



STATE OF SOUTH CAROLINA CONSTRUCTION COMPENDIUM OF LAW

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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. §15-3-530(1).

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, 400, 645 S.E.2d 245, 250 (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. 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. It is always for the jury to determine whether a party has been reckless, willful, and wanton. 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.

Wise v. Broadway, 315 S.C. 273, 276-77, 433 S.E.2d 857, 859 (1993). See also Nguyen v. Uniflex Corp., 312 S.C. 417, 421, 440 S.E.2d 887, 889 (Ct. App. 1994) (generally, the determination of whether a statute has been violated is a question of fact for the jury; whether the violation of the statute is the proximate cause of an injury is also ordinarily a jury issue).

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 the amount of plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence; if there is more than one defendant, plaintiff's negligence shall be compared to the combined negligence of all defendants. Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991).

The law governing joint and several liability has been amended. S.C. Code Ann. § 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. 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 fifty percent [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 fifty percent [50%] of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

S.C. Code Ann. § 15-38-15(A). “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.” S.C. Code Ann. §15-38-15(D). These provisions do 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. S.C. Code Ann. §15-38-15(F).

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, and workmanlike manner. This is distinct from an implied warranty of habitability, which arises solely out of the sale of the home. 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.

Smith v. Breedlove, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (Ct. App. 2008). See also Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (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. See 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, the implied warranty of 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. 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.

Plantation Shutter Co., Inc. v. Ezell, 328 S.C. 475, 478-79, 492 S.E.2d 404, 406 (Ct. App. 1997). 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. See Id. (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).

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, 280-81, 178 S.E.2d 536, 539 (1971).

Further, South Carolina recognizes the common law tort of negligent misrepresentation. See deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 266-67, 536 S.E.2d 399, 405-06 (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. 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. "In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Cody P. v. Bank of America, N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011). 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. § 15-3-530(7).

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 which it is sold.

S.C. Jurisprudence Products Liability § 18. The rule shall apply although; (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. S.C. Code Ann. Section 15-73-10.

VI. Indemnity Claims

There are two forms of indemnity: contractual indemnity and indemnity implied in law, or “equitable indemnity.” Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

A. Contractual 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. 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.

Toomer v. Norfolk Southern Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 636 (Ct. App. 2001). “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, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

S.C. Code Ann. Section 32-2-10 (“Hold harmless clauses in certain construction contracts”) provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

B. Equitable 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, 389, 611 S.E.2d 235, 237 (2005). “South Carolina has long recognized the principle of equitable indemnification.” Toomer v. Norfolk Southern Ry. Co., 344 S.C. 486, 490, 544 S.E.2d 634, 636 (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. 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. at 490-91, 544 S.E.2d at 636. 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, 130, 414 S.E.2d 118, 120 (1992).

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

A cross-claim from a general contractor against a subcontractor, in an action brought by an HOA against the general contractor and various subcontractors, for breach of contract, breach of warranty, and negligence where the general contractor's only damages were the costs it occurred in defending against the HOA's lawsuit is merely an equitable indemnity claim. Stoneledge at Lake Keowee Owners' Assoc., Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015).

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.’”).

13 S.C. Jurisprudence Implied Contracts § 21 (2015).

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. § 15-3-640. The 2005 amendment, effective July 1, 2005, substituted “eight years” for “thirteen years” 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 for which a certificate of occupancy was issued 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.

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. § 15-3-530.

VIII. Economic Loss Doctrine

“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.” Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989) (involved residential home building). 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. *Id.* at 345, 384 S.E.2d at 737. 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. In that situation, no cause of action in negligence will lie.” *Id.*

In Kennedy, the Court found a builder owed 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 that he knows or should know will pose serious risks of physical harm.” *Id.* at 347, 384 S.E.2d at 738. 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 for its holding noted the inherent unequal bargaining positions, the fact

that home buyers no longer supervised construction of the homes, and South Carolina's acceptance of the legal maxim *caveat venditor*. Id.

In Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 379 S.C. 181, 666 S.E.2d 247 (2008), the South Carolina Supreme Court expanded the Kennedy exception to the economic loss rule beyond the residential home building context to manufacturers. The Colleton, "majority held that the economic loss rule will not preclude a plaintiff from filing a products liability suit in tort where only the product itself is injured when the plaintiff alleges breach of duty accompanied by a clear, serious, and unreasonable risk of bodily injury or death." Sapp v. Ford Motor Co., 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). In Sapp, the South Carolina Supreme Court explicitly overruled Colleton "to the extent it expands the narrow exception to the economic loss rule beyond the residential builder context." Id.

The Sapp Court expressed an inclination to be "cautious in permitting negligence actions where there is neither personal injury nor property damage," and noted that "[i]mposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, makes any amount of damages entirely speculative, and holds the manufacturer as an insurer against all possible risk of harm." Id. The Court specifically stated that the exception to the economic loss rule announced in Kennedy was not intended to extend "beyond residential real estate construction and into commercial real estate construction . . . [m]uch less did we intend the exception to the economic loss rule to be applied well beyond the scope of real estate construction in an ordinary products liability claim." Id. at 150, 687 S.E.2d at 51. The Sapp Court emphasized that "the exception announced in Kennedy is a very narrow one, applicable only in the residential real estate construction context." 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. The expense of hiring investigators is, however, included within the term suit money." S.C. Jurisprudence Costs § 35 (2014). See Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988).

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, 356, 650 S.E.2d 68, 70 (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 § 21 (2014).

XI. Stigma Damages

Stigma, or diminution in value, damages are generally awarded when there is a permanent injury to real property. See Gray v. S. Facilities, Inc., 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971) (holding that “[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”). Thus, where there is a permanent injury to land, damages are based on the diminution in value of the property based on its value before the injury and after the injury. Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 645, 529 S.E.2d 764, 767 (Ct. App. 2000).

While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.

Gray, 256 S.C. at 570–71, 183 S.E.2d at 444.

“Diminution in market value is an appropriate measure of damages where there is injury of a permanent nature to real property. 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, 472, 596 S.E.2d 51, 58 (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, 209, 371 S.E.2d 532, 533 (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, 132, 480 S.E.2d 447, 448 (1997). Every contract contains the implied obligation of good faith and fair dealing. Id. at 133, 480 S.E.2d at 448. 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.” 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. 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.” 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. Contract damages “should place the plaintiff in the position he would be in if the contract had been fulfilled.” 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. 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.”

11 S.C. Jurisprudence Damages § 3 (2015).

B. Stigma

See XI. Stigma Damages, supra.

C. Loss of Use

The measure of damages for loss of use of property is determined by its reasonable rental value. If the property has no rental value, damages are determined by the value of the use of the property during the time its use was interrupted. In the case of a manufacturing plant, the value of this use may be based on past performance and profits.

11 South Carolina Jurisprudence Damages § 53 (2014).

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. 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. A conscious failure to exercise due care constitutes willfulness. The plaintiff has the burden of proving punitive damages by clear and convincing evidence.

Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). See also Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) (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).

South Carolina Code Ann. § 15-32-530 (Awards not to exceed certain limits; Board of Economic Advisors to calculate adjustments to maximum awards; publication in State Register) provides:

(A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.

(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), the trial court should first determine whether:

(1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).

(C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or

(3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.

(D) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December thirty-one of the previous year, and the maximum amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised maximum amount recoverable for

punitive damages to the State Register for publication, pursuant to Section 1-23-40(2), and the revised maximum amount recoverable for punitive damages becomes effective upon publication in the State Register. For purposes of this subsection, "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics.

S.C. Code Ann. § 15-32-530.

2011 Act No. 52, § 7, provides as follows:

"SECTION 7. This act takes effect January 1, 2012, and applies to all actions that accrue on or after the effective date except the provisions of SECTION 3 do not apply to any matter pending on the effective date of this act."

E. Emotional Distress

See Emotional Distress Claims, supra.

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. 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.

Boan v. Blackwell, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001).

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, 436, 673 S.E.2d 448, 458 (2009).

Attorneys fees are appropriate if they are established by a statute and the facts of the complaint implicate the statute, even if they are not specifically cited in the complaint. Calland v. Carr, 2015 WL 439477 (D.S.C. 2015).

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." 7 S.C. Jurisprudence Costs § 32 (2017). "The expense of hiring experts has, however, been held to be included under the term "suit money." Id.

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, 382 S.C. 535, 543-44, 677 S.E.2d 574, 578 (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, 560, 614 S.E.2d 611, 614 (2005).

Insured must be provided sufficient information in reservation of rights letter to understand reasons the liability insurer believes the policy may not provide coverage; generic denials of coverage coupled with furnishing the insured with a verbatim recitation of all or most of the policy provisions through a cut-and-paste method is not sufficient. Harleysville Group Insurance v. Heritage Communities, Inc., __ S.C. __, __ S.E.2d __, 2017 WL 105021 (S.C. Sup. Ct 2017) (Westlaw notes this opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal). A reservation of rights letter must give fair notice to the insured that the liability insurer intends to assert defenses to coverage or to pursue a declaratory relief action at a later date. Id. For a liability insurer's reservation of rights to be effective, the reservation must be unambiguous; if it is ambiguous, the purported reservation of rights must be construed strictly against the insurer and liberally in favor of the insured. Id. Commercial general liability insurer's reservation of rights letters were insufficient to contest coverage for liability of condominium developers and general contractor for progressive property damage from construction defects; letters incorporated various policy terms through a cut-and-paste approach, but included no discussion of insurer's position as to the provisions or explanation of its reasons for relying on them, gave no express reservation or other indication of coverage dispute for any specific portion or type of damages, did not disclose intent to file suit to contest coverage, and did not inform insureds of possible conflict of interest or need to protect their interests by requesting appropriate verdict to allocate covered and uncovered damages. Id. Commercial general liability insurer's reservation of rights letters were effective to contest

coverage for liability of condominium developers and general contractor for punitive damages in suits by property owners associations and unity owners alleging progressive property damage from construction defects; letters claimed that the damages did not arise from “occurrence,” did not fit definition of “property damage,” and were “expected or intended” within meaning of intentional injury exclusion, and the letters also advised of possibility of uninsured exposure or interest due to policy limits and value of employing personal counsel. Id.

Punitive damages for which insured condominium developers and general contractor were liable arose from “occurrence” in the form of progressive water intrusion as result of construction defects, and, thus, insuring agreement of commercial general liability policies provided coverage; policy covered liability for “those sums” insured was legally obligated to pay because of property damage caused by “occurrence.” Id. Commercial general liability insurer for condominium developers and general contractor failed to establish that coverage for liability for punitive damages was barred by exclusion for expected or intended injury, even though developers and contractor allegedly approached construction with the aim of doing as little as possible; rather, evidence supported special referee's findings that developers and contractor intended to construct quality condominiums, expected subcontractors to be reliable and skilled, and were actively addressing construction and water-intrusion concerns and that post-construction testing revealed a portion of the intrusion resulted from defectively manufactured components, rather than improper installation. Id.

Commercial general liability insurer's liability for damages that condominium developers and general contractor were required to pay for loss of use as result of repeated infiltration of water into improperly constructed buildings was subject to allocation for time on the risk; the relevant “occurrence” was the repeated infiltration of water which was a progressive injury. Id.

Commercial general liability insurer's liability for punitive damages that condominium developers and general contractor were required to pay was not subject to allocation based on time on the risk for progressive injury as result of water intrusion; evidence demonstrated that all reprehensible acts that justified punitive damages took place entirely during the policy period. Id.

A. Occurrences That Trigger Coverage

In Auto Owners Ins. Co., Inc. v. Newman, the South Carolina Supreme Court held that an arbitrator's finding “that the defective stucco allowed for continuous moisture intrusion resulting in substantial water damage to the home's exterior sheathing and wooden framing” was sufficient to “establish that there was ‘property damage’ beyond that of the defective work product itself, and that therefore, the Homeowner's claim is not merely a claim for faulty workmanship typically excluded under a CGL policy.” 385 S.C. 187, 194, 684 S.E.2d 541, 544 (2009). In addition, the Court held that “although the subcontractor's negligent application of the stucco does not on its own constitute an ‘occurrence,’ we find that the continuous moisture intrusion resulting from the subcontractor's negligence is an ‘occurrence’ as defined by the CGL policy.” Id. This was in part because “the continuous moisture intrusion into the home was ‘an

unexpected happening or event' not intended by Trinity-in other words, an 'accident'-involving 'continuous or repeated exposure to substantially the same harmful conditions.'" Id. at 194, 684 S.E.2d at 544-45.

The Court was careful to "note that interpreting 'occurrence' as we do in this case gives effect to the subcontractor exception to the "your work" exclusion in the standard CGL policy." Id. at 195, 684 S.E.2d at 545.

B. Bodily Injury

In L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 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.'" L-J, Inc. v. Bituminous Fire and Marine Insurance Company, 366 S.C. 117, 122, 621 S.E.2d 33, 35 (2005). In L-J as the majority noted, the Court explained that there may be coverage where faulty workmanship causes third party bodily injury or damage to property other than the contractor's work product. Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. at 200, 684 S.E.2d at 548 (J. Pleicones dissenting). "The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently of every other exclusion." Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. at 197, 684 S.E.2d at 546

C. Property Damage

As previously mentioned, the South Carolina Supreme Court has observed that "[t]he standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently." Auto Owners Ins. Co., Inc. v. Newman, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009). In Newman, the Court noted that "[a]lthough the subcontractor exception preserves coverage for property damage that would otherwise be excluded as 'your work,' another policy exclusion bars coverage for damage to the defective workmanship itself" by providing that "the insurance does not cover damages 'claimed for any loss, cost or expense ... for the repair, replacement, adjustment, removal or disposal of ... 'Your product'; ... 'Your work'; or ... 'Impaired property'; if such product, work or property is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.'" Id. at 197-98, 684 S.E.2d at 546. The Court stated that "[t]hese terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco—even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy—and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from

faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover." *Id.* at 198, 684 S.E.2d at 546.

Turning to the issue of damages, the Court held that "any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy." *Id.* at 198, 684 S.E.2d at 546-47. However, the Court noted it was impossible from the record for the Court to "determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages." *Id.* at 198, 684 S.E.2d at 547. Accordingly, although the trial court's decision was reversed "to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco," there was "no evidence in the record indicting which damages may be attributable to the removal and replacement of the defective stucco" and the Court affirmed the trial court's decision finding that the CGL policy covered the damage awarded by the arbitrator to the homeowner. *Id.*

In footnote 5 to the Newman decision, the Court stated that when the arbitrator determined damages, Auto-Owner's did not seek review of or otherwise contest the damages award. *Id.* at fn.5.

In Crossmann, expanding on its holding in Newman, the Court held that the discussion in a progressive property damage case should involve the policy term "property damage." The Court noted that the standard CGL policy defines "property damage" in two different ways:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 48, 717 S.E.2d 589, 593 (2011).

"With respect to the first quoted definition of 'property damage,' the critical phrase is 'physical injury,' which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter. *Id.* at 49, 717 S.E.2d at 593. The Court emphasized the "difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" *Id.*

Clarifying Newman, the Court held that "the costs to replace the negligently constructed stucco did not constitute 'property damage' under the terms of the policy" because "[t]he stucco was not 'injured.'" *Id.* at 49, 717 S.E.2d at 594. "However, the damage to the remainder of the project caused by water penetration due to the negligently installed stucco did constitute 'property damage.'" *Id.* "Based on those allegations of property damage and construing the ambiguous

occurrence definition in favor of the insured, the insuring language of the policy in Newman was triggered by the property damage caused by repeated water intrusion.” Id. at 49-50, 717 S.E.2d at 594.

The Court stated, “[i]n sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute ‘property damage,’ but the defective construction would not. We find the expanded definition of ‘occurrence’ is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies. We note, however, that various exclusions may preclude coverage in some instances. Because the parties in the present case stipulated not to raise the issue, we do not address any policy exclusions and exceptions.” Id. at 50, 717 S.E.2d at 594.

D. Defective Workmanship

Negligent or defective construction resulting in damage to otherwise non-defective components may constitute “property damage,” but the defective construction itself would not. Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 94 (2011). See discussion on Newman and L-J, supra.

XVI. Mechanics’ Liens

A. Who has a lien?

South Carolina’s Mechanics’ Lien Law is found at South Carolina Code Ann. § 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 Ann. § 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 Ann. § 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 Ann. §§ 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 Ann. § 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 or clerk of court of the county in which the building or structure is situated 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 Ann. § 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 Ann. § 29-5-100.

When an unreasonable period of time has elapsed since substantial completion of the work, the performance of trivial services or the furnishing of trivial materials generally will not extend the 90-day period for filing the certificate of mechanics' lien past the date of substantial completion. However, if subsequent to the date of substantial completion, trivial services or materials are provided at the request of the owner, rather than at the initiative of the contractor for the purpose of saving a lien, the furnishing of such work or material will extend the commencement of the period for filing a certificate. Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (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. South Carolina Code Ann. Section 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.").

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 Ann. § 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 Section 29-5-60. Lowndes Hill Realty Co. v. Marineville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956) (It is the duty of the owner to prorate all just claims) but see Section 29-5-21(B)(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 Ann. § 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 Ann. §§ 29-5-10, 20.

The procedures for enforcing a mechanic's lien are provided by statute, see S.C. Code Ann. §§ 29-5-10 to -440, and must be strictly followed. A court cannot depart from the plain language of the statute when enforcing a mechanic's lien. Moorhead Const., Inc. v. Enter. Bank of S. Carolina, 410 S.C. 386, 389, 765 S.E.2d 1, 2 (Ct. App. 2014) (holding money judgments were improper remedy in mechanic's lien foreclosure suit).

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 South Carolina Code Ann. § 34-31-20, "[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, South Carolina Code Ann. § 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. Id. 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. Id. 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. Id.

Mechanics' liens do not attach to public lands. 22 S.C. Jur. Mechanics' Liens § 7 (2015).

“Statutory payment bonds” in construction cases are those either (1) provided because required by statute and in accordance with the minimum guidelines set out in the statute governing lawsuits on payment bonds or (2) that contain express or implied reference to the provisions detailed in the statute. Hard Hat Workforce Solutions, LLC v. Mechanical HVAC Services, Inc., 406 S.C. 294, 302-03, 750 S.E.2d 921, 925 (2013). 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. S.C. Code Ann. § 29-5-440. 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. Id. No suit under this section shall be commenced after the expiration of one year after the last date of furnishing or providing labor, services, materials, or rental equipment. Id.

“Common-law payment bonds” in construction cases are either (1) any bond not required by statute (i.e., voluntarily provided, perhaps to meet a contractual provision in the agreement between the parties) or (2) any bond required by statute but that specifically varies the statutory requirements so as to provide broader protection. Hard Hat Workforce Solutions, LLC v. Mechanical HVAC Services, Inc., 406 S.C. 294, 303, 750 S.E.2d 921, 925 (2013). Payment bond that primary subcontractor obtained from surety in connection with a high school construction project was a common-law bond, not a statutory bond under the statute governing lawsuits on payment bonds, and thus tertiary subcontractor that filed a claim to collect on the bond was not required to comply with the statute's notice requirements, given that the bond did not mention the statute or any notice requirements; the bond was required not by statute but by primary subcontractor's contract with the project's general contractor. Id.

XVII. Right to Cure

A. Right to Cure (residential)

In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor. The notice of claim must contain the following:

- (1) a statement that the claimant asserts a construction defect;
- (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and
- (3) a description of any results of the defect, if known.

South Carolina Code Ann. Section 40-59-840(A). The contractor has fifteen days from receipt of the claim to request clarification. Id.

(A) The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty days is deemed a denial of the claim.

(B) The claimant shall serve a response to the contractor's offer, if any, within ten days of receipt of the offer.

(C) If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.

(D) Any offers of settlement, repair, or remedy pursuant to this section, are not admissible in an action. S.C. Code Ann. § 40-59-850.

“If the claimant files an action before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.” S.C. Code Ann. § 40-59-830. If the homeowner fails to comply with the Right to Cure Statute, the court will grant a contractor’s motion to stay litigation while the homeowner complies with the Section 840 notice requirements that gives the contractor an opportunity to address the alleged defects as provided in the statute. Grazia v. S. Carolina State Plastering, LLC, 390 S.C. 562, 573-74, 703 S.E.2d 197, 202-03 (2010).

B. Right to Cure (nonresidential construction)

Nonresidential construction is under the South Carolina Notice and Opportunity to Cure Nonresidential Construction Defects Act at South Carolina Code Ann. § 40-11-500. The statute requires the claimant to serve a written notice of claim on the contractor, subcontractor, supplier, or design professional. The notice of claim must contain the following: (1) a statement that the claimant asserts a construction defect; (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and (3) a description of the results of the defect, if known. S.C. Code Ann. § 40-11-530(A). “The contractor, subcontractor, supplier, or design professional must advise the claimant within fifteen (15) days of receipt of the claim, if the description of the claim or claims is not sufficiently stated and shall request clarification.” S.C. Code Ann. § 40-11-530(B). “If the claimant files a civil action or initiates an arbitration before first complying with the requirements of this article, on motion of a party to the action, the court or arbitrator shall stay the action until the claimant has complied with the requirements of this article.” S.C. Code Ann. § 40-11-520.

The contractor, subcontractor, supplier, or design professional has sixty (60) days from service of the initial notice of claim to inspect, offer to remedy, offer to settle with the claimant, or deny, in whole or in part, the claim regarding the defects. Within sixty (60) days from the service of the initial notice of claim, the contractor, subcontractor, supplier, or design professional shall serve written notice on the claimant of the contractor's, supplier's, or design professional's election pursuant to this section. The claimant shall allow inspection of the construction defect at an agreeable time, during normal business hours, to any party, if requested pursuant to this section. The claimant shall give the contractor, subcontractor, supplier, or design professional reasonable access to the property for inspection and if repairs have been agreed to by the parties, reasonable access to effect repairs. Failure to respond within sixty days is considered a denial of the claim. The claimant shall serve a response to the contractor's, subcontractor's, supplier's, or design professional's offer within ten days of receipt of the offer. If the parties cannot agree to settle the dispute pursuant to this article within ninety days after service of the initial notice of claim on the contractor, subcontractor, supplier, or design professional, the claim is considered denied and the claimant may proceed with a civil action or other remedy provided by contract or by law. An offer of settlement, repair, or remedy pursuant to this section is not admissible as evidence in any proceeding.

S.C. Code Ann. § 40-11-540.

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