11) Exhibition halls
- (12) Gymnasiums
- (13) Libraries
- (14) Mortuary chapels
- (15) Motion picture theaters
- (16) Museums
- (17) Passenger stations and terminals of air, surface, underground, and marine public transportation facilities
- (18) Places of religious worship
- (19) Pool rooms
- (20) Recreation piers
- (21) Restaurants
- (22) Skating rinks
- (23) Special amusement buildings regardless of occupant load
- (24) Theaters

Assembly occupancies are characterized by the presence or potential presence of crowds with attendant panic hazard in case of fire or other emergency. They are generally or occasionally open to the public, and the occupants, who are present voluntarily, are not ordinarily subject to discipline or control. Such buildings are ordinarily occupied by able-bodied persons and are not used for sleeping purposes. Special conference rooms, snack areas, and other areas incidental to, and under the control of, the management of other occupancies, such as offices, fall under the 50-person limitation.

Restaurants and drinking establishments with an occupant load of fewer than 50 persons should be classified as mercantile occupancies.

For special amusement buildings, see 12.4.7 and 13.4.7.

The annex subpart (2) of 6.1.2.1 clarifies that a special amusement building is an assembly occupancy, even if the occupant load is fewer than 50 persons. As an assembly occupancy, a special amusement building is subject to the provisions of Chapters 12 or 13, especially 12.4.7 or 13.4.7. If an assembly occupancy were not subject to these provisions, the house of horror amusement building at a carnival, for example, might be treated as a business occupancy, because it does not have the minimum 50-person occupant load typically associated with an assembly occupancy. If it were treated as a business occupancy, the necessary level of life safety would probably not be provided.

Because special amusement buildings purposely confound the egress path and further confuse the occupants with sound and lighting effects, they need to meet the special requirements of 12.4.7 or 13.4.7. For other than special amusement buildings, the threshold at which an assembly use becomes an assembly occupancy is the 50-person occupant load.

6.1.2.2 Small Assembly Uses. Occupancy of any room or space for assembly purposes by fewer than 50 persons in an other occupancy and incidental to such other occupancy shall be classified as part of the other occupancy and shall be subject to the provisions applicable thereto.

6.1.3 Educational.

For requirements, see Chapters 14 and 15.

6.1.3.1* Definition—Educational Occupancy. An occupancy used for educational purposes through the twelfth grade by six or more persons for four or more hours per day or more than 12 hours per week.

A.6.1.3.1 Educational Occupancy. Educational occupancies include the following:

- (1) Academies
- (2) Kindergartens
- (3) Schools

An educational occupancy is distinguished from an assembly occupancy in that the same occupants are regularly present.

Educational occupancies are limited to facilities used for educational purposes through the twelfth grade. College classroom buildings do not meet this criterion and are classified as business occupancies. Where the occupant load of a classroom is 50 or more, the appropriate occupancy classification is assembly, regardless of educational grade level.

6.1.3.2 Other Occupancies. Other occupancies associated with educational institutions shall be in accordance with the appropriate parts of this *Code*.

6.1.3.3 Incidental Instruction. In cases where instruction is incidental to some other occupancy, the section of this *Code* governing such other occupancy shall apply.

6.1.4 Day-Care.

For requirements, see Chapters 16 and 17.

6.1.4.1* Definition—Day-Care Occupancy. An occupancy in which four or more clients receive care, maintenance,

- a. It shall be made on either side of the fire barrier.
- b. It shall be made by an approved device that is designed for the specific purpose.

One source of information on tested materials, devices, and systems for protecting through-penetrations of fire resistance-rated barriers is "Through-Penetration Firestop Systems" (Volume II) of the *Fire Resistance Directory*, published by Underwriters Laboratories.¹⁹ Such devices and systems are designed to resist the spread of fire through openings in fire resistance-rated floor or wall barriers that accommodate penetrating items, such as electrical cables, cable trays, conduits, and pipes. Such devices and systems are classified by UL with respect to installation in a wall only, installation in a floor only, or installation in a wall or floor. The basic standard used by Underwriters Laboratories to investigate products in this category is UL 1479, *Fire Tests of Through-Penetration Firestops*.²⁰ UL 1479 is similar to ASTM E 814, *Standard Test Method for Fire Tests of Through-Penetration Fire Stops* (see A.8.2.3.2.4.2).²¹ A sampling of the currently classified devices includes the use of the following:

- (1) Ceramic fibers
- (2) Foamed silicones
- (3) Mineral wool batts
- (4) Intumescent sheets
- (5) Sealing blankets and plugs
- (6) Fittings and couplings
- (7) Various caulks, putties and mastics
- (8) Spring-loaded guillotine blades

Over the life of a building, it is important to maintain the integrity of barriers to protect against fire penetration. Renovations or any changes to building utilities will tend to violate the compartmentation provided when a building is first occupied.

Exhibit 8.7 illustrates some of the typical fire barrier penetrations, which are covered in 8.2.3.2.4.

8.2.4 Smoke Partitions.

Subsection 8.2.4 is new for the 2000 edition of the *Code*. It is intended to serve as another menu-like item that can be referenced by other parts of the *Code*, especially the occupancy chapters, instead of repeating detailed, slightly-varying criteria in many chapters. In future editions of the *Code*, more occupancy chapters will reference 8.2.4 on smoke partitions where exceptions from the typical 1-hour fire resistance-rated corridor wall requirement are provided for sprinklered buildings. For an example of a

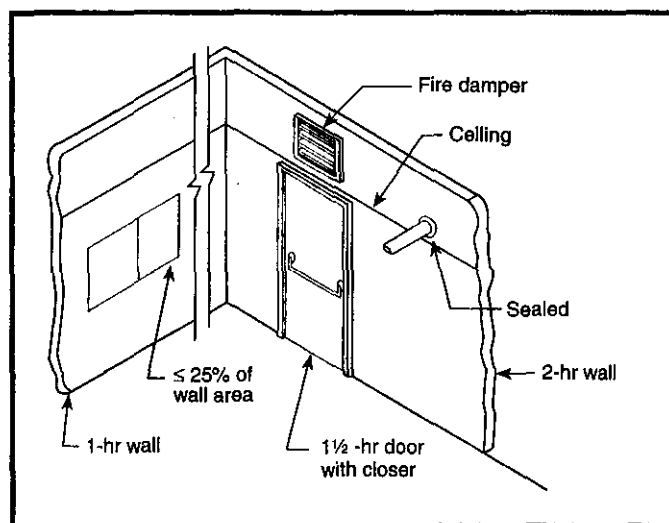


Exhibit 8.7 Typical penetrations of a fire barrier.

mandate for the use of the smoke partitions provisions of 8.2.4 in large residential board and care occupancies, see 32.3.3.6.5 and 33.3.3.6.5.

The new smoke partition requirements provide other sections of the *Code* with another tool that can be referenced. The smoke partition provisions were written to offer options not previously available under the provisions for fire barriers and smoke barriers. For example, a smoke partition is not required to have a fire resistance rating, but a fire barrier must have a rating. Also, a smoke partition is not required to have a smoke leakage-rated damper where ductwork runs through the partition, but a duct penetration of a smoke barrier typically must be provided with a damper.

8.2.4.1 Where required elsewhere in this *Code*, smoke partitions shall be provided to limit the transfer of smoke.

Chapter 8 does not require the installation of smoke partitions but provides detailed criteria for smoke partitions required by other sections of the *Code*. A smoke partition is a continuous membrane designed to form a barrier to limit the transfer of smoke. See the definition of the term *smoke partition* in 3.3.185.

8.2.4.2 Smoke partitions shall extend from the floor to the underside of the floor or roof deck above, through any concealed spaces, such as those above suspended ceilings, and through interstitial structural and mechanical spaces.

*Exception:** Smoke partitions shall be permitted to terminate at the underside of a monolithic or suspended ceiling system where the following conditions are met:

(a) *The ceiling system forms a continuous membrane.*

(b) *A smoketight joint is provided between the top of the smoke partition and the bottom of the suspended ceiling.*

(c) *The space above the ceiling is not used as a plenum.*

A.8.2.4.2 Exception An architectural, exposed, suspended-grid acoustical tile ceiling with penetrations for sprinklers, ducted HVAC supply and return air diffusers, speakers, and recessed light fixtures is capable of limiting the transfer of smoke.

The concept of limiting the transfer of smoke from one side of a smoke partition to the other is different from the concept of preventing any and all smoke from transferring to the other side of a partition. A smoke partition should be thought of as a barrier that reasonably limits, but doesn't prevent, smoke transfer. As such, there are suspended ceiling systems and monolithic surfaced ceilings that provide resistance to smoke transfer that is approximately equal to the traditional, nonrated corridor wall or partition. The exception to 8.2.4.2 permits smoke partitions to terminate tightly against the underside of such ceilings. The annex text further describes the concept. The list of acceptable penetrating items (for example, speakers, recessed light fixtures, and ducted HVAC air diffusers) makes it clear that a smoke partition doesn't prevent all smoke transfer; rather, it limits the transfer of smoke to an acceptable life safety level.

8.2.4.3 Doors.

8.2.4.3.1 Doors in smoke partitions shall comply with 8.2.4.3.2 through 8.2.4.3.5.

8.2.4.3.2 Doors shall comply with the provisions of 7.2.1.

8.2.4.3.3 Doors shall not include louvers.

8.2.4.3.4* Door clearances shall be in accordance with NFPA 80, *Standard for Fire Doors and Fire Windows*.

A.8.2.4.3.4 Gasketing of doors should not be necessary, as the clearances in NFPA 80, *Standard for Fire Doors and Fire Windows*, effectively achieve resistance to the passage of smoke if the door is relatively tight-fitting.

NFPA 80, *Standard for Fire Doors and Fire Windows*, permits clearances of $\frac{1}{8}$ in. (3.2 mm) between the door frame and the top and sides of the door. For swinging doors with builder's hardware, NFPA 80 permits the following clearances:

- (1) $\frac{3}{8}$ in. (9.5 mm) between the bottom of the door and a raised noncombustible sill
- (2) $\frac{3}{4}$ in. (19.1 mm) between the bottom of the door and the floor where no sill exists
- (3) $\frac{5}{8}$ in. (15.9 mm) between the bottom of the door and rigid floor tile
- (4) $\frac{1}{2}$ in. (12.7 mm) between the bottom of the door and floor coverings such as carpet

With the allowed clearances, some smoke will pass to the opposite side of a closed door. It is important to remember that the intent of the smoke partition is not to prevent all smoke transfer but, rather, to limit the transfer of smoke to an acceptable life safety level.

8.2.4.3.5 Doors shall be self-closing or automatic-closing in accordance with 7.2.1.8.

The five sets of provisions applicable to doors in smoke partitions are individually numbered as 8.2.4.3.1 through 8.2.4.3.5 to permit each to be singled out in the references made by other sections of the Code that require smoke partitions. For example, the self-closing requirement of 8.2.4.3.5 is exempted in large residential board and care occupancies under specified conditions, but the other door provisions are retained. See 32.3.3.6.5 and 33.3.3.6.5.

8.2.4.4 Penetrations and Miscellaneous Openings in Smoke Partitions.

8.2.4.4.1 Pipes, conduits, bus ducts, cables, wires, air ducts, pneumatic tubes and ducts, and similar building service equipment that pass through smoke partitions shall be protected as follows:

- (1) The space between the penetrating item and the smoke partition shall meet one of the following conditions:
 - a. It shall be filled with a material that is capable of limiting the transfer of smoke.
 - b. It shall be protected by an approved device that is designed for the specific purpose.
- (2) Where the penetrating item uses a sleeve to penetrate the smoke partition, the sleeve shall be solidly set in the smoke partition, and the space between the item and the sleeve shall meet one of the following conditions:
 - a. It shall be filled with a material that is capable of limiting the transfer of smoke.
 - b. It shall be protected by an approved device that is designed for the specific purpose.
- (3) Where designs take transmission of vibrations into consideration, any vibration isolation shall meet one of the following conditions:



§ 11-10-9. Exemption of governmental entity from liability on claims based on specified circumstances.

[Effective until the date Laws of 2007, ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, this section will read as follows:]

- (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
 - (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
 - (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;
 - (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;
 - (d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;
 - (e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;
 - (f) Which is limited or barred by the provisions of any other law;
 - (g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
 - (h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;
 - (i) Arising out of the assessment or collection of any tax or fee;
 - (j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;
 - (k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in _____ by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;

(b) Receives no revenue;

(c) Has no employees; and

(d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

[Effective from and after the date Laws of 2007, ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, this section will read as follows:]

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar

authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob

violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in _____ by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 1 or 2 of Senate Bill No. 2375, 2007 Regular Session, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;

(b) Receives no revenue;

(c) Has no employees; and

(d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

Sources: Laws, 1984, ch. 495, § 6; reenacted without change, 1985, ch. 474, § 5; Laws, 1987, ch. 483, § 5; Laws, 1993, ch. 476, § 4; Laws, 1994, ch. 334, § 1; Laws, 1995, ch. 483, § 1; Laws, 1996, ch. 538, § 1; Laws, 1997, ch. 512, § 2; Laws, 2007, ch. 582, § 21, eff _____ (the later of July 1, 2007, or the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)