~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

May 19, 2010

**H. 3489**

Introduced by Reps. Harrell, Cato, Sandifer, Cooper, Duncan, Owens, White, Bingham, A.D. Young, Huggins, E.H. Pitts, Edge, Toole, Kirsh, J.R. Smith, G.R. Smith, Brady, Crawford, Barfield, Bedingfield, Erickson, Loftis, Pinson, Rice, Hiott, Littlejohn, Allison, Chalk, Daning, Bowen, Gambrell, Hamilton, Wylie, Sottile, Nanney, Parker, Forrester, Haley, Millwood, Battle, Frye, Simrill, Spires, Thompson, Whitmire, Horne, Clemmons, Skelton and Scott

S. Printed 5/19/10--S. [SEC 5/20/10 2:52 PM]

Read the first time March 10, 2010.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 3489) to amend the Code of Laws of South Carolina, 1976, by enacting the “South Carolina Fairness in Civil Justice Act of 2009” by amending Article 1, Chapter 32, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by striking all after the enacting language and inserting:

/ SECTION 1. This act may be cited as the “South Carolina Fairness in Civil Justice Act of 2010”.

SECTION 2. Chapter 32, Title 15 of the 1976 Code is amended by adding:

“Article 5

Punitive Damages

Section 15‑32‑510. (A) A claim for punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff shall not specifically plead an amount of punitive damages, only that punitive damages are sought in the action.

Section 15‑32‑520. (A) All actions tried before a jury involving punitive damages, if requested by any defendant against which punitive damages are sought, must be conducted in a bifurcated manner before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage.

(C) Punitive damages may be considered if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(D) Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant’s willful, wanton, or reckless conduct.

(E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages. In determining the amount of punitive damages, the jury may consider all relevant evidence, including, but not limited to:

(1) the defendant’s degree of culpability;

(2) the severity of the harm caused by the defendant;

(3) the extent to which the plaintiff’s own conduct contributed to the harm;

(4) the duration of the conduct, the defendant’s awareness, and any concealment by the defendant;

(5) the existence of similar past conduct;

(6) the profitability of the conduct to the defendant;

(7) the defendant’s ability to pay;

(8) the likelihood the award will deter the defendant or others from like conduct;

(9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;

(10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

(11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

(F) If punitive damages are awarded, the trial court shall review the jury’s decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.

(G) In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 15‑32‑530. (A) An award of punitive damages may not exceed three times the amount of the plaintiff’s compensatory damages award or three hundred fifty thousand dollars, whichever is greater.

(B) The limitations provided in subsection (A) do not apply in the following situations, when the:

(1) fact finder determines that at the time of the plaintiff’s injury the defendant’s act or course of conduct complained of by the plaintiff either:

(a) evinced a reckless disregard for the health or safety of others; or

(b) constituted a violation of any statute in which the defendant was convicted of pursuant to Section 17‑23‑80;

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

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

(C) The limitations provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A), and the exemptions in subsection (B) do not apply, the court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed in subsection (A).

(D) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December 31 of the previous year, and the maximum amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised maximum amount recoverable for punitive damages to the State Register for publication, pursuant to Section 1‑23‑40(2), and the revised maximum amount recoverable for punitive damages becomes effective upon publication in the State Register. For purposes of this subsection, ‘Consumer Price Index’ means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics.

Section 15‑32‑540. (A) Seventy‑five percent of any amount awarded as punitive damages pursuant to Section 15‑32‑530, minus attorney’s fees pursuant to subsection (B), shall be given to the clerk of court in the county in which the judgment is rendered for remittance to the State Treasurer by the county treasurer. The State Treasurer must place this amount into the General Fund. The State will have all rights due a judgment creditor until the judgment is satisfied and shall stand on equal footing with the plaintiff in securing recovery after the plaintiff receives payment for damages awarded other than punitive damages. This subsection shall not be construed as making the State a party at interest. The sole right of the State is to the proceeds as provided in this subsection.

(B) In the event the plaintiff receives an award for punitive damages, the plaintiff’s attorney fees shall be calculated based upon the entire award in the manner contractually agreed upon by the plaintiff and his attorney.”

SECTION 3. Article 5, Chapter 7, Title 1 of the 1976 Code is amended by adding:

“Section 1‑7‑750. (A) This section may be cited as the ‘Private Attorney Retention Sunshine Act’.

(B) Except as provided in Section 1‑7‑760, when the Attorney General or a circuit solicitor retains, engages, associates, hires, or otherwise obtains a private attorney, attorneys, or law firm as outside counsel to represent the State or any political subdivision, the outside counsel is required to enter into a contract that is governed by the following terms, provisions, or conditions:

(1) the Attorney General or circuit solicitor, in his sole discretion has the right to appoint a designated assistant, who must be an assistant attorney general or assistant solicitor, to oversee the litigation or other matter for which outside counsel has been retained, which appointment the Attorney General or circuit solicitor may modify at will;

(2) the Attorney General or circuit solicitor may provide attorneys and other staff members to assist outside counsel with the litigation. The identity and responsibilities of personnel assigned to assist must be determined solely by the Attorney General or circuit solicitor. All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the Attorney General or circuit solicitor or his designated assistant;

(3) outside counsel shall coordinate the provision of legal services with the Attorney General or circuit solicitor or his designated assistant, other personnel of the Office of the Attorney General or circuit solicitor, and other persons the Attorney General or circuit solicitor may appoint as outside counsel. All pleadings, motions, briefs, and other material which may be filed with the court must first be approved by the Attorney General or circuit solicitor and provided to his office in draft form in a reasonable and timely manner for review;

(4) outside counsel will render services as an independent contractor. Neither outside counsel nor an employee of outside counsel is regarded as employed by, or as an employee of, the Attorney General, a circuit solicitor, or the State. An attorney‑client relationship exists between the Attorney General or circuit solicitor and outside counsel;

(5) detailed time and cost records reflecting all work must be maintained by outside counsel and presented monthly to the Attorney General or circuit solicitor;

(6) the Attorney General or circuit solicitor or his designated assistant shall approve in advance all aspects of the litigation or other matter for which outside counsel is retained and must be included in settlement discussions. Outside counsel agrees that all settlements must receive the Attorney General’s or circuit solicitor’s express prior approval in writing;

(7) any material, data, files, discs, or documents created, produced, or gathered by outside counsel, or in outside counsel’s possession in furtherance of the litigation or other matter for which outside counsel has been retained, or which fulfills an obligation of the appointment, is considered the exclusive property of the State. Outside counsel agrees to adhere to the South Carolina Freedom of Information Act, pursuant to Chapter 4, Title 30, and maintain all public records concerning the matter in accordance with state law provided; however, that outside counsel shall consult with, and obtain the approval of, the Attorney General or circuit solicitor before responding to a public records request. The contract of retention that satisfies this section is considered a public document. At the conclusion of the litigation or other matter for which outside counsel has been retained, all time records and monthly statements maintained or presented by outside counsel are public documents, subject to all exemptions from disclosure provided in the South Carolina Freedom of Information Act as provided in Chapter 4, Title 30, and subject to exemption from disclosure or redaction as necessary to preserve the attorney‑client privilege, attorney work product protection, and all other applicable privileges and protections;

(8) in contingent fee cases, outside counsel may not receive compensation for services rendered unless the State receives a settlement or damage award in connection with the litigation. If the State receives an award, outside counsel will be compensated as follows:

(a) outside counsel may not be paid, not including punitive or exemplary damages, more than the following percentages corresponding to the gross amount of the judgment or settlement:

(i) twenty‑five percent of the judgment or settlement up to and including the first $5,000,000;

(ii) twenty‑two percent of that portion of the judgment or settlement in excess of $5,000,000 up to $10,000,000;

(iii) eighteen percent of that portion of the judgment or settlement in excess of $10,000,000 up to $25,000,000;

(iv) fifteen percent of that portion of the judgment or settlement in excess of $25,000,000 up to $50,000,000;

(v) twelve percent of that portion of the judgment or settlement in excess of $50,000,000 but less than $100,000,000; and

(vi) ten percent of that portion of the judgment or settlement in excess of $100,000,000.

The structured contingent fee schedule set forth herein shall operate cumulatively so that, in relation to each successive category or level of recovery, outside counsel shall be paid an aggregate sum or value equivalent computed by multiplying the percentage applicable to each successive category or level of recovery by the incremental dollar amount falling within each such category, and the separate products so derived shall be added together to compute the aggregate fee to be paid to outside counsel.

(b) following reimbursement of outside counsel’s reasonable and approved expenses and costs, the remaining net settlement or judgment, but not including punitive or exemplary damages, must be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General or circuit solicitor in his sole discretion; and

(c) outside counsel may not be paid more than the following percentages corresponding to the gross amount of punitive or exemplary damages:

(i) twenty percent of the damages up to and including the first $10,000,000;

(ii) fifteen percent of that portion of the damages in excess of $10,000,000 up to $100,000,000; and

(iii) ten percent of that portion of the damages in excess of $100,000,000.

The structured contingent fee schedule set forth herein shall operate cumulatively so that, in relation to each successive category or level of recovery, outside counsel shall be paid an aggregate sum or value equivalent computed by multiplying the percentage applicable to each successive category or level of recovery by the incremental dollar amount falling within each such category, and the separate products so derived shall be added together to compute the aggregate fee to be paid to outside counsel.

(d) following reimbursement of outside counsel’s reasonable and approved expenses and costs, the remaining amount of punitive and exemplary damages must be paid or applied to or for the State, or the people of South Carolina, or the victims in a manner to be determined by the Attorney General or circuit solicitor in his sole discretion;

(e) all settlement or judgment proceeds shall be paid by or on behalf of any defendant to the Attorney General or circuit solicitor’s office for distribution; and

(f) the fee schedule required by this section applies to all settlements or judgments, whether the settlement or judgment is entirely monetary in nature or is combined with nonmonetary relief. In the event the litigation is resolved by settlement or judgment involving a combination of monetary and nonmonetary relief, such as injunctive relief, nonmonetary payment, the provision of goods or services or other in kind terms, or a combination of these, the Attorney General or circuit solicitor and outside counsel shall jointly determine the monetary value to the State;

(9) outside counsel must be reimbursed for reasonable and approved expenses and costs after payment of fees calculated on the gross amount of the judgment or settlement. Proper documentation by receipts or otherwise must be submitted with all invoices, and all documentation must be retained by outside counsel for at least one year following the agreement’s termination. All expenses must be itemized, and no reimbursement may be applied for or requested for miscellaneous listings. The Attorney General or circuit solicitor, in his sole discretion, may decline to reimburse outside counsel for improperly documented, unnecessary, or unreasonable costs or expenses. In addition:

(a) outside counsel must be reimbursed for the retention of experts, including fees and other reasonable costs, only when expressly authorized by the Attorney General or circuit solicitor; and

(b) for reimbursements of expenses for lodging, travel, or mileage, receipts are required, and these expenses must be reasonable; and

(10) outside counsel may not speak to any representative of a television station, radio station, newspaper, magazine, or other media outlet concerning the work outlined or contemplated in the contract of retention without first obtaining approval of the Attorney General or circuit solicitor. Outside counsel is specifically prohibited from speaking on behalf of the Attorney General or circuit solicitor or the State of South Carolina to any representative of the news media.

Section 1‑7‑760. The provisions of Section 1‑7‑750 may be suspended only under certain conditions when the Attorney General or the circuit solicitor, in his discretion, decides that exceptional circumstances exist which warrant departure from the requirements of Section 1‑7‑750 and in his judgment that departure is absolutely necessary and in the best interests of the State. If the Attorney General or the circuit solicitor decides to invoke the provisions of this section, he must specifically state in writing those provisions of Section 1‑7‑750 that he intends to depart from and must delineate the exceptional circumstances that he finds exists as they relate to each provision. This information is considered public information and is subject to disclosure, pursuant to the South Carolina Freedom of Information Act as provided in Chapter 4 of Title 30 of the South Carolina Code of Laws, subject to all exemptions from disclosure provided in the South Carolina Freedom of Information Act and subject to exemption from disclosure or redaction as necessary to preserve the attorney‑client privilege, attorney work product protection, and all other applicable privileges and protections.”

SECTION 4. Section 15‑3‑670 of the 1976 Code is amended to read:

“Section 15‑3‑670. (A) The limitation provided by Sections 15‑3‑640 through 15‑3‑660 may not be asserted as a defense by ~~any~~ a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event ~~such~~ the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15‑3‑640 through 15‑3‑660 are not available as a defense to ~~any~~ a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to ~~any~~ a person who conceals any such cause of action.

(B) For the purposes of subsection (A), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.

(C) The limitation provided by Section 15‑3‑640 may not be asserted as a defense to ~~any~~ an action for personal injury, including a personal injury resulting in death, or property damage which is:

~~(i)~~(1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and

~~(ii)~~(2) the result of ingestion of or exposure to some toxic or harmful or injury‑producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.”

SECTION 5. Section 18‑9‑130(A)(1) of the 1976 Code, as last amended by Act 216 of 2004, is further amended to read:

“(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

(a) twenty‑five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or

(b) one million dollars, whichever is less, for all other entities or individuals.”

SECTION 6. Article 1, Chapter 77, Title 38 of the 1976 Code is amended by adding:

Section 38‑77‑250. (A) Every insurer providing automobile insurance coverage in this State and which is or may be liable to pay all or a part of any claim shall provide, within thirty days of receiving a written request from the claimant’s attorney, a statement, under oath, of a corporate officer or the insurer’s claims manager stating with regard to each known policy of nonfleet private passenger insurance issued by it, the name of the insurer, the name of each insured, and the limits of coverage. The insurer may provide a copy of the declaration page of each such policy in lieu of providing such information. The request shall set forth under oath the specific nature of the claim asserted and shall be mailed to the insurer by certified mail or statutory overnight delivery. The request must also state that the attorney is authorized to make such a request and must be accompanied by a copy of the incident report from which the claim is derived.

(B) If the request provided in subsection (A) contains information insufficient to allow compliance, the insurer upon whom the request was made may so state in writing, stating specifically what additional information is needed, and such compliance shall constitute compliance with this section.

(C) The information provided to a claimant or his attorney as required by subsection (A) of this section shall not create a waiver of any defenses to coverage available to the insurer and shall not be admissible in evidence.

(D) The information provided to a claimant or his attorney as required by subsection (A) shall be amended upon the discovery of facts inconsistent with or in addition to the information provided.

(E) The provisions of this section do not require disclosure of limits for fleet policy limits, umbrella coverages, or excess coverages.

(F) The information received pursuant to this section is confidential and must not be disclosed to any outside party. Upon final disposition of the case, the claimant’s attorney must destroy all information received pursuant to this section. The court must impose sanctions for a violation of this subsection.

SECTION 7. Section 56‑5‑6540 of the 1976 Code, as last amended by Act 147 of 2005, is further amended to read:

“Section 56‑5‑6540. (A) A person who is adjudicated to be in violation of the provisions of this article must be fined not more than twenty‑five dollars, no part of which may be suspended. ~~No~~ Court costs, assessments, or surcharges may not be assessed against a person who violates a provision of this article. A person ~~must~~ may not be fined more than fifty dollars for any one incident of one or more violations of the provisions of this article. A custodial arrest for a violation of this article ~~must~~ may not be made, except upon a warrant issued for failure to appear in court when summoned or for failure to pay an imposed fine. A violation of this article does not constitute a criminal offense. Notwithstanding the provisions of Section 56‑1‑640, a violation of this article ~~must~~ may not be:

(1) included in the offender’s motor vehicle records maintained by the Department of Motor Vehicles or in the criminal records maintained by SLED; or

(2) reported to the offender’s motor vehicle insurer.

(B) A law enforcement officer ~~must~~ may not issue a citation to a driver or a passenger for a violation of this article when the stop is made in conjunction with a driver’s license check, safety check, or registration check conducted at a checkpoint established to stop all drivers on a certain road for a period of time, except when the driver is cited for violating another motor vehicle law. The driver and any passenger ~~shall~~ must be required to buckle up before departing the checkpoint and should the driver or the passenger refuse, then the person refusing may be charged with a primary violation.

(C) A violation of this article is not negligence per se or contributory negligence or comparative negligence~~, and is not admissible as evidence in a civil action~~. Evidence may be admitted in a civil action to show that an injured person failed to wear a safety belt during an incident giving rise to a civil action, and that the person’s injuries would have been reduced by wearing a safety belt. The evidence, if relevant, may be admitted only if:

(1) the proponent of the evidence presents qualified, reliable, and competent expert testimony that the injured person failed to wear a safety belt and that compensable injuries received would have been reduced had the injured person been wearing a safety belt;

(2) a court of competent jurisdiction admits the evidence pursuant to the South Carolina Rules of Evidence; and

(3) the proponent of the evidence has not been convicted of or pled guilty or nolo contendre to a moving vehicle violation, pursuant to this title, which was a proximate cause of the incident giving rise to the civil action.

The provisions of this subsection shall not supersede the South Carolina Rules of Evidence.

(D) Notwithstanding the admissibility of the evidence, pursuant to subsection (C), the evidence shall not be admissible if the plaintiff’s attorney stipulates the amount in controversy is less than $200,000.

~~(D)~~(E) A vehicle, driver, or occupant in a vehicle ~~must~~ may not be searched, nor may consent to search be requested by a law enforcement officer, solely because of a violation of this article.

~~(E)~~(F) A law enforcement officer ~~must~~ may not stop a driver for a violation of this article except when the officer has probable cause that a violation has occurred based on his clear and unobstructed view of a driver or an occupant of the motor vehicle who is not wearing a safety belt or is not secured in a child restraint system as required by Article 47 ~~of this chapter~~.

~~(F)~~(G) A person charged with a violation of this article may admit or deny the violation, enter a plea of nolo contendere, or be tried before either a judge or a jury. If the trier of fact is convinced beyond a reasonable doubt that the person was not wearing a safety belt at the time of the incident, the penalty is a civil fine pursuant to the provisions of Section 56‑5‑6540. If the trier of fact determines that the State has failed to prove beyond a reasonable doubt that the person was not wearing a safety belt, no penalty ~~shall~~ may be assessed.

~~(G)~~(H) A person found to be in violation of this article may bring an appeal to the court of common pleas pursuant to Section 18‑3‑10 or Section 14‑25‑95.”

**SECTION 8. This Act shall in no way change or modify the limits set forth in Section 15‑78‑120 or Section 33‑56‑180 of the South Carolina Code of Laws.**

SECTION 9. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 10. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 11. The General Assembly finds that all the provisions contained in this act relate to one subject as required by Article III, Section 17 of the South Carolina Constitution, 1895, in that each provision relates directly to, or in conjunction with, other sections to the subject of fairness in civil justice.

The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the act.

SECTION 12. This act takes effect July 1, 2010, and applies to all actions filed on or after this date.

Renumber sections to conform.

Amend title to conform.

LARRY A. MARTIN for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ENACTING THE “SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT OF 2009” BY AMENDING ARTICLE 1, CHAPTER 32, TITLE 15, PREVIOUSLY RESERVED, SO AS TO PROVIDE DEFINITIONS FOR PURPOSES OF THE CHAPTER; TO AMEND SECTION 15‑32‑220, AS AMENDED, RELATING TO LIMITS ON NONECONOMIC DAMAGES, AND ARTICLE 5, CHAPTER 32, TITLE 15, RELATING TO PUNITIVE DAMAGES, BOTH SO AS TO PROVIDE LIMITS ON THE AWARD OF NONECONOMIC AND PUNITIVE DAMAGES IN ALL PERSONAL INJURY ACTIONS AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; BY ADDING SECTION 1‑7‑750 SO AS TO ENACT THE “PRIVATE ATTORNEY RETENTION SUNSHINE ACT” TO GOVERN THE RETENTION OF PRIVATE ATTORNEYS BY THE ATTORNEY GENERAL OR A SOLICITOR AND TO PROVIDE TERMS AND CONDITIONS GOVERNING THE RETAINER AGREEMENT INCLUDING LIMITS ON THE COMPENSATION OF OUTSIDE COUNSEL IN CONTINGENCY FEE CASES; TO AMEND SECTION 15‑3‑670, RELATING TO LIMITATIONS ON ACTIONS BASED ON UNSAFE OR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY, SO AS TO PROVIDE THAT THE VIOLATION OF A BUILDING CODE DOES NOT CONSTITUTE PER SE FRAUD, GROSS NEGLIGENCE, OR RECKLESSNESS; BY ADDING SECTION 15‑3‑160 SO AS TO PROVIDE A REBUTTABLE PRESUMPTION THAT A MANUFACTURER OR SELLER IS NOT LIABLE FOR A PRODUCT IF IT IS MANUFACTURED OR SOLD IN A MANNER APPROVED BY A GOVERNMENT AGENCY; BY ADDING SECTION 15‑5‑10 SO AS TO PROVIDE REQUIREMENTS AND PROCEDURES TO BRING, MAINTAIN, AND CERTIFY CLASS ACTIONS; TO AMEND SECTION 15‑73‑10, RELATING TO LIABILITY OF THE SELLER FOR A DEFECTIVE PRODUCT, SO AS TO PROVIDE THAT THE SELLER IS NOT LIABLE FOR DAMAGE CAUSED ONLY TO THE PRODUCT ITSELF; TO AMEND SECTION 18‑9‑130, AS AMENDED, RELATING TO THE EFFECT OF A NOTICE OF APPEAL ON THE EXECUTION OF JUDGMENT, SO AS TO PROVIDE LIMITS FOR APPEAL BONDS; TO AMEND SECTIONS 33‑6‑220 AND 33‑44‑303, RELATING TO CORPORATIONS AND LIMITED LIABILITY COMPANIES, SO AS TO PROVIDE THAT A JUDGMENT AGAINST A CORPORATION OR LIMITED LIABILITY COMPANY IS A PREREQUISITE TO AN ALTER EGO CLAIM TO PIERCE THE CORPORATE VEIL; TO AMEND SECTION 39‑5‑20, RELATING TO UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES, SO AS TO PROVIDE ACTIONS OR TRANSACTIONS OTHERWISE PERMITTED OR REGULATED BY THE FEDERAL TRADE COMMISSION OR ANOTHER REGULATORY BODY OR OFFICE ACTING UNDER STATUTORY AUTHORITY OF THIS STATE OR THE UNITED STATES ARE NOT COVERED BY THE ACT; TO AMEND SECTION 39‑5‑140, RELATING TO AN ACTION FOR DAMAGES ARISING OUT OF AN UNFAIR OR DECEPTIVE TRADE PRACTICE, SO AS TO PROVIDE THAT A PERSON SEEKING DAMAGES SHALL PAY “OUT‑OF‑POCKET EXPENSES” AND TO DEFINE THIS TERM; TO AMEND SECTION 56‑5‑6540, AS AMENDED, RELATING TO THE PENALTIES FOR THE MANDATORY USE OF SEATBELTS, SO AS TO PROVIDE THAT A VIOLATION MAY BE CONSIDERED IN A CIVIL ACTION AS EVIDENCE OF COMPARATIVE NEGLIGENCE OR AS EVIDENCE OF FAILURE TO MITIGATE DAMAGES; AND TO REPEAL SECTIONS 15‑32‑200, 15‑32‑210, AND 15‑32‑240 ALL RELATING TO NONECONOMIC DAMAGES AND PROCEDURES REGARDING THE LIMITATION AND COLLECTION OF NONECONOMIC DAMAGES.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act may be cited as the “South Carolina Fairness in Civil Justice Act of 2010”.

SECTION 2. Chapter 32, Title 15 of the 1976 Code is amended by adding:

“Article 5

Punitive Damages

Section 15‑32‑510. (A) A claim for punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff shall not specifically plead an amount of punitive damages, only that punitive damages are sought in the action.

Section 15‑32‑520. (A) All actions tried before a jury involving punitive damages, if requested by any defendant against which punitive damages are sought, must be conducted in a bifurcated manner before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage.

(C) Punitive damages may be considered if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(D) Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant’s wilful, wanton, or reckless conduct.

(E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages. In determining the amount of punitive damages, the jury may consider all relevant evidence, including, but not limited to:

(1) the defendant’s degree of culpability;

(2) the severity of the harm caused by the defendant;

(3) the extent to which the plaintiff’s own conduct contributed to the harm;

(4) the duration of the conduct, the defendant’s awareness, and any concealment by the defendant;

(5) the existence of similar past conduct;

(6) the profitability of the conduct to the defendant;

(7) the defendant’s ability to pay;

(8) the likelihood the award will deter the defendant or others from like conduct;

(9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;

(10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and

(11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.

(F) If punitive damages are awarded, the trial court shall review the jury’s decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.

(G) In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 15‑32‑530. (A) An award of punitive damages may not exceed three times the amount of the plaintiff’s compensatory damages award or three hundred fifty thousand dollars, whichever is greater.

(B) The limitations provided in subsection (A) do not apply in the following situations, when the:

(1) fact finder determines that at the time of the plaintiff’s injury the defendant pursued an intentional course of conduct that the defendant knew or should have known would cause injury or damage;

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

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

(C) The limitations provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A) and the exemptions in subsection (B) do not apply, the court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed in subsection (A).”

SECTION 3. Article 5, Chapter 7, Title 1 of the 1976 Code is amended by adding:

“Section 1‑7‑750. (A) This section may be cited as the ‘Private Attorney Retention Sunshine Act’.

(B) Except as provided in Section 1‑7‑760, when the Attorney General or a circuit solicitor retains, engages, associates, hires, or otherwise obtains a private attorney, attorneys, or law firm as outside counsel for any reason, the outside counsel is required to enter into a contract that is governed by the following terms, provisions, or conditions:

(1) the Attorney General or circuit solicitor, in his sole discretion has the right to appoint a designated assistant, who must be an assistant attorney general or assistant solicitor, to oversee the litigation or other matter for which outside counsel has been retained, which appointment the Attorney General or circuit solicitor may modify at will;

(2) the Attorney General or circuit solicitor may provide attorneys and other staff members to assist outside counsel with the litigation. The identity and responsibilities of personnel assigned to assist must be determined solely by the Attorney General or circuit solicitor. All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the Attorney General or circuit solicitor or his designated assistant;

(3) outside counsel shall coordinate the provision of legal services with the Attorney General or circuit solicitor or his designated assistant, other personnel of the Office of the Attorney General or circuit solicitor, and other persons the Attorney General or circuit solicitor may appoint as outside counsel. All pleadings, motions, briefs, and other material which may be filed with the court must first be approved by the Attorney General or circuit solicitor and provided to his office in draft form in a reasonable and timely manner for review;

(4) outside counsel will render services as an independent contractor. Neither outside counsel nor an employee of outside counsel is regarded as employed by, or as an employee of, the Attorney General, a circuit solicitor, or the State. An attorney‑client relationship exists between the Attorney General or circuit solicitor and outside counsel;

(5) detailed time and cost records reflecting all work must be maintained by outside counsel and presented monthly to the Attorney General or circuit solicitor;

(6) the Attorney General or circuit solicitor or his designated assistant shall approve in advance all aspects of the litigation or other matter for which outside counsel is retained and must be included in settlement discussions. Outside counsel agrees that all settlements must receive the Attorney General’s or circuit solicitor’s express prior approval in writing;

(7) any material, data, files, discs, or documents created, produced, or gathered by outside counsel, or in outside counsel’s possession in furtherance of the litigation or other matter for which outside counsel has been retained, or which fulfills an obligation of the appointment, is considered the exclusive property of the State. Outside counsel agrees to adhere to the South Carolina Freedom of Information Act, pursuant to Chapter 4, Title 30, and maintain all public records concerning the matter in accordance with state law provided; however, that outside counsel shall consult with, and obtain the approval of, the Attorney General or circuit solicitor before responding to a public records request. The contract of retention that satisfies this section is considered a public document. At the conclusion of the litigation or other matter for which outside counsel has been retained, all time records and monthly statements maintained or presented by outside counsel are public documents;

(8) in contingent fee cases, outside counsel may not receive compensation for services rendered unless the State receives a settlement or damage award in connection with the litigation. If the State receives an award, outside counsel will be compensated as follows:

(a) outside counsel may not be paid, not including punitive or exemplary damages, more than the following percentages corresponding to the amount of the judgment or settlement:

(i) twenty‑three percent of the judgment or settlement up to and including the first $5,000,000;

(ii) nineteen percent of that portion of the judgment or settlement in excess of $5,000,000 up to $10,000,000;

(iii) fifteen percent of that portion of the judgment or settlement in excess of $10,000,000 up to $25,000,000;

(iv) eleven percent of that portion of the judgment or settlement in excess of $25,000,000 up to $50,000,000;

(v) seven percent of that portion of the judgment or settlement in excess of $50,000,000 but less than $100,000,000; and

(vi) four percent of that portion of the judgment or settlement in excess of $100,000,000.

Provided, that the Attorney General or circuit solicitor shall retain ten percent of outside counsel’s fees awarded pursuant to this subitem;

(b) the remaining net settlement or judgment proceeding, but not including punitive or exemplary damages, must be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General or circuit solicitor in his sole discretion; and

(c) outside counsel may not be paid more than the following percentages corresponding to the amount of punitive or exemplary damages:

(i) ten percent of the damages up to and including the first $10,000,000;

(ii) five percent of that portion of the damages in excess of $10,000,000 up to $100,000,000; and

(iii) three percent of that portion of the damages in excess of $100,000,000.

Provided, that the Attorney General or circuit solicitor shall retain ten percent of outside counsel’s fees awarded pursuant to this subitem;

(d) the remaining amount of punitive and exemplary damages must be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General or circuit solicitor in his sole discretion;

(e) all settlement or judgment proceeds shall be paid by or on behalf of any defendant to the Attorney General or circuit solicitor’s office for distribution; and

(f) the fee schedule required by this section applies to all settlements or judgments, whether the settlement or judgment is entirely monetary in nature or is combined with nonmonetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and nonmonetary relief, such as injunctive relief, nonmonetary payment, the provision of goods or services or other in kind terms, or a combination of these, the Attorney General or circuit solicitor shall determine the monetary value to the State;

(9) outside counsel must be reimbursed solely from the gross recovery of the litigation or other matter for which outside counsel has been retained as approved by the Attorney General or circuit solicitor for reasonable expenses and costs. Proper documentation by receipts or otherwise must be submitted with all invoices and all documentation must be retained by outside counsel for at least one year following the agreement’s termination. All expenses must be itemized and no reimbursement may be applied for or requested for miscellaneous listings. The Attorney General or circuit solicitor in his sole discretion may decline to reimburse outside counsel for improperly documented, unnecessary, or unreasonable costs or expenses. In addition:

(a) outside counsel must be reimbursed for the retention of experts, including fees and other reasonable costs, only when expressly authorized by the Attorney General or circuit solicitor; and

(b) for reimbursements of expenses for lodging, travel, or mileage, receipts are required and these expenses must be expressly authorized in advance by the Attorney General or circuit solicitor; and

(10) outside counsel may not speak to any representative of a television station, radio station, newspaper, magazine, or other media outlet concerning the work outlined or contemplated in the contract of retention without first obtaining approval of the Attorney General or circuit solicitor. Outside counsel is specifically prohibited from speaking on behalf of the Attorney General or circuit solicitor or the State of South Carolina to any representative of the news media.

Section 1‑7‑760. The provisions of Section 1‑7‑750 may be suspended only under certain conditions when the Attorney General or the circuit solicitor, in his discretion, decides that exceptional circumstances exist which warrant departure from the requirements of Section 1‑7‑750 and in his judgment that departure is absolutely necessary and in the best interests of the State. If the Attorney General or the circuit solicitor decides to invoke the provisions of this section, he must specifically state in writing those provisions of Section 1‑7‑750 that he intends to depart from and must delineate the exceptional circumstances that he finds exists as they relate to each provision. This information is considered public information and is subject to disclosure pursuant to the Freedom of Information Act as provided in Chapter 4, Title 30.”

SECTION 4. Section 15‑3‑670 of the 1976 Code is amended to read:

“Section 15‑3‑670. (A) The limitation provided by Sections 15‑3‑640 through 15‑3‑660 may not be asserted as a defense by ~~any~~ a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event ~~such~~ the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15‑3‑640 through 15‑3‑660 are not available as a defense to ~~any~~ a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to ~~any~~ a person who conceals any such cause of action.

(B) For the purposes of subsection (A), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.

(C) The limitation provided by Section 15‑3‑640 may not be asserted as a defense to ~~any~~ an action for personal injury, including a personal injury resulting in death, or property damage which is:

~~(i)~~(1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and

~~(ii)~~(2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma.”

SECTION 5. Section 18‑9‑130(A)(1) of the 1976 Code, as last amended by Act 216 of 2004, is further amended to read:

“(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

(a) twenty‑five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or

(b) one million dollars, whichever is less, for all other entities or individuals.”

SECTION 6. Section 56‑5‑6540 of the 1976 Code, as last amended by Act 147 of 2005, is further amended to read:

“Section 56-5-6540. (A) A person who is adjudicated to be in violation of the provisions of this article must be fined not more than twenty‑five dollars, no part of which may be suspended. ~~No~~ Court costs, assessments, or surcharges may not be assessed against a person who violates a provision of this article. A person ~~must~~ may not be fined more than fifty dollars for any one incident of one or more violations of the provisions of this article. A custodial arrest for a violation of this article ~~must~~ may not be made, except upon a warrant issued for failure to appear in court when summoned or for failure to pay an imposed fine. A violation of this article does not constitute a criminal offense. Notwithstanding the provisions of Section 56‑1‑640, a violation of this article ~~must~~ may not be:

(1) included in the offender’s motor vehicle records maintained by the Department of Motor Vehicles or in the criminal records maintained by SLED; or

(2) reported to the offender’s motor vehicle insurer.

(B) A law enforcement officer ~~must~~ may not issue a citation to a driver or a passenger for a violation of this article when the stop is made in conjunction with a driver’s license check, safety check, or registration check conducted at a checkpoint established to stop all drivers on a certain road for a period of time, except when the driver is cited for violating another motor vehicle law. The driver and any passenger ~~shall~~ must be required to buckle up before departing the checkpoint and should the driver or the passenger refuse, then the person refusing may be charged with a primary violation.

(C) ~~A violation of this article is not negligence per se or contributory negligence, and is not admissible as evidence in a civil action.~~

~~(D)~~ A vehicle, driver, or occupant in a vehicle ~~must~~ may not be searched, nor may consent to search be requested by a law enforcement officer, solely because of a violation of this article.

~~(E)~~(D) A law enforcement officer ~~must~~ may not stop a driver for a violation of this article except when the officer has probable cause that a violation has occurred based on his clear and unobstructed view of a driver or an occupant of the motor vehicle who is not wearing a safety belt or is not secured in a child restraint system as required by Article 47 ~~of this chapter~~.

~~(F)~~(E) A person charged with a violation of this article may admit or deny the violation, enter a plea of nolo contendere, or be tried before either a judge or a jury. If the trier of fact is convinced beyond a reasonable doubt that the person was not wearing a safety belt at the time of the incident, the penalty is a civil fine pursuant to the provisions of Section 56‑5‑6540. If the trier of fact determines that the State has failed to prove beyond a reasonable doubt that the person was not wearing a safety belt, no penalty ~~shall~~ may be assessed.

~~(G)~~(F) A person found to be in violation of this article may bring an appeal to the court of common pleas pursuant to Section 18‑3‑10 or Section 14‑25‑95.”

SECTION 7. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 8. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 9. The General Assembly finds that all the provisions contained in this act relate to one subject as required by Article III, Section 17 of the South Carolina Constitution, 1895, in that each provision relates directly to or in conjunction with other sections to the subject of fairness in civil justice.

The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the act.

SECTION 10. This act takes effect July 1, 2010, and applies to all actions filed on or after this date.

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