~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

February 2, 2011

**H. 3375**

Introduced by Reps. Harrell, Lucas, Cooper, Hardwick, Harrison, Owens, Sandifer, White, Bingham, Atwater, Parker, Crawford, Loftis, Bowen, G.R. Smith, Bedingfield, Toole, Sottile, V.S. Moss, Forrester, Bikas, Huggins, Brady, Allison, Pinson, Frye, Whitmire, Skelton, Nanney, Henderson, Limehouse, Corbin, Barfield, Battle, Clemmons, Cole, Crosby, Daning, Gambrell, Hamilton, Hiott, Hixon, Horne, Lowe, D.C. Moss, Murphy, Norman, Patrick, Simrill, G.M. Smith, J.R. Smith, Spires, Taylor, Willis, Young, Herbkersman, Ballentine, Thayer, Bannister, McCoy, Tallon, Stringer, Long, Hayes, Ott, J.M. Neal, Vick, G.A. Brown, Branham, Anthony, Bowers, Sellers, Quinn and Hearn

S. Printed 2/2/11--H.

Read the first time January 19, 2011.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 3375) to amend the Code of Laws of South Carolina, 1976, so as to enact the “South Carolina Fairness in Civil Justice Act of 2011” by amending Article 5, etc., respectfully

**REPORT:**

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

JAMES H. HARRISON for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE “SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT OF 2011” BY AMENDING ARTICLE 5, CHAPTER 32, TITLE 15, RELATING TO PUNITIVE DAMAGES, SO AS TO PROVIDE LIMITS ON THE AWARD OF PUNITIVE DAMAGES AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; BY ADDING SECTIONS 1‑7‑750 AND 1-7-760 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, AND TO PROVIDE FOR THE SUSPENSION OF THE LIMITATIONS UNDER CERTAIN EXCEPTIONAL CIRCUMSTANCES; 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 BUT MAY BE ADMISSIBLE AS EVIDENCE; 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; AND TO AMEND SECTION 56‑5‑6540, AS AMENDED, RELATING TO THE PENALTIES FOR THE MANDATORY USE OF SEATBELTS, SO AS TO DELETE THE PROVISION THAT PROVIDED THAT A VIOLATION FOR FAILURE TO WEAR A SEATBELT IS NOT NEGLIGENCE PER SE OR COMPARATIVE NEGLIGENCE AND IS NOT ADMISSIBLE IN A CIVIL ACTION.

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 2011”.

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 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, 2011, and applies to all actions filed on or after this date.

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