CHAPTER 77

Suits Involving State, State Agencies and Officials and United States

ARTICLE 1

General Provisions

**SECTION 15‑77‑10.** Persons appointed by United States may prosecute in its behalf.

Every person authorized and appointed by the United States for the purpose, in its name and in its behalf, may commence and prosecute to final decree, judgment and execution any action for the recovery from individuals of debts due and effects belonging to the United States. Every such action shall be conducted in the same manner and subject to the same rules and regulations as when commenced by one citizen of this State against another citizen thereof, and the defendant shall be allowed the same privileges and advantages as he would be entitled to if sued by a citizen of this State.

HISTORY: 1962 Code Section 10‑2601; 1952 Code Section 10‑2601; 1942 Code Section 336; 1932 Code Section 336; Civ. P. ‘22 Section 292; Civ. C. ‘12 Section 3925; Civ. C. ‘02 Section 2822; G. S. 2169; R. S. 2298; 1785 (4) 667.

LIBRARY REFERENCES

Westlaw Key Number Search: 393k135.

United States 135.

C.J.S. United States Sections 253 to 254.

RESEARCH REFERENCES

Forms

Am. Jur. Pl. & Pr. Forms States, Territories, and Dependencies Section 1 , Introductory Comments.

**SECTION 15‑77‑20.** Suits affecting obligations of the State.

No suit shall be filed nor shall any pending suit be prosecuted in any court of this State affecting the issuance or sale of any state security, certificate of indebtedness or bond the intent or effect of which is to prevent, delay or affect the sale or other disposition thereof or which would have this effect unless and until the plaintiff in such action shall make application to the circuit judge presiding in the circuit in which the action is brought or, if there be no judge presiding, then to the resident judge of such circuit or to the Chief Justice of the Supreme Court, if the action be brought in the original jurisdiction thereof, or if he be disabled or disqualified to an associate justice, for leave to bring or prosecute such action and shall convince such judge or justice of the merit in such action or proceeding. Such suit shall not then be filed or prosecuted unless and until the plaintiff shall file in such court a bond in such amount as will adequately protect the State against loss, damage, injury and costs in an amount of not less than twenty‑five thousand dollars, subscribed by a duly licensed surety company or secured by the deposit of a like amount in cash, conditioned to pay all loss, damage, injury and costs, including attorney’s fees, which the State may sustain in any such action. And before any such action shall be commenced at least ten days’ notice thereof, together with a copy of the proposed complaint, shall be given to the Governor and the State Treasurer, so as to afford them an opportunity to appear before the judge or justice in opposition to the filing of the suit and to be heard upon the amount of the bond to be required.

HISTORY: 1962 Code Section 10‑2602; 1952 Code Section 10‑2602; 1942 Code Section 442; 1932 Code Section 442; 1930 (36) 1221.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k194.

States 194.

C.J.S. States Section 310.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Forfeitures Section 12, Venue and Jurisdiction.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina: Sovereign Immunity, 31 S.C. L. Rev. 39.

NOTES OF DECISIONS

In general 1

1. In general

Doctors had standing to bring suit to enjoin county from issuing tax exempt bonds for purchase and renovation of medical care facility by non‑profit corporation functioning as billing and collection agent for clinical services by medical university faculty members, since issuance of hospital bonds clearly impacted the public health and welfare, a profound public interest. Baird v. Charleston County (S.C. 1999) 333 S.C. 519, 511 S.E.2d 69, rehearing denied. Counties 177

Since issuance of hospital revenue bonds by county did not constitute the issuance of state bonds, doctors seeking to enjoin the issuance of the bonds were not required to comply with statute setting forth the requirements for suits affecting obligations of the state. Baird v. Charleston County (S.C. 1999) 333 S.C. 519, 511 S.E.2d 69, rehearing denied. Counties 177

**SECTION 15‑77‑30.** State as defendant in action affecting title to real estate.

In any action or suit at law affecting the title to real estate when it appears that the State has or claims a judgment lien upon such real estate the State may be made a party defendant in such action or suit at law, provided no money demand is made in such suit or action at law against the State.

HISTORY: 1962 Code Section 10‑2603; 1952 Code Section 10‑2603; 1942 Code Section 405; 1932 Code Section 405; 1926 (34) 963.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k203.

States 203.

C.J.S. States Sections 317 to 320.

**SECTION 15‑77‑40.** Action for forfeiture of property to State.

Whenever by the provisions of law any property, real or personal, shall be forfeited to the State or to any officer for its use an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the proper officer in the circuit court.

HISTORY: 1962 Code Section 10‑2604; 1952 Code Section 10‑2604; 1942 Code Section 846; 1932 Code Section 846; Civ. P. ‘22 Section 794; Civ. P. ‘12 Section 481; Civ. P. ‘02 Section 443; 1870 (14) 526 Section 462.

LIBRARY REFERENCES

Westlaw Key Number Searches: 180k9; 180k10; 360k191.

Forfeitures 9, 10.

States 191.

C.J.S. RICO (Racketeer Influenced and Corrupt Organizations) Sections 32, 34.

C.J.S. States Sections 196 to 197, 202, 297 to 307, 314.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Forfeitures Section 12, Venue and Jurisdiction.

NOTES OF DECISIONS

In general 1

1. In general

Defendant’s acquittal on criminal charges involving firearms does not preclude subsequent in rem forfeiture proceeding against same firearms because neither collateral estoppel or double jeopardy bars civil, remedial forfeiture proceeding initiated following acquittal on related criminal charges. U.S. v. One Assortment of 89 Firearms (U.S.S.C. 1984) 104 S.Ct. 1099, 465 U.S. 354, 79 L.Ed.2d 361. Forfeitures 48(17); Judgment 559; Weapons 351

Taxpayer, who disclaimed ownership of boat that was subject to delinquent personal property tax sale in a prior federal quiet title proceeding, was not estopped from asserting that he was owner of boat in state court proceeding to set aside tax sale, where prior action was dismissed without prejudice, and court stated dismissal was not adjudication of title. Hawkins v. Bruno Yacht Sales, Inc. (S.C. 2003) 353 S.C. 31, 577 S.E.2d 202. Estoppel 68(2)

**SECTION 15‑77‑50.** Jurisdiction and venue of actions affecting State agencies and officials.

The circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

HISTORY: 1962 Code Section 10‑2605; 1954 (48) 1541.

CROSS REFERENCES

Venue, generally, see Sections 15‑7‑10 et seq.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k200.

States 200.

C.J.S. States Section 315.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Constitutional Law Section 30, Executive‑ Legislative Conflicts.

S.C. Jur. Venue Section 11, Actions Against Public Officers and Others for Official Acts.

NOTES OF DECISIONS

In general 1

Consolidated Procurement Code 3

Venue 2

1. In general

Scope of immunity, if any, enjoyed by employees of Richland Memorial Hospital in action for wrongful death alleging employees did not follow specified laboratory procedures and failed to exercise proper care in reporting laboratory results, is critical issue which should be decided at trial rather than by demurrer. Hanselmann v. McCardle (S.C. 1978) 270 S.C. 367, 242 S.E.2d 421.

An action against the Tax Commission to recover taxes paid, in which the State is in reality the defendant, is not maintainable under this section [former Code 1962 Section 10‑2605]. Harrison v. South Carolina Tax Commission (S.C. 1973) 261 S.C. 302, 199 S.E.2d 763.

2. Venue

Statute vesting the circuit courts with jurisdiction to hear and determine all questions, actions, and controversies affecting state boards, commissions, and agencies is a venue statute governing instances where the state is subject to suit, rather than a general waiver of sovereign immunity; overruling Kinsey Constr. Co. v. S.C. Dep’t of Mental Health, 272 S.C. 168, 249 S.E.2d 900. Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office (S.C. 2001) 346 S.C. 158, 551 S.E.2d 263, rehearing denied. States 191.6(1); States 200

The effect of this section is to mandate the venue of actions against state agencies. Whetstone v. South Carolina Dept. of Highways and Public Transp. (S.C. 1979) 272 S.C. 324, 252 S.E.2d 35.

Act No. 624 of 1954 [former 1962 Code Section 10‑2605] is essentially a venue statute rather than a waiver of the State’s immunity from suit. Since the Court of Common Pleas has jurisdiction in all civil cases under Article V, Section 15 of the Constitution of 1895, the Act of 1954 could not have been intended to confer jurisdiction on it of this class of actions, rather its intent must have been to fix the venue of such actions “in the circuit where such question, action or controversy shall arise.” Harrison v. South Carolina Tax Commission (S.C. 1973) 261 S.C. 302, 199 S.E.2d 763.

3. Consolidated Procurement Code

Statute vesting the circuit courts with jurisdiction to hear and determine all questions, actions, and controversies affecting state boards, commissions, and agencies does not trump the Consolidated Procurement Code and does not vest the circuit courts with exclusive original jurisdiction over breach of contract actions against the state; the Procurement Code took precedence as the later enacted statute. Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office (S.C. 2001) 346 S.C. 158, 551 S.E.2d 263, rehearing denied. Public Contracts 410; States 108

ARTICLE 5

Attorney’s Fees in State Initiated Actions

**SECTION 15‑77‑300.** . Allowance of fees.

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney’s fees to be taxed as court costs against the appropriate agency if:

(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

(B) Attorney’s fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:

(1) the nature, extent, and difficulty of the case;

(2) the time devoted;

(3) the professional standing of counsel;

(4) the beneficial results obtained; and

(5) the customary legal fees for similar services.

The judge must make specific written findings regarding each factor listed above in making the award of attorney’s fees. However, in no event shall a prevailing party be allowed to shift attorney’s fees pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

HISTORY: 1985 Act No. 44, Section 1; 2010 Act No. 125, Section 1, eff February 24, 2010.

Effect of Amendment

The 2010 amendment rewrote the section.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k215.

States 215.

C.J.S. States Section 328.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 19, Moot Decisions.

S.C. Jur. Attorney Fees Section 77, Trial Judge’s Discretion.

S.C. Jur. Attorney Fees Section 78, Abuse of Discretion: Contracts.

S.C. Jur. Attorney Fees Section 71.1, Common Fund.

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. Costs Section 15, Unjustified Civil Actions Brought by the State.

S.C. Jur. Public Officers and Public Employees Section 57, Home Rule Act.

Forms

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

South Carolina Litigation Forms and Analysis Section 39:11 , Application for and Affidavit of Attorney’s Fees‑Suit Involving State.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law: Remedies. 43 S.C. L. Rev. 157 (Autumn 1991).

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

NOTES OF DECISIONS

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Act without substantial justification 4

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Construction with other laws 1.25

Discretion 1.5

Frivolous claim or defense 3

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1. In general

A key distinction between the award of fees authorized by statute and the award of fees from a common fund is that the equitable principles underlying the common fund doctrine create a mechanism in which attorneys’ fees are not assessed against the losing party by fee‑shifting, but rather are taken directly from the common fund or recovery and borne by the prevailing party through fee‑spreading. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Attorney And Client 155

The “common fund doctrine” allows a court in its equitable jurisdiction to award reasonable attorney fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property; attorney fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Attorney And Client 155

A statutory award of attorneys’ fees is typically authorized under what is known as a “fee‑shifting statute,” which permits a prevailing party to recover attorney fees from the losing party. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Costs 194.22

There are three prerequisites that must be established prior to the recovery of attorney fees and costs by a party contesting state action: (1) the contesting party must be the “prevailing party;” (2) the court must find that the agency acted without substantial justification in pressing its claim against the party; and (3) the court must find that there are no special circumstances that would make an award of attorney’s fees unjust. City of Charleston v. Masi (S.C. 2005) 362 S.C. 505, 609 S.E.2d 301. States 215

A party defending an action brought by a state political subdivision may recover attorney fees and costs if three prerequisites are met: first, the contesting party must be the prevailing party; second, the court must find that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find that there are no special circumstances that would make the award of attorney’s fees unjust. Richland County v. Kaiser (S.C.App. 2002) 351 S.C. 89, 567 S.E.2d 260. Municipal Corporations 1040

Statute authorizing award of attorney fees to prevailing party in civil action does not apply to actions brought under Tort Claims Act; Tort Claims Act is exclusive civil remedy for governmental torts and provides for award of attorney fees only as sanction for filing frivolous pleadings or motions. Knoke v. South Carolina Dept. of Parks, Recreation and Tourism (S.C. 1996) 324 S.C. 136, 478 S.E.2d 256, rehearing denied. Municipal Corporations 1040

The enactment of Section 20‑7‑420 did not intend to repeal that portion of Section 15‑77‑300 precluding the assessment of attorney’s fees against the state in child abuse and neglect actions, despite the provision of Section 20‑7‑736 giving the Family Court exclusive jurisdiction over proceedings brought to protect abused and neglected children, since (1) the legislature has determined that state intervention on behalf of abused and neglected children could be chilled if attorney’s fees were levied against the state, and (2) the Department of Social Services often must act quickly and without thorough investigation to remove children, who may have been abused or neglected, from potentially dangerous situations. Spartanburg County Dept. of Social Services v. Little (S.C. 1992) 309 S.C. 122, 420 S.E.2d 499.

A petition filed pursuant to Sections 15‑77‑300 et seq. requires no summons. The proceeding is not a separate action but is incidental to the original action. McDowell v. South Carolina Dept. of Social Services (S.C.App. 1989) 300 S.C. 24, 386 S.E.2d 280. Costs 198

1.25. Construction with other laws

Fee‑shifting provision of Eminent Domain Procedure Act, and not the general state action statute, governed determination of reasonable litigation expenses prevailing landowner could recover in eminent domain action. South Carolina Dept. of Transp. v. Revels (S.C. 2014) 411 S.C. 1, 766 S.E.2d 700. Eminent Domain 265(3)

1.5. Discretion

The award of reasonable attorney fees under the state action statute is in the Court’s discretion. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

In deciding whether a state agency acted with substantial justification, for purposes of the state action statute, the relevant question is whether the agency’s position in litigating the case had a reasonable basis in law and in fact. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

1.7. Separation of powers

Assessment of attorney fees against the State and the South Carolina Retirement System under the state action statute did not implicate separation of powers concerns, in class action by Teachers and Employee Retention Incentive (TERI) program participants, challenging act amending TERI; underlying holding that the collective action of the State and the Retirement System breached a contract with certain TERI participants did not challenge the wisdom behind the State’s enactment of the amending act or the authority of the Retirement System to enforce the statute. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

2. Prevailing parties

A party need not be successful as to all issues in order to be found to be a prevailing party for purposes of awarding attorney fees under the state action statute. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Plaintiff whose challenge to county’s sales and use tax referendum was rendered moot by Supreme Court’s decision voiding election results was not “prevailing party,” under provision authorizing award of attorney fees to the prevailing party in state initiated actions or cases challenging state action. Douan v. Charleston County Council (S.C. 2007) 373 S.C. 384, 645 S.E.2d 241. Counties 228

The key factor in determining whether a party is a prevailing party, for purposes of statute authorizing award of attorney fees to the prevailing party in state‑initiated action, is the degree of success obtained by the party seeking attorney’s fees. Douan v. Charleston County Council (S.C. 2007) 373 S.C. 384, 645 S.E.2d 241. States 215

A “prevailing party,” for purposes of statute authorizing award of attorney fees to the prevailing party in state‑initiated action, is a party who successfully prosecutes the action by prevailing on the main issue and in whose favor the decision or verdict is rendered and judgment entered. Douan v. Charleston County Council (S.C. 2007) 373 S.C. 384, 645 S.E.2d 241. States 215

Plaintiff’s claim for attorney fees in action challenging referendum on sales and use tax increase was not rendered moot by Supreme Court decision in plaintiff’s favor in related administrative action challenging referendum after its passage. Douan v. Charleston County Council (S.C.App. 2006) 369 S.C. 271, 631 S.E.2d 544, rehearing denied, certiorari granted, certiorari granted, reversed 373 S.C. 384, 645 S.E.2d 241. Action 6

Public service district was not a “prevailing party,” under statute permitting recovery of attorney fees and costs by a party contesting state action, in action to determine entitlement of residents of newly‑formed town to vote in public service district elections and to serve as district commissioner, where circuit court did not specifically find for either party and case was dismissed as moot. City of Charleston v. Masi (S.C. 2005) 362 S.C. 505, 609 S.E.2d 301. States 215

Landlord and tenant were no longer “prevailing parties,” in action by county seeking injunction to enforce zoning ordinance, once trial court’s denial of injunction was reversed on appeal, and thus, landlord and tenant were no longer entitled to award of attorney fees for successfully defending an action brought by a political subdivision. Richland County v. Kaiser (S.C.App. 2002) 351 S.C. 89, 567 S.E.2d 260. Zoning And Planning 1809

Department of Corrections employees seeking retroactive enrollment in the Police Officers Retirement System (PORS) were not entitled to attorney fees under statute permitting recovery of attorney fees by prevailing, non‑state party in civil action brought by state, political subdivision of state, or any party contesting state action. Harvey v. South Carolina Dept. of Corrections (S.C.App. 2000) 338 S.C. 500, 527 S.E.2d 765, rehearing denied. States 215

The Department of Social Services (DSS) was the prevailing party in proceedings in which the parental rights of an indigent mother were terminated, and thus the statute prohibiting fee awards against the state if the state prevails (Section 15‑77‑300) precluded assessment of the mother’s attorney fees against DSS. South Carolina Dept. of Social Services v. Tharp (S.C. 1994) 312 S.C. 243, 439 S.E.2d 854, rehearing denied. Infants 2112

A landowner, as the prevailing party, was properly awarded attorney fees pursuant to Section 15‑77‑300 where the city denied her a building permit without substantial justification—i.e., the denial of the permit was based upon an ordinance that was, subsequent to the denial of the permit, found to be invalid. Simpkins v. City of Gaffney (S.C.App. 1993) 315 S.C. 26, 431 S.E.2d 592.

In an action in which a county board of education sought to restrain a publisher from publishing the county grand jury’s year‑end report and compelling it to divulge its source of information, the publisher did not qualify as a “prevailing party” entitled to recover attorney’s fees under Section 15‑77‑300 because there was never a resolution on the merits, where the publisher’s motion to dismiss for lack of jurisdiction was granted because no summons and complaint had been served as required under Rule 65(b), SCRCP, and therefore no action had been commenced under Rule 3(a), SCRCP. Jasper County Bd. of Educ. v. Jasper County Grand Jury (S.C. 1990) 303 S.C. 49, 398 S.E.2d 498.

A trial court properly proceeded under Section 15‑77‑300 and did not abuse its discretion in awarding attorney’s fees to the plaintiff after appropriate consideration of the following 3 prerequisites to recovery of attorney’s fees and costs by a party contesting state action: (1) the contesting party must be the prevailing party; (2) the court must find that the agency acted without substantial justification in pressing its claim against the party; and (3) the court must find that there are no special circumstances that would make an award of attorney’s fees unjust. A party need not be successful as to all issues in order to be found to be a “prevailing party,” and therefore the plaintiff was the prevailing party in that he was successful on the majority of issues and was unsuccessful on only one minor issue. The defendant acted without substantial justification in pressing its claim where the relevant statute and precedent clearly established that the defendant’s claims were without merit. No special circumstances existed which would make an award of attorney’s fees unjust since the litigation enured to the benefit of the citizens of the county, and it would therefore be unfair for the plaintiff to bear the costs of litigation which benefited all the citizens of the county. Heath v. County of Aiken (S.C. 1990) 302 S.C. 178, 394 S.E.2d 709.

2.5. Percent of recovery

Because the state action statute shifts the source of the prevailing party’s attorney fees to the losing party, an award of fees based on a percentage of the prevailing party’s recovery is improper. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

2.7. Reasonableness

Exceptional circumstances warranted application of a multiplier of 1.25 to lodestar figure, when awarding attorney fees under the state action statute to counsel for participants in Teachers and Employee Retention Incentive (TERI) program, in their breach of contract class action against the State and the South Carolina Retirement System; expedited litigation timeline imposed by the Court, the wholly successful recovery for the entire class of participants, the extraordinary sum of money returned to the participants and ultimately saved by the participants, and the termination of governmental acts constituting a breach of contract justified the use of a multiplier. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

When calculating lodestar figure for reasonable attorney fees expended on claims of participants in Teachers and Employee Retention Incentive (TERI) program, for purposes of calculating award of fees to TERI participants under the state action statute, in class action by working retirees and TERI participants against the State and the South Carolina Retirement System, Court of Appeals would reduce number of total hours expended by three percent to account for any time devoted solely to working retirees’ claims, where counsel represented both classes of plaintiffs and advanced same legal theories. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Using a lodestar figure as a starting point for reasonableness, a court calculating reasonable attorney fees may consider other factors justifying an enhancement of the lodestar figure with a “multiplier” before arriving at a final amount. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Costs 194.18

A “lodestar” figure for attorney fees is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Costs 194.18

Regardless of any theoretical preference for one method of fee calculation over another, the overriding benchmark for awards of attorney fees under both the state action statute and the general premise of the common fund doctrine is that attorney fees must be “reasonable.” Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Attorney And Client 155; States 215

Award of attorney fees in amount of $8.66 million, under the state action statute, to participants in Teachers and Employee Retention Incentive (TERI) program in their breach of contract class action against State and South Carolina Retirement System, was unreasonable; under the state action statute, attorney fees assessed to a state agency could only be paid “upon presentation of an itemized accounting of the attorney’s fees,” and award of $8.66 million resulted in an hourly rate of $6,000 for each attorney and staff member. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

3. Frivolous claim or defense

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

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

4. Act without substantial justification

Trial court did not abuse its discretion by finding that charter school, which breached teacher’s employment contract, lacked substantial justification so as to subject school to attorney fee award under state action statute, providing that, in any civil action brought by party who is contesting state action, the court may allow the prevailing party to recover reasonable attorney fees to be taxed as court costs against the appropriate agency if court finds that the agency acted without substantial justification in pressing its claim against the party. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. Education 615; Public Employment 811

To find that a party acted without substantial justification in pressing its claim, the party must have been justified to a degree that could satisfy a reasonable person for purposes of state action statute providing that, in any civil action brought by the State or any party who is contesting state action the court may allow the prevailing party to recover reasonable attorney fees to be taxed as court costs against the appropriate agency if court finds that the agency acted without substantial justification in pressing its claim against the party; the outcome of the matter eventually litigated is also relevant to the substantial justification consideration under state action statute. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. States 215

South Carolina Retirement System fully complied with temporary restraining order requiring it to stop collecting contributions from certain participants in Teachers and Employee Retention Incentive (TERI) program, such that the Retirement Systems’ continued enforcement of act amending TERI did not supply basis on which to find a lack of substantial justification for actions of State and the South Carolina Retirement System in pressing their claim that the amendments did not breach their contract with certain TERI participants, for purposes of awarding TERI participants attorney fees under the state action statute, in their action against State and Retirement System. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

South Carolina Retirement System’s failure to challenge the enactment and enforcement of act amending the Teachers and Employee Retention Incentive (TERI) program did not supply basis on which to find a lack of substantial justification for actions of State and the South Carolina Retirement System in pressing their claim that the amendments did not breach their contract with certain TERI participants, for purposes of awarding TERI participants attorney fees under the state action statute, in their breach of contract action against State and Retirement System. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Actions of General Assembly in enacting amendment to the Teachers and Employee Retention Incentive (TERI) program did not supply basis on which to find a lack of substantial justification for actions of State and the South Carolina Retirement System in pressing their claim that the amendments did not breach their contract with certain TERI participants, for purposes of awarding TERI participants attorney fees under the state action statute, in their breach of contract action against the State and Retirement System. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

State and South Carolina Retirement System were not substantially justified in pressing their claim that act amending the Teachers and Employee Retention Incentive (TERI) program did not breach their contract with certain TERI participants, in class action by TERI participants challenging the amending act, and thus counsel for TERI participants were entitled attorney fees, under the state action statute; language in TERI statute created an unambiguous contract between State and TERI participants who entered the program prior to enactment of the amendment, and the amendment unilaterally altered the contract. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Although an agency’s loss on the merits does not create a presumption that its position was not substantially justified, the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim, for purposes of the state action statute. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Substantial justification in pressing a claim, for purposes of the state action statute, means justified to a degree that could satisfy a reasonable person. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

Citizen who brought declaratory judgment action against county, alleging that county’s funding scheme for wastewater treatment facility project violated terms of referendum, was entitled to attorney fees under the statute allowing attorney fees in actions involving political subdivision of the state, despite county’s contention that it acted with substantial justification; citizen’s position prevailed in the action, county cited no viable authority supporting its position that it was no longer bound by referendum’s terms, county acted without substantial justification, and no special circumstances rendered attorney fee award unjust. Cornelius v. Oconee County (S.C. 2006) 369 S.C. 531, 633 S.E.2d 492. Counties 228

Taxpayers were not entitled to attorney fees after county prevailed on its claim that the circuit court was not the proper forum for adjudicating tax refund request; the taxpayers could not show action by county without substantial justification. Brackenbrook North Charleston, LP v. County of Charleston (S.C. 2005) 366 S.C. 503, 623 S.E.2d 91. Taxation 2791

For purposes of determining whether prevailing party in a state‑initiated action is entitled to attorney fees, an agency’s loss on the merits does not create a presumption that its position was not substantially justified. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue (S.C.App. 2004) 358 S.C. 647, 595 S.E.2d 890. States 215

Department of Revenue acted with substantial justification in pursuing action against operator of video gaming business for violating statute prohibiting advertisement in any manner for playing of machines, and thus operator was not entitled to attorney fees, even though it was ultimately determined that statute was unconstitutional; by pursuing action, Department was merely enforcing statute as it was obligated to do until constitutionality of statute was judicially determined. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue (S.C.App. 2004) 358 S.C. 647, 595 S.E.2d 890. States 215

In deciding whether a state agency acted with substantial justification in pressing its claim, as would preclude award of attorney fees to prevailing party, the courts look to the agency’s position in litigating the case to determine whether it is one which has a reasonable basis in law and fact. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue (S.C.App. 2004) 358 S.C. 647, 595 S.E.2d 890. States 215

Director of day care facility was entitled, under statute providing for attorney fees in state‑initiated actions, to attorney fees in her action for judicial review of Department of Social Services’ (DSS’s) denial of her application to renew her license to operate day care facility, where Court of Appeals reversed denial of license, and there was no evidence making award of attorney fees unjust. Tennis v. South Carolina Dept. of Social Services (S.C.App. 2003) 355 S.C. 551, 585 S.E.2d 312. Infants 1385; Infants 1402

Remand to the trial court was required for a finding on whether county administrator acted without substantial justification, which was required for county auditor to be entitled to attorney fees as prevailing party in action challenging administrator’s authority under the Home Rule Act to suspend three of her employees for violating personnel policies. Eargle v. Horry County (S.C. 2001) 344 S.C. 449, 545 S.E.2d 276. Counties 228

Tenants, who sued to recover moving costs and rent differential payments under Section 28‑11‑10, were entitled to attorney fees under Section 15‑77‑300, since the language of Section 28‑11‑10 plainly foreclosed the legal position taken by city in the tenant’s lawsuit, and thus the city acted without substantial justification in pressing its claim. Brown v. City of North Charleston (S.C.App. 1994) 314 S.C. 298, 442 S.E.2d 633.

The defendant in an action for declaratory judgment was not entitled to attorney’s fees pursuant to Section 15‑77‑300 where in its complaint the plaintiff Tax Commission asked the court to determine that the taxing statute was constitutional, the defendant taxpayer argued that a subsection of the statute was unconstitutional, but severable from the remainder of the statute, and the court determined that the statute as a whole was unconstitutional; thus, the taxpayer was not the prevailing party under the statute. South Carolina Tax Com’n v. United Oil Marketers, Inc. (S.C. 1991) 306 S.C. 384, 412 S.E.2d 402.

An applicant for food stamp benefits was entitled to attorney fees under Section 15‑77‑300 since the Department of Social Services (DSS), acted without substantial justification in denying benefits, based on the applicant’s holding joint title in her son’s automobile, where it was shown that the applicant furnished no consideration for its purchase, but merely signed all the necessary documents because she had an established credit rating and her son did not. McDowell v. South Carolina Dept. of Social Services (S.C. 1991) 304 S.C. 539, 405 S.E.2d 830.

An applicant who was wrongfully denied food stamp benefits by the Department of Social Services (DSS), and thus was entitled to attorney’s fees, was not entitled to such fees for representation at the hearing before the DSS, but was entitled to fees for representation at the action for judicial review in the circuit court, despite the fact that the circuit court action was not commenced by the service of a summons and complaint as per Rules 2 and 3(a), SCRCP, since it was a civil action within the terms of Section 15‑77‑300; Rule 38, SCSCR, did not limit the applicant to fees of $750. McDowell v. South Carolina Dept. of Social Services (S.C. 1991) 304 S.C. 539, 405 S.E.2d 830.

4.5. Agency action

Either State or South Carolina Retirement System could be held liable for attorney fees under the state action statute, in Teachers and Employee Retention Incentive (TERI) program participants’ class action against State and Retirement System challenging act amending TERI, even though the statute referenced agency action. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

South Carolina Retirement System was not merely a “stakeholder” in Teachers and Employee Retention Incentive (TERI) program participants’ class action against State and Retirement System challenging act amending TERI, as would support defendants’ contention that they could not be liable for attorney fees under the state action statute because it referred to agency action; central focus of litigation was action of both State and Retirement System, Retirement System was a named party, and Supreme Court specified that both entities would be liable on issue of fees. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. States 215

4.75. Schools

Attorney fee provision of state action statute was not enacted especially for public schools, school boards, or school districts, and was not a provision that a charter school could opt out of merely because of its charter school status, as opposed to a traditional public school, and thus, court could find a charter school liable for attorney fees under state action statute. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. Education 387

Charter schools organized under the South Carolina Code may be subject to attorney fees awarded for “state action” under state action statute. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. Education 387

Charter school, which breached teacher’s employment contract, was considered a state entity and, thus, was subject to attorney fee provision in state action statute, providing that, in any civil action brought by party who is contesting state action, the court may allow the prevailing party to recover reasonable attorney fees; charter school was state actor because it was classified as a public school, it was funded by state money, and it was created by virtue of state law in furtherance of the state’s duty to provide public education. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. Education 615; Public Employment 811

Trial court did not abuse its discretion by finding that no special circumstances existed to make an award of attorney fees against charter school, which breached teacher’s employment contract, unjust under state action statute. McNaughton v. Charleston Charter School for Math and Science, Inc. (S.C. 2015) 411 S.C. 249, 768 S.E.2d 389. Education 615; Public Employment 811

5. Political subdivision

The Sumter Airport Commission was not a political subdivision of the state for purposes of Section 15‑77‑300 since the act creating it did not invest it with governmental functions, such as the ability to raise revenue or the power of eminent domain. Willis Const. Co., Inc. v. Sumter Airport Com’n (S.C.App. 1992) 308 S.C. 505, 419 S.E.2d 240. Aviation 223

The Sumter Airport Commission was not a “special purpose district,” and thus was not a political subdivision of the state for purposes of Section 15‑77‑300, despite the fact that other airport districts had been found to be “special purpose districts,” since the other airport districts had been expressly created as political subdivisions with the power to raise revenue, promulgate rules and regulations, exercise eminent domain, and apply for and receive public funds from the state, and no “local governmental function” had been committed to the Sumter Airport Commission. Willis Const. Co., Inc. v. Sumter Airport Com’n (S.C.App. 1992) 308 S.C. 505, 419 S.E.2d 240.

5.1. Immunity

Entity that managed pension trust plans for employees of the State of South Carolina and its political subdivisions was treated as an arm of the state, thus supporting determination that the entity had Eleventh Amendment immunity from suit brought by retired plan members challenging the constitutionality of law requiring them to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit; statutory scheme governing the entity suggested a close relationship between the State and the entity in terms of its administration, its operation and its State‑wide purpose, and the South Carolina Supreme Court had viewed the entity as a State agency for the purposes of the state action statute allowing successful plaintiffs to collect attorney fees when the losing party was a state or a political subdivision of the state. Hutto v. South Carolina Retirement System, 2012, 899 F.Supp.2d 457, reconsideration denied, affirmed on other grounds 773 F.3d 536. Federal Courts 2392

6. Judicial review of award

An appellate court may not disturb an award of attorney fees in a case brought by a party who is contesting state action unless the appellant shows that the trial court abused its discretion in considering the applicable factors. South Carolina Public Interest Foundation v. Greenville County (S.C.App. 2013) 401 S.C. 377, 737 S.E.2d 502, rehearing denied, certiorari denied. Appeal and Error 984(5)

The specific amount of attorney fees awarded pursuant to a statute authorizing reasonable attorney fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Appeal And Error 984(5); Costs 194.18

The decision to award or deny attorney fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute. Layman v. State (S.C. 2008) 376 S.C. 434, 658 S.E.2d 320, rehearing denied. Appeal And Error 984(5)

In an attorney’s fee case under Section 15‑77‑300, an award of attorney’s fees will not be disturbed unless the trial judged abused his or her discretion in consideration of the applicable factors. Heath v. County of Aiken (S.C. 1990) 302 S.C. 178, 394 S.E.2d 709.

**SECTION 15‑77‑310.** Petition.

The party shall petition for the attorney’s fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request.

HISTORY: 1985 Act No. 44, Section 1.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k215.

States 215.

C.J.S. States Section 328.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Costs Section 15, Unjustified Civil Actions Brought by the State.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

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1. In general

An improper caption on a petition for attorney fees, which incorrectly listed the case as being before the court of appeals rather than the court of common pleas, did not doom the petition, absent a showing of prejudice, since it was filed with both the court of appeals and with the court of common pleas within 30 days following final disposition of the case. McDowell v. South Carolina Dept. of Social Services (S.C.App. 1989) 300 S.C. 24, 386 S.E.2d 280. Costs 198

The “final disposition” of a case occurred on the date when the clerk of the court of common pleas filed the remittitur, rather than on the date when the court of appeals filed its opinion. McDowell v. South Carolina Dept. of Social Services (S.C.App. 1989) 300 S.C. 24, 386 S.E.2d 280. Costs 199

7. Final disposition

Circuit court’s filing of the remittitur after Supreme Court decision was “final disposition of the case” within the meaning of fee‑shifting statute requiring request for attorney fees to be made within thirty days following final disposition of the case. Brackenbrook North Charleston, LP v. County of Charleston (S.C. 2005) 366 S.C. 503, 623 S.E.2d 91. Costs 199

**SECTION 15‑77‑320.** No right of action created.

Nothing in this article grants permission to bring an action against an agency otherwise immune from suit or gives a right to bring an action to a party who otherwise lacks standing to bring the action.

HISTORY: 1985 Act No. 44, Section 1.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k191.

States 191.

C.J.S. States Sections 196 to 197, 202, 297 to 307, 314.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

**SECTION 15‑77‑330.** Payment of fees.

Any attorney’s fees assessed against an agency under this article shall be paid from the agency’s funds to the extent the funds are available and from the state’s or political subdivision’s general fund if the agency has no available funds; provided, that such money shall only be paid upon presentation of an itemized accounting of the attorney’s fees. The State Fiscal Accountability Authority shall determine whether or not the agency has available funds for this purpose.

HISTORY: 1985 Act No. 44, Section 1.

Code Commissioner’s Note

At the direction of the Code Commissioner, references in this section to the offices of the former State Budget and Control Board, Office of the Governor, or other agencies, were changed to reflect the transfer of them to the Department of Administration or other entities, pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(D)(1), effective July 1, 2015.

LIBRARY REFERENCES

Westlaw Key Number Search: 360k215.

States 215.

C.J.S. States Section 328.

**SECTION 15‑77‑340.** Costs of blood tests.

In any civil action in which the paternal or maternal relationship of one person to another is sought to be proved by use of blood tests, the costs of such tests shall be paid by that party upon whom the blood test is to be performed, except that the plaintiff shall pay the cost of any test administered to a child if a minor. Upon entry of judgment, the court shall award to the prevailing party any cost incurred by him or it under this section for the administration of such blood tests.

HISTORY: 1985 Act No. 44, Section 1.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.