CHAPTER 36

South Carolina Frivolous Civil Proceedings Sanctions Act

**SECTION 15‑36‑10.** Frivolous lawsuits; signing pleadings; imposition of sanctions; notice and opportunity to respond; reporting violations.

(A)(1) A pleading filed in a civil or administrative action on behalf of a party who is represented by an attorney must be signed by at least one attorney of record who is an active member of the South Carolina Bar or who is admitted to practice in the courts of this State and must include the address and telephone number of the attorney signing the document.

(2) A document filed in a civil or administrative action by a party who is not represented by an attorney must be signed by the party and must include the address and telephone number of the party.

(3) The signature of an attorney or a pro se litigant constitutes a certificate to the court that:

(a) the person has read the document;

(b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;

(c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and

(d) a reasonable attorney in the same circumstances would believe his claim or defense 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.

(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

(i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his 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;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely 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;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

(B)(1) If a document is not signed or does not otherwise comply with this section, it must be stricken unless it is signed promptly or amended to comply with this section after the omission is called to the attention of the attorney or the party.

(2) If a document is signed in violation of this section, or an attorney or pro se litigant has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.

(C)(1) At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his 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;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

(2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

(D) A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.

(E) In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:

(1) the number of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);

(4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;

(5) previous violations of the provisions of this section;

(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

(F) In determining whether sanctions are appropriate or the severity of a sanction, the court shall consider previous violations of the provisions of this section.

(G) Sanctions may include:

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney’s fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;

(2) an order for the attorney to pay a reasonable fine to the court; or

(3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

(H) If the court imposes a sanction on an attorney in violation of the provisions of this section, the court shall report its findings to the South Carolina Commission of Lawyer Conduct.

(I) This act shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules.

(J) The provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law.

(K) The provisions of this section apply in addition to all other remedies available at law or in equity.

(L) The amount requested for damages in a pleading may not be considered in a determination of a violation of the provisions of this section.

(M) All violations of the provisions of this section must be reported to the South Carolina Supreme Court and a public record must be maintained and reported annually to the Governor, Senate, and House of Representatives.

HISTORY: 1988 Act No. 432, Section 6; 2005 Act No. 27, Section 5, eff July 1, 2005, applicable to causes of action arising on or after that date.

Effect of Amendment

The 2005 amendment rewrote this section.

LIBRARY REFERENCES

Westlaw Key Number Searches: 102k1; 102k194.44.

Costs 1, 194.44.

C.J.S. Costs Sections 2, 128.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Action Section 39, Termination.

S.C. Jur. Appeal and Error Section 119, Costs and Sanctions for Frivolous Motions or Appeals.

S.C. Jur. Appeal and Error Section 123, Issues of Fact in Equity Cases.

S.C. Jur. Attorney and Client Section 46, Zealous Representation.

S.C. Jur. Attorney Fees Section 13, Grounds for Sanctions; Factors Considered.

S.C. Jur. Attorney Fees Section 14, Procedure.

S.C. Jur. Attorney Fees Section 15, Available Sanctions.

S.C. Jur. Costs Section 13, Frivolous or Dilatory Filings.

S.C. Jur. Costs Section 14, South Carolina Frivolous Civil Proceedings Sanctions Act.

S.C. Jur. South Carolina Rules of Civil Procedure Section 11.2, Discussion.

Forms

South Carolina Litigation Forms and Analysis Section 39:8 , Attorney’s Fees.

South Carolina Litigation Forms and Analysis Section 39:10 , Application for and Affidavit of Attorney’s Fees‑Frivolous Suit.

LAW REVIEW AND JOURNAL COMMENTARIES

Wall & Weston, An analysis of current theories of liability. 45 S.C. L. Rev. 857 (Summer 1994).

NOTES OF DECISIONS

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1. In general

Client was subject to sanctions under Frivolous Civil Proceedings Sanctions Action for filing a non‑meritorious and baseless legal malpractice action against the attorneys and law firm that handled her federal anti‑trust claims; client conducted no investigation of facts she would be required to prove to substantiate her claim, failed to develop any evidence that could satisfy her burden of proof at trial, and any reasonable attorney would conclude that her case was completely frivolous, and was brought and continued, for seven years without reasonable basis. Holmes v. Haynsworth, Sinkler & Boyd, P.A. (S.C. 2014) 408 S.C. 620, 760 S.E.2d 399, rehearing denied. Costs 2

Because decision whether to impose sanctions under Frivolous Civil Proceedings Sanctions Action is a decision for judge, not jury, it sounds in equity rather than at law. Holmes v. Haynsworth, Sinkler & Boyd, P.A. (S.C. 2014) 408 S.C. 620, 760 S.E.2d 399, rehearing denied. Costs 2

Private hospital and its parent were justified in seeking sanctions against ophthalmologist under the Frivolous Civil Proceedings Sanctions Act (FCPSA), absent any showing by ophthalmologist of a good faith argument for an extension, modification, or reversal of the existing law, especially in light of a ruling against ophthalmologist in a prior lawsuit based on the same legal arguments raised by ophthalmologist in the present action against hospital in which she sought to challenge the internal decision‑making process of the hospital with respect to staff credentials. Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Costs 2

Newly enacted portion of Frivolous Civil Proceedings Sanctions Act that created substantive rights and imposed new obligations by effectively changing the standard for imposing sanctions to “reasonable attorney” standard applied prospectively, rather than retroactively, absent any clear indication to the contrary by the Legislature. Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC (S.C.App. 2011) 394 S.C. 97, 713 S.E.2d 650. Costs 2

In reviewing an award of attorney’s fees under the Frivolous Civil Proceedings Sanctions Act, appellate court may take its own view of the preponderance of the evidence; however, following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded under the Act. Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm) (S.C.App. 2006) 371 S.C. 91, 637 S.E.2d 316. Appeal And Error 984(1); Appeal And Error 1024.1

The determination of whether attorney’s fees should be awarded under the Frivolous Civil Proceedings Sanctions Act is treated as one in equity. Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm) (S.C.App. 2006) 371 S.C. 91, 637 S.E.2d 316. Costs 2

Imposition of sanctions and award of attorney’s fees and costs were warranted under Frivolous Civil Proceedings Sanctions Act against client who had brought third consecutive malpractice suit against attorney, where primary purpose for which the proceedings were initiated was not that of securing the proper adjudication of the civil proceedings, lawsuit at issue alleged causes of action for the same complaint as previous lawsuits, client filed one of the lawsuits despite the fact that attorney had procured a judgment in client’s favor, and it was inconceivable that client reasonably believed his claims against attorney were valid. Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm) (S.C.App. 2006) 371 S.C. 91, 637 S.E.2d 316. Costs 2

Original provisions of Frivolous Civil Proceedings Sanctions Act governed attorney’s motion for attorney’s fees in client’s legal malpractice action, where attorney filed motion prior to the effective dates of two separate revisions to the Act. Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm) (S.C.App. 2006) 371 S.C. 91, 637 S.E.2d 316. Costs 2

Testator’s child should have realized that her action to set aside will and trusts on the ground of undue influence was frivolous and she should have not continued her action after receiving affidavits from testator’s attorney, his colleagues, and his personal physician, and copies of his estate documents, and thus, sanctions under the Frivolous Civil Proceedings Sanctions Act were warranted, where the affidavits and documents clearly established that final will and trust documents established testator’s desires. Russell v. Wachovia Bank, N.A. (S.C. 2006) 370 S.C. 5, 633 S.E.2d 722. Costs 2

Trial court lacked jurisdiction to consider motion for attorney fees under Frivolous Civil Proceedings Sanctions Act (FCPSA) filed after expiration of 10‑day period to file post‑trial motions after entry of judgment, in dispute over sale of limited liability company (LLC); trial court denied plaintiff’s motion to amend complaint to add attorney who drafted amended LLC agreement as defendant, attorney filed motion for attorney fees approximately one year after motion was denied and six months after settlement and dismissal, FCPSA’s implied limitation period precluded application of three‑year limitations period for action on statute. In re Beard (S.C.App. 2004) 359 S.C. 351, 597 S.E.2d 835, certiorari denied. Costs 2

Criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA). In re Beard (S.C.App. 2004) 359 S.C. 351, 597 S.E.2d 835, certiorari denied. Costs 2

Party who makes a frivolous claim or raises a frivolous defense has committed a more egregious act than one who merely acts without substantial justification, for purposes of awarding costs and/or attorney fees. Father v. South Carolina Dept. of Social Services (S.C. 2003) 353 S.C. 254, 578 S.E.2d 11. Costs 2; Costs 194.44

Deceased landowner’s family, against whom quantum meruit action was brought by forester, was not entitled to award of costs and attorney fees pursuant to Frivolous Civil Proceedings Sanctions Act, where action survived family’s motion for nonsuit based upon insufficiency of evidence and was resolved on merits, forester reasonably believed he had claim, and legitimate question existed as to whether oral agreement and subsequent writing of those terms in letter would be considered express contract. Swanson v. Stratos (S.C.App. 2002) 350 S.C. 116, 564 S.E.2d 117, on remand 2003 WL 25763742. Costs 2

Clients of attorney were not “aggrieved” party that could appeal sanctions imposed by trial court on attorney for filing frivolous claim; assessment of sanctions did not affect any property right of clients and did not impose any burden or obligation on them. Burns v. Gardner (S.C.App. 1997) 328 S.C. 608, 493 S.E.2d 356. Attorney And Client 24

Determination of whether attorney fees should be awarded under Frivolous Proceedings Act is treated as one in equity. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Costs 194.44

A wife’s motion to vacate a divorce decree was frivolous, and the husband was entitled to recover attorney fees under Section 15‑36‑30, where (1) the wife’s claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings, which showed that the court had asked her if she was under the influence of drugs or alcohol, and she replied that she was not, (2) the wife’s claim that the husband used undisclosed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance. Kilcawley v. Kilcawley (S.C.App. 1994) 312 S.C. 425, 440 S.E.2d 892.

Determination that vendor was not entitled to statutory damages from a purchaser under the South Carolina Frivolous Civil Proceedings Sanctions Act was not an abuse of discretion, despite claim that the purchaser had filed suit to force the vendor to pay an environmental report preparer’s bill and obtain the environmental data the purchaser needed to finance its purchase of the property; the vendor put forth no evidence to dispute that the purchaser reasonably believed that its claim was valid or that purchaser’s reliance upon the advice of counsel was not sought in good faith and after full disclosure of all facts and information relevant to the cause of action sued upon. Sapphire Development, LLC v. Span USA Inc. (C.A.4 (S.C.) 2005) 120 Fed.Appx. 466, 2005 WL 226032, Unreported. Costs 2

2. Summary judgment

Plaintiffs, a construction company and its principals, were not subject to sanctions for bringing a frivolous action, even though they dismissed the remainder of their claims after defendant construction company presented its case, and before the completion of a full trial, where plaintiffs had survived previous pre‑trial summary judgment motions. Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC (S.C.App. 2011) 394 S.C. 97, 713 S.E.2d 650. Costs 2

Construction lender that prevailed in action brought against it by landowner for trespass was not entitled to attorney fees and costs under the Frivolous Civil Proceedings Sanctions Act, where circuit court declined to issue a ruling on lender’s motion for summary judgment and parties thereafter agreed to submit case to special referee for full merits hearing; that circuit court did not issue a written order denying its motion for summary judgment was not dispositive, as Act only required that claims survive a motion for summary judgment in order to preclude award of fees. Whitfield Const. Co. v. Bank of Tokyo Trust Co. (S.C.App. 1999) 338 S.C. 207, 525 S.E.2d 888, rehearing denied, certiorari denied. Costs 2

Denial of summary judgment on will contestant’s causes of action for undue influence and lack of testamentary capacity precluded award of attorney fees under Frivolous Proceedings Act; since there was evidence worthy of submission to jury, claims could not be “frivolous,” within meaning of Act. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Costs 194.44

Where party survives summary judgment motion, it is not subject to sanctions under Frivolous Proceedings Act after trial on merits of surviving claims. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Costs 2

3. Actions by state agencies

Statute allowing recovery of attorney fees when a state agency acts without justification in pursuing its claim, but specifically exempting child abuse and neglect actions, exempts Department of Social Services (DSS) from payment of attorney fees when its pursuit of a child abuse and neglect action is merely without substantial justification, however, DSS is not exempt from possibility of sanctions in form of attorney fees and/or court costs when DSS’ actions are frivolous, and thus, attorney fees and court costs may be assessed against DSS in a child abuse and neglect action pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA). Father v. South Carolina Dept. of Social Services (S.C. 2003) 353 S.C. 254, 578 S.E.2d 11. Costs 2; States 215

Setting aside of sanctions of attorney fees imposed pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA) against the Department of Social Services (DSS) was warranted, in proceeding instigated by father to determine whether allegations of abuse against him were unfounded, where DSS’ decision to investigate was not improperly motivated. Father v. South Carolina Dept. of Social Services (S.C. 2003) 353 S.C. 254, 578 S.E.2d 11. Costs 2

4. Attorney fees

The decision of whether to award attorney’s fees pursuant to Rule 11 or the Frivolous Civil Proceedings Sanctions Act (FCPSA) is treated as one in equity. Pee Dee Health Care, P.A. v. Estate of Thompson (S.C.App. 2016) 418 S.C. 557, 795 S.E.2d 40, rehearing denied. Costs 2

A county’s appeal to the circuit court from a magistrate’s finding that defendants had not violated a county zoning ordinance was criminal rather than civil in nature, because defendants originally faced criminal charges before the magistrate; thus an award of attorney’s fees and costs was unavailable pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act. Horry County v. Parbel (S.C.App. 2008) 378 S.C. 253, 662 S.E.2d 466, rehearing denied, certiorari denied. Action 18; Costs 2

Determination of whether attorney’s fees should be awarded under the South Carolina Frivolous Civil Proceedings Sanctions Act is treated as one in equity, and in reviewing the award at issue the Court of Appeals may take its own view of the preponderance of the evidence. Horry County v. Parbel (S.C.App. 2008) 378 S.C. 253, 662 S.E.2d 466, rehearing denied, certiorari denied. Costs 2

Motion for sanctions under Frivolous Civil Proceedings Sanctions Act was filed within ten days of the notice of entry of judgment, and thus, trial court had jurisdiction to award attorney fees. Russell v. Wachovia Bank, N.A. (S.C. 2006) 370 S.C. 5, 633 S.E.2d 722. Costs 2

5. Sanctions, generally

Trial court was warranted in ordering sanctions against ophthalmologist under the Frivolous Civil Proceedings Sanctions Act (FCPSA), and in enjoining ophthalmologist from filing any future claims in the circuit court without first posting bond, when ophthalmologist, herself a licensed attorney, continuously and repeatedly challenged hospital’s credentialing decisions in multiple lawsuits without any legal basis to do so, and in the process, cost the hospital and its parent untold amounts of time and resources in defending those claims. Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Costs 2; Injunction 1170

Ophthalmologist was subject to sanctions pursuant to the Frivolous Civil Proceedings Sanctions Act (FCPSA), regardless of whether or not her case against private hospital and its parent for breach of contract and breach of the covenant of good faith and fair dealing had been tried to verdict, where the trial court found by a preponderance of the evidence that sanctions were warranted under the terms of the FCPSA. Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Costs 2

Following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded under the South Carolina Frivolous Civil Proceedings Sanctions Act. Horry County v. Parbel (S.C.App. 2008) 378 S.C. 253, 662 S.E.2d 466, rehearing denied, certiorari denied. Costs 2

5.25. Jurisdiction

Ophthalmologist’s filing of a notice of appeal did not deprive the trial court of jurisdiction to consider hospital and its parent’s post‑trial motion for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA). Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Costs 2

5.5. Justiciability

Ophthalmologist lacked standing to challenge the constitutionality of the Frivolous Civil Proceedings Sanctions Act (FCPSA) on the basis it deprived her of procedural due process by holding a pro se or non‑attorney party to a standard of expertise which a layperson and affected party does not possess; ophthalmologist was a licensed attorney in good standing with the state bar, and had been represented in the action at bar by a licensed attorney. Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Constitutional Law 885

6. Review

An appellate court reviews findings of fact with respect to decision to grant sanctions under the Frivolous Civil Proceedings Sanctions Action by taking its own view of evidence. Holmes v. Haynsworth, Sinkler & Boyd, P.A. (S.C. 2014) 408 S.C. 620, 760 S.E.2d 399, rehearing denied. Appeal and Error 842(1)

Abuse of discretion standard plays a role in appellate review of a sanctions award; for example, where appellate court agrees with trial court’s findings of fact, it reviews decision to award sanctions, as well as terms of those sanctions, under an abuse of discretion standard. Holmes v. Haynsworth, Sinkler & Boyd, P.A. (S.C. 2014) 408 S.C. 620, 760 S.E.2d 399, rehearing denied. Appeal and Error 984(1)

Because the decision whether to impose sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) is a decision for the judge, not the jury, it sounds in equity rather than at law; therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the FCPSA by taking its own view of the evidence. Holmes v. East Cooper Community Hosp., Inc. (S.C. 2014) 408 S.C. 138, 758 S.E.2d 483, rehearing denied. Appeal and Error 1024.1; Costs 2

**SECTIONS 15‑36‑20 to 15‑36‑50.** Repealed by 2005 Act No. 27, Section 12, eff July 1, 2005.

Editor’s Note

Former Section 15‑36‑20 was entitled “Factors supporting finding of proper purpose for action” and was derived from 1988 Act No. 432, Section 6.

Former Section 15‑36‑30 was entitled “Recovery of attorney’s fees and court costs” and was derived from 1988 Act No. 432, Section 6.

Former Section 15‑36‑40 was entitled “Burden of proof” and was derived from 1988 Act No. 432, Section 6.

Former Section 15‑36‑50 was entitled “Court to determine fees and costs” and was derived from 1988 Act No. 432, Section 6.

**SECTION 15‑36‑100.** Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.

(A) As used in this section, “expert witness” means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual’s study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert’s credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert’s credentials pursuant to subsection (E).

(B) Except as provided in Section 15‑79‑125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty‑five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff’s complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

(1) architects;

(2) attorneys at law;

(3) certified public accountants;

(4) chiropractors;

(5) dentists;

(6) land surveyors;

(7) medical doctors;

(8) marriage and family therapists;

(9) nurses;

(10) occupational therapists;

(11) optometrists;

(12) osteopathic physicians;

(13) pharmacists;

(14) physical therapists;

(15) physicians’ assistants;

(16) professional counselors;

(17) professional engineers;

(18) podiatrists;

(19) psychologists;

(20) radiological technicians;

(21) respiratory therapists; and

(22) veterinarians.

HISTORY: 2005 Act No. 32, Section 4, eff July 1, 2005, for causes of action arising after that date.

Cross References

Filing Notice of Intent to File Suit along with affidavit of expert witness as prerequisite to initiating medical malpractice action, see Section 15‑79‑125.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Accountants Section 27, Pleading.

S.C. Jur. Attorney and Client Section 59, Negligence.

S.C. Jur. Hospitals Section 13, Medical Malpractice by Members of the Medical Staff.

S.C. Jur. Medical and Health Professionals Section 32, Expert Testimony‑When Required.

S.C. Jur. Negligence Section 15, Requirement of Expert Testimony.

S.C. Jur. Negligence Section 59, Medical Malpractice.

Treatises and Practice Aids

69 Causes of Action 2d 387, Cause of Action for Negligence in Provision of Hospice Care.

77 Causes of Action 2d 511, Cause of Action for Medical Malpractice or Negligence Related to Implantation or Insertion of Prosthesis or Prosthetic Device.

Notes of Decisions

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3/4. Construction with other laws

Patient filed medical expert affidavit in support of medical malpractice claims within 45 days of notice of intent to file suit (NOI), and thus, NOI tolled three‑year limitations period governing suit against plastic surgeon, surgeon’s professional association, and hospital. Wilkinson v. East Cooper Community Hosp., Inc. (S.C. 2014) 410 S.C. 163, 763 S.E.2d 426, rehearing denied. Limitation of Actions 105(1)

Patient who filed notice of intent to file suit (NOI) for medical malpractice against plastic surgeon, surgeon’s professional association, and hospital, which tolled running of three‑year limitations period, and who complied with statutorily mandated pre‑litigation mediation, had 60 days to file complaint after mediator determined that mediation had failed. Wilkinson v. East Cooper Community Hosp., Inc. (S.C. 2014) 410 S.C. 163, 763 S.E.2d 426, rehearing denied. Alternative Dispute Resolution 444

Assignment of case number when patient filed pre‑suit notice of intent to file suit (NOI) against plastic surgeon, surgeon’s professional association, and hospital, followed by assignment of different case number when she subsequently filed complaint for medical malpractice after unsuccessful pre‑litigation mediation, did not convert patient’s case into two separate lawsuits requiring two separate medical expert affidavits. Code 1976. Wilkinson v. East Cooper Community Hosp., Inc. (S.C. 2014) 410 S.C. 163, 763 S.E.2d 426, rehearing denied. Health 804

Once patient filed medical expert affidavit within 45 days of filing notice of intent to file suit (NOI) for medical malpractice against plastic surgeon, surgeon’s professional association, and hospital, patient did not have to re‑file medical expert affidavit with complaint. Wilkinson v. East Cooper Community Hosp., Inc. (S.C. 2014) 410 S.C. 163, 763 S.E.2d 426, rehearing denied. Health 804

The reference to “affidavit requirements” in statutory provision governing complaints in actions for damages alleging professional negligence constituted an adoption of all provisions of statutory provision governing a notice of intent to file suit in a medical malpractice action, including the 45‑day safe harbor provision that extended the time for filing a pre‑litigation affidavit. Ranucci v. Crain (S.C. 2014) 409 S.C. 493, 763 S.E.2d 189, rehearing denied. Health 804; Health 807

Medical malpractice is a type of professional negligence and, therefore, falls within the domain of both the statute that deals specifically with prelitigation requirements for medical malpractice actions and the statute that establishes the procedure for commencing suits for professional negligence. Ranucci v. Crain (S.C.App. 2012) 397 S.C. 168, 723 S.E.2d 242, rehearing denied, reversed 409 S.C. 493, 763 S.E.2d 189. Health 803

Statute that deals specifically with notice of intent to file suit as prerequisite to filing medical malpractice action does not conflict with statute that establishes the procedure for commencing suits for professional negligence, despite the apparent confusion generated by their internal cross‑references, as each statute governs a district time period during the litigation process, and those time periods are consecutive. Ranucci v. Crain (S.C.App. 2012) 397 S.C. 168, 723 S.E.2d 242, rehearing denied, reversed 409 S.C. 493, 763 S.E.2d 189. Health 807

Medical malpractice statute, requiring the contemporaneous filing, along with notice of intent to file medical malpractice suit, of expert affidavit subject to the “requirements” of another statute relating to expert affidavits filed as part of complaint in a professional negligence action, invokes only provisions of the latter statute concerning preparation and content of expert affidavit. Ranucci v. Crain (S.C.App. 2012) 397 S.C. 168, 723 S.E.2d 242, rehearing denied, reversed 409 S.C. 493, 763 S.E.2d 189. Health 804

1. Contents of affidavit

Patient’s allegation in medical malpractice action that medical defendants’ negligent exposure of patient to latex, when patient had a known allergy, could result in an allergic reaction, was a matter within the common knowledge or experience, so that no special learning was needed to evaluate medical defendants’ conduct at pre‑litigation stage, and thus patient was entitled to invoke statutory common knowledge exception to expert opinion requirement in her prelitigation filings and did not need to file expert witness affidavit with her notice of intent to file suit. Brouwer v. Sisters of Charity Providence Hospitals (S.C. 2014) 409 S.C. 514, 763 S.E.2d 200, rehearing denied. Health 804; Health 807; Health 821(5)

Statutory requirement that plaintiff in medical malpractice action file expert affidavit specifying at least one negligent act or omission claimed to exist and the factual basis for each claim did not require such expert affidavit to contain an opinion as to proximate cause; “negligent act or omission” at common law had well‑defined meaning as breach of duty separate from causation, and legislature was presumed to have adopted that meaning when enacting statute. Grier v. AMISUB of South Carolina, Inc. (S.C. 2012) 397 S.C. 532, 725 S.E.2d 693. Health 804

2. Dismissal

Under South Carolina law, if a medical malpractice claim fails to satisfy statutory requirements of notice of intent to file suit as prerequisite to filing action and expert witness affidavit accompanying complaint and does not fall into an applicable exception, it must be dismissed for failure to state a claim. Duckett v. SCP 2006‑C23‑202, LLC, 2015, 225 F.Supp.3d 432. Health 805; Health 807

Even if pharmacy’s motion to dismiss negligence and breach of warranty claims consumer brought against it was not moot based on dismissal of pharmacy pursuant to fraudulent joinder doctrine, consumer failed to state claims for breach of implied warranty and negligence against pharmacy under South Carolina law; pharmacies were service providers, not sellers, and consumer failed to adhere to substantive statutory requirements for filing negligence claim against pharmacists, which included notice of intent to file suit as prerequisite to filing action and requirement for expert witness affidavit to accompany complaint. Duckett v. SCP 2006‑C23‑202, LLC, 2015, 225 F.Supp.3d 432. Health 804; Health 807; Sales 532(22)

Real estate purchaser’s claims against real estate closing attorney who was also an agent for a title insurance company for breach of an alleged oral contract, formed at the closing, to issue a title insurance policy that covered certain adverse claims were claims of professional negligence, and thus purchaser’s failure to submit an expert affidavit supporting the claims required dismissal of the claims; member of purchaser testified at deposition that he relied on closing attorney as an attorney and was not aware at closing that attorney was also an insurance agent, and any advice attorney gave at the closing regarding the adverse claims constituted the practice of law. H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co. (S.C.App. 2013) 405 S.C. 469, 748 S.E.2d 72, rehearing denied, certiorari dismissed. Attorney and Client 109; Attorney and Client 129(2)