STATE OF SOUTH CAROLINA
GENERAL LIABILITY
COVID-19 QUICK GUIDE

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(As of 7/20/2020)
1. **Statute of Limitations:** The statute of limitations for a negligence claim is three years and begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists. S.C. Code Ann. § 15-3-530 (1976). Although liability for COVID-related claims may eventually be statutorily defined (a committee has been convened for this purpose), we suspect that most claims would otherwise be filed with a general negligence cause of action. (Of course, depending on the circumstances, other more specific causes of action may apply, e.g. medical malpractice.)

2. **Negligence:** We expect for an individual to be found negligent in the transmission of an infectious disease like COVID-19, a plaintiff will need to prove that individual had actual or constructive knowledge they were infected and failed to exercise due care. If the plaintiff cannot prove the defendant was aware or should have been aware of the presence of an infectious disease, then they will likely not be able to prove the subsequent harm was foreseeable.

3. **Standard of Care:** South Carolina courts have yet to lay out what standard of care will be applied to COVID-19 claims. However, parties bringing negligence suits related to COVID-19 have relied on the CDC and South Carolina Department of Health and Environmental Control (DHEC) guidelines in establishing the standard of care in negligence suits.

4. **Causation:** In negligence cases, a plaintiff must prove that the defendant's negligence was, in fact, the cause that contributed to the injury. 18 S.C. Jur. Negligence § 20 (2020). Thus, the plaintiff must show that "but for" the negligence of the defendant, the injury would not have occurred. COVID-19's five to 14-day latency period will create a new challenge when establishing a particular time of exposure.

   After proving cause-in-fact, the plaintiff must also prove that the defendant's negligence was the proximate cause of the injury. The test most often given for determining proximate cause is whether the injury complained of was a foreseeable result of the defendant's negligence. If the injury was a natural and probable consequence of the negligent act, it is deemed to be foreseeable. It is not necessary to show that the defendant could have foreseen the particular event in question; however, a mere possibility is not said to be foreseeable. 18 S.C. Jur. Negligence § 21 (2020).

5. **Premises Liability:** In South Carolina, premises owners/operators are responsible for dangerous conditions they create or for which they have notice (either actual or constructive). This duty typically does not apply to dangerous conditions that are open and obvious. CDC as well as South Carolina Department of Health and Environmental Control (DHEC) have issued signage and guidance to be displayed to emphasize hand washing, social distancing, and caution in workplaces and businesses.

   Further, the South Carolina House of Representatives has formed a COVID-19 Liability Protection Committee that is considering giving businesses a “safe harbor” bill to clearly outline the guidelines and standards for businesses to have temporary and limited immunity. The bill would apply to government buildings, schools, and entertainment venues as well as store front businesses.
6. Violation of Statute/Executive Orders as Evidence of Negligence: Violation of a statute may be evidence of prima facie evidence of negligence. To show a duty of care arising from a statute the plaintiff is under the burden to show: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. Once this burden has been met, the plaintiff has then satisfied the first two elements of negligence.

Under S.C. Governor Henry McMaster’s Executive Orders and pursuant to section 16-7-10(A) of the South Carolina Code of Laws, any individual who “willfully fail[s] or refuse[s] to comply with any lawful order or direction of any law enforcement officer,” or otherwise violates any provision of any order issued by the undersigned in connection with the State of Emergency “is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or imprisoned for not more than thirty days.”

7. Contributory Negligence: South Carolina is a “comparative negligence” state, meaning that a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. Nelson v. Concrete Supply, 303 S.C. 243, 399 S.E.2d 783 (1991). The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. Id. If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants. Id. Comparative negligence is an affirmative defense on which the defendant has burden of proof. We believe that violations of CDC or DHEC guidelines for personal safety precautions by the plaintiff may give rise to an affirmative defense to COVID-19 claims.

8. Assumption of the Risk: To defend successfully on the basis of assumption of risk, a defendant must show that "(1) the plaintiff has knowledge of the facts constituting a dangerous condition; (2) he knows the condition is dangerous; (3) he appreciates the nature and extent of the danger; and (4) he voluntarily exposes himself to the danger." Senn v. Sun Printing Co., 295 S. C. 169, 174, 367 S. E. 2d 456, 458 (Ct. App. 1988). For assumption of the risk to apply in a COVID-19 negligence claim, a person must have freely and voluntarily exposed himself to COVID-19 infection, and he must have understood and appreciated that risk. We expect this defense to be pled in nearly every COVID-related case.


10. Death Cases: The South Carolina wrongful death statute provides a cause of action to the decedent's representative if the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action. In the event of the death of the wrongdoer,

11. Punitive Damages: Courts only award punitive damages where the plaintiff proves by clear and convincing evidence the defendant’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights. S.C. Code 1976, § 15–33–135. There are also caps in most cases.

FAQs:

Can a plaintiff recover for fear of exposure to COVID-19?
This is most likely the type of recovery that would need to be specifically recognized by the Court. “Potential harm” does play into the granting of punitive damages but aside from very unique claims (e.g. familial bystanders to a fatal accident; assault), fear is typically not enough.

Will Commercial General Liability Insurance apply to COVID-19 claims?
Possibly. The application of general liability insurance will depend on the terms of the policy between the insurer and the insured. As both prepare for litigation it will be important to review the terms of the policy closely. The breadth of the policy, the type of damages that will trigger the policy, and the exclusions of the policy will all be things to look at. There has not yet been a wide array of declaratory judgments filed or decided.

Is there immunity from COVID-19 claims?
Not yet. As mentioned above, a committee within the state legislature has been constituted to study the issue. Immunity protection may cover a wide swath of businesses and organizations: grocery and hardware stores, pharmacies, banks, takeout eateries, and other businesses deemed “essential.”

BEST PRACTICES FOR AVOIDING/REDUCING FUTURE LIABILITY FOR COVID-19 CLAIMS

- Follow or exceed industry and CDC standards for hygiene, sanitization, and safety.
- Follow or exceed local, state, and federal prevention guidelines and recommendations.
- Follow or exceed OSHA’s recommended procedures for workplace safety.
- Adopt, implement, and enforce practices that limit person-to-person interaction and promote social distancing (i.e., mobile order, curbside pickup).
- Develop and execute procedures for monitoring the health and well-being of employees.
- Educate employees about prevention and safe practices.
- Display signs/warnings encouraging customers to follow CDC guidelines.
- Prohibit persons who do not comply with CDC guidelines from entering premises.
- Develop policies for communication with local and/or state health department representatives to ensure your business stays current on all guidelines, recommendations, and regulations.
- Develop and implement an incident investigation procedure for all potential COVID-19 related claims (i.e., workers’ compensation, liability).
- Retain documents reflecting all precautions, policies, procedures, and the daily implementation of the same.
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.