STATE OF SOUTH CAROLINA
CONSTRUCTION LAW
COMPENDIUM

Prepared by
Everett A. Kendall, II
Christy E. Mahon
Sweeny, Wingate, & Barrow, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233
www.swblaw.com

F. Cordes Ford, IV
Buist Moore Smyth McGee P.A.
5 Exchange Street
Charleston, SC 29401
(843) 722-3400
www.buistmoore.com
South Carolina is a comparative negligence state. A plaintiff in South Carolina may recover only if his/her negligence does not exceed that of the defendant's and amount of plaintiff's recovery shall be reduced in proportion to amount of his or her negligence; if there is more than one defendant, plaintiff's negligence shall be compared to combined negligence of all defendants. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991).

The law governing joint and several liability has been amended. S.C. Code Ann. Section 15-38-15 took effect on July 1, 2005, and applies to causes of action arising on or after that date except for causes of actions relating to construction torts which would take effect on July 1, 2005, and apply to improvements to real property that first obtain substantial completion on or after July 1, 2005. For improvements that obtain substantial completion prior to July 1, 2005, there is pro rata contribution among persons jointly and severally liable in tort except for cases involving an intentional tort or breaches of trust or other fiduciary obligation. Under the 2005 amendments to the South Carolina Contribution Among Tortfeasors Act, in an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than 50% of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of the plaintiff. A defendant whose conduct is determined to be less than 50% of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact. A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party. These provisions do not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

I. Breach of Contract

A breach of contract claim can be asserted by the purchaser against the general contractor, as well as by the general contractor against its subcontractors. A breach of contract claim in South Carolina is subject to a three year statute of limitations. See S.C. Code Ann. Section 15-3-530.

II. Negligence

In order to prove negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007).

The causative violation of a statute constitutes negligence per se and is evidence of recklessness and
willfulness, requiring the submission of the issue of punitive damages to the jury. Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993). Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence that the defendant acted recklessly, willfully, and wantonly. Id. It is always for the jury to determine whether a party has been reckless, willful, and wanton. Id. However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation. Id.; see also Nguyen v. Uniflex Corp., 312 S.C. 417, 440 S.E.2d 887 (Ct. App. 1994) (generally, the determination of whether a statute has been violated is a question of fact for the jury; additionally, whether the violation of the statute is the proximate cause of an injury is also ordinarily a jury issue).

III. Breach of Warranty

In construction cases, plaintiffs typically assert causes of action for breach of warranty. The breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor and/or warranties implied by law. Three year statute of limitations is applicable (when knew or should have known).

A builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, workmanlike manner. Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (Ct. App. 2008). This is distinct from an implied warranty of habitability, which arises solely out of the sale of the home. Id. Although the warranty of workmanlike service arises out of the construction contract to which the builder is a party, a subsequent purchaser may sue a professional builder on the implied warranty of workmanlike service despite the lack of contractual privity. Id.; see also Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) (“this Court has embraced the notion that in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects. This warranty extends not only to the original purchasers of the home, with whom the builder is in privity, but to subsequent purchasers who may pursue a cause of action in contract or tort against a builder for a reasonable period after the home's construction.”).

One who provides plans and specifications to a contractor and undertakes to oversee the project impliedly warrants the accuracy of those plans in their purpose and view. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951) (one who undertook to design and oversee a construction project for another impliedly warranted the design and quality of construction despite the lack of privity between the parties); Beachwalk Villas Condominium Association v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991) (if a party furnishes plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view).

The Uniform Commercial Code establishes three types of warranty: the implied warranty of merchantability, implied warranty for fitness for a particular purpose, and express warranty. If the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. Plantation Shutter Co., Inc. v. Ezell, 328 S.C. 475, 492 S.E.2d 404 (Ct.
If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. In most cases in which the contract calls for a combination of services with the sale of goods, courts have applied the UCC. In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test. (contract for special manufacture and installation of shutters for home was predominantly contract for sale of goods, and thus was governed by South Carolina version of UCC; while contract did authorize “work” to be performed, contract was entitled “Terms of Sale,” and did not provide for installation charges); see also S.C. Code Ann. Section 36-2-725 (1) (“An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.”).

IV. Misrepresentation and Fraud

In a case of actual fraud, based upon representation, there are nine elements essential to recovery, which are: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Carter v. Boyd Const. Co., 255 S.C. 274, 178 S.E.2d 536 (1971).

Further, South Carolina recognizes the common law tort of negligent misrepresentation. See deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000). Where the damage alleged by the plaintiff is a pecuniary loss, the plaintiff must prove the following elements for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Id. For purposes of proving negligent misrepresentation, evidence that a statement was made in the course of the defendant's business, profession, or employment is sufficient to prove the defendant's pecuniary interest in making the statement, even though the defendant received no consideration for it. Id.

Historically, the Supreme Court of South Carolina has held that a punitive damage award is warranted only when the defendant's conduct is shown to be willful, wanton, or in reckless disregard of the rights of others. Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993). Punitive damages are not recoverable in an action based on negligent conduct. Harold Tyner Development Builders, Inc. v. Firstmark Development Corp., 311 S.C. 447, 429 S.E.2d 819 (Ct. App. 1993); see Lengel v. Tom Jenkins Realty, Inc., 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985) (verdict for plaintiff on a cause of action for negligent misrepresentation did not support an award of punitive damages in the absence of proof of a willful, wanton, or reckless act). Punitive damages are recoverable, however, in an action based on fraud. Harold Tyner Development Builders, Inc. v. Firstmark Development Corp., supra; see also Elders v. Parker, 286 S.C. 228, 332 S.E.2d 563 (Ct. App. 1985) (even though
the jury returned a general verdict in an action for breach of contract and fraud, the plaintiff was held entitled to punitive damages where the evidence supported a finding of fraud).

The statute of limitations is three years. S.C. Code Ann. Section 15-3-530.

V. Strict Liability Claims

In South Carolina, it is firmly established that the strict liability statute applies only to sales of products and not to the provision of services. Fields v. J. Haynes Waters Builders, 376 S.C. 545, 658 S.E.2d 80 (2008) (builder, as general contractor for construction of home, provided services rather than product, and thus, was not subject to strict liability for damage from installation of defective stucco siding that allowed moisture intrusion, in homeowners' action against builder).

Under the South Carolina Defective Products Act, one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his or her property is subject to liability for physical harm caused to the ultimate user or consumer, or to his or her property, if the following apply:

• the seller is engaged in the business of selling such a product
• it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. S.C. Jurisprudence Products Liability § 18.

VI. Indemnity Claims


A. Express Indemnity

Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. Toomer v. Norfolk Southern Ry. Co., 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001). A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party. Id. Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005). A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Federal Pacific Elec. v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). Because it is somewhat unusual for an indemnitee to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed. Id. Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and
unequivocal terms. Id.

B. Implied Indemnity

Equitable indemnity is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party. Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005). South Carolina has long recognized the principle of equitable indemnification. Toomer v. Norfolk Southern Ry. Co., 344 S.C. 486, 544 S.E.2d 634 (Ct. App. 2001). South Carolina Courts have traditionally allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties. Id. According to the principles of equity, the right exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join. Id.; see First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994) (relationship of contractor/subcontractor was sufficient basis for claim of equitable indemnity even though owner alleged negligence on part of contractor with respect to work that was performed by subcontractor).

The damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as attorneys fees and costs which proximately result from the at-fault party's breach of contract or negligence. Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992).

In general, there is no right to indemnity between joint tortfeasors. Toomer v. Norfolk Southern Ry. Co., supra.

C. Comparative Indemnity

In regard to indemnity, South Carolina follows the common law principle of an all-or-nothing remedy. See Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (“In general, indemnity may be defined as a “form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.””).

D. Third Party Beneficiary

“Except in insurance cases, third party beneficiaries are rarely parties in implied contract claims.” 13 S.C. Jurisprudence Implied Contracts § 21 (2008). “Because of the dominance of equitable elements in claims based on a quasi-contract, actions involving third party beneficiaries as defendants are easily conceivable.” Id. “A third party beneficiary may be required to return benefits bestowed by the plaintiff if the circumstances would render their retention by him inequitable, even if the beneficiary did not participate in or contribute to the circumstances that led to his receiving the benefits.” Id. “Since, unlike contracts implied in fact, quasi-contracts do not implicate the elements of a true contract such as assent and inducement, the participation of the third party beneficiary in
the creation of a quasi-contract is probably unnecessary to making a case against him as a defendant.” Id.

VII. Statute of Repose/Statute of Limitations

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. S.C. Code Ann. Section 15-3-640. The 2005 amendment substituted "eight years" for "thirteen years" and became effective July 1, 2005 and applies to improvements to real property for which certificates of occupancy are issued by a county or municipality or completion of a final inspection by the responsible local building official after the effective date. The thirteen year period applies to the improvements that reached certificates of occupancy prior to July 1, 2005.

The limitations provided by Section 15-3-640 are not available as a defense to any person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to any person who conceals any such cause of action. S.C. Code Ann. Section 15-3-670.

The limitations period for most personal injury, products liability, negligence claims and an action upon a contract is three years for actions arising on or after April 5, 1988. S.C. Code Ann. Section 15-3-530.

VIII. Economic Loss Doctrine

Kennedy v. Columbia Lumber and Manufacturing Co., 299 S.C. 335, 384 S.E.2d 730 (1989), has been the leading case in regard to the economic loss rule. The Court stated, “the ‘economic loss rule’ simply states that there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where the damage done is to other property or is personal injury.” Id. at 341, 384 S.E.2d at 734. The Court expressed its concern that a strict application of the economic loss rule would undermine South Carolina’s policy of protecting purchasers of new homes and refocused the inquiry on activity, not consequence. The Court held that a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. Id. The “economic loss” rule will still apply where duties are created solely by contract. Id. In that situation, no cause of action in negligence will lie. Id. In Kennedy, the Court found a builder owes legal duties to a home buyer beyond the contract, and thus, a builder could be liable in tort for purely economic losses, where: “(1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing he knows or should know will pose a serious risk of physical harm.” Id. The Kennedy court concluded that an expansion in traditional concepts of tort duty was needed in order to provide the innocent home buyer with protection. The court noted the inherent unequal bargaining positions, the fact that buyers no longer supervised construction of their homes, and
South Carolina’s acceptance of the legal maxim *caveat venditor*. *Id.*

“In *Kennedy*, we adopted a framework that changed the focus of the inquiry from the consequences of the alleged tortfeasor’s actions to whether or not the alleged tortfeasor acted in a way that violated a legal duty aside from his contractual duties. If the act violates a contractual duty only, then the liability is in contract; however, if the act violates a non-contractual legal duty, then the liability is both in contract and tort. This change in analytical focus did not totally eviscerate the economic loss rule; however, the rule is now less restrictive.” *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 666 S.E.2d 247 (2008). In *Colleton Preparatory*, the Court addressed the issue of whether the legal duties found in *Kennedy* were applicable outside of the residential home building area generally. In *Colleton Preparatory*, the Court held that in a negligence action brought against the manufacturer of fire retardant by a private school which had wood roof trusses treated by the retardant that were in danger of failing, the private school could recover purely economic losses in tort from manufacturer, and the economic loss rule would not apply, if manufacturer owed a duty of care to the school, if a breach of industry standards served as evidence of the breach of that duty, and if the breach of that duty was accompanied by a clear, serious and unreasonable risk of bodily injury or death; however, if manufacturer merely breached industry standards without an accompanying breach of a legal duty owed, the economic loss rule would prohibit school from recovering purely economic damages. *Id.*

IX. Recovery for Investigative Costs

There is presently no authority for the taxation of the costs of investigators as part of the costs in civil litigation. *S.C. Jurisprudence Costs* (2008).

X. Emotional Distress Claims

In order to recover for intentional infliction of emotional distress or outrage, the complaining party must establish that: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so “extreme and outrageous” so as to exceed “all possible bounds of decency” and must be regarded as “atrocious, and utterly intolerable in a civilized community;” (3) the actions of the defendant caused plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff was “severe” such that “no reasonable man could be expected to endure it.” *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 68 (2007).

In contract cases, awards for mental distress cannot be recovered, regardless of the defendant's motives. An exception may exist in cases of fraud; where the contract anticipates a certain strength of feeling or susceptibility (for example, for breach of promise to marry; for mistreatment of passengers or guests by carriers or innkeepers; for dealings with funeral homes; or where the conduct in a business relationship is "so outrageous and shocking to be actionable"). Contract cases allowing mental anguish damages are, however, an exception. The general rule is that no matter how foreseeable the injury, e.g., financial loss due to breach of contract, damages for mental distress are
not usually awarded in contract actions and are never awarded for mere disappointment. S.C. Jurisprudence Damages Section 21 (2008).

XI. Stigma Damages

South Carolina case law does not provide specifically for the claim of stigma damages although it is likely that it is recoverable.

Under South Carolina law, “[t]he general rule is that in case of an injury of a permanent nature to real property ... the proper measure of damages is the diminution of the market value by reason of that injury, or in other words, the difference between the value of the land before the injury and its value after the injury. Where the pollution ... results in a temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property caused by the pollution.” Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000).

Where the injury is temporary, the landowner can recover the depreciation in the rental or usable value of the property caused by the injury. Peoples Federal Savings and Loan Ass'n of South Carolina v. Resources Planning Corp., 358 S.C. 460, 596 S.E.2d 51 (2004).

XII. Economic Waste

There are no South Carolina cases on point.

XIII. Delay Damages

A contractor may be liable for delay damages regardless of whether time was of the essence of the contract. Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 371 S.E.2d 532 (1988). Where a contract sets no date for performance, time is not of the essence of the contract and it must be performed within a reasonable time. Id. Generally, no-damage-for-delay provisions are valid and enforceable so long as they meet ordinary rules governing the validity of contracts. U.S. for Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc., 325 S.C. 129, 480 S.E.2d 447 (1997). Every contract contains the implied obligation of good faith and fair dealing. Id. Delay caused by fraud, misrepresentation, or bad faith is exception to enforceability of “no damage for delay” clause in construction contract, as fraud, misrepresentation, and bad faith in performance of one's contractual duties would give rise to violation of the implied obligation of good faith and fair dealing. Id.

XIV. Recoverable Damages

A. Direct Damages
Under South Carolina law, a negligent defendant who injures another "is liable for compensatory damages "in proportion to the character and extent of the injury, and such as will fairly and adequately compensate the injured party." 11 S.C. Jurisprudence Damages § 3 (2008).

Generally, actual damages in either tort or contract are designed to compensate, to return the injured party to his or her pre-injury state or to give the injured party an amount of money that will compensate adequately for not being able to return to a pre-injury state. Id. In tort actions, the plaintiff may generally recover for "all damages, present and prospective, which are naturally the proximate consequences of the act done…. [including] compensation for whatever it may be reasonably certain will result from future incapacity in consequence of [the] injury." Id. In contract actions, the plaintiff may generally seek as compensation the difference between the value of the contract if performed and the value of the contract after the breach — the value of the loss actually suffered because of the breach. Id. Contract damages "should place the plaintiff in the position he would be in if the contract had been fulfilled." Id. In property cases, the plaintiff may generally recover the difference between the value of the property immediately before and after the breach or the injury. Id. As a general rule, anything that restricts the use, enjoyment, or disposal of property may be said to destroy the property itself because "the substantial value of property lies in its use." Id.

B. Stigma

South Carolina case law does not provide specifically for the claim of stigma damages although it is likely that it is recoverable.

C. Loss of Use

There is no South Carolina case directly on point as to whether loss of use damages are recoverable in construction cases. However, it would appear they are recoverable based on Coleman v. Levkoff, 128 S.C. 487, 122 S.E.2d 875 (1924). Coleman involved personal property, specifically an automobile. The Court held that where a vehicle is negligently damaged, the party was entitled to the cost to repair it or depreciation in the vehicle's value (cost to repair may constitute a part of the measure of depreciation), and the value of the use of which the owner was deprived during the time reasonably required to repair the property. Id.

D. Punitive Damages

In order for a plaintiff to recover punitive damages, there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996). A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights. Id. A conscious failure to exercise due care constitutes willfulness. Id. The plaintiff has the burden of proving punitive damages by clear and convincing evidence. Id.; see also Kincaid v. Landing Development Corp., 289 S.C. 89,
whether deficiencies in building of house resulted from reckless, wanton, or willful conduct, thus justifying punitive damages, was properly left to jury in homeowners' action against developer, sales and marketing agent and contractor, alleging negligence and breach of warranty).

E. Emotional Distress

See section on Emotional Distress Claims above. An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence. Id.

F. Attorney’s Fees

In South Carolina, attorney’s fees are not recoverable unless authorized by contract or statute. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009).

G. Expert Fees and Costs

Presently no authority exists for the taxation of the costs of expert witnesses as part of the costs in civil litigation in South Carolina state courts. S.C. Jurisprudence Costs Section 32 (2008).

XV. Insurance Coverage for Construction Claims

Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint. If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend. An insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured. However, these duties are interrelated. If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend. Accordingly, the allegations of the complaint determine the insurer's duty to defend. City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund, Op. No. 26625 (S.C. Sup. Ct. re-filed May 18, 2009) (“although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer.”).

Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability. Owners Ins. Co. v. Clayton, 364 S.C. 555, 614 S.E.2d 611 (2005).
A. Occurrences That Trigger Coverage

The case law in South Carolina is evolving. The most recent case for negligent construction was *Auto Owners Ins. Co., Inc. v. Newman*, ___ S.E.2d ___, 2008 WL 648546 (March 10, 2008). This opinion has not been released for publication and there is a petition for rehearing pending.

The *Newman* case followed *L-J, Inc. v. Bituminous Fire and Marine Insurance Company*, 366 S.C. 117, 621 S.E.2d 33 (2005). In *L-J*, a developer hired L-J, Inc. as contractor for the site development and road construction in a subdivision development. L-J hired subcontractors to perform most of the work and four years after construction was completed, the roads began to deteriorate due to negligent road design, preparation, and construction. *Id.* The developer sued L-J and the parties settled. L-J subsequently sought indemnification from Bituminous Fire and Marine Insurance Company (“Bituminous”) and three other insurance companies who insured L-J under various CGL policies. *Id.* Bituminous refused to indemnify L-J and brought a declaratory judgment action to determine whether its CGL policy issued to L-J covered the damage to the roads caused by the negligent construction. The Supreme Court of South Carolina found that although the deterioration to the roadways may have constituted “property damage” under the policy, the various negligent acts of the subcontractors upon which the developer based its claim did not constitute an “occurrence” for which the CGL policy provided coverage. Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. *Id.* Because damages to the work product alone resulting from faulty workmanship could not typically be said to have been “caused by an accident or by exposure to the same general harmful conditions,” the Court reasoned that such claims for faulty workmanship did not constitute an “occurrence” falling within the policy's coverage. *Id.*

In *Newman*, the Supreme Court recognized that its attempt to distinguish an “occurrence” of alleged negligent construction, such as that which took place in *L-J*, from negligent construction resulting in an “occurrence,” caused confusion in other courts' interpretations of the ultimate holding in *L-J*. In *L-J*, the Court phrased this distinction as “a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party,” noting that the latter could be covered under a CGL policy. The *Newman* Court stated that it should have been clear that the Court intended the “third party” language to refer to subcontractors who are not a party to the CGL policy between the insurer and the contractor. The Court held that negligent application of stucco to a house by a subcontractor resulted in an “occurrence” of water intrusion, causing property damage covered under homebuilder's CGL policy, where the homeowners alleged that faulty stucco and resulting water intrusion caused water damage to exterior sheathing and wooden framing, which was damage beyond the subcontractor's work product.

The Supreme Court of South Carolina has found that in the absence of a prescribed definition in the policy, the definition of “accident” is “[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm.

In Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89 (1997), the Court adopted a modified continuous trigger theory for determining when coverage is triggered under a standard occurrence policy. Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages. Id. Coverage is also triggered under every policy applicable thereafter. Id.; see Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 561 S.E.2d 355 (2002) (modified continuous trigger theory applied to property damage to house as a result of synthetic stucco exterior constructed by insured's subcontractor, and thus any coverage under a CGL insurance policy began with property damage that occurred during the policy period and applied to any continuing damage after the policy period).

B. Bodily Injury

In L-J, Inc. v. Bituminous, the Bituminous' CGL policy, subject to certain exclusions, provided: “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.... This insurance applies to ‘bodily injury’ and ‘property damage’ only if: (1) The ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory.’ The policy defined ‘occurrence’ as ‘an accident, including continuous or repeated exposure to substantially the same general harmful conditions.’” The Court stated that under the language of the CGL policy coverage may be provided in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone. L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 621 S.E.2d 33 (2005).

C. Property Damage

Replacement of defective stucco applied by a subcontractor was covered under the homebuilder's CGL policy, as a cost associated with remedying other property damage that resulted from an occurrence, even though the policy excluded property damage to subcontractor's work product; water damage resulting from faulty stucco application by subcontractor to rough carpentry, windows and doors, thermal and moisture protection, and interior and exterior finishes could not be assessed nor repaired without removing the entire stucco exterior, and replacement of the stucco was a cost associated with remedying other property damage covered under the policy. Auto Owners Ins. Co., Inc. v. Newman, supra (not released for publication at this time) (because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator's allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that resulted from an “occurrence.”); see Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc., 356 S.C. 156, 588 S.E.2d 112 (2003) (homeowners' alleged losses from the fact that the land was once used as bombing range were not “property damage” within the meaning of contractors' commercial general
liability insurance policies; the homeowners solely alleged economic damages, particularly the diminished value of their property, as a result of contractors' knowing sale of homes located on polluted property containing hazardous materials).

D. **Defective Workmanship**

Insurance policies are subject to the general rules of contract construction. *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002). The Court must give policy language its plain, ordinary, and popular meaning. *Id*. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Id*. Furthermore, exclusions in an insurance policy are always construed most strongly against the insurer. *Id*. See discussion on Newman and L-J, *supra* in regard to faulty workmanship.

**XVI. Mechanics’ Liens**

A. **Who has a lien?**

South Carolina’s Mechanics’ Lien Law is governed by statute found at South Carolina Code § 29-5-10 *et seq*. Persons furnishing labor or materials for the erection, alteration, or repair of buildings or structures by agreement with, or by consent of the owner, shall have a lien upon such buildings and structures and upon the interest of the owner in the real estate upon which they are constructed. S.C. Code § 29-5-10. This includes design professionals and site-work contractors that prepare real estate for construction. *Id*. Laborers, mechanics, subcontractors and material suppliers also have a lien by virtue of their provision of work and materials for the improvement of real estate. S.C. Code § 29-5-20. Others such as surveyors, commercial real estate brokers, rental equipment providers, private security guards, and persons providing construction and demolition debris services also have mechanics’ lien rights arising from their services incident to the improvement of real estate. S.C. Code § 29-5-21, -22, -25, -27. Contractors performing work directly for owners in South Carolina should file with the register of deeds within fifteen (15) days of commencement of the work a Notice of Project Commencement in order to preserve certain rights and defenses to potential lien claims of sub-subcontractors and suppliers with whom it does not directly contract. S.C. Code § 29-5-23.

B. **Perfecting the lien.**

In order to perfect a mechanics’ lien, claimants must serve upon the owner of the real estate AND file in the county register of deeds office a sworn statement of a just and true account of the amount due, with all just credits given, together with a property description sufficient to accurately identify the real estate within ninety (90) days after he ceases to labor on or furnish materials to the real estate. Upon the failure to file and serve this statement within ninety (90) days, the lien is dissolved. S.C. Code § 29-5-90. However, inaccuracies in the property description or statement of account
shall not invalidate the proceedings, unless it appears that the claimant has willfully and knowingly claimed more than is due. S.C. Code § 29-5-100.

Generally, the performance of trivial services or provision of trivial materials will not extend the 90 day period for filing and service of the statement of account. However, provision of such trivial services or materials at the request of the owner, rather than at the initiative of the contractor for the purpose of saving the lien, will extend the commencement period. See Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006).

Further, a claimant must commence a suit to foreclose his lien AND file a notice of pendency of the action (Lis Pendens) within six (6) months after he ceases to labor on or furnish materials to the real estate. Upon the failure to file the foreclosure suit or the Lis Pendens within six (6) months, the lien is dissolved. S.C. Code § 29-5-120; see also Multiplex Building Corp., Inc. v. Lyles, 268 S.C. 577, 580, 235 S.E.2d 133, 134 (1977) (“The statute makes no exceptions, but requires that the lien ‘shall be dissolved’ unless both prerequisites to enforcement are met.”). Under Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced upon filing, so long as service occurs within the statute of limitations, or if not, then not later than 120 days after filing.

C. Priority.

Generally, subcontractors and materialmen who provide labor and material at the instance of a general contractor are entitled to payment in preference to the general contractor. S.C. Code § 29-5-50. In the event that proceeds from a foreclosure action are insufficient to pay all lien claimants, such proceeds will be prorated among all just claims. In other words, there is no priority among lien claimants who have complied with the requirements of the statute. S.C. Code § 29-5-60; Lowndes Hill Realty Co. v. Marineville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956); but see § 29-5-21(4) (“Prior recorded liens shall have priority over a real estate licensee’s lien.”). However, mechanics’ liens are not enforceable against any mortgage recorded before the filing of the notice of mechanics’ lien setting forth the statement of account.

D. Bonding around the lien.

Mechanics’ liens may be resolved as to the real property upon filing of a cash or surety bond with the court in an amount equal to one and one-third (4/3) times the amount claimed in the verified statement of account. S.C. Code § 29-5-110. Once the bond is filed, the property becomes unencumbered by the lien, and the bond shall take the place of the property and is itself subject to the lien.
E. Recoverable damages.

The prevailing party in a Mechanic’s Lien foreclosure action is entitled to recover its attorneys fees and costs. However, the fees and court costs may not exceed the amount of the lien. For purposes of determining the award of attorney’s fees and costs, the prevailing party is based on one verdict in the action, including the consideration of the lien claim and any compulsory counterclaims. Each party may issue a demand via an offer of settlement or its last pleading, and the party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict are equal, then neither party is considered to be the prevailing party. S.C. Code § 29-5-10, -20.

F. Other grounds for recovery.

The Mechanics’ Lien statute does not specifically provide for the recovery of interest. However, a claimant may claim and recover pre-judgment under S.C. Code § 34-31-20, which allows a rate of 8.75% “[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained [as] being due.”

In addition, S.C. Code § 27-1-15 provides a separate means to recover interest and attorney’s fees for persons making improvements to real estate under contract. To trigger this statute, a claimant must make due and just demand by certified or registered mail for payment. The person receiving the demand must conduct a reasonable and fair investigation of the claim and pay the claim, or whatever portion is determined to be valid, within forty-five (45) days of the date of the demand. Failure to make such an investigation or an unreasonable refusal to pay makes the person liable for reasonable attorney’s fees and interest at the judgment rate from the date of the demand.

Mechanics’ liens do not attach to public lands. In such cases, and others where a payment bond is in place, persons furnishing labor, material, and rental equipment to a bonded contractor or its subcontractors shall have the right to sue on the payment bond for the amount due upon expiration of ninety (90) days after the last day on which labor or materials were furnished. Remote claimants shall have the same right only upon giving written notice by certified or registered mail to the bonded contractor within ninety (90) days of the last date on which labor or materials were furnished. No suit on a payment bond shall be commenced after the expiration of one (1) year after the last date on which labor or materials were furnished. S.C. Code § 29-5-440.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue
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