

A PRIMER ON SOUTH CAROLINA TORT REFORM: LEGISLATIVE UPDATE

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Tort Reform Update

Legislative History:

- H.3008 “Economic Development, Citizens, and Small Business Protection Act of 2005”
 - Passed unanimously by the South Carolina Senate by voice vote on March 8, 2005.
 - House voted to concur in the Senate version on March 16, 2005.
 - Signed into law March 21, 2005.

■ S.83: Tort Reform Act of 2005 Relating to Medical Malpractice:

- Passed by General Assembly March 29, 2005.
- Signed into law April 4, 2005.



■ Joint & Several Liability (S.C. Code Ann. § 15-38-15):

- Prior Rule: Each defendant jointly and severally liable for 100% of damages.
- New Rule:
 - 50% Threshold: Joint & several Liability will not apply to any defendant whose conduct is determined to be less than 50% of the total fault at issue. In other words, a defendant whose conduct is determined to be less than 50% of the total fault is only liable for that percentage of the indivisible damages, as determined by the jury or trier of fact.
 - In a separate verdict the trier of fact must specify amount of damages and assign the percentage of fault, if any, of plaintiff, and, upon motion by at least one defendant, the percentage of liability proximately caused by each defendant.

■ Joint and Several Liability (cont'd):

- The percentage of fault assigned must take into account the fault assigned to the plaintiff, such that total percentage = 100%.
- If Court determines two defendants acted in concert, or that vicarious liability exists, those defendants can be treated as a single party.
- Does not preclude defendant from arguing that an “empty chair” tortfeasor, whether or not a party to the action, contributed to the injury and is liable for all or any part of damages claimed.



- Joint and Several Liability (cont'd):
 - A defendant is entitled to a setoff from any settlement received by plaintiff prior to the verdict in the proportion to each defendant's percentage of liability as determined by trier of fact.
 - After initial verdict awarding damages and before special verdict on percentage of liability is determined, parties are allowed oral argument as to the percentage attributable to each party. Time limit discretionary with Court. No additional evidence allowed.



- Act 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 drugs.
- Effective date: causes of action arising on or after July 1, 2005.



■ Construction Statute of Repose (S.C. Code Ann. § 15-3-640)

- Prior law: Thirteen year statute of repose.
- New law: Now reduced to eight years effective July 1, 2005. No action 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.
- Prior to substantial completion, parties can contract to extend any guarantee of a structure to be free from defective or unsafe condition beyond eight years.
- Certificate of occupancy for new construction or completion of final inspection on improvements to existing property, constitutes proof of “substantial completion.”

■ Provision for Changing Place of Trial (S.C. Code Ann. § 15-7-100):

- Court may change place of trial if:
 - Location where complaint is filed does not comply with new venue statute (new);
 - Fair and impartial trial cannot be had there (same);
 - Convenience of witnesses and ends of justice could be promoted (same).



■ Non-Economic Damage Awards (S.C. Code Ann. § 15-32-200):

- New medical malpractice bill limits pain and suffering damage awards against an individual health care provider or health care institution in medical malpractice cases to \$350,000 cap per claimant (regardless of the number of separate causes of action on which claim is based) – no exceptions!
- Plaintiff can name any number of providers or institutions as defendants, but the total noneconomic damages are capped at \$1,050,000.00.
- Effective July 1, 2005 for claims arising thereafter.

■ Mediation (S.C. Code Ann. § 15-79-12):

- Prior to trial, all medical malpractice actions must be mediated.
- Prior to filing medical malpractice actions, plaintiffs must file Notice of Intent to File Suit, which tolls statute of limitations. Thereafter, limited discovery and mediation occur. Only after mediation fails can plaintiff file a complaint with the circuit court.



■ Expert Witnesses (S.C. Code Ann. § 15-36-100):

- New Law:

- In an action for professional negligence (including legal and medical malpractice), the plaintiff must file with the original complaint an affidavit of an expert witness certifying with specificity at least one act of professional negligence and the factual basis for each claim.
- Applies to twenty-two listed professions.



■ Legal Rate of Interest for Money Judgments (S.C. Code Ann. § 34-31-20)

- Prior Law: Post judgment interest rate of 12%. Discouraged appeals of inflated awards by defendants.
- New Law: Equal to Prime Rate Listed in the first edition of the *Wall Street Journal* for the calendar year in which damages are awarded, plus four percentage points compounded annually.
- S.C. Supreme Court must issue order by January 15 of each year confirming the annual prime rate.
- Effective Date: all judgments entered on or after July 1, 2005.



VENUE

No More Home Cooking.

S.C. Code Ann. § 15-7-30 Venue



Prior Law: Old service statute:
Owning property and transacting business

New Law: Owning property and transacting business in a county is insufficient in and of itself to establish the PPB for a corporation for purposes of this section.
(Specifically rejects old standard: own property and transacts business).

S.C. Code Ann. § 15-7-30 Venue (cont'd):

■ INDIVIDUALS

■ Resident Individual Defendant:

- Must be tried in the county in which
 - Defendant resided at the time the cause of action arose, or
 - Most substantial part of alleged act or omission occurred.

■ Non Resident Individual Defendant:

- Must be tried in the county in which:
 - The most substantial part of the alleged act or omission occurred, or
 - Plaintiff resided at time the cause of action arose, or
 - If plaintiff is a domestic corporation . . . at its PPB at the time the cause of action arose.

S.C. Code Ann. § 15-7-30 Venue (cont'd):

■ CORPORATIONS

■ Domestic Corporations:

- Corporation has its PPB at the time the COA arose; or
- Most substantial part of the alleged act or omission giving rise to the COA occurred.

■ Foreign Corporations:

- Must be tried in the county in which
 - Most substantial part of the alleged act or omission giving rise to the COA occurred; or
 - Plaintiff resided at the time the COA arose, or
 - If the plaintiff is a domestic corporation at its PPB at the time the COA arose.

-Owning property and transacting business in a county is insufficient in and of itself to establish the PPB for a corporation for purposes of this section. (Specifically rejects old standard: own property and transacts business).

S.C. Code Ann. § 15-7-30 Venue (cont'd):

- Whaley v. CSX, 362 S.C. 456, 609 S.E.2d 286 (S.C. 2005):
 - Corporate Defendant: only in:
 - (1) county where it maintains its PPB, or
 - (2) maintained an office and an agent.
 - Rejects common law test for past quarter of the century: “owns property and transact business in the county.
 - The new statute is different than Whaley. New statute: (2) substantial part of alleged act or omission giving rise to the COA.

- FRIVOLOUS LAWSUITS:

- Is it okay to dump everything in including the kitchen sink?

- S.C. Code Ann. § 15-36-10

- Frivolous proceedings

- Prior Law: Good Faith Standard

- New Law: Expansion of Good Faith Standard with serious repercussions to those that violate



S.C. Code Ann. § 15-36-10 Frivolous Proceeding

- Signature certifies that:
 - The person has read the document;
 - A reasonable attorney would believe that under the facts his claim or defense is warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
 - A reasonable attorney in the same circumstances would believe . . . it is not intended merely to harass or injure the other party; and
 - A reasonable attorney in the same circumstances would believe the claim is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. §15-36-10 Frivolous Proceeding (cont'd):

- An attorney or pro se litigant may be sanctioned for violating any of the previous certification requirements.

- Can also be sanctioned for:
 - Making frivolous arguments that a reasonable attorney would believe were not reasonably supported by the facts or existing law, or
 - Failing to make a good faith argument that the existing law should be extended or modified or reversed.

S.C. Code Ann. §15-36-10 Frivolous Proceeding (cont'd):

■ Evaluating the frivolous proceedings motion:

- Court evaluates the prevailing parties motion at the conclusion of trial to determine whether:
 - A reasonable attorney in the same circumstances would believe the claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law; or
 - A reasonable attorney in the same circumstances would believe that the claim or defense was intended merely to harass or injure the other party; or
 - A reasonable attorney in the same circumstances would believe that the claim or defense was frivolous as not reasonably founded in fact or was interposed merely for delay.

S.C. Code Ann. §15-36-10 Frivolous Proceeding (cont'd):

■ Procedure:

- A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section.
- Upon notification, the violating attorney or pro se has thirty days to respond to the allegations.
- The violating attorney may comply by: filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation in mitigation.

S.C. Code Ann. §15-36-10 Frivolous Proceeding (cont'd):

- In determining if an attorney or pro se litigant has violated the court will consider:
 - The number of parties;
 - The complexity of the claims and defenses;
 - The length of time available to investigate and conduct discovery for alleged violations;
 - Information disclosed or undisclosed through discovery and adequate investigation;
 - Previous violations of the provisions of this section;
 - The response to the allegation that he or she violated the provisions of this section; and
 - Other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. CodeAnn. §15-36-10 Frivolous Proceeding (cont'd):

■ Standard:

- Preponderance of evidence: Litigant shall not be sanctioned unless violation is clear by the preponderance of the evidence
- Previous violations will be considered in determining whether sanctions are appropriate or the severity of a sanction

S.C. CodeAnn. §15-36-10 Frivolous Proceeding (cont'd):

▪ Sanctions may include:

- An order to pay the reasonable costs and attorney's fees of the prevailing party;
- An order for the attorney to pay a reasonable fine to the court; or
- Injunctive relief designed to deter a future frivolous action or an action in bad faith.
- Court required to report sanctions to the S.C. Commission of Lawyer Conduct.
- All violations must be reported to the S.C. Supreme Court.
- Public record must be maintained and reported annually to the Governor, Senate, and House of Representatives.
- Likely will appear in Advance Sheets.

- **OFFER OF JUDGMENT**

- Section 3 of the 2005 Medical Malpractice Bill; S.C. Code Ann. § 15-35-400 codifies offer of Judgment amendment.
- **The Offer:**
 - Offer: At any time prior to 20 days before trial. Sets a more detailed timeline that SCRPC, Rule 68. (Does not have 20-day language).
 - Must be in writing and filed with clerk.
- **Acceptance:**
 - Within 20 days after notification, or at least 10 days prior to trial, whichever occurs first, otherwise considered rejected.
 - Offeror can withdraw at any time.
 - Offer not to be considered rejected by a counteroffer.
 - Offer remains effective until accepted, rejected or withdrawn.

S.C. Code Ann. §15-35-400 Offer of Judgment (cont'd):

- Consequences of non-acceptance:

- If not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror recovers:
 - Costs: administrative filing, and other costs from the date of offer through judgment.
 - Plaintiff: receives 8% interest compounded on the amount of the verdict or award from the date of the offer, or
 - Defendant: a reduction from the judgment or award of 8% interest compounded on the amount of the verdict or award from the date of the offer.

■ UNLAWFUL TRADE PRACTICES, ATTORNEY ADVERTISING

Heavy Hitter Strikes Out

S.C. Code Ann. § 39-5-39:

- “Section 39-5-39. Notwithstanding another provision of law, it is an unlawful trade practice, pursuant to Section 39-5-20, for an attorney to advertise his services in this State in a false, deceptive, or misleading manner including, but not limited to, the use of a nickname that creates an unreasonable expectation of results.”
- Extends SCUPTA
- Applicable to attorneys that use a nickname that creates an unreasonable expectation of results. (*i.e.*, Heavy Hitter)



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