Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)

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The pervasive use of computers has revolutionized both the practice of law and the conduct of business. Agreements once performed on the basis of an oral promise or a hand shake, at one end of the spectrum, or only following lengthy negotiations and exchanges of drafts of documents which had to be recreated from scratch at each stage, at the other, often are now governed by writings prepared with minimal effort, based on a computerized form used by a party to the contract, or its attorneys, in some prior deal. The ease of "block and copy" drafting of contracts and similar instruments, and the often corresponding decrease of close attention paid to any particular agreement in the drafting stage, increases the potential for misunderstanding among the parties to those agreements when the time comes for them to perform. When litigation results, the threshold issues for the parties, their counsel, and the court are often the same: What are the complete terms of the parties' agreement? What was the parties' intent in entering into the agreement? And, how can we prove
(or challenge) said terms and intent?

In Mississippi, as in every jurisdiction, a considerable body of law governs the resolution of these questions. Many separately articulated—if not always well defined—interpretational guides and evidentiary principles apply. This article explores the process and the rules used by Mississippi courts to determine and effectuate contractual intent, as well as the circumstances under which Mississippi courts and juries may consider evidence beyond the “four corners” of the written instrument. This discussion is relevant to practically every negotiation, drafting session, lawsuit, and settlement involving the written word.¹ For that reason, attorneys responsible

¹ While much of the discussion in this article focuses on written contracts, with certain exceptions—some of which will be discussed later, and some of which are beyond the scope of this article—many of the same rules and guides used to construe and interpret written contracts, and to apply the parol evidence rule to written contracts, also pertain to, inter alia, antenuptial (or “prenuptial”) agreements, see, e.g., Smith v. Smith, 656 So. 2d 1143 (Miss. 1995), bills of lading, see, e.g., Yazoo & Miss. Valley R.R. v. Nichols & Co., 83 So. 5 (Miss. 1919), aff'd, 256 U.S. 540 (1921), certificates of deposit, see, e.g., Wallace v. United Mississippi Bank, 162 So. 2d 1143 (Miss. 1995); Cooper v. Crabb, 587 So. 2d 236 (Miss. 1991), corporate charters, see, e.g., Mississippi Power & Light Co. v. Capital Elec. Power Ass'n, 222 So. 2d 399 (Miss.), appeal dismissed, 396 U.S. 113 (1969), deeds, see, e.g., Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 726 So. 2d 1235 (Miss. 1996); Baker v. Columbia Gulf Transmission Co., 218 So. 2d 39 (Miss. 1969), covenants not to compete, see, e.g., Landry v. Moody Grishman Agency, Inc., 181 So. 2d 134 (Miss. 1965), divorce decrees, see, e.g., Norton v. Norton, 742 So. 2d 126 (Miss. 1999); Crist v. Lawrence, 738 So. 2d 267 (Miss. Ct. App. 1999), easements, see, e.g., Bivens v. Mobley, 724 So. 2d 458 (Miss. Ct. App. 1998), guaranty agreements, see, e.g., Turnbough v. Steere Broad. Corp., 681 So. 2d 1325 (Miss. 1996), indemnity agreements, see, e.g., Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d 1305 (Miss. 1994); Blain v. Sam Finley, Inc., 226 So. 2d 742 (Miss. 1969), indorsements, see, e.g., Hawkins v. Shields, 57 So. 4 (Miss. 1912), insurance policies, see, e.g., Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc., 734 So. 2d 173 (Miss. 1999), leases, see, e.g., IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96 (Miss. 1998); Malsbury v. State Hwy. Comm'n, 161 So. 2d 649 (Miss. 1964), marital property settlements, see, e.g., Roberts v. Roberts, 381 So. 2d 1333 (Miss. 1980), mortgages, see, e.g., United Miss. Bank v. GMAC Mortgage Co., 615 So. 2d 1174 (Miss. 1993), negotiable instruments, see, e.g., Wilkins v. Bancroft, 193 So. 2d 571 (Miss. 1966), partnership divisions, see, e.g., McKee v. McKee, 568 So. 2d 262 (Miss. 1990), promissory notes, see, e.g., Estate of Parker v. Dorchak, 673 So. 2d 1379 (Miss. 1996); Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409 (Miss. 1966), purchase options, see, e.g., Busching v. Griffin, 542 So. 2d 860 (Miss. 1989); releases,
for drafting legal documents, as well as those who handle litigation concerning them, should benefit from this examination—the former by being alerted to the many pitfalls associated with imprecise or incomplete draftsmanship, and the latter by being better prepared to litigate the consequences of imprecise or incomplete draftsmanship. This article should also prove useful to the judges before whom these disputes come and those whose interest in the process of giving meaning and consequence to written agreements is more academic.

I. THE GOAL OF CONSTRUCTION AND INTERPRETATION

*, Divining the intent of the parties is the first rule of contract construction.*

In construing and interpreting a written contract, a see, e.g., Ellis v. Powe, 645 So. 2d 947 (Miss. 1994), restrictive covenants, see, e.g., Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546 (Miss. 1996); Kemp v. Lake Serene Property Owners Ass'n, 256 So. 2d 924 (Miss. 1971), scholarship certificates, see, e.g., Weeks v. Mississippi College, No. 98-CA-00245-COA, 1999 WL 410552 (Miss. Ct. App. June 22, 1999), security agreements, see, e.g., Kelso v. McGowan, 604 So. 2d 726 (Miss. 1992); Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937 (Miss. 1990), settlement agreements, see, e.g., Meek v. Warren, 726 So. 2d 1292 (Miss. Ct. App. 1998), surety agreements, see, e.g., Alexander v. Fidelity & Cas. Co., 100 So. 2d 347 (Miss. 1958), trusts, see, e.g., Hart v. First Nat'l Bank of Jackson, 112 So. 2d 565 (Miss. 1959); Hart v. First Nat'l Bank of Jackson, 103 So. 2d 406 (Miss. 1958), warranties, see, e.g., Ford Motor Co. v. Olive, 234 So. 2d 910 (Miss. 1970), and wills, see, e.g., Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n, 672 So. 2d 1173 (Miss. 1996), including joint and mutual wills, see, e.g., Monroe v. Holleman, 185 So. 2d 443 (Miss. 1966). As such, this Article — beyond its value to legal scholars, law students, judges, and their law clerks — should interest not only “contract lawyers” but also lawyers who specialize in, *inter alia*, family law, estate planning, general civil litigation, financial services, insurance, and real property transactions. For the sake of simplicity, this Article will use “contract” or “instrument” as default terms, unless the circumstances dictate otherwise.


3 To paraphrase Professor Corbin, “interpretation” is the process of determining the meaning of the words and symbols used in the contract, while “construction” is the process of determining the legal effect of those words and symbols in light of many factors external to the contract itself. 3 Arthur L. Corbin, Corbin
court's primary concern is to ascertain and give effect to the mutual intent of the parties at the time of contracting. A

ON CONTRACTS § 534, at 7-9 (1960); see also RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981) ("Interpretation of a promise or agreement or a term thereof is the ascertaining of its meaning."); id. § 200 cmt. c, at 82 ("Interpretation is not a determination of the legal effect of words or other conduct."); id. § 200 note, at 82 (noting that Section 200 "rephrase[s]" Section 226 of the first Restatement of Contracts "to make it clear that 'interpretation' relates to meaning," whereas "construction" relates to "the ascertaining of legal operation or effect"); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.7, at 255-56 (2d ed. 1998); 5 MARGARET N. KNIFIN, CORBIN ON CONTRACTS § 24.3, at 7-11 (Joseph M. Perillo ed., rev. ed. 1998). See generally Robert Braucher, Interpretation and Legal Effect in the Second Restatement of Contracts, 81 COLUM. L. REV. 13 (1981); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833 (1964).

In practice courts often blur the line between construction and interpretation, frequently using the terms interchangeably. See FARNSWORTH, supra, § 7.7, at 256 ("Although courts have sometimes endorsed this distinction, they have often ignored it by characterizing the process of construction as that of 'interpretation' . . .") (footnote omitted); Mark L. Movsesian, Severability in Statutes and Contracts, 30 GA. L. REV. 41, 52 n.79 (1995) (remarking that the distinction between construction and interpretation "proves difficult to maintain, and courts have largely ignored it"). See generally RESTATEMENT (SECOND) OF CONTRACTS ch. 9 intro. note, at 81 ("[S]tating separately rules with respect to various aspects of the process [of interpreting and applying agreements] may convey an erroneous impression of the psychological reality of the judicial process in which many elements are typically combined in a single ruling.").

Nonetheless, the distinction between construction and interpretation is pedagogically useful, in that it helps us understand what courts do with written contracts (even if the courts themselves are not cognizant of the distinction between determining the meaning of the parties' words and their legal consequences). Thus, we may distinguish between the "[i]nterpretation of words and of other manifestations of intention forming an agreement, or having reference to the formation of an agreement," and "the process of determining from such manifestations what must be done or forborne by the respective parties in order to conform to the terms of the contract or agreement." Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc). Some contracts must be interpreted by courts, others need not be. All contracts that come before a court must be construed. Even if a writing requires no interpretation because the objective meaning of the words and symbols used is sufficiently clear, the court must still construe the writing before giving it legal effect.

That said, the discussion in Part II of this article treats construction and interpretation as an integrated process, and does not try to distinguish "rules of construction" from "rules of interpretation." In the words of Professor Corbin: "[T]he construction of a contract starts with the interpretation of its language but does not end with it . . . ." 3 CORBIN, supra, § 534, at 9.

4 See Wallace, 726 So. 2d at 586; Heritage Cablevision, 646 So. 2d at 1312;
Mississippi court—which, for purposes of this article, will also include any court considering a written agreement subject to Mississippi law—must give effect to the objective intent of the parties as it is expressed or apparent in writing, as opposed to the subjective intent of parties who failed to fully capture their intent when they wrote the contract in question. In so doing, the court must consider not only the mean-

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6 See Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) (“The most basic principle of contract law is that contracts must be interpreted by objective, not subjective standards. A court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties.” (quotation omitted)); accord IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104 (Miss. 1998); Burton v. Choctaw County, 730 So. 2d 1, 6 (Miss. 1997); Century 21 Deep South Properties, Ltd. v. Keys, 652 So. 2d 707, 718 (Miss. 1995); Heritage Cablevision, 646 So. 2d at 1312-13; Simmons v. Bank of Miss., 593 So. 2d 40, 42-43 (Miss. 1992); Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 351 (Miss. 1990); Osborne v. Bullins, 549 So. 2d 1337, 1339 (Miss. 1989); UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987); Rogers v. Morgan, 164 So. 2d 480, 484 (Miss. 1964); In re Estate of Huddleston, No. 97-CA-01080-COA, 1999 WL 30541, at *3 (Miss. Ct. App. Jan. 26, 1999).

As the Mississippi Supreme Court explained thirty-five years ago:

Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import
ing of the terms chosen by the parties to it, but also the legal consequence of those terms.

II. THE PROCESS OF CONSTRUCTION AND INTERPRETATION

*This Court must seek the meaning most coherent in principle with the best justification which may be found for that language.*

Over time, courts and scholars have recognized certain "rules" or "maxims" of construction and interpretation to guide courts and litigants in their efforts to give effect to the parties' mutual intention at the time of contracting. These rules appear in no code, and there is less than universal agreement among courts and commentators as to whether all of the maxims set forth below are legitimate guides to construction and as to what priorities, if any, courts are to observe among the various rules.

The prevailing view among American courts and commentators is that a court need not find ambiguity on the contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used.

Byrd v. Rees, 171 So. 2d 864, 867-68 (Miss. 1965); see also Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991) ("[L]egal purpose or intent should first be sought in an objective reading of the words employed, to the exclusion of parol or extrinsic evidence. Courts are not at liberty to infer an intent contrary to that emanating from the text at issue.").

Lehman-Roberts Co. v. State Hwy. Comm'n, 673 So. 2d 742, 744 (Miss. 1996) (paraphrasing Simmons, 593 So. 2d at 43). What could be clearer?

8 See infra subpart II.A.
full integration before it may apply these rules of construction and interpretation to determine the meaning and consequence of the parties’ written agreement. Rather, a trial court may—indeed, should—use these rules, along with all relevant evidence, to ascertain the existence of an ambiguity or a less-than-fully integrated agreement, in the first place, as well as to resolve any such ambiguity or fill the “gaps” created by partial integration once identified.

9 See infra subpart II.B.

This "modified objectivist," or "contextual," approach underlies both the Restatement (Second) of Contracts and the Uniform Commercial Code. According to the Restatement (Second), which was informed by and took account for the Code's treatment of these issues, the questions of whether and to what extent a writing is integrated and whether it is unambiguous are questions of fact, to be determined by the trial judge based on all relevant evidence—including, but not limited to, the circumstances surrounding the formation of the contract—and in light of the relevant rules of construction and interpretation. As a threshold matter, the trial judge determines, based on all relevant evidence, whether and to what extent the writing is integrated. In the absence of integration, ambiguity is irrel-

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See generally infra subpart II.D for a discussion of parol evidence and construction and interpretation issues under the Uniform Commercial Code.

14 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g, at 90; id. § 202 reporter's note, at 91; id. § 203 cmt. d, at 94; id. § 203 reporter's note, at 96; id. § 209 cmt. c, at 116; id. § 209 reporter's note, at 117; id. § 210 cmt. a, at 118; id. § 212 reporter's note, at 128; id. § 216 cmt. a, at 137.

15 See infra notes 16, 19-20.

16 See RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c, at 116 ("Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence . . . . Ordinarily the issue whether there is an integrated agreement is determined by the trial judge in the first instance as a question preliminary to an interpretative ruling or to the ap-
evant, and the parol evidence rule will not apply to prohibit the parties from presenting extrinsic evidence to the trier of fact, who will be charged with determining the existence, terms, and effect of the parties' agreement.\textsuperscript{17} If the trial judge finds that the writing is partially or fully integrated, the next question is whether it is ambiguous—that is, whether the words of the partially or fully integrated writing are reasonably susceptible to more than one legal meaning.\textsuperscript{18} This, too, the trial judge decides based on all relevant evidence.\textsuperscript{19} In

\textsuperscript{17} See, e.g., Walley v. Bay Petroleum Corp., 312 F.2d 540, 543-44 (5th Cir. 1963) (applying Mississippi law); see also Matthews v. Drew Chem. Corp., 475 F.2d 146, 148-50 (5th Cir. 1973) (applying Florida law); infra note 669 and accompanying text.

\textsuperscript{18} See infra note 30 and accompanying text.

\textsuperscript{19} See \textit{Restatement (Second) of Contracts} § 212(1) ("The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in light of the circumstances ....") (emphasis added); id. § 212 cmt. b ("[T]he rule stated in [§ 212(1)] is not limited to cases where it is determined that the language used is ambiguous. \textit{Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.}" (emphasis added)); id. § 214(c) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish .... (c) the meaning of the writing, whether or not integrated ...."); id. § 214 cmt. b ("Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. \textit{Even though words seem on their face to have only a single possible meaning, other
making these threshold determinations of integration and ambiguity, the trial court should also consider the relevant rules of construction and interpretation.\textsuperscript{20}

This view, however, is by no means universal. A minority of courts and commentators adhere to a more "objectivist" approach,\textsuperscript{21} which purports to require a judge to determine the existence of ambiguity and the presence and extent of integration by looking solely at what appears within the written contract itself—a "four corners" test, so to speak.\textsuperscript{22} The preponderance of published Mississippi Supreme Court and Mississippi Court of Appeals cases discussing the construction and interpretation of contracts tend toward the "objectivist" approach, requiring that the court make a threshold finding that the "four corners" of the instrument reveal some lack of integration or some ambiguity (or both) before the court may resort to any interpretational aids.\textsuperscript{23}

\begin{footnotesize}
\begin{enumerate}
\item See id. § 202 cmt. a ("The ['Rules in Aid of Interpretation’ set forth in § 202] are applicable to all manifestations of intention and all transactions . . . . They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.").
\item See KNAPP, CRYSTAL & PRINCE, supra note 11, at 421-22.
\item See, e.g., Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d
\end{enumerate}
\end{footnotesize}
In the oft-cited case of *Pursue Energy Corp. v. Perkins,* the Mississippi Supreme Court prescribed the following "three-tiered process" for construing and interpreting written agreements:

1. **In Pursue Energy Corp. v. Perkins,** the Mississippi Supreme Court prescribed the following "three-tiered process" for construing and interpreting written agreements:
2. **But see**, *Fortune Furniture Mfg., Inc. v. Pate's Elec. Co.,* 356 So. 2d 1176, 1178 (Miss. 1978) ("[W]hether a written contract was intended to be the final and complete expression of the agreement must be determined from the circumstances of the case."); *Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott,* 191 So. 2d 399, 403 (Miss. 1966) ("In determining whether a contract exists, it is incumbent on the court to try to arrive at the intention of the parties, which must be determined in light of the existing circumstances."); *Bivens v. Mobley,* 724 So. 2d 458, 462-63 (Miss. Ct. App. 1998) ("Facts regarding intent are to be determined from the circumstances surrounding the transaction."); *see also,* e.g., *Griffin v. Tall Timbers Dev., Inc.*, 681 So. 2d 546, 551 (Miss. 1996) ("In construing covenants imposing restrictions and burdens on use of land, the language used will be read in its ordinary sense, and the restriction and burden will be construed in light of the circumstances surrounding its formulation, with the idea of carrying out its object, purpose and intent... ") ; *Simmons v. Bank of Miss.*, 593 So. 2d 40, 43 (Miss. 1992) ("We must read these two clauses in the manner that best fits the words of the lease in its entirety, open to the implicit, as we absorb the explicit. We seek as well that meaning most coherent in principle with the best justification which may be found for this language, given the underlying substantive facts, most important of which are that Landowner put not one penny into the building Bank's predecessor built and that the building may feasibly be removed without undue harm to the remainder." (emphases added)); *Williams v. Batson,* 187 So. 236, 238 (Miss. 1939) (en banc) ("The standard of interpretation of an integration (written instrument), except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration... ") (citing 1 *RESTATEMENT OF CONTRACTS § 226 (1932)*) (emphasis added)).
instruments:

First, the court will attempt to ascertain intent by examining the language contained within the "four corners" of the instrument in dispute.

Particular words should not control; rather, the entire instrument should be examined.

This so-called "four corners" doctrine calls for construction through application of correct English definition and language usage. In other words, an instrument should be construed in a manner which makes sense to an intelligent layman familiar only with the basics of English language. Of course, exceptions exist (i.e., when a word has a distinctive legal meaning).

When an instrument's substance is determined to be clear or unambiguous, the parties' intent must be effectuated.

In cases in which an instrument is not so clear (e.g., different provisions of the instrument seem inconsistent or contradictory), the court will, if possible, harmonize the provisions in accord with the parties' apparent intent. A cursory examination of the provisions may lead one to conclude that the instrument is irreconcilably repugnant; however, this may not be a valid conclusion. If examination solely of the language within the instrument's four corners does not yield a clear understanding of the parties' intent, the court will generally proceed to another tier in the three-tiered process. This entails discretionary implementation of applicable "canons" of contract construction . . .

Application of "canons" of construction may provide a court with an objective inference of the parties' intent. But if, at this step in the process, intent remains unascertainable (i.e., the instrument is still considered ambiguous), then the court may resort to a final tier in the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence. In other words, consideration of the totality of the circumstances attendant the devising of an instrument may help reveal the parties' intent . . .

25 Id. at 352-53 (quotations, citations, and parentheticals omitted); accord Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1237-38 (Miss. 1996); see also Barnett v. Getty Oil Co., 266 So. 2d 581, 586
"Four corners" analysis does not require a court to literally construe an instrument; rather, it limits the quantum of evidence a court may consider in making its threshold determinations whether or not the "instrument's substance" is clear and unambiguous.\(^{26}\) As a consequence, the Mississippi Supreme Court preceded its analysis with the proviso: "Of course, the so-called three-tiered process is not recognized as a rigid "step-by-step" process. Indeed, overlapping of steps is not inconceivable." Pursue Energy, 558 So. 2d at 351 n.6.

More than half a century earlier, in Sumter Lumber Co. v. Skipper, 184 So. 296 (Miss. 1938), the Mississippi Supreme Court explained the process this way:

The rules for the construction of deeds or contracts are designed to ascertain and follow the actual or probable intention of the parties, and are: When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them; and when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words.

Id. at 298-99, quoted with approval in Brashier v. Toney, 514 So. 2d 329, 332 (Miss. 1987).

See, e.g., Ham v. Cerniglia, 18 So. 577, 578 (Miss. 1895) ("If strict regard be had to the literal terms of the written contract, it would appear to be a lease;
Court frequently appears to "cheat" by referring to one or more of the following primary rules of construction while conducting its "four corners" analysis. Strictly speaking, however, only a resort to the circumstances surrounding the formation of the contract or the "practical construction" afforded to the agreement by the parties at and after the time of formation necessarily requires looking beyond the "four corners."

A. Key Concept: Ambiguity

To say this paragraph is free from doubt ignores the fact that intelligent lawyers reading it have come to opposite views.... In the absence of the two parties who signed it informing us precisely what was meant, the most enlightened argument from here to the millennium would never remove the cloud cast by the words.

An instrument is ambiguous if one or more terms or provisions are susceptible to more than one reasonable meaning. Mere disagreement between the parties about the meaning of a provision of a contract is not enough to make the contract ambiguous.

but looking below the surface, and through the mere form employed, we have no hesitation in declaring the contract one of conditional sale. The total value of the property is named in the face of the instrument, and the 'monthly rentals,' as they are called; but these monthly installments, if paid promptly, would quickly equal the value of the property.

27 See infra subpart II.C.7.
28 See infra subpart II.C.8.
31 Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987); accord
If a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court, and which should be enforced as written. 32


Ambiguity may be patent—appearing “on the face of the contract” 33—or latent—“arising from words which are uncertain when applied to the subject matter of the contract.” 34

In Traders’ Insurance Co. of Chicago v. E.D. Edwards Post No. 22, G.A.R., 35 the defendant insurer undertook to insure the plaintiff’s hall and its contents “for the term of three years from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon.” 36 Finding these two statements of duration—“for the term of three years” and “from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon”—each to be “perfectly clear in

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32 See Burton v. Choctaw County, 730 So. 2d 1, 6 (Miss. 1997); IP Timberlands, 726 So. 2d at 104; Whittington v. Whittington, 608 So. 2d 1274, 1278 (Miss. 1992); Hynson v. Jeffries, 697 So. 2d 792, 795 (Miss. Ct. App. 1997).

33 See Buddy Jones Ford, 734 So. 2d at 176; IP Timberlands, 726 So. 2d at 106; Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985); Smith v. First Fed. Sav. & Loan Ass’n of Grenada, 460 So. 2d 786, 790 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984); Pfisterer v. Noble, 320 So. 2d 383, 384 (Miss. 1975).

34 IP Timberlands, 726 So. 2d at 104, 110; see, e.g., Tinnin v. First United Bank of Miss., 570 So. 2d 1193, 1195 (Miss. 1990); Dennis, 457 So. 2d at 947; James v. Board of Supervisors of Wilkinson County, 117 So. 111, 113 (Miss. 1928); Miles v. Miles, 30 So. 2, 3 (Miss. 1901).

35 38 So. 779 (Miss. 1905).

36 Id. at 779.
itself, but...mutually inconsistent and contradictory,"\(^{37}\) the court found the policy to be ambiguous—or, in its words, "a palpable case of equivocation in description, induced, doubtless, by clerical misprision."\(^{38}\)

Patent ambiguity was also the focus of the court's analysis in *Schlottman v. Hoffman*,\(^{39}\) where a codicil to the testatrix's will granted to each of her two sons "$5 00," which the court recognized could be read as either "$5.00" or "$500."\(^{40}\) The court described the ambiguity as follows:

When different sums may be expressed by the use of the same characters or figures, according to their collection, and, as arranged, an uncertainty as to their meaning is suggested, an ambiguity appears upon the face of the instrument; and such, we think, is disclosed by the codicil in this case. We cannot say whether the sum given to the legatees is $5, or $500. There is an absence of the decimal mark, but the ciphers are linked together, removed by an unusual space from the figures they qualify, and written, not on the line, but somewhat above it.\(^{41}\)

\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) 18 So. 893 (Miss. 1895).

\(^{40}\) *See* *id.* *at* 895-96.

\(^{41}\) *Id.* *at* 896.

What, then, to do?

*If*, as we have said, there exists an ambiguity on the face of the codicil, then, unless parol evidence may be received, the codicil is inoperative...because the court would not know what sum to decree to be paid.

*Id.* Having previously recited testimony regarding discussions the testatrix had with her neighbor and her lawyer at the time the will was executed, the court resolved the ambiguity based on the evidence of those surrounding circumstances:

Looking, in the case before us, to the situation of the testatrix, the condition of her family, the character and quantity of her estate, and the res gestae of the execution of the will, *we see clearly what she meant and intended to do*, and no violence is done to the words she has employed, nor is anything added thereto, by accepting the figures of the codicil as meaning $5, instead of $500. They may mean, indifferently, the one or the other.

*Id.* (emphasis added).

The role of surrounding circumstances in construing and interpreting contracts.
In *Miles v. Miles*, the issue was not patent ambiguity, but rather ambiguity that arose when the court tried to apply the terms of the document to its subject matter (i.e., "latent" ambiguity). In *Miles*, Theus N. Miles, one of two sons of General William R. Miles, sought to purchase his brother Edward H. Miles's interest in their father's estate. After several letters and conversations,

Ed. and Theus and their father met at Goodhope on July 1, 1897, and the following acts were done: Ed. executed a conveyance of "my entire interest in the estate of W.R. Miles, my father, to Theus N. Miles and Alice Merrick Miles, for and during their lives, with remainder over to the issue of their bodies. This contract embraces anything and everything that I would inherit at my father's death, be the same real estate, personal property, or ornaments, payment to be made by Theus N. Miles". On the same day, the father executed a conveyance to Theus N. Miles and wife for life, remainder to their issue, of two plantations known, respectively, as "Quofaloma" and "Omega," beginning the conveyance with these words: "Whereas, my son E.H. Miles has sold his interest in my estate to his brother, Theus N. Miles." On that same day the father wrote his will, though it was not finally executed until six days thereafter. This will provides that: "Whereas, my son Edward H. Miles sold his entire interest in my estate to his brother, Theus N. Miles; and whereas, on the first day of July, 1897, I made a deed to said Theus N. Miles of the Omega and Quofaloma plantations, which, in connection with advances theretofore made, constituted his and his brother Edward's full share of my estate,"—therefore he proceeds to devise his remaining two plantations, Goodhope and Black Bayou, to his wife.

is discussed further in subpart II.B.7, *infra*. More generally, the role of extrinsic evidence—including, but not limited to extrinsic evidence of the circumstances surrounding the formation of the contract—in construing and interpreting ambiguous contracts is discussed further in Part III, *infra.*

*30 So. 2 (Miss. 1901).*

*Id.* at 2-3.
The court explained the consequences of these acts as follows:

Ed. Miles conveyed to Theus his "entire interest in the estate of W. R. Miles," his father. If his father had been dead, there would have been no ambiguity whatever of any sort. But we learn aliunde the deed that his father was then living, and Ed. therefore had no interest in his estate. This creates a latent ambiguity, an intermediate one, and raises the question, what is meant by the terms "entire interest in the estate of W. R. Miles?"[44]

The issue on appeal was whether Ed had a lien against Omega to secure Theus's promise to pay $10,000 for Ed's "entire interest" in their father's estate. The court said "Yes":

The bill shows what they meant and understood to be conveyed by these terms, which are not in themselves ambiguous, but are made so by the development of the fact that Gen. Miles was then alive. The deed related to property as conveyed, and expressly reserved a lien on it for $10,000. It appears from the bill that Omega was the subject of the conveyance, and the property understood by the parties as the interest of Ed. in the estate of his father, and Ed also renounced claim to everything else of the estate. The express lien is clearly enforceable against Omega.[45]


Whether a written agreement is ambiguous is a question of law for the court.[46] Because the existence of ambiguity is a

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[44] *Id.* at 3.
[45] *Id.* (citations omitted).

Unlike integration, which may exist in degrees, *see infra* subpart II.B.1, a contract is either ambiguous or it is not. A finding of "partial ambiguity" is, therefore, not an acceptable result of the trial court's initial determination. *Cf.* Lehman-Roberts Co. v. State Hwy. Comm'n, 673 So. 2d 742, 744 (Miss. 1996) (calling trial court's findings and conclusions—including but not limited to trial court's statement that subject clause was "somewhat ambiguous"—"a bit confusing").
In Estate of Parker v. Dorchak, the decedent (Parker) sold his step-son (Dorchak) an option to purchase a residence known as "Windy Acres." Dorchak was to pay $10,000 cash and $20,000 over time for the option to purchase Windy Acres for a total of $225,000, inclusive of the option payments. More than a year later, Dorchak exercised the option to buy Windy Acres, executing a promissory note for $215,000—the $225,000 purchase price, less the $10,000 already paid for the option—secured by a deed of trust on the property. The promissory note obligated Dorchak to pay interest on the $215,000 indebtedness "from date." The meaning of this phrase was the central issue at trial and on appeal. Parker's executrix argued that "from date" meant that interest began accruing on the date of the promissory note, whereas the Dorchaks argued that, because the note did not require them to make monthly installment payments until they occupied the premises, that "from date" meant interest would accrue beginning when they took occupancy. Ultimately, the chancellor agreed with the Dorchaks, and Parker's executrix appealed. The Mississippi Supreme Court addressed the standard of review issue as follows:

In his Supplemental Opinion and Ruling, the Chancellor made brief note of this provision in the note, but he then looked to extrinsic evidence as to the parties' intent, most notably with regard to an option contract which was drafted over one year prior to the date of the note. The Chancellor was without discretion to so consider extrinsic evidence, unless he first found that the promissory note was ambiguous under the Parol Evidence Rule. The Chancellor's ruling makes no mention of a finding of ambiguity in the note prior

47 See IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104, 108 (Miss. 1998); Whittington, 608 So. 2d at 1278.
48 673 So. 2d 1379 (Miss. 1996).
49 Id. at 1380.
50 Id.
51 Id.
to looking at extrinsic evidence, and as such, although well-reasoned, does not employ the proper legal analysis. Accordingly, it is for this Court to conduct a de novo review of the facts, taking into consideration the applicable considerations under the Parol Evidence Rule.\(^\text{52}\)

3. **Who Decides What the Ambiguous Terms Mean?**

On the other hand, a writing is ambiguous, the trier of fact must determine the meaning of its terms or provisions.\(^\text{53}\)

In *Deer Creek Construction Co. v. Peterson*,\(^\text{54}\) the deed of trust and note executed by Mrs. Peterson to Deer Creek provided, in relevant part: “Note payable ninety days from date, with interest after maturity at 9% per annum until fully paid.”\(^\text{55}\) The court explained that

Mrs. Peterson was allowed to testify, over the objections of Brown and Deer Creek . . ., that Mr. Brown told her the house would be finished within ninety days and that no interest would be due on the note until such time as the house was

\(^{52}\) *Id.* at 1381. Ultimately, the court affirmed the trial court’s judgment for the Dorchaks:

After conducting said de novo review, and considering the competing canons of contract construction, it is apparent that the judgment reached by the trial judge was correct, although his legal analysis may have been incomplete. The language of the promissory note is in fact ambiguous, and a consideration of the extrinsic evidence, as well as of the note itself, leads inescapably to the conclusion that the “from date” language, which forms the basis of this entire appeal, should not be interpreted in the manner which the Executrix asserts.

*Id.* at 1382. The so-called “canons of construction” alluded to by the Dorchak court will be addressed at length later in this article, see *infra* subparts II.C-.E, as will the parol evidence rule, see *infra* Part III. For present purposes, this case supports the rule that an appellate court’s review of a trial court’s finding of ambiguity is de novo.

\(^{53}\) See *Clark v. State Farm Mut. Auto. Ins. Co.*, 725 So. 2d 779, 781 (Miss. 1998); *Lamb Constr. Co. v. Town of Renova*, 573 So. 2d 1378, 1383 (Miss. 1990); *Dennis v. Searle*, 457 So. 2d 941, 945 (Miss. 1984). *See generally* *Barnett v. Getty Oil Co.*, 266 So. 2d 581, 586 (Miss. 1972) (“If, however, a careful reading of the instrument reveals it to be less than clear, definite, explicit, harmonious in all its provisions, . . . the court is obligated to pursue the intent of the parties.”).

\(^{54}\) 412 So. 2d 1169 (Miss. 1982).

\(^{55}\) *Id.* at 1172.
The construction proposal of Brown, accepted by Mrs. Peterson, dealing with the specifications and price contains no provision with reference to time of completion. However, a note and deed of trust executed by Mrs. Peterson for the purpose of securing Deer Creek and Brown for the construction price provided "Note payable ninety days from date, with interest after maturity at 9% per annum until fully paid." These three instruments represent all of the written agreement with respect to the construction of this house.\textsuperscript{56}

The court noted that, "[w]hen a contract for the construction of a house contains no specific time in which the construction is to be completed, the general rule is that a reasonable period of time for construction is inferred. However, where the contract is ambiguous or indefinite as to the construction period, then parol evidence is admissible for clarification."\textsuperscript{57} The court continued:

[T]he proposal for building the home submitted by Deer Creek and Brown to Mrs. Peterson and accepted by her must be read together with the note and deed of trust which she executed to Deer Creek and Brown for the purpose of securing the construction price in order to determine the intent of the parties. When this is done, a clear ambiguity appears as to the length of time for construction because the proposal submitted by Deer Creek and Brown to Mrs. Peterson was silent as to when the construction would be completed. Yet, the note and deed of trust given to secure Deer Creek and Brown during the construction period clearly states that it was due and payable in ninety days . . . . Therefore, it was not error for the trial court to allow . . . Mrs. Peterson's testimony, that Brown told her that the house would be completed within ninety days, in order to shed light on the ambiguity. Brown testified that he did not make such a representation. The jury was properly allowed to resolve the question.\textsuperscript{58}

\textsuperscript{56} Id.
\textsuperscript{57} Id. (citations omitted).
\textsuperscript{58} Id. (citation omitted).
Because the resolution of ambiguity, once the trial court has found it to exist, is a question of fact, the appellate court must respect the trial court's finding as long as it is supported by credible evidence and is not manifestly wrong. 59

4. How Does the Issue Arise?

Any court asked to enforce a contract must first determine what the contract says, and

if the language of the contract is plain and unambiguous, the [court] must enforce it as written. However, if it is less than clear, the court must then attempt to ascertain the intent of the parties. As a [court] must determine how clear a contract is before he can determine its meaning, whether a party raises a claim of ambiguity or not is in a very real sense irrelevant. 60

59 See Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1383 (Miss. 1990); see also Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989) ("[T]he interpretation of an ambiguous writing by resort to extrinsic evidence presents a question of fact."). If the issue is decided by a jury, then the appellate court should respect the jury's verdict unless it is "against the overwhelming weight of the evidence." Adams v. Green, 474 So. 2d 577, 581 (Miss. 1985).


The Century 21 court went on to contrast ambiguity from contract defenses: "This is what sets ambiguity apart from the affirmative defenses. The clarity of a contract must always be considered before a contract may be enforced, whereas the consideration of non-plead affirmative defenses is not required." Id. The court then quoted from Hertz Commercial Leasing v. Morrison, 567 So. 2d 832, 835 (Miss. 1990):

As defenses to a contract action, failure of consideration, illegality and statute of frauds are similar. Each assumes the contract on its face entitles plaintiff to prevail but then reaches into the bag of rules prescribing forms and limiting the power of persons to contract and pulls one out, saying, "See, this contract may not be enforced." Each finds a rule of law external to the contract and brings it to bear to bar the plaintiff's action.

Century 21, 652 So. 2d at 717. The Century 21 court concluded:

Ambiguity, however, is not a rule of law external to the contract. It is if anything internal, concerned with what the contract means and not
5. The Consequences of Ambiguity

If the trial court, in the course of conducting its "four corners" analysis, finds that the written instrument is other than "clear and unambiguous," Pursue Energy Corp. v. Perkins instructs the trial court to discretionarily apply any relevant "canons" of construction. These canons (or "rules" or "maxims") are the subjects of subparts II.C and II.D, infra.

In the course of applying one or more canons of construction, the trial court may have to resort to extrinsic evidence. And, in any event, if applying the canons does not resolve the ambiguity as a matter of law, the court will consider extrinsic evidence. Part III of this article more fully examines the per-
possible uses of extrinsic evidence in construing and interpreting a written instrument that is latently or patently ambiguous.

B. Key Concept: Integration

The parties to an agreement often reduce all or part of it to writing. Their purpose in so doing is commonly to provide reliable evidence of its making and its terms and to avoid trusting to uncertain memory. In the interest of certainty and security of transactions, the law gives special effect to a writing adopted as a final expression of an agreement.

If the parties to a written contract intend it to serve as a final expression of their agreement as to the terms contained in the writing, then the contract is said to be integrated. All prior negotiations and agreements regarding the subject matter of an integrated term or agreement are “merged” into that integrated term or agreement.

For example, in Gilchrist Tractor Co. v. Stribling, the parties first entered into a preliminary written agreement which provided, among other things, that further written agreements would be made later, dealing more specifically with each of the several aspects of the transaction. This was done, and these contracts, prepared later in the light of the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence.”.

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67 See supra notes 34, 42-45 and accompanying text.
68 See supra notes 33, 35-41 and accompanying text.
69 Restatement (Second) of Contracts ch. 9, topic 3 intro. note, at 114 (1981).
70 See id. § 209(1); Farnsworth, supra note 3, § 7.3, at 215.
71 See Houser v. Brent Towing Co., 610 So. 2d 363, 365 (Miss. 1992); Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 946 (Miss. 1992); Mississippi State Hwy. Comm’n v. Cohn, 217 So. 2d 528, 531 (Miss. 1969); Grenada Auto Co. v. Waldrop, 195 So. 491, 492 (Miss. 1940); State Hwy. Dep’t v. Duckworth, 172 So. 148, 150 (Miss. 1937); Red Snapper Sauce Co. v. Bolling, 50 So. 401, 401 (Miss. 1909); Odoneal v. Henry, 12 So. 154, 155 (Miss. 1892).
72 192 So. 2d 409 (Miss. 1966).
developed facts, supplemented the original written agreements and superseded prior oral agreements, if any. They dealt with the same subject matter and the contracting parties were the same . . . . Prior discussions and oral agreements, if any, were merged into and superseded by the final agreements of the parties as reflected by their detailed written contracts.73

1. Full vs. Partial Integration

An integrated agreement may be either fully integrated or only partially integrated. A fully integrated contract is one that is a final and complete expression of all the terms agreed upon between or among the parties.74 If a contract is fully integrated, all prior and contemporaneous negotiations are merged into the written contract.75

In Keys v. Rehabilitation Centers, Inc.,76 the court explained the effect of the fully integrated closing documents on the rights and obligations established in a preliminary indemnity agreement that pre-dated the closing:

[T]he Keyse argue that their indemnity obligations are governed by the May 13, 1982, purchase agreement and not by the indemnity agreement delivered at closing on July 1, 1982 . . . . The short answer is that their fundamental premise is wrong. The purchase agreement . . . . was not the sale itself. By its terms, it contemplated a closing a little over six weeks later, or whenever the necessary administrative approvals were obtained. At closing the terms of the purchase agreement merged into the closing documents: the deeds, bill

73 Gilchrist Tractor Co., 192 So. 2d at 417; see also, e.g., West v. Arrington, 183 So. 2d 824, 827 (Miss. 1966) ("All negotiations between the Arringtons and West were merged in the deed which the grantee accepted and under which he and his grantees claim.").

74 See Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 251 (Miss. 1998); see also RESTATEMENT (SECOND) OF CONTRACTS § 210(1) (1981); Farnsworth, Contracts, supra note 3, § 7.3, at 215-16.

75 See Singing River Mall, 599 So. 2d at 946; see also Continental Gin Co. v. Freeman, 237 F. Supp. 240, 244-45 (N.D. Miss. 1964), aff'd, 381 F.2d 459 (5th Cir. 1967).

76 574 So. 2d 579 (Miss. 1990).
of sale, promissory notes, and the indemnity agreement. The closing documents themselves subsumed the comparable provisions of the purchase agreement.\footnote{Keys, 574 So. 2d at 583.}

A contract is \textit{partially integrated} if the written agreement is a final and complete expression of some or all of the terms contained therein, but not all of the terms agreed upon between or among the parties are contained in the written agreement.\footnote{The Mississippi Supreme Court has explained:}

\begin{quote}
The written provisions adopted by contracting parties merge only those prior and contemporaneous writings which are contained within as the final and complete expression of their agreement. . . . This does not mean, however, that a separate contract may not be entered into to explain or supplement the existing contract. Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281 (Miss. 1983); see also Fortune Furniture Mfg., Inc. v. Pate’s Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978); RESTATEMENT (SECOND) OF CONTRACTS § 210(2) (1981); Farnsworth, Contracts, supra note 3, § 7.3, at 215.
\end{quote}

\footnote{RESTATEMENT (SECOND) OF CONTRACTS § 216(2). The Restatement provides the following illustration:}

\begin{quote}
A and B in an integrated writing promise to sell and buy [respectively] a specific automobile. As part of the transaction they orally agree that B may keep the automobile in A’s garage for one year, paying $15 a month [above and beyond the selling price of the car]. The oral agreement is \textit{not} within the scope of the integration and is not superseded. \textit{Id.} § 216 illus. 3, at 138 (emphasis added). The \textit{Restatement} counsels that “[t]his situation is especially likely to arise when the writing is in a standardized form which does not lend itself to the insertion of additional terms,” such as negotiable instruments, leases and conveyances, and the like. \textit{Id.} § 216 cmt. d., at 138-39. Also, certain terms collateral to a negotiable instrument would, if included in the terms of the instrument, destroy its negotiability; therefore, it is “natural” to leave such terms off the face of the instrument. \textit{Id.} at 139.
\end{quote}

\footnote{312 F.2d 540 (5th Cir. 1963).

In \textit{Walley v. Bay Petroleum Corp.},\footnote{312 F.2d 540 (5th Cir. 1963).} the trial judge excluded extrinsic evidence that tended to show that the appellee had agreed to sell its products on competitive terms. The trial judge
assumed that the three writings in question—two notes and a letter of guaranty—"constitute[d] a full integration of the agreement between the parties."\(^{61}\) The Fifth Circuit disagreed:

\[T\]he three writings are so incomplete as to show on their face that they were not intended to constitute the full agreement between the parties.

In essence, the evidence offered, and rejected, went to show that, in addition to the recitation of consideration received contained in the notes, there was promissory consideration to the appellant, namely, appellee's promise to sell the products to Walco on competitive terms. . . . [S]ince the writings constituted only a partial integration of the agreement, the appellant could show the existence of additional, promissory consideration for his promise of guaranty.\(^{82}\)

\(a.\) Mississippi Common Law Presumes That a Written Contract Is Fully Integrated

Mississippi courts presume that written agreements are fully integrated.\(^{83}\) This rebuttable presumption, ancient in origin,\(^{84}\) and still embraced by Mississippi common law, is at

\(^{61}\) Walley, 312 F.2d at 544 (applying Mississippi law).

\(^{62}\) Id. at 544-45 (footnote omitted).

\(^{83}\) See Bank of Lena v. Slay, 170 So. 635, 636 (Miss. 1936) ("It is well settled in this state that, when parties deliberately put their agreement in writing, it will be presumed that the whole contract was embodied in such writing . . . ."); see also, e.g., Hoerner v. First Nat'l Bank of Jackson, 254 So. 2d 754, 759 (Miss. 1971); Parker v. McCaskey Register Co., 171 So. 337, 339-40 (Miss. 1936); Red Snapper Sauce Co. v. Bolling, 50 So. 401, 401 (Miss. 1909); Houck v. Wright, 2 So. 422, 422 (Miss. 1898). But see Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("Whether a written contract was intended to be the final and complete expression of the agreement must be determined from the circumstances of the case.").

\(^{84}\) See, e.g., Kerr v. Calvit, 1 Miss. (Walker) 115, 118 (1822) ("[I]t cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and every thing resting in parol, becomes thereby extinguished.") (citing Jackson v. Bradt, 2 Cai. R. 169 (N.Y. 1804)). See generally 4 John Henry Wigmore, Evidence in Trials at Common Law § 2426, at 81-93 (James H. Chadbourn rev. ed. 1972) (tracing the origins of the parol evidence rule, including but not limited to the doctrine of merger and the presumption that written agreements are integrated, and concluding that the modern version of rule and its basic trappings came into being by end of 1600s).
odds with both the Uniform Commercial Code and the Restatement (Second) of Contracts—both of which reject the

See UNIFORM COMMERCIAL CODE § 2-202 cmt. 1 (1995) ("This section definitely rejects . . . [any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon].")

While the Mississippi legislature has adopted section 2-202 of the Uniform Commercial Code, see MISS. CODE ANN. § 75-2-202 (1981), it has not adopted the official comments—including, but not limited to, the comment quoted above, see MISS. CODE ANN. § 75-1-101 et seq. (1981 & Supp. 1998). Nonetheless, a number of Mississippi cases have turned to the official comments for guidance on matters governed by Article 2. See, e.g., Patel v. Telerent Leasing Corp., 574 So. 2d 3, 7 (Miss. 1990); Beck Enter., Inc. v. Hester, 512 So. 2d 672, 676 (Miss. 1987); Rester v. Morrow, 491 So. 2d 204, 211 (Miss. 1986); Franklin County Coop. v. MFC Servs. (A.A.L.), 441 So. 2d 1376, 1378 (Miss. 1983); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 577 (Miss. 1982); Derden v. Morris, 247 So. 2d 838, 839 (Miss. 1971); see also, e.g., Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1123 (5th Cir. 1985); Louis Dreyfus Corp. v. Brown, 709 F.2d 898, 900 (5th Cir. 1983); Weathersby v. Gore, 556 F.2d 1247, 1256-57 (5th Cir. 1977); Curry v. Sile Distrib., 727 F. Supp. 1052, 1054 (N.D. Miss. 1990); C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 209-10 (S.D. Miss. 1986).

Even if Mississippi courts were to construe section 75-2-202 consistently with official comment 1, parties would be able to vary the provisions of the UCC by explicit agreement. See MISS. CODE ANN. § 75-1-102(3) (1981). Therefore, parties to a written agreement subject to the UCC could easily include language in the operative provision(s) that has the effect of creating a presumption of full integration, as well as precluding the resort to extrinsic evidence of the types that the UCC otherwise makes admissible. See infra subpart III.D.

According to the Restatement, a party may prove complete or partial integration on the basis of "any relevant evidence." RESTATMENT (SECOND) OF CONTRACTS § 210 cmt. a, at 118 (1981) (counseling that § 210(1) "is to be read with the definition of integrated agreement in § 209, to reject the assumption sometimes made that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon"); id. § 209 illus. 3, at 116-17 ("In the absence of contrary evidence, the writing is taken to be an integration; whether it is a complete integration is decided on the basis of all relevant evidence."); see also Braucher, supra note 3, at 16 & n.23.

According to the Restatement, a party may prove complete or partial integration on the basis of "any relevant evidence.” RESTATMENT (SECOND) OF CONTRACTS § 210 cmt. b, at 118. While a written, facially integrated, and unambiguous contract signed by both parties may be decisive of the extent of integration, "a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." Id.

The Restatement offers the following illustration:

A, a college, owns premises which have no toilet or plumbing facilities or heating equipment. In negotiating a lease to B for use of the premises as a radio station, A orally agrees to permit the use of [toilet and
presumption that, simply because a writing is integrated as to some terms, it is fully integrated as to all terms.

The rationale for presuming full integration is fairly straightforward: Once the parties have reduced their agreement to writing they are presumed to have selected from prior negotiations only the promises and agreements for which they choose to be bound.

b. The Significance of "Merger" or "Integration" Clauses

To manifest their intention to create a completely integrated agreement, parties will often include a "merger" or "integration" clause stating something to the effect that the writing contains or constitutes "the entire agreement between the parties and supersedes any and all prior agreements, arrangements, or understandings between the parties relating to the subject matter," and that there are no "oral understandings, statements, promises or inducements contrary to the terms of" the writing. The effect of including such a clause,
as a general rule, is to make evidence of prior or contemporaneous oral agreements and representations "varying, modifying, or controlling the written agreement . . . inadmissible."89

However, the mere fact that a written contract contains a merger or integration provision does not guarantee full integration.90 For example, in Swinny v. Cities Service Oil Co.,91 the written contract contained the following provision: "In the event of the sale of products in tank car lots to customers in the territory covered by this agreement, the Corporation shall pay to the Distributor such commission as shall be agreed upon."92 Cities Service Oil Co. did, in fact, sell products in tank car lots to customers in the territory covered by its agreement with Swinny (the "Distributor"), but did not pay Swinny any commission because Swinny did not negotiate the deal.93 In the ensuing lawsuit, Swinny offered testimony that Cities had orally agreed to pay him one-eighth of one cent per gallon

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89 Stribling Bros. Mach. Co. v. Girod Co., 124 So. 2d 289, 293 (Miss. 1960); accord Berry v. McKay, 194 So. 299, 300 (Miss. 1940); see, e.g., Grenada Auto. Co. v. Waldrop, 195 So. 491, 492 (Miss. 1940) (finding merger in a contract that stated "[t]his contract constitutes the entire agreement; no waivers or modifications shall be valid unless written upon or attached hereto," and "all promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein are hereby expressly waived."); Gatlin, 735 So. 2d at 250-51; see also Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 526 (5th Cir. 1986); General Plumbing & Heating, Inc. v. American Air Filter Co., 696 F.2d 375, 378 (5th Cir. 1983) (both applying Mississippi law).

90 See, e.g., Lambert v. Mississippi Limestone Corp., 405 So. 2d 131, 132-33 (Miss. 1981) (approving resort to extrinsic evidence, despite the presence of merger clause, where two paragraphs of written agreement appeared to be in conflict with one another); Dunavant Enter., Inc. v. Ford, 294 So. 2d 788, 789-91 (Miss. 1974) (approving resort to extrinsic evidence, despite the presence of merger clause, where writing "called for cotton to be produced on 1,600 acres situated in Marks, Mississippi," despite the fact that there were not, in fact, 1,600 acres in Marks, Mississippi on which cotton could be grown). See generally RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e, at 140 ("Written agreements often contain clauses stating that there are no representations, promises or agreements between the parties except those found in the writing . . . . But such a clause does not control the question whether the writing was assented to as an integrated agreement . . . .")

91 197 So. 2d 795 (Miss. 1967).

92 Swinny, 197 So. 2d at 796 (emphasis added).

93 Id. at 797.
sold. The trial court found for Cities, and Swinny appealed. The Mississippi Supreme Court rejected Cities' argument that the oral agreement regarding Swinny's commission was incompetent because the written contract contained a written merger and no-oral-modification clause:

[Cities] contends that the "alleged oral agreement" is unenforceable as to the commission because the contract contains a paragraph in which it is said: "This agreement constitutes the entire agreement between the parties, and may not be changed except by written agreement signed by an executive officer of [Cities]."

We do not agree with the argument that this suit is an effort to change the contract or amend it. The effort made by [Swinny] was to enforce the contract. The amount of the commissions to be paid from time to time was by agreement to be determined by the parties. There was no agreement in contract requiring that the amount of commissions should be in writing. It expressed an agreement to pay commissions, the amount of which would be agreed upon later. From time to time, [Swinny] was paid one-eighth of one cent, and it was mutually understood that this was the amount of the commission. This agreement as to the amount of the commission does not vary the terms of the contract, and it is enforceable since the contract does not come within the terms of the Statute of Frauds . . .

\[c. \text{Finding Partial Integration}\]

Parties can make their contracts in such forms as they see fit, and if they wish they can reduce some agreements to writing and leave others to oral expression and still others to partially oral and partially written form. A written agreement, though not a complete integration, may be the complete statement of certain things that have been negotiated out and agreed upon—the so-called "partial integration."
As a general proposition, for a Mississippi court to determine that a written agreement is not fully integrated, it must decide as a matter of law either that the writing is facially incomplete or that, when viewed in light of the totality of evidence regarding the transaction, the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing.\(^7\) Borrowing terminology more typically associated with questions of ambiguity, we may describe these two indicia of partial integration as “patent” incompleteness and “latent” incompleteness, respectively.\(^8\)

1). Patent (Facial) Incompleteness

patent, or facial, incompleteness is easy to understand and apply in the context of the “three-tiered” process of construction and interpretation prescribed by Pursue Energy Corp. v. Perkins.\(^9\) A written agreement may be facially incomplete be-

\(^7\) See generally RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. c, at 118-19 (1981) ("It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement. Incompleteness may also be shown by other writings . . . or it may be shown by any relevant evidence . . .").


\(^9\) 558 So. 2d 349, 352-53 (Miss. 1990). See supra notes 24-25 and accompany-
cause, *inter alia*, (1) blanks in the writing are not filled in,\(^{100}\) (2) the writing explicitly refers to or incorporates a conversation or a past, contemporaneous, or future agreement not included with or in the writing,\(^ {101}\) or (3) the agreement omits necessary terms.\(^ {102}\)
2). Contextual (Latent) Incompleteness

The second indicia of partial integration—that the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing—is more elusive, particularly in light of the Mississippi Supreme Court’s commitment to a “four corners” approach at the outset of any effort to construct or interpret a written instrument. The best proof of contextual, or latent, incompleteness seems to be the existence of one or more collateral agreements between or among the parties to the written instrument before the court—assuming that the court will consider evidence of collateral agreements in the face of a facially integrated written instrument.

For example, in Chism v. Omlie, Omlie agreed to convey to Chism “a 428 acre ranch, certain designated farming equipment, and the furniture in the house on the ranch except ‘personal things’” agreed to by the parties:

Thereafter Mrs. Omlie was permitted by Mrs. Chism to remove some clothing and other small items but Mrs. Chism refused to allow Mrs. Omlie to remove certain other items of personal property which Mrs. Omlie claimed she reserved as “personal things.”

Mrs. Omlie then filed this suit in chancery averring . . .

1991) (“While courts may supply reasonable terms which the parties omitted in the contracting process, such as a time for performance, essential terms such as price cannot be left as open ended questions in contracts which anticipate some future agreement.”) (citing Smith v. Mavar, 21 So. 2d 810, 811 (Miss. 1945)).

103 See supra notes 24-25 and accompanying text.

104 See, e.g., Knight v. McCain, 531 So. 2d 590, 595-96 (Miss. 1988); Lyall, 464 So. 2d at 76; Valley Mills, 145 So. 2d at 702; Chism v. Omlie, 124 So. 2d 286, 288-89 (Miss. 1960); Green v. Booth, 44 So. 784, 784 (Miss. 1907); see also, e.g., Walley v. Bay Petroleum Corp., 312 F.2d 540, 544-45 (5th Cir. 1963) (applying Mississippi law) (holding that written agreement, which consisted of three documents, but which excluded alleged collateral agreement by seller's agent to sell on “competitive terms,” was only partially integrated).

The Walley case is discussed more fully in the text accompanying supra notes 80-82. Collateral agreements in general are discussed more fully in subpart III.A.2.b, infra.

105 124 So. 2d 286 (Miss. 1960).

106 Chism, 124 So. 2d at 287.
that the parties agreed that the "personal things" referred to in the conveyance consisted of a dining room suite, bedroom suite, television, and various other household items which Mrs. Chism refused to allow Mrs. Omlie to remove from the ranch home....

At trial, Omlie and her witnesses testified as to the oral understanding between herself and [Chism]. She testified that she pointed out to [Chism] each item which is now in dispute and which [Omlie] was excepting, and that they agreed thereon; that it would not be necessary to list in the contract the excepted items because both of them understood what was meant by "personal things."

The chancellor found that "the intention of the parties was that the 'personal things' excepted by Mrs. Omlie from the conveyance consisted of the dining room suite, bedroom suite, television, and other items sued for by Mrs. Omlie." The supreme court affirmed:

[T]he written agreement of the parties clearly shows that the parties had a collateral agreement concerning the personal property located in the ranch house, and that such agreement was not embodied in the writing. The writing shows clearly that the parties did not intend that the writing embody that element of their negotiations which concerned the furnishings in the ranch house. What the parties intended to do and that which they did was to enter into a collateral agreement which rested in parol and which was not integrated into the writing.

107 Id. at 287-88.
108 Id. at 288. Chism "objected to all such testimony, . . . contending] that this testimony was inadmissible under the rule that parol evidence may not be admitted to vary the terms of a written contract." Id. The common law parol evidence rule, and the many exceptions to it, are the subjects of Part III, infra.
109 Chism, 124 So. 2d at 288.
110 Id. at 288-89.
2. Who Decides Whether and to What Extent an Instrument Is Integrated?

Whether an agreement is integrated—and, if so, whether it is fully or only partially integrated—is determined by the trial court.\textsuperscript{111}

3. The Consequences of Integration or the Lack Thereof

Why does it matter whether a particular contract is or is not integrated? Because, if the parties have made a written contract and if the written contract is fully integrated, then any evidence of any other prior or contemporaneous agreement between the same parties, regarding the same subject matter,

\textsuperscript{111}\textsc{Restatement (Second) of Contracts} §§ 209(2) & 210(3) (1981). Professor Adams notes:

[\textit{It is exclusively up to the trial judge, even in a jury trial, to decide whether a written contract is fully or partially integrated. This is because the parol evidence rule applies to exclude contradictory evidence only if the disputed terms are integrated . . . . [A] rule allowing the jury to consider any relevant evidence in deciding whether the writing was intended to be a complete integration without any limitations, would emasculate, if not repeal, the parol evidence rule.}

\textsuperscript{But see Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("Since the question whether the written contract was the final and complete expression of the agreement between the parties can be decided only on the basis of the evidence and since the evidence in this case was conflicting, it is clear that a jury issue was presented . . . ."). Apparently finding no support in this state's jurisprudence for the argument that integration was a question of fact, the \textit{Fortune Furniture} court cites only non-Mississippi cases to support its conclusion. \textit{Id.} (citing Putnam v. Dickinson, 142 N.W.2d 111 (N.D. 1966), and Spitz v. Brickhouse, 123 N.E.2d 117 (Ill. Ct. App. 1954)). In so doing, the \textit{Fortune Furniture} court departed significantly from the "mainstream" of Mississippi case law, opting instead to anticipate the fact-based approach advocated by the \textit{Restatement (Second) of Contracts} three years later. But \textit{Fortune Furniture} overshot the \textit{Restatement}, which recognized the factual element of the question of integration, but left its resolution to the trial judge, not the jury. See generally supra notes 11-25 and accompanying text for a discussion of the "majority" approach of the \textit{Restatement} and the "minority" approach taken by the Mississippi Supreme Court in most cases.}
is inadmissible for purposes of varying or contradicting the written agreement.\textsuperscript{112}

Part III of this article discusses the parol evidence rule and the many exceptions to it at greater length.

\textbf{C. Primary Rules of Construction and Interpretation}

\emph{To clarify this vast cloud of legal rhetoric, a few rules should be set forth.}\textsuperscript{113}

Having conducted a "four corners" analysis and having found that writing is not fully integrated and unambiguous, Mississippi courts should apply one or more of the following "rules" in an effort to resolve the lack of integration or ambiguity before resorting to parol evidence.

\textsuperscript{112} As Professor Corbin put it, if the parties have made a written contract to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 CORBIN, \textit{supra} note 3, § 573, at 357 (footnote omitted). Thus, in the words of the Fifth Circuit, "parol evidence allegedly elucidating intent but contradicting the express terms of a written agreement is never admissible." Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971) (applying analogous Florida law).

The Restatement (Second) advises:

The principal effects of a binding integrated agreement are to focus interpretation on the meaning of the terms embodied in the writing . . . , to discharge prior inconsistent agreements, and, in a case of complete integration, to discharge prior agreements within its scope regardless of consistency . . . . [T]he admissibility of evidence to contradict an integrated agreement or to add to a completely integrated agreement is restricted, and a limit is thus placed on the power of the trier of fact . . . .

\textsc{Restatement (Second) of Contracts} ch. 9, topic 3 intro. note, at 114-15.

\textsuperscript{113} Midsouth Rail Corp. v. Citizens Bank & Trust Co., 697 So. 2d 451, 455 (Miss. 1997).
1. Afford Words and Phrases Their "Plain Meaning"

Courts should give each word and phrase in a written agreement its plain, ordinary, commonplace meaning," raising the possibility that words can be given their ordinary meaning unless doing so would cause a result that is contrary to the clearly manifested intention of the parties or to law or public policy.

An example of the first exception is *Paine v. Sanders*, where the court pronounced:

Where the testator's intention appears clearly from the will taken as a whole, this intention cannot be defeated because the testator's intention is expressed in ungrammatical language, or because his intention is expressed in inaccurate and incorrect language.

The law and public policy exception was at issue in *Allstate Insurance Co. v. Chicago Insurance Co.*, where both insurers tried to exercise the “other insurance” provisions of their respective policies, effectively depriving the insured of any cover-
age. The court invoked the "mutual repugnance" rule set forth in *Travelers Indemnity Co. v. Chappell*<sup>120</sup> and held that the plain meaning of each insurer's "other insurance" clause must be ignored:

The central problem posed by this matter is that while both policies cover the claim, each insurer has attempted to limit its respective liability and coordinate its insurance with the other policy. In so doing, both Allstate's and Chicago's "other insurance" clauses come into conflict. Standing alone, each policy would provide primary coverage.

Allstate provides that its policy shall be primary to umbrella policies covering the same loss. The clause is not activated by Chicago's coverage of the claim because Chicago's insurance policy is not an umbrella policy. Chicago's policy, on the other hand contains a "pro rata" clause providing that where there are conflicting "other insurance" clauses, the loss shall be prorated among the insurers.

... Chicago's "other insurance" clause expressly provides that its coverage is in excess of all other coverage. In contrast, Allstate's "other insurance" clause expressly concedes that its coverage is primary.

* ***

Each insurer in the present dispute seeks to shift to the other party its responsibility to the insured. Both parties are, in effect, arguing that "your excess exceeds my excess."

... We hold that the rule of repugnancy is applicable in cases in which "other insurance" clauses or "excessive coverage" clauses conflict. We have long followed the rule that the courts must enforce contracts as they are written, unless such enforcement is contrary to law or public policy. Syllogistic

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<sup>120</sup> 246 So. 2d 498 (Miss. 1971). In *Chappell*, the court stated:

The view most often accepted is to the effect that when there is a conflict in the policies, escape v. escape, escape v. excess or excess v. excess, the two policies are indistinguishable in meaning and intent, (and therefore) one cannot rationally choose between them and must, therefore, be held to be mutually repugnant and must be disregarded.

*Chappell*, 246 So. 2d at 504 (quotation omitted).
folly awaits the unwary justice who seeks to harmonize the conflicting terms presented herein using traditional rules of construction. Public policy and common sense must step in when legal jargon fails. Where competing insurance policies each contain conflicting “other insurance” clauses or “excessive coverage” clauses, the clauses shall not be applied and benefits under the policies shall instead be pro rated according to the coverage limits of each policy. . . .

In cases not governed by the Mississippi Uniform Commercial Code,\textsuperscript{122} the “plain meaning” of the contract’s terms will prevail over any usage of trade, course of dealing, or course of performance not adopted by the contracting parties in the terms of the contract itself.

For example, in \textit{Citizens National Bank of Meridian v. L.L. Glascock, Inc.},\textsuperscript{123} a contractor (Glascock) argued that he was entitled to be paid for supplemental work not within the terms of the written contract but orally requested by an agent of the owner.\textsuperscript{124} Glascock based this argument on the custom in the construction industry by which a contractor will comply with “change requests” made by the owner or the owner’s representative, with the understanding that satisfying “change requests” may cost the owner more than the original bid.\textsuperscript{125} The owner (Citizens) argued that “the very purpose of the contract” was to protect against increased costs by obligating Glascock to complete the building for the lump sum of $679,560.\textsuperscript{126} Declaring that a written contract “expresses the agreement of the parties and that it prevails over custom,”\textsuperscript{127} the court then examined the specific contract provisions and summarized its findings as follows:

Article 15 sets forth the method of payment for extra work,

\textsuperscript{121} \textit{Allstate}, 676 So. 2d at 274-75 (citations and footnote omitted).
\textsuperscript{123} 243 So. 2d 67 (Miss. 1971).
\textsuperscript{124} \textit{Citizens Nat'l Bank of Meridian}, 243 So. 2d at 68.
\textsuperscript{125} \textit{Id.} at 70.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.}
notable of which is that, "no extra work or change shall be made unless in pursuance of a written order from the owner," and Article 16 provides that in any event no claim for extra work shall be valid unless the contractor gives the architect written notice of his claim "before proceeding to execute the work. * * *" . . . .

We can only conclude in comparing these plain terms to the vague assumption of the contractor that custom of the trade would [amend] the written document in his behalf; that the former prevails. The written contract anticipated every contingency upon which this suit was based . . . . The owner, being desirous of limiting its financial obligation, should not have its pocketbook exposed to the custom of architects and contractors unless it agrees thereto . . . .

However, if the writing stipulates the meaning of a particular term, the stipulated meaning, rather than the "plain" meaning, will prevail—as long as all conditions necessary to invoked the stipulated term are met. Likewise, a techni-

128 Id. at 70-71. But cf. Independent Healthcare Mgmt., Inc. v. City of Bruce, No. 96-CA-00989-COA, 1998 WL 881795, at *4 (Miss. Ct. App. Dec. 18, 1998) ("In the context of a commercial lease, we conclude that we must give the meaning to the phraseology that is customarily afforded in the setting of commercial leases generally.").

129 See, e.g., Protective Life Ins. Co. v. Broadus, 205 So. 2d 925, 927 (Miss. 1968) (holding that an insured’s disabling sickness was not covered because it was contracted and became manifest prior to the effective date of the insured’s sickness and accident policy, which defined term “sickness” as sickness or disease contracted while the policy was in force); see also, e.g., State Farm Mut. Auto. Ins. Co. v. Gregg, 526 So. 2d 927-927 (Miss. 1988) (holding that an insurance policy covered chiropractic services because the definition of “medical services” in the policy was expansive enough to cover “healing arts in addition to practice of medicine”); Aetna Cas. & Sur. Co. v. Day, 487 So. 2d 830, 832 (Miss. 1986) (holding that a policy which failed to define the term “theft” necessarily covered temporary unlawful possession for purposes of vandalism); Bacot v. Duby, 724 So. 2d 830, 832-832 (Miss. 1998) (holding that, where instrument failed to define the term “land,” the term would be afforded its usual legal meaning—to wit, the agreement conveyed both surface and mineral interests in designated property, despite the argument that the testatrix/grantor intended to transfer the surface interest to a different grantee).

130 See Gunn v. Principal Cas. Ins. Co., 605 So. 2d 741, 742-43 (Miss. 1992) (recognizing that “words such as ‘relative’ may, by law, be restricted in scope or given meaning other than or different from common and ordinary usage,” but
cal term or term-of-art will prevail over a common-usage definition where the circumstances so dictate.  

2. Construe the Contract as a Whole

Courts should avoid "ascertaining the meaning of a contract by resort to solitary or fragmentary parts of the instrument." The language used in a single clause or sentence is not to control as against the evident purpose and intention of the contracting parties as shown by the whole document. In construing a particular provision, a court should look at the instrument as a whole and determine the provision's meaning in the context of the entire agreement.

If a contract consists of more than one document, or if a refusing to apply policy definition of "relative" to uninsured motorist (UM) portion of policy because definition stated "As used throughout this policy and shown in bold type . . . Relative means" and the term "relative" appearing in UM provision was not "shown in bold type").

131 See Miller v. Fowler, 28 So. 2d 837, 838 (Miss. 1947) ("The language of a contract must be given its usual and ordinary meaning, unless it is clear the certain words or terms are employed in a technical sense.""); see also Johnson ex rel. Blocket v. U.S. Fidelity & Guar. Ins. Co., 726 So. 2d 167, 169 (Miss. 1998) (construing "use" in the Mississippi Uninsured Motorist Act, MISS. CODE ANN. § 83-11-103(b) (1991), as "a legal term of art with a broad definition in this context"). But see First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963) ("Where a testator is not familiar with the technical meaning of words, the words used in the will are to be taken in their ordinary and common acceptance.").

132 Texaco, Inc. v. Kennedy, 271 So. 2d 450, 452 (Miss. 1973); see also Kyle v. Wood, 86 So. 2d 881, 886 (Miss. 1958) ("[I]ntention is to be collected . . . from a consideration of all provisions of the instrument and every part thereof, taken together, rather than from any particular clause, sentence or form of words."), quoted with approval in Carlisle v. Estate of Carlisle, 233 So. 2d 803, 804 (Miss. 1970).

133 Kyle, 86 So. 2d at 886. Accord Carlisle, 233 So. 2d at 804-05.

contract incorporates another document by reference, then all documents comprising the contract or transaction should be read together to give full effect to the intent of the parties.\(^{135}\)

For example, in *Garrett v. Hart*,\(^ {136}\) the written contract stated that certain houses "would be 'constructed according to the plans and specifications in the hands of William Garrett, which have been mutually agreed upon by and between' the parties."\(^ {137}\) The defendants (Schneider's estate and Hart) argued that the written contract did not bind them to pay the plaintiff (Garrett) in full because Garrett had failed to complete the houses that were the subject of the contract.\(^ {138}\) The chancellor recognized that the written contract was, standing alone, incomplete; nonetheless, he found for Garrett by reading the contract together with the plans and specification incorporated by the contract.\(^ {139}\) The supreme court upheld the chancellor's ruling:

> From the reading of the instrument it does not contain all details necessary to build a house—shell or complete—and it is necessary to look elsewhere. There were plans and specifications prepared and in the hands of Mr. Garrett which were to guide the construction, and these were to be initialed. The drawing designated as plans and specifications, signed by Mr. Schneider, was exhibited to the bill of complaint, and was admitted as Exhibit C to Mr. Garrett's testimony. There was no other set of plans and specifications submitted by anyone in the records. . . .\(^ {140}\)

\(^{135}\) See United Miss. Bank v. GMAC Mortgage Co., 615 So. 2d 1174, 1176 (Miss. 1993); Stockett v. Exxon Corp., 312 So. 2d 709, 711-12 (Miss. 1975); Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc); Doe v. Bernard, 15 Miss. 319, 323 (1846).

\(^{136}\) 168 So. 2d 497 (Miss. 1964).

\(^{137}\) *Garrett*, 168 So. 2d 503.

\(^{138}\) Id. at 499-503.

\(^{139}\) Id. at 503.

\(^{140}\) Id.; see also, e.g., Mississippi State Hwy. Comm'n v. Patterson Enters., Ltd., 627 So. 2d 261, 263 (Miss. 1993) ("As the subcontract contained a clause incorporating the terms of the prime contract, the claim prohibition against the commission in the prime contract merged into the subcontract. Therefore, when Mallette accepted final payment, even though doing so over Patterson's objection, any claim Patterson or Mallette might have had against the commission was extin-
As the court explained in *Gilchrist Tractor Co. v. Stribling*: 141

[In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument. Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice so that the intent of the parties may be carried out and the whole agreement actually made may be effectuated.

Where the terms employed to express some particular condition of a contract are ambiguous and cannot be satisfactorily explained by reference to other parts of the contract and the parties have made other contracts in respect of the same subject matter, apparently in pursuance of the same general purpose, it is always permissible to examine all of them together in aid of the interpretation of the particular condition; and if it is found that the ambiguous terms have a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to them in the particular condition. 142

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141 192 So. 2d 409 (Miss. 1966).
142 *Gilchrist*, 192 So. 2d at 417-18 (quotations and citations omitted).

Applying the principles to the facts of the case before it, the *Gilchrist Tractor* court found that there was no ambiguity or lack of integration once the various agreements at issue were read together.

In this case, the parties first entered into a preliminary written agreement which provided, among other things, that further written agreements would be made later, dealing more specifically with each of the several aspects of the transaction. This was done, and these contracts, prepared later in the light of the developed facts, supplemented the original written agreements and superseded prior oral agreements, if any. They dealt with the same subject matter and the contracting par-
3. Afford Each Provision Meaning and Purpose

Mississippi law presumes that parties who go to the effort to consummate a written contract intend for each word and provision of the contract to have meaning and purpose.\textsuperscript{143} Therefore, Mississippi courts should construe contracts, if possible, so that no word or provision is rendered "repugnant, senseless, ineffective, meaningless, or incapable of being carried out in the overall context of the transaction consistently with all of the other provisions" of the contract.\textsuperscript{144}


\textsuperscript{144} Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 30 (Miss. 1971). Accord Freeman, 1998 WL 881772, at *5; see also Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect."). See generally \textsc{Restatement (Second) of Contracts} § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective mean-
Put another way, Mississippi courts should, if possible, give effect "to all words, clauses and provisions of the instrument, if they are not inconsistent with each other or with the general intent of the whole [instrument] when taken as an entirety, . . . unless the court is satisfied that no [particular] effect was intended to be given a particular word or phrase."\(^{145}\) No word or provision should be construed to nullify or strike some other word or provision "unless such a result is fairly inescapable."\(^{146}\)

\(^{145}\) Paine v. Sanders, 135 So. 2d 188, 191 (Miss. 1961) (quotation omitted).

\(^{146}\) Continental Cas. Co. v. Pierce, 154 So. 279, 281 (Miss. 1934); accord Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1239 (Miss. 1996); Manson v. Magee, 534 So. 2d 545, 548 (Miss. 1988).
In *Continental Casualty Co. v. Pierce*, the issue for the court was whether the injury of one employee (Pierce), suffered while riding in the employer's car driven by a fellow employee (Toney), was covered by the employer's (Easterling's) insurance policy, despite the exclusion in the employer's policy for injuries to her employees. The policy contained two pertinent provisions:

Clause A is in this language: "Hereby agrees to Insure the Assured Named in the Schedule Against Loss . . . for damages on account of bodily injuries . . . accidentally suffered . . . within the policy period by any person or persons, by reason of the ownership, maintenance or use (including loading or unloading) of any of the automobiles described in the Schedule; excluding injuries suffered by any employee of the Assured while operating or caring for the automobiles covered hereby, and also excluding injuries suffered by any employee while in the course of his employment in the usual trade, business or profession of the Assured . . . ."

The other clause is in this language: "Additional Assureds. If the automobiles covered by this policy are 'private passenger' or 'commercial' automobiles any person or persons while riding in or operating any of such automobiles and any person, firm or corporation responsible for the operation thereof, shall be considered as an additional Assured under this policy . . . . The coverage afforded by this paragraph shall not apply unless the riding, use or operation above referred to be with the permission of the Assured named in the Schedule of this policy . . . ."

. . . Under Clause A employees of the insured are expressly excluded while operating or caring for the automobile "covered hereby," and the policy also expressly excluded employees of the insured while in the course of their employment in the usual trade, business, or profession of the insured. Clearly, John Toney, the driver of the automobile, and appellee [Pierce], who was engaged in her usual employment as Mrs. Easterling's servant, come within these exclusions. In

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147 154 So. 279 (Miss. 1934).
148 *Pierce*, 154 So. at 280.
other words, the policy did not protect Mrs. Easterling against liability for injuries received by either of them. The trouble arises out of this language under the subsequent clause entitled "Additional Assureds". The argument is that under that language John Toney was an additional assured; that he was insured against liability for appellee's injury, although Mrs. Easterling, to whom the policy was issued, was not insured against such liability.  

Expressing its desire not to strike any part of the policy "unless such a result is fairly inescapable," the court held that the Additional Assureds provision could not be read so as to extend coverage to injuries to Easterling's employees, which are explicitly excluded by Clause A, because doing so "would require the writing into the policy of something which is not there, and the striking out of something which is there, to hold that the coverage of the policy included an employee of hers whose injury, according to the terms of the policy, was expressly excluded therefrom."  

In Brown v. Hartford Insurance Co., the subject insurance policy provided the following definition for purposes of the

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149 Id. at 281.
150 Id.
151 Id.

The court also dispensed with Pierce's proposed construction as unreasonable:

The construction contended for by appellee [Pierce] is not a reasonable one. It is hard to conceive that an insurance company would write a policy of that kind. For illustration: If Mrs. Easterling had been driving the automobile accompanied by appellee, her employee, and the latter had been injured by her negligent driving, clearly the policy would not have protected Mrs. Easterling against liability for such injury, because it expressly so provides. But according to appellee's contention, the policy does insure Mrs. Easterling's servant, John Toney, against liability for an injury to appellee resulting from his negligent driving. In other words, Mrs. Easterling, who procured the policy and paid the premium therefor, would not be insured, while her servant, John Toney, who had nothing to do with procuring the policy, would be insured. We are of opinion that the contract bears no such construction.

Id. at 281-82. The maxim that contracts should be construed in a reasonable (and fair) manner is the subject of subpart II.C.4, infra.
162 606 So. 2d 122 (Miss. 1992).
policy's uninsured motorist (UM) coverage:

C. Uninsured motor vehicle means a land motor vehicle or trailer of any type:
   1. To which no bodily injury liability or policy applies at the time of the accident.
   2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which your covered auto is principally garaged.
   3. Which is a hit and run vehicle whose operator or owner cannot be identified and which hits:
      a. you or any family member;
      b. a vehicle which you or any family member are occupying; or
      c. your covered auto. 153

The issue for the supreme court was whether UM coverage was available if there was no physical contact between an insured and uninsured vehicle:

Clause C contains three sub-parts, but the contract does not expressly state whether all three sub-parts must be met, or whether each sub-part individually defines an uninsured vehicle. That is to say, should the sub-parts be read as being separated by the word “and” or the word “or?” When constructing a contract, we read the contract as a whole, so as to give effect to all of its clauses. Viewing Clause C in light of this rule, physical contact is not required when an uninsured vehicle or its driver are identified. This is so because both sub-clauses 1 and 2 describe vehicles and drivers that are identified, while sub-clause 3 describes a hit and run vehicle, which leaves the scene of an accident, and consequently cannot be identified. To require an insured to identify a hit and run vehicle would render the insured’s protection from a hit and run vehicle meaningless.154

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153 Brown, 606 So. 2d at 125 (emphasis omitted).
154 Id. at 125-26 (citations omitted).
Following this same logic, courts should give meaning and effect to an amendment that is separate and apart from that afforded to the contract it amends because "[a]n amendment to a contract presumably amended something."

4. Require a Fair and Reasonable Construction

A proffered construction or interpretation "must be reasonable to warrant adoption." Mississippi courts should give the words of an instrument "a reasonable construction, where that is possible, rather than an unreasonable one," and should avoid constructions that "give words a meaning they will not bear." A construction leading to an absurd, harsh, or unreasonable result should be avoided, unless the terms are express and lend themselves to no other reasonable interpretation.

In *Frazier v. Northeast Mississippi Shopping Center, Inc.*, the parties entered into a written lease which had a primary term of eight years, starting September 1, 1964, and afforded the lessees, (the Fraziers) two four-year options to extend the lease under the same terms and conditions applying to the primary term. The lease provided, in part: "If the

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156 Lehman-Roberts Co. v. State Highway Comm'n of Miss., 673 So. 2d 742, 744 (Miss. 1996); see *Frazier v. Northeast Miss. Shopping Ctr., Inc.*, 458 So. 2d 1051, 1054 (Miss. 1984); see also Rubel v. Rubel, 75 So. 2d 59, 65 (Miss. 1954) ("[T]he words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one . . . ."); Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.").

157 Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399, 403 (Miss. 1966); see Leach v. Tingle, 586 So. 2d 799, 802 (Miss. 1991).

158 Leach, 586 So. 2d at 802; see Hicks v. Bridges, 580 So. 2d 743, 746 (Miss. 1991); Hutton v. Hutton, 119 So. 2d 369, 374 (Miss.), cert. denied, 364 U.S. 834 (1960).

159 See *Frazier*, 458 So. 2d at 1054; *Pigott*, 191 So. 2d at 403; *Rubel*, 75 So. 2d at 65; McCain v. Lamar Life Ins. Co., 172 So. 495, 500 (Miss. 1937).

160 458 So. 2d 1051 (Miss. 1984).

161 *Frazier*, 458 So. 2d at 1052.
Lessees elect to renew the lease under said option, said lessees must give the Lessor written notice not less than 6 months prior to the end of the term of this lease.\textsuperscript{162} The lease further provided:

Five years after start of lease, Lessee has the option to request Lessor to expand the building an additional 20 feet or any part thereof, at the rear at an annual rental increase of 18-percent of total gross additional construction cost... If the option to expand is exercised, it is understood that this lease, inclusive of all options, shall be beginning anew.\textsuperscript{163}

On or about February 20, 1980, during the last year of the second renewal term, the Fraziers sought to exercise the option for additional space, but the lessor (Shopping Center) refused.\textsuperscript{164} The Fraziers sued for, but were denied, a declaratory judgment.\textsuperscript{165} On appeal, the Fraziers argued that they had “a clear, unambiguous right to extend the lease by their letter dated February 20, 1980.”\textsuperscript{166} The Shopping Center responded that “a clear interpretation of the lease” provided the Fraziers with “a period of five years from and after September 1, 1964, the beginning of the lease, in which to exercise the rights contained in this particular paragraph, and no longer.”\textsuperscript{167}

The Mississippi Supreme Court affirmed the chancery court’s judgment for the Shopping Center:

We content ourselves with fully agreeing with the chancellor that it was manifestly unreasonable for the Fraziers to wait some fifteen years and five months after the start of the lease, and just a little more than six months before its end, to exercise their rights under this paragraph.

There was no increase in rent for sixteen years in a centrally located shopping center in one of the liveliest cities in this state. To claim that by this February 20, 1980, letter the

\textsuperscript{162} Id.
\textsuperscript{163} Id. (emphasis omitted).
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 1053.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 1053-54.
Fraziers extended the lease for another eight, twelve or sixteen years at the same rent is simply incredible.

Parties are bound by what they promise in writing. But, we are not bound to adopt a construction not compelled by the instrument in which we would have to believe no man in his right mind would have agreed to.¹⁶⁸

The court concluded that

the right granted the Fraziers was a simple option, given without additional consideration, which they were free to exercise or ignore. On the other hand, until the time for the exercise of the option had expired, Shopping Center was bound by the option it granted. Shopping Center had no right to compel its exercise, or even be notified by the Fraziers of their intent to exercise the option until the right expired. It is for this reason Courts generally hold that time is of the essence in exercising a simple option. . . .

The Fraziers had the right to exercise the option five years after September 1, 1964, which was August 31, 1969. We must agree with the chancellor that the Fraziers had no right to wait over ten years following in which to exercise the option.¹⁶⁹

In *Lehman-Roberts Co. v. State Highway Commission*,¹⁷⁰ Lehman-Roberts agreed to perform “random clearing” work related to a highway construction project conducted under the Commission’s auspices.¹⁷¹ The contract called for the Commission to pay Lehman-Roberts $4,000 per acre, based on an estimate of 82 acres of random clearing.¹⁷² The Commission ultimately paid Lehman-Roberts $401,716—compared to the original $328,000 estimate—for clearing 101.929 acres.¹⁷³ Lehman-Roberts claimed that it was entitled to payment for clearing 174.44 acres and sued for the balance due according to that

¹⁶⁸ *Id.* at 1054.
¹⁶⁹ *Id.* at 1054-55.
¹⁷⁰ 673 So. 2d 742 (Miss. 1996).
¹⁷¹ *Lehman Roberts Co.*, 673 So. 2d at 742.
¹⁷² *Id.* at 742.
¹⁷³ *Id.* at 742-43.
The contract provision at the heart of the parties’ dispute provided:

The limits of clearing shall be 60 feet (horizontal measure) from the centerline, both left and right of centerline as directed by the engineer. The area measured for payment for random clearing will be the acres actually cleared of trees and will not include any paved areas or any areas which do not contain trees.175

The Mississippi Supreme Court concluded that the provision could not reasonably bear the construction that Lehman-Roberts proposed:

Lehman-Roberts claims that it was required to clear a 60-foot zone, from the centerline of the roadway out to the 60-foot limit of clearing line, anywhere up and down the highway the engineer directed clearing. Lehman-Roberts interpreted the contract provisions as providing for payment for clearing the 60-foot zone, less the pavement which was specifically excluded from the payment . . . .

. . . . Lehman-Roberts knew from the beginning that only 82 acres of random clearing had been estimated for the project. It claims, however, that if a portion of the project has trees located on it and it was directed to clear trees, no matter how many in number, it was to be paid for clearing from the edge of the pavement to the 60-foot limit . . . .

. . . . The language of the clause first sets out what must be cleared, and that is what is directed by the engineer. The next part of the clause sets out what areas would be pay areas, and those are the areas not paved containing trees. Lehman-Roberts claims that the paved areas are specifically excluded, therefore they understand why they do not get paid for that 12 feet. The shoulder and slope are as well excluded if they do not contain trees. Lehman-Roberts would have the phrase “any areas which do not contain trees” mean that the engineer would not direct them to clear such area. Further-

174 Id. at 743.
175 Id. at 742.
more, Lehman-Roberts would have the phrase "payment for random clearing will be the acres actually cleared of trees" mean they are entitled to payment based on a 48-foot width, no matter how many trees were at that particular station. Lehman-Roberts would have the Commission pay for areas not actually cleared.

Where there is a dispute as to the meaning of a contract clause, a party's interpretation must be reasonable to warrant adoption . . . . The Lehman-Roberts interpretation is unreasonable. The parties may have interpreted the clause differently, but it is not ambiguous.\textsuperscript{176}

Mississippi courts should also "endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other."\textsuperscript{177}

In \textit{UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.},\textsuperscript{178} the court was asked to decide whether a hospital (Gulf Coast) was justified under the terms of its contract with its manager/owner (Qualicare) in declaring Qualicare in material breach and terminating the contract because Qualicare unilaterally raised hospital rates over which Gulf Coast had "both final and immediate authority" under the terms of their contract.\textsuperscript{179} The court found itself

confronted with a rather novel situation. UHS-Qualicare has done something—raise the rates—which Gulf Coast by a simple resolution of its Board of Directors, if not by a letter from its president, has unequivocal authority to override—immediately.

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\textsuperscript{176} \textit{Id.} at 744 (citations omitted).
\textsuperscript{177} Rubel v. Rubel, 75 So. 2d 59, 65 (Miss. 1954); accord Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399, 403 (Miss. 1966); see also Citizens' Bank v. Frazier, 127 So. 716, 717 (Miss. 1930) (holding that Mississippi courts are obligated "to give to a contract a construction or interpretation, if possible, which will square its terms with fairness and reasonableness, each party towards the other . . . .")
\textsuperscript{178} 525 So. 2d 746 (Miss. 1987).
\textsuperscript{179} \textit{UHS-Qualicare}, 525 So. 2d at 755.
The novel situation we confront today is one about which the contract provides no express directive. Put abstractly, the question is this: where one party to a contract acts with respect to a matter where the other has unqualified authority, has the acting party breached materially? Assuming arguendo that the acting party has breached the contract, is the other party allowed the radical remedy of termination where it has complete power of cure, where it could by its own action supersed the offending act of the other? The question suggests its own answer: No, absent express contractual language to the contrary.

* * *

Absent clear language to the contrary, we regard it wholly unreasonable that the language of a twenty year, multimillion dollar contract, be read to provide that any failure (whether material or not) to keep, observe or perform, etc. will suffice to trigger the termination clause. Such a result would be productive of great economic waste. An implied requirement that breaches justifying termination be material is only fair, while the contrary reading could only produce harsh, unreasonable, expensive and unintended consequences. The concept of material breach is sufficiently familiar and well-known that contracting parties and their drafting attorneys are charged with knowledge of it. If they wish to exclude it from their contract, they must do so clearly.\textsuperscript{180}

The court concluded:

Moreover, in its termination efforts Gulf Coast was obviously thinking in terms of material breaches. In its July 12, 1983, letter, Gulf coast states "We regard each of the foregoing as material breaches . . . ." The August 15, 1983, letter twice refers to "material breaches." Nothing in the record suggests that, until time came for its lawyers to write their brief, Gulf Coast ever considered that it had authority to invoke the termination clause in the event of breaches not "material."\textsuperscript{181}

\textsuperscript{180} Id. at 755-56 (emphasis omitted).
\textsuperscript{181} Id. at 756.
5. Avoid Illegality

Mississippi law presumes that contracts are made for lawful purposes. Therefore, if a contract or contractual provision is susceptible to two reasonable constructions, one of which comports with statutory law, regulation, common law, or public policy and one of which does not, the court should construe the contract or contractual provision in such a way as to make it legal.

For example, in Grandberry v. Mortgage Bond & Trust Co., the second (MB&T) and third (Grandberry) lienholder against a parcel of improved real property orally agreed that MB&T—who was initiating the foreclosure sale—would bid enough at the sale to cover the principal and interest due on the second lien and the agreed amount of $1,646 toward the third lien. In reliance on that oral promise, Grandberry did not attend the foreclosure sale. MB&T, however, bought the property in foreclosure for less than the amount of its lien.

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182 See Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 31 (Miss. 1971) ("[W]rongdoing will not be presumed and in the absence of any proof to the contrary, it is proper to indulge a presumption that in their business and social relations all persons act honestly and properly."); see also Orgill Bros. v. Perry, 128 So. 755, 757 (Miss. 1930) ("There is always a prima facie presumption of law of right doing, not wrong doing.").

183 See Security Ins. Agency, Inc. v. Cox, 299 So. 2d 192, 194 (Miss. 1974); Crabb v. Comer, 200 So. 133, 135 (Miss. 1941); Citizens' Bank v. Frazier, 127 So. 716, 717 (Miss. 1930); Clay v. Allen, 63 Miss. 426, 430-31 (1886); Merrill v. Melchior, 30 Miss. 516, 531 (1855); Riley's Adm'r s v. Vanhouten, 5 Miss. 428, 429 (1840); see also Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect."); Orrell v. Bay Mfg. Co., 40 So. 429, 430 (Miss. 1906) ("Where a contract is susceptible of two interpretations and capable of being fulfilled in two distinct ways, one permitted [sic] and the other condemned by the law, that construction will be placed upon the contract which will validate it. The law presumes a lawful intent, instead of an illegal one, on the part of all contracting parties."). See generally RESTATEMENT (SECOND) OF CONTRACTS § 203(a) & cmt. c (1981) (favoring "lawful" constructions over "unlawful" ones); id. § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

184 132 So. 334 (Miss. 1931).

185 Grandberry, 132 So. at 334-35.
thereby cutting off Grandberry. When Grandberry complained, MB&T answered that the alleged oral agreement was unenforceable, \textit{inter alia}, as against the statute of frauds.\textsuperscript{186} The Mississippi Supreme Court disagreed:

Keeping in mind the general principle that, viewing all the terms of an agreement and all the surrounding circumstances, it is the duty of courts to give to a contract that construction or interpretation, if possible, \ldots so as to make it legal, rather than take another course of construction which would make it illegal, we think there is no title to land involved here, nor any payment of the debt of another, but simply that the effect of the agreement was that appellee, so far as any rights or interest of appellants were concerned, should start the bidding at the aggregate amount of the [second] deed of trust, plus the agreed amount, $1,646, which appellants were to have out of their deed of trust, plus costs of sale. \ldots

\ldots [A]n agreement between parties, uniting their interest as lienholders, as to the division among themselves of the proceeds of a foreclosure sale, or as to the distribution or sharing of profits and losses between them in respect to such proceeds, is not within the statute of frauds, either in letter or spirit \ldots\textsuperscript{187}

\section*{6. Avoid Implied Terms}

Mississippi courts do not favor implying terms into written agreements\textsuperscript{188}:

[U]nless the implication be indispensable or inescapable, courts will be reluctant to embark upon the dangerous venture of importing into an agreement, by declaratory resort to implication, what so far as the court may definitely know was not at the moment of the contract actually agreed upon by the

\textsuperscript{186} Id. at 335.

\textsuperscript{187} Id. at 335-36 (citation omitted).

\textsuperscript{188} See Williams, 187 So. at 239 ("The court should not interpolate into or eliminate from a written contract words of material legal consequence in order to uphold it."); see, e.g., Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1102-03 (Miss. 1981) (refusing to imply covenant to maintain general merchandise business on leased premises where lease provided for "a fixed substantial adequate minimum rent" not tied to revenues of any business so situated).
parties, and particularly must this be true where, as here, the parties have at much pains and in detail undertaken to reduce their agreement to such specific written terms as to evince their purpose to expressly cover every phase of their understanding.\(^{189}\)

In *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.*,\(^{190}\) the defendant, Hooker,

served as the general contractor for the renovation of residences owned by the Bessemer Public Housing Authority ("BPHA") in Bessemer, Alabama. The renovation involved tearing out fixtures, such as cabinets, and Hooker's contract with the BPHA provided that the BPHA, as the owner of the property, had the option to either keep or salvage fixtures which needed to be torn out during the renovation process . . . . Under said general contract, the cabinets were to become the property of Hooker and to be removed by him in the event that the BPHA elected not to keep said cabinets.

Hooker entered into a subcontract agreement with Roberts . . . , pursuant to which Roberts was required to "furnish cabinets, tops, plastic laminates on walls and furr [sic] down materials and fronts for hot water heaters as per plans and specs for the price listed below." The agreement also provided that "the price includes the cost of tear-out (sic.) old cabinets and installation of new cabinets."\(^{191}\)

A dispute arose between Hooker and Roberts as to who

\(^{189}\) Goff v. Jacobs, 145 So. 728, 729 (Miss. 1933) (citation omitted).

In *Goff*, the court was asked to read a term in the written agreement that one party was "to assume all 1930 taxes" to mean that the party was, in fact, to be responsible for all drainage taxes in subsequent years, as well. *Goff*, 145 So. at 729. The court was not so inclined:

[We are directly requested to read into the written agreement between these parties a further provision, and to insert that provision to the same effect as if expressly therein written by the parties, that the purchaser would assume these drainage taxes and assessments not only for the year 1930, but "for all subsequent years." To such a request we are constrained to return a negative response.]

*Id.*

\(^{190}\) 683 So. 2d 396 (Miss. 1996).

\(^{191}\) *J.O. Hooker*, 683 So. 2d at 398.
was responsible for disposing of the cabinets, as required in the Hooker-BPHA contract:

Roberts asserted that the subcontract did not obligate him to dispose of the cabinets, but Hooker contend[ed] that the "as per specs and plans" language in the subcontract agreement served to incorporate by reference the general contract and that Roberts thus assumed Hooker's duties to dispose of the cabinets. ¹⁹²

The Hooker court observed:

[T]he subcontract in the present case is clear and unambiguous in that it clearly provides that Roberts' bid price includes the cost of tearing out and installing new cabinets, but is completely silent as to any duty on the part of Roberts to dispose of the cabinets. Hooker concedes that the subcontract with Roberts was silent on this issue, but argues that the "specifications for the general contract disclosed that this was within the kitchen cabinet portion of the job." . . .

Hooker asserts that "[t]he specifications on the kitchen cabinet portion of the job, included in the Roberts-Hooker contract by reference, provided that the scope of the job included removing all existing kitchen cabinets and shelves and disposing of them in accordance with local laws and ordinances." It is true that the subcontract refers to the "plans and specs" of the general contract, but said language does not in any way indicate an intent by Roberts to assume additional and expensive duties which were not set forth in the subcontract. The term "as per specs and plans" is better understood as applying to the "furnish[ing]" of cabinets and not to their "removal." ¹⁹³

The parties cited several cases in support of their respective arguments, none of which, in the opinion of the court, provided "strong authority" to resolve their dispute. ¹⁹⁴ Instead, the court turned to whether Hooker raised a genuine issue of

¹⁹² Id. at 399.
¹⁹³ Id. at 400-01.
¹⁹⁴ Id. at 401.
material fact regarding Roberts' duty to dispose of the cabinets that was sufficient to defeat Roberts' motion for summary judgment. The court explained:

Hooker asserted in his affidavit that:

It is very rare for a subcontractor such as Roberts not to do their own cleanup. The only time we have ever contracted with a sub-contractor who did not handle their own cleanup was when the job was within driving distance of our office in Thaxton, Mississippi.

The duty of Hooker to remove the cabinets in the present case, however, arose from specific and detailed contractual provisions entered into between Hooker and the BPHA. The subcontract agreement, as noted earlier, expressly provided that the bid price included the "tear-out" and installation of the cabinets. If Hooker had desired that Roberts be obligated to assume the specific contractual obligations set forth in the general contract to dispose of the cabinets, then it would have been a simple matter to include in the subcontract language obligating Roberts to do so.

It would have been highly advisable for Hooker to have insisted on such language in the subcontract, regardless of his understandings regarding industry customs. This Court is hesitant to find that parties have impliedly assumed obligations to perform expensive duties based on vague assertions of industry custom when the assumption of said duties could easily have been provided for in the subcontract. This Court is especially reluctant to do so in the present case, given that the duties involved are not general obligations to remove materials, but rather specific tasks which Hooker contractually obligated himself to perform.

On these facts, this Court concludes that, as a matter of law, Roberts did not assume the specific contractual duties relating to the removal of the cabinets, and that there accordingly exists no genuine issues of material fact with regard to this issue.

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195 Id.
196 Id. at 401-02.
Implied terms are generally permitted in only two types of cases. First, implied terms are permitted when necessary to effectuate the intent of the parties as evidenced by the agreement as a whole.\footnote{See REO Indus., Inc. v. Natural Gas Pipeline Co. of Am., 932 F.2d 447, 455-56 (5th Cir. 1991) ("[I]t must appear from the express terms of the contract that the implied term was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, or the implied term must be indispensable to give effect to the intent of the parties as disclosed by the contract as a whole."). Namely, if there is to be any implication, it must result from the language employed in the instrument or be indispensable to carry the intention of the parties into effect. Terms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression. 17A AM. JUR. 2d Contracts § 379, at 399-400 (1991).} Examples of this type of case include implying (1) that a contract which sets no time for performance must be performed within a "reasonable" time, considering the condition and circumstances of the parties, and may not be terminated without reasonable notice to the party whose performance is subject to the "reasonable time" requirement;\footnote{See, e.g., Warwick v. Matheny, 603 So. 2d 330, 335-37 (Miss. 1992).} (2) that, "in the absence of some provision in the contract authorizing termination or cancellation, every contract is presumed irrevocable";\footnote{Id. at 336; accord Garner v. Hickman, 733 So. 2d 191, 195-96 (Miss. 1999); Ham Marine, Inc. v. Dresser Indus., Inc., 72 F.3d 454, 460 (5th Cir. 1995) (applying Mississippi law).} and, (3) that, "[w]here a contract is performable on the occurrence of a future event, there is an implied agreement that neither party will place any obstacle in the way of the happening of such event, and where a party is himself the cause of the failure he cannot rely on such condition to defeat his liability."\footnote{Warwick, 603 So. 2d at 337. Accord Garner, 733 So. 2d at 195.} Implied terms are also permitted when they arise by operation of law, such as the implied warranty of habitability;\footnote{See Oliver v. City Builders, Inc., 303 So. 2d 466, 470 (Miss. 1974) (Inzer, J., specially concurring); Brown v. Elton Chalk, Inc., 358 So. 2d 721, 722 (Miss. 1978).}
the implied duty of good faith and fair dealing;\textsuperscript{202} and the im-

\begin{quote}
In Oliver, eight of nine justices recognized that an implied warranty of habit-
ability should be read into a contract between the builder-vendor of a new home
and the first purchaser of that home, notwithstanding that the builder-vendor and
purchaser had reduced the terms of their transaction to a writing that would
otherwise merge all prior agreements and understandings. See Oliver, 303 So. 2d
at 469-70 (Inzer, J., specially concurring, joined by Rodgers, P.J., and Patterson,
Walker, and Broom, JJ.); id. at 470-73 (Robertson, J., dissenting, joined by
Gillespie, C.J., and Sugg, J.). However, because the plaintiff was not the original
purchaser of the home, the specially concurring justices joined Justice Smith in
affirming the circuit court's judgment in favor of the builder because the warranty
was too "remote." See id. at 470 (Inzer, J., specially concurring). The dissenting
justices did not adopt the distinction between first purchasers of new homes and
remote purchasers, relying on prior decisions of the court regarding privity of
contract issues. See id. at 470-72 (Robertson, J., dissenting). Ultimately, the dis-
senting justices in Oliver won the day on the issue of privity. See Keyes v. Guy
Bailey Homes, Inc., 439 So. 2d 670, 672-73 (Miss. 1983) (abrogating privity re-
quirement so that a remote home purchaser may sue the builder for breach of
the implied warranty).

\textsuperscript{202} See General Motors Acceptance Corp. v. Baymon, 732 So. 2d 262, 269
(Miss. 1999); Merchants & Planters Bank v. Williamson, 691 So. 2d 398, 405
(Miss. 1997); Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992); UHS-Qualicare,
Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 757 (Miss. 1987); see
also MISS. CODE ANN. § 75-1-203 (1981). See generally RESTATEMENT (SECOND) OF

In Cenac, for example, the Cenacs purchased a country store from the
Murrys by executing a contract for deed, whereby the Cenacs would make a down
payment and monthly payments for ten years, at the end of which the Murrys
would transfer title to the Cenacs. Cenac, 609 So. 2d at 1259. The court noted
that

a final clause in the agreement stated that, if the purchaser chose not to
exercise her right to purchase, the contract would become null and void,
and all rights of the purchaser would be forfeited and terminated. All
money and other consideration paid by the purchaser to the seller
would be retained by the sellers free of any claim from the purchaser, it being
agreed that such sums constitute a reasonable rental fee for the property
and a reasonable sum as liquidated damages to the sellers if the right
to purchase were not exercised.

Id. at 1260.

Some 18 months into the deal, the Cenacs sued the Murrys, seeking to re-
scind the contract, alleging, \textit{inter alia}, breach of the duty of good faith and fair
dealing. Id. The Cenacs chronicled numerous accounts of bizarre and offensive
behavior by the Murrys, which the Cenacs claimed was aimed at forcing them to
abandon the store before they gained title to it. Id. at 1260. The Mississippi Su-
preme Court found that the Murrys had, in fact, breached the covenant of good
faith and fair dealing implied into their contract with the Cenacs:
plied warranties of title,\textsuperscript{203} merchantability,\textsuperscript{204} and fitness for a particular purpose\textsuperscript{205} set forth in Article 2 of the Mis-

Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness.

... The Cenacs argue that Murry has breached the covenant of good faith pointing to Murry's abusive, aberrant, intimidating, harassing behavior which has made their life a living hell. We agree. We trust that the facts of this case establish Murry's breach of the good faith duty and have nothing to add. Murry's motive is clear. With $30,000.00 in hand and $925.00 monthly payments for each month for ten years, Murry would also get the store back, a healthy windfall, if he could only drive the Cenacs out of town forcing a forfeiture of the contract. In addition to Murry's bizarre behavior, he clearly misrepresented material facts to the Cenacs when they were negotiating for the "purchase" of the store.

\textit{Id.} at 1272-73.

\textsuperscript{203}MISS. CODE ANN. §§ 75-2-312 and 75-2A-211 (1972 & Supp. 1999); see, e.g., Huff v. Hobgood, 549 So. 2d 951, 953-54 (Miss. 1989); Hicks v. Thomas, 516 So. 2d 1344, 1348 (Miss. 1987).

The Mississippi Supreme Court has also recognized an implied warranty of title which attaches to the sale of a non-negotiable chose in action such that, "if the chose is a nullity, the assignee may recover its price irrespective of the seller's ignorance of the defect." Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409, 417 (Miss. 1966). This implied warranty exists, according to the \textit{Gilchrist Tractor} court, even though the sale or assignment is made "without recourse." \textit{Id.}

\textsuperscript{204}MISS. CODE ANN. §§ 75-2-314 and 75-2A-212; see, e.g., Gast v. Rogers-Dingus Chevrolet, 585 So. 2d 725, 728 (Miss. 1991); Settlemires v. Jones, 736 So. 2d 471, 473-74 (Miss. Ct. App. 1999).

In \textit{Beck Enterprises, Inc. v. Hester}, the Mississippi Supreme Court held that section 75-2-314 applies to both new and used goods, although used goods are reasonably expected to require more maintenance and repair. \textit{See} Beck Enterprises, Inc. v. Hester, 512 So. 2d 672, 675 (Miss. 1987); accord Settlemires, 736 So. 2d at 473-74. If the used goods conform to the quality of other similar used goods, they will normally be merchantable. \textit{Beck Enterprises}, 512 So. 2d at 675; Settlemires, 736 So. 2d at 474.

The implied warranty of merchantability may not be waived or disclaimed, except as permitted by statute. MISS. CODE ANN. § 11-7-18 (Supp. 1999); \textit{id.} § 75-2-315.1 (Supp. 1999); see Gast, 585 So. 2d at 728; State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 736 So. 2d 384, 390 (Miss. Ct. App. 1999).

\textsuperscript{205}MISS. CODE ANN. §§ 75-2-315 and 75-2A-213; see, e.g., J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851, 859 (Miss. 1986); Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15, 17-18 (Miss. 1981).

The implied warranty of fitness for a particular purpose, like the implied warranty of merchantability, may not be waived or disclaimed, except as permit-
sissippi Uniform Commercial Code.

7. Account for Surrounding Circumstances

When construing and interpreting a contract, a court should take into account the circumstances surrounding the formation of the contract. In so doing, the court should place itself, as near as possible, in the exact situation of the parties when they executed the instrument, so as to determine their intentions, the objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features.

\[\text{ted by statute. Miss. Code Ann. } \S\text{ 11-7-18; id. } \S\text{ 75-2-315.1; see Gast, 585 So. 2d at 728; J.L. Teel, 491 So. 2d at 859.}
\]
\[\text{See Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc); see, e.g., Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546, 551 (Miss. 1996) ("In construing covenants imposing restrictions and burdens on use of land, . . . the restriction and burden will be construed in light of the circumstances surrounding its formulation, with the idea of carrying out its object, purpose and intent . . . "). See generally Restatement (Second) of Contracts } \S\text{ 209 cmt. a, at 115 (1981) ("Both integrated and unintegrated agreements are to be read in the light of the circumstances and may be explained or supplemented by operative usages of trade, by the course of dealing between the parties, and by the course of performance of the agreement."); id. } \S\text{ 201 cmt. b, at 83-84 ("Uncertainties in the meaning of words are ordinarily greatly reduced by the context in which they are used. . . . In general, the context relevant to interpretation of a bargain is the context common to both parties.").}
\]
\[\text{As the Restatement (Second) states:}
\]
\[\text{In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position [the parties] occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know.}
\]
\[\text{Restatement (Second) of Contracts } \S\text{ 202 cmt. b, at 87 (emphasis added) (internal reference omitted); see also Williams, 187 So. at 238 ("The standard of interpretation of an integration (written instrument), except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean." (emphasis added))}.\]
For example, in *McKee v. McKee*\(^\text{208}\) the court construed an agreement distributing property formerly held by a partnership comprised of a brother (John) and sister (Margaret) in order to determine who had the best claim to 69.6 acres of property formerly a part of a $15,000,000 partnership estate as follows:

One thing on which the parties agree is that John made an original proposal for the division of property in a letter . . . dated October 15, 1983. In the letter he admittedly offered Margaret the “Klondike Place”, totaling approximately 973 acres, a portion of which was the disputed 60 (61 in the letter) acres of the Chism purchase. On the next page of the letter, he stated that he would receive “60 acres of the Chism property—Roper Place—and the Dunn Cut, 25 acres.”

On December 30, 1983, Margaret listed her understanding of the property division. In this listing, she received a “Klondike Place” totaling 973 acres. John received a 60 acre tract described as “Roper”, with “Chism” handwritten beside the word Roper. The total acreage for Margaret was 3720 gross acres and 3480 cultivatable acres. John’s total acreage

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\(^{208}\) 568 So. 2d 262 (Miss. 1990). The dispute in *McKee* centered around the following tracts of land:

1. **Klondike Place**: A large tract of land which may or may not contain the 69.6 acres at issue. Regardless of where those 70 acres end up, both parties agree that Margaret is entitled to “the Klondike Place.” She claims that it should contain 973 acres, while her brother maintains that it comprises 912 acres, more or less. With the 9.6 acres around the Taylor Ginning Company removed, the Klondike Place contains only 903 acres.

2. **Chism Property**: 120 acres of land purchased in 1973 by J & M McKee from the M.E. Chism Estate. It is comprised of two (2) separate rectangular tracts of approximately sixty (60) acres each . . .

3. **Dunn Cut**: A 25 acre tract of land which is mentioned most often in connection with the “Roper cut.”

4. **“The 9.6 Acres”**: A tract of land which may or may not be part of the Taylor Ginning Company. John claims it is an integral part of the operation of Taylor Ginning Co., and since he received the Company under the property division agreement, he claims that he should receive it as well. Margaret maintains that it should go to her as part of the Klondike Place.

*Id.* at 265-66 (emphasis omitted).
was 3680 gross acres, and 3440 cultivatable acres. . . . [T]he "final" agreement was signed by the parties on January 7 and 9. . . .

The final signed document signed by both parties, states on page two that Margaret was to receive the identical 3720/3480 ratio of gross to cultivatable acreage mentioned previously, while John was to receive 3680/3440, also as before. Considering the amount of confusion generated by the terminology used to refer to the various tracts, this is one of the few logical pieces of information this Court was able to find in the record or the exhibits. It also purports to be the final agreement of the parties.

Under general principles of contract law, one should look to the "four corners" of a contract whenever possible to determine how to interpret it. Of course, this is possible only when the intent of the parties is "clear or unambiguous." The "contract" at issue here cannot be characterized as such. In fact, an examination of various "canons" of contract construction is likewise of little help. The only remaining step is to consider the "totality of circumstances" surrounding the final contract, which has been done. The final agreement in the case sub judice makes no sense unless it is examined in conjunction with other correspondence between the parties.

. . . [A] combined reading of the various written correspondence leads to a more internally harmonious result. The chancellor's decision on this point is manifestly contrary to a total reading of all prior documents, and therefore is reversed, with the disputed 60 acres of the Chism property awarded to Margaret. Under this interpretation, the total number of acres awarded to each party is consistent with all previously agreed- to documents.

. . . The 9.6 acres in question lies immediately adjacent to the Taylor Ginning Company and has apparently been used for years as a disposal or refuse site for the Company. The parties seem to agree that John is to receive the entity known as "Taylor Ginning Company" pursuant to the terms of the agreement. John maintains that the agreement also encompasses the 9.6 acre adjacent disposal site; Margaret claims it does not.

In the documents transmitted between the parties, the "Taylor Ginning Company" is mentioned many times, but
exactly what this means is never made clear . . . .

John testified at the hearing that he believed the Gin Company owned the 9.6 acres in question. Whether this is in fact true, he convincingly described the importance of the 9.6 acres to the ginning operation; Margaret was unable to provide equally convincing proof in support of her contention. Unlike the facts surrounding the Klondike Place/Chism/Roper dispute, the Gin Company was described in only the most general of terms in the correspondence between Margaret and John, and the 9.6 acres was never specifically mentioned at all. Therefore, the chancellor was within his discretion in awarding the 9.6 acre dump site to John. There is no contrary indication from the surrounding documents.209

In *Payne v. Campbell*,210 Mullins had leased the land in question to Morehead, reserving a royalty of one-eighth (1/8) of the oil and gas produced on the land.211 Mullins then conveyed to Hodge:

[O]ne-half (1/2) of the whole of any oil, gas or other minerals, except sulphur, on and under and to be produced from said lands; delivery of said royalties to be made to the purchaser herein in the same manner as is provided for the delivery of royalties by any present or future mineral lease affecting said lands.212

Hodge, in turn, granted to Payne "three-eighths (3/8) of the whole of any oil, gas or other minerals," under said lands.213 The question for the court was whether the one-half granted by Mullins to Hodge was properly read as one-half of Mullins's one-eighth royalty interest or a one-half royalty interest—in which case, Mullins would have granted to Payne more than Mullins could grant—and, therefore, whether Payne's interest was three-eighths of Hodge's one-half of Mullins's one-eighth (3/64 of the whole) or three-eighths of one-half (3/16 or 12/64 of

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209 Id. at 266-67 (emphasis, citations and footnote omitted).
210 164 So. 2d 780 (Miss. 1964).
211 *Payne*, 164 So. 2d at 783.
212 Id. at 782.
213 Id.
Ruling that the "one-half" grant had to be read both in the context of the entire granting instrument and in light of the circumstances surrounding Mullins's grant of the interest to Hodge, the court concluded that Mullins had granted to Hodge only one-sixteenth; therefore, Hodge could grant Payne only $3/64:

When the aforesaid royalty deeds were executed there was outstanding of record a ten-year mineral lease executed by Joe V. Mullins and wife to E. G. Morehead dated February 9, 1943, which provided for the payment to lessors a royalty of 1/8 of the oil and gas produced . . . .

The usual royalty provided for in oil leases in Mississippi prior to and at the time of the execution of the royalty deed from Joe V. Mullins and wife to T. F. Hodge on March 28, 1944, was a 1/8 of the whole of all oil, gas and other minerals, except sulphur. At that time the prevailing price being paid landowners per royalty acre in Amite County was $5 to $7 per acre. The amount paid by Hodge to Mullins for said royalty conveyance was $1,000, or $6.51 per acre, if the royalty deed is interpreted as conveying a 1/2 of 1/8 of the oil and gas produced from said lands . . . .

The chancellor entered a decree adjudging that the deed from Joe V. Mullins and wife to T. F. Hodge dated March 28, 1944, conveyed 1/2 of 1/8 royalty in the oil, gas and other minerals, except sulphur, in and under the lands involved . . . .

***

Only one royalty was conveyed by the Mullins to Hodge and it was to be paid out of and deducted from the present or any future lease. It would be impossible to deduct a 1/2 royalty from the 1/8 royalty provided for in the then existing lease. The interpretation made by the trial court is reasonable, conforms to the manifest intention of the parties, the usages of the oil business, and avoids unreasonable results.

Appellants contend that the said royalty conveyances are plain and unambiguous and need no interpretation by the

214 Id. at 784.
court, and the royalty conveyed by Mullins to Hodge was stated as 1/2 of the whole of any oil, gas and other minerals produced from the lands. This may be true if the conveyances were considered in a vacuum separate and apart from the lease referred to therein and without considering the circumstances of the parties and the subject matter. But.... [the words of the conveyance should be considered in the context in which they are used. We are of the opinion that when the royalty conveyance from Mullins to Hodge is applied to the thing on which it operates, it is ambiguous. Therefore, evidence showing all the circumstances surrounding the transactions was admissible. ... 215

Unless the parties clearly manifest a contrary intent "surrounding circumstances" may include any prior course of dealing between the parties,216 as well as any operative usages of trade.217 Courts should also construe all contracts in light of any applicable state or federal law or constitutional provision in effect at the time the contract was formed.218

Generally, Mississippi courts will not consider evidence of surrounding circumstances unless their "four corners" analysis of the written agreement suggests that the agreement is ambig-

215 Id. at 783-84 (citations omitted).

216 A "course of dealing" is "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1981); see also MISS. CODE ANN. § 75-1-205(1) (1972). For a more thorough discussion of the role of course-of-dealing evidence in construing and interpreting contracts under the Mississippi Uniform Commercial Code, see infra subpart III.D.2.a.

217 A "usage of trade" can refer either to a habitual or customary practice in a particular trade or location, or to a meaning ascribed to a word or phrase that is commonly understood by those in a particular trade or location. See RESTATEMENT (SECOND) OF CONTRACTS § 219 cmt. a, at 146; see also MISS. CODE ANN. § 75-1-205(2). For a more thorough discussion of the role of trade usages in construing and interpreting contracts under the Mississippi Uniform Commercial Code, see infra subpart III.D.2.b.

uous, incomplete, or both.\textsuperscript{219}

At issue in \textit{Tufts v. Greenwald}\textsuperscript{220} was whether a term calling for the plaintiff to deliver a soda fountain to the defendant "as soon as possible" contemplated that the plaintiff, who both manufactured and sold soda fountains, would manufacture and deliver a soda fountain to the defendant "as soon as possible," or that the plaintiff would deliver an already-manufactured soda fountain to the defendant "as soon as possible."\textsuperscript{221} The facts latter construction would have favored the defendant:

In the case before us the terms of the agreement may refer indifferently to a soda fountain to be thereafter manufactured and consigned to the defendants, or to one then in existence, to be immediately forwarded. The plaintiff says that, by reason of the fact that he was a manufacturer, he construed the contract to mean that the fountain was to be manufactured and sent to the defendants, and that this was done as soon as practicable. The defendants say that they intended to order a fountain then in stock, and ready for immediate shipment, and that this was well understood by the agent of plaintiff.\textsuperscript{222}

Because of this ambiguity, the Mississippi Supreme Court held that the trial court did not err in permitting the defendant Greenwald to testify that the contract made between his firm and the agent of the plaintiff was for the purchase of a soda-water fountain then

\begin{itemize}
\item \textsuperscript{219} See \textit{supra} notes 23-25 and accompanying text; see, \textit{e.g.}, \textit{State ex rel. Lafayette County v. Hall}, 8 So. 464, 464 (Miss. 1891) ("We recognize the correctness of the legal proposition upon which the argument of appellant's counsel rests, \textit{viz.}, that, where a contract or obligation is expressed in ambiguous terms, and therefore admits of two interpretations, the circumstances under which it was entered into, and the understanding of the parties, may be resorted to in aid of its construction. But this is a mere rule of interpretation, and cannot be appealed to for the purpose of creating an ambiguity in an instrument which is unequivocal in its language, and of well settled legal import."); see also, \textit{e.g.}, \textit{O.J. Stanton & Co. v. Mississippi State Hwy. Comm'n}, 370 So. 2d 909, 915 (Miss. 1979) (refusing to consider evidence of trade usage and custom absent ambiguity).
\item \textsuperscript{220} 6 So. 156 (Miss. 1889).
\item \textsuperscript{221} \textit{Tufts}, 6 So. at 157.
\item \textsuperscript{222} \textit{Id.}
\end{itemize}
represented by the agent to be in stock and capable of immediate shipment. The testimony did not tend to contradict the written agreement, but to apply it to its subject-matter. There is nothing in the agreement or order of shipment indicating that the plaintiff was to manufacture for the defendants a soda fountain, but, because he was a manufacturer and known to be such by the defendants, he assumed that the shipment was to be as soon "as possible" after the fountain should have been made by him, and because it was so shipped that the defendants were by their contract bound to accept it. The plaintiff thus unconsciously appeals to the same principle from which his objection seeks to preclude the defendant, viz., that a contract shall be interpreted by the circumstances and conditions under which it was entered into. It is not competent to contradict or vary the written words which the parties have selected as the exponent of their contract, but, where the language used is susceptible of different meanings, the law says it means what the parties understood it to mean.223

8. Consider the Parties' Own "Practical Construction"

Mississippi courts, asked to construe a facially unclear instrument, should consider the interpretation placed upon the instrument by the parties (and their successors) in seeking the intent of the parties.224 As the court in Sumter Lumber Co. v. Skipper225 counseled:

The rules for the construction of deeds or contracts are designed to ascertain and to follow the actual or probable intention of the parties and are: When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular

223 Id.
225 184 So. 296 (Miss. 1938).
situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution of the instrument, and to what, as may be fairly assumed, they had in contemplation in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them; and when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words.226

In Weeks v. Mississippi College,227 one of the plaintiffs' great-great-grandfathers had donated a sum of money to Mississippi College in the 1850s, in return for which he had received a written "scholarship certificate," which read, in relevant part:

This is to certify that Dr. E.G. Banks of Clinton, having paid to the Mississippi College scholarship Note for the sum of Five Hundred Dollars with accrued interest, now he, the said Dr. E.G. Banks, his heirs, executors, administrators, or assigns are entitled to a Perpetual Scholarship in said Mississippi College.228

The certificate was used on numerous occasions by various persons claiming rights to the certificate through E.G. Banks, and "the College's records indicate[d] that the college repeatedly honored the certificate for tuition in various amounts for various students whenever the certificate was presented or upon the written request" of the daughter or granddaughter of

226 Sumpter Lumber, 184 So. at 298-99; accord Quinn v. Mississippi State Univ., 720 So. 2d 843, 850-51 (Miss. 1998); Farragut v. Massey, 612 So. 2d 325, 329 (Miss. 1992).
228 Weeks, 1999 WL 410552, at *1.
In 1991, plaintiff David Weeks sought to send his wife, plaintiff Susan Weeks, to Mississippi College using the scholarship certificate to pay all of her educational expenses for four years. The College responded that it would honor the certificate for tuition in the amount of one course per semester. The Weekses sued. At trial, the chancellor, having reviewed evidence of the certificate's historical use, "held that the certificate entitled the user to the greater of $100 tuition credit or one course per semester." On appeal, the Weekses argued that, because the chancellor had found the certificate to be ambiguous, he should have construed it strictly against the College under the rule of contra proferentem. The court of appeals affirmed, holding that, while the certificate was ambiguous, the rule of contra proferentem should yield when the "practical construction" given to the ambiguous certificate over the years clearly supported the chancellor's judgment:

The great fallacy of their argument is their claim that the chancellor found that the term "scholarship," in its ambiguity, meant either "full" scholarship rights of free tuition, fees and expenses of attending college, or some lesser or limited amount thereof. The chancellor only found that the term was ambiguous. Having made that determination, he then found it proper, in construing the term "scholarship," to accord considerable weight to the evidence of the actual performance of the contract. This Court finds that, as a matter of law, it was proper for him to so rule. This, so-called, "practical construction" rule of interpretation was applied by the Mississippi Supreme Court in *St. Regis Pulp & Paper Corp. v. Floyd*, 238 So. 2d 740 (Miss. 1970), where it held that the interpretation placed upon the instrument by the original contracting parties and by their successors deserves consideration . . . .
D. Secondary Rules of Construction and Interpretation

In addition to, or sometimes in conjunction with, the primary rules of construction and interpretation just discussed, Mississippi courts also rely from time to time on a number of "secondary" rules. These secondary rules are easier both to define and to apply than the foregoing, more general principles. However, a court should apply the following secondary rules only if two or more provisions of a contract, or two or more reasonable readings of the provisions of a contract, remain uncertain after the court has applied the foregoing primary rules.\footnote{See Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc) (recognizing availability of "several secondary rules" of interpretation that may be applied "when, but not unless, the meaning to be given to a written instrument remains uncertain after applying thereto . . . the primary rules in aid of interpretation"); see, e.g., Weeks, 1999 WL 410552, at *5-6 (electing to resolve ambiguity by following parties' "practical construction" of contract, rather than following maxim of contra proferentem advocated by appellants).}

In response to a citation to the case of City of Cincinnati v. Cincinnati Gaslight & Coke Co., the Weeks court found that each of those requirements was satisfied in the case at bar. From the first instance of its use, up to the complained of instance, the course of dealing between the heirs and assigns under the certificate and the College was uniform, unquestioned, and fully concurred in by both parties. The course of conduct consisted of either, tuition credit in the amount of $100 or the cost of one course per semester.\footnote{See City of Cincinnati v. Cincinnati Gaslight & Coke Co., 41 N.E. 239, 241 (Ohio 1895) (holding that "[t]o have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties.").

\textit{Weeks}, 1999 WL 410552, at *7. See City of Cincinnati v. Cincinnati Gaslight & Coke Co., 41 N.E. 239, 241 (Ohio 1895) (holding that "[t]o have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties.")}

Writing about these secondary maxims of construction and interpretation, Professor Patterson has observed:

There is some doubt whether they have reliable guidance value for judges, or are merely justifications for decisions arrived at on other grounds, which may or may not be revealed in the opinion. This rather cynical view is supported by two observations. One is that for any given maxim that would persuade a judge to a certain conclusion a contrary maxim may be found that would persuade him to the opposite (or contradictory) conclusion . . . .

The second reason . . . for believing that the [secondary] maxims of interpretation are ceremonial rather than persuasive is that in many instances the court will set forth in its opinion the whole battery of
1. Contra Proferentem (Construe Against the Drafting Party)

Ambiguous contract terms are construed most strongly against the party responsible for drafting them.\textsuperscript{235}

2. Noscitur a Sociis (Take Words in Their Immediate Context)

The meaning of a word may be affected by its immediate context.\textsuperscript{236} Therefore, a court should construe or interpret a word in the context of the terms immediately preceding and following it.\textsuperscript{237}

maxims and then proceed to decide the case on the basis of an analysis of the terms of the contract and the facts of the dispute, \textit{without indicating which maxim or maxims, if any, were applied or invoked in reaching that decision.}

\textsuperscript{235} See Wallace v. United Mississippi Bank, 726 So. 2d 578, 588 (Miss. 1998); Love Petroleum Co. v. Atlantic Oil Producing Co., 152 So. 829, 831 (Miss. 1934); see, \textit{e.g.}, Wade v. Selby, 722 So. 2d 698, 701 (Miss. 1998); Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992); Merchants Nat'l Bank v. Stewart, 608 So. 2d 1120, 1126 (Miss. 1992); Leach v. Tingle, 586 So. 2d 799, 801 (Miss. 1991); Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976); Globe Music Corp. v. Johnson, 84 So. 2d 509, 511 (Miss. 1956); see also Estate of Parker v. Dorchak, 673 So. 2d 1379, 1381-82 (Miss. 1996) (recognizing this "well-known canon of construction," but recognizing that another canon of construction applied to facts of the case led to different resolution than would be reached if the court relied solely on \textit{contra proferentem}; and, therefore, concluding that contract was ambiguous).

The presumption against the drafter is less pronounced when the other party has taken an active role in the drafting process or is particularly knowledgeable. \textit{See Restatement (Second) of Contracts § 206 reporter's note, at 105-06} (1981), and cases cited therein.

\textit{Contra proferentem} is by far the most frequently invoked secondary maxim in the reported Mississippi cases. Any substantive discussion of the numerous insurance policy cases in which Mississippi courts have invoked this maxim would significantly lengthen this article. As it is, the discussion of insurance policy construction undertaken herein consumes 14 pages. \textit{See infra} subpart II.E.4.

\textsuperscript{236} See Evans v. City of Jackson, 30 So. 2d 315, 317 (Miss. 1947) ("[U]nder the doctrine of \textit{noscitur a sociis . . . the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."). See \textit{generally} Patterson, \textit{supra} note 3, at 853 ("\textit{Noscitur a sociis. The meaning of a word in a series is affected by the others in the same series; or, a word may be affected by its immediate context.").

\textsuperscript{237} See Evans, 30 So. 2d at 317 (stating that closely situated words, "being
In *Stephens v. Railway Officials’ & Employees’ Accident Ass’n*, 238 the subject insurance policy covered indemnity against two categories of losses:

First, against those injuries, or death, caused by external, violent, accidental means which leave a visible mark upon the body; and, second, against those injuries, or death, caused by means which leave no visible, external mark upon the body. . . . By this [second] paragraph it is provided that the appellee will pay one-tenth of the face of the policy where “the member shall suffer an injury of which there shall be no visible, external mark on his body sufficient to cause death, and it shall appear by an autopsy that such injury contributed to his death, . . . or if such injuries or death shall result from the intentional acts of any person other than the insured, except as the result of quarreling or fighting, whether such other person be sane or insane.” It is to be noted carefully that there is no exception in the first category against liability when the body shows the visible, external marks of violent, accidental death, when death is caused by the intentional act of another than the insured. That exception applies alone to the second category, and this second category embraces the distinctive class of injuries, “of which there shall be no visible, external mark on the body.”

The insured’s employee was killed by the intentional act of someone other than the insured, in such a way that there was a visible, external mark—specifically, his head was “split open.” 240 The insurer apparently argued that the insured was entitled to indemnity only in the amount of one-tenth of the face value of the policy, on the ground that the employee’s death was covered by the italicized passage above. 241 The Mississippi Supreme Court disagreed, holding that “the words, ‘such injuries or death,’ preceding the words, ‘resulting from the intentional act of another,’ . . . under the maxim, ‘Noscitur

*associated together, take color from each other’). 238 21 So. 710 (Miss. 1897).

239 *Stevens*, 21 So. at 710 (emphasis added).

240 *Id.* at 711.

241 *Id.* at 710.
a sociis,' . . . mean injuries or death of the kind with those just before in the same sentence specified . . . that is, injuries or death when no visible, external mark is left on the body."\(^{242}\) And, therefore, because the employee's death did leave a visible, external mark, it fell within the first category of injury or death—namely, "injuries, or death, caused by external, violent, accidental means which leave a visible mark upon the body."\(^{243}\)

3. *Ejusdem Generis* (Limit Generalities to Things of the Same Genre as Those Specified)

When an enumeration of specific things is followed by some more general word or phrase, then the general word or phrase will usually be construed to refer only to things of the same general nature or class as those specifically enumerated.\(^{244}\) However, this rule will yield if its application "would defeat the purpose sought to be accomplished by the use of the

\(^{242}\) Id. at 710-11.

\(^{243}\) Id. at 711.

Noscitur a sociis appears to have been of very limited use to the Mississippi courts in cases involving contract construction—as opposed to statutory construction. See, e.g., State Farm Ins. Co. v. Gay, 526 So. 2d 534, 537 (Miss. 1988); Evans v. City of Jackson, 30 So. 2d 315, 317 (Miss. 1947); Rouse v. Sisson, 199 So. 777, 780 (Miss. 1941). *Stephens* is the only reported case in more than a century to apply the doctrine to a contract, and *Williams* is the only reported decision in that same span to have explicitly considered and rejected the doctrine's application to a contract.

\(^{244}\) State v. Russell, 187 So. 540, 543 (Miss. 1939); see, e.g., Witherspoon v. Campbell, 69 So. 2d 384, 388 (Miss. 1954) ("[t]he ordinary oil and gas lease refers to the minerals that are to be explored for as being 'oil, gas and other minerals,' and under the doctrine of *ejusdem generis* the words 'and other minerals' have reference to other minerals of like kind and character which are not a part of the soil, such as the oil and gas specifically mentioned."). See generally Patterson, supra note 3, at 853 ("A general term joined with a specific term will be deemed to include only things that are like (of the same genus as) the specific one. . . . E.g., *S* contracts to sell *B* his farm together with the 'cattle, hogs, and other animals.' This would probably not include *S*'s favorite house-dog, but might include a few sheep that *S* was raising for the market.").

The doctrine of *ejusdem generis* only applies to an ambiguous contract. See Yazoo Properties v. Katz & Besthoff No. 284, Inc., 644 So. 2d 429, 432 (Miss. 1994); Cole v. McDonald, 109 So. 2d 628, 637 (Miss. 1959).
words,” and “do violence to the manifest intention of the parties as represented by their deed and by their acts and ... defeat the express purpose which the parties were seeking to accomplish.”

In *American Fidelity Fire Insurance Co. v. Hancock*, the collision policy at issue relieved the insurer from liability if the vehicle was subject to a bailment lease, conditional sales contract purchase agreement, mortgage, “or other encumbrance.” The truck was, in fact, subject to a lease—but not a bailment lease. The insurer admitted in its brief that the lease from Ashley to Automatic Poultry Feeder Company did not constitute a bailment lease.

The appellant then shifted gears and claimed that the said lease from Ashley would constitute an “other encumbrance” not specifically declared and described in the policy and, therefore, the entire policy would be voided. The only encumbrances specifically enumerated before the general term “other encumbrance” is used, are bailment lease, conditional sale, purchase agreement, or mortgage.

Applying the rule of *ejusdem generis* to this contention, the lease from Ashley to Automatic Poultry Feeder Company does not qualify as an “other encumbrance.” It is not similar to a sale or mortgage agreement in any respect.

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245 Singer v. Tatum, 171 So. 2d 134, 144 (Miss.), cert. denied, 382 U.S. 845 (1965). The Mississippi Supreme Court has noted that like all other rules of construction, *ejusdem generis* is simply an aid invoked by the courts in determining the intent with which words are used and should not be applied when so to do would defeat the purpose sought to be accomplished by the use of the words, the meaning of which is under consideration.

We think that to apply the rule of *ejusdem generis* to the case at bar would be to do violence to the manifest intention of the parties as well as to defeat the manifest purpose which the parties were seeking to accomplish.

Cole, 109 So. 2d at 636 (quotation omitted).

246 186 So. 2d 212 (Miss. 1966).

247 *American Fidelity*, 186 So. 2d at 217.

248 *Id.* at 217.

249 *Id.*
4. *Expressio Unius est Exclusio Alterius*  
(Exclude Similar Things Not Specified)

On the other hand, when an enumeration of specific things is not followed by some more general word or phrase, then things of the same kind or species as those specifically enumerated are deemed to be excluded. Thus, for example, "[w]here only one exception is mentioned in a contract, the rule of *expressio unius est exclusio alterius* applies and exceptions not mentioned cannot be engrafted upon it." In *Gilchrist Tractor Co. v. Stribling*, Stribling argued that he was entitled to continue supplying two of his former customers, Cook Construction and Hyde Construction, because the agreement by which he sold his exclusive franchise to Gilchrist Tractor included a provision that made Stribling "personally responsible for any liability or responsibility of Gilchrist Tractor Company, Inc. or Stribling Bros. Machinery Co., Inc. to Cook Construction Company and Hyde Construction Company growing out of any contracts with either or both of said companies to furnish equipment at less than retail prices . . . ."

Applying the rule of *expressio unius est exclusio alterius*, the Mississippi Supreme Court concluded that the only permissible exception to the non-competition agreement was precisely the one (and only one) set forth in the parties' written agreements:

The provisions of the agreement executed by Stribling prohibit[] him from competing in the sale of Caterpillar equip-

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250 See Stennis v. Board of Supervisors, 98 So. 2d 636, 645 (Miss. 1957) (McGehee, C.J., dissenting) (translating this maxim as "the expression of one thing is the exclusion of another"); see, e.g., Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409, 414-16 (Miss. 1966). See generally Patterson, supra note 3, at 853-54 ("If one or more specific terms are listed, without any general or inclusive terms, other items although similar in kind are excluded. E.g., S contracts to sell B his farm together with the 'cattle and hogs on the farm.' This language would be interpreted to exclude the sheep and S's favorite house-dog.").

251 *Gilchrist Tractor*, 192 So. 2d at 415.

252 192 So. 2d 409 (Miss. 1966). For additional discussion of the *Gilchrist* case, see supra notes 72-73, 142-43 and accompanying text.

253 *Gilchrist Tractor*, 192 So. 2d at 414.
ment in Mississippi for five years . . . .

There is one, and only one, exception to the prohibition. It is stated clearly, in unmistakable terms:

It is understood that Roger W. Stribling now owns certain machinery and equipment and he may proceed with the orderly liquidation or disposal of said equipment and machinery by either sale or rental purchase agreements.

This is the only exception, and must be construed as negating the suggestion that it was intended that there should be others.

If it had been contemplated that Stribling should continue to have the right to supply Cook or Hyde with Caterpillar equipment until these credits were exhausted in the course of writing seven contracts, it would have been easy to say so. The logical assumption is that, if it had been so intended, there would have been some reference to the fact, especially since the retaining of such a right by Stribling is inconsistent with the basic purpose of the main transaction, and would be an exception to the Non-Competition Agreement.254

5. Favor Specific Terms Over General Terms

If a general provision and a specific provision in the same contract or other instrument conflict or are inconsistent, the specific provision controls or qualifies the meaning of the general.255 More specific language in a contract is to be given

254 Id. at 415-16 (emphasis added).

As is true with noscitur a sociis, see supra note 233, this maxim appears to have been of very limited use to the Mississippi courts in cases involving contract—as opposed to statutory—construction. Stribling is the only reported case in more than a century to apply the doctrine to a contract.

255 See Estate of Parker v. Dorchak, 673 So. 2d 1379, 1382 (Miss. 1996); Garrett v. Hart, 168 So. 2d 497, 503 (Miss. 1964); Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc); see e.g., Busching v. Griffin, 542 So. 2d 860, 864 (Miss. 1989) (“Neither law nor language leave doubt how we should read an instrument respecting an interest in land when it uses words such as 'five (5) acres, more or less' followed by 'more particularly described' or the like. The 'more particular' description controls, modifying, if not replacing, the 'more or less' language.”); see also Forbes v. Columbia Pulp & Paper Co., 275 So. 2d 92, 95
greater weight than general provisions.\textsuperscript{256} However, this preference will yield if the parties clearly manifest a contrary intent.\textsuperscript{257}

In \textit{Camden Fire Insurance Ass'n v. New Buena Vista Hotel Co.},\textsuperscript{258} the court considered an apparent conflict between the terms of a repair clause included in an insurance policy and the terms of a specifically-negotiated rider to the policy:

\begin{quote}
[T]he repair clause . . . being a part of the policy itself . . . is subordinate to the provisions of the rider. It is not an exception to the rider, but the rider itself is a specific and controlling provision dealing with a different liability, and prevails over the terms and conditions of the policy. Since the rider is presumed to have expressed the exact agreement of the parties, it controls the policy insofar as it enlarges, modifies or restricts the terms thereof, as it is a specific statement relating to the subject involved . . . . [W]here a rider is attached to printed forms of general use, and is intended to apply most specifically to the condition of the parties named in the policy, the rider has a predominating influence in determining the meaning and intent of the policy . . . . [T]he reason for the rule is that additions to a policy by a rider are actually for the purpose of modifying the general terms of the policy, and therefore, being specific, control the more general terms of the policy.\textsuperscript{259}
\end{quote}

In \textit{Schlater v. Lee},\textsuperscript{260} the apparent conflict was between two provisions in a will:

\begin{footnotesize}
(Miss. 1973) (“[W]here there are both general and special provisions in a contract relating to the same thing, the special provisions control.”); Carrere v. Johnson, 115 So. 196, 196-97 (Miss. 1928) (recognizing rule that “where property is described in a conveyance in general terms, followed by a specific description by metes and bounds, the latter description will control instead of the former,” but finding it inapplicable in the case sub judice). \textit{See generally} \textit{Restatement (Second) of Contracts} § 203(c) \& cmt. e (1981).
\end{footnotesize}

\textsuperscript{256} \textit{See Dorchak}, 673 So. 2d at 1382.
\textsuperscript{257} \textit{See Restatement (Second) of Contracts} § 203 cmt. e, at 94-95.
\textsuperscript{258} 24 So. 2d 848 (Miss. 1946).
\textsuperscript{259} \textit{Camden Fire Ins. Ass'n}, 24 So. 2d at 860-51 (citations omitted).
\textsuperscript{260} 78 So. 700 (Miss. 1918).
Item 1. I give, devise, and bequeath to my son, Thomas Blewett [a tract of land described] . . . , together with any all notes and indebtedness that is now due and owing to me from said son Thomas, hereby acquitting and discharging him from the same. This devise to my said son Thomas to be in full of all demands on his part against my estate and to be all he is to receive therefrom, he not to account for the property herefore given him, but the foregoing in addition thereto.

Item 5. I give, devise and bequeath to my daughter Mary Wooldridge and her heirs during her natural life [terms of gift described]. At her death to be sold and the proceeds to be divided between my heirs share and share about . . . 261

Thomas's lawful heirs, argued, inter alia, that the provision in item 1 excluding Thomas from sharing in the estate of the testator further than the bequests to him in item 1 conflicted with the provision in item 5 providing for a sale and distribution of the remainder at Mary Wooldridge's death between the heirs of the testator, which would have included Thomas. 262 The court found no irreconcilable conflict:

[The two items are not in conflict, but may be read together and harmonized so as to get the real intent of the testator from the language used in the two items. It is very clear that the testator intended by item 1 to make certain provision for Thomas G. Blewett, Jr., and to expressly exclude him from taking anything further from the estate. At the death of the testator, Thomas G. Blewett, Jr., accepted and took the estate provided for him under item 1 of the will in lieu of any other claim; and he could not accept the bequest in item 1 and also claim an interest as an heir at the death of Mary Wooldridge, life tenant, as provided in item 5. . . . Item 5 of the testator's will here being a general provision, and item 1 being a specific provision, the latter must control and prevail over the former. Therefore we hold that the legatee Thomas G. Blewett, Jr., was by express provision in item 1 excluded from taking

261 Schlater, 78 So. at 700.
262 Id. at 700-01.
from the estate of the testator under item 5 of the will.263

6. Favor Handwriting to Typing and Typing to Printing

Except where the parties clearly manifest a contrary intent, handwritten contract provisions are favored when they conflict with or alter typewritten or printed provisions, and typewritten provisions are favored when they conflict with or alter printed provisions.264 As the Mississippi Supreme Court explained in Dale v. Case265:

The reason why greater effect is given to the written than to the printed part of a contract, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims.266

In H&W Industries, Inc. v. Occidental Chemical Corp.,267 both the purchase order typed by the plaintiff (H&W) and the purchase acknowledgement form, prepared by the defendant (Occidental) in response to a call from H&W confirming its order, showed that H&W would purchase fifteen hopper cars full of resin from Occidental at a price of $ 0.185 per pound.268 The back of Occidental's purchase acknowledgement form contained several pre-printed terms, one of which provid-

263 Id. at 701.
264 See, e.g., Travelers Ins. Co. v. General Refrigeration & Appliance Co., 218 So. 2d 724, 726 (Miss. 1969); see also Thornhill v. System Fuels, Inc., 523 So. 2d 983, 988 n.2 (Miss. 1988) (stating that "when the written provisions of a contract cannot be reconciled with the printed provisions, the written provisions control ".); Holifield v. Perkins, 103 So. 2d 433, 434 (Miss. 1958) ("If an instrument's typeset printing cannot be reconciled with provisions which are filled in by the parties, then the filled-in provisions control."). See generally RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. f, at 95 (1981) ("It is sometimes said . . . that handwritten terms control typewritten and printed terms, and type-written control printed.").
265 64 So. 2d 344 (Miss. 1953).
266 Dale, 64 So. 2d at 349 (quotation omitted).
267 911 F.2d 1118 (5th Cir. 1990).
268 H&W Indus., 911 F.2d at 1120.
ed that “[p]rices and terms of payment are subject to change without notice and will be those in effect on date of shipment.” Occidental was to deliver the carloads in three installments. Between the first and second shipments, the market price of the resin increased unexpectedly, and Occidental notified H&W that subsequent shipments would be at a price in excess of $0.185 per pound, citing the “subject to change” term on the back of the purchase acknowledgement form.

The Fifth Circuit affirmed the jury verdict in favor of H&W, despite Occidental’s “subject to change” term:

The district court rejected Occidental’s contention that the boilerplate provision created an ambiguity or conflict with the price contained in both parties’ purchase orders. The court concluded that “any ambiguity created in this case by the exchange of documents is unilaterally created by the defendant,” and refused to give the instruction that the price terms should “drop out” of the contract. We find no error in the district court’s assessment.

The typewritten provisions on the purchase order forms and the order acknowledgment form take precedence over the printed boilerplate provisions...

In *Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill*, the Mississippi Supreme Court counseled: “[I]f the written and printed matter can possibly be reconciled, this will be done, it being presumed that the instrument contains no clauses not intended by the parties.” *Hardie Tynes* dealt with a contract part of which was printed, part of which was typed, and part of which was handwritten:

The proposition of the company, accepted by the oil mill May

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269 Id. at 1120 n.2.
270 See id. at 1120-21.
271 Id. at 1122-23.
272 36 So. 262 (Miss. 1904).
273 *Hardie Tynes*, 36 So. at 263 (quotation omitted); see also *Ford v. Jones*, 85 So. 2d 215, 217 (Miss. 1956) (“The rule that the written provisions of a deed control over the printed provisions applies only when the former cannot be reconciled with the latter, and where they are wholly inconsistent.”).
22, 1902, and thus becoming a contract on its face complete, is on a printed blank, the spaces filled in with writing, and begins thus: "We propose to make and deliver ___ F. O. B. ___ August ___ 1902 ___ unless delayed by strikes, fires or manufacturing contingencies beyond our reasonable control," the engine, etc., describing the subjects of the manufacture . . . . This contract is followed in typewriting by attached specifications of the work to be done, more elaborate than appear in the accepted proposition. At the end of these are typewritten specifications, which are also in the shape of a proposition, and which provide that the oil mill should prepare the foundation, and that the company should furnish a mechanic to erect, if desired, at certain wages, etc., and they conclude thus, in typewriting: "Price and terms to be in accordance with our printed contract herewith attached and made a part of these specifications . . . . Immediately under this we find, in manuscript, this: "It is understood that the above described engine will be shipped August 15th, 1902, failing to do so, Hardie Tynes agrees to pay as forfeit, $5 per day for every day behind this time,. . . ."

The court, asked to decide whether the handwritten addendum specifying the shipment deadline and the delay penalty was "independent of and uncontrolled by the reservation as to strikes, etc. in the proposition first signed," answered "No":

"The original paper was to ship "__ August ___ 1902 ___ unless delayed by strikes," etc., and the written addendum simply fixes a date in August, and provides for damages per diem for delay in shipment; and we think it should be read as providing for the damages in addition to the first proposed contract, and for the exact day of shipment, all subject to the clause "unless delayed by strikes," etc."

_Pruitt v. Dean_ addressed both the rule favoring writing or typing to printing and the exception limiting the rule's appli-
cation to those instances where the handwritten or typed cannot be reconciled with the printed:

While the question is not free from difficulty, we are of the opinion that since it is conceded that printed forms were used for the execution of both deeds of trust, . . . and that this printed provision was modified by the draftsman of such deeds of trust, either with pen and ink or by typewriter, before their execution, by inserting . . . the words "according to law," . . . the parties intended that the words "according to law" in each of said deeds of trust should be substituted for the entire printed provision . . . relating to how the notice of the time, place, and terms of sale should be given; that is to say, that since the quoted provision, as a whole, in the printed form, dealt with the matter of how the sale should be advertised, . . . the parties in modifying such provision by inserting the words "according to law" intended that the sale should be advertised only in the manner then provided by law . . . .

* * *

In so holding, we are not unmindful of the rule that while written (or typewritten) parts of a contract prevail over the printed part, it is nevertheless true that whenever it is possible by any reasonable interpretation, when there is no conflict or inconsistency between the two, they should be reconciled so as to give effect to both. However, we have decided after a careful study of the instruments in question that a reasonable interpretation of them leads only to the conclusion that the inserted typewritten words in reference to how the lands were to be advertised had the effect of superseding the printed provision in regard thereto in its entirety.278

7. Favor Terms Stated Earlier in the Agreement Over Terms Stated Later

Where two provisions of an instrument cannot be otherwise harmonized, terms stated earlier in an agreement are favored over subsequent terms,279 with one noteworthy excep-

278 Pruitt, 21 So. 2d at 303-04.
279 See Thornhill v. System Fuels, Inc., 523 So. 2d 983, 988 n.2 (Miss. 1988)
tion: "The latter of two clauses of a will that are in irreconcilable conflict is the latest expression of the intention of the testator or testatrix where there is no other guide, and should prevail ... ."  

(2) When the written provisions of a contract cannot be reconciled with the printed provisions, the written provisions control, see, e.g., Dale v. Case, 64 So. 2d 344, 349 (Miss. 1953).

280 Dealy v. Keatts, 128 So. 268, 270 (Miss. 1930).
E. Rules Applicable to Specific Types of Agreements

1. Guaranty Agreements

A guarantor is entitled to a "strict construction," such that its guaranty "may not be extended by construction or implication beyond the precise terms" of the written guaranty. "The person claiming under the guaranty has the burden of showing that the debt whose recovery is sought falls within the contractual terms and that all conditions upon the guarantor's liability have occurred." That said, if the guaranty is clearly a "continuing guaranty," a court should construe to cover all transactions, including those arising in the future which are within the description or contemplation of the agreement, and to remain in force until revoked by the guarantor. In deciding whether a guaranty is limited or continuing, a court may consider evidence of surrounding circumstances.

281 The Mississippi Supreme Court has explained:

[A] guaranty contract possesses the following characteristics: (1) A guarantor is secondarily liable to the creditor on his contract and his liability is fixed only by the happening of the prescribed conditions at a time after the contract itself is made; (2) the contract of a guarantor is separate and distinct from that of his principal, and his liability arises solely from his own contract, although its accrual depends on the breach or performance of a prior or collateral contract by the principal therein; (3) a guarantor enters into a cumulative collateral engagement, by which he agrees that the principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, on being notified, pay the resulting damages-i.e., a guarantor is an insurer of the ability or solvency of the principal, although this characteristic is not present in an absolute guaranty or a guaranty of payment, but only in a conditional guaranty or a guaranty of collection; and (4) except where the guaranty is absolute, generally the guarantor is entitled to notice of the default of the principal.


282 American Oil Co. v. Estate of Wigley, 169 So. 2d 454, 458 (Miss. 1964).

283 EAC Credit Corp. v. King, 507 F.2d 1232, 1236 (5th Cir. 1975) (applying Mississippi law).

284 See, e.g., Ivy v. Grenada Bank, 401 So. 2d 1302, 1302-03 (Miss. 1981); Brent, 258 So. 2d at 434-35.

In *Merchants' & Farmers' Bank v. Calmes*,\textsuperscript{286} the guaranty provided:

Brooksville, Miss., Dec. 6th, 1898. We hereby guaranty the account of Calmes & St. John Co. with the Merchants & Farmers Bank of Macon, Miss., to the amount of $2,500. It is agreed and understood that this guaranty is to cover all amounts which above firm may owe the said Bank to the above specified amount.\textsuperscript{287}

The court held the guaranty to be “not a continuing one,” but rather “confined to the account as of its date.”\textsuperscript{288}

By contrast, in *Brent v. National Bank of Commerce of Columbus*,\textsuperscript{289} the court found the following to be a continuing guaranty:

I hereby give this continuing guaranty to the said Bank of Brooksville, Mississippi, hereinafter called “Bank,” its transferees or assigns, for the payment in full, together with all interest, attorney fees, other fees, and charges of whatsoever nature and kind, of any indebtedness, direct or contingent whether secured or unsecured, of said debtor to said Bank up to the amount of Sixty Five Thousand and no/100 (65,000.00) Dollars, whether due or to become due, and whether now existing or hereafter arising.\textsuperscript{290}

\textsuperscript{286}35 So. 161 (Miss. 1903).
\textsuperscript{287}Calmes, 35 So. at 161.
\textsuperscript{288}Id. at 162.
\textsuperscript{289}258 So. 2d 430 (Miss. 1972).
\textsuperscript{290}Brent, 258 So. 2d at 430; see id. at 434-35.
2. Surety Agreements

As a general rule, courts should construe contracts of surety so as to not expand the surety's obligation beyond that for which it has expressly contracted. A surety's liability is measured by the express terms of its covenant, as contained in the contractual (and statutory) obligations of its principal, and in the surety agreement or bond.

A gratuitous surety is favored by the law, and is entitled to have its undertaking strictly construed in its favor. Gratui-

291 The Mississippi Supreme Court has stated:

[T]he distinguishable attributes of a contract of suretyship are as follows: (1) A surety is primarily and directly liable to the creditor on his contract from the beginning; (2) the undertaking of a surety is made at the same time and usually jointly with that of his principal, and binds him jointly to the performance of the very contract under which the liability of the principal accrues; (3) the contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done-i.e., the surety is an insurer of the debt or obligation; and (4) a surety is held to know every default of his principal and is liable without notice.

Id. at 434.

292 See Alexander v. Fidelity & Cas. Co., 100 So. 2d 347, 349 (Miss. 1958); Metropolitan Cas. Ins. Co. v. Koelling, 57 So. 2d 562, 563 (Miss. 1952).

293 Alexander, 100 So. 2d at 349. In both Alexander and Mississippi Fire Insurance Co. v. Evans, the issue for the court was whether the defaulting obligor's surety was required to reimburse the obligor's creditors for the attorneys' fees the creditors incurred recovering from the defaulting obligor. Both courts said "no," because neither surety bond provided for the payment of attorneys' fees to parties other than the obligor. See Alexander, 100 So. 2d at 349; Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 743-44 (Miss. 1929).

294 See Koelling, 57 So. 2d at 563; National Union Fire Ins. Co. v. Currie, 178 So. 104, 105 (Miss. 1938); W.T. Raleigh Co. v. Rotenberry, 164 So. 5, 5-6 (Miss. 1935). In Rotenberry, the gratuitous surety's contract

had three essential features: It [wa]ls to pay (1) the prior indebtedness of the dealer (2) for any and all goods previously sold to said dealer, and the two foregoing features must be (3) shown by the seller's books. The contract made the seller's books the evidence upon which the liability was to be shown. The contract cannot be extended by construction so as to show the liability, or either of the two required elements of that liability, by any other means than the seller's books. The books must themselves furnish the information required with reasonable certainty without the aid of parol testimony or . . . [writings] kept otherwise than in and as a part of the books themselves.
itous sureties assume their obligations "without pecuniary re-
numeration." As such,

[t]heir liability is . . . strictissimi juris. They have a right to
stand on the terms of their obligation, and, having consented
to be bound to a certain extent only, their liability must be
found within the terms of that consent, strictly construed.

A compensated surety is not entitled to such preferential
treatment; rather, "[w]hile its liability may not be extended
beyond the terms of the contract, if the contract is susceptible
of two constructions, one of which will uphold and the other
defeat the claim, in that event, the construction favorable to
the insured will be adopted":

[T]he rule of strictissimi juris which operates in favor of gra-
tuitous sureties is inapplicable, in a suit against a compensat-
ed surety. This merely means, however, that a compensated
surety is not entitled to a strict or technical construction of
the contract, but that on the contrary the obligation is to be
considered in the same light as any other contract, and that
the obligation of such a surety should not be extended beyond
the scope of his undertaking as deduced from the terms, con-
ditions and circumstances of the instrument. The rule is one
of construction, and if there is no ambiguity, the plain inten-
tion of the parties cannot be disregarded or enlarged by con-
struction. It is essential not merely that performance of the
contract shall operate, but that it must be so intended, for the
direct benefit of the third person.

Rotenberry, 164 So. at 6; see also, e.g., Hederman v. Cox, 193 So. 19, 22 (Miss.
1940) (reciting Rotenberry and recognizing that gratuitous surety's obligation could
not, at common law, "be extended by imposing thereon a new and a different date
for performance by the principal to the hurt or possible hurt of the surety—the
obligation of the surety must not be extended to any other period of time than is
expressed or necessarily included in the contract itself").

Currie, 178 So. at 105.

Id. (emphasis added).

Koelling, 57 So. 2d at 563; see, e.g., New Amsterdam Cas. Co. v. Wood, 57
So. 2d 141, 142 (Miss. 1952) (holding that surety is liable under its bonds for
losses to buyers of all stock sold by misrepresentation, even if coverage on its
face only applied to preferred stock and that sold was common stock).

Hartford Accident & Indem. Co. v. Hewes, 199 So. 93, 98 (Miss. 1940),
As with a guaranty, a suretyship can be either limited (to one or more specified obligations of the principal) or continuing.\textsuperscript{299} A suretyship may also be unlimited or limited with regard to the amount of money the surety may potentially be liable to pay.\textsuperscript{300}

3. Indemnity Agreements

Agreements that attempt to indemnify a party against its own negligence are "not favorites of the law."\textsuperscript{301} Mississippi

\textit{modified on other grounds}, 199 So. 772 (Miss. 1941).

In \textit{Koelling}, the court recognized an ambiguity between the terms of the principal’s contract and the surety bond:

In the former, 80\% of the contract could be drawn as the work progressed, but the remaining 20\% could not be paid until the job was completed. In the latter, while performance in accordance with the contract was required, the obligees might retain as little as 10\% at final completion. The only effect of this ambiguity was that the obligees could pay up to 90\% as the work progressed. Under the above authorities, the construction favorable to the insured must be adopted, and the 10\% provision as to retainage must prevail.

\textit{Koelling}, 57 So. 2d at 563-64.

\textsuperscript{299} See supra note 284 and accompanying text.

\textsuperscript{300} See Currie, 178 So. at 105. In \textit{Currie},

\[\text{the contractual relation between the appellee and appellant was not one of unlimited suretyship. It was unlimited as to duration, but it constituted a continuing guaranty or security, limited as to amount, to wit, the sum of $1,000; and when the surety made good the alleged delinquency of the agent to the full extent of this limited liability, he could not further be held responsible on the bond for other delinquencies occurring during a continuance of the agency.}\]

\textit{Id.}

\textsuperscript{301} Blain v. Sam Finley, Inc., 226 So. 2d 742, 745 (Miss. 1969). Indeed, in some instances, they have been deemed void as contrary to public policy. See, e.g., Entergy Miss., Inc. v. Burdette Cotton Gin Co., 726 So. 2d 1202, 1206 (Miss. 1998) (holding that indemnity clause with regard to utility service provider is void as against public policy).

The willingness of Mississippi courts to uphold clauses excusing a party from the consequences of its own negligence seems to vary depending, at least in part, on the relationship between the parties. For example, anticipatory releases from negligence in contracts between public utilities and their customers have traditionally been held void as a matter of public policy "(1) to dis-
courts should enforce such provisions only if they "are made at arm's length without disparity of bargaining power," and if they express an intent to indemnify against the indemnitee's own negligence in clear and unequivocal terms.

Courts should enforce such provisions only if they "are made at arm's length without disparity of bargaining power," and if they express an intent to indemnify against the indemnitee's own negligence in clear and unequivocal terms.

Entergy, 726 So. 2d at 1206 (citing Entergy, 726 So. 2d at 1206 (citation omitted) (quoting Bisso v. Inland Waterways Corp., 349 U.S. 85, 90-91 (1955)). As the Entergy court explained:

"It is the general rule that a public utility or common carrier cannot contract against liability for its own negligence, and it may not be doubted that such a tortfeasor may not recover under an indemnity agreement which impinges upon this rule." We hold that an indemnity clause in a utility service contract such as the one at issue here intrudes upon the public policy of this State requiring utilities to "exercise the highest degree of care" in constructing and maintaining electrical lines. We cannot allow a utility to contract away its well-established duty of protecting the general public.

On the other hand, Mississippi courts have upheld indemnity clauses in contracts between a utility and a non-customer. See, e.g., Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d 1305, 1313 (Miss. 1994) (holding that cable company is required to indemnify utility company for latter's negligence pursuant to licensing agreement); see also, e.g., Mississippi Power Co. v. Roubicek, 462 F.2d 412, 417 (5th Cir. 1972); Lorenzen v. South Cent. Bell Tel. Co., 546 F. Supp. 694, 697-98 (S.D. Miss. 1982), aff'd, 701 F.2d 408 (5th Cir. 1983). The Entergy court explained that the rationale for upholding anticipatory releases in such cases "revolved around the negotiation of two private concerns, unaffected by the greater public policy consideration" present in the relations between a utility and its customers. Entergy, 726 So. 2d at 1206.

302 Blain, 226 So. 2d at 745-46.

303 Id. at 746. "[W]hile private contracts of this type are not favorites of the law, they are enforceable provided they are made at arm's length without disparity of bargaining power, and the intent of the parties is manifestly plain and unequivocal." Id. at 745-46. Moreover, "[w]hen the contract expressly indemnifies a person against the costs and expenses incident to certain acts, or arising from a certain claim, it extends to the costs and expenses of defending groundless suits," as well as the costs and expenses of suing the indemnitor to make good on the contract of indemnity. Id. at 745-46; see also, e.g., Morgan v. United States Fidelity & Guar. Co., 191 So. 2d 917, 923-24 (Miss. 1966) (affirming award of attorneys' fees and expenses incurred by indemnitee in suing to enforce indemnity agreement which clearly and unambiguously provided for indemnitee's
In *Blain v. Sam Finley, Inc.* Blain agreed to construct a section of highway for the Mississippi State Highway Commission. Blain then sub-contracted with Finley to do a portion of the work called for in Blain's contract with the Commission. Finley's sub-contract with Blain included the following indemnity provisions:

8. PROTECTION OF WORK AND INDEMNITY AGAINST NEGLIGENCE:

Subcontractor agrees to ... so perform the subcontract and subcontract work as to avoid injury or damages to persons or property for which Contractor may be held liable in damages ... and to fully indemnify and save harmless Contractor from all such claims for damages and from all expenses and attorneys' fees incident thereto, arising out of or in anywise connected with the subcontract work.

12. INDEMNITY:

.... Subcontractor shall also pay all of the expense and cost and attorney's fees incurred by Contractor ... in the investigation or defense of any action arising out of this subcontract ..., whether such claim is valid or not, or out of the performance or non-performance of the work hereunder ....

Harvey, an employee of Blain, was killed when his car collided with an asphalt spreader belonging to Finley. Harvey's estate sued both Finley and Blain. Thereafter, Blain demanded indemnity and defense from Finley pursuant to the sub-contract, but Finley refused. Blain and Finley ultimately prevailed in the suit by Harvey's estate, and Blain unsuccessfully sued Finley to reimburse Blain for its attorney's fees and expenses incurred in defending the action by Harvey's estate. The supreme court reversed:

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304 226 So. 2d 742 (Miss. 1969).
305 Blain, 226 So. 2d at 743-44.
306 Id. at 744.
307 Id.
308 Id.
309 Id. at 744-45.
The determinative issue in the case at bar revolves around the interpretation and effect to be given to the indemnity provisions of the subcontract between Blain and Finley . . . . It is clear that section 8 of the indemnity contract in the case at bar is geared to the work and the negligence of the subcontractor. The subcontractor-indemnitor expressly agreed in paragraph 8 of the subcontract "to . . . save harmless Contractor from all such claims for damages and from all expenses and attorneys' fees incident thereto, arising out of or in anywise connected with the subcontract work." This language is plain, clear in meaning and free from ambiguity . . . . Although section 12 is for the most part concerned with claims for labor, materials, equipment and similar related items, section 12 is not limited to these items. Section 12 specifically provides: "Subcontractor shall also pay all of the expense and cost and attorney's fees incurred by Contractor . . . in the investigation or defense of any action arising out of this subcontract or out of the non-payment of any claim of any third party, whether such claim is valid or not, or out of the performance or non-performance of the work hereunder . . . ."

By construing all of sections 8 and 12 together, the intention of the contracting parties to indemnify the contractor, Blain, against his own negligent acts is clearly and unequivocally shown.310

4. Insurance Policies

Mississippi courts strictly construe any ambiguity in an insurance policy against the insurer and in favor of the insured.311 This is particularly true when the policy provision in

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310 Id. at 746 (emphasis added by the court).
question is an exclusion from or limitation on coverage.\textsuperscript{312} A risk that "comes naturally within the terms of a policy" should not be construed as falling outside of the policy "unless the intent of the parties to exclude it appears clearly."\textsuperscript{313} A condition tending to defeat coverage "must be expressed or so clearly implied that it cannot be misconstrued."\textsuperscript{314}

In \textit{Jackson v. Daley},\textsuperscript{315} the Mississippi Supreme Court recently considered whether coverage for "injuries resulting from 'ownership, maintenance, or use' of a county automobile" encompassed fatal injuries sustained by a driver whose car flipped after striking a dirt pile left in the road by a county dump truck.\textsuperscript{316} The court originally concluded that the accident was not covered by the policy, because the driver's collision with the dirt dumped by the county truck was "too remote"

\begin{footnotesize}

312 See, \textit{e.g.}, \textit{Buddy Jones Ford}, 734 So. 2d at 177; \textit{Lewis}, 730 So. 2d at 68; \textit{Burton}, 730 So. 2d at 8; \textit{Garriga}, 636 So. 2d at 662; \textit{State Farm Mut. Auto. Ins. Co. v. Latham}, 249 So. 2d 375, 378 (Miss. 1971); \textit{State Farm Mut. Auto. Ins. Co. v. Taylor}, 233 So. 2d 805, 810 (Miss. 1970); \textit{Keith's Breeder Farms}, 227 So. 2d at 296; \textit{American Hardware Mut. Ins. Co. v. Union Gas Co.}, 118 So. 2d 334, 335 (Miss. 1960); \textit{Griffin v. Maryland Cas. Co.}, 57 So. 2d 486, 489-90 (Miss. 1952). \textit{See generally} \textit{Home Ins. Co. v. Thunderbird}, Inc., 338 So. 2d 391, 394 (Miss. 1976) ("In accord with the general standard of giving effect to the purpose of the contract, the rule is that provisos, exceptions, or exemptions, and words of limitation in the nature of an exception, are strictly construed against the insurer, where they are of uncertain import or reasonably susceptible of a double construction." (quoting \textit{2 George J. Couch, Couch on Insurance} § 15:92 (2d ed. 1969)).

313 \textit{Home Insurance}, 338 So. 2d at 394 (quoting \textit{2 Couch, supra} note 313, § 15:93).

314 Id. (quoting \textit{2 Couch, supra} note 313, § 15:93).

315 739 So. 2d 1031 (Miss. 1999) (en banc).

316 \textit{See Jackson}, 739 So. 2d at 10-41.

\end{footnotesize}
to constitute an "injury[y] resulting from . . . use of a county automobile."\(^{317}\) On rehearing, the court reversed course. Following the earlier decision of *Merchants Co. v. Hartford Accident & Indemnity Co.*,\(^{318}\) wherein the court found the insurer liable for injuries sustained by a driver whose car collided with large poles that had been left on the highway after their use was required to remove the insured's vehicle from a ditch,\(^{319}\) the *Jackson* court, on rehearing, found coverage.\(^{320}\)

In *Cox v. Peerless Life Insurance Co.*,\(^{321}\) the policy covered, *inter alia*, "accidental bodily injury sustained while driving or riding within any automobile, truck or bus . . . , provided such bodily injuries are caused solely by reason of an automobile, truck or bus accident."\(^{322}\) The insured was knocked to the floor of a bus by another passenger while the bus was stopped at a station in order to load and unload passengers.\(^{323}\) The insurer argued that the insured's injuries were not covered because she was not injured "as a result of an accident to the bus."\(^{324}\) The court disagreed:

> We do not think that the term "bus accident" in the policy should be restricted to a casualty to the bus itself. Certainly this does not accord with common understanding of that phrase. We think that within the meaning of the phrase "bus accident" is the unusual, undesigned, and unexpected occurrence of insured's fellow passenger accidentally colliding with insured in the bus and causing injuries. [The insurer's] suggested interpretation would be a very narrow construction of the policy, and would not accord, we think, with the usual and common understanding of the phrase "bus accident."\(^{325}\)

\(^{317}\) See *Jackson v. Daley*, No. 96-CA-00642-SCT, 1998 WL 800123, at *10 (Miss. Nov. 19, 1998), withdrawn and superseded on rehearing, 739 So. 2d 1031 (Miss. 1999) (en banc).
\(^{318}\) 188 So. 571 (Miss. 1939).
\(^{319}\) *Merchants Co.*, 188 So. at 571-71.
\(^{320}\) *Jackson*, 739 So. 2d, at 1141-42.
\(^{321}\) 135 So. 2d 411 (Miss. 1961).
\(^{322}\) *Cox*, 135 So. 2d at 411 (emphasis added).
\(^{323}\) Id.
\(^{324}\) Id. at 412 (emphasis added).
\(^{325}\) Id. at 413. This author is hard pressed to think of spilling coffee on his lap
At issue in *Universal Underwriters Insurance Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc.*,326 was whether the $10,000 limitation on liability for "employee dishonesty" was cumulative with regard to several acts of embezzlement by a single employee or whether each act of embezzlement was subject to a separate limitation on liability.327

while driving as an "automobile accident"; and, therefore, is not too sure about the court's description of the "usual and common understanding of the phrase 'bus accident.'"

326 734 So. 2d 173 (Miss. 1999).
327 *Universal Underwriters*, 734 So. 2d at 176. The policies contained the following provisions relating to the type of loss covered and the maximum amount of liability or limits for loss were set forth in the policies as follows:

**EMPLOYEE DISHONESTY—**WE will pay for LOSS of MONEY, SECURITIES, and other property which YOU sustain resulting directly from any fraudulent or dishonest act committed by an EMPLOYEE with manifest intent to:

(a) cause YOU to sustain such a LOSS, and;

(b) obtain financial benefit for the EMPLOYEE, or any other person or organization intended by the EMPLOYEE to receive such benefit other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions, and other EMPLOYEE benefits earned in the normal course of employment.

**THE MOST WE WILL PAY—**LOSS payment will not reduce OUR liability for other LOSSES. From the amount of LOSS, WE will deduct the net amount of all recoveries obtained or made by YOU (other than LOSS covered by any other bond or insurance) or US. If the net LOSS is in excess of the deductible stated in the declarations, and regardless of the number of persons or organizations included in YOU, the most WE will pay:

(a) under EMPLOYEE DISHONESTY, is the limit stated in the declarations as applicable to a LOSS caused by one or more EMPLOYEES, or to all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated;

**Regardless of the number of years this Coverage Part continues in force, the limit stated in the declarations is not cumulative from one period to another, or from one year to another.**

The policies also contained a discovery requirement and conditions for coverage for employee dishonesty in the policies which read as follows:

1. **DISCOVERY—**LOSS is covered only if discovered not later than one
Patsy Ellis embezzled a total amount of $233,082.97 from Jones Ford. Universal argues that the policy language is unambiguous, and clearly states that the $10,000 limit of liability and the $250 deductible in the declarations for "Employee Dishonesty" apply to "all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated." Thus, Universal argues that the limit of liability and deductible apply to the total amount of loss caused by Ellis, rather than to each of the 175 separate occasions of embezzlement in which she engaged.

The Insuring Agreement, in turn, defines "loss," for the purpose of employee dishonesty, to mean "LOSS of MONEY... which YOU sustain resulting directly from any fraudulent or dishonest act committed by an EMPLOYEE with manifest intent to: (a) cause YOU to sustain such a LOSS; and (b) obtain financial benefit for the EMPLOYEE." Jones Ford maintains, therefore, that the limitations clause plainly and unambiguously applies to all loss resulting directly from each fraudulent or dishonest act committed by an employee. It argues that "[i]f Universal had wished to have the Limitation clause apply to the entire loss caused by all the acts of embezzlement by an employee, Universal simply could have defined 'loss' in the Insuring Agreement as loss of money resulting directly from any fraudulent act, or series of related fraudulent or dishonest acts, committed by an employee."328

The Mississippi Supreme Court affirmed the chancery court's finding that the "employee dishonesty" provision was ambiguous and, construing the ambiguity against the insurer (Universal), held that each act of embezzlement was separately covered up to $10,000.329

In Lewis v. Allstate Insurance Co.,330 the policy in question excluded from coverage "bodily injury or property damage resulting from [a]n act or omission intended or expected to

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year from the end of the Coverage Part period.

Id. at 175.

328 Id. at 176 (alteration in original).

329 See Id. at 177-78.

330 730 So. 2d 65 (Miss. 1998).
cause bodily injury or property damage . . . [e]ven if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that intended or expected." The insured (Thompson), along with two other persons, went to the residence of one Maury Richardson, planning to set it afire with molotov cocktails. Thompson alleged that he believed the residence to be unoccupied at the time, and that their intent was to destroy Richardson's property, not to cause bodily injury. Unknown to Thompson and his cohorts, Donnell Bowie was sleeping upstairs in Richardson's house when it caught fire. Bowie died of smoke inhalation, and Thompson and his cohorts were arrested and charged with Bowie's murder.

Thompson's parents sought defense under their homeowner's policy against the civil action that followed. Allstate tendered a defense under reservation of rights, and sued for a declaratory judgment that coverage was excluded due to the "intentional acts" exclusion quoted above. The trial court granted summary judgment in favor of Allstate. Bowie's survivors appealed, arguing that the intentional acts exclusion did not apply because Thompson did not intend to cause bodily harm. A divided Mississippi Supreme Court affirmed:

Lewis argues that the policy in this case should be read to exclude coverage for bodily injury resulting from an act or omission intended or expected to cause bodily injury and to exclude coverage for property damage resulting from an act or omission intended or expected to cause property damage. However, according to Lewis, the exclusionary provision does

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331 Lewis, 730 So. 2d at 68 (emphasis omitted).
332 Id. at 67.
333 Id.
334 Id.
335 Id.
336 Id.
337 Id. at 67-68.
338 Id. at 68.
339 Id.
not apply to a claim for bodily injury that results from an act intended or expected to cause only property damage. We disagree with Lewis's construction.

The policy, as written, only requires that the insured intended or expected property damage which resulted in property damage or bodily injury for the exclusionary clause to apply. Normally, Allstate would have to show that Thompson intended the property damage, or expected that property damage was substantially certain as a result of his actions. However, Thompson's admission (and Lewis's assent to that admission) that he intended to, or at least expected that the actions by Green and Wilson would, cause property damage, satisfies Allstate's burden and is sufficient to invoke the exclusion. Because of the language of the policy, Thompson's intent regarding bodily injury is irrelevant. Accordingly, since the question of intent of the insured is settled, summary judgment was proper.\(^\text{340}\)

In *Harrison v. Allstate Insurance Co.*,\(^\text{341}\) the court balanced a facially unambiguous policy provision that precluded

\(^\text{340}\) *Id.* at 68, 72. Justices Banks and Sullivan disagreed:

Here the problem is the disjunctive nature of the exclusionary provision. The explanatory “even if”... in the policy language should have been expanded to say that the exclusion applies even if property damage was intended and bodily injury resulted and vice versa if indeed that was what was meant as Allstate now contends. But because it was not, the policy exclusion could reasonably be interpreted as having more than one meaning.

The Lewis' interpretation is that it applies where property damage is intended even if the property damage is of a different kind or degree or sustained by different property and it applies similarly where bodily injury is intended and the bodily injury is of a different kind or to a different person than intended. It follows, in their view, that it does not apply where, as here, property damage was intended and bodily injury occurred.

The Lewis' interpretation of the exclusionary clause is just as reasonable as that asserted by Allstate. In light of the fact that the policy is subject to more then one interpretation it is ambiguous and should have been construed in favor of the insureds.

\(^\text{341}\) *Id.* at 72-73 (Banks, J., dissenting, joined by Sullivan, P.J.) (footnote omitted).

\(^{662}\) So. 2d 1092 (Miss. 1995).
“stacking” of uninsured motorist coverage against the fact that
the insurer included in the premium for the no-stacking policy
an additional charge for the insured’s second car.\textsuperscript{342} The in-
sured, Dudley Harrison, who was involved in an accident with
an uninsured motorist on May 17, 1991,

was insured under an Allstate automobile policy which in-
sured two vehicles. Prior to amendments, the policy provided
uninsured motorist coverage of $10,000 per person and
$20,000 per accident for each occurrence. Allstate charged a
premium of $22.50 for the first car and each additional car
thereafter. Thus, an insured would be charged $45 for stack-
ing two vehicles. In 1989, Allstate added Endorsement
AU1865-1 to its policies which prohibits stacking. Allstate
also amended its billing structure to charge a single premium
of $52.40 for uninsured motorist coverage under a policy list-
ing two or more vehicles (hereinafter referred to as the multi-
car rate), and charged $28.40 for a policy listing only one
vehicle (hereinafter referred to as the single car rate) . . . . As
the result of Harrison’s accident, Allstate tendered a check for
uninsured motorist benefits to him in the amount of $10,000
and paid $1,000 for applicable medical payments coverage.
Allstate, however, denied Harrison’s claim for an additional
$10,000 in uninsured motorist benefits.\textsuperscript{343}

The Mississippi Supreme Court found Harrison’s argument
“well taken”:

\textit{[A}n insurer’s attempt to preclude stacking is ineffective . . .
where the policy language clearly precludes stacking but the
declaration sheet charges separate uninsured motorist premi-
ums thereby rendering the policy, as a whole, ambiguous.

\textsuperscript{342} \textit{Harrison}, 662 So. 2d at 1093. The court explained:

“Stacking” refers to the practice of allowing an insured to add or “stack”
the limits of each vehicle covered under an insurance policy to pay for
damages sustained in an accident. For example, if the insured obtained
a policy providing $10,000 in uninsured motorist coverage for bodily
injury on two vehicles, the maximum recovery would be $20,000 ($10,000
plus $10,000).

\textit{Id.} at 1093 n.1.

\textsuperscript{343} \textit{Id.} at 1093 (footnote omitted).
Where separate premiums are paid, the presumption arises in favor of aggregation of uninsured motorist coverage, notwithstanding clear and unambiguous language to the contrary.

Although the policy language precluding stacking is clear, we find that Harrison was actually charged separate premiums for his two vehicles under the guise of one lump sum on his declaration sheet. Because the premium for two cars is $24 more than the premium for one car, Allstate clearly charges an additional premium for the second car. 344

If an insurance policy covers only items contained within or located at a particular structure or location, "the temporary removal of property from its usual place of storage for cleaning or repairing will not affect the coverage while the property is thus temporarily away from its designated location." 5

In Keith's Breeder Farms, the policy covered the contents of "Poultry House No. 1." 346 At the time of the loss, the nests and other items that normally resided in Poultry House No. 1 had been temporarily removed in order to clean the building. 347 The court found that, given the "long-standing" custom of the poultry business to periodically remove the nests and thoroughly clean the buildings that ordinarily house them,

[i]t would be a strained and tortuous construction indeed if for two or three weeks of each year while the nests were outside purely and simply for cleaning, scrubbing and disinfecting [the building] there would be no coverage, but that immediately when this necessary periodical cleaning was completed and the nests were moved back inside the poultry house, that the coverage would be automatically reinstated. In our

344 Id. at 1094 (citations omitted); see Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977); see also Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984) (finding policy ambiguous both because of excess premium charged for additional vehicles and because "no-stacking" language in policy conflicted with declaration sheet providing separate UM coverage for three vehicles and charging separate premiums for three vehicles).


346 Keith's Breeder Farms, 227 So. 2d at 294.

347 Id.
opinion, neither the insurer nor the insured intended for this to be the case.\textsuperscript{348}

As the court explained elsewhere:

\textit{[T]he statement that property is in, or contained in, a particular house, is not a promissory stipulation or warranty that the property will remain there at all times during the life of the policy, but is used merely to identify the particular property insured.\textsuperscript{349}}

If the provisions of an insurance policy conflict with a relevant statute, the statute controls and its terms are incorporated into the policy.\textsuperscript{350}

In \textit{Atlanta Casualty Co. v. Payne,\textsuperscript{351}} the court considered the effect of the Mississippi Uninsured Motorists Act\textsuperscript{352} on the uninsured motorist coverage in the insured's policy:

Although the Paynes do not contend that the language of the exclusionary provision was ambiguous, the record indicates that they did not have a sufficient understanding of the ramifications of its language to make an informed partial rejection or waiver of uninsured motorist coverage when they signed the exclusion agreement. We believe that it is . . . logical . . . to place the burden of proof on the insurer to show that such an exclusion or any other quasi-rejection of uninsured motorist insurance was a knowing and informed decision.

This Court has consistently viewed any attempts by insurance companies to contract away the protections afforded

\textsuperscript{348} Keith's Breeder Farms, 227 So. 2d at 295; see also Boyd v. Mississippi Home Ins. Co., 21 So. 708, 708-09 (Miss. 1897) (refusing to construe casualty policy as covering only ginned cotton after it had been removed from ginning house and stored in cotton house when cotton in question was destroyed while in ginning house and ready to be moved to cotton house, because such construction would be "technical, to the last degree" and contrary to common knowledge and custom or persons dealing with cotton farming and ginning trades).

\textsuperscript{350} Boyd, 21 So. at 709.


\textsuperscript{352} MISS. CODE ANN. § 83-11-101(1) et seq. (Supp. 1998).
to injured insureds by the Uninsured Motorists Act as invalid. The humanitarian purposes of the statute have been furthered by decisions made from the perspective of the injured insured, enabling the same recovery which would have been possible had the injury been caused by a financially responsible motorist.\footnote{533}

All that said, insurance policies are contracts,\footnote{534} and their construction and interpretation "is according to the same rules which govern other contracts."\footnote{535} Therefore, when the words...

\footnote{533} Payne, 603 So. 2d at 348-49 (citations and parenthetical omitted).


\footnote{535} Krebs v. Strange, 419 So. 2d 178, 181 (Miss. 1982); see, e.g., J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998) ("Initially, in interpreting an insurance policy, this Court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result."). See generally Murriel v. Alfa Ins. Co., 697 So. 2d 370, 371 (Miss. 1997) ("[T]he relationship between an insurance company and its insured is controlled by the nature of the contract, and the respective duties of the parties are specifically stated by the provisions of the insurance policy.").

As the Mississippi Supreme Court posited long ago:

What is a policy of insurance? It is the instrument setting forth the contract of insurance. It is the evidence of the agreement between the insurer and the insured. Its purpose is to show the considerations, the terms, the contract of indemnity, the privileges, the benefits, and the conditions. The usual rules for construing contracts should be applied in considering contracts of insurance. The controlling purpose in the construction of all contracts should be to find the intention of the parties. To this end it is necessary to inspect the whole instrument. It will not do to limit the consideration to one part of a writing, isolated from the other parts. The true intention can only be gathered from all of the words, all of the clauses, and all that may be shown by the entire paper.


At issue in the recent case of \textit{Hare v. State}, was whether the clear and unambiguous terms of an insurance policy could "trump" the equitable right of subrogation. \textit{Hare v. State}, 733 So. 2d 277, 282 (Miss. 1999). Reviewing cases from a number of jurisdictions, as well as earlier related decisions of its own, the Mississippi Supreme Court answered "no," thus carving out an exception to "plain meaning" construction of unambiguous insurance policies:

\textbf{(U)nder Mississippi law two different types of subrogation exist: (1) equitable subrogation, arising from operation of law, and}
conventional subrogation, arising from contract. Union Mortgage, Banking & Trust Co. v. Peters, 18 So. 497 (Miss. 1895); St. Paul Prop. & Liability Ins. Co. v. Nance, 577 So. 2d 1238, 1240 (Miss. 1991). In Peters, this court distinguished between the two as follows:

The principle of equitable subrogation does not arise from contract (for that is conventional subrogation), but is a creation of the court of equity, and is applied in the absence of an agreement between the parties, when otherwise there would be a manifest failure of justice.

Peters, 18 So. at 500. Similarly, the Nance court noted that subrogation had equitable origins but that it could now arise in statutory or contractual contexts. Nance, 577 So. 2d at 1240.

The State asserts that the case sub judice is obviously one of conventional subrogation, and the bottomline issue is then whether the subrogation clause is sufficiently clear and broad to entitle the insurer to recover despite the “made whole” rule.

Hare, 733 So. 2d at 281-82. The “made whole” rule is the general principle that an insurer is not entitled to equitable subrogation until the insured has been fully compensated. Most other jurisdictions follow the “made whole” rule in its broadest terms. Some courts adopting the rule have explained that the rule is most consistent with principles of equity and justice upon which the doctrine of subrogation is based. One court has reasoned that “where either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.”

Id. at 281 (citations and parentheticals omitted) (quoting Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512, 514 (Wis. 1977)). Furthermore,

[m]any of those jurisdictions following the “made whole” rule allow the rule to be overridden by provisions in an insurance contract, as the State asks this Court to do in the case sub judice.

The core issue is then whether Mississippi should follow the Arkansas approach . . . or the Ohio approach . . . . In Hrenko, the Supreme Court of Ohio held that the subrogation clause at issue was of the conventional sort, and thus, by its clear language, it applied . . . .

In Franklin, the Supreme Court of Arkansas . . . . held that “the equitable nature of subrogation requires that no distinction need be made between equitable and conventional rights of subrogation.”

Franklin incurred over $124,000 in medical expenses, and Healthsource paid only $71,120.65 of those bills. Before the issue of double recovery could arise, Franklin would have to recover in excess of $50,000 to be “made whole” for his medical expenses alone which does not even consider the amount of additional damages Franklin incurred that have been valued at over $400,000. Therefore, the Arkansas Supreme Court found that Franklin could not have enjoyed a double recovery.
of an insurance policy are "plain and unambiguous," a Mississippi court should "afford them their plain, ordinary meaning and... apply them as written," as long as doing so is not contrary to law or public policy.

Here both parties cannot be "made whole." Hare endured pain and suffering in nasal surgery and now has a permanent facial scar. The State... only paid $6,056.50 in medical expenses out of a total $8,667.50. Hare's expert witnesses by affidavit stated a potential recovery of between $50,000.00 and $175,000.00. Thus, the $10,000.00 recovered by Hare cannot possibly be said to have "made him whole" or to have been a double recovery.

This Court adopts the "made whole" rule and holds that it is not to be overridden by contract language, because the intent of subrogation is to prevent a double recovery by the insured, especially here as expressly stated in the State Health Plan. Until the insured has been fully compensated, there cannot be a double recovery. Otherwise, to allow the literal language of an insurance contract to destroy an insured's equitable right to subrogation ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements.

Id. at 282-84 (citations omitted) (discussing, inter alia, Blue Cross & Blue Shield Mut. of Ohio v. Hrenko, 647 N.E.2d 1358 (Ohio 1995); Franklin v. Healthsource of Ark., 942 S.W.2d 837 (Ark. 1997)).

Lewis v. Allstate Ins. Co., 730 So. 2d 65, 68 (Miss. 1998); accord Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss. 1999) (en banc). See Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 82 (Miss. 1991); Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 575 (Miss. 1985); Paul Revere Life Ins. Co. v. Prince, 375 So. 2d 417, 418 (Miss. 1979); Insurance Co. of N. Am. v. Deposit Guar. Nat'l Bank, 258 So. 2d 798, 801 (Miss. 1972). As the Mississippi Supreme Court has explained:

Rules of construction are useful only where the language used is ambiguous or unclear. No rule of construction requires or permits the Court... to enlarge an insurance company's obligations where the provisions of its policy are clear.

State Auto. Mut. Ins. Co. v. Glover, 176 So. 2d 256, 258 (Miss. 1965). But see Boyd v. Mississippi Home Ins. Co., 21 So. 708, 708-09 (Miss. 1897) ("[Insurance] policies must always be construed with reference to the nature and kind of property insured, the uses to which it is ordinarily, within the common knowledge of men, put, and custom of the country in dealing with it, and the parties to such contracts must be held to have all this in view in making the contract.").

The Mississippi Supreme Court has recognized an exception to the "plain meaning" rule when the plain meaning of the policy is contrary to law or public policy. See supra note 116; see, e.g., Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 662-65 (Miss. 1994) (holding that "reduction clause" for workers' com-
Any rider attached to an insurance policy is "part and parcel" of the policy and the two must be construed together. Likewise, the application attached to or giving rise to an insurance policy is a part of the insurance contract, and the policy should be construed together with the application. Where the terms of the application and policy conflict, the terms of the policy will ordinarily govern, unless the conflict is due to a clerical error in the policy, mutual mistake, fraud, or the like.

5. Settlement Agreements

Mississippi law "favors" agreements made to settle disputes and, generally speaking, Mississippi courts will enforce a settlement agreement between the parties "absent any fraud, mistake, or overreaching." An enforceable settlement agreement is a contract between the settling parties, and will be construed and interpreted accordingly.

Pension benefits, while not ambiguous, was unenforceable as "contrary to public policy").

Germania Life Ins. Co. v. Bouldin, 56 So. 609, 614 (Miss. 1911).


See id. at 37.

See id. at 37.

McManus v. Howard, 569 So. 2d 1213, 1215 (Miss. 1990); see, e.g., Hines v. Hambrick, 49 So. 2d 690, 693-95 (Miss. 1951); see also McBride v. Chevron U.S.A., 673 So. 2d 372, 379 (Miss. 1996) ("Our law favors settlement for many reasons, not the least of which includes the expeditious closure of cases.").

The Mississippi Supreme Court:

[we are] thoroughly committed to the doctrine that, where money is paid with a recital that it is in full settlement of all demands, or of all accounts, or similar wording, when it is accepted, it is full settlement therefor, although there might be, in fact, more due than the recital in the check or warrant showed.

State Hwy. Dep't v. Duckworth, 172 So. 148, 150 (Miss. 1937); see, e.g., Colonial Life & Accident Ins. Co. v. Cook, 374 So. 2d 1288, 1290 (Miss. 1979); Blue Ribbon Creamery v. Monk, 147 So. 329, 330 (Miss. 1933); A. Greener & Sons v. P.W. Cain & Sons, 101 So. 859, 859-60 (Miss. 1924).

For example, *Warwick v. Gautier Utility District*\(^\text{363}\) considered whether a release and settlement agreement resolving a chancery court proceeding brought by Warwick alleging an unlawful taking of some of his property also, contrary to Warwick's intention and understanding, settled his otherwise unrelated claim pending in circuit court for breach of contract.\(^\text{364}\) The court held that it did not:

Warwick argues that the Release and Settlement Agreement refers only to the claims and issues connected with the specific cause of action in Jackson County Chancery Court which involved the taking of certain property of Warwick's in which he held a reversionary interest and not to all causes of action that may exist between the parties. Specifically, Warwick argues that the chancery court cause of action did not concern or decide any claim or issue related directly or indirectly to the 1970 Agreement which Warwick sought to have enforced in the circuit court matter. Thus, he argues that Gautier Utility District is not released from liability under the terms of the 1970 Agreement. We agree.

The Release and Settlement Agreement specifically states as follows:

That Charles E. Warwick, being an adult resident citizen above the age of twenty-one (21), for the consideration of Ninety Thousand and No/100 Dollars ($90,000.00), to him in hand paid, including cash and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, does hereby release and forever discharge Gautier Utility District and United States Fidelity and Guaranty Company, their agents, servants, employees, successors, assigns, executors, administrators, and all other persons, firms and/or corporations, except as specified herein, of and from any and all claims of any kind or nature growing out of or in any way connected with the taking of the undersigned's property which is in dispute in the lawsuit known as Charles E. Warwick v. Gautier Utility District

\(^{363}\) 738 So. 2d 212 (Miss. 1999).

\(^{364}\) *Warwick*, 738 So. 2d at 213.
filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113.

The Release and Settlement Agreement clearly did not apply to the action for breach of contract pending in circuit court. Although the agreement does state that it releases Gautier Utility District "from any and all claims of any kind or nature growing out of or in any way connected with the taking of the undersigned's property which is in dispute in the lawsuit known as Charles E. Warwick v. Gautier Utility District filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113," a fair and complete reading of the agreement reveals that the intent of the parties was to extinguish all claims regarding the taking of the real property only. The release of "any and all claims" clearly refers to claims arising from the taking of the property. Irrespective of the taking, the separate claim for breach of contract still stands. Both parties to the chancery court lawsuit were aware of the lawsuit pending in circuit court, yet in the agreement they limited the release and settlement agreement to the "lawsuit known as Charles E. Warwick v. Gautier Utility District filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113." While the agreement specifically addressed the claim involving the taking of property, the breach of contract claim pertaining to the dispute over utility charges was never mentioned in the Release and Settlement Agreement. It is clear through examination of the words incorporated in the Release and Settlement Agreement that the parties did not intend a release or settlement of the breach of contract claim pending in Circuit Court.365

6. Releases

Mississippi courts subject releases to "rigid scrutiny" and will not enforce a release unless it is "fairly and honestly negotiated and understandingly entered into."366 Mississippi courts will not uphold a release "if any element of fraud, deceit,

365 Id. at 215-16.
366 Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992) (quotation omitted); accord Quinn v. Mississippi State Univ., 720 So. 2d 843, 851 (Miss. 1998).
oppression, or unconscionable advantage is connected with the transaction.\textsuperscript{367} Nor should a Mississippi court construe a release to extend to anyone not a party to the release\textsuperscript{368} or to any claim not mentioned therein,\textsuperscript{369} absent some manifestation of the releasing party’s intent that its release be so construed.

In Country Club of Jackson, Mississippi, Inc. v. Saucier,\textsuperscript{370} the plaintiff, Saucier, was injured while riding in a vehicle driven by Stevens, who was killed in the accident. Saucier made a claim against Stevens’ estate and his insurer, who paid Saucier $30,000, “[b]y way of settlement and release, dated March 14, 1984.”\textsuperscript{371} Saucier then sued the Country Club, alleging “dram shop” liability. The Country Club argued that Saucier’s March 14, 1984 release extinguished any claim she might have against the Country Club.\textsuperscript{372} The chancery court disagreed, and the supreme court affirmed:

The appellant Country Club contends that it is a third party beneficiary of the release between the guest passenger

\textsuperscript{367} Kansas City, Memphis & Birmingham Ry. v. Chiles, 38 So. 498, 499 (Miss. 1905).

\textsuperscript{368} See Weldon v. Lehmann, 84 So. 2d 796, 797 (Miss. 1956) (“In order for a release of one joint tort-feasor to have the effect of releasing the other joint tort-feasor, the satisfaction received by the injured party must be intended to be and must be accepted as full compensation for the damages sustained.”); accord Holland v. Mayfield, No. 96-CA-01169-SCT, 1999 WL 353023, at *4 (Miss. June 3, 1999); Smith v. Falke, 474 So. 2d 1044, 1045 (Miss. 1985); see also Country Club of Jackson, Miss., Inc. v. Saucier, 498 So. 2d 337, 339-40 (Miss. 1986) (“[A]n injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given only where the intent to release the others is manifest.”).

"Extrinsic evidence must be considered in determining whether a settlement agreement was intended to release a person who was not a party to the agreement." Holland, 1999 WL 353023, at *4; see, e.g., Falke, 474 So. 2d at 1046.

\textsuperscript{369} See, e.g., Smith v. First Federal Sav. & Loan Ass’n of Grenada, 460 So. 2d 786, 787 (Miss. 1984) (holding that “where there is no language in the release agreement which could fairly be construed to render it a general release, the unmentioned personal secured transactions remained viable after execution of the release and may be enforced by the secured according to their tenor”).

\textsuperscript{370} 498 So. 2d 337 (Miss. 1996).

\textsuperscript{371} Saucier, 498 So. 2d at 338.

\textsuperscript{372} Id.
and the driver’s estate and is a member of a specified class discharged under the general release language: “All other persons, firms, organizations, or corporations . . .”

Recently in *Smith v. Falke*, 474 So. 2d 1044 (Miss. 1985) this Court . . . held that the language of the release discharging a codefendant and “all others whatsoever” could not be construed to release another codefendant absent a manifest intent to do so.

* * *

. . . In this case the Court in a finding of fact determined that the parties did not intend that The Country Club benefit from the release. It is also clear that appellant was a stranger to the release contract and paid no consideration for it, nor was consideration paid for its benefit. . . .

[A]n injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given only where the intent to release the others is manifest. No such intent appears here.373

In passing on the validity of a release, “all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown.” In *Kansas City, Memphis & Birmingham Railway Co. v. Chiles*, the court pulled no punches regarding the significance of the evidence regarding surrounding circumstances or the validity of the subject release:

The bare statement of the circumstances attendant upon the procuring of the release in the instant case is more than sufficient to demonstrate that there was an utter absence of that good faith and full understanding of legal rights which are indispensable to the validity of such releases. . . . [T]he action of the court in admitting the correspondence which had passed between counsel for appellee and the officials of appellant was clearly correct. This proof made clearly visible the secret springs moving the officials of the claims department,

373 *Id.* at 338-40 (citations omitted).
375 38 So. 498 (Miss. 1905).
and tended to throw light upon some of the details of the iniquitous scheme by which an ignorant, suffering, and impecunious man, by proffer of financial relief from present distress, joined with vague and misleading suggestions of future benefits and favors, was tricked into bartering away substantial rights for a grossly inadequate consideration, by signing papers the contents of which, according to his testimony, which is strongly corroborated by the circumstances in evidence, were deliberately and designedly misrepresented.\textsuperscript{376}

Mississippi courts should not permit a party to use an "anticipatory release" as a means to escape liability for its own tortious acts\textsuperscript{377}—particularly when those acts clearly "exceed the scope of the [activities] contemplated in the release."\textsuperscript{378}

7. Arbitration Agreements

Mississippi courts should construe arbitration agreements liberally "so as to encourage the settlement of disputes and the prevention of litigation," and should indulge "every reasonable presumption . . . in favor of the validity of arbitration proceedings."\textsuperscript{379}

In \textit{IP Timberlands Operating Co., Ltd. v. Denmiss Corp.}, 726 So. 2d 96, 103, 106 (Miss. 1998) (holding that release in right-of-way deed did not extend to excuse "wilful or grossly negligent damage to the surface of and timber on grantors' adjacent property" caused by installation of culvert by subcontractor of grantee); Yazoo & Miss. Valley R.R. v. Smith, 43 So. 611, 611-12 (Miss. 1907) (refusing to construe release from liability for damage arising out of construction and operation of railroad tracks to cover flooding due to necessity of elevating grade on streets at some future date to facilitate pedestrian and vehicular traffic crossing railroad tracks).

\textsuperscript{376} Chiles, 38 So. at 499. In \textit{Farragut}, the court likewise found that the combination of ambiguous language and surrounding circumstances contraindicated the trial court's summary judgment for the drafter of the release, Massey, and his co-party, Barnett. \textit{Farragut}, 612 So. 2d at 330.

\textsuperscript{377} \textit{Farragut}, 612 So. 2d at 330; see, e.g., \textit{L & A Contracting Co. v. Hube}, 133 So. 2d 394, 395-96 (Miss. 1961) (holding that release in right-of-way deed did not extend to excuse "wilful or grossly negligent damage to the surface of and timber on grantors' adjacent property" caused by installation of culvert by subcontractor of grantee); Yazoo & Miss. Valley R.R. v. Smith, 43 So. 611, 611-12 (Miss. 1907) (refusing to construe release from liability for damage arising out of construction and operation of railroad tracks to cover flooding due to necessity of elevating grade on streets at some future date to facilitate pedestrian and vehicular traffic crossing railroad tracks).

\textsuperscript{378} \textit{Hutto v. Jordan}, 36 So. 2d 809, 812 (Miss. 1948); \textit{accord IP Timberlands Operating Co. v. Denmiss Corp.}, 726 So. 2d 96, 103, 106 (Miss. 1998); \textit{Herrin v. Milton M. Stewart, Inc.}, 558 So. 2d 863, 864-65 (Miss. 1990); \textit{Craig v. Barber}, 524 So. 2d 974, 977 (Miss. 1988).
Corp., the Mississippi Supreme Court resolved two conflicting lines of authority, by holding that it "will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution."

726 So. 2d 96 (Miss. 1998).

IP Timberlands Operating Co., 726 So. 2d at 104. IP Timberlands involved an apparently frequent area of uncertainty in arbitration agreements—to wit, does "arbitration" mean arbitration, or does it mean appraisal? Id. at 98. The trial court found that, as a matter of law, "arbitration" did mean appraisal. Id. The Mississippi Supreme Court disagreed:

The purchase option expressly stated that the price was to be fixed by three arbitrators, not appraisal. Denmiss contends that the term "arbitrators" unambiguously contemplated appraisal, however, the purchase option is not necessarily ambiguous. Although, the analysis for an ordinary contract may end at the plain wording expressed, this Court has discussed the difficulty in determining if the parties' agreement actually contemplated arbitration instead of appraisal.

In what may be the best single source to derive intent, the 1945 agreement provided for the use of arbitrators in one other instance. Under the lease agreement, Kraft paid $1,000,000 on the day of the agreement and was obligated to make another payment to complete the transaction. Kraft had the option of paying a flat $1,250,000 to make complete consideration, or Kraft could elect to pay an amount that was to be based upon the amount of timber on the leased lands. To arrive at the total under the second option, the parties stipulated in the agreement to a set price for different types of lumber (for example, Kraft would pay $1.50 per one thousand feet of pine pulpwood, $7 per one thousand feet of hardwood sawtimber, etc.) that would be multiplied by the amount of timber estimated by a timber cruise. The agreement provided that the firm of Pomeroy & McGowin Estimators were to make an estimate of the timber upon the lands. However, if Pomeroy could not perform the estimate, then the parties were to each choose one arbitrator, and the two arbitrators were to agree on the third arbitrator. If the two arbitrators could not agree upon the third arbitrator, then the parties were to ask a U.S. District Court Judge of Mississippi to choose the third arbitrator. These three arbitrators were to select another firm of estimators.

Under this provision of the agreement, the use of the term "arbitrators" cannot be reconciled with the use of "appraisers." Although, arbitrators often are not limited to such a narrow decision as choosing another firm of timber estimators, the selection of an impartial and fair firm of estimators would be important to both Denkmann and Kraft. Thus, use of the term arbitrators in this provision more closely reflects that the parties did, in fact, contemplate arbitrators. These parties would not have chosen appraisers to choose an estimator. Denmiss admits that
8. Choice of Law Agreements

Mississippi courts

will give effect to an express agreement that the laws of a specified jurisdiction shall govern, particularly where some material element of the contract has a real relation to, or connection with, such jurisdiction. The intention of the parties as to the law governing the validity, construction and effect of a property settlement or separation agreement will be respected in the absence of anything violating the public policy of the forum jurisdiction.\textsuperscript{382}

By so doing, "the law by which a contract is to be governed is that which parties intended or may fairly be presumed to have intended."\textsuperscript{383} However, while Mississippi courts will defer to the substantive law of another jurisdiction chosen by the parties, Mississippi procedural and remedial law will still govern the enforcement of the contract.\textsuperscript{384}

\textsuperscript{382} Id. at 104-06 (quoting Hutto, 36 So. 2d at 812) (citations omitted).
\textsuperscript{383} Miller v. Fannin, 481 So. 2d 261, 262 (Miss. 1985); accord Cox v. Howard, Weil, Laboussie, Friedrichs, Inc., 619 So. 2d 908, 911 (Miss. 1993); see, e.g., Crowe v. Smith, 603 So. 2d 301, 307-08 (Miss. 1992).
\textsuperscript{384} Cox, 619 So. 2d at 911.

Mississippi courts will enforce a liquidated damages provision if the contractual damages are "reasonable and proper in the light of the circumstances of the case." On the other hand, Mississippi courts will not enforce contractual damages if the amount provided is "not a reasonable pre-estimate of damages" or "constitute[s] a penalty."

To determine whether a particular provision is a permissible liquidated damages clause or an impermissible penalty, the terminology used by the parties is not controlling. Rather, Mississippi courts "must look to the parties' intentions," and must consider the difficulty in determining the actual damages that might result from a breach. Where damages for breach are both "uncertain and difficult of estimation," the Mississippi Supreme Court seems more inclined to construe such clauses as permissible liquidated damages provisions.

In *Board of Trustees v. Johnson,* for example, the Board entered into a contract with Johnson, agreeing to lend him $24,000 for expenses . . . . The contract required Johnson to practice [family practice, internal medicine, or pediatrics] for

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385 Maxey v. Glindmeyer, 379 So. 2d 297, 301 (Miss. 1980); accord Board of Trustees of State Insts. of Higher Learning v. Johnson, 507 So. 2d 887, 889-90 (Miss. 1987).

386 *Johnson,* 507 So. 2d at 890; see Wood Naval Stores Export Ass'n v. Latimer, 71 So. 2d 425, 430 (Miss. 1954); Chicago Inv. Co. of Miss. v. Hardtner, 148 So. 214, 217 (Miss. 1933); Shields v. Early, 95 So. 839, 841 (Miss. 1923); see, e.g., Maxey, 379 So. 2d at 301 (finding that forfeiture of $75,000 deposit was inequitable because property survey determined that there was less acreage than represented, and that proper remedy was, at most, judgment for vendor's actual damages).

387 See Latimer, 71 So. 2d at 430; Shields, 95 So. at 841.

388 *Johnson,* 507 So. 2d at 890; see Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co., 142 So. 2d 200, 209 (Miss. 1962); Jones v. Mississippi Farms Co., 76 So. 880, 884 (Miss. 1917).

389 See *Johnson,* 507 So. 2d at 890; Brown v. Staple Cotton Coop. Ass'n, 96 So. 849, 856-57 (Miss. 1923).

390 *Johnson,* 507 So. 2d at 890. See, e.g., Latimer, 71 So. 2d at 431; *Brown,* 96 So. at 856.

391 507 So. 2d 887 (Miss. 1987).
five years in a community of 7,500 population, since changed to 10,000 population, or less. It also provided that Johnson was to repay the loan at six percent interest, and upon breach of its terms, to pay an additional $5,000 "per year for each year remaining to be served" for liquidated damages.392

Johnson breached, and the Board sued, seeking $24,000 in unpaid principal, $25,000 in liquidated damages, and $9,187.50 in interest, for a total of $58,187.50. Johnson sought, and was granted, summary judgment.393 The Board appealed, and Johnson argued, *inter alia*, that the "liquidated damages" provision in the contract was, in fact, an impermissible penalty. The supreme court disagreed:

[T]he loss arising from Johnson's refusal to engage in family practice, internal medicine, or pediatrics, is difficult to assess; consequently, the parties rightly agreed to include a liquidated damages provision in their contract. Moreover, such damages are reasonable, since their amount varies with the time remaining under the contract, thereby more accurately reflecting the Board's losses. Indeed, since Johnson agreed not only to repay the loan but also to practice one of the listed specialties, the mere return of principal with interest does not offer the State complete restitution for the loss of his services.394

10. Grants of Real Property or Other Property Rights

a. Deeds and Related Documents

As a general rule, "where parcels of real estate are conveyed by well-known designations, such conveyances are valid, though resort to extrinsic evidence may be necessary to show what was accurately included in the general description employed in the conveyance."395

392 *Johnson*, 507 So. 2d at 888.
393 *Id.*
394 *Id.* at 890.
395 *Kyle v. Rhodes*, 15 So. 40, 40 (Miss. 1894); *accord* *Jones v. Hickson*, 37 So. 2d 625, 627-28 (Miss. 1948).
In *Raines v. Baird*, Baird agreed to sell Raines "that tract of land adjoining section Nine, and known as the Phil Allen place, containing eighty acres more or less" for $800.00, to be paid over five years and secured by a deed of trust against the property until fully paid. Baird "alleged that the contract was void because of a patent ambiguity in the description of the property sold." But, on cross-examination, Baird accurately described the land in question:

The place was called the Phil Allen place because occupied by a [person] named Phil Allen. A proper description of the land is as follows: It is in the N. E. 1/4 of section seventeen, township seventeen, range four west, and is that part of the N. E. 1/4 which is east of a cypress brake dividing the quarter, and most of the land is in the N. 1/2 of said quarter; being all the N. E. 1/4 east of the brake.

Applying the rule of *Kyle v. Rhodes* that, where the writing "describes the premises by reference to extraneous facts, . . . it is proper to resort to extrinsic evidence to ascertain those facts, in order to show what was embraced in the general designations of the land which was employed by the grantor," the *Raines* court concluded that "resort to the extrinsic

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396 37 So. 458 (Miss. 1904).
397 *Raines*, 37 So. at 458.
398 *Id.*
399 *Id.*
400 15 So. 40 (Miss. 1894).
401 *Kyle*, 15 So. at 40; accord *Jones v. Hickson*, 37 So. 2d 625, 628 (Miss. 1948); see also *Tucker v. Field*, 51 Miss. 191, 194 (1875) ("If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony. Where subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium, to ascertain the subject of devise." (citation omitted)). *See generally Holliman v. Charles L. Cherry & Assocs., Inc.*, 569 So. 2d 1139, 1144 (Miss. 1990) ("[W]here, as here, land is described by township, range and section, so that it may be located with absolute certainty, it is of no importance whatsoever to the validity of the conveyance that the lands or a portion thereof are recited as lying in an incorrect county."); *Cole v. Cole*, 54 So. 953, 954 (Miss. 1911) ("[I]f the description contained in the writing points to specific property, parol evidence is admissible to identify it, because that is certain which is capable of being made
evidence referred to in the contract determined with definiteness and certainty the premises intended to be conveyed”, and, therefore, that “[t]here is no patent ambiguity on the face of the contract of sale sued on herein.”

Ordinarily Mississippi courts construe deeds of conveyance most strongly against the grantor. However, if the grantee prepared the documents of conveyance, the presumption against the grantor may be relaxed, and the deed construed according to rules of construction and interpretation applying to contracts in general.

For example, in *Baker v. Columbia Gulf Transmission Co.*, the Bakers, “Grantors,” sued Columbia Gulf, “Grantee,” for damage to their property resulting from Columbia Gulf’s construction of a natural gas pipeline across their property. The court’s attention focused on the following provisions in the parties’ right-of-way agreement:

2. By the terms of this agreement, Grantee has the right to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace at any time or from time to time one or more additional lines of pipe and appurtenances thereto, said additional lines not to necessarily parallel any existing line laid under the terms of this agreement. Provided however, that for each additional line laid after the first line is laid hereunder, Grantee shall pay Grantor, his heirs or assigns, One Dollar ($1.00) per lineal rod of additional pipe line laid under, upon, over or through said hereinabove de-
scribed property.

4. Grantee hereby agrees to bury the pipe line to a sufficient depth so as not to interfere with cultivation of the soil and agrees to pay for any damage to growing crops and fences which may arise from the construction, maintenance and operation of said lines. Said damage, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons. . . . The written award of such three persons shall be final and conclusive.

6. It is understood and agreed that the sum of 407 Dollars per rod as damages in full will be paid to the Grantors herein by the Grantee herein before the said pipe line is laid and the Grantors herein hereby agree that said sum of 407 Dollars per rod will be accepted by said Grantors as full and complete settlement for any and all damages (real or alleged) occasioned by the construction of said pipe line on and across the above described land.

Columbia Gulf argued that the right-of-way agreement between itself and the Bakers limited the Bakers' damages to $1 per lineal rod foot, as provided for in paragraph two of the agreement.408 The Bakers argued that paragraph six, not paragraph two, controlled.409 Implicitly applying the rules that the contract must be read as a whole,410 and that every word or provision should be given meaning and effect,411 the Mississippi Supreme Court reversed the circuit court's judgment in favor of Columbia Gulf:

Paragraph 2 gives Columbia the right to maintain, repair and change the size of pipes and to lay one or more additional lines upon payment of $1.00 per lineal rod of additional pipe laid. Nothing has been said thus far concerning damages occasioned by construction, maintenance or operation. . . . In

407 Baker, 218 So. 2d at 39.
408 Id. at 40-41.
409 Id.
410 See supra subpart II.C.2.
411 See supra subpart II.C.3.
paragraph 4 . . . the grantee agrees (1) to bury the pipe lines a sufficient depth so as not to interfere with cultivation of the soil and (2) to pay for any damages to growing crops and fences which may arise from the construction, maintenance or operation of the lines. . . . While construction is mentioned, it is our opinion the parties intended for the provisions regarding damages in paragraph 4 to apply primarily to damages arising from maintenance and operation after construction. Paragraph 6 is by its terms concerned with “all damages” occasioned, not by maintenance or operation, but solely from “construction.” . . . The presence of this paragraph shows that the parties intended that the grantor would be paid for “all damages” occasioned by the “construction.” This is a different category from the damages to growing crops and fences arising from maintenance and operation as provided in paragraph 4. The “all damages” occasioned by “construction” could not apply to damages to growing crops and fences arising out of “maintenance and operation” although “all damages” referred to in paragraph 6 could include damages to growing crops and fences occasioned by “construction.” The right to construct additional pipe lines extends to the indefinite future and damages occasioned thereby would probably extend beyond growing crops and fences. In our opinion this accounts for the attempt to provide for an agreement concerning “all damages” from construction. Otherwise there would have been no reason to add paragraph 6.

. . . Paragraph 6, when considered with the other provisions of the agreement, expresses an intention that grantor would be paid for all damages occasioned by construction and that the parties did not agree on the amount. . . .

A deed and mortgage executed contemporaneously between or among the same parties should be construed together, as should a deed and a “contemporaneous and kindred” instrument creating a trust, and a deed and a plat which includes the property granted.

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412 Baker, 218 So. 2d at 42.
413 See Clark v. Carter, 351 So. 2d 1333, 1335 (Miss. 1977).
414 See Doe v. Bernard, 15 Miss. 319, 323 (1846).
415 See Duane v. Saltafornaggio, 455 So. 2d 753, 757 (Miss. 1984) (“The
Mississippi courts presume that a deed conveys possession to the grantee. Nonetheless, "a deed absolute on its face may be found valid and effectual as a mortgage, if it were intended by the parties "to operate as a security for the repayment of money." In determining whether a transaction was intended as a mortgage, rather than a deed, "there is no conclusive test"; rather, "each case must be decided upon its own facts and all the surrounding circumstances." The party seeking to prove that a purported deed was merely a mortgage bears the burden of proof by clear and convincing evidence.

This burden may be met by proving, inter alia, that the grantor has "retained and exercised after the transaction the same control over the land as he did before the transaction took place.

For example, in Sweet v. Luster, the decedent (Sweet) borrowed $1,100 from his uncle (Luster), in exchange for which Sweet conveyed to Luster Sweet's one-fourth undivided interest in 289 acres of real property. Upon Sweet's death, his heirs

416 See Sweet v. Luster, 513 So. 2d 1240, 1241 (Miss. 1987); Bethea v. Mullins, 85 So. 2d 452, 456 (Miss. 1956).
417 Harris v. Kemp, 451 So. 2d 1362, 1364 (Miss. 1984) (quoting Vasser v. Vasser, 23 Miss. 378, 380 (1852)).
418 Harris, 451 So. 2d at 1365; see Lampley v. Pertuit, 199 So. 2d 452, 455 (Miss. 1967); Emmons v. Emmons, 64 So. 2d 753, 755 (Miss. 1953).
419 See Sweet, 513 So. 2d at 1241; Harris, 451 So. 2d at 1364-65; Delancey v. Davis, 91 So. 2d 286, 288 (Miss. 1956); Bethea, 85 So. 2d at 456; see also Conner v. Conner, 119 So. 2d 240, 256 (Miss. 1960); Jordan v. Jordan, 111 So. 102, 103-04 (Miss. 1927).
420 Emmons, 64 So. 2d at 755; accord Sweet, 513 So. 2d at 1241-42; see also Bethea, 85 So. 2d at 457.
421 513 So. 2d 1240 (1987).
attempted to have the deed set aside, arguing that it was merely a mortgage to secure the loan.\(^{422}\) The Mississippi Supreme Court held that the chancellor erred in finding that the deed was a conveyance, rather than a mortgage, because "there was uncontradicted evidence that Sweet had retained and exercised the same control over the land both before and after the deed's execution."\(^{423}\) The court also noted that

Luster stated not only to his loan officer and son, but also at trial that the deed was a debt-securing mortgage . . . . Moreover, Luster's comment, "Dennis, you don't owe the bank, you just owe me," is wholly at odds with his present claim that title vested in him no later than when Sweet failed to pay the loan's principal in February, 1978.

Equally significant, the deed at issue stands as one of several transactions, where individuals secured loans after they had executed deeds to Luster. Upon repayment, Luster would reconvey the property. In this instance, Luster endorsed a note for $1,100.00, receiving in return a deed to property valued at as much as $24,500.00.

Finally, there was testimony that Sweet had continued to express an ownership interest until the time of his death, speaking to his children about the land and timber.\(^{424}\)

The Mississippi Supreme Court has also considered the relation of the parties, the financial condition of the grantor, possession by the grantor, the value of the property, the conduct of the parties, the payment of taxes, and the subsequent dealings of the parties, as pertinent to deciding whether a particular grant was a deed or a mortgage.\(^{425}\)

Thus, for example, in *Harris v. Kemp*,\(^{426}\) the court found that a purported deed was, in fact, a mortgage, based on the circumstances surrounding the transaction:

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\(^{422}\) *Sweet*, 513 So. 2d at 1241.

\(^{423}\) *Id.* at 1242.

\(^{424}\) *Id.* at 1242.

\(^{425}\) *See* *Harris v. Kemp*, 451 So. 2d 1362, 1365 (Miss. 1984); *Emmons*, 64 So. 2d at 755.

\(^{426}\) 451 So. 2d 1362 (Miss. 1984).
The financial condition of the grantor (Harris) was extremely poor and he was attempting, with Kemp's help, to stave off foreclosure. Also Harris, the grantor, remained in possession and control of the property after the execution of the deed. The value of the property, however, was only slightly higher than the total amount Kemp had invested, though as noted below Harris remained obligated to repay these amounts. And finally, the conduct of the parties showed that Kemp acted to help Harris save his property and took a special warranty deed and assignment of the Wesson Milling Company deed of trust only to protect his interest by placing himself above the judgment creditors. Moreover, and perhaps more importantly, the evidence here showed that Kemp merely took an assignment of the $50,000 Wesson Milling Company deed of trust. The testimony indicated that this assignment did not cut off the indebtedness and that it has not been cancelled. Indeed, on August 21, 1979, Kemp renewed the Wesson Milling Company note. Also the evidence showed $18,600 in promissory notes executed by Harris in favor of Kemp and still outstanding. Thus all the evidence, including the testimony of Kemp himself, indicates that a debtor-creditor relationship continues to exist and that the existing debt by Harris was not extinguished by the giving of the special warranty deed.⁴²⁷

c. Deed vs. Will

If an instrument, though in the form of a deed, "makes no present conveyance of an interest in land or otherwise directs that the interest to be conveyed vests in the grantee only upon the death of the grantor, such an instrument is regarded as testamentary in character" and Mississippi courts will construe and enforce it as a will, not a deed.⁴²⁸ On the other hand, if the instrument "conveys a future interest in land which vests in the grantee effective upon delivery of the deed, though reserving in the grantor a life estate, the effect of which is to

⁴²⁷ Harris, 451 So. 2d at 1365.
⁴²⁸ Ford v. Hegwood, 485 So. 2d 1044, 1045 (Miss. 1986); see also Tapley v. McManus, 168 So. 51, 52 (Miss. 1936).
postpone only the grantee's right of possession or occupancy," Mississippi courts will construe and enforce the instrument as a deed.\footnote{Ford, 485 So. 2d at 1045; see also Buchanan v. Buchanan, 112 So. 2d 224, 226-27 (Miss. 1959).}

In \textit{Ford v. Hegwood},\footnote{485 So. 2d 1044 (Miss. 1986).} the instrument at issue provided in relevant part, "[W]e, the undersigned \ldots do hereby sell, convey and warrant to our son, \ldots at OUR DEATH, the following described land \ldots."\footnote{Ford, 485 So. 2d at 1045.} The Mississippi Supreme Court saw this case as falling in between \textit{Tapley} and \textit{Buchanan},\footnote{Id. at 1046; see also supra notes 428-29.} and construed the conveyance as a deed, rather than a will, as follows:

\begin{quote}
Here the words used leave no reasonable doubt but that J.O. Hegwood and Nannie Mae Hegwood intended to convey the land as of June 20, 1951, so that there would be no question of its ownership at their death. Lawyers may find interesting the subtle distinction between a conveyance in the present of a future interest with a life estate reserved, on the one hand, and, on the other, a conveyance to vest at death and irrevocable only at death—and, as noted above, our law recognizes it. We are confident that laymen would not understand such a distinction, much less have it in mind at the time of the drafting of an instrument such as that in question. Doubtful cases will not turn on such subtleties.

The words of the instrument communicate to the reader a dominant intention on the part of the Hegwoods that at their death their property belong to their son and his heirs. \ldots

\ldots The object of persons such as the Hegwoods being one which our law allows to be accomplished, we regard it as a sound rule of construction to resolve doubts in favor of treating the instrument as a deed rather than a will. Put otherwise, an instrument such as that under consideration here appearing in the form of a deed should be adjudicated testamentary in character \ldots only where such affirmatively and clearly appears from the language of the instrument.\footnote{Id. at 1046-47 (footnote and citations omitted). In so ruling, the court disre-}
\end{quote}
d. Reservations of Rights

A valid reservation in or exception to a conveyance must contain words "as definite as those required to convey title." Everything "not unequivocally and specifically reserved" is deemed to be "conveyed by the granting clause." The reservation must "describe the interest reserved with certainty," must be "of some portion of the granted premises, which, without the reservation, would be conveyed by the deed," and must "necessarily be of something which belongs to the grantor at and before the execution of the deed."

...regarded both parties' invitations to treat the instrument as ambiguous and construe it in light of extrinsic evidence, opting to "adjudicate its meaning solely by reference to its language and the intention and purposes there revealed." Id. at 1047.

434 Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1237 (Miss. 1996); Texas Co. v. Newton Naval Stores Co., 78 So. 2d 751, 753 (Miss. 1955); Richardson v. Marqueeze, 59 Miss. 80, 94 (1881).

435 Thornhill v. System Fuels, Inc., 523 So. 2d 983, 989 (Miss. 1988); accord Peoples Bank, 672 So. 2d at 1237; Bedford v. Kravis, 622 So. 2d 291, 294 (Miss. 1993).

436 Peoples Bank, 672 So. 2d at 1237; see also Federal Land Bank of New Orleans v. Cooper, 200 So. 729, 730-31 (Miss. 1941).

437 Barataria Canning Co. v. Ott, 37 So. 121, 124 (Miss. 1904).

438 Barataria Canning Co., 37 So. at 125. Property or rights excluded from a grant because they are not owned by the grantor at the time of the grant are more properly termed "exceptions" rather than "reservations." See Fatherree v. McCormick, 24 So. 2d 724, 725 (Miss. 1946). As the Fatherree court explained:

[A] reservation operates by way of a re-grant by the grantee to the grantor of the estate or interest reserved.

By this test the grantor could not be said to have reserved one-half of the minerals for he owned only one-eighth. If by a reservation the grantee be viewed as re-conveying to the grantor such one-half, the latter would receive back more than he had. We remind ourselves again that the grantor warranted only the undivided interest which he had yet he did not except therefrom one-half of such interest but one-half of "all mineral rights." This exception is consistent with the description of the extent of his undivided interest and inconsistent with a reservation of an undivided one-eighth interest. To give the exception any other character it would have to be so amended or otherwise by simple and clear expression enlarged to indicate that there is a reservation of one-half of the minerals owned by the grantor.

Fatherree, 24 So. 2d at 725 (citations omitted).
In Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, the purported reservation of mineral rights read: "Oil and Mineral rights have been leased before we came into possession of property title is not herein conveyed." Because the conveyance "fail[ed] to describe the interest being reserved with certainty," the court concluded that the plain language of the deed was "of little help," and that it must resort to the rule of contra proferentem, whereby ambiguities are construed against the party who drafted the ambiguous provision.

In Barataria Canning Co. v. Ott, the seller of certain real property (appellee) attempted to reserve "littoral and aquatic rights" over oyster beds, planted by the appellant adjacent to the appellee's property, and the oysters therein. The court held that the reservation was unenforceable because it attempted to reserve something which did not belong to the reserving party:

The attempted reservation in the deed . . . [can] in no wise affect the rights of appellant to the oysters which it had bedded and planted, and in which a right of property had been lawfully granted it. . . . Property cannot be conveyed by reservation, and yet that is what is attempted to be done if the construction contended for by appellee be sustained. At the date of the deed appellee owned the land and the water front with all littoral and aquatic rights lawfully appurtenant thereto. Appellant owned the oysters which it had planted and bedded in the waters in front of the land. By deeding a portion of the land and reserving certain rights which are merely incident to the land, appellees claim to have acquired title to the property of appellant. This view cannot be sustained. Appellant, being the owner of the oyster beds which it had planted, can-

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439 672 So. 2d 1235 (Miss. 1996).
440 Peoples Bank & Trust Co., 672 So. 2d at 1237.
441 Id.
442 Id.
443 See supra subpart II.D.1.
444 See Peoples Bank, 672 So. 2d at 1239-40.
445 37 So. 121 (Miss. 1904).
446 Barataria Canning Co., 37 So. at 122.
not be divested of its ownership by implication, and appellees can only acquire those rights by express grant.\footnote{Id. at 125.}

e. Restrictive Covenants

Mississippi courts generally disfavor restrictive covenants as restraints on alienation,\footnote{See, e.g., Stokes v. Board ofDirs. of La Cav Improvement Co., 654 So. 2d 524, 527 (Miss. 1995); Kemp v. Lake Serene Property Owners Ass'n, Inc., 256 So. 2d 924, 926 (Miss. 1971).} and should, if the terms are ambiguous, strictly construe a restrictive covenant "against the person seeking the restriction and in favor of the person being restricted."\footnote{Kemp, 256 So. 2d at 926; accord Stokes, 654 So. 2d at 527; see also City of Gulfport v. Wilson, 603 So. 2d 295, 299 (Miss. 1992); Andrews v. Lake Serene Property Owners Ass'n, 434 So. 2d 1328, 1331 (Miss. 1983).} Where the language of a restrictive covenant is clear and unambiguous, on the other hand, Mississippi courts should not disregard the covenant merely because a use is prohibited or restricted. If the intent to prohibit or restrict be expressed in clear and unambiguous wording, enforcement is available in the courts of this state.\footnote{Andrews, 434 So. 2d at 1331; accord Stokes, 654 So. 2d at 528.}  

In A.A. Home Improvement Co. v. Hide-A-Way Lake Club, Inc.,\footnote{393 So. 2d 1333 (Miss. 1981).} the court upheld a covenant against non-residential use, stating:

There is no ambiguity in the expression "No lot shall be used for other than residential purposes." Any additional use must be reasonably incidental to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants, and without substantial injury to the neighborhood. It is obvious that the use of Lot 52 on which there is no residence as a connecting roadway to an adjoining subdivision is not in any sense a residential use or a use incidental thereto. . . . The covenant which requires the appellee Club to maintain the roads, with the expense to be shared by all lot owners, shows an intent not to enlarge the exposure of the streets to more traffic than the layout of the plat and
in its connections would produce.\textsuperscript{452}

In determining whether a restrictive covenant is ambiguous, its language "is to be read in its ordinary sense, considering the entire document as well as the circumstances surrounding its formulation to ascertain its meaning, purpose, and intents."\textsuperscript{453}

At issue in \textit{Stokes v. Board of Directors of La Cav Improvement Co.}\textsuperscript{454} was whether a deed restriction providing that "no building of any kind whatsoever shall be constructed on said Lot 17" precludes the repair of an earthen pier and construction of an L-shaped earth and wood addition to that pier so as to create a boat slip.\textsuperscript{455}

The \textit{Stokes} court resolved the issue as follows:

The Stokes urge construction of this provision according to its plain language, that is, as prohibiting the erection of a house or other permanent structure on the lot. La Cav asserts that aside from the Stokes' failure to obtain Building Committee approval before repairing the pier, it objects only to construction of the boat slip. Based on the language used in the restrictive provisions of the warranty deeds to the other "non-building lots," which provides "that no buildings, structures, outbuildings or any other improvements shall be erected on the property conveyed except that a pier may be erected in the water in front of said lot," La Cav argues that although construction of a pier is permissible, construction of a boat slip is not.

... The limiting language of the Stokes' warranty deed restriction would clearly seem to prohibit construction of a

\textsuperscript{452} \textit{A.A. Home Improvement Co.}, 393 So. 2d at 1336-37 (citation omitted).

\textsuperscript{453} \textit{Stokes}, 654 So. 2d at 527 (quotation omitted); see \textit{Wilson}, 603 So. 2d at 299; \textit{Kinchen v. Layton}, 457 So. 2d 343, 346 (Miss. 1984); \textit{Mendrop v. Harrell}, 103 So. 2d 418, 422 (Miss. 1958); \textit{see also Schaeffer v. Gatling}, 137 So. 2d 819, 820 (Miss. 1962) ("Covenants of this kind should be fairly and reasonably construed and the language used will be read in the ordinary sense.").

\textsuperscript{454} 654 So. 2d 524 (Miss. 1995).

\textsuperscript{455} \textit{Id.} at 528.
boat house, storage shed or some other outbuilding which would impede the view of the lake or clutter the small lot. However, when read in light of the restrictive language in the warranty deeds to the neighboring properties, we would construe the Stokes' deed as allowing construction of either a pier or a boat slip on Lot 17.456

Restrictive covenants may arise "by implication from the language used in an instrument or from the conduct of the parties," but, to do so, "the implication must be plain and unmistakable, or necessary."457

In Schaeffer v. Gatling, for example, the subject deeds contained the following covenants:

Said property is to be used strictly for residential purposes and is not to be used for automobile filling station, repair shop, tourist camp, bill boards, dance hall, store or for any other commercial or manufacturing purposes. No residences shall be erected on said land which shall cost less than $6,000.00, exclusive of outhouses or other buildings in connection with said residence, and the front of said residence, exclusive of any gallery or porch that may be attached to said building, shall be set back from the front, or Highway 61 line of said lot, not less than thirty-five (35) feet . . . . 459

The issue was whether the use of a mobile home, if it met the "not less than $6,000" test, was prohibited.460 The court said "no":

The house trailer is being used "strictly for residential purposes." . . . Covenants of this kind should be fairly and reasonably construed and . . . . the restriction should not be extended by strained construction, especially when, as in this case, the restrictive covenants expressly permit the use being made of the land. If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this

456 Stokes, 654 So. 2d at 528-29.
457 Wiener v. Pierce, 203 So. 2d 598, 603 (Miss. 1967).
458 137 So. 2d 819 (Miss. 1962).
459 Schaeffer, 137 So. 2d at 819.
460 See id. at 820.
could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, or by placing a minimum on the floor space for a residence, or by prohibiting temporary residences. None of these things were done.\footnote{Id. (citation omitted).}

\textbf{f. Easements vs. Fees}

An instrument that specifically conveys a right-of-way "will be construed as intending to convey only an easement\footnote{Crum v. Butler, 601 So. 2d 834, 837 (Miss. 1992); see New Orleans & N.E. R.R. v. Morrison, 35 So. 2d 68, 70 (Miss. 1948); Williams v. Patterson, 21 So. 2d 477, 478-80 (Miss. 1945).} unless the terms of the instrument clearly indicate the parties' intent to convey a fee. On the other hand, instruments "that specifically refer to a strip, parcel, or tract of land have been held to convey a fee\footnote{Crum, 601 So. 2d at 838; see Alabama & Vicksburg Ry. v. Mashburn, 109 So. 2d 533, 535-36 (Miss. 1959); Mississippi Cent. R.R. v. Ratcliff, 59 So. 2d 311, 314 (Miss. 1952).}—again, subject to the clearly ex-
It is understood that should the railroad herein mentioned not be built within eighteen months from the date hereof then this Contract shall be null and void.

*Id.* at 836-37 (emphases in original). The 1887 deed provided in relevant part:

I hereby give, grant, bargain, convey and sell to the Louisville New Orleans and Texas Rail Road Company for Right of Way, a strip of land 100 feet wide that is 50 feet on each side of the center of the Road bed now constructed thereon . . . . To have and to hold unto the said Rail Road Company and its assigns forever for the purpose of building and constructing and operating a line of Rail Road on said Right of Way and the said Rail Road Company to have the right to dig earth, quarry rock, cut timber and do such other things on said right of way as are necessary and convenient in constructing and operating its line of Rail Road thereon, and to fell any timber beyond the right of way herein granted, which is sufficiently near the track of said Road to fall on and obstruct the same. . . .

*Id.* at 838 (emphasis in original).

The court approved the chancellor's finding that the 1883 deed granted "merely an easement." *Id.* The court found the 1887 deed to be "unclear and ambiguous." *Id.* at 839. Falling back on the *contra proferentem* maxim (the 1887 deed having been drawn up by the railroad), see *supra* subpart II.D.1, the court held that the 1887 deed, too, granted merely an easement. *See Crum*, 601 So. 2d at 839. The *Crum* court explained:

When we compare the 1883 deed and the 1887 deed it is clear that the grantors in the 1883 deed intended only to convey a right of way. The instrument states that they did "grant, bargain and sell . . . a right of way 100 feet wide through the lands. . . ." The grant was for the purpose of building, constructing and operating a line of railroad on the right of way and none other. The instrument specifically points out that it is a grant of a right of way through the land and not a grant of the land. The chancellor correctly held that the 1883 deed granted merely an easement.

. . . . Crum contends that the chancellor gave undue influence to the term "right of way" in accepting it to mean merely an easement or right to cross. . . . Crum contends that the term "right of way" has a two fold significance; one being a mere intangible right to cross and the other indicating a strip of land which a railroad appropriates for its use.

We are struck by the fact that both the 1883 deed and the 1887 deed clearly point out that the conveyances were for the purpose of constructing and operating a railroad on the right of way. . . .

The 1887 deed in its granting provision conveys "for a Right of Way, a strip of land" to the railroad. The *habendum* clause of the deed provides that the conveyance is to the railroad and "its assigns forever for the purpose of building and constructing and operating a line of Rail Road . . . ."

The instruments here are unclear and ambiguous. Where terms of a
pressed intent of the parties to the contrary.

In *Dossett v. New Orleans Great Northern R.R.*,\(^{464}\) the grantors agreed to “grant, sell, assign, convey and warrant unto New Orleans Great Northern Railroad . . . its successors or assigns,” (1) “a strip of land for a right of way, to be selected by survey and location by [the Railroad] . . . two hundred feet in width (being one hundred feet on each side of the center line of the Railroad Track) in, over, upon and across the following described lands . . . .”; and (2) “all the timber growing on said right of way, together with the right to use therefrom earth, gravel, stones, shells and other materials for the construction and maintenance of said railroad[,] [t]o have and to hold . . . forever, with full warranty, and substitution and subrogation to all our rights in and to the lands hereby conveyed.”\(^{465}\)

The court opined

that the language used in the written instrument here involved was sufficient to indicate the sale of land, rather than right to use land. Since, however, there are phrases, sentences and clauses in the deed which tend to make the meaning of the deed unclear and ambiguous, we must resort to the legal rules of construction as to what the parties considered the instrument to be a deed. It is apparent that the parties considered the instrument to be a deed. Moreover, where the language of an instrument is unclear and ambiguous as to the estate intended to be conveyed, the instrument should be construed to convey the fee rather than a lesser estate.\(^{466}\)

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\(^{464}\) 295 So. 2d 771 (Miss. 1974).

\(^{465}\) *Dossett*, 295 So. 2d at 775-76.

\(^{466}\) Id. at 775.
g. Leases

1). Renewal Options

Mississippi law does not favor perpetual leases.\(^{467}\) Therefore, the parties' "intention to give the right to perpetual renewals must appear in clear and unequivocal language."\(^{468}\)

In *Howard v. Tomicich*,\(^ {469}\) the written contract provided that it would be effective "from January 1, 1901, to January 1, 1902, 'with privilege of longer.'\(^ {470}\) The question for the court was "whether a lease of premises for one year 'with privilege of longer,' secures to the lessee the right of renewal of the lease at his option."\(^ {471}\) The court concluded that it did not:

It is too vague and uncertain to constitute a binding covenant. In this writing the question is, what was the intention of the parties, or, more properly, the meaning of the words in the clause under consideration? . . . [Appellee has testified that in this clause he meant that appellant should have the preference of others for a new lease at whatever rental they could agree upon, whilst appellant swore that he meant to secure to himself the right to a second term of one year at the same rent. So the wisdom of the law excluding parol proof of intention is justified by the evidence on that point in this case. An unqualified covenant to renew a lease involves the making of a new lease of the same premises for the same period and at the same rent, and a stipulation providing for a refusal of the premises for a fixed period gives a right to a new lease at the same rent; but the covenant "with privilege of longer" has no certain meaning in regard to the term or the consideration of the lease. How much longer? Upon what conditions? Certainly the stipulation is uncertain in both respects.\(^ {472}\)

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\(^{467}\) See Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976); Lloyd's Estate v. Mullen Tractor & Equip. Co., 4 So. 2d 282, 285 (Miss. 1941).

\(^{468}\) *Lloyd's Estate*, 4 So. 2d at 285; accord *Stampley*, 332 So. 2d at 63.

\(^{469}\) 33 So. 493 (Miss. 1903).

\(^{470}\) *Howard*, 33 So. at 493.

\(^{471}\) *Id.*

\(^{472}\) *Id.* at 493-94 (citations omitted).
2). Assignments

As a general rule, an assignee of a lease does not incur the obligations of the assignor unless they expressly so agree. As a general rule, an assignee of a lease does not incur the obligations of the assignor unless they expressly so agree. However, “in cases of general assignments involving leases, the assignee takes on the obligations of the assignor when the lease covenants involved ‘run with the land,’ regardless of express agreement.” Lease provisions which affect the property’s use, condition, and value are said to “run with the land.”

An assignee assumes no obligations under the lease—including obligations that “run with the land”—when the assignment is given as collateral for a security interest.

11. Antenuptial Agreements

Mississippi courts have long favored antenuptial agreements, when fairly made,

not only on account of the security thereby provided for the wife, but also because . . . provision for the issue of the marriage is usually the great and immediate object in view; and therefore, the most favorable exposition will be made of the words of such instruments, to support the intention of the parties.

An antenuptial contract is subject to the same rules of construction and interpretation applicable to contracts generally.

473 Midsouth Rail Corp. v. Citizens Bank & Trust Co., 697 So. 2d 451, 455 (Miss. 1997); Coggins v. Joseph, 504 So. 2d 211, 213 (Miss. 1987).
474 Midsouth Rail, 697 So. 2d at 455; see Coggins, 504 So. 2d at 214.
475 Midsouth Rail, 697 So. 2d at 455.
476 Id. at 457; see also Kroger Co. v. Chimneyville Properties, Ltd., 784 F. Supp. 331, 340 (S.D. Miss. 1991). More generally, a collateral assignee of a lease “should not be burdened with the obligations of the assignor.” Midsouth Rail, 697 So. 2d at 458.
477 Estate of Hensley v. Estate of Hensley, 524 So. 2d 325, 327 (Miss. 1988); see Gorin v. Gordon, 38 Miss. 205, 210-11 (1859).
478 Estate of Hensley, 524 So. 2d at 327.
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12. Postnuptial Agreements / Property Settlement Agreements

Mississippi law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching. This is as true of agreements made in the process of the termination of the marriage by divorce as of any other kind of negotiated settlement. They are contracts, made by the parties, upon consideration acceptable to each of them, and the law will enforce them. Courts will not rewrite them to satisfy the desires of either party. With regard to the property of the parties, this is a strong and enforceable rule with few, if any, exceptions.\(^{479}\)

The rules applicable to the construction of written contracts in general apply to postnuptial agreements (also known as property settlement agreements).\(^{480}\) That said, once a postnuptial agreement sufficient to comply with Mississippi’s Irreconcilable Differences Divorce Act\(^ {481}\) is filed along with the final divorce decree, the terms of the property settlement agreement are treated as a part of the chancery court’s final decree.\(^ {482}\)

\(^ {479}\) McManus v. Howard, 569 So. 2d 1213, 1215 (Miss. 1990) (citations omitted); see also McBride v. Chevron U.S.A., 673 So. 2d 372, 379 (Miss. 1996) (“Our law favors settlement for many reasons, not the least of which includes the expeditious closure of cases.”). See supra subpart II.E.5 for a discussion of construing settlement agreements in general.

\(^ {480}\) See Roberts v. Roberts, 381 So. 2d 1333, 1335 (Miss. 1980); see, e.g., Meek v. Warren, 726 So. 2d 1292, 1293-94 (Miss. Ct. App. 1998). Thus, for example, “where ambiguities may be found, the agreement should be construed much as is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses harmonious in the light of that intent.” Switzer v. Switzer, 460 So. 2d 843, 846 (Miss. 1984); see Owen v. Gerity, 422 So. 2d 284, 288 (Miss. 1982) (construing property agreement against ex-wife whose attorney had prepared the agreement); Hoar v. Hoar, 404 So. 2d 1032, 1035 (Miss. 1981) (where property agreement was ambiguous, court correctly allowed parol evidence to show intent); Roberts, 381 So. 2d at 1335.

\(^ {481}\) MISS. CODE ANN. § 93-5-2 (Supp. 1998).

\(^ {482}\) Id. In Switzer, the court explained that the Irreconcilable Differences Divorce Act

contemplates that the parties will negotiate a settlement of all matters, including a division of property and respective rights and responsibilities
Construing a postnuptial contract in the context of a dispute between the estate of one ex-spouse and the surviving ex-spouse, the Mississippi Supreme Court has written:

The rule is, as to a postnuptial agreement, that only such rights in the estate of the deceased spouse are barred as are expressly enumerated or reasonably inferable from the language employed therein. In construing such agreements the purpose must be clear to exclude the surviving spouse from having his or her rights of inheritance in the deceased spouse; and they will be so construed only so far as the agreement clearly requires.483

The court in Roberts v. Roberts484 construed a property settlement agreement that was filed but was not adjudicated before the husband died suddenly. The court noted:

In support of their contention that the widow contracted away her right to inherit, the appellants (brothers and sisters in relation thereto. The statute further contemplates that this property settlement agreement will be filed with the court before a final decree may be entered.

When the statute has been complied with, the . . . agreement becomes a part of the final decree for all legal intents and purposes. . . . If the agreement is sufficient to comply with the statute, that is enough to render it a part of the final decree of divorce the same as if a decree including the same provisions as may be found in the property settlement agreement had been rendered by the Chancery Court following a contested divorce proceeding.

We have heretofore held that, for purposes of subsequent modification proceedings, alimony and child support provisions found in an agreement made incident to an irreconcilable differences divorce are treated the same as though the chancellor had made the award after a contested divorce trial. There is no reason on principal why a property settlement provision such as that in controversy here should not be similarly treated as though it were a part of the divorce decree.

As a matter of law, a property settlement prepared and filed in compliance with the statute can never be a document extraneous to the final decree. This rule is compelled by the logic implicit in Section 93-5-2. Any other rule would exalt form over substance and inevitably produce arbitrary and inequitable results.

Switzer, 460 So. 2d at 845-46 (citations omitted).

483 Kirby v. Kent, 160 So. 569, 572 (Miss. 1935) (citations omitted).

484 381 So. 2d 1333 (Miss. 1980).
of the deceased) cite language in the . . . preamble to the Roberts' agreement which states:

WHEREAS, irreconcilable difference having arisen between them, and they are now living separate and apart and now desire to make a mutually acceptable settlement of their respective rights, liabilities, obligations and property rights arising out of and during the course of their marital relationship; . . .

The appellants urge this Court to adopt the reasoning that the widow's status as an heir "arises out of" the marital relationship . . ., and that she is precluded from asserting her status as an heir of the deceased husband to claim the property allotted to him under the property settlement agreement.

. . . . [C]onsidering the language of the preamble . . . with the language found in Paragraph eight which states: "This agreement shall be binding not only upon the Husband and Wife, but also upon their heirs, successors and assigns", and together with the provision in Paragraph twelve that "This agreement . . . is not contingent upon either party procuring a divorce from the other", the instrument clearly manifests the parties [sic] intention that the property settlement was to be final and binding, not only while they lived, but, also, in the event of the death of one of the parties whether a divorce was obtained or not. Mrs. Roberts received her share of approximately one-half of the couple's property under the agreement, and she is now precluded by that same agreement from claiming the other one-half as the sole heir of the deceased. 485

13. Wills, Testamentary Trusts, and Related Documents

The same rules of construction and interpretation that apply to written instruments generally also apply to trust instruments "whether they are contracts, deeds, or wills."486 As such, a court's primary responsibility is to determine and give effect the intent of the testator or testatrix487—as long as that

485 Roberts, 381 So. 2d at 1334-35 (emphasis omitted).
487 See Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Chris-
intent is not contrary to law or public policy.  

Tinnin Ass'n, 672 So. 2d 1173, 1175 (Miss. 1996); Estate of Blount v. Papps, 611 So. 2d 862, 866 (Miss. 1992); In re Estate of Dedeaux, 584 So. 2d 419, 421 (Miss. 1991); In re Estate of Vick, 557 So. 2d 760, 765 (Miss. 1989); Tinnin v. First United Bank of Miss., 502 So. 2d 659, 663 (Miss. 1987); Stovall v. Stovall, 360 So. 2d 679, 681 (Miss. 1978); In re Estate of Cranberry, 310 So. 2d 708, 711 (Miss. 1975); Hart, 103 So. 2d at 409; Yeates v. Box, 22 So. 2d 411, 413 (Miss. 1945); see also In re Raworth's Estate, 52 So. 2d 661, 663 (Miss. 1951) ("[i]n the absence of a clear intent to the contrary, that construction should be adopted which will result in a just and reasonable disposition of the property."), quoted with approval in Estate of Blount, 611 So. 2d at 866.

For reasons of social policy, our law has come to provide that one may not wholly disinherit one's spouse, that one may not attempt purchase of a ticket to heaven by leaving his entire estate to the church, that one may not control ownership of property beyond life in being plus twenty-one years [and] . . . that entitlement one is eligible to enjoy on one's merits shall not be denied by reason of one's race, color or creed.

Tinnin, 502 So. 2d at 664. In Tinnin, the court was asked to construe a will, the residuary clause of which sought to set up a charitable educational trust to benefit only Caucasian students. The court prefaced its analysis as follows:

Where a testamentary devise fails, because it "violates law or social policy" or for whatever reason, and where the will's residuary clause fails to pick it up, again for whatever reason, the force of the private law is thought spent. Our public law provides for the descent and distribution of property not effectively devised by will. . . .

Our law in sum provides that the court, as here asked to construe a will, supplement it by the statutes on descent and distribution—thus adding the ultimate residuary clause—and by such administrative provisions or modifications as are authorized and necessary, and then restrict it by the various limitations our public law has imposed upon testamentary power. The composite document thus constructed is then construed as a whole with each part, each phrase, each word given effect, if that be possible. . . .

Id. at 665 (citations omitted).

Turning to the will, the court held as follows:

We will never know what Allan Hobgood would have preferred to do with his money if he had known that no court would enforce his wish that his money be loaned exclusively to white students. The language he employed leaves no doubt that he did not want any of his money to be loaned to non-whites. Disingenuousness attends the suggestion that the racially exclusive language of the will was incidental or an afterthought. . . .

Recognition of the unmistakable meaning of this clause, however,
The surest guide to testamentary intent is the wording employed by the maker of the will. Indeed, the intention of the testator is to be found, not in what he intended to say but what he did say. We have authority to give effect to the testator's intent only where that intent has received some form of direct or reasonably implied expression in the will.\(^\text{489}\)

leaves us far short of solution to today's construction riddle. . . . The Chancery Court . . . looked at the racially restrictive clause and asked whether it was incidental or integral. The court should have directed its attention to the alternative dispositions argued for and sought a just and reasonable disposition of Allan Hobgood's will as consistent as may be decreed by reference to the general plan reflected by his reconstructed will. More precisely, the alternatives below and here are (a) striking the racially restrictive clause and continuing the trust and (b) causing the trust to fail and the property to be distributed to the Tinnins, the testator's heirs at law. We know for a fact that Allan Hobgood did not wish either of these alternatives. The question is which is less offensive the general plan of his reconstructed will.

. . . Lucille Hamilton Hobgood Tinnin, Allan's aunt of the half blood, was not mentioned in his will. Indeed, when the will was made, Allan's mother appears to have been his sole heir at law, so that there is no reason for him to have thought of the possibility that Aunt Lucille would share in his estate, much less that her four children might take it all. While it is true that we construe wills favorably to those who would take under the laws of descent and distribution, unless the testator has manifest an intent to the contrary, we do so far more readily in favor of next of kin than remote kin.

The Tinnins' argument is filled with anomaly: because of the unenforceable racially restrictive intention of the testator, the trust, they argue, must fail and the assets must be distributed to four individuals we may say with confidence the testator never intended to benefit. We are asked to give effect to Allan Hobgood's intention by decreeing something we may say with confidence he never intended.

The question resolves itself to whether, given the unenforceability of the racially restrictive clause, Allan Hobgood's reconstructed will should be held to direct that the trust continue on a non-discriminatory basis or that all of its assets go to the Tinnins. The will as reconstructed in accordance with the principles of Section III above is unclear in this regard. The record before us, which is wholly documentary, is inadequate to enable us to answer this question with confidence.

\textit{Id.} at 668-69 (quotation and citations omitted). The court vacated the chancery court's judgment and remanded for a trial on the merits, in which extrinsic evidence should be considered to resolve the ambiguities inherent in the reconstructed will. \textit{See id.} at 669-70.

\(^\text{489}\) \textit{In re} Estate of Anderson, 541 So. 2d 423, 428 (Miss. 1989) (citations omit-
Courts should construe, and the testatrix's intent pursued, from the "usual and ordinary language" expressed in the will.\textsuperscript{490} "The words of a [w]ill are to be construed according to the rules of construction applicable to ordinary speech, except when technical terms are employed."\textsuperscript{491} Even then, "[w]here a testator is not familiar with the technical meaning of words, the words used in the will are to be taken in their ordinary and common acceptance.\textsuperscript{492}

[I]f what the testator has said leaves no doubt in the minds of persons of ordinary experience and intelligence as to what he meant[,] [t]he intention of the testator is not to be defeated merely because apt legal words were not used and the language is ungrammatical and clumsy, or because words which are clearly implied have been inadvertently omitted.\textsuperscript{493}

The first granting clause in \textit{In re Estate of Dedeaux}\textsuperscript{494} read: "It is my desire that if I should preceed [sic] my wife Kay in death that all of my earthly possessions be received by her."\textsuperscript{495} The court found this effective to devise the testator's entire estate to his wife:

There can be but little doubt that if this is all the instrument stated, his widow Kay would have been deemed the sole legatee and devisee under his will, and would have taken all.

\textsuperscript{490} Hemphill, 355 So. 2d at 306.
\textsuperscript{491} Id.
\textsuperscript{492} First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963).
\textsuperscript{493} Paine v. Sanders, 135 So. 2d 188, 192 (Miss. 1961); accord \textit{In re Estate of Dedeaux}, 584 So. 2d at 422.
\textsuperscript{494} 584 So. 2d 419 (Miss. 1991).
\textsuperscript{495} \textit{In re Estate of Dedeaux}, 584 So. 2d at 421.
When Dr. Dedeaux wrote “all of my earthly possessions” we cannot avoid concluding he meant everything he owned. Others might write it differently yet with no clearer meaning. And just as clear is that by “received” Dr. Dedeaux meant for Kay to get “all my earthly possessions.” Kay and no one else was to be the recipient of all his property.

In giving legal effect to an instrument prepared by a layman, a court should endeavor to ascertain what the words contained in it meant to the author, not simply what they could connote to a lawyer. Unless instructed in legal niceties, by the ordinary words “possessions” and “receive” with no further qualification or restriction, Dr. Dedeaux must surely have meant for Mrs. Kay Dedeaux to receive and own everything he possessed and owned.496

If a will is reasonably susceptible to more than one construction, “it is the duty of the court to adopt that construction which is most consistent with the intent of the testator [or testatrix].”497

496 Id. (citations omitted).

In pursuit of the decedent’s intent, the Mississippi Supreme Court has, at times, taken a more inclusive approach to construing wills than it does to other instruments:

The first inquiry, when we come to the construction of [a] will, is whether the court is shut up to a mere inspection of the instrument, or may look to extraneous evidence for the purpose of discovering the meaning of the testatrix, as found in the language she has employed. . . .

It is a well-settled canon for the construction of wills that the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property; that if, when viewed in this light, and from the standpoint of the testator, the language of the will cannot reasonably be so construed as to carry out his discovered purpose, the will and not the intent of the testator must control. In other words, if the will, as made, may, without violence to its terms, be so construed as to effectuate the purpose of the testator, as disclosed by the will and attending circumstances, the courts will so construe it; but no
[N]o two wills probably ever were written in precisely the same language throughout, and probably no two testators ever did die under precisely the same circumstances in relation to their estate, family, and friends, so that technical rules of law and adjudicated cases are not of as great assistance in the construction of a will as they are in the construction of some instruments of a different character, still they are not to be disregarded altogether, but should be followed, unless to do so would do violence to the clear intent of the testator. 498

A will and any valid codicils thereto must be construed together to ascertain the testatrix's intent. 499 "Otherwise the codicil cannot be given any operative effect, and this would be inconsistent with testatrix's intent. 500

The fact that a testator or testatrix made a written will is circumstances are sufficient to control the clear and unambiguous language of the will.

Schlottman v. Hoffman, 18 So. 893, 895 (Miss. 1895); see also Henry v. Henderson, 60 So. 33, 37 (Miss. 1912) ("The sole object of construing a will is to arrive at the intention of the maker; and this intention must be gathered from the whole instrument, construed in the light of the circumstances surrounding the maker at the time of the execution thereof."). But see Estate of Blount, 611 So. 2d 862, 866 (Miss. 1992); Estate of Dedeaux, 584 So. 2d at 421; In re Estate of Anderson, 541 So. 2d 423, 428 (Miss. 1989); Tinnin v. First United Bank of Miss., 502 So. 2d 659, 663 (Miss. 1987); Cockrell v. Jones, 275 So. 2d 105, 107 (Miss. 1973) (all requiring "four corners" approach).

498 Henry, 60 So. at 37.

499 Hemphill v. Robinson, 355 So. 2d 302, 307 (Miss. 1978); see also Hemphill v. Mississippi State Highway Comm'n, 145 So. 2d 455, 458 (Miss. 1962); Magee v. Estate of Magee, 111 So. 2d 394, 402 (Miss. 1959); Joiner v. Joiner, 78 So. 369, 370-71 (Miss. 1918). The Joiner court stated that a codicil is defined as an addition or supplement to a will, and, unless it shall contain express words of revocation applicable to all existing wills, it does not work a revocation, except to the precise extent that the intention of the testator as it is contained and expressed in the codicil is irreconcilable and inconsistent with his intention as it has been expressed in the wills.

Joiner, 78 So. at 370. Therefore, "[a] devise contained in the will should not be upset unless the words employed in the codicil show a manifest intention to revoke the gift contained in the will, or unless such intention to revoke is necessarily inferable from the words of the codicil." Id.

500 Hemphill, 145 So. 2d at 458.
"powerful evidence" of his or her "intention that his [or her] estate not pass according to the laws of descent and distribution." As a consequence, Mississippi courts should construe wills so as to avoid intestacy, if that may reasonably be done.

a. Charitable Gifts

If one construction of a will causes a charitable gift to fail completely and another construction validates the gift, a court should adopt the construction supporting the gift. That said, Mississippi courts "are not at liberty to infer an intent different from that clearly shown by the language of the will" despite the Mississippi Supreme Court's "favorable disposition toward charitable gifts."

In Estate of Williams v. Junius Ward Johnson Memorial Young Men's Christian Ass'n, the will of the testatrix Fannie A. Williams, provided for the creation of three charitable trusts which would be funded by the residuary estate to benefit "the YMCA in Vicksburg, Kuhn Memorial Hospital in

501 Tinnin, 502 So. 2d at 663.
502 Id.; see Richardson v. Browning, 192 So. 2d 692, 694 (Miss. 1966); Cooper v. Simmons, 116 So. 2d 215, 218 (Miss. 1959); Richmond v. Bass, 32 So. 2d 136, 137 (Miss. 1947).
503 See Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n, 672 So. 2d 1173, 1175 (Miss. 1996); Tinnin, 502 So. 2d at 670.
504 Johnson v. Board of Trustees of the Miss. Annual Conference of the United Methodist Church, 492 So. 2d 269, 276 (Miss. 1986).

As the court stated in Tinnin:

Charitable trusts are favored and should be enforced where possible. Instruments to purportedly creating charitable trusts will be liberally construed in favor of the charity. Where there are two possible constructions of the instrument in question, one of which will render the charitable gift valid and the other of which will cause it to fail, we will adopt the construction which will sustain the charitable bequest, absent manifest countervailing considerations. Finally, there is a presumption, albeit a rebuttable one, that the testator preferred the charitable trust to survive so far as may be within the law.

Tinnin, 502 So. 2d at 670 (citations omitted).
505 672 So. 2d 1173 (Miss. 1996).
Vicksburg, and the Old Ladies Home in Jackson. More specifically, with respect to the Old Ladies Home, the will provided:

The trust for the Old Ladies Home in Jackson, Mississippi is limited strictly for the use of that organization in Jackson, Mississippi for the maintaining of an Old Ladies Home in Jackson, Mississippi. If the Old Ladies Home ceases to operate in Jackson as a viable entity, that trust terminates and all undistributed income and principal shall be divided equally among my other residuary trusts created by this article of my Will which have not terminated prior to that time.

Some months prior to the execution of the will, and apparently unbeknownst to Ms. Williams, the Old Ladies Home relocated from West Capitol Street in Jackson to a newly-constructed facility in Madison, some three miles outside the Jackson city limits. Kuhn Memorial Hospital having been closed by the State, the Vicksburg YMCA sought to have itself declared the sole beneficiary of the residuary estate on the grounds that the Old Ladies Home no longer existed "in Jackson." Reciting the preference for a construction that will make a charitable gift valid, the Mississippi Supreme Court held:

Although the testatrix's intent to establish a charitable trust would not be completely defeated by the disqualification of the Old Ladies Home Association, it is certainly more consistent with her testamentary intent to adopt a construction of her will that validates as many of her charitable bequests as possible. Fannie A. Williams clearly intended in her will to benefit an organization known as the Old Ladies Home which operated a home for elderly women in Jackson. There is nothing in the record that suggests that her interests were confined to the Jackson city limits as opposed to the Jackson metropolitan area. In fact, the Old Ladies Home Association

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506 Estate of Williams, 672 So. 2d at 1174.
507 Id.
508 See id. at 1174-75.
509 See id. at 1174.
moved its facility outside the city limits of Jackson six months prior to the execution of the will. Thus, the only possible way to give effect to her testamentary wishes is to construe the phrase "in Jackson, Mississippi" as encompassing a larger geographic area beyond the city's corporate boundaries. This is the only reasonable construction.510

b. Mutual, Joint, or Reciprocal Wills511

The will of two or more persons "executed pursuant to an oral agreement or understanding, may, within itself, when considered and construed together, constitute a contract."512 "The construction of joint and mutual wills and the contract under which they are made is governed by the rules relating to the construction of wills and contracts generally, including the rule that the situation of the parties and the surrounding circumstances are to be taken into consideration so as to determine the intent of the testators."513

In Alvarez v. Coleman,514 Vernard and Dixie Droke, at the time husband and wife, executed a trust agreement transferring all their property into the "Droke Family Trust" to support them for life and then, after both had died, to be divided into two trusts, one-half for the benefit of Dixie's great-grandchildren and one-half for the benefit of the First Seventh Day Adventist Church in Memphis. The trust agreement was revo-

510 Id. at 1175.
511 A "mutual will" is "a will which is executed in pursuance of a compact or agreement between two or more persons to dispose of their property, either to each other, or to third persons in a particular manner." Monroe v. Holleman, 185 So. 2d 443, 448 (Miss. 1966). "The term 'mutual will' has frequently been used by the courts interchangeably with 'reciprocal will,' and with the same meaning, and, occasionally, as meaning a joint will; the terms 'joint wills' and 'mutual wills' are sometimes inaptly used interchangeably." Id. (quotation omitted). "Reciprocal wills' are those in which each of two or more testators makes a testamentary disposition in favor of the other or others, under a similar plan, either by executing separate wills or by all uniting in the same will, a will of the latter sort, or one both joint and reciprocal, being sometimes termed a 'double' will . . . ." Id. (quotation omitted).
512 Monroe, 185 So. 2d at 448; accord Alvarez v. Coleman, 642 So. 2d 361, 372 (Miss. 1994).
513 Monroe, 185 So. 2d at 448; accord Alvarez, 642 So. 2d at 372.
514 642 So. 2d 361 (Miss. 1994).
cable by either Settlor until the death of either; at such point it would become irrevocable. On the same day they executed the trust agreement, Vernard and Dixie executed nearly identical wills, leaving virtually all of their property to the Trust. Following Dixie's death, Vernard revoked the trust, and executed a new will leaving his estate to five of his nieces. Upon Vernard's death in 1988, his 1981 will was offered into probate by the trustee, and his 1987 will was offered by one of the nieces.

Reviewing the law of joint wills set forth in *Monroe v. Holleman*, discussed supra, the Mississippi Supreme Court held that Dixie and Vernard had breached an enforceable contract to make a joint will:

Vernard's and Dixie's wills were clearly executed, together with the trust instrument, pursuant to an agreement or understanding. "Considered and construed together," as directed by *Monroe*, the instruments "constitute a contract."

We held in *Monroe* that the surviving wife impermissibly repudiated the contract she and her husband had made concerning the disposition of their property. . . .

Vernard, the surviving testator, was similarly bound by the contract contained in the November 18, 1981 wills and trust instrument, and similarly estopped from repudiating that contract. Dixie's half-interest in the marital estate became vested upon her death; Vernard could not thereafter revoke the mutual wills and trust agreement.

515 *Alvarez*, 642 So. 2d at 362.
516 Id. at 362-63.
517 Id. at 372.

Turning to the question of the remedy available to those who were damaged by Vernard's breach of the joint will, the *Alvarez* court analogized the situation to the breach of an agreement not to revoke a will:

In *Trotter v. Trotter*, we considered the breach of a contract not to revoke a will. We stated that the breach of such contract was not grounds for contesting the will itself, but that the promisor's heirs might have a remedy "on the contract or perhaps upon a constructive trust theory." In the case at bar, there was a contract to place all assets in a trust, to give the surviving spouse unlimited use and control over the assets, and to divide the residue of the estate (contained in the trust) at the survivor's death between Vernard's designee, the Church, and Dixie's
In the absence of an oral or written contract making the joint wills irrevocable on the death of one of the makers, however, the Mississippi Supreme Court has been reluctant to treat the two wills as anything more than two wills. In Lane v. Woodland Hills Baptist Church, Julius and Beulah Rogers executed a joint will that read:

Be it known that we, Julius P. Rogers and Beulah S. Rogers, . . . do hereby make, declare and publish this one true Joint Last Will and Testament, specifically revoking all previous wills.

1. On the death of one of us, the survivor shall become the full owner of all interest of the one dying in real and personal property, wheresoever situated, with full power in the survivor to own and control the same, and full power to sell and transfer any part of the said property, real, personal or mixed, and to convey good title to any of the property conveyed, and to be transferred and conveyed for any reason deemed good by the said survivor.

2. At the death of the survivor, the property not therefore disposed of by the survivor shall be and become the property of Woodland Hills Baptist Church, Old Canton Road, Jackson, Mississippi . . . .

Unlike Alvarez, there was no separate trust document to which the joint will bound the makers to devise their property, nor was there any provision in the joint will or in a separate agreement (such as the trust agreement in Alvarez) making the joint will irrevocable on the death of Julius or Beulah, whichever might die first. Following Julius's death, Beulah executed a new will leaving particular items of personal property to sever-

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designee, her great grandchildren. Vernard breached this contract by attempting to transfer the residue of the estate to his designee exclusively. Dixie's great grandchildren may maintain a third party claim on this contract theory.

Id. at 372-73 (quoting Trotter v. Trotter, 490 So. 2d 827, 832 (Miss. 1986)).

285 So. 2d 901 (Miss. 1973).

Lane, 285 So. 2d at 901-02.

See supra note 515 and accompanying text.
al individuals.\textsuperscript{521}

At trial, the chancellor held that Beulah's later-executed will was otherwise valid, but that the earlier joint will could not be revoked.\textsuperscript{522} The supreme court reversed:

It is well settled in this state that a joint will constitutes the separate will of each executing it. On the death of each, it may be probated as a will, and its legal effect is separate and distinct-not joint. The declared intentions of each of the testators affect only his own property or his share in joint property . . . .

While two or more persons may jointly execute a single testamentary document, sometimes spoken of as a joint, double, mutual, or reciprocal will, it is well settled in America that this document constitutes the valid separate will of each of those executing it, and that on the death of each it may be probated as a will . . . .

If the will here involved constitutes anything more than a joint will, it must be gleaned from the will itself, since there is no evidence in the record to show any agreement or contract. After a careful study of the will executed by Mr. and Mrs. Rogers, we are of the opinion that it is nothing more than a joint will which under the law serves as the separate will of each of the parties. When Mr. Rogers died, this joint will was probated as his will. Whatever property he owned passed under this will and it cannot now be revoked. Since it was a separate will of each of the parties, Mrs. Rogers was free to make another will. This she did by executing the holographic will on December 20, 1968. The chancellor correctly found that the instrument was a valid will but was in error in holding that Mrs. Rogers could not revoke the joint will.\textsuperscript{523}

\textsuperscript{521} Lane, 285 So. 2d at 902.
\textsuperscript{522} Id. at 903.
\textsuperscript{523} Id. at 903-04 (citations omitted) (quoting Hill v. Godwin, 81 So. 790, 791 (Miss. 1919)).
c. Perpetuities Problems

If reasonably possible, Mississippi courts should construe an ambiguous will so as to avoid conflict with the rule against perpetuities.\textsuperscript{524} If part of the will conflicts with the rule against perpetuities and part does not, the court "should save such parts of the gift as the rigid requirements of the rule do not strike down, provided such action carries out the testator's principal purpose."\textsuperscript{525} Such an approach "will preserve the policy of the rule, and at the same time preserve so far as may be the intention of testator."\textsuperscript{526} Whether a testator's plan would be emasculated by sustaining only a part of it is a question of fact in each particular case.\textsuperscript{527}

d. Other Special Rules

1) Time of Vesting

Mississippi law favors the vesting of an estate "at the earliest possible moment."\textsuperscript{528} In the absence of contrary intent, a

\textsuperscript{524} See Carter v. Berry, 136 So. 2d 871, 874 (Miss.) ["Carter I"], modified on other grounds, 140 So. 2d 843 (Miss. 1962).
\textsuperscript{525} Carter v. Berry, 140 So. 2d 843, 850 (Miss. 1962) ["Carter II"]. As the Carter II court explained:

Infectious invalidity is not a universal doctrine . . . . Where part of the testator's plan is valid and part invalid, the normal procedure is to examine the total plan of testator, and determine whether that part which is invalid is so integral to the total plan that it can be inferred testator would have preferred all to fail, rather than to have the valid part stand alone. If the valid part actually accomplishes most of testator's desires, then that portion should stand. The all-or-nothing rule ignores the proposition that the problem is one of separability, not of perpetuities; a question of construction, not of application of a rule of law. There is no reason to totally amputate an arm in order to save an infected finger. The general dispositive intent should control. The court should save such parts of the gift as the rigid requirements of the rule do not strike down, provided such action carries out the testator's principal purpose.

\textsuperscript{526} Id.
\textsuperscript{527} Id.
\textsuperscript{528} In re Raworth's Estate, 52 So. 2d 661, 663 (Miss. 1951); see In re Estate of Blount, 611 So. 2d 862, 866 (Miss. 1992); Allen v. Allen, 110 So. 685, 686 (Miss.
devise to a class of persons “vests immediately upon the death of the testator in the members of the class then in being, subject to open up and let in members of the class who may afterwards come into being, before the date fixed for the ascertainments of the members of the class.”529

2). Life Estates vs. Fees

Life tenancies “are not favored,”530 such that where a grant or devise is made to one and his children, or issue, or the children or issue of his body, or equivalent words, and the named person has no child at the effective date of the instrument, that the named person takes a fee-simply title to the property conveyed or devised, unless the instrument by express words or necessary implication, shows a clear intent to create a life estate in the named person, remainder to after-born children or issue.531

3). Presumption in Favor of Next of Kin

If a provision remains unclear after applying more general rules of construction, Mississippi courts should construe that provisions “in a manner favorable to the next of kin.”532

14. “Dragnet” Clauses

Mississippi courts should enforce a “properly executed and unambiguous dragnet clause in a deed of trust . . . according to its terms.”533 A dragnet clause is “properly executed” as long

1927); Branton v. Buckley, 54 So. 850, 850 (Miss. 1911).
529 Allen, 110 So. at 686; accord Branton, 54 So. at 850.
530 Raworth’s Estate, 52 So. 2d at 663; see Estate of Blount, 611 So. 2d at 866; Ewing v. Ewing, 22 So. 2d 225, 227 (Miss. 1945).
531 Ewing, 22 So. 2d at 227.
533 Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1371 (Miss. 1995); see Kelso v. McGowan, 604 So. 2d 726, 729 (Miss. 1992); Whiteway Fin. Co. v. Green, 434 So. 2d 1351, 1353 (Miss. 1983); Trapp ex rel. First Miss. Bank of Commerce v.
as "both parties have agreed to the clause, and there was no fraud in the making of the contract." In the absence of fraud or ambiguity, a properly executed dragnet clause "should be construed as written to cover subsequent debts created" by the debtor.

If the creditor claims that a dragnet clause ensnares property that is otherwise exempt from execution as a matter of law, the court must strictly construe the clause in favor of the party entitled to the exemption. A security agreement or mortgage that "employs broad language which purports to secure all debts of a borrower, but does not specifically list

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Tidwell, 418 So. 2d 786, 792 (Miss. 1982); Newton County Bank v. Jones, 299 So. 2d 215, 218 (Miss. 1974).

A "dragnet clause" typically consolidates all prior indebtedness between the parties, as well as any future indebtedness, into the debt evidenced by the writing containing the dragnet clause. For example, in Hudson v. Bank of Leakesville, the dragnet clause provided:

In addition to the indebtedness specifically mentioned above, and any and all extensions or renewals of the same, or any part thereof, this conveyance shall also cover such future and additional advances as may be made to the grantor, or either of them, by the beneficiary, not to exceed the sum of $125,000.00, the beneficiary to be the sole judge as to whether or not such future and additional advances shall be made. In addition to all of the above, it is intended that this conveyance shall secure, and it does secure any and all debts, obligations, or liabilities, direct or contingent, of the grantor herein, or either of them, to the beneficiary, whether now existing or hereafter arising at any time before actual cancellation of this instrument on the public records of mortgages and deeds of trust, whether the same be evidenced by note, open account, over-draft, endorsement, guaranty or otherwise.

Hudson v. Bank of Leakesville, 249 So. 2d 371, 373 (Miss. 1971); see also, e.g., Walters v. Merchants & Mfrs. Bank of Ellisville, 67 So. 2d 714, 717 (Miss. 1953) ("In addition to the aforesaid indebtedness and any and all extensions or renewals of the same or any part thereof, this instrument is intended to secure and does secure any and all debts that the said Grantors or either of them may incur with or owe to the said Beneficiary within 10 years from the statutory limitation of the within instrument from the date hereof, whether the same be evidenced by note, open account, assignment endorsement, or otherwise.")

534 Iuka Guaranty Bank, 658 So. 2d at 1371; see Walters, 67 So. 2d at 717-18.

535 Iuka Guaranty Bank, 658 So. 2d at 1371.

536 See Hudson, 249 So. 2d at 373; Biggs v. Roberts, 115 So. 2d 151, 153 (Miss. 1959); Gardner v. Cook, 158 So. 150, 152 (Miss. 1934).
existing debt,... is ambiguous as to whether the antecedent debt is secured by the agreement."\textsuperscript{537}

In such cases certain principles must be applied to determine the intent of the parties. First, it must be considered whether the dragnet clause employed in the agreement is "boilerplate." The Stewart court noted that "[o]ften these clauses are not discussed between the borrower and the lender so that the borrower is not aware of the existence or the effect of these clauses." Second, the nature of the secured debt must be examined to determine the validity of the dragnet clause with respect to other debt. Where the debt which the lender seeks to have included under the dragnet clause is different in kind from the primary debt secured by the agreement, it is less likely that it was intended to be encompassed by the agreement. Third, heavy emphasis is placed on the fact that the antecedent loans are not listed in the agreement. "The rationale for excluding antecedent loans is that they are known to the lender at the time the agreement is drafted and should be included, if there is an intent to do so, since those loans are easily identifiable." Finally, this Court will consider whether the debt which the lender seeks to have included under the dragnet clause is otherwise fully secured.\textsuperscript{538}

\textit{Merchants National Bank v. Stewart,}\textsuperscript{539} discussed in the preceding quotation, involved the sale of a farm by the Stewarts to their son and son-in-law, who agreed that the purchase price would include a balance of $400,000 on the original purchase still owed by the Stewarts plus the assumption of a small business loan in the amount of $108,000. The son and son-in-law each (1) executed a deed of trust in favor of the elder Stewarts in the amount of $170,000 for the purchase of land, (2) signed a second deed of trust in favor of the bank—securing a note for the remainder of the purchase money, which was also guaranteed by the Farmers' Home Adminis-

\textsuperscript{537} Wallace v. United Miss. Bank, 726 So. 2d 578, 586-87 (Miss. 1998); see Merchants Nat'l Bank v. Stewart, 608 So. 2d 1120, 1126 (Miss. 1992).
\textsuperscript{538} Wallace, 726 So. 2d at 587 (citations and parentheticals omitted).
\textsuperscript{539} 608 So. 2d 1120 (Miss. 1992).
tration (FmHA)—and (3) signed notes for crop production and irrigation loans. The Stewarts signed a hypothecation agreement in favor of the bank as security for the crop and irrigation loans, giving the bank an assignment of the first deeds of trust owed to them by the son and son-in-law.540

The issue for the Stewart court was whether the hypothecation agreement also covered the notes for the purchase money secured by the second deed of trust.541 The bank argued that it did, relying on the language granting the bank "a security interest in . . . any and all other indebtedness of [the son or son-in-law] to [the bank], created at any time before [the bank] shall have received written notice from [the Stewarts] terminating this Hypothecation Agreement and all renewals and extensions thereof."542

The Stewart court held that the purchase money loans were not within the scope of the hypothecation agreement:

The language used by [the bank] in these agreements is "boilerplate" in nature as the agreement was a standard form used by the bank. The bank contends that the Stewarts were fully aware that [their son and son-in-law] had signed second mortgages before the hypothecation agreements were signed. This fact is undisputed, because all of the agreements were signed on the same day. The bank was aware also of the obligations and, as the drafter of the document, could have easily and explicitly included them within the hypothecation agreements.

The primary debt secured by the hypothecation agreement was a line of credit to be used for crop production and irrigation. The notes the bank seeks to have included within the scope of the hypothecation agreement were for money to purchase land and were secured by that land, FmHA guarantees, and second liens. The chief obligation covered by the hypothecation agreement is different in nature. Moreover, the fact that these

540 Stewart, 608 So. 2d at 1122-23, 1125.
541 Id.
542 Id. at 1125 n.4 (emphasis omitted).
notes were otherwise fully secured, further indicates that they were not intended to be included under the hypothecation agreements.\textsuperscript{543}

Dragnet clauses do not "extend to debts purchased or otherwise acquired by a mortgagee from third parties against a mortgagor."\textsuperscript{544} Nor may a dragnet clause be used to collect a

\textsuperscript{543} Id. at 1126-27. Notice the not-so-subtle invocation of \textit{contra proferentem} in the first paragraph—when in doubt, hold the drafter "responsible" for any ambiguity. \textit{See supra} subpart II.D.1. The Wallace court, likewise, appears to have resorted to \textit{contra proferentem} to resolve the scope of the "dragnet" clause before it. \textit{See} Wallace v. United Miss. Bank, 726 So. 2d 578, 588 (Miss. 1998).

\textsuperscript{544} Hudson v. Bank of Leakesville, 249 So. 2d 371, 374 (Miss. 1971). The Hudson court stated:

\begin{quote}
It is contended . . . that the language of the "dragnet" clause, "any other or further indebtedness in the way of future advances hereunder, or otherwise, that the grantor, or either of them, may now or hereafter owe the beneficiary . . . assented to by both grantors in the trust deed, is sufficiently broad and clear in its terms to secure the indebtedness of one of the grantors subsequently made to a third party. We are of the opinion that it is not. A majority of the states hold, and we find no Mississippi case in point, that the "dragnet" clause of a deed of trust or mortgage does not extend to debts purchased or otherwise acquired by a mortgagee from third parties against a mortgagor. We are of the opinion that the better and majority rule is pronounced in Wood v. Parker Square State Bank, 400 S.W.2d 898, 899 (Tex. 1966), with regard to the construction of a "dragnet" clause expressed in these terms:

"And this conveyance is made for the security and enforcement of the payment of said indebtedness and also to secure the payment of any and all other sums of money which may be advanced for or loaned to grantors by the beneficiary, his heirs or assigns."
\end{quote}

The court stated, in rejecting security for the third party indebtednesses:

\begin{quote}
* * * [It] was not contemplated or meant that the mortgagee could buy up third party debts which after the purchase would be secured by the mortgage; and that a mortgagee buying up claims held against his mortgagor by third persons cannot have them embraced in, and secured by, his mortgage, or included in the foreclosure decree, unless the language of the instrument provides in the clearest and most unmistakable terms for their inclusion, and unless such stipulation was expressly called to the mortgagor's attention and he assented thereto. These policy expressions are basically sound. (400 S.W.2d at 902).
\end{quote}
debt owed by only one of multiple joint debtors, unless the clause specifically and expressly allows it. On the other hand, where a single debtor owes secured debts to more than one joint creditor, the dragnet clause will encompass debts owed to less than all of the joint creditors.

The term "in the way of future advances hereunder, or otherwise" used in the present trust deed is not sufficiently clear or in such unmistakable terms as to include the indebtedness made to the Leakesville Hardware Company. This is particularly so, we think, when it is considered that the enlargement of the security afforded is a direct diminution of the homestead and as such is subject to a liberal construction in favor of the exemptionist both as to common assent necessary for encumbering the homestead property and specificity of terms necessary to further encumber.

Hudson, 249 So. 2d at 374 (citation and emphasis omitted).

See, e.g., Holland v. Bank of Lucedale, 204 So. 2d 875, 877 (Miss. 1967); Walters v. Merchants & Mfrs. Bank of Ellisville, 67 So. 2d 714, 717 (Miss. 1953); Davis v. Crawford, 168 So. 261, 262 (Miss. 1936) (all holding that dragnet clause in deed of trust executed by husband and wife which secured future advances made to "them" did not secure advance made only to husband). As one court stated:

The rationale undergirding the strict construction of dragnet clauses in co-debtor situations is that one co-debtor should not be held to have risked his equity for the future debts of another debtor absent a clear expression of intent . . . . If a creditor were allowed to foreclose against one such debtor, the other co-debtors would be in danger of losing their interest in the collateral without ever having defaulted on their own debts . . . .

Kelso v. McGowan, 604 So. 2d 726, 729-30 (Miss. 1992) (citations omitted). But cf. Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1371 (Miss. 1995) ("There is no requirement that the co-tenants have knowledge of the existence of other debts, or each others' consent to the creation of debt and the attendant lien against the property, in order for the dragnet clause to be enforceable.").

See, e.g., Kelso, 604 So. 2d at 729. In Kelso, one of the joint creditors, Pollack,

sought to collect the amount of Kelso's two dishonored checks through foreclosure under the dragnet clause found in the deed of trust which secured Kelso's $50,000 notes to Pollack and Todaro. The subject dragnet clause states: "This Deed of Trust shall also secure any and all other Indebtedness of Debtor due to Secured Party . . . ." The deed of trust identifies "S.E. Pollack and Sal Todaro" as the "Secured Party." Kelso maintains that since the dragnet clause secured only debts owed to "Secured Party," and since the instrument referred to Pollack and Todaro collectively as "Secured Party," then the dragnet clause did not secure
15. "Acceleration" Clauses

An acceleration clause contained in a mortgage, lease, or security agreement will be effective only if it is "clear and unequivocal." Any reasonable doubt as to the meaning of the language employed, requires a construction that will prevent the acceleration of maturity.

Thus, in Frey v. Abdo, the Mississippi Supreme Court held:

[I]n order to find an acceleration clause in the instant lease agreement, the contractual language must clearly and unequivocally set forth such a clause. Careful reading... of the lease reveals no such clearly and unequivocally stated clause. Reasonable interpretation of the [lease] allows lessor, upon

the two dishonored checks—an alleged debt owed to Pollack individually.

Id.

Kelso argued that the dragnet clause could not be invoked with regard to debts owed to less than all of the joint creditors:

Kelso's proposed interpretation is facially contradicted by the express language of the deed of trust. The premises clause refers to the principal debt as follows: "WHEREAS, Debtor is indebted to Secured Party in the full sum of... $100,000.00... evidenced by two promissory notes... in favor of Secured Party." (emphasis added). There is no way that the term "secured party," as used in the premises clause, can logically refer to the creditors as a collective entity: Pollack and Todaro do not hold the two promissory notes jointly. One note is in favor of Pollack only; the other is in favor of Todaro only.

If the term "secured party" is not limited to a collective entity in the premises clause, then it cannot be so limited in the dragnet clause. Consequently, we must read the dragnet clause as securing "all other Indebtedness" of Kelso due to Pollack and/or Todaro, either jointly or individually.

Id. at 730 (citations and parentheticals omitted).

An "acceleration clause" gives the creditor or lessor the power, upon the debtor's or lessee's default as to a single payment, to demand payment in full of the entire outstanding balance, including installments not yet due. See, e.g., Frey, 441 So. 2d at 1384 ("It is further agreed that in default of any one or more of said rental payments, or any part thereof, this lease may be declared forfeited by the Lessor at her option, in which event the Lessee shall be liable for all rents remaining unpaid under this lease agreement...").

Id.; see Boatright v. Horton, 86 So. 2d 864, 868 (Miss. 1956).

441 So. 2d 1383 (Miss. 1983).
the default by the lessee, to forfeit the lease, but whether it allows acceleration of amounts to become due in the future is not clearly stated. The provision could give two results: (1) the Lessor could immediately collect all the payments that are past due, or (2) the lessor could immediately collect all payments that the lease provides for—both past due and due in the future.

Inasmuch as the lease is susceptible to two interpretations, the rule of Boatright v. Horton, supra, resolves the doubt in favor of that construction which would prevent acceleration. Thus we hold that the lease agreement did not contain an acceleration clause and any payment not yet due before suit was brought was not yet actionable.550

16. Bills of Lading

Mississippi courts should resolve any reasonable doubt regarding the construction of a bill of lading against the carrier and in favor of the shipper.551

Bills of lading "are subject to regulation under the law, and when a lawful regulation has been imposed it is not within the power of the carrier to destroy the regulation, by any printed form of contract required to be signed by shippers."562 Stipulations and reservations in bills of lading "are made entirely for the benefit of the carrier, and will receive strict construction, to the end that through it just claims of shippers may not be defeated by dilatory methods in handling the claim."553 As the court in Lasky v. Southern Express Co.554 explained: "These stipulations are made on the back of contracts of shipment, and are rarely read by the shipper, and the one ground upon which they can be upheld is that they are reasonable regulations—not contracts in the true sense."555

550 Frey, 441 So. 2d at 1385.
552 Id. (quotation omitted).
553 45 So. 869 (Miss. 1908).
554 Lasky, 45 So. at 870; accord G.W. Bent, 47 So. at 806-07; see also Illinois
The Mississippi Supreme Court

has repudiated the idea that these printed stipulations may be given the force of a contract, fully, freely, fairly, and voluntarily entered into by private parties, but regards such stipulations more as regulations made by the carrier for its own benefit, the validity of which must depend on reasonableness and consistency with the general law.\footnote{C.W. Bent, 47 So. at 807}

17. Covenants Not To Compete

Mississippi law disfavors covenants not to compete as restraints of trade and individual freedom.\footnote{Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975 (Miss. 1992); Texas Rd. Boring Co. of La.-Miss. v. Parker, 194 So. 2d 885, 888 (Miss. 1967); Frierson v. Sheppard Bldg. & Supply Co., 154 So. 2d 151, 156 (Miss. 1963).}

Nonetheless, Mississippi courts will enforce them "when reasonable."\footnote{See Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975 (Miss. 1992); Texas Rd. Boring Co. of La.-Miss. v. Parker, 194 So. 2d 885, 888 (Miss. 1967); Frierson v. Sheppard Bldg. & Supply Co., 154 So. 2d 151, 156 (Miss. 1963).}

In \textit{Landry v. Moody Grishman Agency, Inc.}, the parties entered into a written agreement whereby Landry agreed to work solely for Moody Grishman during the term of the agree-

\textbf{Cent. R.R. v. Lancashire Ins. Co., 30 So. 43, 43-44 (Miss. 1901)} ("The common carrier must at all times be ready and willing to contract with the shipper on the terms and conditions imposed by law. If the carrier desire to limit its common-law liability, it can only do so by special contract with the particular shipper, freely and fairly entered into, and upon sufficient consideration.").

\textbf{Empiregas, 599 So. 2d at 975 (citations omitted).}

\textbf{Empiregas, 599 So. 2d at 975 (citations omitted).}

\textbf{Frierson, 154 So. 2d at 156.}

\textbf{181 So. 2d 134 (Miss. 1965).}
ment, in return for which Moody Grishman agreed to compensate Landry with a salary and a share of commissions. The agreement provided that, if either party terminated the agreement prior to its expiration date, or if the agreement was not renewed at the end of the term, then

the Employee agrees as a part of the consideration hereof not to compete with the employer in Harrison, Jackson or Hancock Counties, Mississippi, within a period of five (5) years from the date of termination of the contract, for whatever cause the same may be terminated. This agreement not to compete applies equally to the Employee acting in his own capacity or serving as an agent or Employee of another.

The question was whether the clause "became operative upon the termination of the relationship of employer and employee on September 1, 1964." The court found that it did not:

This contract is plain and unambiguous. The restrictive clause became operative only if (1) the contract was terminated before December 31, 1963, or (2) if the parties did not enter into a contract for further employment (after December 31, 1963). Neither of the contingencies occurred . . . .

Landry was not prohibited from competing with the Grishman Agency under the terms of the contract and the undisputed facts. A restrictive clause in a contract is not favored by the law and the court will not exercise power which the contract itself does not invoke.

18. Contingent Fee Contracts

"Every contingency fee contract has a provision, incorporated by implication if it does not explicitly appear in the text, that permits the client to discharge the attorney at any time with or without cause."

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560 Landry, 181 So. 2d at 135-36.
561 Id. at 137-38.
562 Id. at 139.
563 Id. at 139-40.
564 Estate of Stevens v. Wetzel, No. 96-CA-00343-COA, 1999 WL 58566, at *3
19. Express Warranties

An express warranty that warrants "each and every part" of a product "not only warrants each separate part, but warrants all the parts as a whole." If the express warranty provides the method by which it is to be fulfilled, the warrantor is bound only to that method of performance unless the written warranty is unclear or ambiguous.

In *Ford Motor Co. v. Olive*, the written warranty provided that "defective parts were to be 'replaced or repaired' by the selling dealer at his place of business"

The plaintiff testified that the [selling dealer] did all it could to repair the automobile; that it replaced the defective parts and did everything plaintiff requested it to do; that plaintiff's relations with [the selling dealer] were very cordial.

The burden of proof was upon the plaintiff to show that the warranty was not "fulfilled" by the "selling dealer" by its failure to replace or repair defective parts, unless it was shown that the article sold was incapable of being repaired.

In the instant case the testimony shows that the plaintiff made no attempt to rescind the sales contract, although he returned the automobile to the dealer many times for repair. The dealer repaired the automobile and the manufacturer furnished the parts and paid for the cost of labor. The plaintiff continued to use the automobile until he had driven it 24,000 miles. He returned it then, only when it was being repossessed.

... [C]ontinued use of an automobile for a long period of time after it has been repaired in compliance with the manufacturer's warranty is sufficient to show that the repair was satisfactory to the purchaser.
III. THE ROLE OF EXTRINSIC EVIDENCE IN CONSTRUCTION AND INTERPRETATION

Application of "canons" of construction may provide a court with an objective inference of the parties' intent. But if, at this step in the process, intent remains unascertainable . . . , then the court may resort to a final tier in the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence.\(^{570}\)

As a general rule, when two or more parties have executed an unambiguous, fully integrated, written agreement, extrinsic evidence is not admissible to prove either their intent or the meaning of the terms they used in the writing. However, if the court determines that the agreement is not fully integrated, or that the agreement is ambiguous, then the factfinder is free to consider extrinsic evidence that supplements, but does not contradict, those portions of the written agreement that are final and unambiguous, as well as any extrinsic evidence pertinent to those portions of the agreement that are not final and unambiguous, in order to resolve the ambiguity and determine the terms of the entire agreement—subject, of course, to the rules of evidence. Moreover, certain statutory and common law exceptions permit the factfinder to consider certain extrinsic evidence even though an agreement is fully integrated and unambiguous.

In order to better understand the body of common and statutory law permitting or proscribing the use of extrinsic evidence to construe and interpret written agreements, it helps to distinguish between, on the one hand, extrinsic evidence offered to explain the intent of the contracting parties at the time the contract was executed, and, on the other, extrinsic evidence offered to add to, subtract from, or otherwise modify the terms of a written agreement. The former "interpretive"

\(^{570}\) Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 353 (Miss. 1990).
type of evidence is not subject to the parol evidence rule. The latter “suppletive” type of evidence is subject to the parol evidence rule, and the trier of fact may not consider it until the trial court first finds that a written agreement is either not fully integrated or ambiguous, or both. Naturally, the line between interpretive and suppletive evidence is not nearly as clear in practice as it is in theory.

A. The Common Law Parol Evidence Rule

The essence of the parol evidence rule is that the embodiment of an agreement into a single writing makes all other utterances of the parties on that topic legally immaterial for the purpose of determining what are the terms of the contract.\(^{571}\)

As a general rule, evidence regarding prior or contemporaneous oral agreements or prior written agreements is inadmissible when it is offered to add to, subtract from, vary, or contradict the terms of a fully integrated, unambiguous, written agreement.\(^{572}\) Put another way: “[I]n measuring the rights of the parties to a written contract or conveyance which, on its face, is unambiguous and expresses an agreement complete in

\(^{571}\) Chism v. Omlie, 124 So. 2d 286, 288 (Miss. 1960).

\(^{572}\) See Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281 (Miss. 1983); Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1102 (Miss. 1981); Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965); Fuqua v. Mills, 73 So. 2d 113, 118-19 (Miss. 1954); Allen v. Allen, 168 So. 658, 659 (Miss. 1936); Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 251 (Miss. 1998).

One commentator offers the following “working definition” of the parol evidence rule:

When the parties to an agreement have reduced their agreement to a writing intended by them, or treated by the court, as a final and complete statement of the entire agreement, the writing may not be contradicted, varied, or even supplemented by prior oral or written understandings of the parties. If the parties intended, or the court believes, that the writing was to be merely a final expression of some of the terms of the agreement, the writing may be supplemented but not varied or contradicted by prior oral and written understandings of the parties.

all its essential terms, the writing will control.”

This “venerable, honored, and well-established” rule has been a fixture of Mississippi common law for nearly 180 years. Therefore, any examples of its application must be understood as exactly that—mere examples.

In *Kerr v. Calvit*, the first generally reported Mississippi Supreme Court case considering the application of the parol evidence rule, the dispute centered around a note, in the amount of $2,000, representing one-half the amount to be paid for a certain parcel of land, and a deed warranting that the land to be conveyed was “not more than 240 or 250 acres” and that the consideration for the conveyance was the sum of $4,000. The plaintiff sued for payment of the note; the defendant sought to have the amount due reduced on the ground that the property conveyed was less than the defendant had anticipated. The jury found, in part, for the defendant, and

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573 Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927).
574 Byrd, 171 So. 2d at 867; *see also Gatlin*, 738 So. 2d at 251 (referring to parol evidence rule as “bedrock” rule of Mississippi law).
575 See, e.g., Houser v. Brent Towing Co., 610 So. 2d 363, 365 (Miss. 1992); Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991); Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254, 1257 (Miss. 1991); Ross v. Brasell, 511 So. 2d 492, 495 (Miss. 1987); *Security Mutual Finance*, 439 So. 2d at 1281; Lackey, 397 So. 2d at 1102; Byrd, 171 So. 2d at 867; Fuqua, 73 So. 2d at 118-19; Credit Indus. Co. v. Adams County Lumber & Supply Co., 60 So. 2d 790, 791 (Miss. 1952); Taylor v. C.I.T. Corp., 191 So. 60, 62 (Miss. 1939); Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 917 (Miss. 1938); State Hwy. Dep’t v. Duckworth, 172 So. 148, 150 (Miss. 1937); Welch v. Gant, 138 So. 585, 585-86 (Miss. 1932); Jeffery v. Jeffery, 127 So. 296, 297-98 (Miss. 1930); Stirling v. Logue, 123 So. 825, 827 (Miss. 1929); Edrington, 114 So. at 389; Maas v. Sisters of Mercy of Vicksburg, 99 So. 468, 472 (Miss. 1924); Pole Stock Lumber Co. v. Oakdale Lumber Co., 54 So. 596, 596 (Miss. 1911); Hightower v. Henry, 37 So. 745, 745 (Miss. 1905); Maxwell v. Chamberlin, 23 So. 266, 267 (Miss. 1898); Pine Grove Lumber Co. v. Interstate Lumber Co., 15 So. 105, 106 (Miss. 1894); Kerr v. Kuykendall, 44 Miss. 137, 146 (1870); Wren v. Hoffman, 41 Miss. 616, 619-20 (1868); Thigpen v. Mississippi Cent. R.R., 32 Miss. 347, 353-54 (1856); Kerr v. Calvit, 1 Miss. (Walker) 115, 118 (1822); *Gatlin*, 738 So. 2d at 251.
575 1 Miss. (Walker) 115 (1822).
576 *Kerr*, 1 Miss. at 115-16.
577 *Id.* at 115. Both of these claims—failure of consideration and fraudulent misrepresentation—are legitimate contract defenses, and have been held, in other cases, to be exceptions to the parol evidence rule.
awarded the plaintiff $800.25, instead of the $2,000 stated in the note. The plaintiff appealed.

The only evidence at trial that appeared to support the defendant's position and the jury's finding was the testimony of one James Bouth, "who was a subscribing witness to the deed, but not present at its delivery." Bouth testified that "at the time of signing the deed, he expressed some surprise" that the amount of land being conveyed was "only 250 acres, since he understood the sale to have been for four hundred acres," having lived on the tract for a year, and since Terry, the seller of the land, had told Bouth that the buyer "might get four hundred acres, more or less." Another witness at trial, Fake, was present at the sale, and stated that the quantity represented was 250 acres and the consideration $4,000. Finding Fake's testimony to be more reliable than Bouth's . . . , given Fake's presence at the closing and Bouth's absence, the Mississippi Supreme Court held for the plaintiff:

[All the evidence, which by any construction could imply fraudulent misrepresentations, goes to a period anterior to the deed, and is removed thereby, where the [seller] states the true quantity, and the true price, of which [the defendant] could not but be cognizant; . . . but it is sought to affect the consideration it acknowledges, by a reduction, in consequence of conversations which passed between the parties prior to the consummation of the contract . . . .

. . . . [I]t cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, this has to be considered the evidence of the agreement, and every thing resting in parol becomes thereby extinguished.

. . . . In the absence of fraud, which we consider this case not corrupted with, it will readily be conceded . . . that . . . the consideration for the land sold by [Terry] to Mrs. Covington could not be impeached, by parol evidence, having
In *Southern School Book Depository v. Holmes*, the court considered whether parol evidence could be used to identify the "real parties in interest"—who the party proffering the parol testimony contended differed from the parties named in the written agreement. The court found this to be an impermissible attempt to use parol evidence to contradict an unambiguous writing:

[The defect in counsel's position is that, in order to reach the end sought, he must by such evidence take from the contract the agreement to indemnify Davidson & Wardlaw, a partnership composed of E. A. Davidson and S. W. Wardlaw, and substitute therefor the very different agreement to indemnify the Southern School Book Depository, a partnership composed of Victor R. and Burgess Smith.

If this can be done, then under the guise of identifying the parties in interest, or applying the terms of a contract to the subject-matter thereof, the intention of the parties to a contract can be shown by parol evidence to have been very different from that which appears from the written words thereof. In the case at bar, for instance, it could then, under such guise, be shown that it was not the contract of Steger-Holmes Company, the performance of which was intended to be guaranteed, but the contract of quite another and different party; that, while the penalty of the bond is recited to be $3,000, the real penalty was in fact in a different amount; that, although the contract on its face guarantees the performance by Steger-Holmes Company of a certain contract, the real contract intended to be performed was quite another and different one, etc.]

In *Credit Industrial Co. v. Adams County Lumber & Supply Co.*, the plaintiffs alleged that they were owed payment by the defendant of three notes the plaintiffs purchased from

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583 Id. at 116-18 (quotation omitted).
584 61 So. 698 (Miss. 1913).
585 Id. at 699.
586 60 So. 2d 790 (Miss. 1952).
Carbozite Protective Coatings, Inc., from whom the defendants had purchased roofing materials under the terms of a franchise agreement entered into between the defendants and Carbozite. The defendants sought to introduce testimony to support their defense that they were misled by Carbozite and that the plaintiffs knew or had reason to know of Carbozite's double dealing. The trial court excluded this evidence,
and the Mississippi Supreme Court affirmed:

There was no error in the court's ruling on the plaintiffs' objection to the testimony offered by the defendants to prove that the Carbozite Protective Corporation, Inc., had agreed to send a trained salesman to Natchez equipped with special trucks and machinery designed to demonstrate the proper use and application of the Carbozite waterproof roofing materials, and that the Carbozite Protective Coatings, Inc., had agreed to conduct an intensive national and local sales and advertising campaign to stimulate sales of the Carbozite roofing materials. The trade acceptances sued on in the plaintiffs' declaration were issued in payment of the purchase price of 700 gallons of Carbozite waterproof roofing materials delivered to the defendant partnership under the terms of the written franchise agreement dated January 4, 1950, a copy of which the defendants attached to their answer. The purchase order for the 700 gallons of waterproof roofing materials was incorporated in the agreement. The agreement expressly provided that "Orders are not subject to countermand." And in the agreement it was expressly stated that "It is understood that this contract covers and includes the entire agreement between the parties and any changes binding upon the company must be incorporated in this contract. No warranty or conditions will be recognized unless specified in this contract."

Each of the drafts sued on in this case contained a provision that "the transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer."

The... promises which the defendants' attorney proposed to prove by J. W. Claughton were verbal promises to do certain acts in the future. The offer to prove such promises

the practice of the above mentioned corporations in granting overlapping franchises in the same territory for the sale of their respective products under different trade names, and the misrepresentations made by the Carbozite Protective Coatings, Inc., concerning the advertising campaign and large scale demonstration program which the Carbozite company proposed to conduct for the benefit of their retail dealers, and that the plaintiffs were not bona fide purchasers of the trade acceptances described in the plaintiffs' declaration.

Id. at 792-93.

Id. at 793.
was in effect an offer to vary and add to the terms of the written instruments by parol[] testimony; and the testimony was properly rejected for the reason.\textsuperscript{590}

Finally, in \textit{Houser v. Brent Towing Co.},\textsuperscript{591} Houser, who was injured while in the employ of Brent Towing, settled with Brent Towing and executed a release of liability which provided in part:

\begin{quote}
[F]or and in consideration of the full sum of \textdollar{} 100,000.00 DOLLARS, ... Jimmy Ray Houser and Gladys Vivian Houser do hereby release, and forever discharge Brent Towing Company, Inc., ... from any and all rights, claims, causes of action liens or remedies of whatever kind or nature which he or she now has or hereinafter acquired for damages or expenses arising out of Jimmy Ray Houser's employment and injury with Brent Towing Company, Inc., ... including past or future maintenance, cure or wages, or under any compensation statute, Federal or State, or under any contract or policy of insurance, and whether at law, in equity or in admiralty, an[] whether the same be now known or hereafter discovered.\textsuperscript{592}
\end{quote}

When Houser later sued Brent Towing for unpaid medical bills, Brent Towing moved for summary judgment based on the release.\textsuperscript{593} Houser answered the motion by arguing that despite the language of the written release, the parties had intended that Brent Towing Company would pay, in addition to the sum certain specified in the settlement, all maintenance and medical expenses incurred prior to the payment of the settlement funds. Attached to the response were, \textit{inter alia}, an affidavit by Houser's attorney, the letters referred to above, and the outstanding medical bill for the percutaneous discetomy.\textsuperscript{594}

\textsuperscript{590} \textit{Id.}
\textsuperscript{591} \textit{Id.}, 610 So. 2d 363 (Miss. 1992).
\textsuperscript{592} \textit{Houser}, 610 So. 2d at 364.
\textsuperscript{593} \textit{Id.}
\textsuperscript{594} \textit{Id.} at 364-65.
The trial court granted Brent Towing's motion for summary judgment. The Mississippi Supreme Court affirmed:

The question we must resolve is simple: Can Houser avoid the clear and unconditional language of the written release by introducing extrinsic evidence of a contrary intent? The August 13 release unequivocally discharges any and all "damages or expenses arising out of Jimmy Ray Houser's employment and injury with Brent Towing Company, Inc., . . . including past or future maintenance, cure or wages" in exchange for the $160,000.00 settlement. Houser maintains, however, that the June 11 and July 27 letters demonstrate that he intended to additionally hold Brent Towing Company responsible for the cost of his back surgery if the surgery occurred before Houser received the settlement proceeds.

It is axiomatic that the terms of a clear and unambiguous writing may not be varied by parol evidence. When Houser signed the August 13 release, all prior agreements, including any evidenced by the letters to which Houser refers, were merged into the writing.595

1. The Purpose of the Rule

The "essence" of the parol evidence rule "is that the embodiment of an agreement into a single writing makes all other utterances of the parties on that topic legally immaterial for the purpose of determining what are the terms of the contract."596

Parties to a transaction should be able to clearly express their intent regarding the nature and scope of their legal relationship and be able to rely on the legal certainty of that expression. The purpose of memorializing an agreement is to definitely settle its terms and to exclude all oral understandings to the contrary. In the words of the Fifth Circuit:

Both the parol evidence rule and the doctrine of integration exist so that parties may rely on the enforcement of agreements that have been reduced to writing. If it were not

595 Id. at 365 (citations omitted).
596 Chism v. Omlie, 124 So. 2d 286, 288 (Miss. 1960).
for these established principles, even the most carefully considered written documents could be destroyed by "proof" of other agreements not included in the writing. The importance of these principles is well established . . . in contract law generally. True, [contract] law recognizes a number of exceptions to the parol evidence rule. We believe, however, that these exceptions are carefully and narrowly crafted to permit a court to consider parol evidence only in certain well-defined circumstances. If it were otherwise, the exceptions would become the rule, and the general prohibition against parol evidence would cease to have any legal effect.597

2. The Scope of the Rule

The parol evidence rule applies only to controversies between the parties to the written agreement, the existence of which is the basis for invoking the rule.598 As such, the rule may not be invoked by599 or against600 non-parties to the written agreement.

By its own terms, the parol evidence rule does not bar extrinsic evidence that is offered merely to explain, not to add to, contradict, vary or change, a written agreement.601 Nor does the rule bar extrinsic evidence regarding collateral agree-

598 See Sullivan v. Estate of Eason, 558 So. 2d 830, 832 (Miss. 1990); Smith v. Falke, 474 So. 2d 1044, 1046 (Miss. 1985); National Cash Register Co. v. Webb, 11 So. 2d 205, 205 (Miss. 1942); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 347 (1971) (adopting rule that parol evidence rule is only operative as to parties to written agreement).
599 See, e.g., Falke, 474 So. 2d at 1047; National Cash Register, 11 So. 2d at 205 (both holding that third parties seeking to invoke the rule to their benefit lack privity to and are unintended beneficiaries of contract; and, therefore, cannot invoke rule).
600 See, e.g., Sullivan, 558 So. 2d at 832 (holding that named insured could not exclude evidence of separate agreement between named insured and her co-tenants regarding distribution of insurance proceeds by arguing that the insurance policy clearly and unambiguously provided that proceeds would be paid by insurer to named insured).
601 See infra subpart III.A.2.a.
ments, subsequent oral or written agreements, or writings that are "not contractual in nature."

The rule does not apply in the absence of a written agreement.

a. Explanatory Evidence

Parol evidence is admissible if offered merely to explain a written agreement. Put another way: "Parol evidence is admissible to show the meaning which the parties themselves

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602 See infra subpart III.A.2.b.
603 See infra subpart III.A.2.c.
604 Wilkins v. Bancroft, 193 So. 2d 571, 574 (Miss. 1966) (holding that oral testimony regarding letter did not invoke parol evidence rule because letter was merely proposal and "not contractual in nature").
605 See, e.g., Sloan v. Taylor Mach. Co., 501 So. 2d 409, 410 (Miss. 1987); see also Ludke Elec. Co. v. Vicksburg Towing Co., 127 So. 2d 851, 857 (Miss. 1961) ("Where a case is taken out of the Statute of Frauds, for any reason, parol evidence is properly admissible to prove the terms of the agreement."). The Sloan court stated:

[Where a person is not named in the written contract and parol evidence is necessary to show the existence of the contractual relationship, the contract is unwritten insofar as that person is concerned . . . .

Sloan, 501 So. 2d at 410 (quotation omitted). Moreover,

[i]f parol evidence merely establishes the exact amount of money to be paid or physical specifications of work to be performed, the contract is written, but it is unwritten where the parol evidence establishes the basic existence of an obligation to pay or perform.

Id. at 411.
606 See Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 725 (Miss. 1985); Byrd v. Rees, 171 So. 2d 864; 867 (Miss. 1965); Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 702 (Miss. 1962); Miles v. Miles, 30 So. 2, 3 (Miss. 1901); Shackleford v. Hooker, 54 Miss. 716, 719 (1877); Peacher v. Strauss, 47 Miss. 353, 361-63 (1872); see, e.g., Swinny v. Cities Serv. Oil Co., 197 So. 2d 795, 798 (Miss. 1967) (holding that extrinsic evidence of oral agreement about amount of distributor's commission was not an effort to change or amend parties' written contract, notwithstanding presence of merger and no-oral-modification clause, when written contract contained provision that amount of any commissions owed distributor would be paid "as shall be agreed upon"); Wilkins, 193 So. 2d at 573-74 (holding that oral testimony to explain meaning of notation "Loan on 1/4 int. prop. located at NE corner Delaware & 6th 200 x 125 ft." on memo line of check did not violate parol evidence rule because the notation was ambiguous and the testimony was offered to explain, not contradict, the notation).
attached to words they themselves employed in their own written contract. 607

In the early case of Kerl v. Smith, 608 the issue for the court was the meaning of the word “timber” in the parties’ contract. The plaintiff (Kerl) proffered testimony that “timber” meant “merchantable pine timber.” 609 The trial court excluded the testimony, and the defendant (Smith) prevailed. On appeal, the Mississippi Supreme Court reversed:

It was competent for the plaintiff to show what was meant by the word “timber” in this contract, and it was error for the court to exclude testimony offered for this purpose. The use of the word “timber” in the contract, with nothing to explain in the contract what kind of timber is meant, is not so accurate a designation of what was sold as to preclude investigation as to what was meant by it in this ambiguous contract. It was permissible for plaintiff to show what particular business he was engaged in and known to defendant, and what the common acceptation of the word “timber” meant in that business and at the place where he was conducting it. Such testimony is in no sense contradictory of the terms of the contract, but it is essential to explain its meaning, since the contract itself does not do that. 610

In Byrd v. Rees, 611 the written contract recited, in part:

It is the intention of all parties hereto that the business of the Credit Bureau of Hattiesburg Collection Service shall continue uninterrupted just as though there had been no change of

607 Miles, 30 So. 2, 3 (Miss. 1901). By the same rationale, extrinsic evidence, which might otherwise be excluded by operation of the parol evidence rule, may be admissible to explain or interpret technical terms used in a written agreement. See, e.g., Mississippi State Hwy. Comm’n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205 (Miss. 1979). See generally 4 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 613 (3d ed. 1961), and cases cited therein. “Technical terms and words of art [should be] given their technical meaning when used in a transaction within their technical field.” RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981).

608 51 So. 3 (Miss. 1910).
609 Kerl, 51 So. at 3.
610 Id. at 4.
611 171 So. 2d 864 (Miss. 1965).
ownership and that such operation by the Buyer shall conform in general to the plan of the operation heretofore in effect.612

Examining this language, the court opined:

What then was the “plan of operation heretofore in effect?” The contract itself does not indicate what is meant by “the plan of operation heretofore in effect.” We are of the opinion that parol evidence could be introduced to explain the intention of the parties as to what operation had been in effect.613

In Mississippi State Highway Commission v. Dixie Contractors, Inc.,614 the issue was the admissibility of evidence of agreed meanings and trade usages:

We are of the opinion that much of the interpretative testimony which the highway commission tried unsuccessfully to introduce should have been admitted under the exception to the parol evidence rule which permits clarification of contract ambiguities by testimony showing agreed meanings between the parties or those common to the trade generally.

A course of performance under the first segment, depicted in plan sheet 2-E, could be a material aid in construing the performance to be required under identical pay items on the 11.4-mile segment depicted in the plan sheet. Moreover, any competent evidence of trade usage should have been admitted to clarify, hopefully, the complex and somewhat ambiguous language used by the commission in the technical documents constituting the contract at issue.615

612 Byrd, 171 So. 2d at 868 (emphasis added).
613 Id.
614 375 So. 2d 1202 (Miss. 1979).
615 Dixie Contractors, 375 So. 2d at 1205 (citation omitted).

Addressing the argument that any ambiguity should be construed against the drafter, see supra subpart II.D.1, the Dixie Contractors court held:

Dixie correctly states an abstract rule of law requiring that ambiguities in a written contract be resolved unfavorably to the party who drafted the contract. However, this rule may not be enlarged, as it seems to have been done, to exclude the drafting party’s evidence aimed at clearing the ambiguity by showing reasonable commercial understandings, concerning the meanings of technical terms, arising from usage of trade
b. Evidence of Collateral Agreements

A contemporaneous collateral agreement, though it may affect the rights of the parties under the written contract, may be proven by extrinsic evidence if it is not inconsistent with the integrated contract.616 

In the early case of Green v. Booth,617 the parties entered into two agreements: a written option to purchase certain real property, and an oral agreement regarding the commission to be paid if the holder of the option arranged the sale of the property to someone else rather than buying it himself. The option holder (Booth) arranged the sale of the property and requested his commission from the owner (Green).618 Green refused to pay the commission, and Booth sued Green. At trial Green asked the court to instruct the jury that any oral agreement was inadmissible to vary the terms of the written option contract.619 The court refused, and the jury found for Booth. Green appealed. On appeal, the Mississippi Supreme Court upheld the trial court's refusal of the requested instruction on the ground that the proffered evidence did not violate the parol evidence rule:

The suit of appellee to recover commissions for effecting the sale of the property mentioned in the pleadings is not based on the option contract, wherein appellee is given the right to buy the property for the sum of $6,000 cash, or $6,500, one-half cash and the balance in two equal annual payments, with 8 per cent. interest, but on an oral contract to

or a course of performance.

Id. at 1205-06 (citation omitted).

616 See, e.g., Knight v. McCain, 531 So. 2d 590, 595-96 (Miss. 1988); Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69, 76 (Miss. 1985); Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 702 (Miss. 1962); Chism v. Omlie, 124 So. 2d 286, 288-89 (Miss. 1960); see also supra notes 100, 103-09 and accompanying text for additional discussion of collateral agreements.

617 44 So. 784 (Miss. 1907).

618 Green, 44 So. at 784.

619 Id.
pay 5 per cent. commissions for effecting the sale of the property. These two contracts are wholly independent of each other, and to allow proof of the oral contract to pay 5 per cent. commissions for effecting the sale of the property in no way affects the written option contract; nor does it add to, alter, or in any way vary its terms. The written contract is complete in itself, and gives Mr. Booth the right to buy the property for a certain stipulated price. In establishing the oral contract to pay 5 per cent. commissions for effecting the sale of the property, the rule against the admission of parol testimony to contradict or vary the written instrument is no way invaded, because this is not the effect or object of the testimony.  

In Universal Computer Services, Inc. v. Lyall, the parties had a written employment contract “covering duties of employment, non-competition restrictions, etc., but which did not cover [the employee’s] remuneration.” The employee proffered extrinsic evidence regarding, inter alia, a sales plan and commissions. The employer argued that the evidence should be excluded because it “tend[ed] to prove the existence of an employment agreement in lieu of the employment agreement itself.” The Mississippi Supreme Court disagreed:

[T]he employment contract . . . did not address salary or commission . . . . It therefore follows that the employment agreement is not the entire contract between the parties and therefore the chancellor was correct in admitting other evidence to evince the total agreement . . . .

A collateral agreement must be independent of and collateral to the written agreement and not such that the parties might reasonably expect it to be merged in the final writing. Such an agreement, to be performed after the contract

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620 Id.
621 464 So. 2d 69 (Miss. 1985).
622 Lyall, 464 So. 2d at 71.
623 Id.
624 Id. at 76.
625 Id.
626 Knight v. McCain, 531 So. 2d 590, 596 (Miss. 1988).
is executed, is not merged into the written contract.\(^{627}\)

In *Knight v. McCain*,\(^{628}\) the McCains agreed to purchase from Johnson certain real property on which to build a house. Furthermore,

[b]ased upon information that building permits could not be secured on this particular property, the McCains secured from Johnson an amendment to the contract, or an independent stipulation, that if a building permit could not be obtained their purchase price would be refunded. Since the purpose of buying this property was for residence construction, the inability to secure a building permit eliminates the purpose for which the conveyance was executed.\(^{629}\)

Citing cases from thirty-seven jurisdictions recognizing an exception to the merger doctrine for collateral agreements “to be performed subsequent to the conveyance” (and from three other jurisdictions not recognizing such an exception),\(^{630}\) the *Knight* Court adopted the majority view and held, therefore, that “[t]he independent and collateral agreement was enforceable between the McCains and Johnson.”\(^{631}\)

c. Evidence of Subsequent Agreements

The parol evidence rule does not apply to oral or written agreements made between some or all of the same parties after the parties executed the prior written agreement\(^ {632}\)—provided

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\(^{627}\) Id. at 595.

\(^{628}\) 531 So. 2d 590 (Miss. 1988).

\(^{629}\) *Knight*, 531 So. 2d at 596.

\(^{630}\) See id. at 595 & n.1.

\(^{631}\) Id. at 595.

\(^{632}\) See Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1372 (Miss. 1995); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 576-77 (Miss. 1982); see, e.g., Kelso v. McGowan, 604 So. 2d 726, 731 (Miss. 1992) (“Since the writing whereby Pollack agreed to guarantee the Eastover loan was executed prior to Kelso’s promise to pay an additional $10,000, the parol evidence rule does not apply to the parties’ agreements relating to the Eastover loan.”); Ham v. Cerniglia, 18 So. 577, 578 (Miss. 1895) (“The excluded evidence was offered to show that there was an agreement of the parties, made after the sale of the first items of furniture, . . . by which it was understood between the parties that the payments from time to time were to be entered as credits generally upon the entire account of the pur-
that the subsequent agreement is supported by separate consideration and satisfies the other requisites to be a valid contract. Extrinsic evidence may be admitted to prove a subsequent oral or written agreement "although it may alter or abrogate" the prior written agreement.

In *Iuka Guaranty Bank v. Beard*, the plaintiff (Beard) and her former husband, in November 1982, jointly borrowed $46,512.31 from Iuka Guaranty Bank:

Previous notes to Iuka in the sum of $1,300 and $15,000 were consolidated into the balance of this new note on the advice of Gene Jourdan, a banker at Iuka Guaranty since 1962, who noted that [Mr. Beard] had been having difficulty making payments on previous loans. The Beards signed two deeds of trust as security for the 1982 loan. Both of these deeds of trust contained a "dragnet clause" asserting that the instruments secured not only the principal scheduled debt, but also any other separate or joint indebtedness owed to Iuka by either party.

The deeds of trust covered two lots—"Lot 7," on which the Beards' house stood, and "Lot 44," a vacant parcel in the same development.

In 1985, having been notified by Iuka that it was considering foreclosure, Beard obtained a loan of $38,000 in her own

chaser, and not upon any particular items in any particular purchase. This evidence was admissible. It did not vary or alter the written agreement. Its purpose was to show the whole contract of the parties . . . .

*See Iuka Guaranty Bank, 658 So. 2d at 1372; Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927).*

*See Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 947 (Miss. 1992).*

*See Sammons Communications, Inc. v. Polk, 429 So. 2d 564, 567 (Miss. 1983); see *Iuka Guaranty Bank, 658 So. 2d at 1371-72; Renfroe v. Aswell, 21 So. 2d 812, 813 (Miss. 1945); Lee v. Hawks, 9 So. 828, 828 (Miss. 1891); see also Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 259 (Miss. 1998) (Diaz, J., dissenting). See infra subparts III.B.12.a & III.B.12.d for discussions of the related topics of subsequent oral modification and rescission, respectively.*

*658 So. 2d 1367 (Miss. 1995).*

*Iuka Guar. Bank, 658 So. 2d at 1369.*

*Id.*
name from Fidelity Federal Savings and Loan, giving First Fidelity a deed of trust on Lot 7, and forwarded the entire amount to Iuka in full satisfaction of the outstanding balance on the November 1982 loan.\(^{639}\) The plaintiff testified that before they satisfied the loan, Jourdan assured them that he would immediately cancel the deeds of trust on Lot 7 and Lot 44 upon payment. She claimed that Jourdan repeated his guarantees that they had successfully fulfilled all of their obligations to Iuka necessary to release the two deeds of trust. She testified that Jourdan made no mention of any other debts preventing Iuka from releasing both deeds of trust. Though the Beards paid the entire balance of the loan on August 23, 1985, Jourdan testified that the bank would have been equally content had the Beards merely tendered their overdue payments. Jourdan said he canceled the Lot 7 deed of trust on the day following full payment of the 1982 loan.\(^{640}\)

In 1990, Beard, who had since divorced, received a notice of foreclosure from Iuka on Lot 44.\(^{641}\) Beard wrote Jourdan, requesting that the deed of trust on Lot 44 be released. Jourdan denied the request and carried out the foreclosure.\(^{642}\)

Beard sued Iuka for breach of contract in failing to cancel the deed of trust on Lot 44 and improperly exercising the dragnet clause contained in the deed of trust.\(^{643}\) Beard prevailed at trial. Iuka appealed, arguing that the deed of trust containing the dragnet clause unambiguously entitled Iuka to foreclose on Lot 44 due to Mr. Beard's failure to satisfy debts subject to the dragnet provision.\(^{644}\) The Mississippi Supreme Court affirmed because the evidence [Beard] provided the jury was never contradicted or discredited by the defense. The uncontradicted

\(^{639}\) Id. at 1369-70.
\(^{640}\) Id. at 1370.
\(^{641}\) Id.
\(^{642}\) See id.
\(^{643}\) Id. at 1369.
\(^{644}\) Id. at 1371.
evidence sufficiently demonstrated that if Beard repaid the $46,000 loan extended in 1982, then Iuka would cancel the deed of trust on Lot 7 and Lot 44 . . . .

While there was sufficient evidence demonstrating a subsequent agreement between Iuka and Beard, consideration must exist to make it legally binding on Iuka . . . . Faced with the possible foreclosure of Lot 44, Beard prematurely paid the balance of the $46,512.31 loan to Iuka in full. Regardless of how Beard was able to obtain the funds to pay the entire balance due, we find that the act of prematurely satisfying her debt to Iuka was a legal detriment sufficient to enforce the subsequent agreement which the jury found existed between Nancy and Iuka.645

3. General Application of the Rule

Additionally, parol evidence should be admissible in the following circumstances:

a. Partially Integrated, Unambiguous Agreements

If the writing is not the final and complete agreement of the parties as to one or more terms, parol evidence may be admitted to add to, clarify, explain, or give meaning to the writing646—but only insofar as the evidence does not vary or contradict those terms of the writing that are complete and final.647

645 Id. at 1371-72 (citations omitted).
646 See Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 725 (Miss. 1985); Carter v. Collins, 117 So. 336, 338 (Miss. 1928); see also Walley v. Bay Petroleum Corp., 312 F.2d 540, 543-44 (5th Cir. 1963) (applying Mississippi law) ("The parol evidence rule does not preclude the introduction of evidence showing a prior or contemporaneous agreement if the writing, or writings, constitute only a partial integration of the agreement between the parties. That is, if the writings are but a partial integration of the agreement, the rest of the agreement, or collateral agreements, may be shown through parol." (footnote omitted)).
647 See J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 400 (Miss. 1996); Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989); Carter, 117 So. at 338; see also Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510, 517 (1891) (holding that parol evidence cannot be used to vary one of written terms of partially integrated document where particular term is "complete and perfect on its face, without ambiguity"); Walley v. Bay Petroleum Corp., 312 F.2d 540, 545 n.9 (5th Cir. 1963) (applying Mississippi law) ("Even in situations in which
In *Keppner v. Gulf Shores, Inc.*

the Omelette Shoppe, Inc., Wen Coast-Wendelta, Inc., and Gulf Shores, Inc., owned properties contiguous to one another which properties were located on the west side of U.S. Highway 49 in Gulfport. The Omelette Shoppe, Inc., and Wen Coast-Wendelta, Inc. (Wendy's) each planned to build and operate a fast food restaurant, and Gulf Shores, Inc., planned to build and operate a 150 room motel, restaurant, lounge, swimming pool and related facilities under a franchise from Holiday Inns of America.

The parties were aware that sewage collection and disposal would be required for the operations of their respective facilities, and jointly agreed to build such facility which consisted of collection lines from each of their properties to a lift station with all necessary pumps, electrical circuits and controls, and a discharge line from such lift station to a sewage collection system which had been jointly built by the City of Gulfport and Harrison County in an unincorporated area located north of the city.

The parties also agreed to construct and operate a water main from such system built by Gulfport and Harrison County which would serve each of their properties.

This agreement was incorporated into a document dated November 11, 1979, and provided *inter alia*, that the parties would construct a 4 inch water and force main along with a

the writings are but a partial integration of the agreement, that part of the agreement which is reduced to writing cannot be contradicted by parol.

For example:

If a contract provides in writing for a term of "Ten years from date" but is silent as to salary, the salary could be supplied by parol—but the term for which the salary is to be paid could not be shown to be something inconsistent with the ten years . . . . Although under certain conditions parol evidence may be used to supplement a partially written but unintegrated contract, such testimony cannot disintegrate the unimpeachable portions of the written partial integration. An unintegrated written contract having a positive element or term cannot be negatived by parol proof of a contradictory and inconsistent positive that was existent before the writing was signed.


*Keppner* 462 So. 2d 719 (Miss. 1985).
lift station according to plans drawn by T.L. Reynolds at a cost of $50,425.00. The water was to be separately metered, and all maintenance costs of the system were to be divided equally by the original owners and any subsequent users.649

Sometime after this sewage and water agreement was signed, the Omelette Shoppe went bankrupt.650 The property was eventually purchased by Shular, who owned the Sheraton Inn adjoining the Omelette Shoppe property.651 When a dispute subsequently arose regarding the Sheraton's use of the sewage treatment plant originally shared by Wendy's, Gulf Shore, and the Omelette Shoppe, the trial court permitted Gulf Shore's vice president to testify that the objective of the agreement was to provide a sewage treatment facility which would service two fast-food restaurants and one motel, and that the parties understood that the Holiday Inn would use more capacity than the two restaurants.652

Shular argued on appeal that this evidence was improperly admitted in violation of the parol evidence rule.653 The supreme court disagreed:

The parol evidence rule has no application where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement.

In the case sub judice the agreement between the Omelette Shoppe, Wendy's and Gulf Shores is silent on the subject of the relative use of the sewage treatment system by the parties. Therefore, the admission of testimony regarding the matter does not violate the parol evidence rule.654

In *Fortune Furniture Manufacturing, Inc. v. Pate's Electronic Co.*,655 the written contract between the parties did not specify the time by which the plaintiff (Pate) was to per-

649 Id. at 721.
650 Id.
651 Id.
652 Id. at 725.
653 Id.
654 Id. (citations omitted).
655 356 So. 2d 1176 (Miss. 1978).
form. However, the defendant (Fortune) testified that Pate had orally promised at the time the written agreement was made that he would perform within 30 days. The Mississippi Supreme Court reversed the trial court's ruling prohibiting the jury from considering Fortune's testimony about the oral agreement. The court stated

"[t]he general rule is that what is a reasonable time for performance when there is no time specified in the contract is a question of law for the court. The general rule is that what is a reasonable time for performance when there is no time specified in the contract is a question of law for the court. However, in this case the appellant pled and Sidney Whitlock, its president, testified that at the time he signed Pate's proposal, M. L. Pate told him that the system would be installed within thirty days . . . ."

Since the question whether the written contract was the final and complete expression of the agreement between the parties can be decided only on the basis of the evidence and since the evidence in this case was conflicting, it is clear that a jury issue was presented as to whether Pate had contracted to complete installation of the system within thirty days.

b. Integrated, Ambiguous Agreements

If the fully or partially integrated writing is ambiguous, parol evidence may be admitted to clear up the ambiguity.

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656 Fortune Furniture, 356 So. 2d at 1177.
657 Id.
658 Id. at 1178 (citations omitted).
659 See Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989) ("Where, as here, the writing is ambiguous, courts are obligated to pursue the intent of the parties by resort to parol evidence."); Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) ("Parol evidence as to surrounding circumstances and intent may be brought in where the contract is ambiguous . . . "); Keppner, 462 So. 2d at 725; Baylot v. Habeeb, 147 So. 2d 490, 494 (Miss. 1962) ("Whenever . . . an ambiguity arises . . . parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract.");, modified on other grounds, 149 So. 2d 847 (Miss. 1963); see also IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104, 110 (Miss. 1998); Century 21 Deep South Properties, Ltd. v. Keys, 652 So. 2d 707, 716-17 (Miss. 1995); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984); Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972); Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965).
but may not vary or contradict those integrated terms that are unambiguous. In Traders' Insurance Co. v. E.D. Edwards Post No. 22, G.A.R., the insurance policy included two statements of duration—"for the term of three years" and "from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon." Finding each statement to be "perfectly clear in itself, but . . . mutually inconsistent and contradictory," the Mississippi Supreme Court found that the trial court erred in not permitting the introduction of parol evidence to show which of the two periods named in the policy was the one in contemplation of the parties. Parol evidence is admissible in such a case, not to vary the contract, nor to make a contract for the parties, but to make clear what the contract really was.

In Hattiesburg Plumbing Co. v. A.E. Carmichael & Co., the contract in question called for the provision of an "artesian well." Unable to afford an unambiguous "plain meaning" construction to the term, the Mississippi Supreme Court approved the use of parol evidence:

The primary definition in all the dictionaries of the word "artesian" indicates a well from which the water flows natu-

Indeed, the Mississippi Supreme Court and the Mississippi Court of Appeals have both stated that, upon a finding of ambiguity, the trier of fact must resort to extrinsic evidence. See, e.g., Century 21, 652 So. 2d at 716-17; Barnett, 266 So. 2d at 586; Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

See Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989) (holding that the fact that the parol evidence rule does not bar extrinsic evidence "where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement" means "at most . . . that parol evidence is admissible on those points where there is ambiguity" and, therefore, "[s]uch evidence may not be received to contradict parts of the option that are not ambiguous").

38 So. 779 (Miss. 1905). See supra notes 35-38 and accompanying text for more discussion of this case.

Traders' Ins., 38 So. at 779.

Id.

31 So. 536 (Miss. 1901).

Hattiesburg Plumbing, 31 So. at 536.
rally without artificial pressure; but the secondary definition of this word in the Century and Standard Dictionaries and others seems to indicate that it may be applied, also, to wells from which the water is made to flow by artificial means. The word "artesian," therefore, becomes a term of equivocal significance, standing unexplained in a contract. It was hence competent to introduce parol testimony to show what meaning it had in this particular contract. The court consequently erred in excluding this testimony. It should receive all parol testimony showing what meaning this word "artesian" had, as used by the parties to this contract.\footnote{Id. at 537.}

The Mississippi Supreme Court has repeatedly approved the resort to extrinsic evidence in cases involving latent ambiguity,\footnote{See, e.g., Tinnin v. First United Bank of Miss., 570 So. 2d 1193, 1195 (Miss. 1990); Claughton v. Leavenworth, 37 So. 2d 776, 777-78 (Miss. 1948); Butler v. R.B. Thomas & Co., 116 So. 824, 824-25 (Miss. 1928); Miles v. Miles, 30 So. 2, 3 (Miss. 1901); Hanna v. Renfro, 32 Miss. 125, 129-30 (1856). See supra notes 34, 42-45 and accompanying text for further discussion of "latent" ambiguity.} but has charted a somewhat more winding path on the admissibility of parol evidence to resolve patent ambiguities.\footnote{Compare, e.g., Seal v. Anderson, 108 So. 2d 864, 866-67 (Miss. 1959); Sack v. Gilmer Dry Goods Co., 115 So. 339, 340 (Miss. 1928); Haughton v. Sartor, 15 So. 71, 71 (Miss. 1894) (all holding that patent ambiguity in deed cannot be resolved by parol evidence) with, e.g., Sunnybrook Children's Home, Inc. v. Dahlem, 265 So. 2d 921, 924 (Miss. 1972); Smalley v. Rogers, 100 So. 2d 118, 120 (Miss. 1958) (both holding that parol evidence was admissible to address patent ambiguity in suit to reform ambiguous instrument); Carlisle v. Carlisle's Estate, 252 So. 2d 894, 895-96 (Miss. 1971) (holding that parol evidence was admissible to resolve meaning of "home" in will); Ham v. Cernigilia, 18 So. 577, 578 (Miss. 1895) (holding that parol evidence was admissible to resolve patent ambiguity regarding point at which "lease" payments would terminate and status of title to "leased" goods after payments equaling full value of goods were made). See supra notes 33, 35-41 and accompanying text for further discussion of "patent" ambiguity.}
c. Unintegrated Agreements

If the writing is not the final and complete agreement of the parties as to its terms, the parol evidence rule does not apply.669

4. The Parol Evidence Rule Is a Rule of Substantive Law, Not a Rule of Evidence

The parol evidence rule is "not merely a rule of evidence, but is one of substantive law,"670 which "is foremost a rule that prescribes conditions for the exercise of powers other law confers upon" the parties to the written contract.671 Because the parol evidence rule is a matter of substantive law, a federal court sitting in diversity or another state's court hearing a dispute over a Mississippi contract, will apply the parol evidence rule in accordance with Mississippi law.672

5. Invoking the Parol Evidence Rule

A party may not successfully raise the parol evidence rule for the first time on appeal.673 A party seeking to exclude evidence based on the parol evidence rule must object to its consideration before the trial court enters its judgment.674

669 See Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) ("The parol evidence rule does not become applicable unless there is an integration of the agreement, that is, unless the parties have assented to a certain writing as a [complete and accurate] statement of the agreement between them."); see also Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("Prior and contemporaneous negotiations are merged only into the writings that are adopted by the parties as the final and complete expression of their agreement.").


671 Cooper, 587 So. 2d at 241.

672 See supra note 5.

673 See Service Fire Ins. Co. v. Craft, 67 So. 2d 874, 876 (Miss. 1953); accord Estate of Parker v. Dorchak, 673 So. 2d 1379, 1384 (Miss. 1996).

674 Estate of Parker, 673 So. 2d at 1384. The court explained:
6. Summary Judgment Considerations

The interpretation of a written agreement becomes an issue for the trier of fact only when there remains a genuine uncertainty as to which of two (or more) meanings is proper.\(^6\) If the contract is worded so that it can be given a certain and definite meaning, it is not ambiguous; therefore, a trial court may construe it as a matter of law, "even though the parties disagree regarding the meaning and import of [its] terms."\(^7\) In such a case, summary judgment on the contract is proper, even though the provisions of the contract are "not perfectly clear."\(^8\) On the other hand, when a contract contains an ambiguity, summary judgment is improper because the interpretation of the ambiguous instrument becomes a fact issue.\(^9\)

Given that the Parol Evidence Rule is a rule of substantive law, a party should not lose the right to claim the benefit of said law merely because he failed to make a contemporaneous objection at the time the evidence was offered. We thus hold that, so long as evidence violative of the Parol Evidence Rule is properly objected to prior to the consideration of said evidence by the trier of fact, such evidence should properly be disregarded by said trier of fact in accordance with the law. In the case of a trial by jury, a limiting instruction instructing the jury to disregard said evidence should be granted by the trial judge on proper motion prior to the submission of the case to the jury. In the context of the present case, the objection to the testimony of Dorchak was made prior to the consideration of such testimony by the Chancellor as trier of fact in his Supplemental Opinion and Ruling and was thus timely.

*Id.* But see *Kelso v. McGowan*, 604 So. 2d 726, 730 n.4 (Miss. 1992) (McRae, J.) ("[S]ince the parol evidence rule is substantive, it prevails even in the absence of objection." (quoting—and apparently misapplying—*Edrington*, 114 So. 3d 389)).\(^{67}5\) See supra subpart II.A.3.

\(^{66}7\) See *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985).

\(^{67}7\) *Id.*; see *Smith v. First Fed. Sav. & Loan Ass'n of Grenada*, 460 So. 2d 786, 790 (Miss. 1984).

\(^{67}8\) See *Ellis v. Powe*, 645 So. 2d 947, 952-53 (Miss. 1994) ("[W]here the contract is ambiguous and its meaning uncertain, questions of fact are presented which are to be resolved by the trier of facts after plenary trial on the merits."); *Shelton v. American Ins. Co.*, 507 So. 2d 894, 896 (Miss. 1987) ("[W]here a contract is ambiguous . . . questions of fact are presented . . . and the granting of summary judgment is inappropriate."); *Shaw*, 481 So. 2d at 252 ("[W]e take a dim view of the practice of resolving contract ambiguities via summary judgment."); *Dennis v. Searle*, 457 So. 2d 941, 945-46 (Miss. 1984) ("The interpretation
For example, in Dennis v. Searle, the Mississippi Supreme Court was presented with a contract that provided, in relevant part: "Sale conditioned on... house free of termites based on certificate of pest control concern acceptable to purchaser and termite damage repaired." Reversing the chancery court's summary judgment in favor of the seller of the house, the court reasoned:

There are any number of "ambiguities" in this language. On the one hand, this language may arguably be construed to mean that "house free of termites" is an absolute condition precedent to the obligation of Dennis to purchase the house and that the "certificate of pest control concern" is merely a procedural mechanism for determining when the sale should be closed. On the other hand, it may be argued that the contract means that the acceptance of a termite certificate by Dennis binds him and does not, under the language of the agreement, permit him any relief if he subsequently finds that the information contained in the termite certificate was inaccurate.

Finally, the language in the agreement "termite damage repaired" is susceptible of the construction that the Searles remained obligated to repair any termite damage existing at the time of closing, period. Those three words could reasonably be read as meaning that any termite infestation or damage existing at the time of closing would be the Searles' responsibility, even though not disclosed in the infestation report. It cannot be said that the agreement expressly provides that the damage must be discovered and that Dennis on pain of waiver, must insist upon its repair before closing.

These musings are not intended to suggest the final and

of an unclear contract generally involves questions of fact sufficient so that our summary judgment procedure will be an inappropriate vehicle for final decision."); see also Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986) ("[A] district court may properly grant summary judgment when a contract is unambiguous, but may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact." (citations omitted)) (applying Mississippi law).

679 457 So. 2d 941 (Miss. 1984).
680 Dennis, 457 So. 2d at 945.
authoritative construction of this agreement and language in question. They are presented as undergirding for our conclusion that, as a matter of law, the language employed in the agreement is ambiguous. Having in mind that, on a summary judgment procedure, the evidence must be viewed in the light most favorable to the party against whom the motion has been made, we have merely tried to demonstrate that there are reasonable constructions of the language of the agreement favorable to the Searles. Because of these, we find the document ambiguous and its proper construction to present questions of fact which ought not to have been determined on summary judgment.\footnote{Id. at 945-46.}

In \textit{Taylor Machine Works, Inc. v. Great American Surplus Lines Insurance Co.},\footnote{635 So. 2d 1357 (Miss. 1994).} the question for the court was whether a letter written by a deceased worker's employer (ITS) to the manufacturer of the fork-lift (Taylor) involved in the employee's death, notifying the manufacturer of the accident involving the employee (Dacquisto), constituted a “claim” under the manufacturer's “claims-made” liability insurance.\footnote{Taylor Mach. Works, 635 So. 2d at 1361.} Taylor's policy with its insurer (Great American) defined claim as “a notice received by the insured of an intention to hold the insured responsible for an occurrence involving the insurance provided under this policy, and shall include the service of suit or institution of arbitration proceedings against the insured.”\footnote{Id. at 1359.}

Taylor received ITS's letter on or about December 8, 1986. Dacquisto's heirs did not file suit against Taylor until 1987. When Taylor sought to have Great American treat the Dacquisto claim as having been made in 1986 (Taylor having exhausted its 1987 policy limit on another claim), Great American refused, and Taylor sued.\footnote{Id. at 1359.} Great American moved for and received summary judgment on the grounds that, \textit{inter}

\footnote{Id. at 945-46.}
alia, the December 8, 1996 letter from ITS to Taylor was not a "claim" as defined by the Taylor policy. The Mississippi Supreme Court reversed, finding summary judgment inappropriate under the circumstances:

The question of whether the December 8 letter was a claim or not, following the definition under the contract, was subject to the context in which the letter was written, the intent of the letter writer, the understanding of the parties, etc. Therefore, since this is a vital fact issue, and the parties' evidence is in dispute as to what the letter meant and also as what the policy meant to be a "claim," summary judgment was improper. The trier of fact should determine whether the letter reveals an intention to hold Taylor responsible for the damages.

In Lowery v. Guaranty Bank & Trust Co., the decedent (Lowery)

acquired credit life insurance for a term of 104 days (June 19, 1984 to October 1, 1984) on the $9,000.00 note, and for a term of 244 days (from February 14, 1984 to October 1, 1984) on the $2,000.00 note. The record clearly indicates that the credit life insurance terminated with the maturity date of the notes.

The policy included the following "grace period benefit:"

Grace Period Benefit: In addition to the death benefit for reducing life insurance as provided in the Death Benefit Provision, the Company will pay an additional benefit to the Creditor Beneficiary of an amount, if any, that the unpaid balance of the loan at the date of death exceeds the death benefit, except that the amount of such additional benefit shall not exceed two (2) times the uniform monthly decrease as defined in the Death Benefit Provision. No Grace Period Benefit will be paid if death occurs sixty (60) or more days after the expiration

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686 See id. at 1359-60.
687 Id. at 1361 (citations omitted).
688 592 So. 2d 79 (Miss. 1991).
689 Lowery, 592 So. 2d at 82.
of the term of insurance.

On Level Life Insurance, the Company will pay the death benefit if the Insured Debtor should die within seven (7) days after the expiration of the term of the insurance and the insured loan is unpaid and outstanding as of the date of death.\(^{690}\)

Thus, where the credit life insurance death benefit is "reducing life," the grace period for reducing life insurance is 60 days. If the death occurs within 60 days of the expiration of the insurance, the death benefit will still be paid. The grace period for "level life" is seven (7) days, i.e., the death benefit is paid if the insured debtor dies within seven (7) days of the expiration of the term of the insurance.\(^{691}\)

If the type of credit life coverage on each note had been clear, the trial court might well have been correct in granting summary judgment. Such was not the case:

Assuming that Mr. Lowery owned the "reducing life" form of credit life insurance, then he had 60 days of additional coverage from the expiration of the insurance. Mr. Lowery's death occurred well within that 60 day period and the insurance would pay both notes. However, if he had "level life," the insurance would not cover the notes. Mr. Lowery would have only had a seven day grace period and his death was beyond that period for both notes.

There is no indication from the notes whether the credit life insurance on the Lowery notes was "reducing life" or "level life," so there is no indication as to which grace period applies to Mr. Lowery's death. Treating the insurance as "reducing life" places the Lowerys within the 60 day grace period. Treating it as "level life" excludes the Lowerys . . . .

There is a material issue of whether the Lowerys fit within one of the grace periods, and whether coverage by [Defendant] is available to the Lowerys even after the insurance expired.\(^{692}\)

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\(^{690}\) Id.

\(^{691}\) Lowery, 592 So. 2d at 82.

\(^{692}\) Id. (citation omitted).

The Lowery court passed (twice) on the chance to "stick it" to the defendant
B. Common Law Exceptions to the Parol Evidence Rule

It is always allowable to show that the instrument sued on was never valid, either for fraud or illegality, or want of consideration, or for failure of some condition on which the instrument was to take effect; or that, having been valid, from something occurring subsequently, it has ceased to be operative wholly or partially. It is not admissible to vary the terms of a valid written instrument by parol; but it is allowable to attack the instrument, and seek to overthrow it as never valid or having ceased to be... The former cannot be altered by parol. The latter may be.693

The parol evidence rule is “subject to many exceptions” and “very flexible.”694 The exceptions discussed in this subpart are roughly organized into two groups: (1) exceptions relating to the validity or enforceability of the writing at the time the contract was formed;695 and (2) exceptions relating to the validity or enforceability of the written contract at the time of the alleged breach or at the time declaratory judgment was sought.696

If one or more of the following exceptions applies, the parol evidence rule will not bar the introduction of extrinsic evidence

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insurer. Id. First, the court remarked that “[a]mbiguities in an insurance contract are resolved in favor of the insured” but then declined to so construe the apparent ambiguity in this case as to what kind of grace period benefit Lowery contracted for. Id. Second, the court then noted that it has “in the past held that credit life insurance such as that taken out by the Lowerys may be ‘reducing life’ insurance and the grace period applied” but again declined to so hold in this case. Id. Put them together, and you have to wonder whether the “contra insurer” rule, see supra subpart II.E.4, is weaker than it used to be.

693 Cocke v. Blackbourn, 57 Miss. 689, 691 (1880).
695 See infra subparts III.B.1-.7.
696 See infra subparts III.B.7-.12. (The consideration topics overlap the two categories—thus, II.B.7 is included in both lists).
to explain, expand, or modify the written provisions of an otherwise integrated and unambiguous contract.

1. Fraud

The parol evidence rule does not bar extrinsic evidence that the party offering the evidence was fraudulently induced to enter into the written agreement—even if the agreement states that the parties thereto are relying solely on his or her own knowledge and not on any representations by the other party that are not included in the writing.

Extrinsic evidence may also be admissible to show “fraud of the draftsman”—i.e., that the drafting party fraudulently

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697 See Bank of Shaw v. Posey, 573 So. 2d 1355, 1359 n.3 (Miss. 1990); Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1372 (Miss. 1982); Patten-Worsham Drug Co. v. Planters' Mercantile Co., 38 So. 209, 210 (Miss. 1905); see also Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 525-26 (5th Cir. 1986) (applying Mississippi law). See generally Byrd, 171 So. 2d at 867; Stirling v. Logue, 123 So. 825, 827 (Miss. 1929) (both reciting that, absent fraud, mistake, accident, or other factor sufficient to invalidate contract, parol evidence is not admissible to add to, subtract from, vary or contradict unambiguous, integrated contract). But see McCall Co. v. Parsons-May-Oberschmidt Co., 66 So. 274, 275-76 (Miss. 1914) (finding error in trial court's admission of parol evidence, notwithstanding offering party's argument that evidence was to show that other party fraudulently induced offering party to enter into written contract, on ground that "[t]he same argument can always be made when it is sought to vary a contract by parol on the ground that the parties thereto placed a construction upon it at variance with its plain meaning"). "Fraud vitiates all things, and may be predicated of promises designed to entrap the unwary, and never intended to be kept, as well as of misstatements of existing facts." Patten-Worsham Drug, 38 So. at 210.

698 Brown v. Ohman, 42 So. 2d 209, 213 (Miss. 1949). The Brown court stated

there is an exception to the parol evidence rule in actions of fraud and deceit even though the contract itself recites that each contracting party relies and acts upon his own knowledge and not upon the representations of his adversary, this being for the reason that misrepresentations may induce a party to enter into a contract which contains such a provision.

Brown, 42 So. 2d at 213. But see J.B. Colt Co. v. Harris, 171 So. 695, 697 (Miss. 1937) ("[T]he written contract . . . was based upon the terms of the contract in which appellees plainly stated to the appellant that they were not relying upon any statement or representation which was not contained therein; and the evidence as to the representations . . . was incompetent and should have been excluded by the court.").
omitted some term to which the parties had agreed prior to the execution of the written document—on the theory that "the writing does not evidence the real contract."699:

The fact that a contract is in writing does not preclude the introduction of evidence to show that a material stipulation therein was founded on the misrepresentations and fraud of one of the parties, or inserted by fraud, or that a material stipulation was omitted on account of fraud.

.... [W]hen fraud enters into a transaction to the extent of inducing a written contract, the instrument never becomes a valid contract and hence ... the parol evidence rule is not applicable .... [F]raud cannot be merged; hence, the doctrine that prior negotiations and conveyances leading up to the formation of a written contract are merged therein is not applicable to preclude the admission of parol or extrinsic evidence to prove that a written contract was induced by fraud. The reduction of an agreement to writing is not at all conclusive against fraud in the contract, and the admission of extrinsic evidence which bears clearly upon the existence of fraud sought to be established for the purpose of avoiding the effect of the written agreement—as by rescission, reformation, or the establishment of a trust—or as the basis of a tort action, does not constitute an attempt to vary the terms of the agreement by parol. It was never intended that the parol evidence rule be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his chicanery .... The general rule that parol or extrinsic evidence is admissible to prove that a written contract was procured by fraud applies ... whether the evidence offered relates to fraud in the omission of a material provision or to fraud in the insertion of, or a misrepresentation concerning, a certain term in the instrument, or whether the evidence offered directly contradicts the writing or merely covers a point not referred to in the writing, and in spite of special provisions in the contract which purport to

699 Sistrunk v. Wilson, 54 So. 89, 89 (Miss. 1911).
limit the application of parol evidence by stating that the writing contains all the terms involved and the representations made, or that the written contract shall be the sole evidence of the transaction, or that each contracting party relies and acts only upon his own knowledge, and not upon the representations of his adversary.\textsuperscript{700}

Indeed,

[\textit{it} is practically a universal rule that in suits to reform written instruments on the ground of fraud . . . , parol evidence is admissible to establish the fact of fraud . . . and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had . . . If this were not so, a rule adopted by the courts as a protection against fraud and false swearing would, as has been said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent. Evidence of fraud . . . is seldom found in the instrument itself, and unless parol evidence may be admitted for the purpose of procuring its reformation, the aggrieved party would have as little hope of redress . . . \textsuperscript{701}]

\textsuperscript{700} Brown, 42 So. 2d at 212-13; see also McArthur v. Fillingame, 186 So. 828, 829 (Miss. 1939) ("Parol evidence may be admitted to avoid a contract in toto, as for fraud and the like, at the time of the execution thereof, but not to vary its terms so that it may stand in part as written, and go down as to other parts."); Howie Bros. v. Walter Pratt & Co., 35 So. 216, 217 (Miss. 1903) ("[P]arol evidence may be admitted to show that the instrument is altogether void, or that it never had any legal existence or binding force, . . . by reason of fraud . . . . This qualification of the rule applies to all contracts.' . . . It is one thing to attempt to vary, alter, or contradict the terms of a written contract once validly executed, and quite a different thing to show that the contract offered never had any legal existence, because its execution was procured by fraud." (quoting Wren v. Hoffman, 41 Miss. 616, 620 (1868)); Grayson v. Brooks, 1 So. 482, 483 (Miss. 1887) ("Where the parties have reduced their agreements to writing, it is not admissible to show another contract than that evidenced by the writing. But where, by the fraud of one or both of the parties, the true contract is not shown by the writing, and is not intended to be so shown, the principle invoked has no application."). See generally Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (reciting that parol evidence may be used to show written contract's validity is impaired by, \textit{inter alia}, fraud).

\textsuperscript{701} Smalley v. Rogers, 100 So. 2d 118, 119-20 (Miss. 1958), quoted with ap-
In *State Highway Commission v. Powell*, an agent of the Commission was dispatched to negotiate a right-of-way across the plaintiffs' land. On assurances from the agent that the Commission would provide an underpass through which the plaintiffs' livestock could go to and from the pasture and the water supply, and by means of which the plaintiffs could have access to and from the field, the plaintiffs agreed. The Commission, in fact, only provided drainage under the new highway, and the plaintiffs sued to rescind the contract. Despite the fact that the written agreement between the plaintiffs and the Commission said nothing about the Commission building an underpass sufficient to permit the plaintiffs and their livestock to pass under the road, the plaintiffs prevailed both at trial and before the supreme court on the strength of their testimony regarding the agent's oral misrepresentations.

The chancellor found from the testimony that this assurance given them by the agent amounted to a representation of an existing fact, and not merely a promise to do something in the future; that except for the representation that the State Highway Commission had already planned to provide such an underpass the deed of conveyance here involved would not have been executed for the consideration of $325 paid therefor; and that since the Highway Commission had not planned to provide the underpass, but had planned to install and did in fact install, only a 3 x 3 foot culvert in the hollow underneath the proposed highway, the appellees were entitled to a cancellation of the deed upon the return of the consideration paid on the ground that there had been a false and fraudulent representation as to an alleged existing fact in regard to what the Commission had planned to do in that behalf.

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703 185 So. 589 (Miss. 1939).
704 *Powell*, 185 So. at 589.
705 See id.
706 Id.
707 Id. at 591.
The agent who procured the execution of the conveyance denied having made the representation, but several witnesses having testified to the contrary, and the chancellor having found in favor of appellees on such conflict in the testimony, we must assume that the deed was procured under the circumstances hereinbefore mentioned. The parol evidence was admissible, since it did not vary, alter or contradict a valid written instrument, but showed that there was no valid contract at all by reason of the fraud alleged to have been perpetrated.\textsuperscript{707}

A party seeking to prove either variety of fraud (i.e. fraudulent inducement or "fraud of the draftsman") must do so by clear and convincing evidence.\textsuperscript{708}

2. Negligent Misrepresentation

By the same rationale, parol evidence should also be admissible to show that the offering party was induced to enter into the contract by some material misrepresentation, even if that misrepresentation did not rise to the level of fraud.\textsuperscript{709}

3. Duress or Undue Influence

Parol evidence may be admitted to establish that a facially integrated and unambiguous written agreement was formed as

\textsuperscript{707} Id. at 589-90; see also Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 918 (Miss. 1938) ("[I]f the writing is procured by false representations, or fraud, committed by one of the parties to the writing on the other, on which he might reasonably rely, the court will permit the facts to be shown, and if fraud was committed in the procurement of the contract, it will be avoided; in other words, no contract exists in legal contemplation which is procured by fraud.").

\textsuperscript{708} See, e.g., Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982); Bethea v. Mullins, 85 So. 2d 452, 456 (Miss. 1956); Pearce v. Pierce, 58 So. 2d 824, 825 (Miss. 1952); Grenada Auto Co. v. Waldrop, 195 So. 491, 492-93 (Miss. 1940). See generally Foster v. Wright, 127 So. 2d 873, 875 (Miss. 1961) ("It is a well-settled doctrine that in all cases the presumption of evidence is in favor of honesty.").

\textsuperscript{709} See Nichols v. Shelter Life Ins. Co., 923 F.2d 1158, 1163 (5th Cir. 1991) (applying Mississippi law); see, e.g., Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1181-82 (Miss. 1990); Scott v. Transport Indem. Co., 513 So. 2d 889, 895-96 (Miss. 1987).
a result of duress or undue influence.\textsuperscript{710}

4. Mutual Mistake

The parol evidence rule does not bar extrinsic proof of mistake.\textsuperscript{711} As with fraud,\textsuperscript{712}

"It is practically a universal rule that in suits to reform written instruments on the ground of . . . mistake, parol evidence is admissible to establish the fact of . . . a mistake and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had . . . . Evidence of . . . mistake is seldom found in the instrument itself, and unless parol evidence may be admitted for the purpose of procuring its reformation, the aggrieved party would have as little hope

\textsuperscript{710} See Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (discussing duress); see also Sheehan v. Kearney, 21 So. 41, 42 (Miss. 1896) (holding that, in absence of undue influence or other issue of "testamentary capacity being involved, . . . parol evidence is not competent to vary, enlarge, or contradict the will"). See generally Hitz v. Jenks, 123 U.S. 297, 305-06 (1887) (holding that, absent fraud or duress, extrinsic evidence was incompetent to impeach written, signed agreement); F.R. Hoar & Sons, Inc. v. McElroy Plumbing & Heating Co., 680 F.2d 1115, 1117 (5th Cir. 1982) ("[I]t may be shown by parol evidence . . . that the proffered instrument was not the complete contract, or that its validity was impaired by . . . duress . . . .") (applying Mississippi law).

\textsuperscript{711} See Bedford v. Kravis, 622 So. 2d 291, 295-96 (Miss. 1993); Holliman v. Charles L. Cherry & Assoc.s., Inc., 569 So. 2d 1139, 1145-46 (Miss. 1990); Penfield v. Cook, 355 So. 2d 1104, 1105 (Miss. 1978); Brimm v. McGee, 80 So. 379, 380-81 (Miss. 1919); see also, e.g., F.R. Hoar & Sons, 680 F.2d at 1115-17 (finding that parol evidence rule did not bar evidence of mistake). See generally Broome Construction, 229 So. 2d at 547 (reciting that parol evidence may be used to show that written contract's validity is impaired by, inter alia, mistake).

Mutual mistake occurs when both (or all) parties to an agreement have contracted under a misconception about or ignorance of a material fact. See Greer v. Higgins, 338 So. 2d 1233, 1236 (Miss. 1976). "The mistake may apply to the nature of the contract, the identity of the person with whom it is made, or the identity or existence of the subject matter; but in order to relieve a party from liability on the contract, the mistake must relate to a material fact, past or present." Id. To qualify as an exception to the parol evidence rule, the mistake must be mutual. See Restatement (Second) of Contracts §§ 152, 155 (1981). But see F.R. Hoar & Sons, 680 F.2d at 1115-17 (finding that the parol evidence rule did not bar evidence of unilateral mistake).

\textsuperscript{712} See supra subpart III.B.1.
of redress . . . .

"Generally, it may be said that any testimony which tends to prove the mistake alleged or the intention of the parties is admissible. A witness in a position to know may testify concerning the intention of the parties to an agreement, to the same effect as to any other fact."\(^7\)\(^13\)

That said, parol testimony to reform a writing on the basis of mistake "must be received with 'great caution and distrust.'"\(^7\)\(^14\) Mistake must be proven beyond a reasonable doubt.\(^7\)\(^15\) The Mississippi Supreme Court has stated that "it is better that a doubtful written instrument should stand[ ] than that a doubtful provision should be substituted by parol testimony."\(^7\)\(^16\)

5. Illegal Provisions or Agreements

Parol evidence is admissible to show that part or all of an otherwise integrated, unambiguous contract is, or was entered into in a manner that is, contrary to law, public policy, or public morals.\(^7\)\(^17\)

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\(^7\)\(^13\) Smalley v. Rogers, 100 So. 2d 118, 119-20 (Miss. 1958) (quoting 45 AM. JUR. Reformation of Instruments § 113), quoted with approval in Bedford, 622 So. 2d at 294.

\(^7\)\(^14\) Watson v. Owen, 107 So. 865, 866 (Miss. 1926); accord Frierson v. Sheppard, 29 So. 2d 726, 727 (Miss. 1947).

\(^7\)\(^15\) See Penfield v. Cook, 355 So. 2d 1104, 1106 (Miss. 1978); Sunnybrook Children's Home, Inc. v. Dahlem, 265 So. 2d 921, 925 (Miss. 1972); Brown v. King, 58 So. 2d 922 (Miss. 1952); Frierson, 29 So. 2d at 727.

\(^7\)\(^16\) Harrington v. Harrington, 3 Miss. (2 Howard) 701, 718 (1838), quoted with approval in Frierson, 29 So. 2d at 727, and Progressive Bank of Summit v. McGehee, 107 So. 876, 877 (Miss. 1926); see also Jones v. Jones, 41 So. 373, 373 (Miss. 1906) (stating that evidence to warrant reformation of written instrument must sustain allegation of mutual mistake "practically to the exclusion of every other reasonable hypothesis"); St. Paul Fire & Marine Ins. Co. v. McQuaid, 75 So. 255, 257 (Miss. 1917) (same). See generally Lauderdale v. Hallock, 15 Miss. (7 S. & M.) 622, 629 (1846) (stating that parol evidence to explain or vary terms of writing must be received with "great caution and distrust").

\(^7\)\(^17\) Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969); see, e.g., Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 31 (Miss. 1971) ("In cases involving usury, parol evidence is admissible to show that writings are not what they seem and to establish the true facts with respect to the transaction. In such cases it may be shown by parol that a docu-
In *Merchants Bank & Trust Co. v. Walker*, Walker gave the Bank a note in the amount of $450. Walker argued that the note, given for a balance due on a former note given by him to the Bank in payment for five shares of the Bank's corporate stock, was unenforceable as against statute. The Bank, on the other hand, argued that Walker gave the Bank the (second) note in exchange for a loan by the Bank to enable Walker to purchase five shares of the Bank's capital stock. Apparently, the note itself did not describe the obligation for which it was given. Therefore, the trial court permitted Walker to present evidence of the note's illegal purpose, and Walker ultimately prevailed at trial. On appeal, the Mississippi Supreme Court considered whether the trial court had properly allowed the evidence:

Whether the note . . . was given to the appellant in payment for shares of its corporate stock was submitted to the jury which found on ample evidence therefor that it was so given . . . .

There was no error in admitting the appellee's evidence which contradicted the statement in his letter to the appellant that he was making a loan with the appellant in order to complete the purchase of the five shares of stock. This letter is not a contract but at most constitutes a mere admission of a fact and even if it were a contract the evidence does not simply contradict it but if true discloses that it was made in furtherance of an object forbidden by law.
In *Mitchell v. Campbell*, the court held that parol evidence was admissible to prove that a lease was entered into with the intent to carry on an illegal business—namely, a brothel and bar:

[If a landlord knowingly leases his property to be used for the purposes of prostitution, he cannot recover for rents which a tenant has agreed to pay. The whole contract is against public policy, an offense against morality, and absolutely void . . . .

If the contract is in writing, parol evidence is admissible to expose its immoral and unlawful character.

6. Non-Existente, or "Sham," Contracts

Parol evidence is admissible to show that a valid contract never, in fact, existed between the purported contracting parties, or that, despite the existence of a written instrument purporting on its face to be a contract, the parties never intended to perform it, or that the purported contract is a "sham" agreement.

722 72 So. 231 (Miss. 1916).

723 *Mitchell*, 72 So. at 232-33 (citations omitted); accord *Lavecchia v. Tillman*, 76 So. 266, 266 (Miss. 1917). The *Mitchell* court stated that courts will not lend their aid in enforcing illegal contracts. The door of the court is and must always be open to litigants having substantial rights to be enforced or wrongs to be redressed, and in searching for truth and justice much perjury, filth, and crime are often necessarily exposed. The law, however, is always on the side of morality. Courts are founded to execute the laws, and not to sanction or assist in their violation. As well said by Johnson, J., in *Bank v. Owens*, "No court of justice can in its nature be made the handmaid of iniquity."

*Mitchell*, 72 So. at 233 (citation omitted) (quoting *Bank of U.S. v. Owens*, 27 U.S. (2 Pet.) 527, 538 (1829)).

724 See, e.g., *Clow Corp. v. J.D. Mullican, Inc.*, 356 So. 2d 579, 583 (Miss. 1978) (holding that parol evidence was properly admitted to address whether an individual who purported to execute an otherwise unambiguous written contract on behalf of corporate defendant had actual or apparent authority to do so); *Lewis v. Lewis*, 129 So. 2d 353, 358 (Miss. 1961) ("When the validity of an instrument of this kind is questioned, . . . evidence which tends to prove or disprove [its] existence . . . should be admitted; and many courts have held that the declarations of the testator that he had made a will and that he kept it in a certain place are admissible, at least to corroborate evidence of the existence or
7. Evidence Pertinent to Consideration

a. Lack of or Failure of Consideration

Parol evidence is admissible to show want or failure of consideration\(^{725}\):

The rule of exclusion does not apply to evidence of failure of consideration . . . . [I]t is allowable to show by parol that the writing never had validity, or, that having had a legal existence, it has for some reason ceased to be operative.\(^{726}\)

\(^{725}\)See, e.g., In re Will of Johnson, 351 So. 2d 1339, 1341 (Miss. 1977); Merchants' & Farmers' Bank v. Smith, 64 So. 970, 971 (Miss. 1914); Cocke v. Blackbourn, 57 Miss. 689, 691 (1880); see also Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (reciting that parol evidence may be used to show that written contract's validity is impaired by, inter alia, lack of or failure of consideration). See generally C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 530 (Miss. 1988) ("The general rule is that consideration for a contract need not appear on the face of the instrument, but may be proved by extrinsic evidence.").

\(^{726}\)Meyer v. Casey, 57 Miss. 615, 617 (1880). Furthermore,

where a written agreement requires consideration and none is stated in the writing, a finding that the writing is a completely integrated agreement would mean that it is not binding for want of consideration. Since only a binding integrated agreement brings the parol evidence rule into operation, evidence is admissible to show that there was consideration and what it was.

Restatement (Second) of Contracts § 218 cmt. d, at 145 (1981); see also id.
In *In re Will of Johnson*, the appellant (wife) testified that the only "consideration" she received for agreeing not to renounce her husband's will was the provision in her husband's will that she was to have a life estate in the homestead property, which, she claimed, was no consideration, as she was entitled to a life estate in the homestead as a matter of law. The court stated that

[t]he appellee m[et] this by contending that since the contract recited that there were other considerations besides the life estate devised to the widow that the appellant could not show by parol evidence that there was in fact no other consideration and that the appellant is bound by the recitation in the contract. However, that rule of exclusion does not apply to evidence of failure of consideration. In the case of *Meyer v. Casey*, this Court addressed itself to that point:

The consideration [for] the bill of sale of the cotton wholly failed as to Casey. The written instrument recites a consideration, and it is claimed that it is not allowable to contradict the writing in this respect. The rule of exclusion does not apply to evidence of failure of consideration. It is not admissible to vary by parol the terms of a valid written instrument. If it has a valid existence, it must stand as the sole expositor of the terms of the contract it evidences; but it is allowable to show by parol that the writing never had validity, or, that having had a legal existence, it has for some reason ceased to be operative.

We therefore hold that the chancellor properly admitted parol evidence to show that there was in fact no consideration other than the devise to the widow of a life estate in the

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§ 218(2) ("[Extrinsic e]vidence is admissible to prove whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement.").

727 351 So. 2d 1339 (Miss. 1977).

728 *Will of Johnson*, 351 So. 2d at 1340-41.

729 See id. at 1341 (citing MISS. CODE ANN. § 91-1-23 (1972)).

730 57 Miss. 615 (1880).
homestead.\textsuperscript{731}

\textit{b. True Consideration}

Parol evidence may also establish the real consideration given for a written agreement where that real consideration is different from what is recited in the agreement,\textsuperscript{732} where the

\begin{footnotesize}
\textsuperscript{731} Will of Johnson, 351 So. 2d at 1341 (quoting Meyer, 57 Miss. at 617).

\textsuperscript{732} The Mississippi Supreme Court has explained that

\begin{quote}
[t]he terms of an obligation, assumed to be valid, cannot be varied by parol; but it may be shown by parol what caused the party to thus oblige himself. That consists with the written obligation, and does not vary it. The right to show the real consideration is a qualification of the general rule of the admissibility of parol evidence to alter the terms of a written contract, and is as well established as the rule itself. What I bind myself by writing to do cannot be varied by parol; but I may always show by parol what induced me to thus bind myself . . . .
\end{quote}

Cocke v. Blackbourn, 57 Miss. 689, 691-92 (1880) (citation omitted); see, e.g., Raleigh State Bank v. Williams, 117 So. 365, 367 (Miss. 1928) (holding that seller was entitled to present extrinsic evidence that true consideration for sale of property was $5,850, even though written conveyance of the lands recited a consideration of only $3,500 "cash in hand," because "the true consideration for the conveyance may be shown by parol. The principle that parol evidence is not admissible to vary the terms of a written contract has no application to the consideration recited in a contract."); Campbell v. Davis, 47 So. 546, 546 (Miss. 1908) (holding that parol evidence that the $700 due stated in writing was actually only $200 was admissible). See generally \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 218 cmt. e, at 145 ("Where consideration is required, the requirement is not satisfied by a false recital of consideration . . . . An incorrect statement of a consideration does not prevent proof either that there was no consideration or that there was a consideration different from that stated."). \textit{But see} Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974) (holding that trial court improperly considered testimony that insurance check, not mentioned in parties' written contract, was part of the consideration for deal because "the evidence offered would show a different consideration from that expressed in the writing."); Thompson v. Bryant, 21 So. 655, 656 (Miss. 1897) ("[A] consideration recited or admitted merely as a fact may be varied by parol, while the terms of a contract may not be, and that, where a stipulation as to the consideration becomes contractual, it, like any other written contract, is the exclusive evidence, and cannot be varied by parol."); Baum v. Lynn, 18 So. 428, 430 (Miss. 1895) (same). As one court wrote,

\begin{quote}
ordinarily parol evidence is admissible to explain, or even contradict, a written contract as to the \textit{mere consideration}; but, when the consideration is \textit{contractual}, parol evidence is no more admissible to vary that than it is any other part of the written instrument . . . . [A] consideration, recited in a written contract merely as a fact, may be varied by parol evidence; but, when the stipulation of the writing concerning the
agreement fails to recite the consideration at all,\textsuperscript{733} or where consideration is \textit{contractual}, it cannot be so varied. The terms of the contract are the propositions stated and accepted by the parties, and when these are reduced to writing the writing settles the contract and binds the parties, and it is not competent afterwards for one of them to show by parol evidence that the written contract does not express the real agreement. So to do would be in the very teeth of the rule prohibiting the variance or contradiction of a written contract by parol. The very object of the parties in reducing the contract to writing is that it shall no longer be subject to oral disputation.

\textit{Dodge v. Cutrer}, 58 So. 208 (Miss. 1912) (emphasis added).

The court in \textit{Thompson v. Bryant}, found that extrinsic evidence of consideration was incompetent to prove the "real consideration" for the agreement between the parties:

The terms of the contract are embodied in the note and bill of sale, and the contract they disclose shows what each of the parties finally agreed and contracted to do, and what they did, in relation to the transaction. Thompson sold and warranted his half interest in stock of goods, merchandise, etc., in the business of Buford & Thompson, to J. O. Bryant, and Bryant paid him $1,200 in cash, and gave him his note for $500, payable in 90 days. It is clear that the consideration is contractual, and is not a mere fact recited or admitted in the written contract. It cannot be said that the proffered testimony would not contradict, alter, add to, or vary the terms of the contract, but only a mere fact recited or admitted in the contract. To permit appellant to show that Bryant assumed his part of the debts of Buford & Thompson at the time he executed his note to appellant would most certainly import a new element into the contract. The testimony was properly excluded.

\textit{Thompson}, 21 So. at 656.

\textsuperscript{733} See \textit{Sunflower Bank v. Pitts}, 66 So. 810, 812 (Miss. 1914) ("The parol evidence introduced does not vary the express terms of the contract, for the simple reason that the contract does not recite any consideration. If no consideration is expressed in a written contract, the real consideration may be shown."); see, \textit{e.g.}, \textit{Boatright v. Horton}, 86 So. 2d 864, 867-68 (Miss. 1956).

In \textit{Walley v. Bay Petroleum Corp.}, 312 F.2d 540 (5th Cir. 1963), the defendants sought to introduce evidence tending to show that appellant's guaranty was made in reliance upon appellee's promise to sell refined petroleum products to Walco on terms competitive with the independent field. Appellant (and his son) contended that the appellee failed so to price its products, and that such failure, which constituted a breach of appellee's promise, was the cause of the Walleys' breach, if any. The trial judge excluded that evidence on the basis of the parol evidence rule.

\textit{Walley}, 312 F.2d. at 543 (applying Mississippi law). The Fifth Circuit held that the trial court had erroneously excluded the evidence, and remanded the case for a new trial:
the agreement describes some form of consideration and adds "and other valuable consideration," or words to that effect.\textsuperscript{734}

The Mississippi Supreme Court stated nearly 120 years ago:

We consider it well settled that the real consideration of a [contract] may be shown by parol, what ever may be the statement of the [contract] as to the consideration. If this were not so, all inquiry could be shut out by the easy process of stating the consideration in every [contract] to be gold coin or other equally unassailable consideration, and then the defence of illegality, or want or failure of consideration would be unknown, to the great relief of courts, but at the expense

In essence, the evidence offered, and rejected, went to show that, in addition to the recitation of consideration received, contained in the notes, there was promissory consideration to the appellant, namely, appellee's promise to sell the products to Walco on competitive terms. The only written consideration for appellant's promise of guaranty is the recital in the notes, "for value received." Of course, that recitation, being only the recital of a fact, could be contradicted in parol because, not being promissory, the recital is not part of the agreement . . . . On a new trial, therefore, any evidence offered by appellant to show the existence of a collateral promise by appellee to sell its products to Walco on a competitive basis, is to be admitted . . . . Of course, it will be for the jury to determine whether the appellee did, in fact, make the promises as alleged by appellant.

\textit{Id.} at 544-45 (footnotes omitted).

\textsuperscript{734} See, e.g., Management, Inc. v. Crosby, 197 So. 2d 247, 251 (Miss. 1967) ("consideration of ten dollars, and other good and valuable consideration"); Morehead v. Morehead, 75 So. 2d 453, 456 (Miss. 1954) ("$500, and other valuable considerations"); Haden v. Sims, 150 So. 210, 210 (Miss. 1933) ("$1 and other considerations"); Blum v. Planters' Bank & Trust Co., 135 So. 353, 355 (Miss. 1931) ("$10 and other consideration, good and valuable"). The mere presence of a phrase to the effect of "other valuable considerations" will not necessarily open the door to extrinsic evidence if it is followed by some qualifier that would, standing alone, constitute "other valuable consideration." See, e.g., Rogers v. Rogers, 43 So. 434, 434-35 (Miss. 1907) (prohibiting extrinsic evidence where conveyance described consideration as "$1 and other valuable consideration, that J.T. Rogers shall look after my welfare and business when so required to do"); State Hwy. Dep't v. Duckworth, 172 So. 148, 149-50 (Miss. 1937) (holding that extrinsic evidence was not invited by including "and other valuable consideration" in the deed when deed proceeded to recite that "[t]he consideration herein stated includes all damage to fences, property and the like, and the rebuilding of fences caused by the construction of said highway").
of justice between the parties litigant.\textsuperscript{735}

8. Scrivener’s Error

Extrinsic evidence may be admissible to show the existence of a clerical error or omission in a written instrument.\textsuperscript{736}

In \textit{Traders’ Insurance Co. v. E.D. Edwards Post No. 22, G.A.R.},\textsuperscript{737}

[t]he time for which appellant undertook to insure the society hall of appellee and its furniture and paraphernalia is fixed in the policy as being “for the term of three years from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon.”\textsuperscript{738}

The court found that the trial court had erred in failing to admit oral testimony to clear up the internal conflict on the face of the policy:

This attempted statement of the time for the duration of the contract involves two descriptions, each of which is perfectly clear in itself, but which are mutually inconsistent and contradictory. It is a palpable case of equivocation in description, induced, doubtless, by clerical misprision. The court erred in not permitting the introduction of parol evidence to show which of the two periods named in the policy was the one in contemplation of the parties. Parol evidence is admissible in such a case, not to vary the contract, nor to make a contract for the parties, but to make clear what the contract really was.\textsuperscript{739}

\textsuperscript{735} Cocke v. Blackburn, 57 Miss. 689, 691 (1880).
\textsuperscript{736} See Robinson v. Martel Enters., Inc., 337 So. 2d 698, 701 (Miss. 1976) (“A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein, which can be corrected by perusing the whole instrument. If an improper word has been used or a word omitted, the court will strike out the improper word or supply the omitted word if from the context it can ascertain what word should have been used.”); see, e.g., Webb v. Mobile & Ohio R.R., 62 So. 168, 168 (Miss. 1913) (holding parol evidence admissible to correct date from “1906” to “1907”).
\textsuperscript{737} 38 So. 779 (Miss. 1905).
\textsuperscript{738} \textit{Traders’ Ins.}, 38 So. at 779.
\textsuperscript{739} \textit{Id.; see also, e.g.}, Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972) (holding that parol evidence was admissible to show that “through a
If the intention of the parties is obvious from the contract, despite the scrivener's error, a court "may strike an improper word or clerical error or include an inadvertent omission so long as the court understands what words should have been used."

In *Newell v. Hinton*, the court was faced with a property settlement agreement entered into between the parties addressing the disposition of and responsibility for payments on a "1984 Ford Mustang," despite the fact that Hinton and Newell traded their 1984 Ford Mustang for a 1985 Ford Mustang on June 28, 1985—roughly six weeks before they signed the property settlement agreement. The *Newell* court explained:

On the other hand, however, when the judgment was executed, there remained some forty-four monthly payments for the 1985 Mustang. Indeed if the parties were contracting the obligations concerning the 1984 Mustang, then they would have failed completely to address the payments of the new car. If they had failed to address this concern, then the obvious question would be: who would be responsible for paying the notes on the 1985 Mustang? Consequently, it is obvious the parties were not referring to the 1984 Mustang when they drafted and executed the property settlement agreement.

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... Newell concedes that the parties did trade in their 1984 Mustang for a 1985 Mustang ...

Newell maintains, however, that she and Hinton reached an agreement as to the division of property and delegation of debts, that they spoke with their attorney and provided him with lists for his use in drawing up the property settlement agreement, and that they did this prior to the time they traded the 1984 Mustang. Newell further claims that she never agreed to be solely responsible for the lease on the new car.
and that Hinton agreed to help her with the lease. Because Hinton did not assist her, Newell had to let the car go back to Ford because she could not handle the payments alone. Newell's defense can be summed up in one sentence: "I only agreed to be responsible for the payments on the 1984 Mustang, not the 1985 Mustang." With this in mind the focus once again is turned to the 1985 Mustang.

.... The property settlement agreement has become a part of the final divorce decree for all legal intents and purposes. When ambiguities, such as the one involved in this case, are discovered the agreement should be construed "much as is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses [words or numbers] harmonious in light of that intent." It could not have been the intent of the parties to enter a contract involving a car they no longer owned.743

9. Lost or Destroyed Contract

If a written and signed contract is lost or destroyed, such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the party must prove its execution, terms, and loss or destruction, and may do so by parol evidence.744

In Bolden v. Gatewood,745 Gatewood and Bolden were equal partners in the Marshall County Equipment Company. Prior to Gatewood's death, Gatewood and Bolden each took out $25,000 life insurance policies on the other. The partners were also to have executed a contingent "buy-sell" agreement that, in the event one of them died, would enable the surviving partner to buy-out the deceased partner's share of the partnership

743 Id. at 1042-43 (citations omitted).
744 See, e.g., Bolden v. Gatewood, 164 So. 2d 721, 730-31 (Miss. 1964); Dewees v. Bostick Lumber & Mfg. Co., 50 So. 865, 866 (Miss. 1910); see also Howie Bros. v. Walter Pratt & Co., 35 So. 216, 217 (Miss. 1903) (holding that trial court erred by refusing to allow testimony regarding contents of letters from one of parties where party offering testimony had shown letters to have been lost or destroyed). But cf. Gulfport Sash, Door & Blind Mfg. Co. v. Town of Bond, 49 So. 260, 261 (Miss. 1909) (holding parol evidence of contents of writing not competent if party proffering parol evidence failed to account for absence of writing).
745 164 So. 2d 721 (Miss. 1964).
using the proceeds of the life insurance policy "plus any additional sum required." After Gatewood died,

the policies were found, but the 'buy-sell' agreement was not found. Bolden collected the $25,000 on the policy issued on the life of Gatewood, but denied the execution of the 'buy-sell' partnership agreement and refused to pay over to the legal representative of Gatewood's estate the proceeds of the policy as the purchase price of Gatewood's interest in the estate of the partnership.

Gatewood's executrix sued Bolden for the proceeds of the policy, arguing that the "buy-sell" agreement that obligated Bolden to use the insurance proceeds to buy-out Gatewood's partnership interest "had either been lost or destroyed, or was being withheld from [Gatewood's executrix and heirs], but that the defendant Edgar Lee Bolden had admitted the execution of such agreement." The chancellor, having heard and considered considerable oral testimony regarding the alleged "buy-sell" agreement, held:

It is not humanly possible for the court to know whether or not the agreement was executed, and if so, what became of it. However, by a preponderance of the evidence, I am forced to reach the conclusion that the complainant has met the burden of proof, that it was executed in the form copy of which is in evidence, and that it was lost or destroyed; and that under the law, and in good conscience and under the principles of equity, it should be enforced.

The Mississippi Supreme Court affirmed, finding "ample evidence in the record to support the finding of the chancellor that the complainant had met the burden of proof, that the 'buy-sell' agreement... was executed and lost or destroyed." In support of its holding, the court specifically

746 Bolden, 164 So. 2d at 722-23.
747 Id. at 722.
748 Id. at 723-24.
749 Id. at 730.
750 Id.
referred to the oral testimony of the insurance agent who sold Gatewood and Bolden their policies and provided them with the draft "buy-sell" agreement, as well as oral testimony by Gatewood's executrix and her brother regarding statements made to them by Bolden shortly after Gatewood's death.\textsuperscript{751}

This exception to the parol evidence rule is not intended to vitiate the "best evidence" rule.\textsuperscript{752} Rather, the exception applies only where the "best evidence" is not available.\textsuperscript{753}

10. Material Alteration

If one party alleges that a written and signed contract offered into evidence lacks or alters some material provision that was present when the party signed the contract, or includes a material provision that was not present when the party signed the contract, the terms of the written contract at the time it was actually agreed to by the parties may be proved by parol evidence.\textsuperscript{754} An alteration is "material" if it "enlarges the scope of an instrument as a means of

\textsuperscript{751} Id. at 731.

\textsuperscript{752} See Casey v. Valentour, 218 So. 2d 863, 865 (Miss. 1969) ("Ordinarily, the contents of documents or records cannot properly be shown except by introducing the document itself, which is the best evidence."); see, e.g., Lee v. Lee, 119 So. 2d 780, 648 (Miss. 1960) ("It is true that the plaintiff didn't offer to introduce the policy in evidence after being advised that her husband, Clyde Lee, had the policy . . . . The court was correct in holding that oral testimony was not competent to prove the terms and provisions of the policy . . . ."). For Mississippi's "best evidence" rule, see MISS. R. EVID. 1002 ("requirement of original").

\textsuperscript{753} See, e.g., Universal Computer Services, Inc. v. Lyall, 464 So. 2d 69, 76 (Miss. 1985) (recognizing viability of "best evidence" rule, but holding that it did not apply where written contract did not address certain terms of parties' agreement).

\textsuperscript{754} See Jones v. Index Drilling Co., 170 So. 2d 564, 572 (Miss. 1965). See, e.g., Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 546-47 (Miss. 1969) (holding that parol evidence was admissible to resolve defendant's claim that the copy of written contract tendered into evidence by plaintiff lacked an essential term that was present when defendant signed the contract).

There would seem to be no question as to the admissibility of parol evidence to show an unauthorized alteration of a written instrument, the object of such evidence being not to vary the terms of the instrument but, on the contrary, to prove the terms thereof as originally executed.

Jones, 170 So. 2d at 572 (quotation omitted).
In *Jones v. Index Drilling Co.*, the question for the court was whether the trial court had erred in permitting oral testimony by a client (Williams) to explain the scope of his written agreement with his attorney. While employed by Production Services, Inc., Williams was injured as a result of the negligence of one of Index Drilling's truck drivers. Williams received worker's compensation benefits for approximately one year. Thereafter, he approached attorney Jones to ask whether he was entitled to additional worker's compensation benefits. In October 1958, Williams signed a "Contract for Legal Services," assigning to Jones "an undivided one-fourth interest in said claim and also in and to all sum, or sums, received therefrom (one-third if the case is appealed)."

Several months passed, during which Williams received no additional worker's compensation and, apparently, no word from Jones regarding his efforts to secure more benefits for Williams. In August 1959, Williams consulted attorney Collins, who told Williams that he "would not interfere in the compensation matter" because Williams had already employed Jones to handle that, but Collins would take Williams's "third..."

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755 J.R. Watkins Co. v. Fornea, 100 So. 185, 187-88 (Miss. 1924).
756 *Index Drilling*, 170 So. 2d 564 (Miss. 1965).
757 Id. at 565.
758 Id.
759 Id. The contract, which was typewritten, except for two-and-one-half lines "which were underscored and filled in with pen and ink," *id.* at 567, and was signed by Williams, *id.* at 568, read in relevant part:

> For and in consideration of legal services rendered in my behalf in the prosecution of my claim against Index Drilling Co., Dapsco Inc., Martin Connection Works & Maryland Casualty Co. or any other person, firm or corporation I hereby assign and set over to W. Arlington Jones, Attorney, an undivided one-fourth interest in said claim and also in and to all sum, or sums, received therefrom. (one-third if case is appealed).

> I hereby authorize the above attorney, W. Arlington Jones, to prosecute this claim in my name, and I hereby ratify his actions in all things pertaining thereto.

760 *Id.* at 565.
party suit against Index Drilling.\footnote{Id. at 568.} When Collins filed suit against Index Drilling on Williams's behalf, Jones attempted to intervene in order to establish his right to a share of any settlement or award.\footnote{Id. The court continued:}

Williams testified that he had been paid workmen's compensation after his injury, but payments had been stopped during the year 1957; and after waiting several months he went to see Mr. Jones and asked him about his workmen's compensation claim. He asked Mr. Jones, "Wasn't I entitled to some more workmen's compensation?" Mr. Jones told him he would have to look into the matter. Mr. Jones then handed him a sheet of paper that had two blank lines. Williams

\footnote{Jones testified that after the signing of the above mentioned contract he represented Williams in his claim for compensation for injuries received by him as a result of the accident referred to in the plaintiff's declaration. Jones was then asked whether he was presently employed by Williams. His answer was "No." He then identified and introduced in evidence a letter which he had received from Williams, postmarked October 17, 1959. The letter signed by Williams appears in the record, and is as follows:}

Dear Mr. Jones:
This is to advise you that now that the Workmen's Compensation case against Martin Connection Works and Welding Shop that you handled for me has now been settled and you have been paid your fee in full and have been paid for your services in full, and I will not be in need of any further services from you. I am writing this letter to you in order that you will know that our relationship at attorney and client terminated as of the date of the settlement of the suit as mentioned above, and that I no longer retain you as my attorney in any wise.
Yours truly,
Charles Williams

Jones stated that . . . he had been discharged and he understood that Williams had employed Judge Burkit Collins to represent him. Jones stated that he had given notice to Index Drilling Company of the assignment which he held of a 25 percent interest in Williams' claim, that he had also given notice to the other corporations mentioned and the Maryland Casualty Company of his interest in the claim.

\footnote{Id. at 568.}
asked Mr. Jones what the paper was, and Mr. Jones said, "This is to give me authority to look into your medical reports. ** I cannot look into them without your permission." Williams was asked to examine the contract dated October 31, 1958, which he had signed and which Jones had offered in evidence during the hearing on September 6. Williams stated, "That is the contract with the exception of the pencil writing was not in there." Williams was asked to read that part of the instrument which he said was not in the instrument when he signed it. He then read the two and one-half lines of the contract which were filled in with a pen or a pencil. He stated that the two words "one-half", which appeared in the type-written form, were blocked out and the words "one-fourth" were inserted in their place at the time he signed it. Williams was asked when that part of the instrument that was left blank, which was later written in by pencil, "When was that done?" His answer was, "It was done after I had left or sometime, because it was not in there when I signed the contract." Williams stated that about three or four months later he went back to see Mr. Jones, that his father went with him, and he asked Mr. Jones if anything had been done about his workmen's compensation. Mr. Jones advised him at that time that he had been paid and he could not receive anything else. Williams stated that he went back to see Mr. Jones again about two months later, and Mr. Jones again advised him that he did not have anything except workmen's compensation. Williams stated that his foot was hurting him and he went back to Mr. Jones' office a third time to see if he was not entitled to some more medical care, and Mr. Jones again told him that he had been paid all that he could be paid; that he then asked Mr. Jones, "Wasn't there any person or corporation that would be responsible for his accident other than Production Service?" And Mr. Jones told him, "No Sir."

Williams stated that he then went to see Judge Burkitt Collins; that he told Mr. Collins that he had given a contract to Mr. Jones for his workmen's compensation, and Mr. Collins would not advise him as to that; that Collins told him that he would not interfere with another lawyer's contract, but if he had not given his Index Drilling case to anyone he would take that. Williams stated that a few days after he had turned the matter over to Judge Collins he received word from Mr. Jones
that he could settle his workmen's compensation claim for about $2000. That was after Judge Collins had filed suit against Index Drilling Company.

At the conclusion of the hearing the court found that Jones had a contract with the plaintiff Williams to represent him in a workmen's compensation case, but the contract covered only the matter of workmen's compensation and had no relation to a third party suit; that Jones had no contract with Williams to represent him in a third party suit against Index Drilling Company for damages arising out of the injury for which he had received workmen's compensation....

On appeal, Jones argued that the trial court erred in permitting Williams to testify "as to the facts and circumstances surrounding the execution of the contract for legal services and the changes made in the written instrument after it was signed by Williams." The supreme court disagreed:

[W]e think there was no error in the court's admitting the testimony of Williams relating to the interview he had with Jones which led to the signing of the instrument and the fact that the blank spaces had not been filled in when the instrument was signed.

Williams' testimony that the two and one-half lines of blank spaces in the typewritten instrument had not been filled in when he signed the instrument, that the words "one-half" were stricken out and the words "one-fourth" inserted in place of the words "one-half" before he signed the instrument, and that Jones said that the paper which he was requested to sign was needed to give him authority to look into Williams' medical reports, that he could not look into them without Williams' permission, shed light upon the meaning of the words "my claim" as used in the instrument which Jones prepared and which Williams signed. That testimony was uncontradicted, and in our opinion, lends support to Williams' contention that his employment of Jones as an attorney was limited to the prosecution of his claim for additional

763 Id. at 570-71.
764 Id. at 572.
workmen's compensation only.  

If an instrument is signed with one or more terms left blank, parol evidence may be admissible to show that a term later filled in by one of the parties was not what was agreed to by both parties at the time the instrument was signed. "A party who signs a blank piece of paper"—or, it would seem, a piece of paper with one or more blanks on it—"cannot be bound to the obligation written therein, unless it can be shown that he gave the person who wrote it"—or who filled in the blank(s)—"authority."

11. Condition Precedent

A "condition precedent" is one "which must be performed before the agreement of the parties shall become a binding contract" or "which must be fulfilled before the duty to perform an existing contract arises." Parol evidence of a condition precedent to a contract or contractual provision is generally admissible, irrespective of whether the contract or term is integrated or ambiguous.

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765 Id.
766 See First Nat'l Bank of Jackson v. IDS Mortgage Corp., 353 So. 2d 775, 777-78 (Miss. 1978); Service Fire Ins. Co. v. Craft, 67 So. 2d 874, 876-77 (Miss. 1953). In Craft, the missing information was the amount of consideration to be paid for a release, Craft, 67 So. 2d at 876; in IDS Mortgage, it was the effective dates, amount, and recording data for a subordination agreement, IDS Mortgage, 353 So. 2d at 776-77. In both cases, the court found that parol evidence as to the terms left blank did not contradict the written instrument as of the time it was signed. Id. at 778; Craft, 67 So. 2d at 876. Therefore, the party contesting the written instrument was not prohibited "from showing by parol testimony the true intention of the parties." IDS Mortgage, 353 So. 2d at 778.
767 Craft, 67 So. 2d at 877, quoted with approval in IDS Mortgage, 353 So. 2d at 778.
768 Turnbough v. Steere Broad. Corp., 681 So. 2d 1325, 1327 (Miss. 1996). A condition precedent is distinguished from a "condition subsequent" for purposes of the parol evidence rule. A condition subsequent is "a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition." BLACK'S LAW DICTIONARY 293-94 (6th ed. 1990).
769 See, e.g., Ohio Pottery & Glass Co. v. J.R. Pickle & Son, 66 So. 321, 322 (Miss. 1914).
The general rule which excludes parol evidence, when offered to contradict or vary the terms, provisions, or legal effects of a written instrument, is subject to many qualifications. Among these qualifications is one to the effect that conditions relating to conditions precedent may be shown by extrinsic evidence. A party who concedes that the instrument evidencing the contract was placed in the possession of the party seeking relief, but claims that the latter took it with the understanding that it was not to go into effect until the happening of some other or further event, and that such event has not transpired, is not considered as one seeking to vary or contradict a written contract, but as one endeavoring to show that no contract between the parties ever in fact came into existence. For this reason, evidence of such conditions precedent is held admissible.  

In Turnbough v. Steere Broadcasting Corp., the appellants personally guaranteed the indebtedness and all interest due in accordance with a promissory note tendered for the radio station. The personal guaranty stated that it could “only be enforced after the default procedures specified in the Security Agreement” between Turnbough and the Caravelle Broad-
cast Group had been observed:

There was little evidence presented as to whether the parties ever intended to have a security agreement executed. When asked about the security agreement, Alfred Koenenn, Turnbough's attorney during closing, testified that Turnbough discussed the execution of a security agreement with Caravelle, but realized that such execution was "impossible." Therefore, "the personal guaranties of the limited partners was accepted rather than any kind of security agreement, either for the personal property or mortgage on the real property which was sold." There was no testimony presented by any of the members of Caravelle. The evidence does not contain any other reference to any security agreement or default procedures within any type of agreement. Therefore, the only indication of the parties' intent is Koenenn's testimony as to what Turnbough may have told him during closing.

The Mississippi Supreme Court reversed the circuit court's grant of summary judgment for the guarantors, holding that the language of the personal guaranty was "ambiguous as to whether the parties intended that the execution of a security agreement operate as a condition precedent to performance under the personal guaranty" and, therefore, summary judgment was inappropriate.

According to the Restatement (Second) of Contracts, "where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition." The commentary to the Restatement (Second) of Contracts elaborates:

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772 Turnbough, 681 So. 2d at 1327.
773 Id. at 1328.
774 Id. at 1325.
775 Id. at 1328.
directly on the issues [of] whether the writing was adopted as an integrated agreement and if so whether the agreement was completely integrated or partially integrated . . . . If the parties orally agreed that performance of the written agreement was subject to a condition, either the writing is not an integrated agreement or the agreement is only partially integrated until the condition occurs. Even a "merger" clause in the writing, explicitly negating oral terms, does not control the question [of] whether there is an integrated agreement or the scope of the writing.\footnote{\textit{Id.} § 217 cmt. b; see also Plant Flour Mills Co. v. Sanders & Ellis, 157 So. 713, 714 (Miss. 1934) ("The stipulation in the contract that it 'constitutes the complete agreement between the parties hereto and cannot be changed in any manner whatsoever without the written consent of both buyer and seller' is not inconsistent with the oral agreement that it should not become operative until approved by Ellis & Sanders."). The Restatement advises further that "[a] major rationale expressed by the courts for the rule of this Section is that it has to do with an oral condition that must occur before the written contract comes into existence. Thus, if the oral condition is not met there is no subsequent and superseding agreement and no reason to apply the parol evidence rule." \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 217 reporter's note to cmt. b, at 143 (emphasis added).} 

12. Subsequent Acts or Agreements

The parol evidence rule excludes only extrinsic evidence of prior or contemporaneous oral agreements and prior written agreements.\footnote{\textit{See supra} text accompanying note 572. See generally \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 212.} Evidence of occurrences after the contract is executed is not excluded by the rule.\footnote{\textit{See} Kelso v. McGowan, 604 So. 2d 726, 731 (Miss. 1992); \textit{supra} subpart III.A.2.c.}

a. Subsequent Conduct

What the parties to a contract do thereunder "is relevant extrinsic evidence, and often the best evidence, of what the contract requires them to do."\footnote{Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989); see also, \textit{e.g.}, UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987) ("Where what the parties have said is less than clear and definite in material part, the court may resort to extrinsic aids to as-
on an instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument." The parties' subsequent conduct "may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct." 

In Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc., the question for the court was whether the lessee's assignee, Bear Kelso, was obligated to quit the leased premises because Bear Kelso was using the leased premises for crop farming rather than pasturage, as was provided for in the original lease:

The lease, originally entered into by Delta, lessor, and G. L. Johnson, lessee, on August 21, 1962, provided for annual rental payments of $2,500 per year and was for an initial five-year period with the privilege of lessee to renew same for four successive five-year periods at a rental of $2,500 per year. It also provided that if any of the described premises should, during the term of the contract or any renewal thereof, be assessed for ad valorem taxes at a value "in excess of that at which uncultivable land in Issaquena County is assessed" that the lessee, in addition to the annual rental specified, would pay the increase in as valorem taxes thereby imposed as additional rental.

-sign meaning to contract terms . . . [O]ne of those extrinsic aids should be the construction which the parties themselves have given to a contract in the course of their life together under it." (citation omitted)); Sumter Lumber Co. v. Skipper, 184 So. 296, 298-99 (Miss. 1938) ("[W]hen the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words."); Yazoo & Miss. Valley R.R. v. Lakeview Traction Co., 56 So. 393, 395 (Miss. 1911) ("We must look to and consider the contemporaneous construction which the parties themselves place upon the instrument. In cases of ambiguity, this contemporaneous interpretation becomes of great value, and frequently is decisive.").


782 Kight, 537 So. 2d at 1359. See Stinson v. Barksdale, 245 So. 2d 595, 597-98 (Miss. 1971).

783 281 So. 2d 683 (Miss. 1973).
Said lease also provided, among other things, that: LESSEE shall have the right and privilege to put any part or all of said land in pasture, and to erect such fences or other improvements thereon as Lessee may need in and about such operations, and may remove at Lessees (sic) option such fences or improvements at the termination hereof.

At the time G. L. Johnson entered into the above mentioned lease, he and his brother, Wendell Johnson ... were raising cattle on what was described by the witnesses as woods pasture. After leasing the 1,240 acres in question, they fenced these lands and ran cattle thereon until sometime prior to the middle of 1964 by which time they had sold all of the cattle. During this same period, beginning in 1963, the Johnsons began to clear all of the trees and buck vines from the leased lands and converted them into cultivated row crop lands for the purpose of growing soybeans. Prior to being cleared, a large portion of the land was covered with timber, the value of which was estimated at some $23,370. It was estimated that the cost of clearing the land would run between $75 and $90 per acre, and that the total cost of drainage structures was approximately $30,000. The total of this being well in excess of $100,000 ....

... [A]fter observing the Johnsons' successful soybean operations ..., by a second lease, Delta cleared and leased to Johnson additional acres known as the "thousand acre deadening," being between 1,000 and 1,200 acres. This second lease to the Johnsons did not prohibit a sublease and they sublet it in part to Claude Cook and in part to W. L. and Lee Braxton. On January 10, 1967, when the second lease had about four years to run, Delta decided after negotiations to allow the Johnsons to sublease the disputed 1962 lease on certain conditions. Delta's corporate minutes of that date provide:

2. RESOLVED, ... Delta Wild Life shall amend that certain written lease from Delta Wild Life to G. L. Johnson and Wendell Johnson ... so as to grant the said G. L. and Wendell Johnson the right to sublease said premises, provided said premises be kept in a good
state of cultivation and properly farmed by the sublessee.

On August 11, 1967, G. L. "Doc" Johnson advised Delta by letter that he was exercising his option to renew the disputed 1962 lease for an additional five years and enclosed his check in the amount of $2,500 which check was accepted and cashed by Delta. Thereafter, the 1968 annual rental was paid and the check therefor was deposited to Delta's account on August 16, 1968.

G. L. "Doc" Johnson died on November 4, 1968, and on November 19, 1968, Wendell H. Johnson, his partner, and Mrs. Jeryl T. Johnson, his widow and sole devisee and legatee, quitclaimed to the appellee, Bear Kelso, their rights as lessee to the 1962 lease in question. Agricultural operations continued as usual on the leased properties. Then, on August 19, 1969, Delta forwarded to Bear Kelso a notice to quit on the 1962 lease, giving a number of reasons why the lease had been breached. The appellee, Bear Kelso, refused to quit the leased land and has remained in possession and continued to row crop its property until the present. Suit was filed on August 26, 1971.

After setting forth these pertinent facts, the court turned to Delta's argument that Bear Kelso was in violation of the "pasturage" requirement of the lease because Bear Kelso was using the land for row crops:

It is undisputed that in early 1963 the Johnsons began clearing the land in question at considerable expense to themselves and that this was known by officers of Delta and that virtually all of the clearing had been completed in 1964. With this knowledge, Delta accepted the annual rental payments each year, and in 1967, after negotiations, the Johnsons were allowed to sublet and assign the questioned lease, and speaking through its minutes, Delta expected, among other things, that the leased premises "be kept in a good state of cultivation and properly farmed." Such a provision is wholly inconsistent with Delta's present contention

784 Delta Wild Life, 281 So. 2d at 683-85 (emphases deleted).
that the land was to be used for pasture only. Further, Delta's agreement to allow the Johnsons to sublease the property was granted only after the Johnsons agreed to give up valuable leases that they had on other properties belonging to Delta and which Delta immediately released to third parties at a considerable profit. If a bona fide serious dispute existed between the parties as to the interpretation of the lease then certainly it would have manifested itself in the terms of this new agreement. Also, the satisfaction of Delta with the arrangement between the parties, which had been going on for several years, was further evidenced by the acceptance by Delta, without protest, in 1967 of a notice by Johnson of renewal of the lease for an additional five years and the acceptance of the annual rental payment of $2,500 at that time and again in 1968. It was not until August, 1969, after G. L. Johnson died and after the lease had been quitclaimed to Bear Kelso that Delta decided that the Johnsons had breached the lease. This decision comes too late. The contemporaneous construction placed upon the instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument. It is evident from the acts of the parties themselves covering many years that they contemplated that these lands covered by the 1962 lease would be converted to row crop use. The lease itself provided that the lessee would pay any increase in taxes resulting from an assessment of taxes in excess of that at which uncultivated land in Issaquena County is assessed.

b. Abandonment of Contract

Extrinsic evidence may also be admitted to prove that one or both parties abandoned a contract at some date after its execution. In such a case, extrinsic evidence may be admitted even in the face of an unambiguous, fully integrated, writ-
c. Subsequent Oral Modification

The parol evidence rule does not bar extrinsic evidence regarding subsequent oral modification of a prior written agreement. Nor does it preclude extrinsic evidence of an oral agreement to waive or modify a particular provision in a written contract.

In *Albert Mackie & Co. v. S.S. Dale & Sons*, the written contract was for the purchase of six carloads of potatoes. The defendant argued that, by a subsequent parol agreement, the plaintiff agreed to accept and the defendant agreed to deliver only three carloads instead of six. The court held:

[S]trict performance of a written contract within the statute of frauds may be waived by a parol understanding or by words and acts inconsistent with an intention to require performance where the other party has been misled or kept from performing . . . .

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787 Id. at 545-46.
788 See *Williamson v. Metzger*, 379 So. 2d 1227, 1229 (Miss. 1980); *St. Louis Fire & Marine Ins. Co. v. Lewis*, 230 So. 2d 580, 581-82 (Miss. 1970); *Flowood Corp. v. Chain*, 152 So. 2d 915, 920 (Miss. 1963); *Commercial Credit Corp. v. Long*, 82 So. 2d 847, 848 (Miss. 1955); see also *Lusk-Harbison-Jones, Inc., v. Universal Credit Co.*, 145 So. 2d 623, 624 (Miss. 1933) ("[A] subsequent oral agreement to modify a prior written contract is valid and proof thereof does not violate the parol evidence rule, especially where the subsequent agreement is acted upon.").
789 See *Williamson*, 379 So. 2d at 1229; *Long*, 82 So. 2d at 848; *Oden Constr. Co. v. Helton*, 65 So. 2d 442, 446 (Miss. 1953).

As the court observed in *Lee v. Hawks*, 9 So. 828, 828 (Miss. 1891):

The statute of frauds debar one of an action on a contract, in certain cases, unless the contract be in writing; but a parol agreement to annul or waive a particular stipulation in the written contract which has been mutually assented to and fully performed, may be offered in evidence in defense of an action for a breach of the original written contract. An action may not be maintained, in cases within the statute, upon a contract not in writing; but a defense may be made by showing an executed parol agreement waiving or annulling a particular provision of the written contract.

Id. at 828, quoted with approval in *Williamson*, 379 So. 2d at 1229.
790 84 So. 453 (Miss. 1920).
791 *Albert Mackie & Co.*, 84 So. at 453-54.
The simple contention is made that the purchaser agreed to accept one-half of the property contract to be delivered and waive performance as to the other half. It is immaterial whether this action be termed a waiver, modification, or release. The parties acted upon the parol agreement, and, if the testimony on behalf of appellee be true, it would be very inequitable to award damages in this case.\footnote{792 Id. at 454-55; accord Williamson, 379 So. 2d at 1229-30 (holding that parol evidence was admissible to prove the assent of the lessors to a substituted mode of performance of the original lease).}

A no-oral-modification clause may be waived by a party either by accepting non-written changes from the other party or by making non-written changes.\footnote{793 The Mississippi Supreme Court has often recognized the validity of a subsequent oral modification, even where the prior written contract requires that any modification be in writing. See, e.g., Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 946 (Miss. 1992); Eastline Corp. v. Marion Apts., Ltd., 524 So. 2d 582, 584 (Miss. 1988); Shaw v. Burchfield, 481 So. 2d 247, 253 (Miss. 1985). But see MISS. CODE ANN. § 75-2-209(2) (1981) ("A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . "). The Mississippi Supreme Court wrote that

\[\text{[for a subsequent agreement to modify an existing contract, the later agreement must, itself, meet the requirements for a valid contract. Since a contract modification must have the same essentials as a contract, a binding post-contract agreement must fulfill the requirements of a contract regardless of whether a party characterizes it as a modification or a stand-alone contract.} \]

\textit{Singing River Mall}, 599 So. 2d at 947 (citations omitted).} The question of whether or not the parties waived the requirement of a writing is a question for the trier of fact.\footnote{794 Id. at 946; \textit{Eastline}, 524 So. 2d at 584; Green v. Pendergraft, 179 So. 2d 831, 836 (Miss. 1965).}

\textbf{d. Rescission}

A prior written contract may be rescinded by subsequent oral agreement or subsequent conduct.\footnote{795 \textit{See} \\
Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969); Sammons Communications, Inc. v. Polk, 429 So. 2d 564, 567 (Miss. 1983).} While rescission may be inferred from conduct, as opposed to an agreement
between the parties,

notice for the rescission or termination of a contract must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation. To effect a rescission, an affirmative act on the part of the person desiring to rescind is necessary. Although notice of rescission need not consist of a formal written notice, the declaration or acts constituting rescission must be definite and unequivocal and clearly indicate the right asserted.\textsuperscript{796}

Merely ignoring or disregarding the terms of a contract may not be sufficient to constitute rescission.\textsuperscript{797}

Extrinsic evidence offered to prove the rescission may be admitted even in the face of an unambiguous, fully integrated, written contract.\textsuperscript{798}

In \textit{Renfroe v. Aswell},\textsuperscript{799} Aswell and Renfroe were partners in a sawmill. Renfroe executed four notes, totaling $1,000, which Aswell claimed represented Renfroe's purchase of Aswell's half of the business.\textsuperscript{800} When Renfroe did not pay, Aswell sued. At trial, Renfroe offered to prove that, after he executed the notes but was unable to borrow the rest of the money he needed to complete the purchase and pay off outstanding debts of the partnership, he and Aswell got together and had a further parol understanding that the purported sale would be, and was, rescinded by mutual agreement, and that pursuant thereto Aswell was redelivered his half interest in the business and property, and that the parties jointly took charge of the property and assets and sold the same and applied the proceeds of the sale to payment of the partnership debts.\textsuperscript{801}

The supreme court concluded that the trial court erred by ex-

\textsuperscript{796} U.S. Fin. Co. v. Barber, 157 So. 2d 394, 398 (Miss. 1963).
\textsuperscript{797} Wiener v. Pierce, 203 So. 2d 598, 603 (Miss. 1967).
\textsuperscript{798} \textit{Broome Construction}, 229 So. 2d at 545-46.
\textsuperscript{799} 21 So. 2d 812 (Miss. 1945).
\textsuperscript{800} \textit{Renfroe}, 21 So. 2d at 812.
\textsuperscript{801} \textit{Id.} at 813.
Evidence is generally admissible to show a subsequent parol agreement, valid under the law and effective as to its subject matter, between the parties to a written instrument, although it may alter or abrogate such writing, and especially so where such parol agreement is acted upon by the parties. 802

e. Novation

A novation "is a contract that discharges at once an existing obligation and creates a new contractual obligation" and substitutes at least one party to the original contract with "a party who was not previously obligated." 803 A novation "may be implied from the circumstances absent an express substitution." 804 However, implied novation requires "substantial proof" that the surviving party from the original contract "impliedly accepted" the new party in lieu of the party to the original contract the new party seeks to replace. 805 The party asserting novation bears the burden of proving it. 806 The determination of whether there has been a successful novation—and particularly a successful implied novation—is a question of fact. 807

The Mississippi Supreme Court explored novation—both express and implied—at length in Mississippi Motor Finance Co. v. Enis: 808

On June 22, 1962, defendant [Enis] purchased a 1962 Rambler from Safety Motors . . . [and] executed to Safety Mo-
tors a conditional sales contract for $4,172.80, payable in twenty-four monthly installments. Failure to pay any installment accelerated the entire debt. The conditional sales contract was assigned ... to plaintiff, with recourse ....

On June 28, 1963, defendant purchased a 1963 Rambler from W.H. Cooper, doing business as Safety Motors, and executed to Safety Motors a conditional sales contract for the full purchase price .... Cooper had told a representative of plaintiff, prior to the purchase by defendant of the 1963 Rambler, that the trade would be made and that he, Cooper, would pay off the balance due on the 1962 Rambler when he sold it. A representative of plaintiff knew when the trade was consummated between Cooper, doing business as Safety Motors, and defendant, and that the 1962 Rambler was on the yard of Safety Motors after the transaction. As between Cooper and defendant it was agreed that Safety Motors would pay off the balance due on the 1962 Rambler, and words to that effect were written by Cooper on the invoice. Plaintiff did not receive this invoice.

After the trade on June 28, 1963, two payments on the 1962 Rambler for the months of July and August, 1963, were made by defendant, but he testified that the money was furnished him by Cooper.

Cooper ... went out of business [in 1963]. He sold the 1962 Rambler and failed to pay plaintiff. Plaintiff sued defendant Enis for the balance due on the conditional sales contract for the 1962 Rambler.

A novation involving substitution of debtors is a contract that (a) discharges immediately an existing contractual obligation, (b) creates a new contractual obligation by, (c) including as the new obligor a party who was not previously obligated. The contract of novation is a mutual undertaking among all parties concerned.

In order to establish his affirmative defense of novation, it was necessary for defendant Enis to prove (a) that he, Enis, was immediately discharged from the obligation to pay the debt evidenced by the conditional sales contract for the 1962 Rambler, (b) a new contractual obligation was created between plaintiff and Cooper, whereby Cooper would become liable to plaintiff, and (c) that Cooper was not previously
obligated to plaintiff on the conditional sales contract for the 1962 Rambler.

There was no express agreement that Enis was released from payment of the debt, evidenced by the conditional sales contract, for the purchase of the 1962 Rambler. No new contractual obligation between Cooper as debtor and plaintiff as creditor was created in connection with the trade between Cooper and Enis. . . . Cooper was already liable to plaintiff on the 1962 contract by reason of his assignment thereof with recourse. For the same reason, defendant failed to prove that Cooper was not previously obligated on the 1962 contract. We find no evidence of an express contract of novation.

. . . . [N]ovation may be implied where the facts and circumstances demonstrate that it was the intention of the parties to substitute one party for another . . . . The circumstances relied upon by Enis as establishing a novation by implication include the fact that Cooper told the manager of plaintiff that he was going to trade with Enis and that he, Cooper, would pay off the indebtedness on the 1962 Rambler. The manager of plaintiff knew the trade was made, and knew the 1962 Rambler was on Safety Motors' lot . . . . Plaintiff's manager talked to Cooper a number of times after the trade between Cooper and Enis, and requested Cooper to pay off the balance due on the 1962 Rambler. The conditional sales contract involved in this case was one of many Cooper had assigned to plaintiff, and a representative regularly went over these accounts with Cooper. The payments for the months of July and August were made by Enis, although Cooper furnished Enis the money. We are of the opinion that all that was said and done by the parties was consistent with Enis' remaining liable for the indebtedness on the 1962 Rambler. The evidence did not justify a finding of novation by implication. Plaintiff continued to hold the original conditional sales contract. There was no new document signed. The agreement between Cooper and Enis that Cooper was to pay the balance on the contract and plaintiff's knowledge of it was no proof that plaintiff intended to release Enis . . . .

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809 Enis, 181 So. 2d. at 903-05 (citations omitted).
C. The Common Law Parol Evidence Rule in Action: A Simplified Checklist

Few subjects connected with the interpretation of contracts present so simple and uniform a statement of principle, bedeviled by such a perplexing and harassing number of difficulties in its application, as the parol evidence rule.

While the parol evidence rule may be easy to recite, it is much more difficult to pin down in practice. As discussed previously, and as is apparent from the foregoing statements of the parol evidence rule, before a trial court reaches the question of whether evidence offered regarding a prior agreement or prior discussions will be admitted before the trier of fact, the court must make the following threshold determinations:

1. Is there a written agreement covering the subject matter of the proffered extrinsic evidence?
2. If so, does the written agreement constitute the final agreement of the parties regarding the subject matter of the proffered extrinsic evidence?
3. If so, does the written agreement constitute the complete and exclusive agreement of the parties regarding the subject matter of the proffered extrinsic evidence?
4. If so, is the final and complete written agreement unambiguous?
5. If so, does the proffered extrinsic evidence concern a prior or contemporaneous oral term or agreement or a prior written term or agreement?

This checklist is adapted from Glasser & Rowley, supra note 10, at 743-45. See generally Arthur L. Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 603-10 (1944); Hunter, supra note 5, §§ 7-6-7-8.

JAEGER, supra note 607, § 632A, at 984.

That is to say: Is the written agreement integrated? See supra notes 70-73 and accompanying text.

That is to say: Is the integrated written agreement fully integrated? See supra notes 74-77, 83-86 and accompanying text.

See supra subpart II.A.

See supra note 572 and accompanying text; subpart III.A.2.c.
(6) If so, does the proffered extrinsic evidence contradict, vary, or supplement some term of the written agreement that the court has previously determined to be unambiguous, final, and complete? If the answer to any of the foregoing questions is "No," then the parol evidence rule does not prevent the trier of fact from considering some or all of the proffered extrinsic evidence. If the answer to all of the foregoing questions is "Yes," then the trial court must answer the following additional question:

(7) Does the proffered extrinsic evidence, which is otherwise subject the parol evidence rule, fit within one or more of the numerous exceptions to the rule?

If so, then, again, the parol evidence rule should not prevent the trier of fact from considering the proffered extrinsic evidence. If not, and only if not, then the parol evidence rule properly bar the trier of fact from considering the proffered extrinsic evidence.

In answering the foregoing questions, a Mississippi trial

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816 See supra notes 572-73 and accompanying text; subparts III.A.2.a.-b.
817 Briefly: (1) The parol evidence rule does not apply in the absence of a written agreement. See supra note 605 and accompanying text. (2) The parol evidence rule does not apply to unintegrated agreements, even if they are in writing. See supra subpart III.A.3.c. (3) If the written agreement is not fully integrated, the parol evidence rule does not bar evidence offered to add to, clarify, explain, or give meaning to the writing, as long as the proffered evidence does not vary or contradict any terms of the writing that are integrated. See supra subpart III.A.3.a. (4) Even if the written agreement is fully integrated, and more so if it is less-than-fully integrated, the parol evidence rule does not bar evidence offered to resolve any ambiguity, as long as the proffered evidence does not vary or contradict any terms of the writing that are both integrated and unambiguous. See supra subpart III.A.3.b. (5) Even if the written agreement is both integrated and unambiguous, the parol evidence rule, by its own terms, does not bar evidence of subsequent oral or written agreements. See supra subpart III.A.2.c. (6) Even if the written agreement is both integrated and unambiguous, the parol evidence rule, by its own terms, does not bar evidence that is offered merely to explain, not to add to, contradict, vary, or change, a written agreement, nor does the rule bar extrinsic evidence regarding collateral agreements or writings that are not "contractual in nature." See supra notes 601-02, 604 and accompanying text; subparts III.A.2.a.-b.
818 See supra subpart III.B.
court appears to be bound by the three-tiered process prescribed in *Pursue Energy Corp. v. Perkins.*

These questions should be raised and resolved as early in the case as possible, as they will govern the extent and types of evidence that may be submitted to the trier of fact, as well as the extent to which the written agreement will be open to interpretation.

D. Special Case: Contracts for the Sale or Lease of Goods

[The meaning of commercial contracts is not necessarily to be found exclusively within the four corners of the document but must take into account the commercial circumstances surrounding the transaction. . . . The court . . . should recognize that the words selected by the parties may have a special meaning to them or to the trade in which they operate and that some terms may have been omitted from the formal contract, because they are so well understood by the parties that putting them into the final writing was deemed unnecessary. Indeed, some aspects of the agreement may be so clear to the parties that suggesting that these terms be written into the contract would be insulting. These “missing” terms are really implied parts of the agreement which in many cases may be ascertained by resort to course of performance, course of dealing or usage of trade.]

The Mississippi Uniform Commercial Code codifies the parol evidence rule pertaining to contracts for the sale or lease of goods.

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519 558 So. 2d 349 (Miss. 1990). See supra notes 21-28 and accompanying text.
520 See generally Hunter, supra note 5, §§ 7:8, at 7-14.
522 The statute reads:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(1) by course of dealing or usage of trade (Section 1-205) [§ 75-1-
lease\textsuperscript{223} of goods. These codified versions of the parol evidence

\footnotesize

205] or by course of performance (Section 2-208) [§ 75-2-208]; and
(2) by evidence of consistent additional terms unless the court finds
the writing to have been intended also as a complete and exclusive
statement of the terms of the agreement.

MISS. CODE ANN. § 75-2-202 (1981). Other than the addition of parenthetical cross-
references to the Mississippi Code versions of Sections 1-205 and 2-208, the Missis-
sippi Code version of Section 2-202 is identical to the “uniform” version. Compare

Contracts for the sale of goods between a Mississippi resident and a resident
of a foreign country may be governed by the 1980 United Nations Convention on
reprinted in 19 I.L.M. 668. The CISG does not apply if the foreign buyer or seller's
place of business or “habitual residence” is in a country that has not ratified the
CISG. See id. arts. 1(1)(a) & 10(b). The CISG does not apply if, even though the
foreign buyer or seller’s place of business or habitual residence is in a country that
has ratified the CISG, if the Mississippi buyer or seller neither knew nor had
reason to know that it was dealing with a party whose place of business or hab-
ital residence was in a foreign country. See id. art. 1(2). Nor does the CISG
apply to contracts for goods being purchased for personal, family, or household use
where the seller neither knew nor had reason to know at any time prior to or at
the conclusion of the contract of the goods' intended use
by
the buyer. See id. art.
2(a). Parties to a contract that would otherwise be governed by the CISG may
contractually agree not to be governed by it in part or in whole, see id. art. 6,
subject to certain limitations, see id. art. 12.

The CISG provides that “[a] contract of sale need not be concluded in or evi-
denced by writing and . . . may be proved by any means, including witnesses.” Id.
art. 11; see also id. art. 8(3) (“In determining the intent of a party . . . , due con-
sideration is to be given to all relevant circumstances of the case including the
negotiations, any practices which the parties have established between themselves,
usages and any subsequent conduct of the parties.”). The few courts to have con-
sidered these provisions of the CISG, have read them to mean that the CISG has
no parol evidence rule. See, e.g., MCC-Marble Ceramic Center, Inc. v. Ceramica
Nuova d'Agostino, 144 F.3d 1384, 1389-90 (11th Cir. 1998); Mitchell Aircraft
1998); Claudia v. Olivieri Footwear Ltd., 1998 WL 164824, at *4-6 (S.D.N.Y. Apr.
7, 1998).

There are no reported Mississippi state or federal cases addressing the CISG,
and a discussion of construing and interpreting contracts subject to the CISG is
beyond the scope of this article. The point of raising the issue of the CISG here is
to make the reader aware of its existence and possible application to certain con-
tracts that would otherwise be governed by Article 2 of the Mississippi Uniform
1237 (S.D.N.Y. 1992) (holding that the CISG “trumps” the UCC in cases where the
CISG applies), appeal dism'd, 984 F.2d 58 (2d Cir. 1993).

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rule are presumed to “trump” common law approaches to con-
struing and interpreting contracts — even fully integrated con-
tracts — for the sale or lease of goods.

to Section 2-202, supra note 822, except for the parenthetical cross-references.


The Uniform Commercial Code clarifies, for purposes of disputes over con-
tracts for the sale or lease of goods, that the language used in a written contract
should be afforded “the meaning which arises out of the commercial context in
which it was used,” rather than the meaning that might be attributed to it “by
rules of construction existing in the [common] law.” UNIFORM COMMERCIAL CODE
§ 2-202 cmt. 1(b).

Contracts for the sale or lease of goods

are to be read on the assumption that the course of prior dealings be-
tween the parties and the usages of trade were taken for granted when
the document was phrased. Unless carefully negated they have become an
element of the meaning of the words used. Similarly, the course of actual
performance by the parties is considered the best indication of what they
intended the writing to mean.

Id. § 2-202 cmt. 2 (emphasis added). The Code “rejects both the ‘lay-dictionary’ and
the ‘conveyancer’s’ reading of a commercial agreement. Instead the meaning of the
agreement of the parties is to be determined by the language used by them and
by their action, read and interpreted in light of commercial practices and other
surrounding circumstances.” Id. § 1-205 cmt. 1 (emphasis added). And the “measure
and background for interpretation are set by the commercial context which may
explain and supplement even the language of a [fully integrated] writing.” Id. (em-
146, 149 (5th Cir. 1979) (outlining the various parol evidence provisions in Texas’s
analogy to § 75-2-202 and their effects on the issues before the court) with Citzi-
1971) (refusing to consider evidence of custom and usage in construction industry,
under pre-Code law, when doing so would result in a different construction of the
contract than that afforded by a “plain meaning” approach).

As the Fifth Circuit explained nearly thirty years ago:

[E]vidence of course of dealing and usage of trade [is] necessarily and
properly admissible to explain, qualify, or supplement the provisions of
[the] written agreement. In providing for the admission of such evidence,
the [UCC] manifests the law’s recognition of the fact that perception is
conditioned by environment: unless a judge considers a contract in the
proper commercial setting, his view is apt to be distorted or myopic,
increasing the probability of error.

Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971).

There is no corresponding comment to Section 2A-202. Rather, the Official
Comment for that section merely refers the reader to Section 2-202. UNIFORM
1. Similarities to the Common Law Parol Evidence Rule

As is true at common law,\(^{226}\) the Code's parol evidence rules governing written contracts for the sale or lease of goods bar extrinsic evidence of prior or contemporaneous oral agreements or representations and prior written agreements or representations to the extent that such evidence contradicts the terms of an integrated writing.\(^{227}\)

For example, in *General Plumbing & Heating, Inc. v. American Air Filter Co.*,\(^{228}\)

the written quotation-contract prepared by American and accepted by General was specifically made subject to terms and conditions that included (1) the quotation was expressly limited to the terms within the document, with "no understandings, agreements, or obligations (outside of this quotation) unless specifically set forth in writing"; and (2) any quoted shipping date or acknowledgment was American's best estimate but that American made no guarantee of shipment by that date and assumed no obligation for failure to ship on such date.\(^{229}\)

General sued American for breach of contract, claiming that American agreed that it would deliver the equipment within six weeks of the order or, at least, by a date sufficient

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\(^{226}\) See supra note 572 and accompanying text.

\(^{227}\) See MISS. CODE ANN. § 75-2-202 (1981); MISS. CODE ANN. § 75-2A-202; see, e.g., Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1282 (Miss. 1983) (reversing the trial court's ruling admitting extrinsic evidence because "the parol evidence was not in explanation of or supplementary to the contemporaneous writing but rather was contradictory to it"); U.S. Axminster, Inc. v. Directions in Design, Inc., 1996 WL 671403, at *3 (N.D. Miss. Oct. 24, 1996) ("An alleged agreement wherein the defendant's duty to pay is conditioned upon receipt of payment from its customer is clearly contradictory to the payment terms of 'net 30 days after invoice. It is quite a stretch to assert that the alleged oral agreement merely explains or supplements the payment terms set forth in writing.'"). See generally Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 (S.D. Miss. 1995) ("Under § 75-2-202, parol evidence is not admissible to contradict the express terms of an agreement.").

\(^{228}\) 696 F.2d 375 (5th Cir. 1983) (applying Mississippi law).

\(^{229}\) *General Plumbing*, 696 F.2d at 377.
for General timely to complete its renovation subcontract. American prevailed in the trial court, owing largely, according to General, to the trial court's refusal to admit evidence of the oral agreement. The Mississippi Supreme Court upheld the trial court's ruling:

General contends that this oral understanding constitutes a "course of dealing" or "usage of trade," which is admissible into evidence in order to "explain or supplement" the written contract, as an exception to the parol evidence rule, § 75-2-202(a). American counters that . . . . General's proposed testimony would impermissibly "contradict" the express term contained in the contract providing that any shipping date is a best estimate, that no guarantee of any shipping date is made, and that it would incur no liability for untimely shipment unless expressly stated otherwise in the agreement.

We agree with American that the express terms and conditions contained in the written contract preclude the introduction of oral testimony regarding delivery dates . . . .

Since no firm delivery date is specified in the contract, evidence of a promised six week delivery may arguably "supplement" rather than "contradict" contract terms. However, the only reason General urges introduction of a firm delivery date is to suggest that delivery after that date constitutes a breach of contract for non-timely delivery, by reason of which American is liable for incidental and consequential damages. The testimony is inadmissible under § 75-2-205 because its intended use flatly contradicts the unambiguous language of the contract that any date agreed upon by the parties is only a "best estimate" and that American would incur no obligation or liability from untimely delivery.\(^{330}\)

As is true at common law,\(^{831}\) the Code does not bar ex-

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\(^{330}\) Id. at 377-78. That said, the court also recognized that the written contract was silent as to price "because the contract contains no price terms, an oral agreement concerning price does not impermissibly 'contradict' this written contract, as would introduction of oral terms regarding delivery dates." Id. at 378 n.4.

\(^{831}\) See supra subparts III.A.2.b & III.A.2.c and note 580 and accompanying text, respectively.
trinsic evidence of collateral agreements of subsequent agreements or modifications. Nor does the Code bar extrinsic evidence in the absence of a writing or when the writing against which the evidence is offered is unintegrated, in whole or in relevant part. Likewise, the various "judge-made" ex-

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832 Cf. Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281-82 (Miss. 1983) (describing the rule that the written provisions adopted by the parties do not merge a separate contract, entered into to explain or supplement the existing contract, as "consistent" with Section 75-2-202).


835 Professor Hawkland explains:

The parol evidence rule of Section 2-202 operates only with regard to "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein . . . ."

The concept of finality is an important limitation on the parol evidence rule, because it means that not all writings are protected by that rule. For example, there is no finality of agreement in a memorandum that is sent by one party to the other. The fact that the recipient does not reject it may deprive him of the protection of the statute of frauds under Section 2-201(3), but the failure to reject does not prevent the recipient showing that the terms of the contract are different from those stated in the memorandum, or, indeed, that no contract ever came into existence. This idea is reinforced by the language "confirmatory memorandum" found in Section 2-202, indicating that more than one memorandum is necessary to establish the kind of final written expression that is needed to make the parol evidence rule operate.

Even where the parties have exchanged memoranda or have signed a written contract, it does not necessarily follow that the terms stated therein express their final agreement. A contract can be worked out in great detail with respect to some terms, while failing to address others in any way. In that case, it is possible to say that the contract is final as to one term but not as to another. Even where a term is defined precisely, there may be no finality as to certain aspects of it. For example, the parties may state the place and manner of delivery in great detail but not the time. The fact that the term is a final expression of their agreement as to place and manner, does not prevent the parties from showing by parol evidence what they had in mind as to the time the delivery was to be made. Similarly, the fact that they have made a
ceptions to the common law parol evidence rule,\textsuperscript{836} also apply to contracts for the sale or lease of goods.\textsuperscript{837}

In \textit{Franklin v. Lovitt Equipment Co.},\textsuperscript{838} the Mississippi Supreme Court considered whether the exception to the common law parol evidence rule for extrinsic evidence of fraudulent inducement\textsuperscript{839} applied in a case governed by section 2-202:

Prior to enactment of the Uniform Commercial Code as a part of our statutory law, it was a well-established principle

\textbf{\textit{...}}

\textbf{...}

The fact that the parties have reduced a term to writing is some evidence that it was intended as the authentication of their final agreement, but they have the competence to show otherwise. This competence is not destroyed by an integration or merger clause, because that clause cannot lift itself by its own bootstraps so as to be immune from contrary parol evidence that the parties did not intend integration. The merger clause is strong evidence that integration was intended, but it is not the sole evidence to be considered.

\textbf{See supra subpart III.B.}

\textbf{See \textit{supra note 833}, § 2-10, at 88 & n.3 (observing that the UCC parol evidence does not “exclude evidence that the parties did not intend the writing to be binding”).}

\textbf{See \textit{1 HAWKLAND, supra note 821}, § 2-202:2, at 2-176 to -178 & -181 to -182 (footnotes omitted); see also \textit{1 WHITE & SUMMERS, supra note 833}, § 2-12, at 94. For example, Section 2-202 has no application to a writing that was obtained or executed through fraud, duress, or mistake. These matters are sometimes said to constitute exceptions to the parol evidence rule, but they are assimilated under the “intended by the parties as a final expression of their agreement” language of Section 2-202. In other words, the parties are always competent to show under the section that they did not make a contract, and the parol evidence rule does not prevent them from making this showing. They are also competent to show that no contract was formed because of lack of consideration, even though the writing recites that a consideration was given, or that the contract has failed because oral conditions precedent to its existence have not been satisfied, notwithstanding the fact that the writing contains no recital of these conditions or, conversely, states that the obligation is absolute.}

\textbf{See \textit{supra subpart III.B.1.}}

\textbf{1 HAWKLAND, supra note 821, § 2-202:2, at 2-179 to -181 (footnotes omitted).}

\textbf{\textit{420 So. 2d} 1370 (Miss. 1982).}

\textbf{See \textit{supra note 821}, § 2-202:2, at 2-179 to -181 (footnotes omitted).}
that where fraud was alleged with respect to the formation of a written contract, the parol evidence rule would not bar consideration of a contemporaneous oral agreement. Further, section 75-1-103 of the Mississippi Code Annotated (1972) explicitly provides that the common law principles of fraud and misrepresentation should supplement the commercial code provisions. On the basis of this background, our Court has continued to recognize the fraud exception to the parol evidence rule subsequent to the passage of section 75-2-202. Thus, we conclude that the chancellor was required to consider the testimony offered by Franklin and his friends.840

2. Distinguishing Features

Unlike common law, the terms of a written contract for the sale or lease of goods — even an integrated, unambiguous contract for the sale or lease of goods — may be supplemented by non-contradictory evidence41 of course of dealing, usage of trade, course of performance,42 or evidence of consistent addi-

840 Franklin, 420 So. 2d at 1372 (citations omitted).
41 Professor Hawkland provides an interesting discussion of contradiction versus explanation or supplementation, see 1 HAWKLAND, supra note 821, § 2-202:3, at 2-187 to -196, as do Professors White and Summers, see 1 WHITE & SUMMERS, supra note 833, at 2-187 to -196.
42 See MISS. CODE ANN. § 75-2-202(1) (1981). The Code also allows a court to admit such evidence to explain the terms of a writing, see id., but that allowance is afforded by the common law as well, see supra subpart III.A.2.a.

Professor Hawkland argues that even contradictory evidence of course of performance is admissible under Section 2-202 because

under Section 2-202, the final expression of written terms cannot be "contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Course of performance involves neither a prior nor a contemporaneous agreement, and thus is beyond the proscription of the section.

... According to the comments to Section 2-208, course of performance is the best indication of what the contract means, and it is always admissible to show what that meaning is. This does not mean, of course, that it stands higher in the hierarchy of probative value than the express term itself. Indeed, the converse is true. That is a different matter, however. Course of performance is always admissible to show the meaning of a term. Where there is a difference in the meaning derived from the term itself and the course of performance, the court is directed by Section 2-208(2) to construe the two consistently, and that can usual-
tional terms.\textsuperscript{843}

The Code dispenses with the presumption that a written contract is fully integrated,\textsuperscript{844} as well as the requirement that

ly be accomplished by finding that the course of performance has result-

In the rare case where neither modification nor waiver can be es-

established, and no other reasonable way of reconciling course of perfor-

mance with the express term is available, the express term controls.

Even in this situation, however, course of performance is admissible, and

it fails only when the court cannot reconcile it with the express term, a

process that has no connection with the parol evidence rule.

1 HAWKLAND, \textit{supra} note 821, § 2-202:3, at 2-196 to -197.

\textsuperscript{842} See Miss. CODE ANN. § 75-2-202(2). However, if (but only if) the court finds

the writing to be \textit{fully} integrated, then evidence of consistent additional terms

(and only evidence of consistent additional terms) is \textit{not} admissible to explain or

supplement the writing. \textit{See id.} Furthermore,

\[\text{[t]his proviso is essentially what distinguishes Section 2-202(b) from Sec-

tion 2-202(a). Under subsection (a), trade usage and course of perfor-

mance may be admitted to explain or supplement a written contract

even where the contract is found to be integrated in the sense of being a

complete and exclusive statement of the terms of the agreement. This

is because commercial documents are to be read on the assumption that

the course of prior dealings between the parties and usage of trade were

taken for granted when the document was written. Unless that assump-

tion is negated expressly or by strong implication, these implied terms

become elements of the contract itself. No such assumption is made with

regard to other additional terms, and, therefore, they cannot be said to

exist where the written contract is found to contain a complete and

exclusive statement of terms.}

1 HAWKLAND, \textit{supra} note 821, § 2-202:4, at 2-197 to -199 (footnote omitted). \textit{See}

generally \textit{id.} § 2-202:3, at 2-187 & n.3.

\textsuperscript{844} See UNIFORM COMMERCIAL CODE § 2-202 cmt. 1(a) (1999). \textit{See generally 1

HAWKLAND, \textit{supra} note 821, § 2-202:1, at 2-175 & n.5; 2 NELSON & HOWICZ, \textit{supra}

note 834, § 13-23, at 85 & n.71. But cf. 1 WHITE & SUMMERS, \textit{supra} note

833, § 2-9, at 87-88 (observing that "[s]ome commentators and at least a few

courts conclude that 2-202 abolishes any presumption that a writing apparently

complete on its face is complete and exclusive," but then admitting uncertainty,

as between White and Summers themselves, about how far section 2-202 erodes

the presumption that "elaborate writings" are complete). In other words,

\[\text{[b]y asking whether the "writing [was] intended by the parties as a final

expression of their agreement with respect to such terms as are included

therein," the Code shifts the initial inquiry to the question of partial in-

tegration. A judge working through the parol evidence rule finds the

question of total integration the last question, rather than the first,}

because it is found in the last clause of Section 2-202, which asks
a trial court must find that a written contract is ambiguous or less-than-fully integrated before the court may admit any evidence beyond the four corners of the writing, including but not limited to evidence of course of dealing, usage of trade, course of performance, or consistent additional terms.\(^{845}\)

In the estimation of the Mississippi Supreme Court, the Code

provides a more permissive approach for the admission of extrinsic evidence than that found in our general body of law. Specifically, § 75-2-202 does not require that the agreement in question first be found to be incomplete or ambiguous before evidence of course of dealing and usage of trade may be considered.

whether the writing was "intended also as a complete and exclusive statement of the terms of the agreement."


\(^{845}\) See UNIFORM COMMERCIAL CODE ¶ 2-202 cmt. 1(c); see also Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 n.3 (5th Cir. 1986) (observing that, under section 75-2-202, a court "may be able to consider course of dealing, usage of trade, and course of performance in determining whether the contract is ambiguous," but not reaching that issue in the case sub judice "because the parties d[id] not contend on appeal that course of dealing, usage of trade, or course of performance should be considered in determining whether the contract between Southern and Pursue is ambiguous"). But see id. at 1082 n.5 (citing Pfiesterer v. Noble, 320 So. 2d 383 (Miss. 1975), a non-Code case, as authority for refusing to consider evidence beyond the four corners of the contract in determining whether the contract is ambiguous). See generally 1 HAWKLAND, supra note 821, § 2-202:1, at 2-175 & n.6; 2 NELSON & HOWICZ, supra note 834, ¶ 13-23, at 85.

Section 2-202

recognizes the value of certainty in commercial dealings by giving prima-ry to written terms, but it also acknowledges that the purpose of sales law is not only certainty of result, but the enforcement of the agreement of the parties.

1 HAWKLAND, supra note 821, § 2-202:1, at 2-174. In this way, Professor Hawkland argues, Section 2-202 forges a "compromise" between Professor Williston's view that the words or a written contract should be given their usual, objective meaning, notwithstanding the meaning the parties actually attributed to them, and Professor Corbin's view that the words or a written contract can only be understood in the context in which the agreement was formed. See id. at 2-172 to -174. However, the "compromise" seems to come out rather more in Professor Corbin's favor. See id. at 2-174 to -176 and authorities cited therein.
Under our general, non-UCC, parol evidence rule, by contrast, a document must first be found to be incomplete or ambiguous before said document may be explained, but not contradicted, by extrinsic evidence.\(^\text{846}\)

\(a.\) Course of Dealing

A “course of dealing” is “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."\(^\text{847}\) A course of dealing “give[s] particular meaning to and supplement[s] or qualify[ies] terms of an agreement”\(^\text{848}\)—that is to say, a course of dealing may (1) explain or qualify the terms of the written agreement or (2) supplement or modify the terms of the written agreement.\(^\text{849}\) The parties’ course of dealing “may enter the agreement either by explicit provisions or the agreement or by tacit recognition” arising out of prior conduct.\(^\text{850}\)

A prior single act cannot constitute a “course of dealing” as that term is defined in section 1-205,\(^\text{851}\) nor can “the mere


\(^{848}\) Id. § 75-1-205(3).

\(^{849}\) See id. See generally 1 HAWKLAND, supra note 821, § 1-205:1, at 1-245 to -246 & n.5. That is not to say, however, that a prior single act is not relevant at all to determining the intent of the parties to a written contract for the sale or lease of goods:

Because of the requirement that course of dealing involve sequential, previous conduct, a single prior act of the parties can never become a course of dealing. A prior single act may, however, be some evidence of what the parties had in mind in the transaction presently at issue and should be admitted into evidence to prove that intent, unless it violates the parol evidence rule stated by Section 2-202. As a single act it is not entitled to control usage of trade in accordance with the hierarchy set forth in Section 1-205(4). In other words, while a course of dealing may show that the parties have their own special way of doing business that is at odds with usual trade practice, a single act cannot be used to establish that idiosyncratic behavior which one of the parties denies.

1 HAWKLAND, supra note 821, § 1-205:3, at 1-254 (footnotes omitted).

\(^{850}\) UNIFORM COMMERCIAL CODE § 1-205 cmt. 3 (1999) (emphasis added).

\(^{851}\) International Therapeutics, Inc. v. McGraw-Edison Co., 721 F.2d 488, 491
sending of terms back and forth . . . , without more. Nor does the conduct of the parties after they have executed the written agreement constitute a course of dealing. The parties' course of dealing "is restricted, literally, to a sequence of conduct between the parties previous to the agreement."

(5th Cir. 1983); see also Kern Oil & Ref. Co. v. Tenneco Oil Co., 792 F.2d 1380, 1385 (9th Cir. 1986) (applying analogous Texas law), cert. denied, 480 U.S. 906 (1987). See generally 1 WHITE & SUMMERS, supra note 833, § 3-3, at 114 and authorities cited therein.

See Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1123 (5th Cir. 1985); Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.8 (S.D. Miss. 1995) (both emphasizing that "course of dealing" deals with conduct between the parties prior to the transaction at hand). The conduct of the parties after the written agreement is more properly termed their "course of performance." See infra subpart III.D.2.c. See generally 1 WHITE & SUMMERS, supra note 833, § 3-3, at 115 & n.5.

854 UNIFORM COMMERCIAL CODE § 1-205 cmt. 2. Courts may consider prior dealings between the party against whom the course of dealing is offered and third parties; but, a court asked to do so should exercise caution:

If the evidence proffered relates to dealings with a third party, rather than to prior dealings between the litigating parties, courts have noted that "[s]ubsidiary evidence of parallelism must be strong and convincing . . . [and] standards of admissibility should be higher than when dealing with transactions between the same parties."


In Carlo Corp. v. Casino Magic of La. Corp., 26 F. Supp. 2d 904 (S.D. Miss. 1998), the court rejected an argument by the thwarted seller of a vessel (Casino Magic) that the would-be buyer (Carlo) was required by its "past course of conduct" to give the seller a "reasonable basis" for refusing to consummate the sale:

[T]he language and terminology centered upon the understanding by both parties that if Carlo accepted the vessel, it did so according to the following limitations set forth at page 3 of the Agreement:

Seller shall deliver the Vessel to Buyer "as is and where is". Except with regard to title, Seller makes NO WARRANTY of any kind whatsoever, whether expressed or implied, including without limitation, any implied warranty of merchantability, quality, condition, fitness for any particular purpose, seaworthiness, or against any redhibitory vices or defects, hidden, latent or otherwise, all such warranties being expressly WAIVED by Buyer.

It is this Court's opinion that [this] Condition Precedent . . . , is
A sequence of conduct does not require a sequence of contracts. "A pattern for purposes of course of dealing... may be established under a single contract presenting repeated occasions for tender and rejection." 

The probative value of the parties' prior course of dealing is a function of the similarities between the prior transaction(s) and the one before the court:

Section 1-205(1) provides that course of dealing is restricted to the parties' activity "which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." This reservation does not mean that the current transaction must be identical to previous ones but that it must be sufficiently analogous to make probable a finding that the parties intended to give

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clearly in the nature of caveat emptor; with the drafter's express intent that the burden was upon the buyer, should it accept the vessel "as is," to perform such inspections as it deemed necessary to justify its decision. Such language clearly anticipates and prepares to defend against any subsequent claim by the buyer, after acceptance, that it was prohibited from inspecting the merchandise.

What was intended as a shield against liability, at the outset, is now being employed as a sword to force a prospective buyer to pay a penalty for electing to withdraw.

Carlo's reasons for electing to not take the vessel "as is"... are now being challenged as not the reasons that Casino Magic would have accepted; however, no where within the four corners of the Agreement is it stated or implied what the parties agreed would be acceptable reasons. ... The Court does not find that the terms, when construed within the context of the Agreement as a whole, are ambiguous...

Curiously, Casino Magic asserts in the alternative that "the evidence concerning Carlo's past course of conduct supports Casino Magic's interpretation requiring that Carlo provide a reasonable basis for refusing to accept the Vessel 'as is.'" ...

As to "course of conduct" or "course of dealing," [Casino Magic] apparently concedes that this term, under the UCC, requires previous conduct between the parties. Casino Magic, however, argues that as Mr. Paulson [Carlo's apparent alter ego], in an unrelated transaction, employed different language to allow him to reject a vessel, he should have placed the same or similar language in the subject Agreement. The Court rejects this "back door" approach... [This] Agreement was not drafted by Mr. Paulson, but by Casino Magic.

Id. at 908.

1 HAWKLAND, supra note 821, § 1-205:3, at 1-255.
their present contract the same meaning they had assigned to their previous deals through their conduct. Similarity of contracts is not the only test in determining this probability. The determination must also take into account changes in conditions and any other factors that affect the probable validity of the analogy.856

Whether the prior course of dealing is sufficiently similar to be deemed to have informed the parties’ agreement is an issue for the trier of fact.857

In Mid-South Packers, Inc. v. Shoney’s, Inc.,858 the Fifth Circuit considered whether the parties’ prior course of dealing created a reasonable expectation that an invoice, containing terms additional to those orally agreed to by the parties, would be sent by the seller (Mid-South), in response to the buyer’s (Shoney’s) purchase order; and, therefore, whether the additional terms contained within the invoice became part of the parties’ agreement under section 2-207.859 The court explained that

[section 75-2-207 applies to the situation in which an agreement has been previously reached either orally or by informal writings, and one or both parties send written confirmation of

856 Id. at 1-256 to -257 (footnotes omitted).
857 See id. at 1-257 & n.8.
858 761 F.2d 1117 (5th Cir. 1985) (applying Mississippi law).
859 Section 2-207, addressing the so-called “Battle of the Forms,” provides in relevant part:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
   (a) the offer expressly limits acceptance to the terms of the offer;
   (b) they materially alter it; or
   (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

terms discussed, adding certain terms not discussed. The written confirmation is recognized primarily as a writing necessary to satisfy the statute of frauds when the agreement reached is at least partially unenforceable for lack of a writing; this appears to be the primary basis for permitting a written confirmation to act as an acceptance under § 75-2-207(1). We think this rationale properly applies to contracts that are partially oral, i.e., the offer is oral and the acceptance written, so long as the written acceptance does not purport to contain the entire agreement.

Here, Mid-South's August 12 offer to sell was orally made. Thus, the contract, concluded by Shoney's purchase orders, was initially unenforceable against Mid-South because not evidenced by a writing signed by Mid-South. Mid-South's invoice rendered the contract enforceable against it under the statute of frauds. By the same token, the extensive course of dealing between the two parties clearly indicated to Shoney's that the invoices would follow its purchase orders and, Shoney's having received several of the invoices in prior transactions, the interest and collection costs terms came as no surprise to Shoney's. Moreover, Shoney's purchase orders did not purport to contain all of the terms of the agreement and Mid-South's invoice, sent only one day following shipment, added a certainty and definiteness to the contract's terms that both parties expected and, presumably, desired. Finally, Shoney's had the right and the opportunity to prevent, in the usual way, the proposed terms from becoming part of the contract. . . .

To be sure, courts have expressed some doubt, in contexts different from that presented here, whether a writing sent subsequent to the closing of the bargain may operate as an acceptance under § 2-207(1). However, under the circumstances of this transaction, and for the reasons stated, we think Mid-South's invoices constituted "written confirmations" within that section. 860

In Southern Cotton Oil Co. v. Merchants National Bank, 861 the issue for the Fifth Circuit was whether a course

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860 Mid-South Packers, 761 F.2d at 1123 (footnotes and citations omitted).
861 670 F.2d 548 (5th Cir. 1982) (applying Mississippi law).
of dealing between a bank (Merchants) and its customer (Southern) could establish whether the bank made presentment and notice of dishonor within a "reasonable" time under section 4-202. The court held that Merchants had, based on its prior dealings with Southern, acted with a "reasonable" time despite delaying notice of dishonor for fifty-two days:

A course of dealing may establish the seasonableness of an action. A course of dealing had been established between the Bank and Southern prior to the present controversy. In seven prior transactions, delays from 9 to 45 days had been experienced. In three similar transactions involving drafts drawn by Southern on another customer, the payments were each delayed by 48 days. This history of slow payment was acceptable until, of course, a buyer became bankrupt in the interim. In light of this established course of dealing, we are in agreement with the District Court's implied finding that the Bank acted seasonably in delaying notice of dishonor for 52 days.

Section 4-202 provides, in relevant part:

(b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

(c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.


Southern Cotton Oil, 670 F.2d at 550.
b. Usage of Trade

A "usage of trade" is a "practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." To establish "regularity of observance," the proffering party "must demonstrate a dominant pattern of use within the industry."

The language of any commercial contract "is to be interpreted as meaning what it may be fairly expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade." An absurd or unreasonable meaning will not suffice.

Usages of trade "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding." To

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564 Miss. Code Ann. § 75-1-205(2) (1981). See generally 1 White & Summers, supra note 833, § 2-10, at 101 & n.54 and cases cited therein. "When a trade usage is widespread, there is a presumption that the parties intended its incorporation, unless the contract language carefully negates it." Id. at 101.

565 H&W Indus., Inc. v. Occidental Chem. Corp., 911 F.2d 1118, 1122 (5th Cir. 1990) (applying Mississippi law). Thus, for example, "[t]he testimony of one officer as to that company's practices is generally insufficient to establish such a pattern." Id. (citing First Flight Assocs., Inc. v. Professional Golf Co., 527 F.2d 931 (6th Cir. 1975), Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970), and Magnolia Lumber Corp. v. Czerwicz Lumber Co., 43 So. 2d 204 (Miss. 1949)).


567 See Yazoo Mfg. Co. v. Lowe's Cos., 976 F. Supp. 430, 436 (S.D. Miss. 1997) ("[D]efendant has not produced any evidence that its definition of 'committed to take' is embodied in any written trade code or similar writing. Defendant would simply have the court take its word on the subject and ask the trier of fact to accept that the words used actually mean the opposite of what they say. This court is persuaded otherwise, and holds that a trier of fact would find that to construe the phrase 'committed to take' to mean 'forecast' leads to an impractical and absurd result. The words 'committed to take' mean what they say and clearly connote Lowe's promise to purchase the lawn mowers at issue.").

568 Uniform Commercial Code § 1-205 cmt. 4. The Mississippi Supreme Court stated that

any competent evidence of trade usage should have been admitted to clarify, hopefully, the complex and somewhat ambiguous language used by the commission in the technical documents constituting the contract.
be recognized as such, a trade usage need not be "ancient or immemorial," 'universal,' or the like. Rather, Section 1-205 at issue.

Dixie correctly states an abstract rule of law requiring that ambiguities in a written contract be resolved unfavorably to the party who drafted the contract. However, this rule may not be enlarged, as it seems to have been done, to exclude the drafting party's evidence aimed at clearing the ambiguity by showing reasonable commercial understandings, concerning the meanings of technical terms, arising from usage of trade.

Mississippi State Hwy. Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205-06 (Miss. 1979) (citations omitted).

586 UNIFORM COMMERCIAL CODE § 1-205 cmt. 5. In this way, Section 1-205 displaces the ancien regime of "custom." See 1 HAWKLAND, supra note 821, § 1-205:4, at 1-257. That said, Professor Hawkland advises:

Although displaced, common law custom provides a good vantage point from which to view usage of trade. To be effective common law custom had to be: "(1) legal; (2) notorious; (3) ancient or immemorial and continuous; (4) reasonable; (5) certain; and (6) universal and obligatory." Several of these requirements are continued in modified form as aspects of trade usage under the Code.

The requirement that custom be "legal" undoubtedly carries over to the UCC. A usage of trade involving illegal activities may form a part of the parties' agreement but is unenforceable and, accordingly, does not form a real part of the contract. The requirement that custom be "notorious" means, in effect, that it is binding only upon those who know of it. Section 1-205(2) modifies this requirement and is reinforced through the rule announced in Section 1-205(3) that usage of trade binds all members of that trade and, additionally, binds others who are, or should be, aware of it. If both the seller and the buyer are in the sugar business, a trade usage among sugar merchants would bind them, even if they are ignorant of it. On the other hand, if the seller is a sugar merchant but the buyer is not, the trade usage would not become an implied term of their contract, unless the buyer actually knew of it or should have known of it.

The fact that Section 1-205 seems to have rejected outright the requirements that custom be immemorial or ancient does not create "instant" trade usage, because subsection 1-205(2) defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." . . .

The Code seems to continue the quality of reasonableness required by custom. Official Comment 5 states that trade usage includes "usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not readily agree." This language suggests, as would be expected, that neither unreasonable nor unethical
205(b) encompasses any usage "currently observed by the great majority of decent dealers, even though dissidents ready to cut kinds of usage may qualify as trade usage. Official Comment 6 discusses the matter more explicitly:

The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

The requirement that custom be certain meant that widespread variation from a "customary norm" could prevent its efficacy. If, for example, allowing late deliveries was usual in a particular trade but the tardiness varied from two days with respect to some merchants to 10 days with respect to others, no custom existed. Official Comment 9 indicates that the Code rejects this view and states in part that

[j]in cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party in relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established.

For the late deliveries example Official Comment 9 requires that the seller be given two days of tolerance.

The requirement that custom be universal to be effective meant that almost all persons who were supposed to adhere to the custom did, in fact, observe it. Although mere majority compliance was insufficient to establish custom, some noncompliance was allowed, because perfect compliance was an obvious impossibility. The Code changes this requirement for its concept of trade usage but only in matter of degree. While Section 1-205(2) provides that trade usage comes into existence when "regularity of observance" causes people to rely on it, not everyone need observe the practice involved, as Official Comment 5 states that full recognition is "available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes." "Great majority," as used in this comment, probably means something less than what "universality" meant at common law so that a trade code may rise to the level of trade usage, although a slim plurality of the affected merchants adopt it.

Id. at 1-257 to -261 (footnotes omitted).
corners do not agree. Both parties need not be "consciously aware" of the usage for the court to consider it; rather, "[i]t is enough if the trade usage is such as to 'justify an expectation' of its observance.

A court should consider any usage of trade in the vocation or trade in which the parties are engaged, in the place where any performance is to occur, or of which the parties are or should be aware.

The party asserting a trade usage must prove its existence and its applicability to the other party. The existence and scope of trade usage by which the terms of a written contract for the sale or lease of goods may be explained are fact questions.

c. Course of Performance

The meaning of words is not as clear as many suppose. Justice Holmes once observed that "you cannot prove a mere private convention between two parties to give language a different meaning from its common one. It would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church." If the parties through repeated performances, however, indicate that they regard "five hundred feet" as meaning "one hundred inches" or that "Bunker Hill Monument" means "Old South Church" this evidence of course of performance should be admitted, and probably relied

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870 UNIFORM COMMERCIAL CODE § 1-205 cmt. 5.
871 1 WHITE & SUMMERS, supra note 833, § 3-3, at 114. Indeed, "a party can be chargeable with a usage of trade of which it is ignorant." Id. at 115.
872 Id. at 114 (quoting the analog of MISS. CODE ANN. § 75-1-205(2)).
874 Id. § 75-1-205(5).
875 Id. § 75-1-205(3). See generally 1 WHITE & SUMMERS, supra note 833, § 3-3, at 114 & n.4.
876 1 HAWKLAND, supra note 821, § 1-205:4, at 1-261.
877 MISS. CODE ANN. § 75-1-205(2) ("The existence and scope of such a usage are to be proved as facts."). See generally 1 HAWKLAND, supra note 821, § 1-205:4, at 1-261 & n.14.
A "course of performance" is a sequence of previous occasions to tender or to perform under the contract in dispute, provided that on all such occasions, the non-tendering or non-performing party was aware of the tender or performance, had an opportunity to object to it, and did not object in a timely manner, if at all. A single act or omission does not constitute a course of performance. Rather, a course of perfor-

\footnotesize

\textsuperscript{878} 1 HAWKLAND, supra note 821, § 2-208:3, at 2-305 (quoting Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 420 (1899)).

\textsuperscript{879} The Mississippi Uniform Commercial Code provides that:

\begin{quote}
Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
\end{quote}


Course of performance, under the Code, is similar to, but distinct from the common law doctrine of "practical construction," discussed supra subpart II.C.8. See 1 WHITE & SUMMERS, supra note 833, § 1-6, at 48 (discussing both the similarities and the differences between course of performance and practical construction). Professor Hawkland sees far more similarity than difference:

\begin{quote}
"Course of performance" is new language for an old idea called "practical construction." For more than a century, United States courts have recognized that the actual performance of a contract by the parties had high probative value in determining its actual meaning, particularly when its express terms were vague, missing or ambiguous. . . . Section 2-208 extends this approach by making course of performance relevant to determine the meaning of the contract, even where the meaning of its express terms seems clear on their face.
\end{quote}

1 HAWKLAND, supra note 821, § 2-208:1, at 2-299 (footnote omitted).

\textsuperscript{880} See UNIFORM COMMERCIAL CODE § 2-208 cmt. 4 (1999). See generally 1 HAWKLAND, supra note 821, § 2-208:2, at 2-301 & n.3; 1 WHITE & SUMMERS, supra note 833, § 1-6, at 48. In other words,

\begin{quote}
[although a single occasion of performance does not amount to a "course of performance," where it is tendered and accepted under a contract to be performed in stages, there is a waiver of the express term as to that occasion of performance. Depending on the circumstances, it also might constitute the kind of conduct that would impose upon the other party the duty to notify the variant performer that subsequent stages must be
performance deals with a contract which provides for several "occasions for performance." 8

Unilateral acts or omissions, undertaken without the knowledge or consent of the other party to the contract, cannot rise to the level of course of performance. 8

The parties' course of performance of a particular contract is always relevant to determine the meaning of their written agreement. 8 The parties' course of performance may also

performed in accordance with the express contract terms. This notification need not be given in any formal way, and may be accomplished in most cases by a grumbling acceptance of the defective tender. The whole idea, of course, is not to lull a party into thinking that strict performance is not required so that he is surprised by a rejection of a subsequent tender which he had some reason to think would be acceptable.

1 HAWKLAND, supra note 821, § 2-208:3, at 2-310.

See MISS. CODE ANN. § 75-2-208(1); see also Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.8 (S.D. Miss. 1995). See generally 1 WHITE & SUMMERS, supra note 833, § 1-6, at 48. Furthermore,

[t]he words "repeated occasions" suggest [a] contract that is to be performed in several stages, but only two occasions of conduct are needed to trigger the operation of the section. Obviously, the greater the number of performances that are made and accepted, the greater will be the probative value of the course of performance in establishing the meaning of the contract. Moreover, the relationship is not necessarily a direct one, because three successive performances of an installment contract, given by one party and accepted by the other, may be worth proportionally more than two successive performances by the same parties as an aid in determining their actual agreement.

1 HAWKLAND, supra note 821, § 2-208:2, at 2-301 to -302 (footnote omitted).

See 1 HAWKLAND, supra note 821, § 2-208:2, at 2-302. Before invoking Section 2-208, the party seeking to invoke it must show that an occasion of performance was accomplished under circumstances in which the other party had knowledge of its nature and the opportunity to object to it. Hence, a sudden, unilateral act of performance thrust upon the other party cannot be considered a "course of performance," though it may be incumbent upon the other party to object to it after it is made, lest he mislead the first actor into thinking that the performance was satisfactory and a proper basis for accomplishing latter stages of the contract. Conversely, if the other party does object to performance in a timely manner, given the circumstances of the situation, the performance, whether proffered or accomplished, thereafter can form no part of a course of performance.

Id. (footnote omitted).

See UNIFORM COMMERCIAL CODE § 2-208 cmt. 2; see, e.g., Mississippi State
modify or waive the express terms of the written agreement,\textsuperscript{884} notwithstanding the hierarchical preference for express terms over course of performance and other terms implied by the Code,\textsuperscript{885} as long as it does not run afoul of one or both of the provisions in Section 2-209 that (1) any subsequent modifications must be in writing, if the parties include such a requirement in their written contract,\textsuperscript{886} and (2) the modified agreement must satisfy the statute of frauds.\textsuperscript{887}

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Hwy. Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205 (Miss. 1979) ("A course of performance under the first segment, depicted in plan sheet 2-E, could be a material aid in construing the performance to be required under identical pay items on the 11.4-mile segment depicted in the plan sheet."). See generally 1 WHITE & SUMMERS, supra note 841, § 1-6, at 47-48.

\textsuperscript{884} See MISS. CODE ANN. § 75-2-208(3) ("[C]ourse of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."). See generally 1 WHITE & SUMMERS, supra note 833, § 1-6, at 47 ("[I]f, in light of a 'relevant' course of performance, either a waiver or a modification . . . is thus shown, courts sometimes say that course of performance 'controls' and thus alters the express term.").

\textsuperscript{885} See MISS. CODE ANN. § 75-2-209(2); infra notes 911-14 and accompanying text. Furthermore, a course of performance is relevant under section 2-208(1) to determine the "meaning of the agreement" in the first place. When the section is so used, the apparent inconsistency between an express term and course of performance can melt away. After all, the very theory of course of performance, according to Comment 1, is that "[t]he parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was." When course of performance thus "controls," despite a seemingly inconsistent express term, the express term is not modified or waived. . . .

1 WHITE & SUMMERS, supra note 833, § 1-6, at 47-48 (quoting UNIFORM COMMERCIAL CODE § 2-208 cmt. 1).

\textsuperscript{886} See MISS. CODE ANN. § 75-2-209(2) (1981).

\textsuperscript{887} See MISS. CODE ANN. § 75-2-209(3).

However, Professor Hawkland emphasizes that, even if the course of performance does run afoul of either Section 2-209(2) or (3), and is, therefore, not a valid modification, the course of performance is still relevant evidence of the parties' construction and interpretation of the (unmodified) written agreement:

The parties are always competent to perform their contract differently from the manner contemplated by its express terms, and their actual performance will always be relevant and admissible to show their actual agreement. At minimum, this actual performance will show a waiver of the express term for the particular stage of performance; at maximum it
Unlike a usage of trade, with which a party may be deemed to have knowledge despite the parties' actual ignorance of the usage, the party against whom a course of performance is offered to modify, waive, or supplement the express terms of the written agreement must have had "knowledge of the nature" of the other party's non-conforming performance, or non-performance, and the opportunity to object to that (non)performance, and must have either accepted or acquiesced in the other party's act or omission or failed to object in a timely manner. Unlike course of dealing and trade usage, course of performance may not be "carefully negated" by the terms of the written agreement in order to proscribe its use in the event of a dispute over the contract's meaning and construction.

d. Consistent Additional Terms

Consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

may show that the express term has been modified and replaced by a new term indicated by the course of performance.

1 HAWKLAND, supra note 821, § 2-208:2, at 2-306.

888 See supra note 871.
889 MISS. CODE ANN. § 75-2-208(1).
890 See id. See generally 1 WHITE & SUMMERS, supra note 833, § 1-6, at 48, and authorities cited therein.
891 See 1 HAWKLAND, supra note 821, § 2-208:3, at 2-306 (observing that Comment 2 to Section 2-202, while counseling that course of dealing and usage of trade may be superseded if the writing carefully negates them, makes no such provision for carefully negating course of performance "because course of performance necessarily involves activities that occur after the contract is made").
892 UNIFORM COMMERCIAL CODE § 2-202 cmt. 3 (1999); see also Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 656-57 (Miss. 1975) ("We ascertain the legislative intent from [§ 75-2-202] to be that parol evidence may not be used to contradict the terms of confirmatory memoranda of a written agreement intended as the final expression of a contract, but that it might be explained or supplemented
The party proffering evidence of a consistent additional term, under Section 2-202(2), must satisfy the court that (1) the proffered term is "consistent" with the terms contained in the writing and (2) the writing is not fully integrated, thereby proscribing additional terms, consistent or otherwise. As Professor Hawkland explains:

[B]efore evidence of a consistent additional term becomes inadmissible, both parties must have intended the writing to "be a complete and exclusive statement of all the terms." Merger and other terms in a form contract, or those inserted unilaterally into a negotiated contract, and not carefully considered by both parties, may be found not to reflect the actual agreement of the parties, particularly where they thrust in a different direction from the dickered terms. Evidence explaining or supplementing these unbargained-for terms will normally be found to be consistent and thus admissible, because the circumstances will probably show that the parties did not intend the written term in question to reflect their complete and exclusive statement of the agreement. This point, however, cannot be carried too far, lest the stability of contractual undertakings be unduly threatened. To become admissible, evidence of additional terms must overcome two hurdles. Such terms are inadmissible unless the court answers two questions in the negative: (1) Did the parties actually intend the writing to represent their entire agreement? (2) If not, is the

Section 216 of the Restatement (Second) takes a similar position as the UCC, but in some ways goes further from the Code toward allowing evidence of consistent additional terms:

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumstances might naturally be omitted from the writing.

proffered additional term of such a kind and nature that it
certainly would have been included in the written contract
had the parties, in fact, agreed upon it?883

In Noble v. Logan-Dees Chevrolet-Buick, Inc.,884 the writ-
ten contract between the parties recited, *inter alia*, the total
consideration ($6,615) to be paid by the buyer (Noble) – consist-
ing of a cash down payment, trade-in allowance, and $2,150
payable on delivery – and that “The front and back of this
order comprises the entire agreement pertaining to this pur-
chase and no other agreement of any kind, verbal under-
standing or promise whatsoever, will be recognized.”885 The
seller (Logan-Dees) offered trial testimony that, in addition to
the $2,150 payable at delivery, Noble had verbally agreed to
transfer to Logan-Dees an insurance check in the amount of
$1,532.66, pertaining to the vehicle Noble was trading in.886
The trial court admitted the evidence and entered a judgment
ordering Noble to pay the proceeds of the insurance check to
Logan-Dees. On appeal, the Mississippi Supreme Court re-
versed and rendered judgment for Noble:

Noble contends that under the provisions of MISS. CODE ANN.
§ 75-2-202 (1972) the court erred by permitting parol testimo-
ny contradicting the terms of the agreement of the parties as
expressed in the contract. Logan-Dees contends that it was
entitled to offer parol testimony under subsections (a) and (b)
of the statute.

883 1 HAWKLAND, supra note 821, § 2-202:4, at 2-201 to -203 (footnotes omis-
ted). Furthermore,

[i]n answering these questions, . . . the court is entitled to listen to all
the evidence out of the hearing of the jury. . . . [T]he test . . . centers
on the actual, subjective intent of the parties, and the “certainly-would-
have-been-included” standard becomes one of credibility rather than an
exclusionary force in and of itself . . . . But the standard seems to be
something more than a mere indication that certain facts are to be scru-
inizied for credibility; it is, itself, a test of credibility.

Id. at 2-203.

884 293 So. 2d 14 (Miss. 1974).

885 Noble, 293 So. 2d at 15.

886 See id. at 14-15.
We hold that, under the facts as disclosed by the record, Logan-Dees was not entitled to offer parol testimony under subsection (a) because the evidence does not disclose a course of dealing and usage of trade as defined in MISS. CODE ANN. § 75-1-205, neither does it disclose a course of performance as defined by MISS. CODE ANN. § 75-2-208 (1972).

We hold that Logan-Dees was not entitled to introduce parol testimony under subsection (b) because the evidence offered was not of consistent additional terms, but the evidence offered would show a different consideration from that expressed in the writing. We also hold that parol evidence was not admissible under subsection (b) because the contract, by its own terms, was a complete and exclusive statement of the terms of the agreement of the parties.

If Logan-Dees expected to receive the proceeds of the insurance check as part of the consideration for the car sold to Noble, it would have been a very simple matter to include such a provision in the contract. Where parties, without any fraud or mistake, have deliberately put their contract in writing, the writing is not only the best, but the only, evidence of their agreement.\textsuperscript{897}

Where a written agreement is not the final and complete expression of the parties' agreement, Mississippi courts have permitted extrinsic evidence of additional consistent terms.\textsuperscript{898}

\textsuperscript{897} Id. at 15.

\textsuperscript{898} Compare, e.g., Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975) (holding that testimony regarding oral agreement which purportedly explained or supplemented written agreement was admissible because the written agreement provided that it was "as per our conversation"), with Ralston Purina Co. v. Rooker, 346 So. 2d 901, 902 (Miss. 1977) (distinguishing Paymaster Oil Mill, on the ground that the written agreement sub judice did not contain any language to the effect of the "as per our conversation" language in Paymaster Oil Mill, and concluding, therefore, that "the terms of the written contract were intended as the exclusive statement of the agreement between the parties" and that the proffered parol evidence that the parties understood that the defendant would only provide the plaintiff with the "soybeans produced from a particular farm, up to 4,500 bushels, [were] inconsistent with the contract provisions for buying and selling 4,500 bushels of soybeans" without regard to their source).
e. Terms Implied by the UCC (a.k.a. “Gap-Fillers”)

Article 2 provides a number of “default” or “gap-filler” terms to which a court may resort if the written agreement of the parties is silent on a subject or if the express term(s) proffered by the parties create(s) a conflict or ambiguity that cannot be resolved by referring to course of performance, course of dealing, usages of trade, or consistent additional terms. A court is often unable to resolve an ambiguity or conflict without resort to one or more “gap-filler”

when the parties have omitted a term through inadvertence or ignorance, because in that situation they have made no agreement on the matter, either express or implied. In setting forth a number of statutory terms to be used to fill some of these gaps, the Code supplies the commonly accepted term on the matter and perhaps prevents the contract from failing for lack of a reasonable basis for enforcement.

3. Applying the UCC Parol Evidence Rules

Subject to the free admissibility of non-contradictory evidence of trade usages, course of dealing, and course of performance, the admissibility of any other evidence extrinsic to a writing governed by the Code depends, at least in part, on the familiar issues of integration and ambiguity.

a. Questions of Integration

When may a judge invoke the applicable Code parol evidence rule to exclude evidence extrinsic to the terms of an unambiguous writing:

First, the judge may exclude the evidence on finding that the parties intended the writing to be a complete and exclusive statement of the terms of the agreement (unless it be evidence of course of dealing, usage of trade, or course of

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890 1 HAWKLAND, supra note 821, § 1-205:2, at 1-251.
891 See supra subpart III.D.2.
performance introduced only to explain or supplement the writing). . . . Second, the judge may exclude evidence extrinsic to terms set forth in the writing if he or she decides that the writing is a final written expression as to these terms and that the other evidence contradicts these terms. . . . Third, in passing on any parol evidence rule objection, the judge may decided that the proffered evidence of terms extrinsic to the writing is not credible, and he or she may exclude it on that ground alone. Section 2-202 is silent on this, but Professor McCormick thought that the "real service" of the parol evidence rule was here.902

Conversely, when may a judge admit extrinsic evidence notwithstanding the existing of an unambiguous writing:

A court may decide that the writing is not a "final written expression" as to any terms and admit the evidence. A court may decide that the writing is a final written expression of some terms, but not a "complete and exclusive" statement of all terms, and admit evidence of "consistent additional terms" [unless he or she also determines that the alleged extrinsic term, if agreed upon would certainly have been included in the writing]. A court may decide that the writing is a final written expression as to terms and also that the writing is a "complete and exclusive statement," yet admit evidence of course of dealing, usage of trade, or course of performance to "explain" the meaning of the terms in the writing.903

The questions of whether a writing is integrated, or "complete," and, if so, whether it is fully integrated, or "exclusive," are questions of law for the trial judge to decide outside the presence of the jury904:

902 1 WHITE & SUMMERS, supra note 833, § 2-9, at 86-87 (footnotes omitted).
903 1 WHITE & SUMMERS, supra note 833, § 2-12, at 104; see also id. § 2-10, at 91; 2 NELSON & HOWICZ, supra note 834, § 13-24, at 86 (observing that, if there is "any doubt" whether the parties intended their writing to be "the exclusive statement" of their agreement, "then parol evidence should be admitted, at least on the matter of consistent additional terms, to aid the court in giving full effect to the meaning of the contract").
904 See MISS. CODE ANN. § 75-2-202(2) (1981); UNIFORM COMMERCIAL CODE § 2-
The language of 2-202 does not expressly set forth “tests” by which the judge is to determine whether the writing is a complete and exclusive statement of the terms of the contract. Over the years, courts have devised different tests. One of these is the so-called “four corners” test by which the trial judge simply looks at what is within the four corners of the writing and decides if the writing looks complete. The structure of section 2-202 seems less congenial to this test than earlier versions of the parol evidence rule. The section may not adopt any presumption that the entire agreement is embodied in the writing. A four corners test thrives more readily under a rule that presumes full embodiment in the writing unless only partial embodiment is proved. Further, Comment 3 to 2-202 may reject a four corners test. Usually a judge should be willing to go beyond the four corners and consider any proffered evidence on the issue of completeness and exclusivity. At minimum the judge must learn of the context and of the character of the terms not in the writing; otherwise he or she will be in the dark at least as to some of the respects in which the writing might not be complete and exclusive. . . .

202 cmt. 3 (1999); 2 NELSON & HOWICZ, supra note 834, § 13-29, at 95 & n.19. See generally 1 WHITE & SUMMERS, supra note 833, § 2-10, at 86-87 & nn.7-9 and authorities cited therein.

905 1 WHITE & SUMMERS, supra note 833, § 2-10, at 89-90 (footnotes omitted); see also 2 NELSON & HOWICZ, supra note 834, § 13-21, at 83 (“In order to make a determination of when a contract is the alleged full integration of all prior or contemporaneous negotiations, one must look to the conduct of the parties, to the contract language itself, and to the circumstances surrounding the making and performance of the contract.”). Namely,

[t]he parties may expressly provide that the written contract is the full and final integration of their agreement by including an integration or merger clause within the contract. While the existence of an integration or merger clause in a contract does not in itself render a writing as the complete and exclusive statement of the parties' agreement, it is strong evidence of the parties' intention that the written instrument is the complete embodiment of the contract.

2 NELSON & HOWICZ, supra note 834, § 13-29, at 95 (footnotes omitted). That said,

[t]he fact that the parties have integrated their contract through a merger clause which states that the writing is intended as a complete and
b. Questions of Ambiguity

As is true at common law, even if the judge finds that the writing is fully integrated, she may admit extrinsic evidence (that does not contradict any integrated, unambiguous term) if she finds that one or more terms in the fully integrated writing is/are ambiguous.

According to the Fifth Circuit, the Code adds a third level to the traditional two-level [ambiguity] inquiry. Instead of asking, "Were the contract terms ambiguous" and then, "If they were ambiguous what do they mean in light of extrinsic evidence," the Code poses three inquiries:
1. Were the express contract terms ambiguous?
2. If not, are they ambiguous after considering evidence of course of dealing, usage of trade, and course of performance?
3. If the express contract terms by themselves are ambiguous, or if the terms are ambiguous when course of dealing, usage of trade, and course of performance are considered (that is, if the answer to either of the first two questions is yes), what is the meaning of the contract in light of all extrinsic evidence?

exclusive statement of terms is not sufficient to negate the force of trade usage and course of dealing, because these are such an integral part of the contract that they are not normally disclaimed by general language in the merger clause.

1 HAWKLAND, supra note 821, § 2-202:3, at 2-187.
906 See supra subpart III.A.3.b.
907 See 2 NELSON & HOWICZ, supra note 834, § 13-28, at 92-93 ("While the court need not make a finding of ambiguity prior to the admission of evidence of consistent additional terms, if the court rules that the contract in question is ambiguous . . . or uncertain in any of its terms, then parol evidence as to the meaning of the terms in the contract may be admitted."); see also 1 WHITE & SUMMERS, supra note 833, § 2-10, at 99 & n.47 (observing that the reasons for admitting evidence of a course of dealing, usage of trade, or course of performance are even stronger if the writing is, inter alia, ambiguous, and citing cases in accord).

With respect to the second and third "prongs," parties who enter into a contract and are aware of some current usage of trade by implication can be said to have incorporated that usage into
The first inquiry is a question of law; the third inquiry is a question of fact.\footnote{1999} The "thorny problem," in the words of the Fifth Circuit, is determining whether the second inquiry is one of law, fact, or both.\footnote{1999} Neither the Mississippi courts nor the Fifth Circuit have as yet resolved this thorny question.

In both finding and resolving ambiguity, Mississippi courts should strive to construe the express terms of the written agreement, the parties' prior course of dealing, any relevant usages of trade, the parties' course of performance, any consistent additional terms, and any terms implied as a matter of law as being consistent one with another.\footnote{1999} However, when their written agreement, even where the contract seems clear and unambiguous and does not include any precise language concerning that usage. The Code has clearly indicated that as far as sales (or lease) contracts are concerned, any evidence of usage of trade . . . is admissible to make a determination concerning the parties' intention, even if the contract terms are not ambiguous.

2 Nelson & Howicz, supra note 834, § 13-44, at 111. The same rationale can clearly be applied to the parties' own course of dealing prior to the execution of the written instrument. And, with course of dealing, there is no question of whether the party against whom the course of dealing is offered knew or should have known, because it was a party to the course of dealing.

\footnote{1999} Paragon Resources, 695 F.2d at 996.

\footnote{1999} See id. Eleven years later, the Fifth Circuit again took the opportunity not to decide whether the effect of trade usage, course of dealing, and course of performance was to be determined by the court as a matter of law or by the trier of fact. See Bloom v. Hearst Entertainment, Inc., 33 F.3d 518, 522-23 (5th Cir. 1994) (quoting the passage above from Paragon Resources, observing that the Paragon Resources court did not resolve the question of who was to answer the second inquiry, and then failing to resolve the issue itself).

\footnote{1999} Miss. Code Ann. § 75-2-208(2) (1981). See generally 1 Hawland, supra note 821, § 2-208:3, at 2-304. Professor Hawland writes that [t]he full meaning of many contracts may be determined only by considering their express terms in conjunction with the implied terms developed through resort to course of performance, course of dealing and usage of trade and augmented by the statutory (gap-filling) terms provided by the UCC itself. A bare bones sales contract usually will contain only three express terms -- the description, quantity, and price of the goods. Important matters such as delivery, credit, quality and details of performance may be completely omitted. . . . Sections 1-205(4) and 2-208(2) direct[] the courts to try to harmonize the express terms that are provided in the written contract with the implied and statutory terms
such a construction is unreasonable, the Code prescribes the following hierarchy: (1) express terms control course of performance; (2) course of performance controls course of dealing; (3) course of dealing controls usages of trade; and (4) usages of trade control terms implied as a matter of law (i.e., "gap fillers"),\footnote{13} other than "mandatory" terms.\footnote{13}

that are to be determined by going outside of it. Additionally, the courts must try to achieve harmony among the implied terms whenever possible. In the bare bones sales contract which contains express terms only on price, description and quantity, the court may, for example, find the delivery term by resorting to course of dealing, the credit term by resorting to usage of trade, some details of performance by resorting to course of performance, and the warranty or quality term by resorting to the statutory gap-filling provisions of the UCC, found in this case in Sections 2-314 and 2-315.  

\textit{Id.} § 1-205:2, at 1-247 to -248 (footnote omitted).

\footnote{12} MISS. CODE ANN. §§ 75-1-205(5) & -2-208(2) (1981); see Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.9 (S.D. Miss. 1995); see also RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981) (setting forth the same priority scheme established in §§ 1-205(d) & 2-208(b) for all contracts, not only those governed by the UCC). \textit{See generally} 1 HAWKLAND, \textit{supra} note 821, § 1-205:2, at 1-248 to -250. Professor Hawkland writes that

\textbf{... In cases of conflict the statutory terms are subordinated in rank to course of performance, course of dealing and usage of trade. This subordination is sound because course of performance, course of dealing and usage of trade are methods of identifying the implied terms of the contract, part of the agreement itself, while the statutory terms are not part of any agreement between the parties.}

\footnote{13} 1 HAWKLAND, \textit{supra} note 821, § 1-205:2, at 1-251 to -252 (footnote omitted).

Section 2A-207(b) sets forth the analogous provision regarding lease contracts. \footnote{13} MISS. CODE ANN. § 75-2A-207(2) (Supp. 1998).

\footnote{13} Professor Hawkland explains that
The hierarchy established by Section 2-208(2) does not necessarily mean that evidence of trade usage, for example, may not be admitted to determine the meaning of an agreement, merely because it is inconsistent with evidence of course of performance or course of dealing. The hierarchy only emphasizes the weight to be given to various kinds of evidence, and does not go to its admissibility. Conceivably, in this connection, a court might prefer to make a finding on the basis of very strong evidence of trade usage, when contradicted by very weak evidence of course of performance or course of dealing.\textsuperscript{914}

As is true with non-Code cases,\textsuperscript{915} the construction and

\textsuperscript{914}Id. § 2-208:3, at 2-304. Professors White and Summers are even more skeptical of the Code’s hierarchy, arguing that “the provision that express terms control inconsistent course of dealing and its cohorts really cannot be taken at face value, at least in some courts.” 1 WHITE & SUMMERS, supra note 833, § 3-3, at 120. They explain:

[C]ourse of dealing and one or more of its cohorts may cut down or even subtract what would otherwise be whole terms of the express agreement of the parties. Section 1-205 says that course of dealing and usage of trade may “qualify” the express terms of the agreement. Thus, “delivery June-August” may be qualified by trade usage to require deliveries spread through these three months rather than all at once. And 2-208(1) on course of performance is drafted broadly enough to allow for the same kind of effect. A major function of course of performance, together with the law of modification and waiver, is to help cut down or subtract express terms altogether. Section 2-208(3) says that a course of performance inconsistent with any [express] term of the agreement “shall be relevant to show a waiver or modification” of the [express] term . . . .

\textsuperscript{915}See supra notes 32, 53 and accompanying text.
interpretation of an unambiguous contract for the sale or lease of goods is a matter of law for the court, while the construction and interpretation of an ambiguous contract for the sale or lease of goods, through the lens of extrinsic evidence of the parties’ intent, is a matter of fact. Thus, a trial court may properly grant summary judgment when a contract for the sale or lease of goods is unambiguous, but should not grant summary judgment when a contract for the sale or lease of goods is ambiguous and the parties’ intent presents a genuine issue of material fact.

IV. CONCLUSION

Extrinsic evidence, admitted or excluded by the operation of one or more of the rules of contract construction and interpretation at the disposal of Mississippi courts, often plays a dispositive role in contract litigation. The parol evidence rule – once thought to be a bastion which would turn away any unwanted agreements or evidence that added to, altered, or contradicted the express rights and obligations provided by a written contract – has been eroded by many judicially-created exceptions and exclusions, to say nothing of the exceptions embodied in the Uniform Commercial Code. Indeed, in light of the various statutory and common-law exceptions and exclusions, one might conclude that, to the extent that the parol evidence rule acts as a “rule” in cases governed by the Code, it does so more in the nature of an “enabling” rule, permitting parties to present extrinsic evidence that might otherwise be excluded, rather than an “exclusionary” rule, preventing parties from presenting extrinsic evidence that might otherwise be admissi-
ble. Moreover, many instances exist in which extrinsic evidence will be considered where the parol evidence rule is of no consequence.

Over time, courts, primarily in other jurisdictions, seem to have concluded that this result is not all bad – and they are probably correct. Given that the stated purpose of contract construction and interpretation is to give maximum effect to the intent of the parties at the time they executed the agreement, that purpose may indeed be better served by a rule that does not screen out relevant evidence simply because there exists a written instrument that appears on its face to be complete and unambiguous. Unfortunately, such a rule is not currently followed by the Mississippi Supreme Court except in cases governed by the Uniform Commercial Code – and then, it seems at times, only grudgingly.

One consequence of the Mississippi Supreme Court’s unwillingness to follow the lead of the Restatement (Second) of Contracts, the Uniform Commercial Code by analogy to non-Code cases, leading treatises and commentators, and a majority of sister jurisdictions with respect to non-Code cases is that parties to contracts and other similar instruments governed by Mississippi common law face a markedly different set of rules that will be used to construe and interpret their written agreements than they might be accustomed and/or entitled to in other jurisdictions. Whether that, in turn, encourages or discourages non-Mississipians to contract with Mississipians is a question for another day – even if we assume that non-Mississipians know of and understand the difference between the Mississippi Supreme Court’s approach to contract construction and interpretation and that followed by a majority of other jurisdictions, there is certainly room to debate whether Mississippi’s approach increases or decreases the frequency of disputes over the meaning and consequence of the terms of a written contract and the predictability of the outcome of those disputes. What does seem clear is that a non-Mississippian who is unaware of Mississippi’s approach to contract construction and interpretation may be in for a pleasant surprise or a rude awakening, depending on which side he takes in the writing-
Another consequence of the Mississippi Supreme Court's unwillingness to follow the lead of the Restatement, the Code by analogy to non-Code cases, leading treatises and commentators, and the "majority rule" of sister jurisdictions with respect to non-Code cases is that parties to contracts and other similar instruments governed by Mississippi common law face a markedly different set of rules that will be used to construe and interpret their written agreements than will be used to decide otherwise identical disputes in cases that are governed by the Mississippi Uniform Commercial Code. Depending on whether one thinks that the Code or the court has it right, the fact that different rules apply to Code and non-Code cases may be troubling because it affords "better" treatment to one class of disputes and disputants than to another. Moreover, the variance between the Code approach and the court's approach in non-Code cases may cause problems for lower courts trying to "get it right" in the first place.

A final consequence of the Mississippi Supreme Court's unwillingness to follow the lead of the Restatement, the Code by analogy to non-Code cases, leading treatises and commentators, and the "majority rule" of sister jurisdictions with respect to non-Code cases is that the outcome of non-Code cases may tend to hinge more on the applicability of one or more exceptions to the common law parol evidence rule than on the application of a well-reasoned process of construction and interpretation.

Until the Mississippi Supreme Court decides to abandon a "four corners" approach to construction and interpretation and embrace a more modern contextual approach, if ever, Mississippi judges, lawyers, and litigants -- and those in other jurisdictions who are asked or compelled to apply, explain, or adhere to Mississippi law -- need to understand the rules, guides, and exceptions discussed in this article and in the source materials from which it draws. I hope the reader finds it educational.