CHAPTER 79

Medical Malpractice Actions

**SECTION 15‑79‑110.** Definitions.

As used in this chapter:

(1) “Ambulatory surgical facility” means a licensed, distinct, freestanding, self‑contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers, for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.

(2) “Health care institution” means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.

(3) “Health care provider” means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.

(4) “Hospital” means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty‑four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.

(5) “Institutional general infirmary” means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents, or inmates with illness, injury, or infirmity for a period exceeding twenty‑four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical, and professional nursing care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.

(6) “Medical malpractice” means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.

(7) “Nursing home” means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty‑four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.

(8) “Renal dialysis facility” means an outpatient facility which offers staff assisted dialysis or training and supported services for self‑dialysis to end‑stage renal disease patients.

(9) “Skilled nursing services” means services that:

(a) are ordered by a physician;

(b) require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and

(c) are furnished directly by, or under the supervision of such personnel.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.

RESEARCH REFERENCES

Encyclopedias

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

Treatises and Practice Aids

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

Medical malpractice 1

1. Medical malpractice

Patient’s claim against hospital stemming from injuries sustained when patient attempted to use the bathroom while unattended in hospital was a negligence claim, rather than a medical malpractice claim, and therefore patient was not required to comply with statutory requirements for filing a medical malpractice claim; patient’s complaint made clear that she had not begun receiving medical care at the time of her injury, nor did it allege the hospital’s employees negligently administered medical care, rather, the complaint stated that patient’s injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 800

**SECTION 15‑79‑120.** Mediation and arbitration.

At any time before a medical malpractice action is brought to trial, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules in effect at the time for the State or any portion of the State. Parties may also agree to participate in binding arbitration, nonbinding arbitration, early neutral evaluation, or other forms of alternative dispute resolution.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date; 2006 Act No. 354, Section 3, eff June 9, 2006.

Effect of Amendment

The 2006 amendment in the second sentence added “nonbinding arbitration, early neutral evaluation, or other forms of alternative dispute resolution”.

RESEARCH REFERENCES

Forms

South Carolina Litigation Forms and Analysis Section 3:24 , Medical Malpractice.

**SECTION 15‑79‑125.** Notice of Intent to File Suit as prerequisite to filing action; subpoena of medical of records; depositions; mandatory prelitigation mediation; initiating action; ADR participation.

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15‑36‑100, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

(B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.

(C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. The action must be filed:

(1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or

(2) prior to expiration of the statute of limitations, whichever is later.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.

RESEARCH REFERENCES

Encyclopedias

26 Am. Jur. Proof of Facts 3d 185, Discovery Date in Medical Malpractice Litigation.

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

Forms

South Carolina Litigation Forms and Analysis Section 3:24 , 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.

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1. Construction and application

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)

South Carolina statute that required plaintiffs to file notice of intent to file suit prior to initiating civil action asserting medical malpractice claim and also provided for tolling of “all applicable statutes of limitation” applied to patient’s state‑law claims against generic drug manufacturer for, inter alia, products liability, fraud, and breach of warranty that were asserted in action that also alleged medical malpractice claim against patient’s treating physician. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Limitation Of Actions 105(1)

Material issues of fact existed as to when consumer, who allegedly developed tardive dyskinesia due to his use of metoclopramide, knew or should have known, by exercise of reasonable diligence, that he had cause of action against manufacturer of generic metoclopramide, and as to whether tolling provision of South Carolina statute that required plaintiffs to file notice of intent to file suit prior to initiating civil action asserting medical malpractice claim applied in action, precluding summary judgment for manufacturer on consumer’s claims against it for, inter alia, products liability, fraud, and breach of warranty on grounds that they were barred by South Carolina’s three‑year statute of limitations. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Federal Civil Procedure 2510; Federal Civil Procedure 2515

Trial court retains jurisdiction to permit the mediation process for malpractice claims to continue beyond the statutory 120‑day time period, and situations of noncompliance are to be resolved through application of the relevant provisions of the South Carolina Alternative Dispute Resolution Rules (SCADRR). Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

Failure to comply with the 120‑day time period for pre‑suit mediation process for medical malpractice claims may result in dismissal, but as a function of the court’s discretion based on the facts and circumstances, and not as a mandated one‑size‑fits‑all result. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

Although statute requires parties to submit to pre‑suit mediation process within 120 days from the service of the notice of intent to file malpractice suit, circuit court retains discretion to permit the mediation process to continue beyond the 120‑day time period and may consider principles of estoppel and waiver to excuse noncompliance. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

Statutory pre‑suit mediation process for medical malpractice claims is an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

Circuit court retained jurisdiction after the expiration of the statutory 120‑day pre‑suit mediation process for medical malpractice claims, and as such, circuit court erred in granting doctors’ motions to dismiss malpractice claim and in failing to compel mediation; nothing in statute governing pre‑suit mediation process deprived the circuit court of jurisdiction or mandated dismissal if the parties failed to mediate within the 120‑day time period. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 801; Health 806

1.2. 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

2. Expert affidavit

To succeed on medical malpractice claim under South Carolina law, plaintiff must establish by expert testimony both the standard of care and the defendant’s failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant’s conduct. Seastrunk v. U.S., 2014, 25 F.Supp.3d 812. Health 821(2)

In context of medical malpractice claim involving suicide, under South Carolina law, a professional’s duty to prevent suicide requires the exercise of that degree of skill and care necessary to prevent a patient’s suicide that is ordinarily employed by members of the profession under similar conditions and circumstances. Seastrunk v. U.S., 2014, 25 F.Supp.3d 812. Health 703(1)

Under South Carolina law, question whether duty has been breached, for purposes of medical malpractice claim involving suicide, turns on the professional’s departure from the standard of care rather than the event of suicide itself. Seastrunk v. U.S., 2014, 25 F.Supp.3d 812. Health 703(1)

In context of medical malpractice claim under South Carolina law, regardless of the area in which the prospective expert witness practices, he must set forth the applicable standard of care and he must demonstrate to the court that he is familiar with the standard of care. Seastrunk v. U.S., 2014, 25 F.Supp.3d 812. Evidence 538

Summary judgment affidavit of medical expert retained by personal representative of estate of decedent, a United States Marine who committed suicide in a friend’s home by means of self‑inflicted gunshot wound to the head, failed to set forth applicable standard of care that was allegedly breached by health care providers employed by the Department of Veterans Affairs in their treatment of decedent, and thus affidavit was insufficient to oppose motions for summary judgment on medical malpractice claim, under South Carolina law, in representative’s Federal Tort Claims Act (FTCA) action; although expert set forth in his affidavit certain actions not taken by providers, those references were not specific enough for district court to infer prevailing standard of care. Seastrunk v. U.S., 2014, 25 F.Supp.3d 812. Federal Civil Procedure 2515

Expert affidavit of medical doctor who was board certified in anesthesiology and anesthesiology pain management was facially sufficient given it was sworn to and identified a potentially meritorious medical malpractice claim against physician who performed a needle core breast biopsy on patient who then suffered a collapsed lung, and there was no factual basis in the record to challenge the expert’s qualifications or the contents of the affidavit. Ranucci v. Crain (S.C. 2014) 409 S.C. 493, 763 S.E.2d 189, rehearing denied. Health 804

In medical malpractice actions, expert testimony is required to establish both the duty owed to the patient and the breach of that duty, unless the subject matter of the claim falls within a layman’s common knowledge or experience. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 821(2); Health 821(4)

Because medical knowledge is generally outside of a juror’s common knowledge, the requisite expert testimony required in a medical malpractice action assists the jury in making a more accurate determination of fault regarding whether a physician’s negligence in rendering medical care proximately caused the patient’s injury. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 821(3); Health 821(4)

A plaintiff in ordinary negligence case against health care entities, as opposed to medical malpractice case, does not need to produce expert testimony to establish his claim because the jurors can easily understand and evaluate the relevant facts and law merely by exercising their common knowledge. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 821(2)

In general, if the patient receives allegedly negligent professional medical care, then expert testimony as to the standard of that type of care is necessary, and the action sounds in medical malpractice. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 800; Health 821(2)

If a patient receives nonmedical, administrative, ministerial, or routine care, expert testimony establishing the standard of care is not required, and the action sounds in ordinary negligence rather than medical malpractice. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 800; Health 821(2)

While providing medical services to a patient, a medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony; however, at all times, the medical professional must exercise ordinary and reasonable care to insure that no unnecessary harm befalls the patient. Dawkins v. Union Hosp. Dist. (S.C. 2014) 408 S.C. 171, 758 S.E.2d 501, rehearing denied. Health 618; Health 821(2)

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

2.5. Jurisdiction

Statutory 120 day time period for pre‑suit mediation process for medical malpractice claims is not intended to place limitations on the circuit court’s subject matter jurisdiction, and thus, failing to comply with the 120‑day statutory time period is a non‑jurisdictional procedural defect. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

Failure to complete the pre‑suit mediation process for medical malpractice claims in a timely manner does not divest the trial court of subject matter jurisdiction, and dismissal is not mandated. Ross v. Waccamaw Community Hosp. (S.C. 2013) 404 S.C. 56, 744 S.E.2d 547. Health 806

3. Sufficiency of notice

Notice of intent to file medical malpractice suit was sufficient, under South Carolina law, to toll limitations period against drug manufacturer, even though complaint was filed under different case number than notice of intent, and regardless of whether manufacturer participated in mediation before suit was filed; complaint was consistent with facts in notice of intent, and there was no showing that manufacturer had been prevented from participating in mediation. Fisher v. Pelstring, 2011, 817 F.Supp.2d 791, on reconsideration in part. Limitation of Actions 105(1)

3.5. Sanctions

Patient’s failure to comply with the mandatory mediation requirements for a medical malpractice action did not warrant the sanction of dismissal with prejudice, absent any showing that such failure was the product of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants. Rickerson v. Karl (S.C.App. 2015) 412 S.C. 215, 770 S.E.2d 767. Health 806

The purpose of the mandatory mediation requirement in a medical malpractice action is to foster the settlement of potentially meritorious claims and to discourage the filing of frivolous claims; therefore, a technical noncompliance with the statute, without bad faith, should not result in the dismissal of the case. Rickerson v. Karl (S.C.App. 2015) 412 S.C. 215, 770 S.E.2d 767. Health 806

4. Waiver

Nursing home did not waive its right to enforce arbitration agreement providing for mandatory arbitration of “any and all controversies, claims, disputes, disagreements[,] or demands of any kind arising out of or relating to” residency agreement, in action by personal representative of resident’s estate against nursing home for medical malpractice, survival, and wrongful death; although nursing home attempted to mediate representative’s claims for approximately four months after representative filed notice of intent to file a medical malpractice suit, and nursing home requested limited discovery in order to engage meaningfully in statutorily required mediation process, nursing home moved to compel arbitration at its first opportunity after representative filed her formal complaint, and even if nursing home should have filed motion to compel arbitration immediately after representative filed notice of intent, representative showed no prejudice or undue burden to her from four‑month delay. Dean v. Heritage Healthcare of Ridgeway, LLC (S.C. 2014) 408 S.C. 371, 759 S.E.2d 727. Alternative Dispute Resolution 182(2)

5. Mediation

Patient who suffered a collapsed lung after physician performed a needle core breast biopsy was not required to engage in mandatory pre‑suit mediation with the requisite 120‑day time period, where the trial court dismissed her notice of intent to file suit against physician before the 120‑day time period had elapsed. Ranucci v. Crain (S.C. 2014) 409 S.C. 493, 763 S.E.2d 189, rehearing denied. Health 806

6. Review

Patient was deemed to have abandoned for appellate review argument that insufficiency of notice of intent to file suit for failing to include expert witness affidavit became moot when patient and medical defendants entered into mediation, in patient’s medical malpractice action; patient’s argument on appeal was conclusory, was not supported by any authority, and trial court had not ruled on the issue. Brouwer v. Sisters of Charity Providence Hospitals (S.C. 2014) 409 S.C. 514, 763 S.E.2d 200, rehearing denied. Appeal and Error 1079

**SECTION 15‑79‑130.** Report to licensing entity of expert testimony or evidence offered in bad faith or without reasonable basis.

If a judge finds that an expert health care provider or health care institution in a medical malpractice action in this State has offered testimony or evidence in bad faith or without a reasonable basis in fact or otherwise acted unethically in conjunction with testifying as an expert in deposition or at trial, the judge must report the expert to the state entity that licenses and regulates the profession of the expert or the type of health care entity represented by the expert.

HISTORY: 2005 Act No. 32, Section 5, eff July 1, 2005, for causes of action arising after that date.