



STATE OF SOUTH CAROLINA COMPENDIUM OF LAW

Prepared by

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PRE-SUIT AND INITIAL CONSIDERATIONS

Notice Requirements/Prerequisites to Suit

Notice requirements are not generally needed. Some of the exceptions include medical malpractice claims, *see* S.C. CODE ANN. § 15-79-125 (2008), and construction defects claims, *see* S.C. CODE ANN. § 40-59-810 *et seq.*

Relationship to the Federal Rules of Civil Procedure

The South Carolina Rules of Civil Procedure are based on the Federal Rules. In interpreting those rules, where there is no South Carolina law, the courts “look to the construction placed on the Federal Rules of Civil Procedure.” *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991). It should be noted, however that the South Carolina Rules of Civil Procedure are not identical to the Federal Rules. For example, S.C. R. CIV. P. 23 concerning class actions varies notably from FED. R. CIV. P. 23. Therefore, the South Carolina Rules of Civil Procedure should always be consulted.

Description of the Organization of the State Court System

A) Judicial selection.

- 1) **Supreme Court justices.** Supreme Court justices are elected by the General Assembly (state legislators) and serve ten-year terms. S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10 (2008).
- 2) **Court of Appeals judges.** The Court of Appeals is South Carolina’s intermediate appellate court. Each member of the Court of Appeals is elected for a term of six years by a joint public vote of the General Assembly. S.C. CONST. art. V, § 8; S.C. CODE ANN. § 14-8-20 (2008).
- 3) **Circuit Court.** The Circuit Court is composed of the Court of Common Pleas (civil matters) and the Court of General Session (criminal matters). Judges are elected by the General Assembly for six-year terms. Family Court Judges are similarly elected. *See* S.C. CONST. art. V, § 27.

B) Structure. South Carolina’s unified judicial system encompasses the following courts: (1) The Supreme Court, (2) The Court of Appeals, (3) Circuit Courts (including courts of common pleas and courts of general sessions), (4) Court of the Master-in-Equity, (5) Family Court, (6) Probate Courts, (7) magistrate’s court; and (8) municipal courts. *See generally* SOUTH CAROLINA JUDICIAL DEPARTMENT, *available at* <http://www.judicial.state.sc.us/> (last visited May 31, 2012).

C) Mandatory ADR (Arbitration and Mediation). By order dated February 1, 2006, the Supreme Court of South Carolina adopted “Court-Annexed Alternative Dispute Resolution (ADR) Rules,” which govern court-annexed ADR processes in South

Carolina Circuit Courts in civil suits, and in South Carolina Family Courts in domestic relations actions in counties designated by the Court for mandatory ADR or as required by statute. *Re: Circuit Court Arbitration & Mediation & Family Court Mediation*, No. 2009-09-16-02 (Sept. 16, 2009). Effective with cases filed on or after January 1, 2010, the counties in the Fourteenth Judicial Circuit, Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lexington, Pickens, Richland, Union, and York have mandatory ADR procedures. *Court News*, South Carolina Judicial Department, *available at* <http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexID=577> (last visited Sept. 24, 2012).

Statutes of Limitations

- A) **Construction.** 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. § 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 § 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. § 15-3-670 (2008).

- B) **Contract.** The statute of limitations for contract claims is three (3) years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. *See* S.C. CODE ANN. § 15-3-530 (2008) (except those covered by § 15-3-520, such as an action upon a bond or other contract in writing secured by a mortgage of real property).
- C) **Contribution.** The statute of limitations for contribution for an adverse judgment is one (1) year after the judgment has become final; or if based on settlement prior to suit, then within one (1) year of payment; or if the party seeking contribution settles the common liability after an action is initiated against it, contribution is permitted where the settlement is paid and the action for contribution is initiated within one year of the agreement. *See* S.C. CODE ANN. § 15-38-40 (2008).
- D) **Employment.** The statute of limitations for employment actions is generally one (1) year. *See* S.C. CODE ANN. §§ 15-3-560, 41-1-80.

- E) **Fraud.** The statute of limitations for fraud is three (3) years. *See* S.C. CODE ANN. § 15-3-530(7) (2008).
- F) **Improvements to realty.** The statute of limitations for improvements to realty is three (3) years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. *See* S.C. CODE ANN. § 15-3-530(3) (2008). Note below the statute of repose.
- G) **Indemnity.** The statute of limitations for indemnity actions is one (1) year from the time judgment is entered against the defendant. *See* S.C. CODE ANN. § 15-38-40; *see also* *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994). An action for indemnification is subject to the statute of repose which limits claims brought on the underlying cause of action for which the right to indemnification is claimed. *See* *Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 394 S.C. 68, 713 S.E.2d 639 (Ct. App. 2011), *reh'g denied* (Aug. 23, 2011).
- H) **Personal injury.** The statute of limitations for personal injury is three (3) years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. *See* S.C. CODE ANN. § 15-3-530 (2008).
- I) **Professional liability.**
- 1) **Medical malpractice.** The statute of limitations for medical malpractice is three (3) years from date of treatment giving rise to action, or three (3) years from date of discovery or when it reasonably should have been discovered, not to exceed six (6) years from date of occurrence. When based on leaving of foreign object, it is two (2) years from date of discovery or when it reasonably should have been discovered with no limitation of action less than three years after leaving of foreign object. *See* S.C. CODE ANN. § 15-3-545 (2008).
 - 2) **Legal malpractice.** The statute of limitations for legal malpractice is three (3) years. *See* S.C. CODE ANN. § 15-3-530.
- J) **Property damage.** The statute of limitations for property damage is three (3) years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. *See* S.C. CODE ANN. § 15-3-530 (2008).
- K) **Survival.** The statute of limitations for a survival action is three (3) years from death of the decedent. *See* S.C. CODE ANN. § 15-3-530 (2008).
- L) **Tolling.** Generally persons who are (1) under the age of 18, (2) insane, or (3) imprisoned for a term less than life at the time the cause of action accrues may avoid the effect of the statute of limitations applicable to their claims. *See* S.C. CODE ANN. § 15-3-40 (2008). The statute of limitations may also be subject to equitable tolling. *See* *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009).

- M) **Wrongful Death.** The statute of limitations for wrongful death is three (3) years from the death of the decedent. *See* S.C. CODE ANN. § 15-3-530 (2008).

Statute of Repose

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. § 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 § 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. § 15-3-670.

Venue Rules

Venue is determined at the time the cause of action arose, not at the time the action is commenced. S.C. CODE ANN. § 15-7-10, *et seq.* (2008).

- A) **Real property.** Actions for the recovery of real property, injuries to real property, for partition of real property, for foreclosure of mortgage or real property, and for recovery of personal property distrained for any cause, must be tried in the county in which the subject of the action or some part thereof is situated. *See* S.C. CODE ANN. § 15-7-10 (2008).
- B) **Statutory penalty or forfeiture.** Actions for the recovery of a penalty or forfeiture imposed by statute; and actions against a public officer or person specially appointed to execute his duties (or his agent) for acts of office must be tried where the cause of action arose. *See* S.C. CODE ANN. § 15-7-20 (2008).
- C) **Penalty of forfeiture on water.** When an action for the recovery of a penalty or forfeiture imposed by statute is for an offense committed on a lake, river or other stream of water situated in two or more counties, the action may be brought in any county bordering on that body of water and opposite to the place where the offense was committed. *See* S.C. CODE ANN. § 15-7-20 (2008).
- D) **County where defendant resides.** All other actions must be tried in the county where the defendant resides or where the most substantial part of the alleged act giving rise to

the cause of action occurred. If there is more than one defendant and each resides in a different county, any county where a defendant resides is proper. A corporation's place of residence is its principal place of business. *See* S.C. CODE ANN. § 15-7-30 (2008).

NEGLIGENCE

Comparative Fault/Contributory Negligence

Under South Carolina's doctrine of comparative negligence, a plaintiff may recover damages only if his own negligence is not greater than that of the defendant. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). Ordinarily, comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. *Id.* In a comparative negligence case, the trial court should determine judgment as a matter of law only if the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent. *Id.*

Contributory negligence is not applicable to South Carolina claims arising after July 1, 1991.

Exclusive Remedy – Workers' Compensation Protections

Under the "exclusivity rule," workers' compensation is the exclusive remedy for personal injury to an employee arising out of and in the course of employment. F. PATRICK HUBBARD & ROBERT L. FELIX, *SOUTH CAROLINA LAW OF TORTS* 212 (3d ed. 1990). In most situations, a tort action by an employee against an employer or against a co-employee is barred, and exclusive jurisdiction rests with the Workers' Compensation Commission. *Id.* This is a defense to a tort suit that is waived if it is not raised in the defendant's answer or by a S.C. R. CIV. P. 12(b)(6) motion to dismiss. *Id.* In most cases, a contractor is considered the statutory employer of the employee of a subcontractor, and benefits from the exclusivity provision provided by S.C. CODE ANN. § 42-1-540.

Indemnification

Toomer v. Norfolk S. Ry., 344 S.C. 486, 490, 544 S.E.2d 634, 636 (S.C. Ct. App. 2001):

South Carolina has long recognized the principle of equitable indemnification. 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. 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.

Joint and Several Liability

- A) South Carolina provides for the apportionment of damages under S.C. CODE ANN. § 15-38-15 (2008), also known as the Uniform Contribution Among Tortfeasors Act ("the Act"). Under the Act a defendant who is found to be less than 50% at fault as compared to the total fault for damages (including any fault of the plaintiff), will only be liable for its percentage of the damages as determined by a jury or trier of fact. *Id.*

- B) **Percentage fault.** Where there are two or more defendants, a defendant may make a motion to specify the percentage of liability attributable to each defendant. *Id.* A defendant may also argue that a non-party had liability for the alleged injury. *Id.* Upon such a motion, the court will after the initial verdict awarding damages but before the special verdict on percentages of liability is rendered, allow each defendant time for oral argument on the determination of percentage of attributable fault. *Id.* No additional evidence may be entered. The jury will then apportion damages among the defendants.

Therefore, if a jury finds that there were one hundred thousand dollars (\$100,000.00) in damages, but the plaintiff was 35% at fault, the overall verdict against Defendants A and B would of course then be reduced to sixty-five thousand dollars (\$65,000.00). Defendant A or B may then make a motion to specify the percentage of liability as to each defendant. Each defendant will then have the opportunity to make an oral argument after which the jury will make the apportionment of liability.

In determining the percentage of fault between the defendants, the plaintiff's fault should be considered as well so that the total percentage of fault is 100%. As the plaintiff has already been found 35% negligent, the jury must apportion the remaining 65%. If the jury finds that Defendant A is 10% at fault, that leaves Defendant B as 55% at fault. Under § 15-38-15(A), Defendant A could only be held responsible for its 10% or ten thousand dollars (\$10,000.00), not the entire sixty-five thousand dollars (\$65,000) owed to the plaintiff. However Defendant B, having more than 50% of the liability apportioned to it, is jointly and severally liable for the entire sixty-five thousand dollars (\$65,000.00).

This section does not apply to a defendant whose conduct is determined to be willful, 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.

Strict Liability

- A) **Products.** South Carolina law provides for the strict liability of one who is engaged in the business of selling a product if he sells that product in a defective condition unreasonably dangerous to the user or consumer, for physical harm caused to the ultimate user or consumer or to his property, if the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. *See* S.C. CODE ANN. § 15-73-10 (2008).
- B) **Property.** South Carolina law also imposes strict liability on adjoining landowners engaged in blasting, *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960), and engaged in trespassing, *Wood v. Pacolet Mfg. Co.*, 80 S.C. 47, 61 S.E. 95 (1908).
- C) **Dogs and aircraft.** Dog owners and those caring for or keeping a dog are held strictly liable for damages suffered when their dog bites someone. S.C. CODE ANN. § 47-3-110 (2008). There are three scenarios for imposing strict liability under the dog bite statute when the attack is unprovoked and the injured party is lawfully on the premises: first, the dog owner is strictly liable and common law principles are not implicated; second, a property owner is liable when he exercises control over, and assumes responsibility for,

the care and keeping of the dog; and third, a property owner is not liable under the statute when he has no control of the premises and provides no care or keeping of the dog. *Clea v. Odom*, 394 S.C. 175, 714 S.E.2d 542 (2011). Aircraft owners are strictly liable for injuries to persons or property on land beneath their aircraft for damages caused by ascent, descent, flight of the aircraft, or the dropping of any object, S.C. CODE ANN. § 55-3-60 (2008).

Willful and Wanton Conduct

The terms reckless, willfulness and wantonness are synonymous. *See* RALPH KING ANDERSON, JR., SOUTH CAROLINA REQUESTS TO CHARGE – CIVIL (2002) §§ 21-1, 22-1 (2008). Gross negligence is defined as “the failure to exercise slight care.” *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007). It has also been defined as “the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” *Id.* Gross negligence “is a relative term, and means the absence of care that is necessary under the circumstances.” *Id.* “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).

DISCOVERY

Electronic Discovery Rules

South Carolina has not yet adopted rules specifically for electronic discovery.

Expert Witnesses

A) **Forms of disclosure.** A discovering party may discover facts and opinions of experts not expected to be called as a witness in the case of examining physicians or upon a showing of exceptional circumstances making it impracticable for the discovering party to obtain that information by other means. *See* S.C. R. CIV. P. 26(b)(4)(B).

- 1) **Informal consultants.** Parties are not required to disclose or produce experts only consulted informally. *See id.*
- 2) **Expert depositions.** Experts subject to deposition shall be produced within South Carolina for deposing with the payment of reasonable fees for time and travel expenses by the discovering party upon request of the discovering party, unless the court determines otherwise for good cause shown. *See* S.C. R. CIV. P. 26(b)(4)(C).

In the above situation and upon motion, the court may require the party seeking discovery to pay the other party a fair portion of fees and expenses reasonably incurred by the latter in obtaining facts and opinions from the expert. *See* S.C. R. CIV. P. 26(b)(4)(C).

- B) **Expert work product.** Pursuant to S.C. R. Civ. P. 26, facts and opinions of experts otherwise discoverable and acquired or developed by that expert in anticipation of litigation are discoverable. *See* S.C. R. Civ. P. 26(b)(4)(A).
- 1) **Subpoena.** Documents produced by experts by subpoena must be produced as they are kept in the usual course of business or shall organize and label them to correspond with the categories in demand. *See* S.C. R. Civ. P. 45(d)(1).

Non Party Discovery

- A) **Subpoenas.** S.C. R. Civ. P. 45 governs the issuance of subpoenas. A subpoena may be served on any person who is not a party and is at least eighteen years old. Required fees are set out within the rule. Service may be accomplished in the same manner for service of a summons and complaint.
- B) **Respondents.** A respondent is given fourteen days to respond to a subpoena duces tecum. Lay non-parties are subject to the same duties in responding to a subpoena as an expert. *Id.*

Privileges

- A) **Attorney-client privilege.** The attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relating to a legal matter. The privilege is not absolute, and not every communication within the attorney and client relationship is privileged. 32 S.C. JUR. WITNESSES § 27. The attorney-client privilege applies only if: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or a member's subordinate and in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing preliminarily either an opinion on the law, or legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by the client. *Id.* An assertion of the attorney-client privilege must be strictly confined within the narrowest possible limits, consistent with the logic of its principle, and the burden of establishing the privilege rests upon the party asserting it. The determination of whether the attorney-client privilege applies is within the sound discretion of the trial judge, after making a preliminary inquiry into the surrounding facts and circumstances leading up to the communication, without first requiring the substance of the communication to be disclosed. The court's decision will not be reversed absent an abuse of discretion. *Id.* The attorney-client privilege belongs to the client. Unless the client waives the privilege, it survives even his or her death. *Id.*
- B) **Statements.** S.C. R. Civ. P. 26(b)(3):

[A] party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject

matter previously made by that person. If the request is refused, the person may move for a court order.

- C) **Work product privilege.** S.C. R. Civ. P. 26(b)(1) protects from discovery matters that are “privileged.” The concept and scope of privilege in discovery correspond with that of privilege developed in the law of evidence, *i.e.*, the scope of privilege in discovery is the same as that which would be applied at trial. S.C. R. Civ. P. 26(b)(3) provides a qualified immunity for materials prepared in anticipation of litigation or for trial. These materials are usually referred to as work product.
- D) **Self-critical analysis.** There is no South Carolina law that deals with the self-critical analysis privilege.

Requests to Admit

- A) Requests to Admit are governed by S.C. R. Civ. P. 36:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of discovery that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request.

A matter is deemed admitted unless answered within thirty (30) days. *Id.*

- B) **Objections.** If an objection to a request is made, the grounds for it must be stated. *Id.*
- C) **Effect of admission.** Any matter admitted in a request for admission is conclusively established unless the court on motion permits withdrawal or amendment of the admission. *Id.*
- D) **Limit.** More than one set of requests to admit may be served upon a party, but the total number shall not exceed twenty requests to admit, including subparts. *Id.*

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A plethora of South Carolina cases allow testimony by experts in accident reconstruction. *See, e.g., Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *Oliver v. S.C. Dep’t of Highways & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992).

Appeal

- A) **When permitted.** “The right to appeal is a matter of grace and is not an inherent or vested right, and the rules of court and statutes must be followed in perfecting the appeal.” *Toomer v. Toomer*, 244 S.C. 399, 137 S.E.2d 406 (1964); *see also* JEAN HOEFER TOAL ET AL., *APPELLATE PRACTICE IN SOUTH CAROLINA* 115 (2d ed. 2002). S.C. R. APP.

PRAC. 201(a) provides: “Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision.” *See also* TOAL, *supra*, at 83.

- B) **Timing.** The first step in initiating and perfecting the appeal involves the notice of appeal. TOAL, *supra*, at 116. “A party intending to appeal must serve and file a notice of appeal.” S.C. R. APP. PRAC. 203(a) (2008). The Notice of Appeal is served on the respondent, and filed with the clerk of the appellate court, and the clerk of the lower court. The time limitations for an appeal are set forth in the South Carolina Appellate Court Rules. The time limitations for serving the notice of appeal differ based on whether the appeal is from the court of common pleas (civil court) or from the general sessions court (criminal court). In appeals from the court of common pleas, a notice of appeal must be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. S.C. R. APP. PRAC. 203(b)(1); *see also* TOAL, *supra*, at 118. The thirty day time limit is jurisdictional and cannot be extended. In addition to serving the notice of appeal, the appellant must file the notice of appeal. The notice of appeal must be filed with the clerk of the appellate court and the clerk of the lower court within ten (10) days after the notice of appeal is served. S.C. R. APP. PRAC. 203(d)(2); *see also* TOAL, *supra*, at 124.
- C) **Writ of certiorari.** A petition for a writ of certiorari may not be filed until the decision of the Court of Appeals is final. Specifically, not until a petition for rehearing has been acted on by the Court of Appeals. *See* S.C. R. APP. PRAC. 242(c) (2008); TOAL, *supra*, at 277. The Supreme Court grants certiorari in a very limited number of cases. The petition must be served on opposing counsel and filed with proof of service with the clerk of Court of Appeals and the clerk of the Supreme Court within thirty (30) days after the petition for rehearing is finally decided by the Court of Appeals. S.C. R. APP. PRAC. 242(c); *see* TOAL, *supra*, at 277. Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. S.C. R. APP. PRAC. 221(a); *see* TOAL, *supra*, at 293.
- D) **Reconsideration.** Petitions for Rehearing are governed by S.C. R. APP. PRAC. 221 (2008). Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. S.C. R. APP. PRAC. 221(a); *see* TOAL, *supra*, at 293. A petition for rehearing must state with particularity the points supposed to have been overlooked or misapprehended by the Court. *See* S.C. R. APP. PRAC. 221(a); *see* TOAL, *supra*, at 293.

The Court of Appeals may rehear cases en banc. S.C. R. APP. PRAC. 219(a) (2008); *see* TOAL, *supra*, at 294. Under S.C. R. APP. PRAC. 219(a), it requires the affirmative vote of six members of the Court of Appeals to rehear an appeal or other proceeding en banc.

- E) **Rules governing timing of motions.** S.C. R. APP. PRAC. 263(b) (2008), provides that the time prescribed by the South Carolina Appellate Court Rules for performing any act, “except the time for serving the notice of appeal under Rules 203 and 243, may be extended or shortened by the appellate court, or by any judge or justice thereof.” *See also* TOAL, *supra*, at 263.

Biomechanical Testimony

The test for determining admission of biomechanical testimony is the same as determining admission of any expert testimony in South Carolina. This test, which closely resembles the test in the federal rules states that if the information will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto. *See* S.C. R. EVID. 702; *see also* *Wilson v. Rivers*, 357 S.C. 447, 593 S.E.2d 603 (2004).

Collateral Source Rule

According to the collateral source rule in South Carolina, a plaintiff's damages may not be reduced by benefits received from some source like unemployment compensation or first party insurance. F. PATRICK HUBBARD & ROBERT L. FELIX, *SOUTH CAROLINA LAW OF TORTS* 560 (3d ed. 1990). This rule has been "liberally applied in South Carolina" to a variety of situations, including not only insurance schemes but also where medical services and facilities were made available to the plaintiff by a governmental agency. *Id.* at 561.

Convictions

- A) **Criminal.** Evidence of other crimes is "not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." S.C. R. EVID. 404 (2008). Once a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction. *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 295 (2008).
- B) **Traffic.** Evidence of conviction of traffic violations is inadmissible in a civil action. S.C. CODE ANN. § 56-5-6160 (2008).

Day in the Life Videos

Videotape of patient's daily activities near the end of her life was relevant to depict patient's condition and quality of life just shortly before her demise from breast cancer and its probative value was not outweighed by danger of unfair prejudice, confusion of issues, or misleading jury; tape was not graphic, gruesome, or grotesque, and any false impression that videotape may have given to effect that patient's swollen condition resulted from her cancer was counteracted by records that documented patient's weight gain before her cancer was diagnosed. *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295(S.C. Ct. App. 2000) (stating that videotapes are extensively used in civil litigation and are routinely admitted into evidence by courts throughout the country).

Dead Man's Statute

The rule embodied in the Dead Man's Statute is designed to prevent testimony about communications and transactions between a deceased or incapacitated person or certain persons listed in the statute. S.C. CODE ANN. § 19-11-20 (2008); *see also* THE SOUTH CAROLINA PRACTICE MANUAL CIVIL LAW VOL. 2 24 (William L. Howard, Sr. & E. Warren Moise eds., 2001). In order for the statute to prevent the introduction of testimony, first the witness must belong to one or more, or to all, of the four classes of persons whose testimony may under certain circumstances be excluded. Those are: (1) a party to the action or proceeding; (2) a person having an interest which may be affected by the event of a trial; (3) a person who has had such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding, and an (4) assignor of a thing or controversy. *Id.* at 425. Secondly, the testimony must partake of not merely one or two, but it must possess all three of the disqualifying characteristics: (1) it must pertain to any transaction or communication between the witness and a person deceased, insane, or lunatic, and it must be (2) against a party prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, and (3) the present or previous interest of the witness may in some manner be affected by the testimony or by event of the trial. *Id.* at 426.

Medical Bills

In most cases, the plaintiff seeks to recover for injuries that have already occurred. However, the plaintiff has only one opportunity to recover damages for both past and future injuries. The plaintiff may seek to recover damages that will accrue in the future, as long as the injury and the amount of damage are reasonably certain and "not within the speculative realm." 11 S.C. JUR. DAMAGES § 6 (2007). The plaintiff may not recover for expenses that may be incurred only in the future. *Id.*

Offers of Judgment

S.C. R. CIV. P. 68 addresses offers of judgment. Rule 68 is not identical to the Federal Rule. Rule 68(a), S.C. R. CIV. P., provides:

(a) Offer of Judgment. Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules. Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment. Upon the filing, the court shall immediately issue the judgment and the clerk shall enter the judgment as provided in the offer of judgment. If the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not admissible except in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney as provided in these rules. Any

offeror may file a subsequent offer of judgment in any amount which supersedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing and service, terminates any rights to interest or costs under the superseded offer. An offer is not considered rejected by a counter offer and shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. All offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

Offers of Proof

Failure to make an offer of proof precludes consideration of an issue on appeal. *State v. Cabbagstalk*, 281 S.C. 35, 314 S.E.2d 10 (1984). S.C. R. EVID. 103 provides:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

Prior Accidents

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. S.C. R. EVID. 403.

Relationship to the Federal Rules of Evidence

South Carolina has adopted its own Rules of Evidence, which differ in some respects from the Federal Rules. *See, e.g.*, S.C. R. EVID. 404.

Seat Belt and Helmet Use Admissibility

- A) **Seat belts.** S.C. CODE ANN. § 56-5-6520 (2008), states that the violation of the article (mandatory use of a seatbelt) does not constitute negligence per se or contributory negligence and is not admissible as evidence in a civil action.
- B) **Helmets.** A motorcyclist over twenty-one does not have a duty to wear a helmet; therefore, failure to wear a helmet is not contributory negligence. *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993); F. PATRICK HUBBARD & ROBERT L. FELIX, S.C. LAW OF TORTS 186 (3d ed. 1990).

Spoliation

The South Carolina Supreme Court has upheld a jury charge which advised that “when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.” *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990).

Subsequent Remedial Measures

The South Carolina rule for subsequent remedial measures is identical to the Federal Rule. *See* Note, S.C. R. EVID. 407. Rule 407 states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Use of Photographs

The admission of photographic evidence must satisfy foundational requirements under S.C. R. EVID. 901. These requirements are nearly identical to those required under the Federal Rules. “Normally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved.” *State v. Campbell*, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972). The use of photographs must conform to the Best Evidence rules, requiring original documents. *See* S.C. R. EVID. 1001, 1002. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. S.C. R. EVID. 403.

DAMAGES

Caps on Damages

- A) There is no broad cap on damages although there are exceptions. Two exceptions are for governments and officials which allows for limited actual damages but not punitive damages, exemplary damages, or prejudgment interest (S.C. CODE ANN. § 15-78-120 (2008)), also known as the Tort Claims Act, currently set at three hundred thousand dollars (\$300,000.00) per person or six hundred thousand dollars (\$600,000.00) per occurrence); for charities under S.C. CODE ANN. § 33-56-180(A) which limits recovery against charitable organizations to the same limit as those imposed by the Tort Claims Act.
- 1) **Medical malpractice.** In medical malpractice judgments against either a single health care provider or a single health care institution, liability for non-economic damages is limited to three hundred and fifty thousand dollars (\$350,000.00) per claimant. S.C. CODE ANN. § 15-32-220 (2008).

When judgment is rendered against more than one health care institution or provider, the limit of non-economic damages is three hundred and fifty thousand dollars (\$350,000.00) per claimant for each institution or provider with recovery for one claimant against all institutions and providers not to exceed one million,

fifty thousand dollars (\$1,050,000.00) per claimant. These limitations do not apply if it is determined that the defendant was grossly negligent, willful, wanton, or reckless and its actions were the proximate cause of the claimant's non-economic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant has altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant. *Id.*

The above provisions do not limit economic damages suffered by a claimant or punitive damages where the claimant is able to prove an entitlement thereto. *Id.*

Calculation of Damages

The amount of damages is generally a factual matter for the jury. The jury's discretion is subject to the supervision and check of the Court. F. PATRICK HUBBARD & ROBERT L. FELIX, S. C. LAW OF TORTS 550 (3d ed. 1990).

Available Items of Personal Injury Damages

- A) **Past medical bills.** A plaintiff is entitled to recover for past medical expenses proximately caused by the defendant's tort. *See Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001).
- B) **Future medical bills.** A plaintiff is entitled to recover for future medical expenses proximately caused by the defendant's tort. *See id.*
- C) **Increased risk of harm.** There is no South Carolina case that directly deals with increased risk of harm. However, in general a plaintiff may recover both tangible and intangible losses. F. PATRICK HUBBARD & ROBERT L. FELIX, S.C. LAW OF TORTS 570 (3d ed. 1990).
- D) **Disfigurement.** Disfigurement is an element of damages that is recoverable and may involve both tangible and intangible aspects. *Id.* at 571.
- E) **Loss of normal life/hedonic damages.** "Loss of enjoyment of life" is compensable as an element of damages, separate from pain and suffering, deserving a distinct charge to the jury. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001).
- F) **Disability.** Disability is an element of damages that is recoverable and may involve both tangible and intangible aspects. HUBBARD, *supra*, at 571.
- G) **Past Pain and Suffering, Future Pain and Suffering.** Pain and suffering, both past and present, is a proper element of damages where it is the proximate consequence of actionable misconduct. *Id.*
- H) **Loss of society.** S.C. CODE ANN. § 15-75-20 (2008) provides: "Any person may maintain an action for damages arising from an intentional or tortious violation of the

right to the companionship, aid, society and services of his or her spouse. Provided, that such action shall not include any damages recovered prior thereto by the injured spouse.”

- I) **Lost income, wages, earnings.** Loss or impairment of earning capacity caused by personal injury is a proper element of compensation. HUBBARD, *supra*, at 577.

Lost Opportunity Doctrine

An injured party may recover lost profits for a failed new business or enterprise if the lost profits are: (1) the natural consequence of the breach, (2) foreseeable by the breaching party, and (3) determinable with reasonable certainty. *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988).

Mitigation

Generally, an injured party has a duty to mitigate damages. F. PATRICK HUBBARD & ROBERT L. FELIX, *SOUTH CAROLINA LAW OF TORTS* 563 (3d ed. 1990). The plaintiff may not recover for the aggravation of his own loss and is bound to exercise reasonable care to avoid or reduce damages after a legal wrong committed by the defendant. *Id.* Mitigation only applies where the injured party is able to mitigate or minimize damages through due diligence. *Id.*

Punitive Damages

- A) **When may be brought.** A Plaintiff may recover if the defendant’s violation of the plaintiff’s rights was reckless, willful, wanton, or malicious. *Gilbert v. Duke Power Co.*, 255 S.C. 495, 500, 179 S.E.2d 720, 723 (1971).
- B) **Insurability.** Under the Title governing automobile insurance, “damages” is defined to mean both actual and punitive damages. S.C. CODE ANN. § 38-77-30(4) (2008). Punitive damages are insurable and the Supreme Court has held that a policy which provided that: “The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages,” and that did not define damages covered punitive damages. *S.C. State Budget & Control Bd., Div. of Gen. Servs., Ins. Reserve Fund v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991).

Recovery and Pre- and Post-Judgment Interest

- A) **Prejudgment interest.** Prejudgment interest is not usually recoverable on an unliquidated claim in the absence of an agreement or statute providing such recovery. F. PATRICK HUBBARD & ROBERT L. FELIX, *S.C. LAW OF TORTS* 566 (3d ed. 1990). However, where the amount is liquidated (reducible to a precise, certain figure), prejudgment interest is a proper element of damages. *Id.* at 566-67. Interest is generally not recoverable for bodily injury and emotional distress or for lost profits or similar consequential loss, but is recoverable for loss of or damage to property. *Id.* at 567. Interest has been held recoverable in an action for damages to land caused by the ponding of waters above a dam erected and owned by the defendant. *Id.* Comparably, prejudgment

interest has been awarded from the date of loss in claims against insurance companies for bad faith refusal to pay. *Id.* In claims of conversion, the measure of damages may include prejudgment interest on the value of the property converted. *Id.* at 567-68.

- B) **Post-judgment interest.** South Carolina provides for post-judgment interest by statute. *See* S.C. CODE ANN. § 34-31-20(B) (2008).
- C) **Legal Rate of Interest.** On the first business day of every year, the Supreme Court issues an Order prescribing the legal rate of interest for that year. For 2012, the legal rate of interest is 7.25% compounded annually.

Recovery of Attorney's Fees

- A) Attorney's fees are not generally awarded in the absence of a statutory, contractual, or equitable basis. F. PATRICK HUBBARD & ROBERT L. FELIX, S.C. LAW OF TORTS 564 (3d ed. 1990).

- 1) **Statutes.** *Id.* at 565-66 states:

The following are examples of statutory provisions for awarding attorneys fees in actions bearing directly or indirectly on tort law: (1) South Carolina Code § 15-77-300 provides that the court may allow the prevailing party to recover 'reasonable attorney's fees to be taxed as court costs against the appropriate agency' in any civil action brought by the State, except in certain specified proceedings; (2) the South Carolina Unfair Trade Practices Act provides the court shall award reasonable attorney's fees and costs to the person establishing a violation under the act; (3) under the statutory regulation of manufacturers, distributors, and dealers of automobiles, a specialized kind of Unfair Trade Practices Act, a party injured by anything forbidden by the statute; "shall recover . . . the cost of suit, including a reasonable attorney's fee; (4) suits against insurers where failure to pay was 'without reasonable cause or in bad faith,' and (5) various acts and rules that address frivolous actions or other litigation misconduct and authorize attorney fees as a sanction for improper litigation of litigation misconduct.

- B) **Exception.** Attorneys' fees are sometimes awardable in the absence of a statute, contract, or equitable principle. For example, "a plaintiff may recover attorney's fees and court costs that are part of the damages incurred in defending prior tortuous proceedings, such as malicious prosecution or abuse of process, or in defending suits that are a foreseeable result of defendant's conduct." *Id.* at 564-65.

Settlement Involving Minors

- A) **Settlements in excess of \$25,000.** For settlements involving minors in claims that exceed twenty-five thousand dollars (\$25,000.00), the petitioner must file with the court a verified petition setting forth all pertinent facts concerning claim, payment, attorneys' fees and expenses, and why in the opinion of the petitioner the settlement should be approved. The court may require a hearing on the matter, after which an order will be issued. If settlement requires the payment of money or delivery of personal property for

the benefit of the minor, the order must require that payment or delivery be made through a conservator, upon which a proper receipt and release or covenant not to sue will be executed, which will be binding on the minor. S.C. CODE ANN. § 62-5-433 (2008).

- B) **Settlements not in excess of \$25,000.00.** For settlements that do not exceed twenty-five thousand dollars (\$25,000.00), if a conservator has been appointed he may settle the claim without court authorization or confirmation. The conservator shall receive the payment or delivery of money and/or property and execute a proper receipt and release or covenant not to sue which is binding on the minor. If no conservator has been appointed the guardian (ad litem) must petition the court for approval as if the settlement were for more than twenty-five thousand dollars (\$25,000.00) and there were no conservator yet appointed. *Id.*

The settlement of a claim not exceeding two thousand five hundred dollars (\$2,500.00) may be effected by a minor's parent/guardian without court approval and without appointment of a conservator. The parent shall receive any payment or delivery of money and or property and execute a proper receipt and release or covenant not to sue which is binding on the minor.

Taxation of Costs

Taxable costs include: (1) costs authorized by statute and sanctions imposed in favor of the prevailing party; (2) all filing and recording fees charged by the clerk of court; (3) fees of the sheriff; (4) fees incurred in service of process; (5) witnesses' fees; and (6) fees for exemplification and copies of papers necessarily obtained for trial. *See* S.C. R. CIV. P. 54(e) (2008).

The taxing of costs under S.C. R. CIV. P. 54 is a function of the clerk. *See id.*

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 an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.