SOUTH CAROLINA

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I. MECHANICS' LIEN BASICS

A. Requirements

S.C. Code Ann. Sections 29-5-10 to 29-5-440 provide for and govern mechanics' liens on private projects in South Carolina. A mechanics' lien may be filed by a contractor, subcontractor, laborer, or supplier who, *with the owner's consent*, performs work to improve buildings or structures on real property. This right has been statutorily extended to surveyors, real estate professionals and those providing landscape services.[1] The purpose of the lien is to allow such a contractor, subcontractor, laborer, or supplier to obtain a security interest on the improved property, and to force the sale of the property in order to secure payment for the improvements. The failure to perfect a mechanic's lien under the statute does not preclude an action on the debt.[2]

The right to a lien "arises inchoate," which is to say that the right exists, but the lien has not been perfected.[3] In order to perfect a mechanics' lien, a contractor who has contracted directly with the owner must:

(1) Serve on the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the loan amount and a description of the real property.[4] As only licensed or registered contractors may file a mechanics' lien, the contractor must record his contractor license or registration number on the lien document when it is filed.[5] These documents must be filed within ninety days after the contractor ceases to labor or furnish labor or materials.[6]
(2) Commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property; and
(3) File a notice of the pending action (Lis pendens) within six months after ceasing to provide labor or materials for such real property.[7]

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[1] See S.C. Code Ann. §§ 29-5-21 and 29-5-26.
[2] *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 631 S.E.2d 252 (2006).
[3] *Id.*
[4] *Id*.
[5] S.C. Code Ann. § 29-5-15(A).
[6] S.C. Code Ann. § 29-5-90.
[7] *Butler Contracting, Inc.*, 369 S.C. at 129.

A subcontractor or supplier who has not contracted directly with the owner must also send to the general contractor and owner,[8] via registered or certified mail, a Notice of Mechanics' lien that provides the following information:

(1) the name of the subcontractor or supplier who claims payment;
(2) the name of the person with whom the claimant contracted or by whom he was employed;
(3) a description of the labor, services, or materials furnished and the contract price or value thereof;
(4) a description of the project where labor services, or materials were used sufficient for identification;
(5) the date when the first and last item of labor or service or materials was actually furnished or scheduled to be furnished; and
(6) any amount claimed to be due, if any.[9]

The date on which a supplier ceases furnishing labor or materials for improvements to a building or structure is the trigger for determining when the supplier must serve and file a notice or certificate of a mechanic's lien, commence a lawsuit to enforce the lien, and file a lis pendens.[10] After properly providing notice, a subcontractor is entitled to be paid in preference to the contractor "at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice."[11] "In other words, 'payment by the owner to the general contractor after the owner has received notice of the lien is made at the owner's peril, as it will not effect [sic] the amount recoverable by the party with the mechanics' lien.'"[12] However, the mechanics' lien is limited to the amount of the unpaid balance at the time the owner receives the notice, so the timing of the notice does affect the amount of the potential lien.[13]

B. Enforcement and Foreclosure

Foreclosure of a mechanics lien is an action at law.[14] The suit must be filed in the Court of Common Pleas of the County in which the property is located, and must consist of a summons, a notice of lis pendens, and a complaint. The complaint must include a statement of the amount due, a description of the premises, and a prayer for relief requesting sale of the premises and distribution of the proceeds. Failure to timely file a foreclosure action can result in dissolution of the lien but

[8] S.C. Code Ann. § 29–5–40; *Ferguson Fire and Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 762 S.E.2d 561 (2014) ("When the person claiming the lien was employed by someone other than the owner, he must give written notice to the owner of the furnishing of labor or material in order for the lien to attach to the property").
[9] S.C. Code Ann. § 29-5-20.
[10] *Ferguson Fire and Fabricators, Inc.*, 409 S.C. at 341.
[11] S.C. Code Ann. § 29-5-50.
[12] *Action Concrete Contractors, Inc. v. Chappelear*, 404 S.C. 312, 745 S.E.2d 77 (2013) (quoting *Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 412, 450 S.E.2d 101, 106 (Ct. App. 1994)).
[13] *Stovall Bldg. Supplies, Inc. v. Mottet*, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990).
[14] *Cohen's Drywall Co. Inc. v. Sea Spray Homes, LLC*, 374 S.C. 195, 648 S.E.2d 598 (2007).

only if it is formally dismissed through Court order, affidavit of the bondholder's attorney or defendant's attorney.[15]

A party who files suit to enforce a mechanics' lien is entitled to a jury trial. If a lien is established in such an action, the party is entitled to sell the real property to which the lien attaches. The sale may be subject to, and inferior to, prior liens and properly recorded mortgages.[16] However, if the lien is perfected by a subcontractor or supplier, the amount which may be recovered from the owner is limited to the amount owed by the owner to the contractor.[17] While the subcontractor and supplier's liens have preference over those of a contractor,[18] if the amount owed to the contractor is insufficient to pay all perfected liens, the lienholders will be required to pro-rate their recovery.[19]

The prevailing party in an action to enforce a mechanics' lien is entitled to recover attorneys' fees. The determination of the prevailing party is established in S.C. Code Ann. § 29-5-10 and 20 and is based on the exchange of offers and demands prior to trial. However, the amount of the fee may not exceed the amount of the lien.

C. Ability to Waive and Limitations on Lien Rights

To date, South Carolina courts have not directly addressed the issue of prospective waivers of liens. The Court of Appeals has referred in passing, however, to "conditional waivers."[20] In other settings, the courts have allowed a waiver of future rights provided the waiver is knowingly given, supported by consideration and bargained for. If a supplier fails to timely complete any of the steps to perfect and enforce a mechanics' lien, the lien is dissolved.[21]

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

South Carolina law mandates that when a "governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract."[22] The bond must be secured by cash or must be issued by a surety company licensed in the State with an "A"=" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability".[23] The governmental body may

[15] *See* S.C. Code Ann. § 29-5-120.
[16] *See* S.C. Code Ann. § 29-5-70.
[17] *See* S.C. Code Ann. § 29-5-60.
[18] S.C. Code Ann. § 29-5-50.
[19] S.C. Code Ann. § 29-5-60.
[20] *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group*, *LLC*, 372 S.C. 89, 99 641 S.E.2d 459 (Ct. App. 2007).
[21] S.C. Code Ann. § 29–5–90.
[22] S.C. Code Ann. § 29-6-250.
[23] *Id.*

not exact that the labor and material payment bond be furnished by a particular surety company or through a particular agent or broker.[24]

Every person who has furnished labor, material, or rental equipment to a bonded contractor or its subcontractors in the prosecution of work provided for in any contract for construction, and who has not been paid in full before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material or rental equipment was furnished or supplied by him for which such claim is made, shall have the right to sue on the payment bond for the amount, or the remaining balance, unpaid at the time of the institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him.[25] Subcontractors and others who do not contract directly with the government can seek payment through such payment bonds, which general contractors are required to provide for state projects.[26]

1. Notices and Enforcement

The duty to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form lies with the entity contracting for the improvement.[27] A remote claimant shall have a right of action on the payment bond only upon giving written notice by certified or registered mail to the bonded contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which such claim is made.[28] After receiving the notice of furnishing labor, materials, or rental equipment, no payment by the bonded contractor shall lessen the amount recoverable by the remote claimant. Suppliers furnishing labor, material, and rental equipment to a bonded contractor or its subcontractors shall have the right to sue on the payment bond for the amount due upon expiration of ninety days after the last day on which labor or materials were furnished, and no suit on a payment bond shall be commenced after the expiration of one year after the last date on which labor or materials were furnished.[29]

B. Claims to Public Funds

South Carolina is one of several states that do not provide for private claims to public funds.

III. STATUTES OF LIMITATION AND REPOSE

The statutes of limitation that commonly apply in construction related litigation are the following:

A. Statutes of Limitations and Limitations on Application of Statutes

1. Contract for Sale (UCC) - 6 years.[30]

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[24] *Id.*
[25] S.C. Code Ann. § 29-5-440.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id*.
[30] S.C. Code Ann. § 36-2-725.

This does not alter the law of tolling of statute of limitations nor does it apply to causes of action which have accrued before the act became effective.

2. Contract action, obligation, or liability (express or implied) – 3 years.[31]

   This 3-year statute of limitations applies to all contractual obligations other than (a) an action upon a bond or other written contract secured by a mortgage on real property; or (b) an action upon a sealed instrument. The statute of limitations for these actions is the twenty (20) year period set forth in §15-3-520.

3. Actions for trespass upon or damage to real property – 3 years. [32]

4. Actions for injury to the person, property or rights of another (negligence) – 3 years. [33]

The "discovery rule" is applicable to actions under each of these provisions.[34] Under the discovery rule, the statute runs from the date the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.[35] "The exercise of reasonable diligence means an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right . . . has been invaded or that some claim against another party might exist."[36]

B. Statutes of Repose and Limitations on Application of Statutes

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than 8 years after substantial completion of the improvement.[37] An action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. an action to recover damages for breach of a contract to construct or repair an improvement to real property;

2. an action to recover damages for the negligent construction or repair of an improvement to real property;

3. an action to recover damages for personal injury, death, or damage to property;

[31] S.C. Code Ann. § 15-3-530(1).
[32] S.C. Code Ann. § 15-3-530 (3).
[33] S.C. Code Ann. § 15-3-530(5)
[34] S.C. Code Ann. § 15-3-535 (all actions, initiated under § 15-3-530(5) must be commenced within 3 years after a person knew or by exercise of reasonable diligence should have known that he had a cause of action).
[35] *McClain v. Jarrad*, 354 S.C. 218, 580 S.E.2d 763 (Ct. App. 2003).
[36] *Id., citing Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981).
[37] S.C. Code Ann. § 15-3-640.

4. an action to recover damages for economic or monetary loss;

5. an action in contract or in tort or otherwise;

6. an action for contribution or indemnification for damages sustained on account of an action described in this section;

7. an action against a surety or guarantor of a defendant described in this section;

8. an action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement;

9. an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.[38]

"Substantial completion" means "that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and owner."[39]

Unless the contractor and owner, by written agreement, establish a different date of substantial completion of an improvement, a certificate of occupancy issued by a county or municipality, in the case of new construction, or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion.[40]

Normal statutes of limitations continue to run within this 8-year statute of repose.[41]

This statute of repose does not in any way preclude a person from entering into a contractual agreement prior to the substantial completion of the improvement which extends any guarantee of a structure or component being free from defective or unsafe conditions beyond 8 years after substantial completion of the improvement or component.[42]

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[38] *Id.*
[39] S.C. Code Ann. § 15-3-630.
[40] S.C. Code Ann. § 15-3-640.
[41] *Id.*
[42] *Id.*

A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights to contract for a guarantee of the structure being free from defective or unsafe conditions beyond 8 years after substantial completion of the improvement.[43]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

A. Non-Residential Construction Defects

The claimant must serve a written notice of claim on the contractor, subcontractor, supplier, or design professional. The notice of claim must contain the following:

1. a statement that the claimant asserts a construction defect;

2. a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and

3. a description of the results of the defect, if known.

Within 15 days of receiving the claim, the contractor, subcontractor, supplier, or design professional must advise the claimant if the description of the claim or claims is not sufficiently stated and shall request clarification.[44]

The contractor, subcontractor, supplier, or design professional has 60 days from service of the initial notice of claim to inspect, offer to remedy, offer to settle with the claimant, or deny, in whole or in part, the claim regarding the defects. Within 60 days from the service of the initial notice of claim, the contractor, subcontractor, supplier, or design professional shall serve written notice on the claimant of the contractor's, supplier's, or design professional's election pursuant to this section. The claimant shall allow inspection of the construction defect at an agreeable time, during normal business hours, to any party, if requested. The claimant shall give the contractor, subcontractor, supplier, or design professional reasonable access to the property for inspection and if repairs have been agreed to by the parties, reasonable access to effect repairs. Failure to respond within 60 days is considered a denial of the claim.[45]

The claimant shall serve a response to the contractor's, subcontractor's, supplier's, or design professional's offer within 10 days of receipt of the offer.[46] If the parties cannot agree to settle the dispute pursuant to this article within 90 days after service of the initial notice of claim on the contractor, subcontractor, supplier, or design professional, the claim is considered denied and the claimant may proceed with a civil action or other remedy provided by contract or by law.[47]

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[43] *Id.*
[44] S.C. Code Ann. § 40-11-530.
[45] S.C. Code Ann. § 40-11-540.
[46] *Id.*
[47] *Id.*

If the claimant files a civil action or initiates an arbitration before first complying with the requirements of this article, on motion of a party to the action, the court or arbitrator shall stay the action until the claimant has complied with the requirements of this article.[48]

The claimant's written notice tolls the applicable statute of limitations and statute of repose pursuant to Title 15, Chapter 3, and an applicable warranty period for 120 days after the date the written notice is served upon the contractor, subcontractor, supplier, or design professional.[49] The protections afforded by these notice provisions do not limit the ability of a person to file and perfect a mechanic's lien, as discussed in Section I, above.[50]

B. Residential Construction Defects

In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than 90 days before filing the action, serve a written notice of claim on the contractor.[51] The notice of claim must contain the following:

1. a statement that the claimant asserts a construction defect;

2. a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and

3. a description of any results of the defect, if known.

The contractor or subcontractor shall advise the claimant within 15 days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.[52]

The contractor or subcontractor has 30 days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within 30 days is deemed a denial of the claim.[53]

The claimant shall serve a response to the contractor's offer, if any, within 10 days of receipt of the offer. If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.[54]

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[48] S.C. Code Ann. § 40-11-520.
[49] S.C. Code Ann. § 40-11-570.
[50] S.C. Code Ann. § 40-11-560.
[51] S.C. Code Ann. § 40–59–840.
[52] *Id*.
[53] S.C. Code Ann. § 40-59-850.
[54] *Id*.

If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.[55]

If the claimant files an action before first complying with the requirements of S.C. Code §§ 40-59-810 through 860 and this noncompliance forecloses the possibility of compliance with the statutes, then the claimant's action will be dismissed, and the claimants will be similarly barred from arbitrating the dispute.[56]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

In a recent opinion, the South Carolina Supreme Court modified its analysis as to how coverage should be determined under a CGL policy in a progressive damage situation. Prior to this opinion, the South Carolina Supreme Court focused exclusively on the definition of "occurrence" under the CGL policy.[57] However, the *Crossmann* opinion found the definition of "occurrence" was ambiguous and "elect[ed] to clarify the applicable legal framework for determining whether coverage is triggered" under a CGL policy.[58] The Court shifted the focus to "property damage" as the initial coverage trigger.[59] The Court held that any coverage analysis must begin with a determination as to whether the damage falls within the meaning of "property damage" set forth in the policy.[60] Only if that threshold question is answered in the affirmative, should a South Carolina court then consider whether there has been an "occurrence" pursuant to the policy definition.[61] Analyzing the damages through the lens of "property damage" and "occurrence," the Court concluded that the negligent or defective workmanship itself cannot constitute "property damage" as defined in the policy.[62] The Court further found the definition of "property damage" was limited to damage to "other non-defective" elements of the construction caused by the negligent or defective workmanship.[63] The South Carolina Supreme Court has also held that diminution in value is not property damage, and therefore does not give rise to an occurrence.[64]

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[55] S.C. Code Ann. § 40-59-830.

[56] *See McIntire v. Seaquest Dev. Co., Inc. et al*, No. 2016-CP-10-1833 (9th Cir. Ct. Jan. 17, 2017).

[57] *See Auto Owners v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).

[58] *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 48, 717 S.E.2d 589, 593 (2011).

[59] *Id.* ("We believe a more complete understanding of the coverage issue in this kind of progressive property damage case should involve the term 'property damage.'").

[60] *Id.*

[61] *Id.* at 49.

[62] *Id.* ("[W]e clarify that the costs to replace the negligently constructed stucco did not constitute 'property damage' under the terms of the policy . . . . However, the damage to the remainder of the project caused by water penetration due to the negligently installed stucco did constitute 'property damage.'"); *see also Stroup Sheetmetal Work, Inc. v. Aetna Casualty & Surety Co.*, 268 S.C. 203, 232 S.E.2d 885 (1977) (nothing in the policy warrants the conclusion Aetna is obligated to pay for faulty workmanship); *C.D. Walters Construction Co. v. Fireman's Ins. Co. of Newark, N.J.*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984).

[63] *Id.* at 50.

[64] *See Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003) (The court held that under the unambiguous language of the policies, diminution in value did not fall within the definition of property damage, and therefore, there is no coverage.).

However, the Court specifically noted that the *Crossmann* opinion did not address the impact the exclusions or exceptions contained in the CGL may have on the coverage issue.[65]

The South Carolina Supreme Court also altered the test applicable to the allocation of progressive damages when successive CGL policies cover the property. The Court adopted the pro rata/"time on the risk" approach for this allocation analysis, overruling its prior allocation precedent.[66] The Court recognized that the "time on the risk" approach "best conforms to the terms of a standard CGL policy and the parties' objectively reasonable expectations" under the policy.[67] This new approach mandates that each insurer is only responsible for a pro rata portion of the damages corresponding with the time the insurer insured the risk.[68] The Court provided a default formula to assist in calculating the share for each party, but the Court acknowledged that the trial court may have to adapt this formula to ensure that each insurer is responsible for only that portion of the property damage occurring during that party's policy period.[69] The Court clarified that the insured would be responsible for a pro rata share of the damages for any period that the insured failed to have sufficient CGL coverage or failed to insure the property at all.[70]

VI. CONTRACTUAL INDEMNIFICATION

In South Carolina, a party engaged in a construction related activity cannot contract for indemnification from its own negligence. Any attempt to do so is against public policy and is unenforceable. S.C. Code Ann. § 32-2-10 (1976), provides that:

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

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[65] *Crossmann*, 395 S.C. at 50, 717 S.E.2d at 594 ("[B]ecause the parties stipulated not to raise the issue, we do not address any policy exclusions or exceptions.")
[66] *Id.* at 50 (expressly overruling *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002)).
[67] *Id.*
[68] *Id.* at 60, 66.
[69] *Id.* at 66.
[70] *Id.* at 65, n. 15.

This language was first addressed by the South Carolina appellate courts in 2018. The South Carolina Court of Appeals held that an indemnification clause in contract was void as against public policy to the extent that it purported to require subcontractor to indemnify contractor for damages caused by the contractor's own negligence or the negligence of contractor's other subcontractors.[71] The Court concluded that the statute allowed agreements between a subcontractor and contractor whereby the subcontractor would indemnify contractor for damages caused by subcontractor or sub-subcontractors, but the statute did not allow for agreements to require that a subcontractor indemnify a contractor for its own negligence.[72] However, it should be noted that this language is unique to construction-related entities. The South Carolina courts have upheld a party's ability to contractually indemnify itself from its own negligence, if the language is clear and explicit.[73]

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[71] *D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC*, 422 S.C. 144, 810 S.E.2d 41 (S.C. App. 2018).
[72] *Id.*
[73] In *Federal Pacific Electric v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) the South Carolina Court of Appeals held that a party can contract for indemnification from its own negligence, but that the provision must be clear and explicit.

> A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. *Longi v. Raymond-Commerce Corp.,* 34 N.J.Super. 593, 113 A.2d 69 (1955). Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed. Annot., 4 A.L.R.4th 798 at 801 (1981). Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."

Id. at 26. Courts have applied three different tests to interpret the phrase "clear and unequivocal." The court noted:

> Some courts hold that the "clear and unequivocal terms" requirement is satisfied only by a specific reference in the indemnity clause to the indemnitee's negligence. Other courts take the view that words of general import are sufficient to satisfy the "clear and unequivocal terms" requirement and that a specific reference to the indemnitee's negligence is therefore not necessary. Still other courts look at the entire contract and any other factors manifesting the intention of the parties to determine whether they "clearly and unequivocally" expressed the intent to indemnify the indemnitee for its own negligence.

Id. at 27. The court found that the South Carolina Supreme Court had not specifically stated what view applied, but found that the Supreme Court had "hinted at its choice in *Murray v. The Texas Co*., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934).

> The general rule with reference to such contract is laid down in 6 R. C. L. 727, as follows: 'It is, of course, clear that a person cannot by contract relieve himself from a duty which he owes to the public independently of the contract. Whether he can relieve himself from the duties to the other contracting party attaching as a matter of law to the relation created by the contract is more difficult to determine.'

VII. CONTINGENT PAYMENT AGREEMENTS

Introduction

A contingent payment agreement is a contractual provision that makes payment contingent upon the occurrence of some event. In construction, the typical contingent payment clause provides that the subcontractor's payment is contingent upon the contractor being paid by the owner.

A. Enforceability

In South Carolina, § 29-6-230 governs contingent payment agreements in the construction context, and mandates that "payment by the owner to the contractor, or the payment by the contractor to another subcontractor or supplier is *not* . . . a condition precedent" to the subcontractor being paid.[74] Thus, a contractor's payment to its subcontractor cannot be conditioned upon the contractor itself being paid first.

Contingent payment provisions in contracts have been interpreted by the South Carolina Supreme Court as merely establishing that payment to the subcontractor occur within a "reasonable time" after the contractor would normally expect payment from the owner.[75] Whether the

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Murray, at 232. In that case, the contract failed to specifically state that the provision was relieving the party of all negligence, and therefore was not sufficient.

> [T]he provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit. While it is true that the language used in the quoted provision of the contract before us, that the agent shall hold the company "harmless from all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station," is broad and comprehensive, it is, as stated by the court below, provocative of some doubt. The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence, As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.

Id. The *Federal Pacific* court used this analysis in determining that the provision in question did not clearly and unequivocally indemnify the party for its own negligence. The court held that:

> [r]esolving the doubt concerning the language used by the indemnity provision in Carolina Production's favor, we therefore hold that the use of the general terms "indemnify ... against any damage suffered or liability incurred ... or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease" does not disclose an intention to indemnify for consequences arising from Federal Pacific's own negligence.

This opinion was confirmed by the Supreme Court in *Laurens Emergency Medical Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003).

[74] S.C. Code Ann. § 29-6-230.
[75] *Elk & Jacobs Drywall v. Town Contractors, Inc*., 229 S.E.2d 260 (1976).

contractor is paid by the owner or not will not determine whether or not the subcontractor is to be paid.[76]

VIII. SCOPE OF DAMAGES RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

When a builder is wrongfully prohibited from performing the contract by the owner, the builder may recover profits anticipated under the contract.[77] Generally, when the owner has breached the contract after the builder has partially performed, the builder may recover under one of three formulae: (1) the contract price less the cost to finish the job; (2) the profits expected from the entire job plus any expenses incurred in the partial performance; or (3) the percentage of the contract price for the completed work plus the profits on the uncompleted work.[78] The builder is not limited to the contract price if that would not fully compensate for the work performed.[79] However, an unlicensed contractor may not recover either under contract or in equity for any work performed.[80]

Damages can include the cost of labor and materials;[81] supervisory costs (including the value of the owner's time);[82] and use of tools, equipment, and overhead and operating expenses.[83]

When the breach involves defective construction, damages may be measured by (1) the cost to repair or replace the defect; or (2) if repair is too expensive, the difference in value as constructed and as contracted.[84]

B. Attorney's Fees Shifting and Limitations on Recovery

Attorney's fees generally are available only if specified in a contract, or if available by statute.[85] As noted above, the prevailing party in an action to enforce a mechanics' lien is entitled to attorneys' fees. Likewise, under S.C. Code Ann. § 27-1-15, a contractor, laborer, design professional and others may send a demand to the owner or the contractor for payment. If the party receiving the demand fails to investigate and pay the amounts due, the demanding party will be entitled to recover his attorney's fees if his claim is proven.[86]

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[76] *Id.*
[77] *Jenkins v. Charleston S.R. Co.*, 58 S.C. 373, 36 S.E. 703 (1900).
[78] See *Feaster v. Richland Cotton Mills*, 51 S.C. 143, 28 S.E.301 (1897); C. McCormick, *Handbook of the Law of Damages*, §§ 164, 166 (1935).
[79] See *Id.*
[80] See *Skiba v. Gessner*, 374 S.C. 208, 648 S.E.2d 605 (2002).
[81] *W.F. Magann Corp. v. Diamond Mfg. Co.*, 580 F. Supp. 1299 (D.S.C. 1984), *aff'd* in part, *rev'd* in part, 775 F.2d 1202 (4th Cir. 1985).
[82] *Jowers v. Dysard Constr. Co.*, 113 S.C. 84, 100 S.E. 892 (1919).
[83] C. McCormick, *Handbook of the Law of Damages*, § 165; see also *W.F. Magann Corp.,* 580 F. Supp. 1299 (D.S.C. 1984).
[84] C. McCormick, *Handbook of the Law of Damages*, §§ 168 (1935); see also *Scott v. Fort Roofing and Sheetmetal Works, Inc.*, 385 S.E.2d 826, 299 S.C. 449 (1989); *Roland v. Palmetto Hills,* 308 S.C. 283, 417 S.E.2d 626 (App. 1992); *Joyner v. St. Mathews Builders*, 263 S.C. 136, 208 S.E.2d 48 (1974).
[85] *United States Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956).
[86] See also S.C. Code Ann. § 29-6-50.

B. Consequential Damages

Consequential damages come in the form of, among other things, delay damages, extended overhead costs, and lost profits on other jobs. Most states have refused to allow consequential damages to be included in the lien amount, and South Carolina courts have not yet made this determination. However, consequential damages can still be assessed in breach of contract claims.

Under South Carolina law, consequential damages include: (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.[87] Further, contractual provisions stipulating the exclusion of consequential damages are invalid where the damages are such that the parties did not reasonably anticipate them.[88] The Supreme Court has indicated that consequential damages could also include additional operating expenses caused by the breach.[89]

D. Delay and Disruption Damages

The general damages for delay in completing construction are measured by the rental value of the completed building. Special damages may include the loss of any "specific opportunity" to rent the building or to earn profits, provided the owner had notice of these special damages at the time of the contract. [90]

A contractor may be liable for delay damages regardless of whether time was of the essence of the contract.[91] Where a contract sets no date for performance, time is not of the essence of the contract and it must be performed within a reasonable time.[92]

E. Economic Loss Doctrine

South Carolina law generally follows the economic loss rule, which limits a plaintiff to contract remedies if the plaintiff has suffered only an economic loss with no personal injury or property loss.[93] However, the South Carolina Supreme Court has refused to apply this restrictive rule to a builder who violated building codes in such a way that he knew or should have known the violations posed a risk of physical harm.[94]

F. Interest

In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the

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[87] S.C. Code Ann. § 36-2-715 (2).
[88] *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 536, 455 S.E.2d 183, 192 (Ct. App. 1995).
[89] *Marshall and Williams Co. v. General Fibers and Fabrics, Inc.,* 270 S.C. 247, 241 S.E.2d 888 (1978).
[90] *Id.* § 70.
[91] See *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 212 (1988), *citing* 17A C.J.S. Contracts § 502(4)(a) (1963).
[92] *Id* .(*citing General Sprinkler Corp. v. Loris Industrial Developers, Inc*., 271 F. Supp. 551, 557 (D.S.C. 1967).
[93] See *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009)).
[94] *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989).

rate of 8.75% per annum.[95] Interest may also be awarded if an owner or contractor fails to timely make periodic or final payment of properly submitted invoices.[96] However, this provision does not apply to residential builders or persons making improvements to residential property consisting of 16 or fewer units.[97]

G. Punitive Damages

Punitive damages will not generally be awarded for breach of contract, unless the breach is accompanied by a fraudulent act independent of the act constituting the breach. However, a builder may be liable in punitive damages for gross negligence.[98]

H. Liquidated Damages

Liquidated damages clauses are generally enforceable. A breach of a contract containing a liquidated damage clause generally entitles the offended party to retain or recover the amount stipulated without proof of damage actually sustained.[99] It is commonly stipulated in land contracts that a payment made by one of the parties to the other shall be retained by the recipient in the event of default by the party making such payment.[100] The dispositive test on whether a provision in a contract is for liquidated damages or is an unenforceable penalty was set forth by our Supreme Court in *Tate*, where the Court held that whether such a provision is one for liquidated damages, or for a penalty, is primarily a matter of the intention of the parties.[101]

"Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty."[102] However, where the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from a breach of the contract, the stipulation will be held to be one for penalty, and not for liquidated damages, regardless of terminology.[103]

IX. CASE LAW AND LEGISLATION UPDATE

In *Ferguson Fire and Fabrication*, the South Carolina Supreme Court clarified the statutory scheme provided for in §§ 29-5-20, 29-5-40, and 29-5-90, regarding the notice to be given to the owner of a lien.[104] In that case, a subcontractor hired Ferguson Fire to furnish materials for the

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[95] S.C. Code Ann. § 34-31-20. See also S.C. Code Ann. § 27-1-15 (interest allowed if a proper demand is not investigated and paid); *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 647 S.E.2d 488 (S.C. Ct. App. 2007).
[96] S.C. Code Ann. § 29-6-50.
[97] S.C. Code Ann. § 29-6-60.
[98] *Kennedy*, 299 S.C. at 346, 384 S.E.2d at 737.
[99] *Tate v. Le Master*, 231 S.C. 429, 99 S.E.2d 39, 46 (1957).
[100] *Id.,* at 45.
[101] *Id.,* at 45.
[102] *ERIE Ins. Co. v. Winter Const. Co.,* 393 S.C. 455, 460-61, 713 S.E.2d 318, 321 (Ct. App. 2011).
[103] *Tate,* at 46.
[104] *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 762 S.E.2d 561 (2014).

installation of a fire protection system at the owner's data center.[105] When a dispute arose between the parties regarding payment, Ferguson Fire brought an action against the owner of the data center for the foreclosure of a mechanic's lien.[106] The trial court found, and the Court of Appeals affirmed, that the Notice of Furnishing sent by the supplier to the owner was ineffective under § 29-5-40 because it "was sent prior to furnishing all the material, failed to identify the final amounts of the goods delivered, and never made a demand for payment."[107] However, the Supreme Court clarified that the requirements under § 29-5-40 for a Notice of Furnishing, and the requirements under § 29-5-90 for a notice of a lien, serve two different purposes, and held that Ferguson Fire's written notice to the owner, which simply gave an *estimation* of the cost of materials, was sufficient when coupled with its subsequent *specific* payment demand on the owner.[108]

The Court instructed that a Notice of Furnishing need not make a specific payment demand, and can be given to the owner at any time when the person asserting the lien is employed by someone other than the owner.[109] This decision by the Court overturned the previous interpretation of § 29-5-40, which followed the thought that a Notice of Furnishing, similar to a notice of a lien, must occur at a specified time and also must make a specific payment demand of the owner.[110]

In 2019, the South Carolina Court of Appeals in *Alwin v. Russ Cooper Associates, Inc.* clarified the discovery rule in construction defect litigation.[111] In *Alwin*, the plaintiffs constructed a vacation home on Kiawah Island, SC in the early 1990s.[112] By the late 1990s and early 2000s, they had been notified by their live in guests of numerous problems with the roof, chimneys, exterior walls, windows, doors, patio, and basement.[113] From 2001 to 2008, the plaintiffs retained numerous experts and inspectors to determine the defects with their home. In 2009, the plaintiffs retained counsel and filed suit in 2013.[114] The defendant architect moved for summary judgment on the basis of statute of limitations which was granted by the circuit court.[115]

On appeal, the South Carolina Court of Appeals, ruled that the circuit court properly granted summary judgment.[116] The court held that the statute of limitations had run because the plaintiffs had notice of their potential claims as early as 1999.[117] Moreover, at the very latest the statute of limitations had run three years after plaintiff retained counsel which was a year before the suit was filed.[118]

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[105] *Id*., at 336.
[106] *Id.* at 339.
[107] *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC,* 397 S.C. 379, 725 S.E.2d 495 (Ct.App.2012).
[108] *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 344, 762 S.E.2d 561, 567 (2014).
[109] *Id.*
[110] *Id.*
[111] 426 S.C. 1, 825 S.E.2d 707 (S.C. Ct. App. 2019), *reh'g denied* (Apr. 19, 2019), *cert. denied* (Sept. 18, 2019).
[112] *Id.* at 4.
[113] *Id.* at 5–4.
[114] *Id.* at 5–10.
[115] *Id.* at 10.
[116] *Id.* at 15.
[117] *Id.*
[118] *Id.*