

Mississippi

By: M. Patrick McDowell and Zach Smith



M. Patrick McDowell is a member at Brunini, Grantham, Grower & Hewes, PLLC. His practice focuses on complex litigation in federal and state trial and appellate courts, including antitrust, contract, business tort, unfair competition, RICO, trademark, securities, product liability, drug device, medical device, toxic exposure, and environmental litigation.



Zach Smith is an associate at Brunini, Grantham, Grower & Hewes, PLLC and is a member of the litigation team with a focus on commercial litigation.

A. Uniform Commercial Code

Mississippi has adopted and codified all¹ articles of the Uniform Commercial Code—save for article 12—at Title 75 Chapters 1 through 11 of the Mississippi Code. While Mississippi has not adopted the official comments to the UCC, its courts “[s]till look to the official comments about uniform laws, when those laws have been adopted all but verbatim ... as the most informed source explaining the

provisions of the original enactment.”²

B. Compensatory Damages

Mississippi courts award compensatory damages as the standard measure of recompensing the actual harm sustained by an injured party. “The fundamental principle of the law of damages is compensation for injuries

¹ See MISS. CODE ANN. § 75-1-101 *et seq.* Mississippi’s codification of Article 6 of the UCC was repealed effective July 1, 1995 as recommended by the Uniform Law Commission. See MISS. CODE ANN. § 75-6-112.

² Nat’l Bank of Com. v. Shelton, 27 So. 3d 444, 448 (Miss. Ct. App. 2009) (quoting *Holifield v. BancorpSouth, Inc.*, 891 So. 2d 241, 248 (Miss. Ct. App. 2004)).

sustained.”³ In awarding compensatory damages, Mississippi courts “will compensate the injured party for the injury sustained, and nothing more”⁴ Logically then, “actual damages are synonymous with compensatory damages.”⁵

Compensatory damages for economic harm are unlimited with narrow exceptions for actions against the state and its political subdivisions. However, compensatory damages for noneconomic harm are strictly capped at \$500,000 in medical malpractice actions and \$1,000,000 in all other civil actions.⁶ The term “noneconomic damages” does not encompass punitive or exemplary damages but is otherwise broadly defined by statute to include “nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages,

other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury.”⁷

C. Consequential and Incidental Damages (and exclusions)

Consequential damages are those which result from a defendant’s acts or omissions, but which are not “typically caused by” or the expected to result of the same.⁸ Consequential damages may be recovered in both tort and contract, but only where the damages suffered are reasonably foreseeable at the time of breach or tortious conduct.⁹ In all instances, no recovery may be had for uncertain, speculative, or remote injuries. However, “[t]he rule that uncertain damages cannot be recovered applies only to the nature, not the extent, of the damages.”¹⁰ “[W]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or

³ *Wilson v. Gen. Motors Acceptance Corp.*, 883 So. 2d 56 (Miss. 2004).

⁴ *Parsons v. Walters*, 297 So. 3d 250, 259 (Miss. 2020) (internal quotation mark omitted) (quoting *Richardson v. Canton Farm Equip. Inc.*, 608 So. 2d 1240, 1250 (Miss. 1992)).

⁵ *Gorman v. McMahan*, 792 So. 2d 307, 316 (Miss. Ct. App. 2001) (quoting *Black’s Law Dictionary* 35 (6th Ed. 1990)).

⁶ *See* MISS. CODE ANN. § 11-1-60.

⁷ *Id.*

⁸ *See Puckett Mach. Co. v. Edwards*, 641 So. 2d 29, 37-38 (Miss. 1994).

⁹ *Wright v. Stevens*, 445 So. 2d 791 (Miss. 1984) (consequential damages recoverable under contract); *Walker v. Brown*, 501 So. 2d 358 (Miss. 1987) (recovery of direct and consequential damages allowed in tort action).

¹⁰ *Benchmark Health Care Ctr., Inc. v. Cain*, 912 So. 2d 175, 179 (Miss. Ct. App. 2005).

prevent a jury decision awarding damages.”¹¹

A party may recover incidental damages incurred in attempting to remedy or mitigate the damages resulting from a breach or tortious act. “As a general rule, a party is entitled to all legitimate expenses that he may show to have been incurred by him in an honest endeavor to reduce the damages flowing from or following the wrongful act.”¹² This right to recovery is not unlimited. A party may only recover as damages the “reasonable and necessary expenses incurred in an attempt to prevent future damages, so long as those expenses do not exceed the diminution in value” experienced if said measures were not taken.¹³

With respect to commercial entities, the right to recover consequential or incidental damages may be prospectively waived. “[E]xclusionary clauses limiting incidental and consequential damages in purely commercial transactions are prima facie conscionable and the burden of establishing unconscionability is on the party attacking the clause.”¹⁴ In consumer contracts, and especially

contracts of adhesion, prospective damage waivers are disfavored.¹⁵

D. Liquidated Damages

Liquidated damages provisions are presumptively valid under Mississippi law. “[A]n agreement for liquidated damages will be held valid in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive, or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of agreement.”¹⁶ The burden of proving a particular liquidated damages provision is unreasonable falls to the party seeking to avoid its application. Still, the damages agreed to must bear some relation to the harm contemplated at the time of contracting. Mississippi courts will only “enforce a contract for liquidated damages if such liquidated damages can be found to be reasonable and proper in the light of the circumstances of the case.”¹⁷ The reasonableness of a liquidated damages provision is typically measured at the time of contracting, rather than when the

¹¹ Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050 (Miss. 1984).

¹² Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 739 (Miss. 1999).

¹³ City of Jackson v. Keane, 502 So. 2d 1185, 1188 (Miss. 1987) (emphasis in original).

¹⁴ Swampfox Oilfield Servs., LLC v. Blackjack Oil Co., Inc., 281 So. 3d 287, 297 (Miss. Ct. App. 2019) (citation and quotation omitted).

¹⁵ See Pitts v. Watkins, 905 So. 2d 553, 556 (Miss. 2005) (Such clauses are “not to be enforced unless the limitation is fairly and honestly negotiated and understood by both parties.”).

¹⁶ Wood Naval Stores Export Ass’n v. Latimer, 71 So. 2d 425, 431 (Miss. 1954).

¹⁷ Maxey v. Glindmeyer, 379 So. 2d 297, 301 (Miss. 1980).

breach occurred. Parties may “agree to the payment of liquidated damages in circumstances where it is difficult to predict actual damages that may result from a breach.”¹⁸

E. Nominal Damages

Mississippi allows for the award of nominal damages for the technical violation of some legal right, “a consequence of which requires an award of some damage to determine that right.”¹⁹ Nominal damages are viewed as being small or trivial in nature as distinguished from compensatory damages which refer to actual damages suffered.²⁰ Such damages are available in actions sounding in both tort and contract.²¹ Mississippi courts have allowed for awards as high as \$1,000 for nominal damages and as low as \$.01.

¹⁸ *Hovas Const., Inc. v. Bd. of Trs. of W. Line Consol. Sch. Dist.*, 111 So. 3d 663, 666 (Miss. Ct. App. 2012).

¹⁹ *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312, 320 (Miss. Ct. App. 1999).

²⁰ *Wells v. Branscome*, 74 So. 2d 743, 745 (Miss. 1954) (\$.01 award for nominal damages); *Southland Co. v. Aaron*, 80 So. 2d 823, 826 (Miss. 1955) (proof exceeded award of nominal damages); *City of Laurel v. Bush*, 120 So. 2d 149, 155 (Miss. 1960) (\$50 award for nominal damages).

²¹ *See, for example, Callicott v. Gresham*, 161 So. 2d 183, 186 (Miss. 1964) (“[W]here a suit is brought for a breach of a contract, and the evidence sustains the claim, the complainant is entitled to recover at least nominal damages for the failure of the defendant to

F. Punitive Damages

An award of punitive damages acts to punish the wrongdoer and is intended to set an example, thereby discouraging others from similar behavior.²² “Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed with caution and within narrow limits.”²³ A single statute applies in every action in which such damages are sought.²⁴ Punitive damages require clear and convincing evidence that a given defendant “acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.”²⁵ Despite the statutory language seemingly requiring disregard for the safety of others, recent interpretations have affirmed an award of punitive damages based on disregard for the rights of others.²⁶

carry out his agreement.”); *Edwards v. Williams*, 292 So. 3d 586 (Miss. Ct. App. 2019) (structure extending into neighboring land was a trespass by definition, supporting award of nominal damages even if no harm was sustained).

²² *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 895 (Miss. 2006).

²³ *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006).

²⁴ *See* MISS. CODE ANN. §11-1-65.

²⁵ *Id.*

²⁶ *See United Servs. Auto. Ass'n v. Est. of Sylvia F.*, 2024 WL 4985302, at *10 (Miss. Dec. 5, 2024) (affirming award of punitive damages an insurer’s “gross and reckless disregard for [the] insured’s rights”).

Punitive damages are handled in a bifurcated manner. First, an award of compensatory damages must be made; only then can a court determine whether the issue of punitive damages may be submitted to the jury.²⁷ The amount of punitive damages allowed is constrained by the net worth of the individual or entity against whom such damages are sought based on a statutorily set maximums rather than a general consideration of the defendant's financial condition. For instance, caps are set at \$20 million for a defendant with a net worth of more than \$1 billion, \$15 million for a defendant whose worth is between \$750 million and \$1 billion, etc. However, in instances of injury caused by felonious conduct or by an individual under the influence of alcohol or illicit drugs, punitive damages are not limited by net worth considerations.²⁸

G. Pre- and Post-Judgment Interest

Pre- and post-judgment based on "any sale or contract shall bear interest at the same rate as the contract evidencing the debt" on

which the judgment was awarded.²⁹ If the contract does not specify an interest rate, the default rate is eight percent per annum.³⁰ All other judgments bear interest at a rate set by the judge from a date determined by the judge, not to commence "prior to the filing of the complaint."³¹ Pre-judgment interest is only allowed where (1) "the amount due [was] liquidated when the claim [was] originally made or ... the denial of [the] claim [was] frivolous or in bad faith," and (2) the complaint includes a demand for pre-judgment interest.³²

H. Attorneys' Fees

In the absence of a contract or statute providing for the recovery of attorneys' fees, such fees may not be awarded "unless the facts are of such gross or willful wrong as to justify the infliction of punitive damages."³³ However, an award of punitive damages is *not* required to support the recovery of attorneys' fees. Rather the nature of the defendant's conduct must be such that it would make an award of punitive damages appropriate, even if such damages were not

²⁷ See *Bradfield*, 936 So. 2d at 936.

²⁸ See MISS. CODE ANN. § 11-1-65(c-d).

²⁹ MISS. CODE ANN. § 75-17-7.

³⁰ *Gordon v. Gordon*, 929 So. 2d 981 (Miss. Ct. App. 2006).

³¹ MISS. CODE ANN. § 75-17-7.

³² *Upchurch Plumbing Inc. v. Greenwood Util. Comm'n*, 964 So. 2d 1100, 1117 (Miss. 2007).

³³ *Bellefonte Ins. Co. v. Griffin*, 358 So. 2d 387, 391 (Miss. 1978).

awarded.³⁴ Litigants may also recover attorneys' fees incurred as a result of a frivolous claim or other pleading under the Mississippi Litigation Accountability Act of 1988.³⁵ A claim is frivolous when an objective review reveals "the pleader or movant has no hope of success."³⁶

The reasonableness of an award of attorneys' fees is based on "the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to acceptance of the case."³⁷

I. Reliance Damages

Mississippi does not typically award reliance damages incurred as a result of a party's breach, opting instead to award expectation damages measured as the amount required to put the non-breaching party "in as good a position as he

would have been in had the contract been performed."³⁸ An award of reliance damages in excess of expectation damages would be improper as placing the claimant in a better position than it would be in had no breach occurred. While expenses incurred in reliance on another party's promise to perform are properly considered in the realm of quasi-contractual equitable remedies, even then reliance damages are only an element thereof, rather than a standalone claim.³⁹

J. Unjust Enrichment Damages

In Mississippi, unjust enrichment is an equitable remedy appropriate when there is no legally enforceable contract, but the party sought to be charged is in possession of money or property which in good conscience and justice it should not retain as fairly belonging to another.⁴⁰ Unjust enrichment is available only in situations tantamount to a mistaken

³⁴ Aqua-Culture Techs., Ltd. v. Holly, 677 So. 2d 171, 184 (Miss. 1996).

³⁵ MISS. CODE ANN. § 11-55-1 *et seq.*

³⁶ Leaf River Forest Prods. Inc. v. Deakle, 661 So. 2d 188, 195 (Miss. 1995).

³⁷ McKee v. McKee, 418 So. 2d 764, 767 (Miss. 1982) (internal citation omitted).

³⁸ J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 405 (Miss. 1996).

³⁹ See Boyanton v. Bros. Produce, Inc., 312 So. 3d 363, 372 n.2 (Miss. Ct. App. 2020) ("Detrimental reliance is not a separate claim under Mississippi law but rather is an element of estoppel[.]").

⁴⁰ Koval v. Koval, 576 So. 2d 134, 136 (Miss. 1991).

payment, and “it applies *only* where no legal contract exists.”⁴¹

K. Attachment

Mississippi allows for pre-judgment attachment of property in the forms of attachment at law and attachment at chancery.⁴² However, the constitutionality of these mechanisms has been questioned.⁴³ Nonetheless, pre-judgment attachment in chancery is still ostensibly available in Mississippi as a “provisional remedy.”⁴⁴ Pre-judgment attachment may be sought against (1) “any nonresident, absent or absconding debtor, who has lands or tenements within the state,” and (2) “persons in the state who have in their hands effects of, or are indebted to, such

non-resident, absent or absconding debtor.”⁴⁵ The statute authorizes an *in personam* decree only against a defendant of the former type, and then only “if summons has been personally served against him, or if he has entered an appearance.”⁴⁶

L. Public Policy Considerations

The public policy of Mississippi prevents the imposition of excessive damages, as reflected in the limitations placed on punitive and noneconomic damages discussed above. In addition to those statutory limitations, punitive damages may not be awarded against the State of Mississippi, its governmental entities, or political subdivisions absent specific legal authorization.⁴⁷

⁴¹ *Willis v. Rehab Solutions, PLLC*, 82 So. 3d 583, 588 (Miss. 2012) (emphasis added).

⁴² See MISS. CODE ANN. § 11-33-1 (at law), § 11-31-1 (at chancery). The Mississippi Rules of Civil Procedure have left these traditional remedies untouched. See MISS. R. CIV. P. 64.

⁴³ See *Mississippi Chem. Corp. v. Chem. Const. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977) (prejudgment attachment violates due

process as no notice or hearing is afforded to a debtor).

⁴⁴ *Fed. Sav. & Loan Ins. Corp. v. S. & W. Const. Co. of Tennessee*, 475 So. 2d 145, 147 (Miss. 1985).

⁴⁵ MISS. CODE ANN. § 11-31-1.

⁴⁶ *Id.*

⁴⁷ MISS. CODE ANN. § 11-46-15.