

DIGEST OF INSURANCE LAW

SOUTH CAROLINA

Courtesy of

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CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Supreme Court. Limited original jurisdiction to issue writs and orders. Const. Art. V, §5.

Unlimited Jurisdiction. Circuit Court shall be general trial court with original jurisdiction in criminal and civil cases, except those cases in which exclusive jurisdiction shall be given to inferior courts. Civil circuit court is called the Court of Common Pleas, and criminal circuit court is called the Court of General Sessions. Const. Art. V, §11.

Master-In-Equity Courts. Each county with population of at least 130,000 is considered a division of Circuit Courts. S.C. Code §14-11-10 to -15.

Magistrate's Courts. Have jurisdiction over certain limited criminal and civil cases. Civil jurisdiction extends to cases up to \$7,500. S.C. Code §22-3-10 to -30; 22-3-510 to -590.

Municipal Courts. Have jurisdiction over all cases arising under the ordinances of the municipality and have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates. No jurisdiction over civil matters. S.C. Code §14-25-45.

Probate Courts. Have jurisdiction over estates of decedents, protection of minors (except that jurisdiction over the care, custody and control of minors is given to the state's family courts by S.C. Code §62-5-201) and insane persons, trusts, issuance of marriage licenses, proceedings in eminent domain when clerk of court of common pleas is disqualified and involuntary commitment of persons. S.C. Code §§14-23-1150, 62-1-302.

Family Courts. Have jurisdiction over certain matters involving marriage and children. S.C. Code §20-7-400 to -470.

Appellate Courts

Circuit Courts. Appeals from Magistrate's and Municipal Courts (S.C. Code §14-5-340), Probate Courts

(S.C. Code §62-1-308), and all other inferior courts (S.C. Code §18-7-10) is to Circuit Court

South Carolina Court of Appeals. Appellate jurisdiction over questions of law and equity arising from Circuit Courts, Family Courts, and final decisions of the Workers' Compensation Commission except cases concerning: (a) final judgment from Circuit Court which includes sentence of death, (b) setting of public utility rates, (c) significant constitutional issues, (d) government bonds, (e) elections, (f) limits on grand juries, and (g) family court orders regarding abortion over which Supreme Court has exclusive appellate jurisdiction. S.C. Code §14-8-200. Court of Appeals has appellate jurisdiction over final judgments of Masters-in-Equity. S.C. Code §14-11-85. Notice of intent to appeal shall be filed with Court of Appeals which may then issue an order to transfer case to Supreme Court if it lacks jurisdiction. If Supreme Court determines notice should have been filed with Court of Appeals, Supreme Court will issue order transferring to Court of Appeals. S.C. Code §14-8-260; Appellate Court Rule 204(a). Court of Appeals consists of Chief Judge and eight associate judges elected by legislature. Cases assigned to this Court are distributed between three panels of three judges, although Court may choose to decide case en banc. S.C. Code §§14-8-10, -20; 14-8-80, -90. Appeal is to Supreme Court by writ of certiorari. S.C. Code §14-8-210.

Supreme Court of South Carolina. This is the state court of last resort, both civil and criminal. It is composed of Chief Justice and four associate justices, elected by legislature. S.C. Code §14-3-10, -330.

LAW

Abbreviations

Appellate Court Rule – South Carolina Appellate Court Rules.

Const. – South Carolina Constitution of 1895, as amended.

Family Court Rule – South Carolina Rules of Family Court.

F. Supp. – Federal Supplement.

F.2d – Federal Reporter, Second Series.



F.3d – Federal Reporter, Third Series.
 S.C. – South Carolina Reporter.
 S.C.R.E. – South Carolina Rules of Evidence.
 S.C.R.C.P. – South Carolina Rules of Civil Procedure.
 S.C.R.Cr.P. – South Carolina Rules of Criminal Procedure.
 S.C. Code – South Carolina Code, Annotated 1976, as amended.
 S.E. – South Eastern Reporter.
 S.E.2d – South Eastern Reporter, Second Series.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS”; “DISABILITY.”

“Anti-Duplication” or “Co-ordination of Benefit” Provisions. The Supreme Court has limited the application of provisions that restrict payout to expenses not covered by other policies in holding that payments made to wife by wife’s group insurer because of husband’s medical expenses did not constitute payments to or on behalf of husband. *Millstead v. Life Ins. Co. of Va.*, 256 S.C. 449, 182 S.E.2d 867 (1971).

Attorney’s Fees. Insured’s attorney’s fees paid by insurer in contract action where insurer’s refusal to pay claim is without reasonable cause or in bad faith. S.C. Code §38-59-40; see *Sciarrone v. Life Ins. Co. of VA*, 280 S.C. 446, 313 S.E.2d 322 (Ct. App. 1984); *Coker v. Pilot Life*, 265 S.C. 260, 217 S.E.2d 784 (1975).

Cancellation. Insurer may not reserve right to cancel policy nor write policy on an optionally renewable basis. S.C. Code Ann. §38-71-335(A)-(C). A nonrenewable policy may be nonrenewed at policy anniversary date or premium due date. S.C. Code §38-71-335(C).

Contract Law. Policy forms must be approved by the director of Department of Insurance or his designee. S.C. Code §38-71-310. Standard policy provisions are stated in S.C. Code §§38-71-310 to 430. False statements in application do not bar recovery unless made with actual intent to deceive or they materially affect acceptance of risk or hazard assumed by insurer. S.C. Code §38-71-40. All contracts of insurance on property, lives, or interests in this state are considered to be made in the state and all contracts of insurance the applications for which are taken within the state are considered to have been made within this state and are subject to the laws of this state. S.C. Code §38-61-10. Existence of a contract is considered a question of fact. *Price v. Bethea*, 167 S.C. 376, 166 S.E. 409 (1932).

Disability or Death from Treatment of Covered Injury. Disability or death resulting from medical treat-

ment of covered accidental injury regarded as having been caused by such injury and compensable under accident policy if treatment administered was necessary or proper because of injury. *Deese v. American Bankers Life*, 263 S.C. 160, 208 S.E.2d 736 (1974).

Doctrine of Reasonable Expectation – An insurance contract must provide the coverage that the insured reasonably believes he was purchasing. South Carolina does not recognize this doctrine. *Allstate Ins. Co. v. Mangnum*, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989).

Incontestable Period. After the policy has been in force two years during the insured’s lifetime, the insurance company cannot contest the statements contained in the application. S.C. Code §38-71-340(2)(a).

More than One Policy Owned by Insured. Insured may recover on hospital expense policy that contained no clause prohibiting additional like insurance, although he has numerous other like policies that provide total benefits far in excess of insured’s earnings; such policy is not wagering contract. *Batchelor v. American Health Ins.*, 234 S.C. 103, 107 S.E.2d 36 (1959). Blanket Accident and Health Insurance. See S.C. Code §§38-71-1010 to -1050. Group Accident and Health Insurance. See S.C. Code §§38-71-710 to -810.

Notice and Proof of Loss. Insurer shall furnish proof of loss forms within twenty days of notice of loss or claimant is considered to have complied with written proof requirements of policy. S.C. Code §38-59-10.

Renewal. Grace period required for payment of renewal premium not less than seven days for weekly premium policies, ten days for monthly policies, and thirty-one days for all other policies. S.C. Code §38-71-340(3).

Statute of Limitations. No legal action may be brought to recover on policy within sixty days after written proof of loss has been given. No legal action to recover on policy may be brought after six years from time written proof is required. S.C. Code §38-71-340(11).

ACCIDENTAL MEANS

Definition. If while performing an act something unforeseen, unexpected, or unusual occurs which produces an injury, then the injury has resulted through accidental means. *Ducker v. Central Surety*, 234 S.C. 228, 107 S.E.2d 342 (1959).

Examples of Occurrences Found to be Accidents: Blow to head and shot inflicted by robber were not such intentional injuries as would defeat recovery. *Jennings v. Clover Leaf Life*, 146 S.C. 41, 143 S.E. 668 (1928). Death from heatstroke. *Goethe v. New York Life*, 183 S.C. 199, 190 S.E. 451 (1937). Death resulting from

sickness produced by casualty. *Huguenin v. Continental Cas.*, 94 S.C. 138, 77 S.E. 751 (1913). Test of whether injury is accidental is not whether injury was reasonably foreseeable, but whether it occurred with insured's intent or volition. *Stevenson v. Connecticut General*, 265 S.C. 348, 218 S.E.2d 427 (1975).

Examples of Occurrences Not Found to be Accidents: Injury to person in feeble health from exposure to conditions harmless to one in good health. *Young v. Continental*, 128 S.C. 168, 122 S.E. 577 (1924). Evidence of intentional injury will preclude recovery under policy carrying accidental means clause, but evidence must be so strong as to preclude any other inference. *Linnen v. Commercial*, 152 S.C. 450, 150 S.E. 127 (1929). No accident occurs where death or injury is natural and probable result of voluntary and intentional act by insured, and the result was unaccompanied by anything unforeseen except the death or injury. However, where death or injury is not the natural and probable result of a voluntary and intentional act, or if something unexpected occurs in the act preceding injury, then the injury is a result of accidental means. *Goethe v. New York Life*, 183 S.C. 199, 190 S.E. 451 (1937).

Suicide. Presumption against suicide exists and burden is on insurer to prove otherwise. *Dill v. Sovereign Camp, W.O.W.*, 126 S.C. 303, 120 S.E. 61 (1923). Where insurance policy bars recovery if suicide occurs within two years from policy date, policy date is construed as date first conditional premium received where no medical examination was required and no effective date was requested in application because of language of suicide clause. *Turkett v. Gulf Life*, 279 S.C. 309, 306 S.E.2d 602 (1983).

S.C. Reg. 69-34(E)(4) mandates minimum standard for definition of "accident," "accidental means," and "accidental injury" for individual accident and health insurance policies.

ADJUSTERS

Definition. "Adjuster" means an individual who determines the extent of insured losses and assists in settling or attempts to settle claims. S.C. Code §38-1-20(3).

Licensing Requirements. Adjusters must be licensed by the director or his designee. S.C. Code §38-47-10. Each license issued is for indefinite term unless sooner revoked or suspended if biennial license fee paid. S.C. Code §38-47-40. Biennial license fee is eighty dollars (\$80.00), but fee is greater for nonresident adjusters if their home state charges South Carolina adjusters higher license fee. S.C. Code §38-47-30. No license shall be issued to nonresident adjuster from state that refuses to license South Carolina adjusters. S.C. Code §38-47-10. Applicants shall be of good moral character,

have sufficient knowledge of insurance business and duties of adjuster, be fit and proper persons for such position, and not have violated any insurance laws of state. S.C. Code §38-47-10. Upon ten days notice, the director or his designee may revoke license and impose penalties if, after investigation, the director or his designee finds a violation of Title 38. S.C. Code §§38-47-70, 38-2-10.

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE."

Majority. Age of majority is eighteen (18) years. S.C. Code §15-1-320.

Insurance. Insurance contract made by minor is voidable at his election but minor may not void part and affirm part. *Arnold v. Life of Georgia*, 226 S.C. 60, 83 S.E.2d 553 (1954); *Power v. Allstate*, 312 S.C. 381, 440 S.E.2d 406 (S.C. Ct. App. 1994).

Minor can change beneficiary of policy on his life. *Dryman v. Liberty Life*, 216 S.C. 177, 57 S.E.2d 163 (1950).

Selling any alcoholic beverage to anyone under age of 21 is prohibited. S.C. Code §61-4-50, formerly S.C. Code §61-9-40.

AGENTS AND BROKERS

Definitions. "Insurance producer" means an individual who represents an insurance company and is required to be licensed in accordance with S.C. Code §38-43-10. S.C. Code §38-1-20 (20). This include persons who sell, solicit, or negotiate insurance on behalf of an insurer and a person who receives or delivers a policy of insurance of an insurer or receives, collects or transmits any premium of insurance. "Insurance broker" means an individual licensed by the department to represent citizens of this State in placing their insurance. An insurance broker may place that insurance either with an eligible surplus lines insurer or with a licensed insurance producer in an insurance carrier licensed in this State. S.C. Code §38-1-20 (21).

Collusion between Agent and Insured to Defraud Insurer. It is a felony to present a false claim greater than \$1,000 or to assist, solicit, or conspire with another to do so. S.C. Code §38-55-170.

Exemplary Damages. Recoverable against insurer in conversion action where agent converted premiums for his own use. *McPherson v. United American Ins.*, 242 S.C. 28, 129 S.E.2d 842 (1963).

Failure to Procure Policy. Agents required to exercise due care in placing insurance and personally liable for neglect of duty. *Riddle-Duckworth, Inc. v. Sullivan*,

253 S.C. 411, 171 S.E.2d 486 (1969). Duty of insurance agent to procure represented coverage does not create duty to obtain coverage at any or most favorable rate, absent express promise to do so. *Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993).

Fraud. If acting within scope of employment, fraudulent acts of agent bind insurer. *Huestess v. South Atlantic Life*, 88 S.C. 31, 70 S.E. 403 (1911). Agent's fraudulent intent will not defeat recovery unless insured participates in fraud. *Galphin v. Pioneer Life*, 157 S.C. 469, 154 S.E. 855 (1930).

Knowledge of Agents. Agent's knowledge acquired within scope of his authority binds insurer. *Marlowe v. Reserve Life*, 261 S.C. 23, 198 S.E.2d 267 (1973); *Rogers v. Atlantic Life*, 135 S.C. 89, 133 S.E. 215 (1926). Knowledge of agent acting in collusion with beneficiary or insured will not bind company. *Dubuque Fire & Marine v. Miller*, 219 S.C. 17, 64 S.E.2d 8 (1951); *Ayers v. Business Men's Ins.*, 148 S.C. 355, 146 S.E. 147 (1929). However, mere knowledge of the beneficiary that the agent is adverse to the company will not prevent agent's knowledge from being that of the companies. *Huestess v. South Atlantic Life Ins. Co.*, 88 S.C. 31, 70 S.E. 403.

Liability of Agent. Failure of insurer's agent to comply with instructions of insurer resulting in loss to insurer renders agent liable to insurer. *U.S. Casualty v. Hiers*, 233 S.C. 333, 104 S.E.2d 561 (1958).

Managing General Agent - See S.C. Code §38-44-20(3).

For statutory licensing and regulation of brokers, agents, and managing general agents, see S.C. Code §§38-45-10 to -170, 38-43-10 to -500 and 38-44-10 to 80.

ARBITRATION

Arbitration of Automobile Property Damage Liability Claims. See S.C. Code §§38-77-710 to -770. Arbitration clause prohibited in uninsured motorist provision. S.C. Code §38-77-200. Under S.C. Code §38-77-770, party dissatisfied with decision of the arbitrator in motor vehicle property damage action may appeal decision within twenty days to the circuit court, and trial must be "de novo." *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750 (1997).

ATTORNEYS

Appointment and Authority. "Client" created when person seeks legal advice by communicating in confidence with attorney to obtain such advice. *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (S.C. Ct. App. 1984). Acts of attorney are binding upon client absent

fraud or mistake. *Shelton v. Bressant*, 312 S.C. 183, 439 S.E.2d 833 (1993).

Conflict of Interest. All doubts should be resolved in favor of disqualification. *United States v. Clarkson*, 567 F.2d 270 (4th Cir. 1977).

Fees. Entitled to reasonable value of services performed for his client in absence of controlling contract, statute, or rule of court. *Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership*, 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993).

Legal Malpractice. Attorney should prosecute his client's cause with reasonable diligence and dispatch. *Norris v. Alexander*, 246 S.C. 14, 142 S.E.2d 214 (1965).

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE"; "NO-FAULT"; "DAMAGES."

Age. Minimum age for unrestricted operator of motor vehicle is 16 years. S.C. Code §56-1-40(1). Minors between the ages of 15 and 16 who have held a beginner's permit for 180 days, passed a driver's education course, successfully passed all tests prescribed by the Department of Motor Vehicles, and satisfied the school attendance requirement may obtain a conditional license that allows for driving during daylight hours. S.C. Code §56-1-175. Minors between the ages of 16 and 17 who have satisfied the requirements of S.C. Code Annotated §56-1-175 may obtain a special restricted license. S.C. Code Ann. §56-1-180(A). The nighttime driving restriction may be modified for holder of a special restricted license if the restriction interferes with transportation for employment, school, or vocational training. S.C. Code Ann. §56-1-180(B). Insurer not exempt from liability where automobile is operated by underage driver, absent some causal connection between age of driver and collision. *McGee v. Globe*, 173 S.C. 380, 175 S.E. 849 (1934) (questioned in *Myers v. Ocean Accident & Guar. Corp.*, 99 F.2d 485 (4th Cir. 1938)).

Accidents. Driver of any vehicle involved in accident resulting in injury to or the death of a person immediately must stop his vehicle, give information, and render aid which is reasonably necessary or requested. S.C. Code §56-5-1210 to -1250. In absence of gross negligence or willful or wanton misconduct, provider of gratuitous emergency care rendered at accident scene is not liable for resulting injury. S.C. Code §15-1-310. Driver of vehicle involved in accident producing injury or death must immediately report to local police; if incapacitated, any occupant or owner must immediately report. S.C. Code §§56-5-1260, 1280. Reports are not evidence of

negligence in civil actions. S.C. Code §56-5-1290. Operator or owner involved in accident not investigated by police involving injury or death or property damage in excess of \$1,000 shall file written report and verification of liability insurance coverage with Highway Department within 15 days. S.C. Code §56-5-1270.

Agency. Owner's liability, if any, for injuries caused by his automobile operated by another rests on doctrine of respondeat superior, *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940), and theory of negligent entrustment. *American Mut. Fire Ins. v. Passmore*, 275 S.C. 618, 274 S.E.2d 416 (1981); *Jackson v. Price*, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986). Owner's presence in car may imply agency. *Neese v. Toms*, 196 S.C. 67, 12 S.E.2d 859 (1941). Coverage extended to one using vehicle for a permitted purpose, even if actual operation of vehicle was expressly prohibited. Consent from the named insured for the use of a vehicle need only flow to the use of the vehicle itself. *Maryland Cas. Co. v. State Farm*, 312 S.C. 476, 441 S.E.2d 338 (S.C. Ct. App. 1994). Negligence or willful misconduct of minor driving uninsured motor vehicle imputed to person who signed application for minor's permit. S.C. Code §§56-1-100 to -120, -1780. Recoverable damages caused by motor vehicle constitute a lien on the vehicle, except where vehicle is stolen by breaking lock. S.C. Code §29-15-20. Injured person may file action in rem against automobile without joining owner as defendant. *Tolbert v. Buick Car*, 142 S.C. 362, 140 S.E. 693 (1927).

Alcohol/DUI. Presumption of impairment based on blood/alcohol content; if .08 or greater, inference of being under influence. S.C. Code §56-5-2950(b)(3). Penalties range from fine to mandatory prison. See S.C. Code §§56-5-2940, -2945, -2995.

Cancellation by Insurer. See S.C. Code §38-77-120.

Comparative/Contributory Negligence. Contributory negligence is a complete defense to cause of action arising before July 1, 1991, after which comparative negligence is rule. *Nelson v. Concrete Supply*, 303 S.C. 243, 399 S.E.2d 783 (1991).

Compulsory Insurance Coverage. \$25,000 per person, \$50,000 per accident, \$25,000 property damage. S.C. Code §38-77-140.

Family Purpose Doctrine. Is recognized. *Hewitt v. Fleming*, 172 S.C. 266, 173 S.E. 808 (1934); *Murphy v. Smith*, 243 F. Supp. 1006 (D.S.C. 1965).

Guest Statute. S.C. Code §15-1-290, which forbids guests being transported in a motor vehicle from maintaining a suit against the motor vehicle or its owner for any injury, death, or loss in case of an accident unless such accident shall have been intentional or caused by

reckless conduct of the owner or operator, is unconstitutional denial of equal protection guarantees of State and United States Constitutions. *Ramey v. Ramey*, 273 S.C. 680, 258 S.E.2d 883 (1979).

Imputed Negligence/Joint Enterprises. Negligence or contributory negligence of the driver of the motor vehicle cannot be imputed to a party in the car unless such party controlled the driver or had the right to do so. *Funderburk v. Powell*, 181 S.C. 412, 187 S.E. 742 (1936); see also *Bolt v. Gibson*, 225 S.C. 538, 83 S.E.2d 191 (1954). Joint enterprise rule does not apply in actions between members of joint enterprise, and therefore does not prevent one member of enterprise from holding another member liable for personal injuries inflicted by latter's negligence in carrying out enterprise. *McJunkin v. Waldrep*, 225 S.C. 73, 81 S.E.2d 284 (1954).

In Rem Jurisdiction. Injured person may maintain action in rem against automobile alone without making owner, operator, or anyone else a party defendant; owner's remedy being by intervening and setting up his rights to attached car. *Tolbert v. Buick Car*, 142 S.C. 362, 140 S.E. 693 (1927).

Insured. The named insured, all relatives and spouses sharing a household, any permissive user, and any guest to the vehicle are considered insured by statute. S.C. Code §38-77-30(7).

Last Clear Chance. All or nothing effect of last clear chance in relieving plaintiff of liability is inconsistent with purpose and policy behind adoption of comparative negligence. *Davenport v. Cotton Hope Plantation Prop. Reg.*, 333 S.C. 71, 508 S.E.2d 565 (1998).

Motorized Bicycles. To operate moped on public street, one must have either valid driver's license or moped operator's license. One must be at least 14 years of age to obtain moped operator's license. S.C. Code §56-1-1720.

Ownership/Title. Motor vehicle owner defined. S.C. Code §56-3-20 (21); see also S.C. Code §56-5-410, 56-3-2460. When an automobile dealer permits a prospective purchaser of an automobile to test drive a car, the relationship between the dealer and the prospective purchaser is that of bailor and bailee. The person to whom the insured under an automobile collision policy loans the automobile is not an insured with respect to collision insurance and the collision insurer can maintain a subrogation action against such person for collision loss. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994).

Pedestrians. Any person afoot is a pedestrian. S.C. Code §56-5-390. Rights and duties of pedestrians. See S.C. Code §§56-5-3110 to -3280.

Permissive User. If owner has actual knowledge that another person intends to use his auto and he takes no steps to prevent such use, an inference arises that the use is with owner's implied permission. *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986).

Personal Injury Protection. Insurance companies may prohibit stacking of personal injury protection (PIP) benefits for nonmandatory coverage. *State Farm v. Richardson*, 313 S.C. 58, 437 S.E.2d 43 (1993).

Seat Belts. Driver and every occupant of motor vehicle must wear safety belt. S.C. Code §56-5-6520. See S.C. Code §56-5-6530 for exceptions. Law enforcement officer may stop driver for not wearing safety belt in absence of another violation of motor vehicle laws if he has probable cause that violation has occurred based on his clear and unobstructed view of driver or occupant of motor vehicle who is not wearing safety belt or is not secured in a child restraint system. S.C. Code Ann. §56-5-6540(E) Failure to wear seat belt does not constitute negligence per se or contributory negligence and is not admissible as evidence in civil action. S.C. Code §56-5-6540(C). See S.C. Code §§56-5-6410 to -6470 for statutes requiring child passenger restraint systems.

Service of Process on Non-Resident Motorists. A nonresident, by operating motor vehicle in state, is deemed to have appointed Director of the Department of Public Safety as his lawful attorney upon whom process may be served in any action arising from use of highways. S.C. Code §15-9-350. Copy of process is to be sent to nonresident by registered mail and return receipt is to be filed with papers in action. S.C. Code §15-9-370, -380. Action against nonresident defendant may be brought in county designated by plaintiff. *Courtney v. Meyer*, 202 S.C. 437, 25 S.E.2d 481 (1943).

Speed Limit. Violation of statute that establishes maximum speeds (S.C. Code §56-5-1520) is negligence per se and is evidence of recklessness, willfulness, and wantonness. However, whether or not such breach contributed as a proximate cause to plaintiff's injury is ordinarily a question for the jury. *Rowe v. Frick*, 250 S.C. 499, 159 S.E.2d 47 (1968). Violation of a statute may support punitive damages. *Copeland v. Nabors*, 285 S.C. 340, 329 S.E.2d 457 (S.C. Ct. App. 1985).

Trailers/Weight Limits. See S.C. Code §56-5-4140.

Uninsured Motorist Coverage. No automobile insurance policy shall be issued without uninsured motorist provision, which will compensate insured for damages caused by owner or operator of uninsured vehicle. The provision must include coverage for at least fifteen thousand dollars (\$25,000) per person, thirty thousand dollars (\$50,000) per accident and least ten thousand dollars (\$25,000) coverage for damage to insured's

property. S.C. Code §38-77-140, 150. Insurer must offer coverage up to the insured's liability limits. The Department of Insurance may prescribe the form to be used in providing uninsured motorist coverage and when prescribed and promulgated no other form may be used. S.C. Code §38-77-150(A). If owner or operator of vehicle causing accident is unknown, then no recovery under uninsured motorist provision unless injury or damage was caused by physical contact with unknown vehicle, or accident was witnessed by someone other than owner or operator of insured vehicle who signs affidavit attesting to truth of facts, insured reported accident to proper authorities within a reasonable time, and insured was not negligent in failing to determine identity of other vehicle and driver. S.C. Code §38-77-170. For injured party to recover uninsured motorist benefits, he must prove that injuries were sustained through ownership, maintenance, or use of the vehicle. *Wausau Underwriters v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). The injury must be foreseeably identifiable with normal use, maintenance, and ownership of vehicle. *Hite v. Hartford Acc. & Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986).

Underinsured Motorist Coverage. All automobile insurance carriers must offer, at option of the insured, underinsured motorist coverage up to limits of insured's liability coverage and must use the form promulgated by the Department of Insurance. S.C. Code §§38-77-160-350. Renewal of insurance contract is a new contract requiring valid offer of underinsured motorist coverage unless 1) expiring contract mandates the same terms shall be in effect and 2) policy terms do not change upon renewal. *Webb v. South Carolina Ins. Co.*, 305 S.C. 211, 407 S.E.2d 635 (1991). Insurer must provide insured with adequate information in such a manner as to allow insured to make intelligent decision of whether to accept or reject coverage. *State Farm v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987); *Mathis v. State Farm*, 315 S.C. 71, 431 S.E.2d 619 (S.C. Ct. App. 1993) (including property damage). Insured must personally mark, select and sign UIM offer form to satisfy meaningful offer requirements of S.C. Code Ann. §38-77-350(B). *Floyd v. Nationwide*, 367 S.C. 253, 626 S.E.2d 6 (2005). If insurer fails to comply with statutory duty to make a meaningful offer to insured, policy will be reformed, by operation of law, to include UIM coverage up to limits of liability insurance carried by the insured. *Butler v. Unisun*, 323 S.C. 402, 475 S.E.2d 758 (1996) (superseded by statute on other issue).

Underinsured motorist coverage is applicable when insured's damages exceed the at-fault motorist's liability limits. S.C. Code §38-77-30 (15); *Gambrell v. Travelers Ins.*, 280 S.C. 69, 310 S.E.2d 814 (1983) (superseded by statute on other issue); *State Farm v. Horry*, 304 S.C. 165, 403 S.E.2d 318 (1991) (questioning *Gambrell* as to

definition of underinsured motor vehicle). An insured's son, who suffers injuries from an accident caused by insured, can collect underinsured motorist benefits despite insured's policy provision excluding insured's automobile from coverage. *Bratcher v. National Grange*, 292 S.C. 330, 356 S.E.2d 151 (Ct. App. 1987). Stacking is allowed in some situations. See *National Gen. Ins. v. Pena*, 308 S.C. 521, 419 S.E.2d 375 (Ct. App. 1992), *overruled in part*, *Concrete Servs. v. United States Fid. & Guar.*, 331 S.C. 506, 498 S.E.2d 865 (1998); *Garris v. Cincinnati Ins.*, 280 S.C. 149, 311 S.E.2d 723 (1984) (superseded by statute on other issue); *but see State Farm v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987) (court refused to permit stacking because neither of insured's vehicles were involved in accident). Stacking refers to insured's recovery of damages under more than one policy in succession until all damages are satisfied or until total limits of all policies are exhausted and also combining multiple coverages within a single policy until all damages are satisfied. *Jackson v. State Farm*, 288 S.C. 335, 342 S.E.2d 603 (1986) (scope of decision limited by *Ruppe v. Auto-Owners Ins. Co.*, 339 S.C. 402, 496 S.E.2d 631 (1998)). A policy provision which purports to limit stacking of statutorily required coverage is invalid. *Id.* Right to stack available only to Class I insureds who are the named insured, spouse, and relatives residing in his household who have a vehicle involved in the accident. *Fireman's Ins. Co. v. State Farm*, 295 S.C. 538, 370 S.E.2d 85 (1988). Stacking does not depend on number of policies issued, but on number of additional coverages for which insured has contracted. *Ruppe v. Auto-Owners Ins.*, 329 S.C. 402, 496 S.E.2d 631 (1998). Insured's husband, who owned motorcycle involved in accident, was entitled to stack under wife's policy on three other vehicles. *American Security Ins. v. Howard*, 315 S.C. 47, 431 S.E.2d 604 (Ct. App. 1993), *overruled in part*, *Concrete Servs. v. United States Fid. & Guar.*, 331 S.C. 506, 498 S.E.2d 865 (1998) (holding that ownership of vehicle is not required so long as individual is Class I insured, i.e. spouse, relative of named insured living in the home). Spouse of sole shareholder of corporation not entitled to stack UIM coverage where corporation is named insured on policy and spouse was injured while operating vehicle owned by corporation. *Concrete Serv. v. U.S. Fidelity*, 331 S.C. 506, 498 S.E.2d 865 (1998). Stacking of uninsured and underinsured coverage is prohibited when an insured vehicle is not involved in the wreck. *Brown v. Continental Ins.*, 315 S.C. 393, 434 S.E.2d 270 (1993). Sole shareholders in closely held corporation not entitled to stack under corporation's garage policy. *Mangum v. Maryland Cas. Co.*, 330 S.C. 573, 500 S.E.2d 125 (Ct. App. 1998).

No requirement of payment of applicable liability policy limits as precondition to collecting UIM benefits,

but UIM carrier is entitled to a credit for any amount of liability insurance not exhausted in a settlement with its insured. *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

Public policy is not offended by an automobile insurance policy provision that limits basic underinsured motorist (UIM) coverage portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy; UIM coverage is entirely voluntary. *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007). But, policy provision limiting uninsured motorist (UM) coverage to the lesser of the limits of policy covering vehicle not involved in accident or policy covering vehicle involved in accident, if the involved vehicle was not named insured's auto described in the policy, was void as to passenger on her husband's uninsured motorcycle, and, thus, the passenger was entitled to UM benefits under policy on her car; UM coverage was mandatory. *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 644 S.E.2d 62 (2007).

Uninsured motorist statute not intended to apply to injuries inflicted by vehicles not subject to registration or compulsory insurance provisions. *Anderson v. State Farm*, 314 S.C. 140, 442 S.E.2d 179 (1994). Minor cannot disaffirm his rejection of underinsured motorist coverage while ratifying remainder of policy. *Power v. Allstate*, 312 S.C. 381, 440 S.E.2d 406 (Ct. App. 1994).

AVIATION

See S.C. Code §55-1-10 to -100.

Uniform Act. Uniform Aircraft Financial Responsibility Act. S.C. Code §55-8-10 to -210. Uniform Airports Act. S.C. Code §55-9-10 to -240.

Limits to Liability. Guest passenger traveling without charge has no cause of action for damages, unless owner caused accident intentionally or with reckless disregard of others' rights. S.C. Code §55-1-10. Similar guest statute regarding guests in motor vehicles deemed unconstitutional in *Ramey v. Ramey*, 273 S.C. 680, 258 S.E.2d 883 (1979). Thus, constitutionality of S.C. Code §55-1-10 is uncertain. Aircraft owner is absolutely liable for injuries caused to persons or property below, unless injured party contributes to injury. S.C. Code §55-3-60.

Service of Process. Operation of aircraft in state deems Secretary of Commerce attorney for service of process. S.C. Code §55-8-170.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Where policy requires entry into safe by actual force shown by visible marks, it must be interpreted to require actual force in connection with opening of safe, *i.e.* contributing factors to opening of safe, not that safe was opened by actual force alone. *Protho v. Comm. Cas. Ins.*, 200 S.C. 432, 21 S.E.2d 1 (1942).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE"; "LIABILITY INSURANCE"; "FIRE INSURANCE."

Cancellation notice. Insurer must give insured 15-day notice on approved form stating effective date of cancellation and specific reason for cancellation or refusal to renew. S.C. Code §38-77-120; *Bannister v. Ohio Cas.*, 314 S.C. 388, 444 S.E.2d 528 (Ct. App. 1994).

Cancellation for Misrepresentation. A health or accident insurance policy cannot be canceled for false statement in application, unless the misrepresentation was made with actual intent to deceive or materially affected insurer's acceptance of the risk or hazard. *Small v. Coastal States Life*, 241 S.C. 344, 128 S.E.2d 175 (1962) (citing Code provision now codified at §38-71-40). Insurer can only challenge insured's representations in application for life insurance during first two years of policy. S.C. Code §38-63-220(d); *Carroll v. Jackson Nat'l Life*, 307 S.C. 267, 414 S.E.2d 777 (1992).

Right to Cancel. When policy provisions give either insured or insurer right to cancel insurance contract upon notice to the other, either party has right to terminate contract by complying with requisite terms, and the other party's consent is not necessary for effective cancellation. *Wilbanks v. Prudential Property*, 277 S.C. 256, 286 S.E.2d 127 (1982).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Ambiguity of Terms. Where insurance policy is ambiguous or susceptible of two reasonable interpretations, court will adopt one most favorable to insured. *Walker v. Commercial Cas.*, 191 S.C. 187, 4 S.E.2d 248 (1939). But court will not rewrite or distort contract under guise of judicial construction. *S.S. Newell Co. v. American Mut. Liab.*, 199 S.C. 325, 19 S.E.2d 463 (1942).

Conditional Receipt of Application. Limiting provisions in insurance contract and conditional receipt of such application by company are waived where agent fails to bring such provisions to attention of applicant.

Rickborn v. Liberty Life, 321 S.C. 291, 468 S.E.2d 292 (1996).

Inconsistent Policy Terms. Generally, ambiguous policy provisions are liberally construed for insured and strictly construed against carrier, but where there is no ambiguity court must construe policy according to plain, ordinary meaning of words by which parties chose to contract. *Deese v. American Bankers Life*, 263 S.C. 160, 208 S.E.2d 736 (1974).

Oral Binders. Are valid even if no specific insurer is designated by the parties, where policy is actually issued by insurer. *Fuller v. Eastern Fire & Cas. Ins.*, 240 S.C. 75, 124 S.E.2d 602 (1962).

CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

DAMAGES

Actual Damages or Compensatory Damages. Damages in satisfaction of, or in recompense for, loss or injury sustained. *Laird v. Nationwide*, 243 S.C. 388, 134 S.E.2d 206 (1964). Generally, to recover damages, the evidence should enable the court or jury to determine the amount thereof with reasonable (not absolute) certainty or accuracy. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981).

Attorney's Fees. In absence of contractual or statutory liability, attorney's fees generally are not recoverable as item of damages. *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956). Insured is entitled to recover attorney's fees from insurer if insured prevails in declaratory judgment action brought by insurer to determine coverage on insurance policy. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). Insurer is liable in contract action for reasonable attorney's fees incurred when insurer, without reasonable cause or in bad faith, refuses to pay claim. S.C. Code §38-59-40. Payment of insured attorney's fees by insurer may be proper when insurer acted in bad faith in settling case prior to trial. *Brown v. Johnson*, 276 S.C. 68, 275 S.E.2d 876 (1981). Note that statute does not require payment of attorney's fees in every contested case won by insured. For example, fees will not be allowed where case involves legal principles of novel impression. *Nelson v. United Fire Ins. Co.*, 275 S.C. 92, 267 S.E.2d 604 (1980); *Myers v. Gov't Employees Ins.*, 279 S.C. 70, 302 S.E.2d 331 (1983).

Bad Faith Damages. Insurer must exercise good faith and reasonable care when considering offer by insured to settle third-party claim within policy limits. *Tyger River Pine Co. v. Maryland Cas.*, 170 S.C. 286, 170 S.E. 346 (1933). The elements of bad faith cause of ac-

tion are 1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; 2) refusal by the insurer to pay benefits due under the contract; 3) good faith and fair dealing arising on the contract; 4) causing damage to the insured. *Crossley v. State Farm*, 307 S.C. 354, 415 S.E.2d 393 (1992). Recovery may be had in form of actual, consequential, and punitive damages if insurer in bad faith refuses to settle claim for first party benefits. Insured must demonstrate that insurer acted in willful or reckless disregard of insured's rights to recover punitives. *Nichols v. State Farm*, 279 S.C. 336, 306 S.E.2d 616 (1983) (superseded by statute on other grounds). Cause of action for bad faith refusal to pay first-party benefits does not extend to person not party to or named insured under the contract and who possesses mere contingent interest in property insured. *Carter v. American Mut.*, 279 S.C. 368, 307 S.E.2d 227 (1983). Derivative policy holder has standing to maintain action for bad faith refusal. *Ateyeh v. Volkswagon of Florence*, 288 S.C. 101, 341 S.E.2d 378 (1986).

Collateral Source Rule. South Carolina follows the rule where compensation received by an injured party from a source wholly independent of the wrongdoer should not be deducted from the amount of damages owed by the wrongdoer to the injured party. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Receipt of money on accident policy by one suffering personal injury does not preclude recovery or lessen amount recoverable from tortfeasor. *Joiner v. Fort*, 226 S.C. 249, 84 S.E.2d 719 (1954).

Comparative Negligence. Plaintiff in a negligence action may recover damages if his negligence is not greater than that of defendant or, if more than one defendant, the combined negligence of all defendants. *Nelson v. Concrete Supply*, 303 S.C. 243, 399 S.E.2d 783 (1991). Amount of plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. *Id.* Applies to all causes of action arising on or after July 1, 1991. *Id.*

Excessiveness of Verdict. Verdict which may be supported by any rational view of evidence and bears reasonable relationship to character and extent of injury and damage sustained is not excessive. *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969). For court to set aside verdict for excessive damages, award must result from the jury's caprice, passion, or prejudice and be so grossly excessive as to shock the conscience. *Collins Music v. Terry*, 303 S.C. 358, 400 S.E.2d 783 (Ct. App. 1991).

General Damages. Such as necessarily accrue from unlawful acts alleged and are recoverable under general averment of damage. *Epstin v. Berman*, 78 S.C. 327, 58 S.E. 1013 (1907).

Indemnification. A person compelled to pay damages from negligence imputed by tort of another can bring indemnity action against negligent person; subject to proviso that one's negligence did not join in causing the injury. *Atl. Coast Line v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963). Right to indemnify not defeated if amount to be indemnified is paid by insurance company. *Otis Elevator v. Hardin Constr.*, 316 S.C. 292, 450 S.E.2d 41 (1994). Innocent indemnity sued by third party may recover cost of settling case, subject to certain conditions. *Id.*

Mitigation. Plaintiff's failure in negligence action to reasonably mitigate damages would affect recovery amount but would not bar recovery altogether. *W. D. Bourne v. Southeastern Freight Lines*, 259 S.C. 139, 191 S.E.2d 4 (1972).

Pain and Suffering. Pain and suffering is very material element of damage on which recovery may be based but assessment rests in sound discretion of jury subject only to correction by court for abuse. *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964).

Psychic Injuries. Separate damages given for mental anguish where evidence shows shock, fright, emotional upset, and/or humiliation caused by defendant's negligence. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). Separate damages also given for "loss of enjoyment of life" for limitations on ability to participate in and derive pleasure from normal activities of daily life or inability to pursue talents, recreational interests, hobbies, or avocations. *Id.*

Punitive Damages. Punitive damages are allowable in tort actions, not only as punishment for wrong, but as vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. *Harris v. Burnside*, 261 S.C. 190, 199 S.E.2d 65 (1973). For punitive damages to be awarded there must be award for actual damages. Punitive damages must be proved by clear and convincing evidence. S.C. Code §15-33-135. Trial judge must conduct post-trial review to determine whether award is grossly disproportionate to severity of offense using several factors. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993). If insured can demonstrate insurer's actions were willful or in reckless disregard of insured's rights, he can recover punitive damages. *BP Oil v. Federated Mut. Ins.*, 329 S.C. 631, 496 S.E.2d 35 (S.C. App. 1998). Right to punitive damages is personal; for example, husband had no cause of action for punitive damages arising out of injuries to his wife and minor child. *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839 (1967). In assessing punitive damages, the main considerations are character of tort committed, punishment which should be meted out for deterrence,

and ability of wrongdoer to pay. Violation of statutory rule of road is negligence per se and is evidence of recklessness, willfulness, or wantonness. *Rowe v. Frick*, 250 S.C. 499, 159 S.E.2d 47 (1968).

Special Damages. Such as naturally and proximately, but not necessarily, accrue from unlawful acts alleged, and are not recoverable unless specifically alleged. *Id.*

Statutory Caps on Awards. Only in South Carolina Tort Claims Act, S.C. Code §15-78-120.

Workers' compensation claimant has no cause of action under *Nichols v. State Farm*, 279 S.C. 336, 306 S.E.2d 616 (1983), case to recover damages for bad faith refusal to pay benefits. Remedy is under statute. *Cook v. Mack's Transfer & Storage*, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986), cert. denied, 292 S.C. 230, 355 S.E.2d 861 (1987).

ERISA preempts bad-faith claim except where state has promulgated law governing the insurance issue in controversy. *Duncan v. Provident Mut. Life*, 310 S.C. 465, 427 S.E.2d 657 (1993).

DEATH

See Law Digest Tables.

Abatement and Survival of Actions. Causes of action for injuries to real estate, person, or personal property, survive both to and against representative of deceased and insolvent persons, and defunct or insolvent corporations. S.C. Code §15-5-90. Actions for malicious prosecution, slander, fraud and deceit do not survive. *Brewer v. Graydon*, 233 S.C. 124, 103 S.E.2d 767 (1958).

Action for Wrongful Death. Cause of action created. S.C. Code §15-51-10. Action is brought by representative for benefit of wife or husband and child, or children, if any; and if none, to the parent or parents; and if none, to benefit of heirs of person whose death shall have been so caused. S.C. Code §§15-51-20 and 15-51-40 (regarding amount of damages and to whom damages are payable). Action for wrongful death may not be joined with action under survival section. *Bennett v. Spartanburg Ry.*, 97 S.C. 27, 81 S.E. 189 (1914). Action must be commenced within six years of death if death prior to April 5, 1988; otherwise within three years. S.C. Code §15-3-530(6).

Unexplained Absence. Death is presumed after seven years unexplained absence and tidings from person. *Griffin v. Southern Ry.*, 66 S.C. 77, 44 S.E. 562 (1903). This presumption is rebuttable. *Ligon v. Metropolitan Life*, 219 S.C. 143, 64 S.E.2d 258 (1951); see

also Uniform Simultaneous Death Act, S.C. Code §62-1-501 to -508.

DISABILITY

See "ACCIDENT AND HEALTH INSURANCE."

Disability. No special statute exists on question of permanent and total disability. Insured is deemed totally disabled when unable to do work for which trained, and on which he depends for living. *Hickman v. Aetna*, 166 S.C. 316, 164 S.E. 878 (1932). Insured is not totally disabled if he can do other work that rationally approaches the same livelihood and living standard enjoyed before his injury. *Blackwell v. Prudential*, 206 S.C. 320, 34 S.E.2d 57 (1945); *Rowe v. Home Security Life*, 289 S.C. 236, 345 S.E.2d 758 (Ct. App. 1986).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables. See also "AUTOMOBILES, Compulsory Coverage."

FIRE INSURANCE

Arbitration. Where policy forbids insured from bringing suit until after he submits loss amount to arbitration, compliance, if demanded by insurer, is condition precedent to action on policy. *Harwell v. Home Mut.*, 228 S.C. 594, 91 S.E.2d 273 (1956).

Arson. Evidence of non-prosecution for criminal arson irrelevant and immaterial in civil case for fire insurance proceeds. *Brown v. Allstate Ins.*, 344 S.C. 21, 542 S.E.2d 723 (2001). Evidence of criminal arson charges excluded in suits for fire insurance proceeds as highly prejudicial. *Id.* To prove arson by insured, insurer must demonstrate by preponderance of the evidence that fire was incendiary in origin and that insured caused fire. *Id.*

Assignment. Insured's endorsement on policy stating loss payable to mortgagee as interest held not to violate provision stipulating policy to be void if assigned without insurer's consent. *Henderson v. Abbeville*, 96 S.C. 430, 81 S.E. 171 (1914). Pledge of insurance policy as collateral security held not assignment. *Stokes v. Liverpool*, 130 S.C. 521, 126 S.E. 649 (1925).

Contract-Policy. When insurance company issues fire insurance policy with standard mortgagee clause, insurer cannot cancel policy due to mortgagor's payment with bad check without first notifying mortgagee, which allows mortgagee opportunity to protect his interests. *Fort Hill Fed. Savings & Loan v. South Carolina Farm Bureau*, 281 S.C. 532, 316 S.E.2d 684 (Ct. App. 1984).

Uniform Commercial Code. Effective January 1, 1968, South Carolina adopted Uniform Commercial Code and repealed all acts or parts of acts inconsistent



with Uniform Law, including provisions for chattel mortgages. S.C. Code §36-1-101 *et seq.* Transactions entered into before effective date of Uniform Code are valid. Security interest in chattels now provided for under Commercial Code.

Contribution. Two or more policies written upon same property shall be deemed and held contributive insurance; if aggregate sum of all such insurance exceeds the insurable value of property, as agreed by insurer and insured, in event of total or partial loss, each company shall be liable for its pro rata share of said insurance. S.C. Code §38-75-20. This section does not apply to insurance on chattels or personal property. The above section does not prohibit open policies on builder's risk. *Ulmer v. Phoenix Fire*, 61 S.C. 459, 39 S.E. 712 (1901) (Questioned in *Averill v. Preferred Mut.*, 314 S.C. 49, 441 S.E.2d 632 (1994) (Recovery in total loss by fire equals full amount of insurance under policy and not actual value.)) By an "open" insurance policy, the amount of liability is left open, to be determined according to the actual loss. Whereas "a valued" policy is one in which the amount payable in case of loss is fixed by the terms of the policy itself. *Riggs v. Home Mut.*, 61 S.C. 448, 39 S.E. 614 (1901). Doctrine that payment in part of amount due on contract at or after maturity does not operate as satisfaction of the whole does not apply to unliquidated loss under open insurance policy. *Id.*

Fraudulent Claims. Fraud in contents claim will not defeat recovery for loss of dwelling, as insurance contract is severable. *Johnson v. South State Ins.*, 288 S.C. 239, 341 S.E.2d 793 (1986).

Maximum Amounts. No company writing fire insurance policies, doing business in this State, shall issue policy for more than value stated in policy or value of the property to be insured. S.C. Code §38-75-20. Amount of insurance to be fixed by insurer and insured at or before time of issuing policy. In case of total loss by fire insured shall be entitled to recover the full amount of insurance, and in case of partial loss insured shall be entitled to recover actual amount of loss, but in no event more than amount of insurance stated in contract. Valued policy statute does not apply to total loss by windstorm. *McNeely v. South Carolina Farm Bureau*, 259 S.C. 39, 190 S.E.2d 499 (1972).

Subrogation. Landlord's insurer shall have no right of subrogation against tenant for damage to leased property unless such damage is caused by tenant intentionally or in reckless disregard of rights of others. S.C. Code §38-75-60; *Vaughn v. A.E. Green Co.*, 277 S.C. 392, 287 S.E.2d 493 (1982). Insurer need not prove insured's total losses and expenses incurred in effecting third party re-

covery. *Frank B. Hall & Co. v. Vic Bailey Lincoln-Mercury*, 298 S.C. 282, 379 S.E.2d 892 (1989).

FRAUD

Absent illiteracy or near illiteracy, insured has no fraudulent misrepresentation action when he fails to read contents of policy. *Regal Leasing v. American Motorists Ins.*, 288 S.C. 253, 341 S.E.2d 802 (Ct. App. 1986).

See "AGENTS AND BROKERS."

GUEST CASES

See "AUTOMOBILES, Guests."

HOSPITALS

Evidence-Records. No common law doctor/patient privilege exists; however, there are exceptions for patients with mental illness or emotional conditions. See S.C. Code §19-11-95. Regarding confidentiality of alcohol and drug abuse commitment records, see S.C. Code §44-22-100. All proceedings and data collected by professional peer review committees are confidential. S.C. Code §40-71-20. S.C. Code §40-71-10(B) grants immunity to an appointed member of a committee of a hospital or medical staff for act undertaken with the scope of the functions of committee, provided the committee operates pursuant to written by-laws. S.C. Code §40-71-20 protects all proceedings and information required by committee in performing its duties, although information or records that are otherwise available from original sources are not immune from discovery. The statute does not protect all results of committee's decision making process. *McGee v. Bruce Hosp.*, 312 S.C. 58, 439 S.E.2d 257 (1993).

Immunity. Statute which limited liability of charitable hospital to \$100,000 violated equal protection in light of another statute with \$200,000 limitation for all other charitable organizations. *Hanvey v. Oconee Mem. Hosp.*, 308 S.C. 1, 416 S.E.2d 623 (1992). Now, immunity of certain hospitals discussed under South Carolina Tort Claims Act. See S.C. Code §15-78-10 to -200. S.C. Code §33-56-180 limits liability of any charitable organization to \$300,000 and allows judgment against its employees for reckless, willful or grossly negligent conduct.

Liens. In South Carolina, the doctrine of n necessities requires creditors to first seek recovery against spouse who incurred the necessary expense before the creditor proceeds against other spouse. *Anderson Mem. Hosp. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994).

HUSBAND AND WIFE

See Law Digest Tables.



Dower and Curtesy. Wife's common law right to dower and husband's right to curtesy declared unconstitutional. *Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (1984).

Divorce. Granted only after residence for one year upon following grounds: adultery; desertion for period of one year; physical cruelty; habitual drunkenness; provided, this ground is construed to include habitual drunkenness caused by use of any narcotic drug, and living separate and apart without cohabitation for period of one year. Plea of res judicata or recrimination with respect to any other provision of this section shall not bar obtaining divorce on ground of living separate and apart without cohabitation. S.C. Code §§20-3-10, 20-3-30.

Interspousal Immunity. No husband or wife shall be required to disclose any confidence or, in a criminal proceeding, any communication made by one to the other during their marriage, except in certain suits, actions or proceedings involving children/minors. S.C. Code §19-11-30. The exemption against disclosure by a spouse is a privilege of the testifying spouse, and is unaffected by any objection of the other spouse. *State v. Motes*, 264 S.C. 317, 215 S.E.2d 190 (1975). Suits between the spouses allowed.

Loss of Consortium. A person may recover for loss of companionship, aid, society and services of spouse. S.C. Code §15-75-20. Punitive damages are not recoverable on a loss of consortium claim.

Marriage. Married woman may sue and be sued as if unmarried. S.C. Code §15-5-170.

Marital Property. Property acquired during marriage is marital except property received by inheritance, devise, bequest, or gift to one spouse. S.C. Code §20-7-473(1). Neither husband nor wife is liable for the other's debts. S.C. Code §§20-5-30, 20-5-60. A spouse may be held individually liable for medical benefits furnished to other spouse. *Ateyeh v. Volkswagen of Florence*, 288 S.C. 101, 341 S.E.2d 378 (1986).

Right to Sue Each Other in Tort. Wife may maintain action in tort against her husband for willfully beating her, *Prosser v. Prosser*, 114 S.C. 45; 102 S.E. 787 (1920); and for injuries sustained in automobile accident, *Pardue v. Pardue*, 167 S.C. 129, 166 S.E. 101 (1932).

INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

Parental Liability. Parents are liable for intentional acts of their minor children if they knew or should have known of their child's dangerous propensities and fail to

take reasonable steps to avoid harm caused by child. *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973).

INLAND MARINE

No statute or case law.

LARCENY

Action of bailee hiring automobile and failing to return it held to be "theft" within meaning of theft policy, in view of Criminal Code which declares that breach of trust with fraudulent intent shall be held to be larceny: *Simpson v. Palmetto Fire*, 145 S.C. 405, 143 S.E. 184 (1928); *Simpson v. General Exch.*, 155 S.C. 400, 152 S.E. 672 (1930).

Mere disappearance of cotton from warehouse is not sufficient to warrant recovery upon indemnity policy of caretaker providing against loss by "fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction, or willful misapplication." *Salley v. Globe Indem.*, 133 S.C. 342, 131 S.E. 616 (1926).

LIABILITY INSURANCE

Cancellation. Insurer who wishes to cancel or refuse to renew an automobile policy must deliver notice to the named insured, stating an effective date at least fifteen days from the date of delivery. S.C. Code Ann. §38-77-120.

Compromise of Claims. Insurer must exercise good faith and reasonable care when considering offer by insured to settle third-party claim within policy limits. *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933). Liability insurer may settle claims in good faith with some claimants even if such settlements reduce amount available to others. *Hartford Cas. v. Dodd*, 416 F. Supp. 1216 (D. Md. 1976), *aff'd*, 568 F.2d 773 (4th Cir. 1978). If insured can demonstrate bad faith or unreasonable action by insurer in processing a claim under the insurance contract, then insured can recover consequential damages, and actual damages are not limited by contract. Furthermore, punitive damages can be recovered if insured can demonstrate insurer's actions were willful or in reckless disregard of insured's rights. *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618 (2003) (citing *Nichols v. State Farm*, 279 S.C. 336, 306 S.E.2d 616 (1983)).

Contribution. South Carolina recognizes contribution among joint and severally liable tortfeasors. The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. S.C.



Code §15-38-20. S.C. Code §15-38-20 does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the indemnity obligor is not entitled to contribution from the obligee for any portion of the obligor's indemnity obligation. *Id.*

Cooperation of Insured in Defense of Action. Duty to notify insurer: Most policies written in this State provide that insured shall give notice of and shall cooperate fully with insurer in defense of any action. This condition is generally held to be continuing warranty, breach of which by insured will cause policy to be voidable at instance of insurer. *Tucker v. State Farm*, 232 S.C. 615, 103 S.E.2d 272 (1958); *Meehan v. Commercial*, 166 S.C. 496, 165 S.E. 194 (1932). No statement made by insured or on his behalf and no violation of policy shall defeat or void any policy certified under Motor Vehicle Financial Responsibility Act. S.C. Code §56-9-20(5)(b)(3). Injured party does not have to rely on insured to give notice of lawsuit to insurer. Injured party can do so. If insured fails to cooperate to the prejudice of the insurance company, those acts may relieve the company of its obligation to insured, but not to the mandatory minimum coverage to an innocent third party. *Cowan v. Allstate*, 357 S.C. 625, 594 S.E.2d.275 (2004).

Burden on Insurer. Insurer must show substantial prejudice due to failure to cooperate. *Cook v. State Farm*, 235 S.C. 452, 112 S.E.2d 241 (1960). Insurer seeking to deny liability on basis of failure to notify insurer of accident must show substantial prejudice from insured's failure to notify or forward the suit papers within reasonable time. *Squires v. National Grange*, 247 S.C. 58, 145 S.E.2d 673 (1965).

Construction of Terms. A court will construe contract exclusion provisions in favor of insured when the exclusion is ambiguous. *S.C. Farm Bureau Mut. Ins. Co. v. Courtney*, 349 S.C. 366, 563 S.E.2d 648 (2002).

Defense of Action. See *American Mut. v. Sloan*, 190 S.C. 252, 2 S.E.2d 796 (1939). Insurer's exercise of its right and duty to control defense until such time as it was determined there was no liability insurance coverage does not constitute waiver of its reservation of right. *Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 193 S.E.2d 527 (1972). Insured, in bringing action against insurer under uninsured motorist endorsement, must give insurer proper notice of institution of suit. Such notice requires service of complaint upon carrier. Burden of proving excuse for non-performance by insured of policy provisions is on insured. *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 188 S.E.2d 459 (1972).

Duty to Defend. Insurer has no duty to defend when liability is excluded from coverage. *Engineered Prod-*

ucts v. Aetna, 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988). Because of ambiguity in policy, insurer not relieved of its duty to defend even though it tendered the policy limits. *Nationwide v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993). Underinsured carrier lacks standing to enforce duty to defend on liability carrier. *Nationwide v. Tate*, 313 S.C. 444, 438 S.E.2d 266 (Ct. App. 1993).

Joinder of Insurer with Tortfeasor. Allowed where insured is common carrier, *Dobson v. American Indem.*, 227 S.C. 307, 87 S.E.2d 869 (1955); and where city ordinance requires taxi to have insurance, *Bryant v. Blue Bird Cab*, 202 S.C. 456, 25 S.E.2d 489 (1943), even though accident occurred beyond city limits. *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946); but see *Watts v. Baker*, 233 S.C. 446, 105 S.E.2d 605 (1958). Insurer may not be joined with insured when insured is owner of private motor vehicle privately used. *Cox v. Employers Liab. Assur. Corp.*, 191 S.C. 233, 196 S.E. 549 (1938); *Brown v. Quinn*, 220 S.C. 426, 68 S.E.2d 326 (1951); see also, *Bartell v. Willis Constr. Co.*, 259 S.C. 20, 190 S.E.2d 461 (1972).

Jury. See S.C. Rules of Evidence Rule 411. Improper in most cases for plaintiff to divulge fact of liability insurance before jury. *Horsford v. Carolina Glass*, 92 S.C. 236, 75 S.E. 533 (1912); see *McLeod v. Rose*, 231 S.C. 209, 97 S.E.2d 899 (1957) (concerning defendant's divulging same).

Non-Waiver Agreements. Held valid in *Edgefield Mfg. Co. v. Maryland Cas.*, 78 S.C. 73, 58 S.E. 969 (1907), which stated insurance company can defend insured without waiving policy coverage questions.

Punitive Damages. Mere fact that punitive damages had been awarded in action against insured and that liability policy covered negligence and not intentional acts would not exonerate insurer from liability to tort victim. *Pennsylvania Threshermen & Farmers' Mut. v. Thornton*, 244 F.2d 823 (4th Cir. 1957). Violation of statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence that defendant acted recklessly, willfully, and wantonly. If evidence shows defendant violated a statute, the jury must determine issue of punitive damages. *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993).

Rights of Injured Party Against Insurer. Under liability policy injured party, by complying with policy terms, may bring action against insurer. *Meehan v. Commercial*, 166 S.C. 496, 165 S.E. 194 (1932), but insurer will not be liable where insured would not be liable. *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940). Where policy is one of indemnity injured party

may not bring action against insurer. *Young v. Smith*, 168 S.C. 362, 167 S.E. 669 (1933).

Statutory Provisions. All automobile policies written within state are subject to and dependent upon approval of the Department of Insurance. S.C. Code §§38-77-320. Every auto liability policy issued in this state must afford coverage to named insured, and while resident of same household, spouse of any such named insured and relative of either, while in motor vehicle or otherwise; and any person who uses vehicle with consent of named insured and guest in motor vehicle. Residents, other than named insured, can be excluded from policy if done by special agreement. S.C. Code §§38-77-30, -340. Required coverage does not extend to girlfriend of son of named insured without consent, *Southern Farm Bureau v. Hartford*, 255 S.C. 427, 179 S.E.2d 454 (1971), nor to relative of named insured while driving automobile not listed in policy. *Willis v. Fidelity & Cas. Co.*, 253 S.C. 91, 169 S.E.2d 282 (1969) (grandson); *Crenshaw v. Preferred Risk Mut. Ins. Co.*, 259 S.C. 302, 191 S.E.2d 718 (1972) (step-daughter).

Violation of Law. To defeat recovery, causative connection between violation of law and injury must be shown. *Reynolds v. Life & Cas.*, 166 S.C. 214, 164 S.E. 602 (1932); *McGee v. Globe*, 173 S.C. 380, 175 S.E. 849 (1934); *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

For Actions for recovery of real property see S.C. Code §15-3-310 to -380.

One Year. Against sheriff or other officer for escape of prisoner. S.C. Code §15-3-560.

Two Years. Libel, slander, or false imprisonment. Upon statute for forfeiture or penalty to State. S.C. Code §15-3-550. Two year statute of limitations does not apply to tort of intentional infliction of emotional distress. *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (applying a six year statute of limitations). For medical malpractice involving foreign object left in body, action must be commenced two years from discovery or when reasonably discoverable. S.C. Code §15-3-545.

Three Years. Against sheriff, coroner, or constable, upon liability incurred for act or omission in his official capacity, including non payment of money collected upon execution, but not for escape. S.C. Code §15-3-540. 1) Upon statute for penalty or forfeiture where action is given to party aggrieved, or to party and state, except where statute imposes different limitation. S.C. Code §15-3-540. 2) Medical malpractice actions shall be

commenced within 3 years from date of treatment, omission, or operation, giving rise to cause of action or 3 years from date of discovery or when it reasonably ought to have been discovered, not to exceed 6 years from date of occurrence. S.C. Code §15-3-545. If action arising on or after April 5, 1988 for leaving foreign object in body, must be commenced two years from discovery or when reasonably discoverable, but in no event shall limitation be less than three years from date foreign object was left in body. S.C. Code §15-3-545(B).

Three Years or Six Years. Six years if cause of action arising prior to April 5, 1988. Three years if arising on or after April 5, 1988. Upon contract, obligation, or liability, express or implied (except those provided for in S.C. Code §15-3-520); upon liability created by statute, other than penalty or forfeiture; for trespass upon or damage to real property; for taking, detaining, or injuring goods and chattels, including specific recovery of personal property; for assault, battery, or any injury to person or rights of another, not arising on contract, and not enumerated by law; for relief on ground of fraud, but cause of action shall not be deemed to have accrued until discovery of facts constituting the fraud; upon policies of insurance, either fire or life, from date of loss or accrual of cause of action, any clause, condition, or limitation in policy to contrary notwithstanding. S.C. Code §15-3-530. Action under S.C. Code §§15-51-10 to 15-51-60 for death by wrongful act, period begins to run upon death of person on account of whose death action is brought. S.C. Code §15-3-530. Intentional infliction of emotional distress. *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981).

Twenty Years. Upon bond, or other contract in writing, secured by mortgage of real property; action upon a sealed instrument. S.C. Code §15-3-520.

Improvements to Real Property. For actions based upon defective or unsafe condition of improvement to real property, there is a thirteen-year statute of repose for all improvements completed prior to July 1, 2005. For all improvements completed after July 1, 2005, there is an eight-year statute of repose. See S.C. Code §15-3-640.

Tolling. Statute providing for tolling of statute of limitations for all prisoners except those serving life sentences did not violate Equal Protection. *Mitchell v. Holler*, 311 S.C. 406, 429 S.E.2d 793 (1993). Provisions in Tort Claim Act providing tolling during a child's minority apply only to actions on or after March 14, 1933. However, failure to provide for tolling in earlier version of Act violated child's equal protection rights. *Green v. Lewis Truck Lines*, 315 S.C. 253, 433 S.E.2d 844 (1993). Six-year statute of repose in S.C. Code §15-3-545 was not tolled by the tolling statute found in S.C. Code §15-

3-30 when doctor was continuously absent from state. *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993).

Statutory and Case Law References. S.C. Code §15-3-545 provides a three-year statute of limitation for actions against any “licensed health care provider,” unless the person was a minor at the time giving rise to the cause of action. Red Cross does not fall under this term because the collection and processing of blood does not constitute providing health care to patients. Action against Red Cross for tainted blood is governed by six-year statute of limitations found in S.C. Code §15-3-530(5) if on or before April 5, 1988, or three-year if after April 5, 1988. Because wrongful death actions seek to recover damages for injury to the person, the three-year statute of limitations applies. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993).

MALPRACTICE

Informed Consent. South Carolina Court of Appeals rejected prudent patient standard for informed consent and adopted professional medical standard. *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984).

Hospitals. Receive statutory charitable immunity. S.C. Code §33-56-180 limits liability of any charitable organization to \$300,000 and allows judgment against its employees for reckless, willful or grossly negligent conduct. *Hanvey v. Oconee Mem. Hosp.*, 308 S.C. 1, 416 S.E.2d 623 (1992) (applied S.C. Code §33-55-210 with limit \$200,000). See “HOSPITALS.”

Medical Malpractice Insurance. South Carolina patients’ compensation fund is established to pay that portion of any participant’s medical malpractice or general liability claim, settlement or judgment which is in excess of one hundred thousand dollars per incident or in excess of three hundred thousand dollars in aggregate for one year. S.C. Code §38-79-420. Certain provider’s of health care services may participate in fund. S.C. Code §§38-79-440, 38-79-410.

Damages. For medical malpractice actions arising after July 1, 2005, S.C. Code Ann. §15-32-220 limits non-economic damages to \$350,000 per claimant against a single health care provider or institution. In medical malpractice actions multiple health care providers or institutions, the limit for non-economic damages for each provider or institution is \$350,000 per claimant, not to exceed a total of \$1,050,000 for each claimant. S.C. Code Ann. §15-32-220(C). These limitations do not apply to economic damages, punitive damages, or where defendant was willful, wanton, reckless, or grossly negligent and such conduct proximately caused claimant’s non-economic damages. S.C. Code Ann. §15-32-220(D)-(E).

Requirement of Expert Testimony. For actions arising after July 1, 2005 alleging professional negligence, an affidavit of a qualified expert must be filed with the Complaint. Expert affidavit must specify at least one negligent act or omission by each defendant and set forth a factual basis of each claim. S.C. Code Ann. §15-36-100. See S.C. Code Ann. §15-36-100(A) for the definition of a qualified expert. No affidavit is required if the subject matter lies within the ambit of common experience, so that no special knowledge is needed to evaluate the physician’s conduct. S.C. Code Ann. §15-36-100(C)(2).

Standard of Care. Standard of care for doctor or dentist is measured by national standard rather than by that of particular locality or geographic area. *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981) (applying standard “of an average, competent practitioner during the same or similar circumstances”); *Moultrie v. Medical Univ. of South Carolina*, 280 S.C. 159, 311 S.E.2d 730 (1984). National standard of care extended to include hospitals, nurses, and other health care professionals. *McMillan v. Durant*, 312 S.C. 200, 439 S.E.2d 829 (1993).

Legal Malpractice. See “ATTORNEYS.”

NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES”; “NO-FAULT.”

Age. In both primary and contributory negligent cases, minor’s conduct should be judged by standard of behavior to be expected of child of like age, intelligence, and experience under similar circumstances. If the child is fourteen years old or older then he or she is judged by the adult standard. *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (1982).

Assumption of Risk. The four requirements to establish this defense are 1) the plaintiff must have knowledge of the facts constituting a dangerous condition, 2) the plaintiff must know the condition is dangerous, 3) the plaintiff must appreciate the nature and extent of the danger, and 4) the plaintiff must voluntarily expose himself to the danger. No longer a complete defense to injured person’s negligence claim in most circumstances. A plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant. *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565 (1998), *aff’g*, 325 S.C. 507, 482 S.E.2d 569 (Ct. App. 1997).

Attractive Nuisance Doctrine. Owner and occupier of real property owe different standard of care to children than to adults. *Medlin v. United States*, 244 F.



Supp. 403 (D.S.C. 1965). Land proprietor is liable for injuries to children, whether licensees or trespassers, either where: 1) he brings or artificially creates something which is attractive and dangerous to children without taking reasonable pains to guard them, or 2) where dangerous thing, although not attractive nuisance, is left exposed so that children are likely to come into contact with it, is obviously dangerous to them, and reasonable pains are not taken to guard against injury. *Lynch v. Motel Enterprises, Inc.*, 248 S.C. 490, 151 S.E.2d 435 (1966). Liability will not be imposed under attractive nuisance doctrine where children went onto property for reasons other than temptation of very instrumentality which caused injury. *Kirven v. Askins*, 253 S.C. 110, 169 S.E.2d 139 (1969) (questioned by *Henson ex rel. Hunt v. Int'l Paper Co.*, 374 S.C. 375, 650 S.E.2d 74 (2007))).

Charitable Immunity. See HOSPITALS.

Comparative/Contributory Negligence. Doctrine of comparative negligence recognized in South Carolina for causes of action arising on or after July 1, 1991. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). For earlier cases, contributory negligence doctrine still applies.

Damages - Punitive. Clear and convincing evidence of reckless, willful, wanton or malicious conduct is required to receive punitive damages. *Mellen v. Lane*, 327 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); See also *Gilbert v. Duke Power Co.*, 255 S.C. 495, 179 S.E.2d 720 (1971). Violation of a statute is some evidence that defendant acted recklessly, willfully and wantonly, though the violation does not constitute recklessness, willfulness, and wantonness per se. *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993). *But see State v. Rowell*, 321 S.C. 114, 467 S.E.2d 247 (Ct. App. 1995) (declining to extend *Wise* holding to criminal recklessness).

Governmental Immunity. Under Tort Claims Act, a governmental entity is not liable for loss that results from the entity's failure to enforce any law that it has adopted. An ordinance creates a special duty of care towards individual members of the general public when an essential purpose of the ordinance is to protect against a particular kind of harm; the ordinance imposes such a duty on a specific public officer; the class of persons that the statute intends to protect is identifiable before the fact; the plaintiff is a person within the protected class; the public officer knows of harm to members of the class if he fails to do his duty; and the officer is given sufficient authority to act or undertakes to act in the exercise of his office. *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993).

Imputed Negligence. Negligence of driver cannot be imputed to guests. *Bober v. Southern*, 151 S.C. 459,

149 S.E. 257 (1929), unless they are engaged in common enterprises, *Funderburk v. Powell*, 181 S.C. 412, 187 S.E. 742 (1936).

Joint and Several Liability. Prior to July 1, 2005, each joint tortfeasor was wholly responsible to plaintiff. Plaintiff could collect entire judgment from one tortfeasor. Tortfeasors would have right to pursue other tortfeasors for contribution pursuant to Contribution Act. For claims arising on or after July 1, 2005, if a Defendant is found to be less than fifty percent at fault, that Defendant is only liable for the Defendant's percentage of the damages. Joint and several liability still applies to any defendant who is responsible for fifty percent or more of the combined fault of all defendants and the plaintiff. This limit on joint and several liability does not apply to defendants whose conduct is determined to be willful, wanton, reckless, grossly negligent or intentional. S.C. Code Ann. §15-38-15.

Last Clear Chance Doctrine. No longer followed in South Carolina. The doctrine has been subsumed within the comparative negligence analysis. *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998).

Limitations on Awards. South Carolina Tort Claims Act. Governmental entity is not liable for punitive damages. S.C. Code §15-78-120(b). Governmental liability is limited to \$300,000 per person and \$600,000 per occurrence. S.C. Code §15-78-120(a). Cap on noneconomic damages of \$350,000.00 in medical malpractice for claims arising on or after July 1, 2005. S.C. Code §§15-32-200, to -240.

Liquor Liability/Dram Shop Act. No person or establishment shall sell alcoholic liquors to an intoxicated person. S.C. Code §61-6-2220 (repealing S.C. Code §61-5-30). While violation of this statute is negligence per se, certain defenses which break the causal link may be asserted by defendant. *Tobias v. The Sports Club, Inc.*, 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996).

Negligence Per Se. Violation of a safety statute or regulation is negligence per se. *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982).

No-Fault Automobile Insurance. There is no personal injury protection coverage mandated under automobile insurance laws of this State. If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage shall not be assigned or subrogated and is not subject to a setoff. S.C. Code §38-77-144.

Parental Immunity. Common law doctrine of parental immunity has been abolished in South Carolina. *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980).



Premises Liability. Owner/occupier must use due care to insure that persons outside his premises are not injured by activities on his premises. *Humphries v. Union & Glenn Springs R.R.*, 84 S.C. 202, 65 S.E. 1051 (1909).

Proximate Cause Doctrine. Negligence to be actionable must be the proximate cause of the injury. *Lewis v. Seaboard*, 167 S.C. 204, 166 S.E. 134 (1932); *Crawford v. Atlantic*, 179 S.C. 264, 184 S.E. 569 (1936).

Res Ipsa Loquitur. The doctrine is not recognized in South Carolina. *Bellamy v. Hardee*, 242 S.C. 71, 129 S.E.2d 905 (1963). However, negligence may be established by circumstantial evidence. *Gantt v. Columbia Coca-Cola*, 193 S.C. 51, 7 S.E.2d 641 (1940). If the thing which causes injury is shown to be under management of defendant, and accident is such that it would not ordinarily occur if defendant used proper care, such circumstances afford reasonable evidence, in absence of explanation by defendant, that accident arose from lack of proper care. *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 149 S.E.2d 761 (1966).

Sovereign Immunity. South Carolina Supreme Court abolished doctrine of sovereign immunity. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). The Court did not abolish the immunity applicable to legislators, judiciary, and public officials vested with discretionary authority, for action taken in their official capacity. *Id.* The doctrine is now controlled by the South Carolina Tort Claims Act. S.C. Code §15-78-10 *et seq.*

Sudden Emergency. Sudden emergency, or imminent peril, is not a defense in and of itself; it is merely a portion of the overall charge of the law of negligence and is charged to the jury in a proper case merely for the assistance of the jurors in applying the basic law of negligence. *Wiggins v. Thomas*, 264 S.C. 360, 215 S.E.2d 426 (1975).

NO FAULT INSURANCE

See "AUTOMOBILES".

PENALTY AND ATTORNEY FEES

If insurer refuses to pay claim and the refusal was without reasonable cause or in bad faith, the insurer is liable to insured for the amount recoverable plus reasonable attorneys' fees. The amount of attorneys' fees may not exceed one-third of the amount of judgment. S.C. Code §38-59-40(1).

PRIVILEGED COMMUNICATIONS

Attorney/Client. Communications are privileged. *Drayton v. Industrial Life & Health*, 205 S.C. 98, 31 S.E.2d 148 (1944).

Clergy/Penitent. Clergy are not required to disclose confidential communications of penitent. S.C. Code §19-11-90.

Spousal. See "HUSBAND AND WIFE, interspousal immunity."

PRODUCTS LIABILITY

Elements. In products liability action plaintiff must establish three elements, regardless of theory on which he seeks recovery: 1) that he was injured by product; 2) that product at time of the accident was in essentially same condition as when it left hands of defendant; and 3) that injury occurred because product was in defective condition unreasonably dangerous to the user. *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

Foreseeability of Injury. Manufacturer is expected to reasonably foresee only injuries arising in course of such use and to anticipate reasonably foreseeable risks inherent in proper use for which product is manufactured. *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. 1971). Intervening negligence of third person will not relieve original wrongdoer of responsibility if such intervention should have been foreseen in exercise of reasonable care. *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969). If injury is one that follows breach in usual course of events, there is sufficient reason for defendant to foresee it. *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 188 S.E.2d 841 (1972).

Negligence. Plaintiff must prove defect and that such was proximate cause of injury. *Campbell v. Robbins Tire & Rubber Co.*, 256 S.C. 230, 182 S.E.2d 73 (1971). Defect complained of must be shown to have existed at time of sale. *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969). Neither extended lapse of time nor changes in ownership will be sufficient alone to defeat recovery in products liability case when clear evidence of original defect exists. *Id.*

Privity of Contract. Not required in tort action. *Saladin v. Tellis Pharmacy*, 247 S.C. 267, 146 S.E.2d 875 (1966).

Sophisticated User Defense. Manufacturer has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to a learned intermediary or sophisticated user. *Bragg v. Hi-Ranger Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

Strict Liability. S.C. Code §§15-73-10 to 15-73-30 adopts Restatement (Second) of Torts §402A. Recovery under 402A is limited to personal injuries and property damage other than damage to defective goods which was caused by their defective condition. Strict liability in tort was not recognized in common law of this State prior to enactment of statutes, which operate prospectively only.



Hatfield v. Atlas Enterprises, Inc., 274 S.C. 247, 262 S.E.2d 900 (1980). A product is not defective for failure to warn of the obvious. *Dema v. Shore Enterprises*, 312 S.C. 528, 435 S.E.2d 875 (Ct. App. 1993). Recovery is barred under strict liability if the user discovers a defect and is aware of its danger and proceeds unreasonably. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994). A seller is not required to warn about products when the danger is generally known and recognized. *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 471 S.E.2d 708 (Ct. App. 1996).

Warranty. Recovery cannot rest on presumption arising from mere accident itself or any doctrine of *res ipsa loquitur*. Must show proof of defect and reasonable probability that such was cause of injury. *Brown v. Ford Motor Co.*, 287 F. Supp. 906 (D.S.C. 1963). S.C. Code §36-2-318 extends seller's warranty expressed or implied to any natural person who uses or may be expected to use. S.C. Code §36-2-318 has been extended to include corporations. *JKT Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980) (partially overruled on other grounds by 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990)).

RELEASE

See Law Digest Tables.

Construction. Construction of release as to actual intent of parties presents question of fact to be determined from surrounding conditions and circumstances and construed with reference to amount of consideration paid and language of release itself. *Hilton v. Duke Power Co.*, 254 F.2d 118 (4th Cir. 1958).

Contractual Effect. Release of liability held to be contract and governed by general rules of contract. *Johnson v. Charleston & Savannah Ry. Co.*, 58 S.C. 488, 36 S.E. 851 (1900). It will be void where mental incapacity is shown. *Treadway v. Union Buffalo Mills Co.*, 84 S.C. 41, 65 S.E. 934 (1909). Fraud in its procurement will avoid release. *Thompson v. Bass*, 167 S.C. 345, 166 S.E. 346 (1932). If not supported by consideration release of future liability on payment of benefits accrued is not binding. *Sutton v. Continental*, 168 S.C. 372, 167 S.E. 647 (1933). When consideration is paid for release, it cannot be attacked without offer to return consideration paid. *Cook v. Hartford*, 168 S.C. 283, 167 S.E. 148 (1932); *Lawrence v. Durham Life*, 166 S.C. 203, 164 S.E. 632 (1932). Doctrine of mutual mistake of fact may serve as ground for rescission of release for personal injuries. *Herndon v. Wright*, 257 S.C. 98, 184 S.E.2d 444 (1971).

Covenant Not to Sue. Label which parties give to settlement instrument is not controlling as to whether such instrument is covenant not to sue or true release,

nor is terminology used necessarily controlling. *Ayers v. Pastime Amusement Co.*, 240 F. Supp. 811 (D.S.C. 1965). Settlement with and release of one tortfeasor in which right is expressly reserved against other tortfeasors is not technically a release but is covenant not to sue. *McWhirter v. Otis Elevator Co.*, 40 F. Supp. 11 (D.S.C. 1941).

Effect on Other Tortfeasors. Release of one joint tortfeasor does not release others who wrongfully contributed to plaintiff's injuries unless this was intention of parties, or unless plaintiff has, in fact, received full compensation amounting to satisfaction. *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971) (superseceded by statute as stated in *Lloyd's, Inc. v. Good*, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991)).

REPRESENTATIONS AND WARRANTIES

Answers to questions concerning the health of an applicant for life insurance are representations and not warranties, and such answers, even if false, will not void the policy unless they are material to the risk, known by the applicant to be false, made with the intent to mislead the insurer and are relied upon by the insurer as the basis for the issuance of the policy. *Small v. Coastal States Life Ins. Co.*, 241 S.C. 344, 128 S.E.2d 175 (1962).

SERVICE OF PROCESS

See Law Digest Tables.

Corporations. Registered agent appointed by any domestic corporation shall be agent of such corporation for service of any process and this service will be binding upon corporation. If corporation fails to appoint registered agent or if agent cannot be located, the corporation can be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. S.C. Code §15-9-210.

Non-Resident Motorists. Non-resident accepting rights and privileges conferred by laws in force in this state permitting operation of motor vehicles shall be deemed equivalent to appointment by such non-resident of Director of Department of Public Safety as his agent for service of process.

Foreign Insurers. Service of process upon qualified foreign insurer shall be effectuated by service upon Director of Dept. of Insurance. Secretary of State shall be agent for service of process upon unauthorized insurer. S.C. Code §§15-9-270 - 280 and 38-25-510 to -530.

Personal Service. Service of process in cases not mentioned above are covered in S.C. Code §15-9-210 *et seq.*

By Mail. Service by mail return receipt requested satisfied rule when receipt showed pleadings not deliv-



ered to agent designated for service. Defendant must show receipt signed by unauthorized person. *Roche v. Young Brothers*, 318 S.C. 207, 456 S.E.2d 897 (1995) (reversed on other grounds by 332 S.C. 75, 504 S.E.2d 311 (1998)).

Tolling of Statute of Limitations. Plaintiff may toll statute of limitations by delivering pleadings to sheriff for service, and Section 3(b) of the South Carolina Rules of Civil Procedure is not limited to absent defendants even though the heading of the section refers to absent defendants. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993).

Effect of Service. A civil action is commenced when summons and complaint are filed with the clerk of court if 1) summons and complaint are served within the prescribed statute of limitations in any manner prescribed by law; or 2) if not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing. S.C.R.C.P. 3(a).

SUBROGATION

Under South Carolina law, subrogation is equitable right and will be enforced or not according to dictates of equity and good conscience, and arises independently of contract provisions. *Bank of Fort Mill v. Lawyers Title Ins. Corp.*, 268 F.2d 313 (4th Cir. 1959). The essential elements of right of subrogation are: 1) that the party claiming it has paid debt, 2) that he was not a volunteer, but had direct interest in discharge of debt or lien, 3) that he was secondarily liable for debt or for discharge of lien, and 4) that no injustice will be done to other party by allowance of equity. *Dunn v. Chapman*, 149 S.C. 163, 146 S.E. 818 (1929). Insurance company, paying loss under its policy and becoming subrogated to insured's rights against tortfeasor whose act caused loss, should properly enforce its right of subrogation by suit in name of insured for benefit of insurer. *Mobile v. Columbia & Greenville R.R. Co.*, 41 S.C. 408, 19 S.E. 858 (1894). See generally, *Globe v. Foil*, 189 S.C. 91, 200 S.E. 97 (1938) (overruled in part on other grounds).

Defendant may not set up in his/her answer that plaintiff has been paid for part of loss by insurance company, thereby showing that action is for benefit of plaintiff and insurer. *Pringle v. Atl. Coast Line R.R. Co.*, 212 S.C. 303, 47 S.E.2d 722 (1948).

Insurer may not enforce its subrogation rights against another insurer who has settled case without complying with "no action" clause of latter's policy. *Travelers Indem. Co. v. Canal Ins. Co.*, 254 S.C. 92, 173 S.E.2d 656 (1970).

Under South Carolina Uninsured Motorist Statute, insurer is subrogated not only against uninsured motor-

ist, but against all persons causing injury. However, subrogation not allowed beyond minimum limits. *Senn v. J. S. Weeks & Co.*, 255 S.C. 585, 180 S.E.2d 336 (1971).

Right of beneficiary of life policy, which insured assigned as security for debt, to be subrogated to creditor's claim against insured's estate for amount paid to creditor out of proceeds of policy depends primarily upon intention of insured as disclosed by facts of particular case. *Murphy v. Murphy*, 259 S.C. 147, 190 S.E.2d 735 (1972).

WAIVER AND ESTOPPEL

The distinction between waiver and estoppel is stated as follows: "Waiver is intentional relinquishment of known right, while essential elements of estoppel are ignorance of party who invokes estoppel, representations or conduct of party estopped which mislead, and innocent and deleterious change of position in reliance on such representations or conduct." *Harvey v. Philadelphia*, 131 S.C. 405, 127 S.E. 836 (1925). Elements of both waiver and estoppel are factual and present jury questions; juries and Courts are very prone to decide these questions in favor of insured. Defense of estoppel is affirmative defense which must be plead. *Lindler v. Baker*, 280 S.C. 130, 311 S.E.2d 99 (Ct. App. 1984).

Incontestability. All companies that issue life insurance policies shall after two years from date of policy be deemed to have waived right to dispute truth of application for insurance except as to age or sex of applicant. S.C. Code §38-63-220(d) and (e). This provision does not apply to incontestability of health and accident insurance. *Culbreth v. Prudence Life Ins. Co.*, 241 S.C. 46, 127 S.E.2d 132 (1962).

Waiver of Lapse Provision in Insurance Policy. When insurance company received payment for month of January and was on actual notice of non payment of previous month's premium, retention of January premiums operated as waiver of insurance company's right to lapse policy. *Greene v. Durham Life Ins. Co.*, 287 S.C.197, 336 S.E.2d 478 (1985).

Waiver cannot create coverage and bring into existence something not covered in insurance policy. *Alverson v. Minnesota Mut.*, 287 S.C. 432, 339 S.E.2d 140 (Ct. App. 1985).

WORKERS' COMPENSATION

See Law Digest Tables.

See S.C. Code §42-1-10 *et seq.*

Jurisdiction. When there is a pending employee claim for compensation, the exclusive jurisdiction to determine questions concerning cancellation, coverage, and construction of insurance contracts is in the commis-

sion. S.C. Code §42-3-180. When there is no pending employee claim the commission lacks jurisdiction to decide such questions. The commission is never a proper forum for a bad faith/wrongful cancellation action. *La-boureur v. Harleysville Mut.*, 302 S.C. 540, 397 S.E.2d 526 (1990).

Statutory Reference. The employment status of an injured worker, as it affects jurisdiction, is a matter of

law for the court to resolve. Whether an employee is a statutory employee is governed by S.C. Code §§42-1-400, -130 *Wheeler v. Morrison Machinery*, 313 S.C. 440, 438 S.E.2d 264 (Ct. App. 1993). An employer and employee's underinsurance carriers may offset workers' compensation benefits received by an employee. *Williamson v. U.S. Fire Ins.*, 314 S.C. 215, 442 S.E.2d 587 (1994).

