RECENT DECISION

CONSTRUCTION LAW -- COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES -- THE INITIAL ACT OF HIRING A SUBCONTRACTOR DOES NOT PRECLUDE CGL POLICY COVERAGE UNDER MISSISSIPPI LAW

I. FACTS

On April 14, 2000, third party plaintiff and appellant Architex Association, Inc. contracted with Vikram Parshotam and CIS Pearl, Inc. (CIS) to build a Country Inn and Suites hotel in Pearl, Mississippi.[1] On July 31, 2002, CIS filed suit against Architex for construction defects related to the building of the Inn and stemming from work done by several of Architex's subcontractors.[2] CIS alleged that Architex breached its contract, that Architex and/or one or more of its subcontractors was negligent in the performance of its work on the Inn and that such negligence caused CIS injury, and that the construction lien claim by Architex amounted to slander of title.[3] CIS claimed that Architex's and/or its subcontractors' defective work caused damage to CIS's property in the form of water intrusion, mold and mildew damage, rebar deficiencies, and the rusting of fixtures and hardware.[4] The damages alleged by CIS were the result of negligence on behalf of one or more of Architex's subcontractors; indeed, all construction on the Inn was performed by subcontractors–not by Architex personnel.[5] In regard to the breach of contract claim, CIS alleged that Architex refused to complete construction of the Inn, performed work which diverged from the contract plans, specifications, and applicable building codes, and failed to cure defective work.[6]

Prior to the several disagreements between Architex and CIS, Scottsdale Insurance Company had issued "three consecutive one-year Commercial Lines policies to Architex," each of which contained a Commercial General Liability (CGL) element.[7] Under these CGL policies,

---

[1] Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1149 (Miss. 2010).
[2] *Id.*
[3] *Id.*
[4] *See* Complaint of Plaintiff, Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148 (Miss. 2010) (No. 2008-CA-01353-SCT).
[5] *Architex*, 27 So. 3d at 1150. The following is a list of subcontractors, sub-subcontractors, manufacturers, and/or suppliers who performed work on the Project: (1) A-1 Roofing and Guttering Co.; (2) Ainsworth Pool Tech; (3) American HinTech; (4) Apex Supply; (5) Aqua-Lawn; (6) Ark-La-Tex Wallsource, Inc.; (7) Bailey Electric; (8) Bemis; (9) Bend of the River; (10) Cajun Carpets; (11) Callender Enterprises; (12) Central Asphalt; (13) Chris-More, Inc.; (14) Concrete Creations; (15) Continental Construction; (16) Custom Millworks; (17) Daltile; (18) David Futrell; (19) Delta Faucet Co.; (20) Elizer; (21) Flag Source; (22) Griggs & Son Construction; (23) Helping Hand; (24) Hi-tower Gycrete; (25) Holley Construction; (26) Hughes Brothers Plumbing; (27) Ilco; (28) Imperial Contract Wallcoverings; (29) Ivy Waltman, Inc.; (30) Jackson Ready Mix; (31) John Matthews; (32) Kaba-Ilco; (33) KD Construction; (34) Konover Swinerton; (35) L&B Construction; (36) Lexmark Carpet Mills; (37) McKay Drywall; (38) Masterchem Inc.; (39) Mike Rasmussen; (40) Old South Brick & Supply; (41) Pre-build Co.; (42) Prem Supply; (43) Puckett Rents; (44) R&R Mechanical; (45) Roadrunner Lock Co.; (46) Roger Dooley; (47) Schindler Elevator; (48) Smart Landscapes; (49) Southeast Automatic Sprinkler; (50) Southeast Wholesale Door; (51) Tandem Staffings; (52) The Carpet Expert; (53) Thrasher Door & Hardware; (54) Valiant Products Corporation; (55) Waste Management; and (56) Wickes Lumber.
[6] *Architex*, 27 So. 3d at 1150.
[7] *Id.* at 1151.

Architex paid just over $11,000 in premiums from 1999-2001 for subcontractor work in connection with the construction of its buildings.[8] All three policies contained similar language which stated that the Scottsdale would only provide coverage of claims for "'property damage' . . . caused by an 'occurrence' that takes place in the 'coverage territory'; and . . . occurs during the policy period."[9] Additionally, the policies stated that the insurance did not apply to "'property damage' expected or intended from the standpoint of the insured."[10] These were the two main provisions of the policy at issue in the case. There were additional provisions: one provided that the insurance did not cover "property damage" to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations;" another provided that the insurance did not apply to "'[p]roperty damage' to 'your work.'"[11] This provision was known as the "your work" exclusion.[12]There was, however, an exception in the policy to the "your work" exclusion, known as the "subcontractor exception;" this exception stated that "this exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a *subcontractor*."[13]

Architex initially considered the suit filed against it by CIS to be a "mere fee dispute;" however, in September 2004, CIS informed Architex that there were "serious rebar deficiencies" in the Inn's foundation that needed to be addressed.[14] That is when, on October 5, 2004, Architex contacted Scottsdale and sought defense against the suit and coverage under the CGL policy for the alleged defects in the construction of the Inn.[15] The key dispute between Scottsdale and Architex hinged on whether an "occurrence" existed which triggered coverage under the policy.[16] The notice of claim stated that the "date of occurrence" was September 30, 2004, and described the "occurrence" with vague language which denied the allegation of rebar deficiencies and averred that the building was sound and built during the policy term.[17] The chief financial officer for Architex, Victor Hamby, testified that the notice of claim concerning the rebar deficiencies "triggered an occurrence under the policy."[18] On October 8, 2004, Scottsdale

---

[8] *Id.*
[9] *Id.* (quoting the CGL policy language at issue). The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 1151, n.7.
[10] *Id.* at 1152 (quoting the CGL policy language at issue).
[11] *Id.*
[12] *Id.* "Your work" was defined by the policy as "(a) work or operations performed by you or on your behalf; and (b) materials, parts or equipment furnished in connection with such work or operations." *Id.* at 1152, n.8.
[13] *Id.* (emphasis added).
[14] *Id.* at 1150.
[15] *Id.*
[16] *Id.* at 1156.
[17] *Id.* at 1150. The Mississippi Supreme Court quoted Architex's counsel's description of the purported "occurrence":

> [CIS] filed accusations of faulty work against [Architex] claiming that no rebar was placed in foundation and building is total loss. [Architex] denies this allegation and building is sound. . . . This accusation was just made by [CIS]. [Architex] has been involved in legal action against [CIS] for failure to pay monies owed on this building. . . . Please contact [Architex's] attorney to coordinate defense. [Inn] was built during policy term."

Id.
[18] *Id.*

alerted Hamby that they received the notice of claim and they provided Architex with a "reservation of rights" letter; however, Scottsdale did not accept or deny coverage under the policy.[19]

On June 29, 2006, Architex counsel filed a "Third Party Complaint" against Scottsdale in the Circuit Court of Rankin County, Mississippi, for failure to defend and indemnify them for the claims against them by CIS.[20] Scottsdale formally denied Architex's request for "defense and indemnity" on September 6, 2006, stating that "there has not been any occurrence which would trigger coverage."[21] On March 28, 2008, Architex filed a "Motion for Summary Judgment" in the district court, averring that because the alleged property damage did not result from acts that were intended by Architex, there was an "occurrence" under the CGL policy, and thus, Scottsdale owed Architex a duty to defend.[22] Scottsdale countered with its own "Motion for Summary Judgment," asserting that they did not have a duty to defend because the allegations in CIS's complaint did not qualify as an "occurrence" under the policy.[23]

Rankin County Circuit Court Judge Kent McDaniel ruled for Scottsdale on its summary judgment motion and held that the issues presented by the parties concerning "the type of damage, coverage for that damage, whether it was caused by a subcontractor, and all similar issues" were moot because of the existence of "other language in the policy."[24] The circuit court held that Architex's claims were not covered under the CGL policy because Architex's intentional hiring of its subcontractors was the underlying act referenced by the "occurrence" language in the CGL policy, and thus, there had not been an "occurrence" because the hiring was intended and not an "accident."[25] The circuit court ultimately held that because there had not

---

[19] *Id.*
[20] *Id.*
[21] *Id.* at 1151 (internal quotations omitted).
[22] *Id.* at 1153.
[23] *Id.* (internal quotations omitted).
[24] *Id.* The circuit court specifically noted:

> this [c]ourt is convinced that this particular case is quite simple and that the controlling law on this policy language revolves around the word "*occurrence*." The controlling and/or strongly persuasive case law has defined plainly how that word is to be interpreted and applied. While it may be time for the [c]ourts of this state to expand that language and law so as to bring construction defects under the indemnity and defense obligations included in CGL policy language, this trial court is not at liberty to do so in the face of *binding precedent*.

Id. The circuit court also commented on the meaning of the word "occurrence":

> [the] definition of "occurrence" being parsed by the [Mississippi] Supreme Court in [*United States Fidelity & Guaranty Company v. OmniBank*, 812 So. 2d 196 (Miss. 2002)] is *verbatim* identical to the language in the policy at issue here. In fact, all of the CGL Coverage Form language quoted in *Omnibank* and virtually every other case studied appears to be a *verbatim* recitation of the language at issue here.

Id.
[25] *Id.* at 1154. The circuit court noted in its analysis that:

> whatever work was improper or defective or was not completed, as alleged in the original complaint and via ensuing discovery, was nevertheless the result of intended action by the insured,

been an "occurrence" then coverage was not triggered and thus, Scottsdale had no duty to defend."[26] Architex appealed to the Mississippi Supreme Court, which granted certiorari and held: reversed and remanded.[27] The Supreme Court reversed the circuit court and held that the policy's definition of an "occurrence" did not facially exclude coverage for property damage caused by a subcontractor's alleged negligence.[28]

II. RELATED LAW

A. *Allstate v. Moulton: The Beginning of the "Occurrence" Line of Cases in Mississippi*

In *Allstate Insurance Company v. Moulton*, the Mississippi Supreme Court reversed the circuit court and held that the insurer, Allstate, was not obligated to defend the insured under a comprehensive coverage policy, similar to the one at bar, where the initial action by the insured was intentional, even if the results of the action were unintentional.[29] In *Moulton*, Mrs. Moulton asked Allstate to defend her in a malicious prosecution action where she claimed that although she meant to have the plaintiff arrested, she did not intend to cause him any embarrassment or humiliation.[30] Mrs. Moulton's comprehensive policy covered her for accidents which were "neither expected nor intended from the standpoint of the [i]nsured."[31] The Court noted that "[t]he only relevant consideration" in determining if there had been an "occurrence," was "whether, according to the [d]eclaration, the chain of events leading to the injuries complained of [were] set in motion and followed a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force."[32]

The Court determined that the heart of the issue was whether the word "accident" or "occurrence" referred to the insured's initial action of having the plaintiff arrested for stealing her dog or to the consequences of that action–the plaintiff's embarrassment and humiliation.[33]

> Architex. Architex had a contract to build [the Inn]. It intentionally subcontracted the various portions of the work to others who entered contractual obligations to Architex. Architex undoubtedly did not intend for any of those subcontractors to do defective or improper work. However, the hiring of those subcontractors was not an "accident, including continuous or repeated exposure to substantially the same general harmful conditions" as the definition of "occurrence" sets out plainly in the insurance policy. Additionally, the hiring of the subs, was a "course consciously devised and controlled by [the insured]" which undeniably set in motion the "chain of events leading to the injuries complained of."

Id.

[26] *Id.*

[27] *Id.* at 1162. Justice Randolph authored the opinion for the Court. All nine Justices joined the Opinion.

[28] *Id.*

[29] 464 So. 2d 507 (Miss. 1985).

[30] *Id.* at 508. The plaintiff in the action, Anthony Walls, was arrested, held in jail for two hours until he posted a $1,000 bond, and then brought to trial where the charges were dismissed. *Id.* Mrs. Moulton had him arrested because she thought he had stolen her dog. *Id.*

[31] *Id.* Mrs. Moulton's comprehensive policy contained language nearly identical to the CGL policy in *Architex*. *See id.* Mrs. Moulton's policy was also triggered by an "occurrence," which was defined in her policy as "an accident, including injurious exposure to conditions, which results, during the endorsement period, in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." *Id.* This language is also nearly identical to that contained in Architex's CGL policy.

[32] *Id.* at 509.

[33] *Id.*

The Court held that the policy language unambiguously referred to the insured's initial actions and not the resulting damages, whether intended or not.[34] Thus, the Court ruled that because the insured's actions, which began the chain of events that lead to the plaintiff's claim against the insured, were intentional, the comprehensive insurance policy did not require the insurer to defend the insured.[35] The Court thereby concluded that Mrs. Moulton had set the chain of events in motion and controlled those events which caused the plaintiff harm without intervention by a third party.

B. *Southern Farm Bureau v. Allard: The Mens Rea to Cause Damage*

In *Southern Farm Bureau Casualty Insurance Company v. Allard*, the Mississippi Supreme Court affirmed the circuit court and held that because the insured's shooting of his brother-in-law was not intentional, the damages resulting from the shooting were covered by the general liability insurance policy issued to him by Southern Farm Bureau.[36] The Court found that despite the fact that the insured, Dr. Allard, meant to fire the shotgun, he did not mean to actually wound the plaintiff.[37] Under the insurance policy at issue in *Allard*, there again was the dubious provision stating that coverage "does not apply to bodily injury or property damage which is expected or intended by the insured."[38] The Court noted that the primary inquiry in the case turned on intent–whether Dr. Allard intentionally caused injury to Thomas Rowland.[39] Citing its own precedent, the Court noted that "[a]n act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it."[40] The Court cited the Restatement of Torts and found that "[t]he word intent . . . denotes that the actor desires to cause the consequences of his act."[41] The Court, finding that Dr. Allard

---

[34] *Id.*

[35] *Id.* The Court specifically noted:

> Mrs. Moulton obviously intended to swear out the complaint against Anthony Walls. Although she may not have intended for him to suffer humiliation or embarrassment, she certainly intended for him to be arrested. By requiring Allstate to defend and indemnify Mrs. Moulton, this Court would have stretched the meaning of accident beyond the bounds of that normally used in the English language and certainly beyond the bounds of the use intended within the policy.

Id.

[36] 611 So. 2d 966, 968-69 (Miss. 1992). The insured, Dr. George Allard shot his brother-in-law, Thomas Rowland, in the leg "accidentally" following a heated discussion. *Id.* at 967. Allard stated that he merely fired the shot toward the ground near Rowland to calm Rowland down and bring some reality to the overblown situation. *Id.* Allard claimed Rowland stepped forward into the line of fire and caused his own injury. *Id.* at 968. The jury awarded Rowland $106,750 in damages, but they also found that Allard's actions were unintentional and Farm Bureau should indemnify Allard under the general liability policy. *Id.* at 967. Farm Bureau appealed to the Mississippi Supreme Court, and the Court affirmed the jury finding that Allard's shooting of Rowland was unintentional. *Id.* at 968-69.

[37] *Id.* at 968-69.

[38] *Id.* at 968 (quoting the homeowner's policy) (internal quotations omitted). The general liability policy at issue also denied coverage for any "injury . . . arising out of an act by any insured that is intentionally designed to do harm to others." *Id.* (internal quotations omitted). The general liability policy in *Allard*, like the CGL policy in *Architex*, turns on whether there had been an "accident or occurrence," defining an "occurrence" as "an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period." *Id.* (internal quotations omitted).

[39] *Id.*

[40] *Id.* (quoting Coleman v. Sanford, 521 So. 2d 876, 878 (Miss. 1988)) (internal quotations omitted).

[41] *Id.* (quoting Stevens v. FMC Corp., 515 So. 2d 928, 931 (Miss. 1987)) (internal quotations omitted).

"intended" to fire the gun but didn't "intend" to harm Rowland, held that Dr. Allard's act was not "intentional behavior designed to bring about [Rowland's] injury."[42] Thus, Southern Farm Bureau was required to indemnify Dr. Allard for the amount of damages awarded to Rowland in the lawsuit.[43] Although this decision was perhaps a peculiar one, it set the debate in motion as to whether "occurrence" meant the underlying intended act of the insured or the unexpected consequences of that act.

C. *USF&G v. OmniBank: "Force-placing" the Upper Hand to the Insurer*

In *United States Fidelity & Guaranty Company v. OmniBank*,[44] the Mississippi Supreme Court, on a certified question from the Fifth Circuit, held that "a claim resulting from intentional conduct which causes foreseeable harm is not covered, even where the actual injury or damages are greater than expected or intended."[45] Georgia Ramsay financed her car through OmniBank, who required that she obtain car insurance.[46] Ramsay sued OmniBank in the United States District Court for the Southern District of Mississippi for allegedly "force-placing" automobile insurance upon her and for adding the amount of premiums and interest to her pre-existing loan.[47] OmniBank filed a third-party complaint seeking defense and indemnification from its insurer, United States Fidelity & Guaranty Company.[48] USF&G filed a motion for summary judgment on the basis that OmniBank's insurance policies, including its CGL policy, did not provide coverage for the allegations brought against it by Ramsay and did not require USF&G to defend or indemnify OmniBank.[49] The district court entered a final order mandating that USF&G indemnify OmniBank for its defense of the Ramsay claims.[50] USF&G appealed to the Fifth Circuit, who certified to the Mississippi Supreme Court the question of whether USF&G had a duty to defend OmniBank against Ramsay's claims.[51]

On certification, the Mississippi Supreme Court held that the policy agreement between OmniBank and USF&G unambiguously mandated that "coverage does not apply to 'bodily injury' or 'property damage' that is expected or intended from the standpoint of the insured."[52] OmniBank argued that an insured is covered for intended acts under a CGL policy, such as the one in *Architex*, as long as "there is no intent to cause 'bodily injury' or 'property damage,'" in keeping with the *Allard* decision.[53] The Court disagreed and held that OmniBank was not owed a

---

[42] *Id.* (internal quotations omitted). The Court noted that "the facts in the record reflect [Allard] did not intend to shoot or hit Rowland with the shotgun, but only to stop him by firing in front as he approached." *Id.* In an attempt to remove doubts of the accuracy of the jury's verdict considering that the weapon was a shotgun, the Court noted that "the range at which Allard shot in front of Rowland could cause a shot pattern probably no larger than the muzzle of the shotgun and that the shot would not begin to spread at that range." *Id.* The Court, however, did not provide any data or evidence from the record supporting such contention.

[43] *Id.* at 967.

[44] 812 So. 2d 196 (Miss. 2002).

[45] *Id.* at 201.

[46] *Id.* at 197.

[47] *Id.* at 197-98.

[48] *Id.* at 198.

[49] *Id.*

[50] *Id.* The district court ordered USF&G to pay OmniBank $10,856 in costs associated with the defense. *Id.*

[51] *Id.*

[52] *Id.* at 199-200.

[53] *Id.* at 201. The CGL policy taken out by Architex from Scottsdale in the case *sub judice* identically reads, "[t]his insurance does not apply to . . . 'bodily injury' or 'property damage' expected or intended from the standpoint of the

defense by USF&G because its conduct of "force placing" insurance upon Ramsay was intentional and caused harm that should have been foreseeable by OmniBank regardless of the damages being "greater than expected or intended."[54] The Court summarized its stance on CGL coverage in *OmniBank* by stating that "an insurer's duty to defend under a general commercial liability policy does not extend to negligent actions that are intentionally caused by the insured."[55]

On the issue of whether USF&G had a duty to defend OmniBank, the Court reiterated the language used in *Moulton* proclaiming that the only relevant inquiry germane to determining whether there had been an "occurrence" for purposes of the policy was "whether . . . the chain of events leading to the injuries complained of were set in motion and followed a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force."[56] The Court noted the similarities between *Moulton* and *OmniBank* and stated that because OmniBank intended to make Ramsay a loan, intended to require her to obtain collateral protection insurance, intended to "force-place" such insurance upon her when she did not obtain it on her own, and intended to charge her for the coverage as an add-on to her existing loan, OmniBank's actions were "set in motion . . . [,] consciously devised[,] and controlled by OmniBank without the unexpected intervention of any third person or extrinsic force."[57] Thus, the Court held that USF&G was not obligated to defend OmniBank against Ramsay's allegations.[58] The holding of this case re-invigorated *Moulton* and was directly contrary to *Allard*; this set the stage for the Fifth Circuit to take an "Erie guess" that the *Architex* Court viewed as misguided.

D. *ACS Construction Company v. CGU: Erie-Bound Adjudication*

In *ACS Construction Company v. CGU*, the Fifth Circuit affirmed the district court and held, without certification to the Mississippi Supreme Court, that under Mississippi law, the installation of defective construction work was the underlying act referenced as an "occurrence" in the CGL policy language–not the damages resulting from the installation.[59] The Court further held that exclusionary language in the CGL policy could not create coverage where it had not previously existed.[60] ACS contracted with the U.S. Army Corps of Engineers to build munitions

---

insured." Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1152 (Miss. 2010). In *Architex*, Scottsdale argued, and the circuit court agreed, that since Architex intentionally hired subcontractors which in the end performed defective work on the Inn, that intentional hiring did not qualify as an "occurrence" for purposes of the policy. *Id.* at 1153.

[54] *OmniBank*, 812 So. 2d at 201.

[55] *Id.* at 202. The Mississippi Supreme Court fully noted:

> We reject as illogical OmniBank's argument that coverage exists if an insured does not intend the precise damages resulting from its intentional act. Even though OmniBank did not implement the collateral protection insurance program with the intent of being sued, it clearly intended to protect its collateral and charge the premiums to the borrowers.

Id. at 201-02.

[56] *Id.* at 200.

[57] *Id.* at 201.

[58] *Id.* at 202.

[59] 332 F.3d 885, 891-92 (5th Cir. 2003).

[60] *Id.* at 892.

bunkers at Pope Air Force Base in North Carolina.[61] ACS hired a subcontractor, Chamberlin Company, to install waterproofing membranes on the roofs of the bunkers.[62] Leaks developed in the roofs after the membrane installation, and because ACS could not convince Chamberlin to correct the roofs, ACS undertook the repairs themselves, costing them over $190,000.[63]

Under ACS's CGL insurance policy that it obtained from CGU,[64] the insurance only covered "occurrences."[65] Occurrence was defined therein as "an accident, including continuous or repeated exposure to substantially the same harmful conditions."[66] Once again, the insurance coverage did not apply to "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured."[67] ACS sought coverage from CGU for the loss it had incurred, but CGU denied coverage under the determination that there had not been an "occurrence" causing "property damage."[68] The United States District Court for the Northern District of Mississippi granted CGU's motion for summary judgment on the basis that there had not been an "occurrence" for purposes of coverage under the CGL policy.[69]

On appeal, the Fifth Circuit first addressed the issue of liability coverage under the CGL policy.[70] The Court stated that the CGL policy defined an "occurrence" as an "accident," but neither the policy language nor Mississippi law was clear on what constituted an "accident" for CGL purposes.[71] In this light, the Court noted that it was their duty to "determine whether, under Mississippi law, an 'accident' refers to the unintended consequences of installing the waterproofing membrane or whether an 'accident' refers to the underlying act of the installation itself."[72] It was then that the Fifth Circuit recognized the split in Mississippi law as to what constituted an "accident," but nonetheless failed to certify the inquiry.[73]

The Fifth Circuit rightly noted that there was a difference between the *Moulton* definition of an "accident" and the *Allard* definition of the same.[74] The key inquiry was whether an

---

[61] *Id.* at 887.
[62] *Id.* Chamberlin Company merged with Southern Commercial Waterproofing Company of Alabama, Inc., and Southern accepted all responsibility for the work to be completed under the ACS subcontract. *Id.* The two companies will be referred to as "Chamberlin" in this article.
[63] *Id.*
[64] Also known as General Accident Insurance Company. *Id.* at 885.
[65] *Id.* at 887.
[66] *Id.* (quoting the CGL language) (internal quotations omitted). This language is identical to that of the *Architex* policy. *See* Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d, 1148, 1151 n.7 (Miss. 2010).
[67] *ACS*, 332 F.3d at 887.
[68] *Id.*
[69] *Id.* ACS brought suit against CGU in Mississippi State Court, but CGU removed to federal court under 28 U.S.C. § 1332, where the parties filed cross motions for summary judgment. *Id.*
[70] *Id.* at 888. The Court first, however, gave a review of Mississippi contract and insurance law. The Court noted that "[u]nder Mississippi law, an insurance policy is a contract subject to the general rules of contract interpretation." *Id.* (citing Clark v. State Farm Mut. Auto. Ins. Co., 725 So. 2d 779, 781 (Miss. 1998)). The Court also noted that the policy is ambiguous if after review, "the policy can be interpreted to have two or more reasonable meanings." *Id.* (quoting J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998)) (internal quotations omitted). If the court "finds ambiguity in the language of the insurance policy, then '[it] must necessarily find in favor of coverage.'" *Id.* (quoting *J & W Foods Corp.*, 723 So. 2d at 552).
[71] *Id.* at 888.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 889. The *Moulton* definition was preferred by CGU, whereas the *Allard* definition was preferred by ACS. *Id.* As a point of reminder, *Moulton* held that the proper inquiry was whether the insured intended the underlying

"occurrence" referred to the underlying action taken by the insured or the consequences of that underlying action.[75] The Fifth Circuit proclaimed that the *OmniBank* decision "resolved" the discrepancy between *Moulton* and *Allard*, but in this author's opinion that resolution was unclear at best.[76] The Fifth Circuit held that the *Moulton* test was dispositive; thus, the "occurrence" language in the CGL policy referenced the underlying action of the insured, not any unintended results of those actions.[77] The court noted that just as in *Moulton*, where the insured intended to sue the plaintiff but did not intend to embarrass him by doing so, ACS intended to hire Chamberlain to complete the membrane work but not intend for the work to be defective.[78]

ACS argued that *Allard* changed the law with respect to the interpretation of what actions constituted an "occurrence" under CGL policies.[79] The Fifth Circuit stood firm, however, on the notion that *OmniBank* clarified the law in Mississippi when it analyzed identical policy language, restated the test delineated in *Moulton*, and held that "even if an insured acts in a negligent manner, that action must still be accidental and unintended in order to implicate policy language."[80] While noting *OmniBank*'s assertion that "*Allard* does not constitute a change in the law[,]" the Fifth Circuit ruled that "even though the installation of the membrane was done negligently, the action of installing the membrane was not accidental nor unintended to implicate coverage under the policy."[81] The court reasoned that "the installation of the waterproofing membrane [was] the underlying act referenced in 'occurrence' which does not trigger coverage under the policy."[82] The court held that ACS's hiring of the subcontractors to install the membranes was not an "accident," and thus, policy coverage was not triggered.hat would trigger coverage under the policy.[83]

The Fifth Circuit also addressed the exclusionary language in the CGL policy.[84] The policy in *ACS* included the same exclusionary language that existed in the *Architex* policy: "[t]his insurance does not apply to . . . 'property damage' to . . . part of any property that must be

---

action, such as the hiring of the subcontractor to complete the work. *Allard* held that the inquiry was whether the insured intended the consequences of the underlying action, such as the leaking membranes or molded sheetrock.

[75] *Id.* at 888.

[76] *Id.* at 889.

[77] *Id.*

[78] *Id.*

[79] *Id.* The court in *Allard* held that "an act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it." S. Farm Bureau Cas. Ins. Co. v. Allard, 611 So. 2d 966, 968 (Miss. 1992) (internal quotations omitted)..

[80] *ACS*, 332 F.3d at 890 (citing U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 199 (Miss. 2002)).

[81] *Id.* (quoting *OmniBank*, 812 So. 2d at 201).

[82] *Id.* at 891-92. The Fifth Circuit expanded on their analysis by stating:

> The negligence in installing the waterproofing membrane in the roofs was the foreseeable cause of the leaks that developed. The act of installing the waterproofing membrane fell outside of the terms of the policy because regardless of whether prompted by negligence (1) ACS's acts were committed deliberately and the intervention of Chamberlin/Southern to complete the work was expected; and (2) the likely (and actual) leaking that developed as a result of faulty workmanship was within ACS's foresight. The faulty workmanship of Chamberlin/Southern unfortunately amounts to negligence. Hiring the subcontractors and installing the waterproofing membranes were not accidents under the terms of the policy.

Id. at 891.

[83] *Id.*

[84] *Id.* at 892.

restored, repaired, or replaced because 'your work' was incorrectly performed on it.[85] The policy language also stated: "[t]his exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."[86] The Fifth Circuit simply cited *OmniBank* and held that "the Mississippi Supreme Court recently explained that the exclusionary language in the policy cannot be used to create coverage where none exists."[87] No further analysis of the exclusionary language or explanation of the holding was given.

III. ARCHITEX ASSOCIATION INCORPORATED V. SCOTTSDALE INSURANCE COMPANY

In his opening line, Justice Randolph for the Mississippi Supreme Court stated that the matter at hand was an issue of first impression.[88] At the beginning of its analysis, the Court noted that it would only address "the limited and narrow issue of: Whether the circuit court erred in concluding, as a matter of law, that the intentional act of hiring subcontractors by the insured general contractor precludes the possibility of coverage."[89] After giving a brief background on the nature of CGL policies and the conflicting interpretations applied to them, the Court stated that the analysis of the issue at hand hinged on the policy language, not on policy justifications.[90] The Court made clear that the CGL policy did not allow defective workmanship or faulty construction to be considered an "occurrence" under the policy, but that the CGL policy was "designed to provide liability protection for the general contractor and their subcontractors for accidental, inadvertent acts which breach accepted duties and proximately cause damage to a person or property."[91]

Architex argued to the Court that the relevant "act" at issue, i.e. the would-be "occurrence," was not the act of subcontracting but the accidental and unintentional act of "improperly placing rebar and knocking off a false chimney (which led to water damage to the [Inn])."[92] Scottsdale contended that the relevant act was the intentional hiring of the subcontractors and that there was no "occurrence" because the failure to install rebar and the defective construction work which caused mold and mildew to be present in the Inn were not "accidents."[93] Architex also maintained that although Scottsdale accepted premiums designated

---

[85] *Id.*
[86] *Id.*
[87] *Id.* (citing *OmniBank*, 812 So. 2d at 200).
[88] Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1149 (Miss. 2010). This is important because CIS contended that *OmniBank* and the Fifth Circuit's ruling in *ACS* was dispositive of the issue at hand based on prior Mississippi Supreme Court precedent. This is also interesting because of the Fifth Circuit's failure to certify the question.
[89] *Id.* at 1154. The Court noted that the standard of review for interpreting insurance policies is de novo. *Id.* at 1156.
[90] *Id.* at 1156. The Court stated that CGL policies:

> begin with a broad grant of coverage, which is then limited in scope by exclusions. Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. However, *it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought.*

Id. at 1155. The Court also noted the opposing views on "whether defective subcontractor construction constitutes an 'occurrence' under a CGL policy. *Id.*
[91] *Id.* at 1156.
[92] *Id.* at 1157.
[93] *Id.*

for subcontractor coverage over the years, they now attempted to "deny Architex the benefit of its bargain" by claiming that the subcontractor work was the same as the general contractor's work and thus denied from coverage under the "your work" exclusion in the policy.[94] Scottsdale countered that the subcontractor premiums "mean[t] only that the policy takes into account that subcontractors will be working on the hotel construction project, and that they have their own insurance."[95] In keeping with its proclamation that this case hinged on the CGL policy language,[96] the Court took the opportunity to recognize controlling Mississippi contract law, stating:

> if a contract is *clear and unambiguous,* then it must be *interpreted as written.* A policy must be *considered as a whole, with all relevant clauses together.* If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party. Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage. However, ambiguities do not exist simply because two parties disagree over the interpretation of a policy. Exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. Nevertheless, "a court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured."[97]

The Court analyzed the *Moulton* and *OmniBank* decisions and noted, without overruling them, that they were "factually distinguishable."[98] The Court repeated its finding in *Moulton* that with respect to the determination of whether there was an "accident," "[t]he *only relevant consideration* is whether, according to the Declaration, the *chain of events leading to the injuries* complained of was *set in motion and followed a course consciously devised and controlled by appellant without the unexpected intervention of any third person or extrinsic force.*"[99] The Court noted that the issue in *OmniBank* was "whether, under Mississippi law, an insurer's duty to defend under a *general commercial liability policy* for injuries caused by accidents extends to *injuries unintended by the insured but which resulted from intentional actions of the insured if those actions were negligent* but not intentionally tortious."[100] The Court stated that the issues and policy language at bar were substantively similar to that of *OmniBank*, where the Court found that the language unambiguously demonstrated that:

> Omnibank intended to make a loan to Ramsey, intended to require Ramsey to maintain insurance, intended to place [a] collateral protection insurance provision in the loan agreement, and intended to include the premium in the finance charge. This chain of events was set in motion and followed a course consciously devised and controlled by Omnibank, without the unexpected intervention of any third

[94] *Id.* at 1156.
[95] *Id.* at 1157.
[96] The policy at issue here defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*
[97] *Id.* (quoting U.S. Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 963 (Miss. 2008)).
[98] *Id.*
[99] *Id.* at 1157-58 (citing Allstate Ins. Co. v. Moulton, 464 So. 2d 507, 509 (Miss. 1985)).
[100] *Id.* at 1158 (quoting U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 197-98 (Miss. 2002)).

> person or extrinsic force. Clearly, under the rationale of *Moulton,* USF&G is under no duty to defend.[101]

In spite of the holdings in *Moulton* and *OmniBank*, the *Architex* Court noted that:

> Unlike in this case, the insureds in both *Moulton* and *Omnibank* were the parties who engaged in intentional and allegedly tortious conduct leading to the injuries complained of. Thus, the insured's intentional actions did not constitute "accidents," and the damages resulting therefrom did not amount to "occurrences" under the respective policies. In the present case, by contrast, the only act or conduct considered by the circuit court was the hiring of subcontractors, without consideration of whether the underlying acts or conduct of the insured or the subcontractors proximately causing "property damage" were negligent or intentional or were otherwise excluded by policy language. While the alleged "property damage" may have been "set in motion" by Architex's intentional hiring of the subcontractors, the "chain of events" may not have "followed a course consciously devised and controlled by [Architex], without the unexpected intervention of any third person or extrinsic force."[102]

After noting the Fifth Circuit's decision in *ACS*, the Court found that the problem with the Fifth Circuit's position was that they did not examine the policy "as a whole."[103] The Court asserted that the policy exceptions and exclusions are important in determining the coverage limits and the meaning of terms within the policy language such as "accident"–to the extent that it is used to define "occurrence."[104] The Court quoted the Fourth Circuit and the Florida Supreme Court for their support of the position that "if an 'occurrence' is a condition precedent to coverage, but 'personal injury' or 'property damage,' if proximately caused by a negligent act or conduct of a subcontractor, is not covered, then there is no logical explanation for why the policy contains the referenced exclusions and exceptions to exclusions."[105] The most notable of these is the "subcontractor exception" to the "your work" exclusion of coverage.[106]

---

[101] *Id.* (quoting *OmniBank*, 812 So. 2d at 200-01).
[102] *Id.* at 1159 (quoting *OmniBank*, 812 So. 2d at 200-01).
[103] *Id.* at 1160.
[104] *Id.*
[105] *Id.* The Court cited the Fourth Circuit for the proposition that:

> [t]he import of the "your work" exclusion and its subcontractor exception is not that the exclusion "creates" coverage. Rather, the import is that the exception lends insight into the baseline definition of "occurrence" from which parties and courts interpreting CGL policies should operate. *If the definition of "occurrence" cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage any damage the insured's faulty workmanship causes to its own work is nugatory.* If, on the other hand, the definition of "occurrence" does include an insured's faulty workmanship, such an exclusion functions as a meaningful "limitation or restriction on the insuring clause."

Id. (quoting Stanley Martin Co. v. Ohio Cas. Group, 313 Fed. Appx. 609, 613 n.2 (4th Cir. 2009)). The Court cited the Supreme Court of Florida for the proposition that:

The Court stated that it is clear that an "occurrence," as defined by the CGL policy, only triggers coverage when "property damage" is proximately caused by an accident, which is an inadvertent act.[107] The Court found, however, that in the case *sub judice*, the record was not sufficiently developed to be able to adequately determine if there had been an "occurrence."[108] That is, the Court did not have enough information to rule as to whether the rebar deficiencies and the cause of the water damage at the Inn constituted an "accident" or "defective work."[109]

The Court further found that the premiums Architex paid to Scottsdale supported coverage for Architex to the extent that an act performed by a subcontractor working on behalf of Architex caused unintended "property damage."[110] The Court cited an uninsured-motorist coverage case to support its averment that coverage is presumed to exist if the insured pays premiums over-and-above the amount for regular coverage.[111] Because Architex specifically paid premiums for subcontractor work related to the construction of its buildings, the Court reasoned that this also favored coverage. The Court used the uninsured-motorist precedent for the point of law that "in order to limit this coverage it must be done in such clear and unambiguous language that it may be readily seen and understood by the insured that the coverage is limited."[112] The Court found that "no such 'clear and unambiguous language' [limited] coverage for Architex as to unexpected or unintended 'property damage' resulting from work 'performed on its behalf by a subcontractor.'"[113]

The Court ruled that the Fifth Circuit's exclusive reliance on *OmniBank* for its decision in *ACS* was improper and thus inapplicable to the case at bar.[114] The Court stated that the CGL policy purchased by Architex "*unambiguously* extends coverage to Architex for unexpected or unintended 'property damage' resulting from negligent acts or conduct of a subcontractor, if not excluded by other applicable terms and conditions of the policy not at issue in this appeal."[115] The Court held that the circuit court erred in its analysis of the case because it failed to consider the policy as a whole.[116] Therefore, because the circuit court granted Scottsdale summary judgment on the basis that coverage did not exist, the Supreme Court reversed the decision and

---

> if the insuring provisions do not confer an initial grant of coverage for faulty workmanship, there would be no reason for [the insurer] to exclude damage to "your work[.]" . . . In addition, *a construction of the insuring agreement that precludes recovery for damage caused to the completed project by the subcontractor's defective work renders the "products-completed operations hazard" exception to exclusion (j)(6) and the subcontractor exception to exclusion (l) meaningless. . . . Reading these provisions in pari materia with the insuring agreement supports the conclusion that a subcontractor's defective work that results in damage to the completed project can constitute an "occurrence."*

Id. (quoting U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 886-87 (Fla. 2007)).
[106] *Id.*
[107] *Id.* at 1161.
[108] *Id.*
[109] An accident would be covered under the policy, but defective work would not.
[110] *Id.*
[111] *Id.* at 1162 (citing Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977)).
[112] *Id.* (quoting *Bridges*, 350 So. 2d at 1381).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

remanded the case to determine if the acts by the subcontractors were accidental, inadvertent acts or if they were the product of defective workmanship.[117] In a statement of its final position on the issue, the Court held that under the CGL policy at hand, "the term 'occurrence' [could not] be construed in such a manner as to preclude coverage for unexpected or unintended 'property damage'" which resulted from negligent or defective work that was performed by a subcontractor on Architex's behalf, "unless otherwise excluded or the insured breache[d] its duties after loss."[118]

IV. DISCUSSION

The *Architex* decision is likely to result in far-reaching ramifications for the construction and insurance industries in Mississippi and around the nation. Before discussing these policy effects, some analysis of the accuracy of the opinion should be given. This author agrees with the decision in large part. One question that may be raised through analysis of the seminal line of "occurrence" cases,[119] however, is whether the Court should have overruled *OmniBank*. The Court did not have to overrule *OmniBank* in *Architex* because the issue addressed was so incredibly narrow: "Whether . . . the intentional act of hiring subcontractors by the insured general contractor precludes the possibility of coverage."[120] To appreciate the Court's opinion, one has to realize just how narrow this question is. The Court did not address the larger issue that was litigated in *OmniBank*, which was "whether, under Mississippi law, an insurer's duty to defend under a general commercial liability policy for injuries caused by accidents extends to injuries unintended by the insured but which resulted from intentional actions of the insured if those actions were negligent but not intentionally tortious."[121] The *Architex* question asks whether the simple act of hiring subcontractors precludes coverage for negligent work done by those subcontractors; the *OmniBank* question asks whether CGL policies provide coverage for the unintended consequences of the insured's intended, underlying act. Keep in mind that the CGL policies at issue did not provide coverage for acts that are "expected or intended" from the standpoint of the insured.[122] Thus, the Court really did not need to overrule *OmniBank* in order to reach its holding in *Architex*. It will, however, need to overrule *OmniBank* if it decides in the future that CGL coverage should exist for *unintended* consequences caused by the *intentional* actions of the insured general contractor or the subcontractor.[123] As the rule currently stands, and as implicitly reinforced by the Court, defective construction work performed by the subcontractors will not be covered as an "occurrence" if the work causing damage is the not the result of an "accident."

The Court also stated that *OmniBank*, along with the other seminal cases in this line, were distinguishable from *Architex* because in *Moulton*, *Allard*, and *OmniBank* the litigated actions

---

[117] *Id.* The case will now proceed to trial in Rankin County Circuit Court.
[118] *Id.* All nine Justices concurred in the opinion: Waller, C.J., Carlson and Graves, P.JJ., Dickinson, Lamar, Kitchens, Chandler and Pierce, JJ. There were no dissents. *Id*. at 1163.
[119] *Moulton*, *Allard*, *OmniBank*, and now *Architex*.
[120] *Architex*, 27 So. 3d at 1154; *see supra* note 89 and accompanying text.
[121] U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 197 (Miss. 2002); *see supra* note 55 and accompanying text.
[122] *See supra* notes 10, 31, 38, 52, and 67 and accompanying text.
[123] This is opposite of the holding in *OmniBank*. *See supra* note 45 and accompanying text.

were taken by the insured–not by a subcontractor or agent of the insured as in *Architex*.[124] This is an important point to understand–the subcontractor was a key player in the decision. The actions which caused damage in *Architex* were not taken by Archiex directly, but by the subcontractor. This is unlike *Moulton* where the insured herself brought the malicious prosecution, unlike *Allard* where the insured himself pulled the shotgun's trigger, and unlike *OmniBank* where the insured entity was the one who "force-placed" insurance onto the plaintiff.[125]

Since "[a]n accident by its very nature, produces unexpected and unintended results[,]" "property damage," expected or intended from the standpoint of the insured, cannot be the result of an accident but only of defective work which is not covered by the CGL policy.[126] The Court properly realized the difference between intentionally force-placing automotive insurance on a customer and hiring a subcontractor.[127] The Court implicitly held that coverage would be denied if the subcontractor's actions were "intended or expected" and not an "accident." This issue was not addressed by the Court due to the posture of the case–the lower court granted summary judgment for Scottsdale.[128] Thus, the court did not say that the actions by the subcontractors in this case were indeed covered–it just said that if the actions taken by the subcontractors were "accidents," then they would be covered under the policy language. Note the importance of the Court's holding–the case *sub judice* must still be litigated to determine if the subcontractor's actions were "unexpected or intended." It will be interesting see how this litigation develops and unfolds in the future due to the factual and legal questions left lingering.

On a broader note of analysis of the seminal line of cases previously addressed, however, the language in Architex's CGL policy was substantially and substantively similar to the general policies used in *Moulton*, *Alllard*, *OmniBank*, and *ACS*.[129] Following the Fifth Court's decision in *ACS*, which was labeled by the Court as "inconsistent with Mississippi law and, therefore, inapplicable," there is undoubtedly some confusion as to whether or not coverage exists for the unintended consequences of an insured's intended act.[130] It is also unclear what level of intent or foreseeability of consequence may be necessary on behalf of the insured to preclude coverage.

Although *Moulton* and *OmniBank* were "factually distinguishable" from *Architex*, the "occurrence" line of cases should be revisited by the Court for the sake of clarification.[131] Despite the Court's disclaimer in *OmniBank* that *Allard* was not a change in the law, *Allard* stood for a proposition that flew directly in the face of *Moulton* and perhaps constructively overruled it.[132] Examining the Court's decision in *OmniBank*, it should be seen that before the Court was satisfied with its position there, it needed to attempt to reconcile its decision in *OmniBank* and *Moulton* with its prior decision in *Allard*.[133] The Court in *OmniBank* reiterated

[124] *See supra* note 98 and accompanying text.
[125] *See supra* note 30, 37, and 47 and accompanying text.
[126] *OmniBank*, 812 So. 2d at 200; *see supra* note 45 and accompanying text.
[127] *See supra* notes 47 and 98 and accompanying text.
[128] *See supra* note 24 and accompanying text.
[129] *See supra* notes 29, 35, 50, and 65-68 and accompanying text.
[130] Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1162 (Miss. 2010); *see supra* note 114 and accompanying text.
[131] *See supra* note 99 and accompanying text.
[132] *See supra* notes 34, 37, and 82 and accompanying text.
[133] S. Farm Bureau Cas. Ins. Co. v. Allard, 611 So. 2d 966 (Miss. 1992); *see* U.S. Fid. & Guar. Co. v. OmniBank, 812 So. 2d 196, 201 (Miss. 2002). In this author's opinion, the attempt failed.

that an act is "intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it."[134] The *OmniBank* Court explained that the scope of the inquiry in *Allard* was "whether such act constituted an 'occurrence' or 'incident,' as defined in the policies . . . *not* . . . whether specific damages must have been intended in order for the 'intentional acts' exclusions of the policy to be applicable."[135] In *Allard*, however, the Court *did* note that part of the pertinent issue was whether the act was "an act of intentional behavior designed to bring about the *injury*."[136] In addition to its discussion of the intent of bringing about an injury, or damages, the *Allard* Court stated that the "sole question in [the] case [was] whether Dr. Allard intentionally harmed Thomas Rowland"; the Court did not say that the sole issue was whether Dr. Allard intentionally pulled the trigger on the shotgun, which would be the equivalent of hiring a subcontractor in a construction defects case.[137]

The *OmniBank* Court attempted to reconcile *Moulton* and *Allard* by stating that "*Allard* and *Moulton* are consistent in that they both address the nature of the insured party's conduct, not the resulting damages of that conduct."[138] In *Moulton*, however, the Court held that the insurer was not required to defend or indemnify the insured because the insured's initial actions were intentional; in *Allard*, the Court oppositely held that although the insured's actions were intentional, the insurer did have a duty to indemnify because the damages resulting from the insured's actions were unintentional.[139] Did *OmniBank* constructively overrule *Allard*? If so, is *OmniBank* the current standard even though, according to the Mississippi Supreme Court, it was wrongly relied upon by the Fifth Circuit in *ACS*? Accordingly, the "clarification" of the law in *OmniBank* needs its own clarification, and the Court should take the opportunity to settle the issue once and for all if it so arises.

The Court could have further distinguished *Moulton*, since that was the case ultimately relied upon by both *OmniBank* and *ACS*. In *Moulton*, the court stated that the "only relevant consideration is whether . . . the chain of events leading to the injuries complained of was set in motion and followed a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force."[140] To hold, in a construction defects case involving work done by subcontractors, that the initial hiring of subcontractors is the "setting in motion" of the "injuries complained of" would be widely off mark. General contractors hire subcontractors everyday to complete work on major projects, and certainly none of them, if they are legitimate, "set into motion" and follow courses "consciously devised" to cause damages to their projects by hiring subcontractors. Furthermore, the very fact that the work was performed by subcontractors shows that there was intervention of a third person, and the work being allegedly defective should not be considered something that is "expected" by any given general contractor.

---

[134] *OmniBank*, 812 So. 2d at 203; *see supra* note 40 and accompanying text.
[135] *OmniBank*, 812 So. 2d at 201; *see supra* notes 52-55 and accompanying text.
[136] *Allard*, 611 So. 2d at 968 (emphasis added); *see supra* notes 36-43 and accompanying text. The injury is analogous to the specific damages.
[137] *Allard*, 611 So. 2d at 968; *see supra* note 39 and accompanying text.
[138] *OmiBank*, 812 So. 2d at 201; *see supra* note 53-58 and accompanying text.
[139] *Allard*, 611 So. 2d at 968; *see supra* notes 35 and 43 and accompanying text.
[140] Allstate Ins. Co. v. Moulton, 464 So. 2d 507, 509 (Miss. 1985); *see supra* note 32 and accompanying text.

Readers should note the additional reasoning given by the Court for its decision in *Architex* and decide for themselves whether it is persuasive.[141] The Court reasoned that the CGL policy would indeed cover "unexpected or unintended" "property damage" resulting from the negligent acts of a subcontractor, unless otherwise excluded, for several reasons. The main reason was that the insured party was not the party acting in negligence–it was the subcontractor.[142] Additionally, the circuit court failed to look at the policy language as a whole; that is, the circuit court did not take into account the "subcontractor exception" to the "your work" exclusion in the policy.[143] Further, Architex paid premiums to Scottsdale explicitly for subcontractor coverage related to the construction of its buildings, and there was no clear or unambiguous language limiting coverage in the policy such that Architex should have or would have been aware that their initial act of hiring the subcontractor precluded them from being covered for any "accidents" or "occurrences" on behalf of that subcontractor which caused "property damage."[144]

It is important to note that the CGL policy, as marketed by Scottsdale and other insurance companies, infers to the insured by its language that the act which triggers coverage is any "accident" causing "property damage" which results from the work of a subcontractor.[145] The policy states that subcontractor work is covered and nowhere states that the hiring of a subcontractor could be considered an intentional act removing from coverage any "property damage" later caused by that subcontractor.[146]

Additionally, there are strong contract justifications for the decision. Architex paid premiums to Scottsdale in order to be covered for any defective subcontractor work.[147] Scottsdale gladly accepted those premiums, with knowledge that Architex would contract all of their work out to subcontractors. Scottsdale then refused to defend or indemnify Architex and denied Architex the benefit of its bargain. To deny contractors the benefits of their bargains is contrary to Mississippi contract law. It would thus be errant to hold in a construction defects case that an "accident," and thus an "occurrence," refers only to the general contractor's initial act of hiring subcontractors but not to the subsequent acts performed by those subcontractors.

Without any further analysis as to whether this author thinks the Court's decision was correct, it can be stated without question that *Architex* will drastically affect the construction and insurance industries in Mississippi and the United States. Justice Randolph adamantly noted in his first sentence of the discussion that the case would be based on the CGL policy language and not on policy justifications, and it rightly was; however, this decision will have policy effects on the economy as a whole in a way much greater than will be experienced by the parties to the case *sub judice*.[148] Lying beneath the examination of whether "occurrence" means the intentional hiring of a subcontractor or the negligent work performed by that subcontractor is a consideration of millions upon millions of dollars at stake for general contractors, subcontractors,

[141] This author thinks it is.
[142] *See supra* note 102 and accompanying text.
[143] *See supra* note 116 and accompanying text.
[144] *See supra* notes 110-13 and accompanying text.
[145] *See supra* notes 25 and 33 and accompanying text.
[146] *See supra* note 13 and accompanying text.
[147] *See supra* notes 110-13 and accompanying text.
[148] *See supra* note 90 and accompanying text.

and insurance companies around Mississippi and the United States. This decision will likely change the landscape of how a general contractor pays for its insurance, and how much.

Economic development in Mississippi will hopefully gain from this decision. Mississippi has goals of growing economically, of improving its infrastructure in its small towns and areas such as the Mississippi Delta, and of further repairing its Mississippi Gulf Coast region. The Court's ruling will hopefully make these endeavors much easier than they would have been had the Court ruled in favor of Scottsdale. To hold in a construction defects case that an "accident," and thus an "occurrence," refers only to the general contractor's initial act of hiring subcontractors but not to the subsequent acts performed by those subcontractors would have caused this State extended problems in the construction industry and in its efforts to develop and grow economically.

V. CONCLUSION

In conclusion, the decision rendered by the Mississippi Supreme Court in *Architex* was, although narrow, a much needed clarification in the areas of construction law and commercial general liability insurance. The Court held that the term "occurrence" in the CGL policy issued to Architex by Scottsdale could not be construed in a way as to deny Architex coverage for "unexpected or unintended property damage" which resulted from the negligent actions of a subcontractor. The Court ruled that a general contractor's initial act of hiring a subcontractor is not the act referenced by the "occurrence" language in the policy and thus does not automatically preclude coverage by rendering the contractor's actions to be intentional. The actions that must be examined, in order to determine if the damages were caused by defective work, and were therefore intentional and not accidental, are those of the subcontractors. This decision, although narrow in its holding, will greatly benefit the construction industry and the Mississippi economy, and it will help contractors to receive the benefits of their bargains from insurance companies.

Cody C. Bailey