IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-01353-SCT

ARCHITEX ASSOCIATION, INC. — APPELLANT

VS

SCOTTSDALE INSURANCE COMPANY — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
RANKIN COUNTY, MISSISSIPPI

BRIEF OF SCOTTSDALE INSURANCE COMPANY AS APPELLEE AND IN RESPONSE TO AMICI BRIEFS

ORAL ARGUMENT IS NOT REQUESTED

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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 disqualification or recusal.

1. Architex Association, Inc., appellant.

2. Dorsey R. Carson, Jr. and Cheri Turnage Gatlin, Burr & Forman LLP, counsel for the appellant and defendant Hanover Insurance Company.

3. Scottsdale Insurance Company, appellee.

4. James W. Shelson and Justin L. Matheny, Phelps Dunbar LLP, counsel for appellee.

5. Vikram Parshotam and CIS Pearl, Inc., plaintiffs.

6. Mark C. Baker, Baker Law Firm and Joshua C. McCrory, McCrory Law Firm, counsel for plaintiffs.

7. Hanover Insurance Company, defendant.

8. Pre-Build Company, Inc., third-party defendant.

9. Guy Barr d/b/a L&B Construction, Inc., third-party defendant.

10. James Mathew d/b/a L&B Construction, Inc., third-party defendant.

11. Leonard Coleman d/b/a Continental Construction, third-party defendant.

12. Mike Rasmussen, third-party defendant.

13. Schindler Elevator Corp., third-party defendant.

14. M.D. Bailey & Sons Electrical Co., Inc., third-party defendant.

15. Hughes Brothers Plumbing Company, Inc., third-party defendant.

16. R&R Mechanical, Inc., third-party defendant.

17. Central Asphalt Co, Inc., third-party defendant.

18. Darryl Callendar d/b/a Callendar Enterprises, third-party defendant.

19. Associated General Contractors of America, Associated General Contractors of Mississippi, amici curiae.

20. Christopher Solop, Robinson Biggs Ingram Solop & Farris, PLLC, and Patrick J. Wielinski, Cokinos Bosien & Young, P.C., counsel for amici curiae Associated General Contractors of America, Associated General Contractors of Mississippi.

21. American Subcontractors Association of Mississippi, American Subcontractors Association, Associated Builders and Contractors, Inc., Mississippi Associated Builders and Contractors, Mississippi Asphalt Paving Association, Inc., amicus curiae.

22. Bradley Vance, Eric Hatten, John M. Lassiter, Jalinda L. Parker, Burr & Forman LLP, counsel for amici curiae American Subcontractors Association of Mississippi, American Subcontractors Association, Associated Builders and Contractors, Inc., Mississippi Associated Builders and Contractors, Mississippi Asphalt Paving Association, Inc..

23. Mississippi Department of Finance and Administration, Bureau of Building, Grounds, and Real Property Management, Mississippi Insurance Department, Mississippi Department of Transportation, and the State of Mississippi *ex rel.* Attorney General Jim Hood, amici curiae.

24. Leigh T. Janous, Larry A. Schemmel, Special Assistant Attorneys General, counsel for amici curiae Mississippi Department of Finance and Administration, Bureau of Building, Grounds, and Real Property Management, Mississippi Insurance Department, Mississippi Department of Transportation, and the State of Mississippi *ex rel.* Attorney General Jim Hood.

James W. Shelson

STATEMENT REGARDING ORAL ARGUMENT

The judgment below should be summarily affirmed without oral argument on the basis of this Court's controlling decision in *U.S.F.&G. v. Omnibank*, 812 So.2d 196 (Miss. 2002), and the Fifth Circuit's application of *Omnibank* in *ACS Constr. Co., Inc., of Miss. v. CGU*, 332 F.3d 885 (5th Cir. 2003). Scottsdale properly relied on these decisions in making its coverage determination, and the trial court correctly applied them in granting summary judgment to Scottsdale.

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STATEMENT OF THE ISSUES

1. Should this Court overrule *U.S.F.&G. v. Omnibank*, 812 So.2d 196 (Miss. 2002) – and disregard the uniform application of *Omnibank* by the Fifth Circuit in *ACS Constr. Co., Inc., of Miss. v. CGU*, 332 F.3d 885 (5th Cir. 2003), Mississippi federal district court opinions,[1] and the trial court – to create a special rule for construction contractors that does not exist for anyone else under Mississippi law regarding what constitutes an "occurrence" under a CGL policy?

2. Does an insured violate the notice requirements of its policy by failing to notify its insurer of the existence of a lawsuit for more than two years while defending the suit on its own and tactically positioning its defense to the insurer's prejudice?

3. In making coverage determinations, is it bad faith for an insurer to rely on Mississippi law – e.g., this Court's holding in *Omnibank* and the Fifth Circuit's application of *Omnibank* in *ACS*?

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[1] *Nationwide Mut. Ins. Co. v. Panther Creek Constr. Co., Inc.*, 2008 WL 886047 (S.D. Miss.); *QBE Ins. Corp. v. Brown & Mitchell, Inc.*, 2008 WL 5789764 (S.D. Miss.); *Mendrop v. Shelter Mut. Ins. Co.*, 2007 WL 4200827 (N.D. Miss.); *Fairmont Specialty Ins. Co. v. Smith Poultry & Farm Supply, Inc.*, 2006 WL 2077584 (S.D. Miss.).

STATEMENT OF THE CASE

Statement of the Facts and Course of Proceedings Below

A. Statement of the Facts.

Plaintiffs Vikram Parshotam and CIS Pearl, Inc. are the owners of the Country Inn & Suites hotel in Pearl, Mississippi. 1:45, R.E. 2.[2] On July 31, 2002, the owners filed a lawsuit against Architex Association, Inc. ("Architex") and Hanover Insurance Company arising out of Architex's alleged faulty construction of the hotel. *Id.* Architex was the general contractor for the hotel project. Hanover Insurance Company issued Architex's construction bond.

The complaint charged Architex with four counts consisting of breach of construction contract, negligence, breach of performance bond and slander of title. The negligence count, which is the only count at issue on this appeal, was based upon the following alleged acts or omissions of Architex:

> abandoning the project, refusing to complete the work, performing work which was contrary to the contract plans and specifications and contrary to applicable codes and building standards, and by failing to correct or remedy defective work. Architex also failed to reimburse Parshotam for monies expended for the project which were to be paid by Architex.

[2] Citations to the record and the exhibits will be as follows: [volume]:[page(s)] or Ex. [volume]:[exhibit no.]. Citations to the Mandatory Record Excerpts are "M.R.E. [tab]" and the Additional Record Excerpts are cited as "R.E. [tab]".

1:46-47 at ¶ 11, R.E. 2. Architex hired its own attorney, Thomas W. Prewitt, to defend against the complaint. Prewitt served as Architex's attorney in this matter from its inception until March 7, 2006. 18:2675.

The construction contract between Architex and plaintiffs required arbitration. 1:89. Prior to October 2004, the lawsuit was referred to arbitration. 18:2678. Subsequently, Architex – through its counsel, Prewitt – waived the arbitration requirements and decided to proceed in Circuit Court.

For more than two years, Architex litigated the case without any notice to Scottsdale of the claims, the lawsuit or the arbitration. Finally, on October 5, 2004, Architex submitted an Acord Notice of Claim form. 4:471. The Acord form indicated that plaintiffs claimed Architex failed to include sufficient rebar in the foundation of the hotel project. *Id.* Architex did not provide a copy of the complaint with the Acord form. 5:620 at ¶¶ 5-6.

Following receipt of the Acord form, the independent adjusting company of Crawford & Company ("Crawford") was assigned to investigate the rebar claim. 5:620 at ¶ 5. Crawford contacted Prewitt and attempted to take recorded statements regarding the rebar issue. *Id.* Scottsdale also requested a copy of the complaint from Victor Hamby, one of Architex's principals. 5:614.

Prewitt eventually provided a copy of the complaint but informed Scottsdale it was a "courtesy copy." 5:620 at ¶ 6. Scottsdale was not requested to defend

Architex against the complaint, but only against the purported rebar issue (of which no mention was made in the complaint). 1:45, R.E. 2; 5:620.

Subsequently, on April 22, 2005, Prewitt told Scottsdale's claim representative that plaintiffs were no longer pursuing the rebar issue and Scottsdale was not required to provide a defense. 5:620 at ¶ 7. As a result, Scottsdale closed its file. *Id.* at ¶ 8.

Meanwhile, Architex (through its attorney, Prewitt) and the hotel owners withdrew the case from arbitration. Prewitt and attorneys for the hotel owners also entered into an agreed order setting the case for a bench trial and relaxing the standard of proof necessary for the trial. 1:142.

For more than a year following the April 22, 2005 advice from Architex that it was not seeking a defense against the hotel owners' claims, neither Prewitt nor Architex attempted to contact Scottsdale. However, in late April or May 2006, Architex replaced Prewitt with its current attorney, Dorsey Carson. On May 5, 2006, four years following the filing of the complaint, Carson telephoned Scottsdale's claims representative and requested that Scottsdale provide a defense and indemnity against the claims asserted by the complaint. 5:620-21 at ¶ 9. The representative requested that Carson send him contact information in a letter identifying who he represented. R. 7:962. Carson never sent the letter. 5:621 at ¶ 10.

B. Course of Proceedings Below.

Instead of sending the follow-up letter, Architex sued Scottsdale. On June 29, 2006, Architex filed a third-party complaint against Scottsdale as part of the plaintiffs' action against Architex. 2:185. The third-party complaint sought coverage under the Policy for the allegations included in plaintiffs' complaint. *Id.* Scottsdale timely answered the complaint and denied any liability for coverage under the Policy. 2:220. Subsequently, on October 6, 2006, Architex filed an amended third-party complaint adding claims for indemnity against its subcontractors on the hotel project and an additional count for declaratory judgment against Scottsdale, again alleging it was entitled to coverage under the Policy. 2:298.

Meanwhile, Architex and Scottsdale exchanged written discovery requests. In November 2006, Architex filed a motion for declaratory judgment and Scottsdale responded with a cross-motion for summary judgment. 4:465; 4:496. The motions were briefed and set for hearing on December 19, 2006. 5:616.

Just prior to the hearing, Architex asserted that it needed additional discovery and disposition of the motions was postponed. Over the next 13 months, Architex was allowed free range to conduct discovery. The parties exchanged more written discovery, took depositions, and each side designated expert witnesses. Architex also expanded its claims and filed a Third Amended Third-Party Complaint alleging bad faith against Scottsdale. 12:1796.

In March 2008, the parties submitted another round of briefs to the trial court. Architex's submissions to the trial court included 1,166 pages of exhibits. 17:2480; Ex. 1:1-12; Ex. 2:13-21.[3]

On April 15, 2008, the trial court conducted a hearing on the parties' cross-motions for summary judgment. Following the hearing, the court issued an opinion and order. It held that the owners' claims against Architex did not constitute an "occurrence" under the subject insuring agreement, and granted Scottsdale's motion for summary judgment. 21:3010, M.R.E. 3. Final judgment was subsequently entered dismissing Architex's claims against Scottsdale, including all claims for bad faith. 21:3026, M.R.E. 4. Architex then filed this appeal from the final judgment. 21:3032.

SUMMARY OF THE ARGUMENT

No "Occurrence"

In *U.S.F.&G. v. Omnibank*, 812 So.2d 196, 201-02 (Miss. 2002), this Court held that an insured's expected or intended act is not an "occurrence," even if it causes unexpected or unintended damage. In its appeal, Architex erroneously claims the intended acts of its subcontractors were an "occurrence" that should be covered. In light of the clear precedent in this State, Architex's position is wrong and the trial court should be affirmed.

[3] Architex has included miscellaneous pages from these two volumes of exhibits in its Additional Record Excerpts tabbed 1-30.

The law regarding what constitutes an "occurrence" under a CGL policy is as stated by Chief Justice Waller in *Omnibank*. An "occurrence" is an "accident," and the term "accident" refers to the insured's action, "now whatever unintended damages flow from that act." *Id.* at 201. "[W]e hold that an insurer's duty to defend under a general commercial liability policy does not extend to negligent actions that are intentionally caused by the insured." *Id.*

The Fifth Circuit applied this holding to a construction defect case in *ACS Constr. Co., Inc., of Miss. v. CGU*, 332 F.3d 885 (5th Cir. 2003). The Fifth Circuit held that although a subcontractor negligently installed roofing membrane, there was no "occurrence" because "the action of installing the membrane was not accidental nor unintended." *Id.* at 890.

The trial court correctly explained that this case is "quite simple and . . . the controlling law on this policy language revolves around the word 'occurrence.'" The claims made by the owners against Architex do not constitute an "occurrence" under *Omnibank*. Architex and its subcontractors intended to perform the construction work that led to the claims for coverage. *Omnibank* mandates that an action that is taken intentionally, but that is performed negligently, is not accidental and not an "occurrence." Because there was no "occurrence," there is no coverage. The trial court should be affirmed.

No Notice

Architex defended itself against the owners' lawsuit for over two years with no notice whatsoever to Scottsdale. Architex conducted its defense in a manner that was prejudicial to Scottsdale by, among other things, waiving its right to arbitration, counterclaiming against the owners, and agreeing to a bench trial with a relaxed standard of proof. Architex also prevented Scottsdale from considering all procedural options, such as removal, had it accepted the defense. Even if there were coverage, and there is not, Architex's prejudicial late notice acts to defeat coverage.

No Bad Faith

Architex's bad faith claims were properly dismissed as a matter of law. In denying Architex's claims for coverage, Scottsdale relied on *Omnibank* and *ACS*. Scottsdale's understanding of *Omnibank* is legally sound. Scottsdale did not give an unreasonable meaning to *Omnibank*. The Fifth Circuit in *ACS*, Mississippi federal district courts,[4] the trial court, and even a Louisiana federal district court applying Mississippi law,[5] all read *Omnibank* the same way that Scottsdale does. Because Scottsdale followed the law, it did not, as a matter of law, commit bad

[4] *Panther Creek Constr.*, 2008 WL 886047; *QBE Ins. Corp.*, 2008 WL 5789764; *Mendrop*, 2007 WL 4200827; *Smith Poultry & Farm Supply*, 2006 WL 2077584.

[5] *Liberty Mut. Ins. Co. v. Zurich American Ins. Co.*, 2007 WL 3487651, at *6-7 (E.D. La.) (no "occurrence" where the contractor's work was intended but negligently caused unintended harm).

faith. Architex's persistent and long-winded arguments to the contrary are not legitimate legal arguments.

ARGUMENT

I. No "Occurrence," No Coverage.

A. No coverage under *Omnibank*.

Coverage is determined by the insuring agreement. The insuring agreement here provides that Scottsdale "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." 2:284 at Section I.1.a. The insurance applies to "bodily injury" and "property damage" only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' . . . ." *Id.* at Section I.1.b.

In *Omnibank*, this Court considered the meaning of "occurrence" as that term is used in the insuring agreement of a CGL policy. The policy in *Omnibank* defined the term "occurrence" exactly the same way that it is defined in Scottsdale's policy here. This Court held that the term "occurrence" refers to the insured's act, not to the unintended consequences of that act. *Omnibank*, 812 So.2d at 200. "It follows that bodily injury or property damage, expected or intended from the standpoint of the insured, cannot be the result of an accident." *Id.* at 200. If the insured intended to perform the underlying act, the resulting property damage is not accidental and, therefore, not an "occurrence." *Id.* at 200-01. That is exactly what happened here.

There is no "occurrence" because Architex and its subcontractors intended to perform the construction work that led to the claims for coverage. Jerry Milton, Architex's coverage expert, admitted that Architex intentionally did the work on the hotel project. 19:2716. According to Milton, no work was unintended. *Id.* Architex itself admitted that it did not "accidentally" hire the subcontractors who worked on the project. 19:2710. It also admitted that the subcontractors intended to do the work they performed on the hotel. 19:2708. Failing to install rebar in a building is not an accident. Defective construction work that causes mold, rust, or water leaks likewise is not an accident. *Omnibank* precludes coverage for the owners' claims against Architex. On the basis of *Omnibank*, Scottsdale properly denied coverage.

B. No coverage under *ACS*.

The Fifth Circuit applied *Omnibank's* holding regarding what constitutes an "occurrence" to a construction defect case in *ACS Constr. Co., Inc., of Miss. v. CGU*, 332 F.3d 885 (5th Cir. 2003). In that case, ACS was sued for the defective installation of roof membranes by one of its subcontractors. *Id.* at 887.

In applying *Omnibank*, the Fifth Circuit found that the test for an "occurrence" is whether the insured intended the ***underlying action***, not whether the insured intended the ***consequences*** of its actions. *Id.* at 888. If the insured intended the underlying action, then the action is not accidental and not an "occurrence." *Id.* at 888-89. The Fifth Circuit correctly applied *Omnibank*.

Architex's "coverage" expert, Jerry Milton, agrees that the alleged property damage is to the hotel construction project itself:

> Q. In this case, what sustained the alleged property damage?
>
> A. From what I've been able to see the actual hotel building itself.

19:2716. Because there is no damage to "other property," there is no meaningful distinction between the facts of *ACS* and the facts of this case.

Installing insufficient rebar, or performing other defective work that caused mold, are not accidents, because Architex and its subcontractors intended the underlying actions. That they may have acted negligently in performing their work under the construction contract does not make the underlying work an accident or unintended. *Omnibank*, 812 So.2d at 200-02 (intentional acts negligently performed are not accidents). *ACS* further supports the conclusion that, under *Omnibank*, the owners' claims against Architex do not constitute an "occurrence."

C. The trial court correctly applied *Omnibank* and *ACS*.

The trial court found that *Omnibank* "read together the definition of 'occurrence' and the 'Expected or Intended Injury' exclusion, both of which are identical to Scottsdale's policy." 21:3017, M.R.E. 3. "The Supreme Court held that this policy language '***mandates*** that coverage does not apply to 'bodily injury' or 'property damage' that is expected or intended from the standpoint of the insured.'" *Id.* (emphasis added). As the trial court noted, the "critical inquiry"

under *Omnibank* is "the insured party's conduct, not the resulting damages of that conduct." *Id.*

Turning to Architex's claim for coverage, the trial court found that "whatever work was improper or defective or was not completed, as alleged in the original complaint and via ensuing discovery, was nevertheless the result of intended action by the insured, Architex." *Id.* Architex had a contract to build a hotel, and it subcontracted that work to others. *Id.*

"Architex undoubtedly did not intend for any of those subcontractors to do defective or improper work. However, the hiring of those subcontractors was not an 'accident, including continuous or repeated exposure to substantially the same general harmful conditions' as the definition of 'occurrence' sets out plainly in the insurance policy.'" 21:3017-18, M.R.E. 3. Architex's hiring of the subcontractors was a "'course consciously devised and controlled by' Architex which undeniably set in motion the 'chain of events leading to the injuries complained of.'" 21:3018, M.R.E. 3. The trial court concluded: "This is plain and unambiguous English; there is no ambiguity in the policy language nor lack of clarity in the Supreme Court's position on what that language means." *Id.*

The trial court observed that *Omnibank* is not a construction defect case, but noted that it "has available very persuasive guidance from our sister federal courts." *Id.* In particular, the trial court turned to the Fifth Circuit's decision in *ACS.*

II. Non-Mississippi Law is Contrary to *Omnibank*.

A. *Omnibank* correctly decided, Texas and Florida law irrelevant.

Continuing with its misguided effort to escape what the law is in favor of what it wants the law to be, Architex incorrectly states that a "vast majority of jurisdictions find coverage for subcontractor work." Architex Br. at p. 15. This is a misstatement of the law of other jurisdictions.

"The majority of jurisdictions have held that breach of contract is not an occurrence . . . . Similarly, a claim for faulty workmanship, in and of itself, is not an occurrence . . . because a failure of workmanship does not involve the fortuity required to constitute an accident." COUCH ON INSURANCE 3D, § 129:4 (2005). *See also Mendrop*, 2007 WL 4200827, at *6 and n. 3 (citing numerous authorities holding claims of faulty workmanship do not constitute an "occurrence"). To the extent that a majority of courts recognize an ***exception*** to this rule, it is that the CGL policy "does provide coverage if the faulty workmanship causes bodily injury or property damage to something ***other than*** the insured's work product." *Id.* (emphasis added).

The limited exception is of no assistance to Architex. Insufficient rebar and mold and mildew damage to the hotel are damage to Architex's work product itself. Architex even admits there is no damage to other property at issue here. 19:2709. Given these established facts it is unclear why Architex is advocating the "other property" exception, as it incorrectly argues that *ACS* did not involve

damage to "other property," but that somehow this case does. Architex Br. at pp. 12-13. At bottom, even under the "damage to other property exception" utilized in some other jurisdictions, Architex has ***no*** coverage.

In an attempt to escape this predicament, Architex relies on two cases that take ***the most expansive view*** of what constitutes an "occurrence" under a CGL policy: *Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), and *United States Fire Insurance Company v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007). Architex Br. at pp. 15-19.

Both of these cases were decided in 2007. Three states – Illinois, Indiana and Colorado – have already declined to follow *J.S.U.B.* *See Lyerla v. Amco Ins. Co.*, 536 F.3d 684, 691 (7th Cir. 2008); *Westfield Ins. Co. v. Sheehan Constr. Co., Inc.*, 580 F.Supp.2d 701, 711 (S.D. Ind. 2008); *General Sec. Indemn. Co. v. Mountain States Mut. Cas. Co.*, 2009 WL 400053, at *6 (Colo. Ct. App.). Two states – Illinois and Colorado – have declined to follow *Lamar Homes*. *See Lyerla,* 536 F.3d at 691; *General Sec. Indemn. Co.*, 2009 WL 400053, at *6 (explaining *J.S.U.B.* and *Lamar Homes* represent minority view that faulty workmanship may constitute an "occurrence").

More importantly, *Lamar Homes* and *J.S.U.B.* are flatly contrary to *Omnibank.* For example, Architex notes that under *Lamar Homes*, "a deliberate act, performed negligently, is an accident if the effect is not an intended or expected result . . ." Architex Br. at p. 16.

This Court reached the ***opposite*** conclusion in *Omnibank*: "an insurer's duty to defend under a general commercial liability policy does not extend to negligent actions that are intentionally caused by the insured." *Omnibank*, 812 So.2d at 202. "[A] claim resulting from intentional conduct which causes foreseeable harm is not covered, even where the actual injury or damages are greater than expected or intended." *Id.* at 201. When considering the opinions of the Texas Supreme Court and its own opinions on the same issue, this Court's opinions control.

Omnibank is not only controlling, it is also correctly decided. The trial court observed that *Omnibank* is a good rule of law that makes sense, that wisely requires general contractors to select good subcontractors, and that properly declines to make insurers "super-guarantors" of every construction contract:

> *Omnibank* also comports with common sense. To find otherwise would relieve general contractors of their responsibility to pick good subcontractors and supervise them properly. In effect, the CGL carrier would become a "super-guarantor" for every construction contract; the broad reading urged by Architex would presumably permit a CGL claim for almost every defect which damages or reduces the value of the project. If this should be the law, a CGL carrier should know this up front so that risk analysis, underwriting procedures, and rates could take this into account before the policy is sold.

21:3018, M.R.E. 3.

If Architex insists on looking at non-Mississippi cases, instead of looking at how other states apply their own law, it should look at how they apply Mississippi law. A Louisiana federal district court applied Mississippi law to a construction

defect case in *Liberty Mut. Ins. Co. v. Zurich American Ins. Co.*, 2007 WL 3487651 (E.D. La.).

In that case, the subcontractor's installation of exterior cladding and other materials caused the building to leak and mold and mildew to grow. *Id.* at *5. The court reviewed *Omnibank* and *ACS*. It concluded that there was no "occurrence" because, even if the subcontractor was only negligent, the act of installing the materials was not accidental or unintended. *Id.* at *6-7. Architex can try to pretend otherwise, but Mississippi law regarding what constitutes an "occurrence" in construction defect cases in well known in Mississippi and outside of Mississippi.

B. Extrinsic evidence is inadmissible.

It is undisputed that the Policy is unambiguous. 4:465; 4:496; 21:3018, M.R.E. 3. Where the policy is unambiguous, the Court should not resort to any extrinsic evidence to interpret the policy. *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss. 1987). The drafting history of the CGL Form has no place in the interpretation of the unambiguous policy language at issue.

Moreover, any opinions, guidelines, formulas and the other information which Architex has erroneously advanced are not admissible evidence of the intent of the parties to the insuring agreement. Architex Br. at pp. 20-21. The same rule that bars consideration of drafting history in contract interpretation applies.

Cherry, 501 So.2d at 419. Extrinsic evidence, in any form, simply does not alter the application of *Omnibank* to the facts of this case.

III. Architex Misstates the Record.

Architex misstates the record regarding several matters. The record is set straight below.

A. No admission of coverage.

Architex incorrectly argues that Charles Buchanan "admitted during a deposition that the mold and mildew claims present an arguable basis for coverage." Architex Br. at pp. 4, 24. Buchanan was asked about a letter from Architex's counsel to Scottsdale's counsel that was written ***after*** Architex filed its third-party complaint. The letter contains a short list of allegations purportedly made by the hotel owners, but cites no actual facts.

After referencing the list at Buchanan's deposition, Architex's counsel improperly asked Buchanan to give a legal conclusion, "[w]ould those allegations arguably come within coverage under the CGL policy?" Buchanan responded that "[a]rguably, you know, those allegations could possibly be construed as being covered under a CGL policy." Ex. 1:9 at pp. 98-102, R.E. 12.

Buchanan did not say anything about "mold and mildew." Nor was the question posed in terms of Mississippi law. Buchanan's testimony does not create coverage where none exists under the insuring agreement or under Mississippi law. The trial court rejected the false contention that coverage was admitted, and

granted summary judgment to Scottsdale. 21:3020, M.R.E. 3. This Court should affirm.

B. Architex continues to play games regarding what claims or "facts" are allegedly covered.

Architex has the burden of proving that the owners' complaint is within the scope of the insuring agreement. *Southern Life & Health Ins. Co. v. Kemp*, 300 So.2d 782, 785 (Miss. 1974). To this day, Architex continues to play games with even identifying – much less proving – what claims are purportedly covered.

The owners' complaint alleges claims for breach of contract, negligence, breach of performance bond, and slander of title. 1:45, R.E. 2. None of the claims are covered. Architex and its expert even admitted that Architex did not report the owners' complaint to Scottsdale for more than two years because the complaint does not contain any covered claims. 18:2690; 19:2720-21.

Because the complaint does not contain any covered claims, Architex seeks to invoke the limited "true facts" exception recognized by *Mavar Shrimp & Oyster Company v. U.S.F.&G. Co.*, 187 So.2d 871 (Miss. 1966). Architex Br. at p. 23. Under *Mavar Shrimp*, an insurer may have a duty to defend when it has knowledge, or could with reasonable investigation obtain knowledge, of "true facts" that would trigger coverage. *Id.* at 874.

When asked in an interrogatory to identify any such "facts," ***Architex refused to do so***. It replied, "the facts not contained in the subject complaint that trigger coverage may be found by proper investigation of Scottsdale." 4:546.

When Architex was deposed and could no longer dodge the question, it could identify only two things that are allegedly covered: insufficient rebar and mold and mildew. 19:2704. That is it. Architex's coverage expert likewise testified that these are the only purportedly covered "facts."[6] 19:2724.

The "true facts" exception does not apply for two reasons. First, Architex does not identify any "true facts." Instead, Architex merely repeats the allegations the owners have purportedly made outside of the complaint. Assertions by the insured without any evidence to back them up are not facts that make a defense or even an investigation necessary. *American States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 553-54 (5th Cir. 1998) (assertions by insured are not facts that could trigger duty to defend); *Evanston Ins. Co. v. Neshoba County Fair Ass'n, Inc.*, 442 F.Supp.2d 344, 349 (S.D. Miss. 2006) (even if asserted "true facts" are considered, but they do not establish coverage, then there is no duty to defend).

Second, even if any unpled allegations did constitute "true facts," they still did not result from an "occurrence," so there is no coverage. *See Maryland Cas. Co. v. Lab Discount Drugs, Inc.*, 468 F.Supp.2d 862, 867 (S.D. Miss. 2006) (no

[6] Architex's counsel now alleges the covered claims are insufficient rebar, water intrusion, mold and mildew, and rusting of fixtures and hardware. Architex Br. at p. 2. Architex's list of allegedly covered claims is a moving target. It is larger on appeal than it was in the trial court. It continues to have no credibility.

duty to defend where neither the facts pled nor the "true facts" constitute an "occurrence").

C. Architex did not buy "supplemental subcontractor coverage."

Architex erroneously claims that the Extension of Supplemental Declarations page of the Policy indicates that Architex purchased "supplemental subcontractor liability coverage." Architex Br. at p. 19. That is not what that page says, and it is not what Architex purchased. 2:283.

The classification that Architex references means only that that Policy takes into account that subcontractors will be working on the hotel construction project, and that they have their own insurance. Because the subcontractors had their own insurance, Architex's premium was ***reduced.*** Architex has no evidence to the contrary. It has only spin and supposition for what it euphemistically calls its "logical interpretation." Architex Br. at p. 19.

D. Exceptions to exclusions do not create coverage.

Architex also incorrectly alleges that the subcontractor exception to the "Your Work" exclusion somehow creates coverage. Architex Br. at p. 15. This is wrong because, among other reasons, Architex itself admits that "an exclusion may not create coverage." 20:2898.

An exception to an exclusion cannot provide coverage that is not within the scope of the insuring agreement. *ACS*, 332 F.3d at 892 ("exclusionary language in the policy cannot be used to create coverage where none exists") (citing *Omnibank,*

812 So.2d at 200).[7] Here, the owners' claims against Architex are not within the insuring agreement because there was no "occurrence."

Architex cannot establish that there are any provisions in the insuring agreement that provide coverage for its defective work. The "Your Work" exclusion is never even implicated because there is no initial grant of coverage. Because the exclusion itself is not implicated, neither is the exception to that exclusion.

E. Scottsdale did not bankrupt Architex.

Architex incorrectly claims that Scottsdale forced it "to become bankrupt." Architex Br. at p. 29, n. 3. Architex has never come forward with any proof it is bankrupt. Its only supposed "proof" is argument of counsel that must be disregarded. But, in any event, Architex's corporate representative, Victor Hamby, testified that Architex quit performing construction jobs in 2001 at the end of its third policy term with Scottsdale "[b]ecause of the lawsuit. Our resources were focused on getting the money that was owed to us by [the owners] and we incurred significant legal bills in defending this." 19:2702.

[7] *Accord, Amerisure, Inc. v. Wurster Constr. Co.*, 818 N.E.2d 998, 1005 (Ind. Ct. App. 2004): "if the insuring clause does not extend coverage, one need look no further. If coverage exists, exclusions must then be considered. If an exclusion excludes coverage, an exception to the exclusion may regrant coverage. However, the entire process must begin with an initial grant of coverage via the insuring clause; otherwise, no further consideration is necessary."

Architex stopped performing construction jobs in 2001. 19:2702. The owners sued Architex in July 2002. 1:45, R.E. 2. Architex did not notify Scottsdale of the lawsuit until October 5, 2004. 4:471.

Although Architex claims that "this persistent litigation" forced it out of business, Architex stopped doing business at least two years before it first notified Scottsdale of the owners' lawsuit. Architex Br. at p. 33. During that two-year period, without any notice to Scottsdale, Architex hired its own lawyer, filed a counterclaim against the owners, contemplated then waived arbitration, agreed to the appointment of a special judge and a non-jury trial. 19:2811-12. Its lawyer billed Architex directly for his time and never billed Scottsdale. 19:2820. Architex was out of work and voluntarily defending itself for over two years before Scottsdale ever even had an opportunity to be involved. If Architex is bankrupt, it was self-inflicted. Architex's counsel takes great liberties in stating otherwise.

IV. Architex's Failure to Provide Timely Notice Prejudiced Scottsdale.

Alternatively, even if the owners' claims were covered by the Policy (which they are not), Scottsdale legitimately denied coverage on the basis of Architex's failure to give timely notice. Although a defense never became due, this failure prejudiced Scottsdale's ability to defend Architex. *Hague v. Liberty Mut. Ins. Co.*,

571 F.2d 262, 267 (5th Cir. 1978); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So.2d 336, 242-43 (Miss. 2004).[8]

Tom Prewitt defended Architex from when the owners' filed their complaint in July 2001, 1:45, R.E. 2, until he was replaced by Dorsey Carson in March 2006. 18:2675.

The owners and Architex agreed to a special procedure for the handling of their dispute. Prewitt testified that he and Mark Baker, the owners' attorney, agreed to have Judge Kent McDaniel specially appointed "because of Judge McDaniel's experience in construction litigation." 19:2811-12.

Because Prewitt thought the dispute between the owners and Architex was going to be arbitrated, he never intended "that this case would proceed as a regular matter on the civil docket" of the trial court. 19:2812. Prewitt favored arbitration because "[i]t is usually determined by a panel of arbitrators or a single arbitrator who know the front end from the back end of the hammer, and often juries have a difficult time with construction terms and sequences and understanding what we do as construction lawyers." *Id.* Despite Prewitt's preference for arbitration, Architex waived its right to arbitrate, with no prior notice to Scottsdale.

[8] Architex mentions that Scottsdale's expert witness, Jeffrey Jackson, believes that notice is not an issue in this case, but does so in a misleading manner. Professor Jackson explained there was no need to resort to the notice issue because Architex's claim for coverage was properly denied based upon the lack of any "occurrence." Ex. 2:17 at pp. 240-43, R.E. 18.

During the time he represented Architex, Prewitt made the legal and tactical decisions on Architex's behalf. 19:2811. Architex filed a counterclaim against the owners. The counterclaim alleges that the owners failed to pay Architex what Architex was due under the construction contract between the owners and Architex. 1:68-69. Architex sued the owners for $456,075.00, of which $256,075.00 is covered by a construction lien that Architex asserted against the owners. 1:70. Architex also sought interest, prejudgment interest, attorney's fees and costs. *Id.*

Prewitt never looked at any coverage issues while he represented Architex. 19:2816. When Prewitt was asked why Architex did not tender its defense to Scottsdale when it was initially sued by the owners, Prewitt said "[t]hat's a question beyond my information." 19:2819. Prewitt reviewed the owners' complaint during his deposition, saw that it contains a claim for "negligence," and testified that he does not know why Scottsdale was not contacted when the complaint was filed. *Id.*

Victor Hamby is the CFO of Architex. 18:2698. He is also an insurance agent. 18:2693. When Hamby's insurance clients notify him that they have been sued, he immediately notifies the insurance company. 18:2694. Hamby never advises his insurance clients to defend lawsuits without putting the insurance company on notice. *Id.* Hamby disregards this practice when it comes to Architex.

Architex waited more than two years before ever notifying Scottsdale of ***any claim*** being made by the owners. The policy requires notice of a lawsuit as soon as practicable. 2:288 at Section IV.2.b(2). The complaint was filed on July 31, 2002. 1:45, R.E. 2. A notice of loss (which did not include the complaint) was not sent to Scottsdale until October 5, 2004. 4:471. The notice reported only that the hotel owners were making a claim for lack of rebar against Architex. 4:472. The first time Architex claims to have provided the actual complaint was in November 2004.

By that time, Architex had already tactically positioned the case to Scottsdale's prejudice. Its privately retained attorney did not pursue arbitration (as was Architex's right under the construction contract), counterclaimed against the owners, agreed to a bench trial with a relaxed standard of proof, and deprived Scottsdale of its procedural options, such as removal. 1:142. A new defense counsel for Architex appointed by Scottsdale would have been handcuffed by all of the tactical decisions made by Architex's previous counsel. No coverage is owed because of the prejudicial late notice.

V. No Bad Faith.

Architex claims that it has a "mountain of evidence" of bad faith, but it really has ***no*** evidence of bad faith. In denying Architex's claims for coverage, Scottsdale relied on *Omnibank* and *ACS*. It should not be punished for doing so. The Fifth Circuit, Mississippi federal district courts, and the trial court all read

Omnibank the same way that Scottsdale does. The trial court found (on summary judgment, no less) that *Omnibank* bars Architex's claims for coverage. Scottsdale followed the law. That cannot be bad faith. Architex's ideological quest for expanded insurance coverage for general contractors is one thing, but its continued pursuit of a specious bad faith claim is beyond the pale.

As a preliminary matter, an insured must prove that it is entitled to coverage before any bad faith damages may be awarded. *Stubbs v. Mississippi Farm Bureau Cas. Ins. Co.*, 825 So.2d 8, 13 (Miss. 2002). There is no coverage here, so there is no bad faith. The bad faith inquiry should go no further.

Even if this Court overrules *Omnibank*, disregards the Fifth Circuit's application of *Omnibank* in *ACS*, and reverses the trial court's grant of summary judgment to Scottsdale, Architex still must prove two things to establish a bad faith claim: (1) that Scottsdale lacked an arguable or legitimate basis to deny the claim, and (2) the denial resulted from an intentional wrong, insult, abuse or gross negligence that amounts to an independent tort. *Caldwell v. Alfa Ins. Co.*, 686 So.2d 1092, 1095 (Miss. 1996).

A. Scottsdale acted with an arguable and legitimate basis.

An insurer's reasonable belief that the policy does not provide coverage is an arguable and legitimate basis for denial. *U.S.F.&G. Co. of Mississippi v. Martin*, 998 So.2d 956, 971 (Miss. 2008). Reliance upon controlling and persuasive legal authority is the quintessential arguable and legitimate basis for

denial. *Murphree v. Federal Ins. Co.*, 707 So.2d 523, 531 (Miss. 1997). No coverage is an arguable and legitimate reason to deny a claim. *Nationwide Mut. Fire Ins. Co. v. Dungan*, 634 F.Supp. 674, 684 and n. 7 (S.D. Miss. 1986), *aff'd*, 818 F.2d 1239 (5th Cir. 1987).

As noted, in denying Architex's claims for coverage, Scottsdale relied upon the language of its policy and existing Mississippi law. Scottsdale's reliance on *Omnibank* and *ACS* constitutes an arguable basis for denying coverage to Architex. Because Scottsdale had an arguable basis for denying coverage – the law – it did not commit bad faith.

B. No independent tort.

Architex cannot establish that any of the owners' claims against it are covered. It cannot establish that Scottsdale lacked an arguable basis for denying coverage. It likewise cannot establish malice, i.e., an intentional wrong, insult, abuse, or gross negligence that amounts to an independent tort. *Murphree*, 707 So.2d at 531. This showing requires clear and convincing proof that is sufficient to permit an award of punitive damages. MISS. CODE ANN. § 11-1-65(1)(a). Even on summary judgment inquiry, the proof must be viewed in light of the substantive evidentiary burden Architex must carry at trial. *Estate of Smiley*, 530 So.2d 18, 26 (Miss. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Nevertheless, Architex erroneously argues that the independent tort element is satisfied because Scottsdale purportedly breached the duty to defend, the duty to

investigate, and the duty of good faith and fair dealing. Architex is wrong in all respects.

1. No breach of duty to defend.

No duty to defend arises when the claims are outside of the insurance policy's coverage. *Moeller v. Am. Guar. & Liability Ins. Co.*, 707 So.2d 1062, 1069 (Miss. 1996). Scottsdale had no duty to defend Architex because, as the trial court found, the policy does not cover the owners' claims against Architex. 21:3020, M.R.E. 3.[9]

2. No breach of duty to investigate.

Architex repetitiously claims that Scottsdale breached a duty to investigate. Architex Br. at pp. 26, 28. Mississippi law does not require any investigation where, as here, the allegations of the complaint are not covered under an insurance policy. *Maryland Cas. Co. v. Lab Discount Drug, Inc.*, 486 F.Supp.2d 862, 867 (S.D. Miss. 2006). As previously established, *supra* p. 20, none of the claims made in the owners' complaint are covered.

Because no covered claims are asserted in the complaint, Architex is reduced to arguing that the narrow "true facts" exception of *Mavar Shrimp &*

[9] Architex also claims that Scottsdale breached the duty to indemnify. Architex Br. at p. 27. That is nonsense. The Policy requires Scottsdale to pay only "those sums that the insured becomes legally obligated to pay as damages...." 2:284 at Section I.1.a. Architex is not legally obligated to pay any damages. Scottsdale did not breach the duty to indemnify because that duty has not arisen.

Oyster Company v. U.S.F.&G. Co., 187 So.2d 871, 874 (Miss. 1966), somehow applies.

The situation at hand in *Mavar Shrimp* more than forty years ago bears no resemblance to the facts on this appeal. In *Mavar Shrimp*, the plaintiff's complaint accused the insured of injuring him while he was working as an employee. The policy did not provide coverage for claims by an employee, so the insurer refused to defend. However, the insurer knew the actual fact from prior litigation that the plaintiff was an independent contractor, not an employee. The insurer could thus not rely on strictly what the complaint said – i.e., the plaintiff's alleged status as an employee. On the other hand, this case does not involve any actual facts known pre-suit or discoverable to Scottsdale that Architex or anyone has ever come forward with to create coverage here.

Indeed, assertions by the insured – such as everything Architex says here – without any evidence to back them up are not facts that make a defense or even an investigation necessary. *American States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 553-54 (5th Cir. 1998) (assertions by insured are not facts that could trigger duty to defend); *Evanston Ins. Co. v. Neshoba County Fair Ass'n, Inc.*, 442 F.Supp.2d 344, 349 (S.D. Miss. 2006) (even if asserted "true facts" are considered, but they do not establish coverage, then there is no duty to defend).

In this case, no information has been supplied that suggests the owners actually suffered damage resulting from an "occurrence." When Scottsdale

specifically asked Architex, under oath, to identify all of the actual facts beyond the complaint that allegedly create coverage, Architex did not identify any fact to support its claim. 4:546.

Moreover, assuming investigation is required, Architex must prove that an alleged failure to investigate was more than simply negligent to support its bad faith claim. *Murphree*, 707 So.2d at 531. The "level of negligence in conducting the investigation must be such that a proper investigation by the insurer 'would easily adduce evidence showing its defenses to be without merit....'" *Id.* (citations omitted).

Architex's interminable list on page 31 of its Brief of things that Scottsdale purportedly never investigated is meaningless. Architex has never come forward with any evidence showing that an investigation would reveal there was an "occurrence" under the insuring agreement. The trial court agreed that nothing in the complaint, nor anything else that Architex argued, was an "occurrence." "[W]hatever work was improper or defective or was not completed, as alleged in the original complaint and via ensuing discovery, was nevertheless the result of intended action by . . . Architex." 21:3017, M.R.E. 3. Scottsdale was never presented with any "claims" or "facts" that required any investigation beyond what it did. No amount of investigation would reveal an "occurrence." *Mavar Shrimp* does not create coverage here.

3. No breach of the duty of good faith and fair dealing.

A party which acts in accordance with the express terms of a contract cannot breach the duty of good faith and fair dealing. *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 898 (S.D. Miss. 1998). As explained above, and as the trial court found, Scottsdale was within its rights under the policy to deny Architex's request for a defense against the owners' lawsuit. 21:3020, M.R.E. 3. Consequently, it did not breach any duty of good faith and fair dealing. *See, e.g.*, *General Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 269 (Miss. 1999) (no breach of good faith and fair dealing where defendant took actions authorized by contract).

Omnibank was correctly decided. If this Court nonetheless chooses to overrule its precedent, Architex's bad faith claims should remain dismissed. It is impossible for Scottsdale to have acted in bad faith when following Mississippi law.

VI. Pro-Contractor Amicus Briefs Add Nothing to the Coverage Analysis.

A. Amici General Contractors want special treatment.

The amicus brief of the Associated General Contractors of America and the Associated General Contractors of Mississippi (collectively, the "General Contractors") is an unsurprising effort to expand coverage for construction defects beyond the scope of the policy's insuring agreement. The General Contractors disarmingly claim that they "ask nothing from this Court but to apply the language

of the policies for which Scottsdale collected premiums." General Contractors Br. at p. 4. They do not mean it. In actuality, the General Contractors want this Court to exclude the requirement of an "occurrence" from the policy, to overrule its definition of "occurrence" in *Omnibank*, and disregard the Fifth Circuit's correct application of that definition to a construction defect claim in *ACS*.

Coverage is determined by the insuring agreement. In this case, the insuring agreement provides that the insurance applies to "bodily injury" and "property damage" only if "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' . . . ." 2:284 at Section I.1.b.

As noted, this Court ruled in *Omnibank* that the term "occurrence" refers to the insured's act, not to the unintended consequences of that act. *Omnibank*, 812 So.2d at 200. This Court held "that an insurer's duty to defend under a general commercial liability policy does not extend to negligent actions that are intentionally caused by the insured." *Id.* at 202.

This holding obliterates the General Contractors' argument that "[u]nder the plain language of the CGL policy, the determining factor is not the intentional nature of the actions that result in property damage, but rather, the unintended or undesigned nature of the damages themselves." General Contractors Br. at p. 7. The Policy does not say that the "determining factor" is the "unintended or undesigned nature of the damages." That is the opposite of *Omnibank's* holding that the determining factor is "the nature of the insured party's conduct, not the

resulting damages of that conduct." 812 So.2d at 201. Like Architex, the General Contractors' ignore controlling Mississippi law in favor of what they want the law to be.

Omnibank rejected as "illogical" the insured's argument "that coverage exists if an insured does not intend the precise damages resulting from its intentional act." *Id.* That is exactly the argument the General Contractors are making. It should likewise be rejected.

Although the General Contractors make the calculated equivocation that their position does "not necessarily" require this Court to overrule *Omnibank*, this Court would have to do just that. General Contractors Br. at p. 7. It would have to hold, contrary to *Omnibank*, and *ACS*'s application of *Omnibank*, that an insurer's duty to defend under a CGL policy does not extend to negligent actions that are intentionally caused by the insured, ***unless the insured is a general contractor***. This "special exception" to *Omnibank*, requested by the General Contractors for general contractors, does not exist for any other class of insureds under CGL policies in Mississippi. Such a rule is contrary to the policy language and to Mississippi case law.

B. Amici State of Mississippi's request to overrule *Omnibank* is unwarranted.

1. Legislature did not mandate coverage for construction defect claims.

The State notes that MISS. CODE ANN. § 31-5-53(7) requires any person who enters into a contract with the State for the construction, alteration, or repair of any public building or public work to obtain general liability insurance coverage in an amount not less than $1 million. State Br. at pp. 1-3. This statute is of no assistance to the State's position.

Section 31-5-53(7) does not require this Court to interpret the term "occurrence" in a CGL policy in any particular way. Section 31-5-53(7) does not require CGL policies to cover construction defect claims, nor does any other State law, rule or regulation.

When the Legislature intended to mandate that an insurance policy cover particular claims or damages, it has done so. For example, § 63-15-43(1)-(3) specifies in detail the claims and damages a motor vehicle liability policy must cover. On the other hand, § 31-5-53(7) does not identify any particular claims or damages that a CGL policy must cover, and says nothing at all about construction defect claims. To the extent the State is implying that the Legislature intended § 31-5-53(7) to require CGL policies to cover construction defect claims, it is mistaken. The statute says no such thing.

2. The policy language, *Omnibank* and *ACS* outweigh the State's public policy arguments.

To its credit, unlike Architex and the General Contractors, the State concedes that its position requires this Court to overrule *Omnibank*. The State admits that "under the current interpretation of occurrence, an owner cannot rely on such protection [CGL policies] since defective design or construction work does not trigger coverage." State Br. at p. 4.

The State's only rationale for its position that a construction defect caused by a subcontractor should constitute an "occurrence" is that the State will have expanded insurance coverage. This public policy argument is contrary to the insurance policy language and controlling Mississippi case law.

The language of the Policy should outweigh the State's public policy argument, as should *Omnibank* and *ACS*. If this Court is inclined to go beyond the policy language and controlling case law and consider public policy arguments, the Court should find that Architex's claims are not covered under Scottsdale's CGL policy for several compelling public policy reasons.

Under the "business risk doctrine," CGL policies do not cover construction defect claims because they are the contractual business risks of the insured contractor: "the contractor has a contractual business risk that he may be liable to the owner resulting from failure to complete the building project itself in a manner so as not to cause damage to it. This risk is one the general contractor effectively

controls and one which the insurer does not assume because it has no effective control over those risks and cannot establish predictable and affordable insurance rates." *Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229, 234 (Minn. 1996).

Duties imposed by contract are, of course, contractual duties, not torts that give rise to negligence claims. *Palmer v. Orkin Exterminating Co.*, 871 F.Supp. 912, 914 (S.D. Miss. 1994). Labeling a breach of contract claim a negligence claim does not transform the claim into an "occurrence." A general contractor's negligence – i.e., failure to use reasonable care – in performing its contractual obligations, or in failing to adequately supervise its subcontractors, is not an accident. It is a negligent breach of contract. Damages resulting from a general contractor's breach of contract likewise are not an "accident" and therefore not an "occurrence."

As Professor Jackson explained, this rationale is consistent with the policy language, *Omnibank* and *ACS*:

> [Architex] intended to perform its obligations under the contract. It promised to do so by contract. Its work through contractors, no matter the quality, was not by accident. It intended to discharge its contractual obligation through subcontractors. The procurement of the subcontractors was not an accident, but an intended act by the insured to meet its obligation promised under the contract.

20:2852. A CGL policy is not an ATM machine for a general contractor's contractual liability to fix its own defective work or that of its subcontractors. Indeed, the subcontractors' work ***is*** the general contractor's work.

To interpret CGL policies to provide coverage for construction defects permits the general contractor to be paid initially by the owner, and again by the insurer, to repair the general contractor's own defective work or that of its subcontractors. It is not good public policy to permit the general contractor to be paid for defective work by the owner, keep the money, and then make the insurer pay to repair the defective work.

The State makes the extra-record claim that if *Omnibank* is not overruled, the State has and will continue to "suffer financially at the cost of millions of dollars." State Br. at p. 5. There is no evidence of the State's completely undocumented claim. It is also at least equally plausible that overruling *Omnibank* to allow coverage for construction defect claims will result in greatly increased insurance premiums for CGL policies to general contractors, thereby increasing the cost of the State's public works projects and the burden on taxpayers.

This point was recognized by the dissent in *Lamar Homes*, 242 S.W.3d 1. "Instead of builders standing behind their subcontractors' work . . . the Court shifts that duty to insurance companies. Every crack, stain, dent, leak, scratch, and short-circuit arising from a subcontractor's work . . . must be repaired by the builder's insurer, who may have to pay the builder to repair its own home. Why should

builders avoid unqualified subcontractors if their insurers (and other policyholders) will pay the consequences? No one really believes this is what the parties intended – that for a $12,005 annual premium the insurer agreed to repair all damage to every home Lamar Homes had ever sold." *Id.* at 20 (in dissent).

The State implicitly recognizes this when it says that "[t]he cost of repair for construction defects involving public facilities may be much more than the cost of the budgeted project itself." State Br. at p. 3. If insurance can be obtained at all for such expansive contingencies, the premiums will be substantial. The State offers no explanation for its "recourse" if the claim were covered but the cost of repair exceeded the limits of liability under the policy. The State's position that "the more insurance coverage, the better," is not the panacea for construction defect claims that it thinks it is.

The State's assertion that *Omnibank* exposes it "to an enormous amount of risk exposure and liability with no recourse" is untrue. State Br. at p. 3. The State has ***contractual*** recourse against the general contractor. Effectively taking the position that its public works contracts are not worth the paper they are written on, the State argues that it is "very likely" that general contractors and subcontractors cannot "afford the potentially large litigation costs or the costs of defect repair." State Br. at p. 9. Unless the State is attempting to support this extra-record claim by contending that there are no financially solvent general contractors or subcontractors, it could perhaps favorably resolve this problem by being more

selective about whom it hires. The State can certainly require that contractors bidding on State projects provide more rigorous and verifiable proof of their financial condition.

Furthermore, the State's reference to *State of Mississippi v. The Johnson-McAdams Firm, P.A.*, in LeFlore County Circuit Court, is puzzling. State Br. at p. 6. This is yet another extra-record matter. Even so, the State claims that the insurer relied on *ACS* in denying the claim of its insured. The State does not explain why, if it thought the insurer was incorrect, it did not pursue a claim against the insurer. *Id.* at pp. 6-7. Perhaps the State recognized then that *Omnibank* is correctly decided. The State also fails to explain whether the architect had insurance (and if not, why not), and why *Omnibank* or *ACS* would foreclose coverage under an architect's professional liability coverage. *Id.*

Finally, MISS. CODE ANN. § 31-5-53 was last amended in March 2001. This Court decided *Omnibank* in March 2002. The Fifth Circuit decided *ACS* in June 2003. The State has known for more than five years that under *Omnibank* and *ACS* construction defects do not constitute an "occurrence" under CGL policies in circumstances such as those presented here. In the five plus years since *Omnibank* and *ACS* were decided, the Legislature has not amended § 31-5-53, so there is no indication that the Legislature believes that *Omnibank* or *ACS* conflict with § 31-5-53.

Faced with what it disingenuously calls "an enormous amount of risk exposure and liability with no recourse," the State apparently did nothing until it filed an amicus brief in this case – a case where the insured failed to notify Scottsdale of the owner's lawsuit for over two years, and even refused to identify what claims it contends are covered. Although the State has now ended its long silence in a case that is rife with facts and Mississippi case law that do not support coverage for Architex, the slowness of the State's response diminishes the credibility of its extra-record assertions of enormous risk and liability, and its request that this Court overrule *Omnibank* and disregard *ACS*.[10]

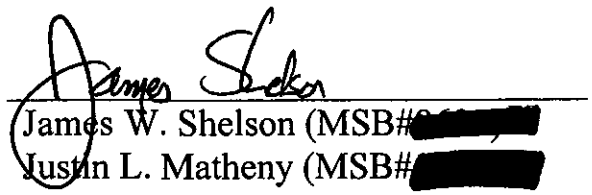
CONCLUSION

Scottsdale properly relied on Mississippi law – *Omnibank* and *ACS* – in denying Architex's claims for coverage. The trial court correctly applied Mississippi law in granting summary judgment to Scottsdale and dismissing all of Architex's claims against it. This Court should affirm.

This the 1st day of May, 2009.

[10] Scottsdale is confident that the Court will disregard the State's shameless golden rule "hypothetical" on p. 7 of its Brief regarding construction defects in the new Mississippi Supreme Court building. *Danner v. Mid-State Paving Co.*, 252 Miss. 776, 789, 173 So.2d 608, 614 (1965) (golden rule arguments are "condemned" and constitute reversible error).

Respectfully submitted,



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