2010
South Carolina
Construction Law Update

Presented By

Editors:
L. Franklin Elmore
Leslie D. Sullivan

Contributors:
Bryan P. Kelly
Peden Brown McLeod, Jr.
William W. Watkins, Jr.
Jessica E. Bowers

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South Carolina Construction Law Update
August 2009 - July 2010

I. FEDERAL AND STATE DECISIONS

ARBITRATION

- **No Class Action Arbitration Without Contractual Basis**

The United States Supreme Court issued a ground-breaking decision on arbitration, considering the question whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act. In a 5-3 opinion delivered by Justice Alito, the court found that, "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." The Court held that, in this case, the arbitrators had exceeded their authority in permitting class arbitration. As a consequence, the Court took the unusual step of vacating the arbitration award. The Court further held that class arbitration was not permitted under these facts and reversed the result. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S.Ct. 1758 (2010).

- **Challenge to Arbitration Agreement for the Arbitrator to Decide**

The Plaintiff in the case, Rent-a-Center employee Antonio Jackson, claimed that the binding arbitration agreement he signed when he started work was unconscionable, because he had no alternative but to sign it if he wanted the job. In a 5-4 split decisions, the Court held that certain challenges to arbitration agreements must be decided by arbitrators, and not judges. Justice Scalia reasoned that Jackson had consented to have disputes settled by arbitration, and it made "no difference" that the dispute at issue happened to be about the enforceability of the arbitration agreement itself. "Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator." Rent-a-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).

- **Arbitration Provision Enforceable**

Daughter was attorney-in-fact for mother under durable power of attorney executed in 1995. Mother opened investment account with brokerage firm in 1996. Power of attorney recorded in 2004. Subsequently, Mother executed investment service contract with successor-in-interest to original investment firm which included arbitration clause.

Daughter, an employee of successor investment firm, removed over $129,000 from Mother's account and used it for her own benefit. Mother sued and investment firm and daughter sought to compel arbitration. Trial court denied motion and investment firm appealed. The Court of Appeals reversed finding that the investment firm was entitled to arbitration.

The South Carolina Supreme Court acknowledged that "it is probable where an employee of an investment company steals money from an investor's account, that illegal act would not be found to be foreseeable from the investor's standpoint, and thus the transaction would not be subject to arbitration." The court found that the actions of the daughter were not the theft of funds from the Mother's account but instead the daughter utilized the authority granted to her in the power of attorney to transfer of funds from the investment firm account to her own. Holding that there was not, and could not be, a finding that the investment firm did anything illegal or outrageous in permitting daughter, acting pursuant to a durable power of attorney, access to the funds and assets in the investment account, the Court ruled that the investment firm was entitled to enforcement of the arbitration clause and affirmed the decision of the Court of Appeals. Timmons v. Starkey, 2010 WL 3397429 (S. C. Aug. 30, 2010).

- **Pending Case on Consumer Arbitration**

The U.S. Supreme Court will decide whether corporations can ban class actions in the fine print of their contracts with consumers and employees. The Supreme Court will hear arguments in the case in November 2010. Class-action bans are contract provisions that purport to deny consumers and workers the right to seek relief as a class. Many courts have deemed these provisions unconscionable under state law. The question presented in AT&T v. Concepcion, 584 F.2d 849 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3454 (U.S. May 24, 2010), is whether the Federal Arbitration Act of 1925 precludes courts from declining to enforce class-action bans when they are embedded in arbitration agreements.

BONDS

- **Statute of Limitations Applicable to Performance Bond Case**

Contractor brought action in July 2001 against HOA for failure to pay for dredging work at a private marina. The contract required completion by March 15, 2001. Surety provided performance bond. HOA filed Answer and Counterclaim in August 2001. Contractor subsequently filed for bankruptcy in Indiana. State court dismissed action filed by Contractor in December 2001. HOA granted relief from automatic stay in May 2004 to pursue claims against

Contractor and Surety. Case restored to active roster September 2005. HOA granted leave to amend its Answer. In its Amended Answer, HOA asserted third party claim against Surety to recover under performance bond. Surety removed case to federal court.

Surety argued that S.C. Code § 15-3-530 (establishing a three year statute of limitations for actions brought upon a contract) governed and that HOA's claim expired three years after HOA declared contractor to be in default.

The HOA argued language in the Bond stating that, "A[ny] suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due," extended the statue of limitations until two years after final payment becomes due. HOA argued that final payment was not yet due under the contract so the statute of limitations had not yet run. The district court disagreed. stating, "A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken . . . plaintiff's interpretation would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff." The court further found that default of the Contractor was "the trigger" for Surety's liability to the HOA.

The HOA also argued that the performance bond was a sealed instrument and that the twenty year statute of limitations of S.C. Code Ann. § 15-3-520 applied. The court found that the Surety's impress or stamped seals were not used. Above the signature lines on the performance bond are the words "signed and sealed this 22nd day of December 2000." Just below the company names and above the signatures of the president of Contractor and the Attorney-in-Fact of Surety was the word "(Seal)" for each company. The body of the performance bond lacked any express language evidencing an intent that it be under seal. The court also found that "a twenty year limitations period would serve no purpose in the context of a performance bond for the completion of contractual work which was scheduled to take less than six months to complete." The court also found that the context under which the term "(Seal)" appears did not make it evident that the parties intended to create a sealed instrument. The bond form includes the notation "(Seal)" to reflect the location where the corporate seal is to be affixed if the parties desire to create a sealed instrument. No seal was affixed by either party. The court found a lack of intent to create a sealed instrument. The court also noted that the Power of Attorney illustrated how the surety evidences its seal by including an official stamp by the signatures. Midwest

Dredge & Excavating, Inc. vs. Bay Point Homeowner's Ass'n, Inc., 2007 WL 7141921 (D.S.C. May 17, 2007) (opinion published in 2010).

CLASS ACTIONS

- **Pending Cases**

Grazia v. S.C. State Plastering, LLC, Civil Action No. 2007-CP-07-1396. Appeal from Beaufort County Common Pleas. Issue: Whether trial Court erred in granting Motion to Strike Class Allegations because all members of the putative class had not complied with S. C. Code Ann. §40-59-810, thereby precluding class certification.

CONTRACTS

- **Right to Withhold Payment**

The Plaintiffs purchased a partial completed single family residence, which was 80% to 85% complete at the time of purchase. The Plaintiffs purchased the residence "as is." The Plaintiffs subsequently entered into a contract with Contractor to complete construction. The contract amount was for $136,000 with work and payment divided into five phases.

The Plaintiffs paid in the Contractor in advance the full payments for Phase 1, 2, and 4. However, Plaintiffs only paid 90% of Phase 3 because they alleged that Contractor failed to complete the phase. In Plaintiffs ultimately paid the Contractor $123,000.00, which was 90% of the contract amount. The Plaintiffs withheld the remaining contract balance, alleging not all the work had been completed and concerns regarding the Contractor's payments to subcontractors and vendors.

The Contractor told Plaintiffs that they needed to pay the total contract price before he was going to complete the construction. The Plaintiffs responded by listing the items that needed to be completed prior to payment. Contractor refused to complete the work without payment. The Plaintiffs then responded asking that Contractor have two mechanics liens removed, correct electrical problems, and provide window screening.

Plaintiffs initiated the action related in small claims court, which was then transferred to the court of common pleas. After a bench trial, the trial court issued a form order finding in favor of the Plaintiffs in the amount of $11,000. Contractor appealed.

On appeal, the issues were the trial court erred in: (1) ruling the Contractor breached the contract because the Plaintiffs' antecedent breach of the contract excused Contractor's nonperformance; and, (2) in calculating damages? The Court of Appeals affirmed, holding that

there was evidence to support the trial court's determination that the Plaintiffs had the right to withhold funds.

The contract contained several provisions which allowed for withholding of payments. The contract further provided that stated that final payment was to be made when the work has been completed, the contract fully performed, and a Certificate of Occupancy was issued. Furthermore, the contract also stated that final payment was not due until contractor provided owner with a release of all liens or receipts for payment by subcontractors and vendors, or a bond to indemnify the owner from mechanics liens.

The court found that the Plaintiffs had provided evidence that, at the time work stopped, the Contractor had not completed any of the five phases, some work was defective, as well and several subcontractors and vendors had not been paid. Accordingly, the court found there was sufficient evidence to support the trial court's determination the Plaintiffs had grounds to with hold some of the payments and that Contractor was in breach of the contract. The Court of Appeals affirmed the trial court's order, but slightly reduced the amount of damages. Ezzo v. Smith, No. 2009-UP-391 (S.C. Ct. App. 2009).

EVIDENCE

- **Contractual Insurance Coverage Requirements Properly Presented at Trial**

Homeowners executed a construction contract with a Contractor to build a home. Contractor agreed to assume "full responsibility for acts, negligence or omissions of all of his subcontractors and their employees and for those of all other persons doing work under a contract for him." Contractor was also required to maintain liability insurance to cover workers' compensation and other personal injury claims and "for property damage that may arise out of work under this Contract, whether caused directly or indirectly by [Contractor] or directly or indirectly by a subcontractor." The Homeowners were contractually obligated to maintain liability insurance and property damage insurance at their own expense "on the work at the site to its full insurance value including interests of Owners, Contractor and subcontractor against fire, vandalism, and other perils ordinarily included in extended coverage." Finally, the parties agreed to waive "all claims against each other for fire damage" covered by the property damage insurance that the Homeowners were to maintain on the construction site.

Contractor began construction in March 2001 and subcontracted certain woodwork staining to a Subcontractor. On September 29, 2001, after the Subcontractor spent several days

staining wood, a fire erupted, destroying the home. The Homeowners filed suit against both the Contractor and Subcontractor, alleging that the Subcontractor's workers caused the home fire by discarding staining rags within the home, which in turn caused the fire.

Both the Contractor and Subcontractor disputed the Homeowners' allegation regarding the cause of the fire, contending that regardless of cause, the construction contract allocated risk of fire damage to the Homeowners and the Homeowners' insurance carrier. Contractor and Subcontractor further contended that the Homeowners and their insurance carrier expressly waived any subrogation claim against both parties under the parties' contract.

The jury returned a verdict for the Contractor and Subcontractor. The Homeowners moved for judgment notwithstanding the verdict and in the alternative, for a new trial. The South Carolina Court of Appeals affirmed the trial court's denial of both motions.

The Court of Appeals held that the trial court properly: (1) allowed the defendants' reference to the Homeowners' insurance since the trial judge acted within his discretion with the Court of Appeals expressly recognizing that the Homeowners were contractually obligated to carry liability and property damage insurance; (2) denied the Homeowners' request to bifurcate the trial and their request that insurance evidence be presented only if the jury found the defendants to be liable; (3) instructed the jury regarding the concept of subrogation; (4) refused to find that Contractor was liable to the Homeowners as a matter of law; (5) found that the parties' contract contained an enforceable waiver of subrogation rights; (6) refused transcripts of recorded statements from Subcontractor's employees since these statements were not properly admissible under the South Carolina Rules of Evidence; (7) refused to allow expert testimony as to cause of origin of the fire since the tendered expert did not do a thorough investigation; (8) excluded parol evidence regarding the parties' intents regarding the contract; (9) applied the parties' subrogation waiver to Subcontractor; (10) refused to replay all trial evidence for the jury due to the length of time such presentation would take; and, (11) presented an appropriate verdict form to the jury. The Court of Appeals found that the Homeowners failed to properly preserve objections pertaining to Contractor's counsel's closing arguments and jury instructions; consequently, these matters could not be reviewed by the Court of Appeals. Finding no reversible error, the Court of Appeals affirmed. Wright. v. Hiester Constr. Co., 2010 WL 2943665 (S.C. Ct. App., Jul. 21, 2010).

INSURANCE

- **No Coverage for Damage Caused By Known Uncorrected Construction Defects**

Owner hired Contractor to supervise construction of a condominium project. Contractor hired a Subcontractor to perform the framing work. The Owner's engineer inspected the Project and found four defects in the structural framing that must be corrected. Three months after the engineer's inspection, in July 2005, the Subcontractor quit. In October 2005, the Contractor also quit. Between July 2005 and October 2005, the Contractor did not hire another subcontractor to correct the defective framing work. The owner's engineer inspected the building after the Contractor quit and found thirty-eight defects, which included the four defects found in the original inspection.

Owner commenced a lawsuit in state court against the Contractor and Subcontractor and Contractor cross-claimed against the Subcontractor. Contractor's CGL carrier filed the instant declaratory judgment action in federal court, seeking a declaration that the CGL policy did not provide coverage for the alleged construction defects.

The state court entered a judgment in favor of the Owner. The state court entered judgment in favor of the Contractor on its cross-claim against the Subcontractor, finding thirty-one construction defects were attributable to the Subcontractor's negligence. The state court also found that damage occurred to the structure after the Subcontractor and Contractor stopped work. This damage included framing failure and water intrusion resulting from the deterioration of the sheathing and framing.

The federal court concluded that the CGL policy did not provide coverage because there had been no property damage caused by an occurrence. There was no coverage because the trial court had found there were thirty-one defects before the Contractor and Subcontractor left the project and that this faulty workmanship did not constitute an occurrence. The federal court also found that to the extent the faulty workmanship cause damage to other parts of the structure, such damage was not caused by an occurrence. The court found that the numerous defects were discovered early in construction process and could have been corrected. Moreover, the Contractor and Subcontractor knew about these defects and should have known that if the defects were left uncorrected damage would occur. Thus, there was nothing accidental or unexpected about the damage. The court stated that allowing coverage under the facts in the case would "encourage contractors to avoid or to prolong correction of faulty work discovered during the

construction process." Accordingly, the court declared that the CGL policy did not provide coverage and the insurer did not have to indemnify the Contractor. Builders Mutual Ins. Co. v. R Design Constr. Co., No. 07-1890 (D.S.C. May 21, 2010).

- **Policy Exclusions Preclude Recovery for Removal and Replacement of EIFS System**

Owner hired a Contractor to construct a home. The Contractor hired a Subcontractor to install the exterior insulation and finish system ("EIFS") for the home. Six years later, the Owner placed the house on the market. A prospective buyer hired an engineer to inspect the property and perform tests. At that time, the Owner discovered defects in the home's EIFS cladding, which allegedly had allowed moisture to enter the home and damage parts of the home including the structure, flooring, windows, doors and decking. The prospective buyers agreed to purchase the house. Owner established an escrow account of $200,000 to fund the house repairs. The Owner subsequently hired the original Contractor and Subcontractor to repair the residence. The Contractor was paid $84,625.90 from the repair escrow, including an amount of $1,887.58 for lumber and materials to replace sheathing and framing that had been water damaged.

Owner commenced a lawsuit in state court against the Contractor, Subcontractor and EIFS manufacturer. Subcontractor's CGL carrier ("Insurer") filed the instant declaratory judgment action in federal court, seeking a declaration that the CGL policy did not provide coverage as to certain acts or omissions of the Subcontractor.

Insurer moved for summary judgment. While the Insurer conceded that the damage alleged in the state court action constituted an "occurrence," the Insurer contended that the "your work" exclusion in the Policy precluded coverage for the alleged property damage with the exception of the $1,887.58 expended for lumber and materials to replace sheathing and framing that had been water damaged.

The federal court agreed with the Insurer, finding that the costs of the removal and replacement of the EIFS product was not recoverable under the policy exclusions. The court declared that the only damage covered by the CGL policy was the $1,887.58 expended for lumber and materials to replace sheathing and framing that had been water damaged. Owners Ins. Co. v. Santee Stucco Sys., No. 09-3022 (D.S.C. May 19, 2010).

- **Damages Partially Covered Under Policies**

Contractor entered into a contract with the Owner to construct a home. The home was in a low lying lot. The Contractor was responsible for complying with all building and zoning codes as well as homeowner's association ("HOA") requirements. When the HOA reviewed the building plans, it suggested that a landscape architect or engineer design the appropriate site drainage. The HOA also expressed concern over the adequacy of the floor elevation height. The Contractor understood that this concern arose from the ability to connect into the municipal sewer system. To address this concern, the Contractor modified the plans to include electrical service for a sewage lift station.

After the certificate of occupancy was issued, the Owner began to notice construction defects. The Owner filed a lawsuit against the Contractor and several subcontractors after the problems persisted and the Contractor failed to correct the problems. The Owner's complaint alleged three primary defects: (1) the residence was constructed at an improper elevation causing problems with sewage drainage and the sewage pump installed by the Contractor did not correct the problem and was in violation of HOA requirements and applicable code requirements; (2) the lot was improperly graded to allow drainage thus causing flooding of the lot; and, (3) there were further defects as outlined in a contract addendum and certified letters to the Contractor. The Owner and Contractor subsequently arbitrated the underlying litigation and the arbitrator issued an award in favor of the Owner.

Contractor failed to notify its CGL carriers until approximately two and one-half year after the lawsuit was commenced. The CGL carriers denied any duty to defend the Contractor. The Contractor filed a declaratory judgment action, seeking a declaration of the rights and obligations of the parties pursuant to the insurance contracts.

The court found that there was no occurrence in regards to the damages associated with the lift station because the Owners did not allege, or experience, any property damage as a result of the lift station. Therefore, the Contractor was not entitled to coverage for the lift station claim under the CGL policies. The court further found that if there had been an occurrence related to the lift station, the damage would not be covered due to the "your work" exclusion.

Next, the court found that there was no occurrence in regards to the damages associated with the incomplete punch list. In his award, the arbitrator found that the incomplete punch list items were predominately cosmetic issues and minor repairs. Moreover, the Owners did not

allege any property damaged due to the Contractor's improper performance of the minor punch list items. Therefore, there was no occurrence under the policies and no coverage.

Next, the court addressed the improper grading. As a result of the improper grading, the Owners had claimed that water infiltrated their garage and covered the driveway. The court examined the arbitration testimony regarding the flooding. During the arbitration, experts testified that the primary reason for the flooding was the overall condition of the property. In particular, the experts found that the lot's location next to a wetland, which was at full capacity due to increased runoff from development, was the primary cause of the flooding of the Owner's yard. Based on the expert testimony, the arbitrator found the Contractor's work was not the legal proximate cause of the flooding of the Owner's lot; however, the arbitrator did assign some degree of fault to the Contractor because the Contractor acknowledged that the siting and elevation of the house was the Contractor's responsibility. The arbitrator awarded the Owner $10,000 for damaged due to the lot flooding, but did not specify in the award whether any of the award was attributed to damage to the house due to water intrusion.

The court found that flooding of the lot constituted "property damage" as defined by the policies. The court further found that the flooding constituted an "occurrence" as defined by the policies because it was a result of continuous exposure to substantially the same harmful conditions, namely the adjacent wetlands and ineffective grading. As a result, the Contractor was obligated to pay the Owners for flooding, such as water damage suffered by the Owner's garage. On these facts, the court found there was coverage for the claims related to the flooding.

Finally, the court addressed the Contractor's failure to timely notify the insurance carriers. The court first noted that the insurers had the burden of proof to show that the Contractor's failure to notify the insurers of the underlying litigation substantially prejudiced the insurers' rights. While the court stated that the Contractor failed to notify the insurers as soon as reasonably possible, the court found that the insurers failed to meet their burden of showing they were substantially prejudiced by the Contractor's delay. Jessco, Inc. v. Builders Mut. Ins. Co., No. 08-1759 (D.S.C. Sept. 22, 2009).

- **Judicial Interpretation of Endorsement CG 22 94 10 01**

Homeowner entered into standard AIA A107 construction contract with Contractor for construction of residence. Contractor constructed residence and obtained Certificate of Occupancy. Thereafter, Contractor transferred residence to Homeowner. Shortly after occupying

residence several construction defects and faulty workmanship was observed throughout the home. Contractor failed to remedy defects and Homeowner filed suit alleging negligence, breach of contract, breach of express and implied warranties and unfair trade practices.

Contractor's carrier insured contractor for a one year period after construction contract was signed until approximately six (6) weeks after Certificate of Occupancy was issued. The policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy contained a "your work" exclusion, which did not apply to work performed on the Contractor's behalf by a subcontractor. However, the policy also contained endorsement CG 22 94 10 01, which removed the subcontractor's exception to the "your work" exclusion.

Carrier brought declaratory judgment action in United States District Court against Homeowner, Contractor and another carrier alleging that it had no duty to defend or to indemnify. The court found that allegations in the Complaint alleging faulty workmanship resulting in significant water damage to the residence were an "occurrence" under South Carolina law and the policy citing Auto Owners v. Newman, 684 S. E. 2d 541 (S.C. 2009). While construction defects are not, in themselves sufficient to constitute an "occurrence" where there is water intrusion resulting in wood rot, staining and mold growth there is "property damage" beyond the defective work product itself.

The District Court further found that while there was property damage within the initial grant of coverage, the "your work" exclusion and the endorsement removing the subcontractor's exception from the "your work" exclusion precluded coverage for the underlying property damage claims. This is the first case in the country interpreting endorsement CG 22 94 10 01. Builders Mutual v. Kalman, No. 07-CV-3609, slip op. (D.S.C. Dec. 8, 2010)(J. Duffy).

- **Carrier Had Right to Control Settlement Under Terms of Policy**

In another case addressing several issues of first impression, the United States District Court ruled that under the terms of a general commercial liability policy, the insurer rather than the insured had the right to control settlement under the policy. Insurer brought action predicated on five (5) underlying state court actions against window manufacturer alleging windows were defective. Insurer sought a declaration on several issues including: (1) that that Insurer had right to control settlement; (2) whether single policy must cover property damage spanning multiple policy periods; (3) whether Insurer's had the right to seek contribution on pro rata basis of

allocation of payments based on time on risk; and, (4) allocation of insured's deductible to multiple time on risk carriers.

The court found that the wording of each of the policies indicated the carrier had the authority to control settlement decisions at its discretion. Further, all policies triggered by progressive damages claims provide coverage for that claim stating "the policy in effect at the time of the injury-in-fact covers all the ensuing damages [and] [c]overage is also triggered under every policy applicable thereafter."

The court further found that the carrier had the right to seek contribution for defense and settlement costs against the non-contributing carrier pro rata based on the length of time the risk was covered. The issue of allocation of an insured's deductible to multiple time on risk carriers was certified to the South Carolina Supreme Court. Finally, whether the carrier had acted in bad faith in settling the underlying claims was not obviated by the court's finding that the carrier had the right to control the settlement. Liberty Mut. Ins. Co. v. J. T. Walker Indus., Inc., No. 08-CV-2043, slip op. (D.S.C. March 30, 2010) (J. Seymour).

- **Pending Cases**

Crossman Communities of N.C. v. Harleysville Mut. Ins. Co., Civil Action No. 2004-CP-26-84. Appeal from Horry County Common Pleas. Trial court found that faulty work performed by subcontractors with resulting property damage to work of subcontractors that was not faulty as a result of repeated exposure to same harmful conditions was an "occurrence" within meaning of commercial general liability policy. **Issue:** Whether non-settling carriers are entitled to set off for amounts paid by settling carriers. Prejudgment interest not awarded.

PUBLIC PROCUREMENT

- **Hospital System a "Political Subdivision" for Purposes of Applying Procurement Code**

Plaintiffs brought three declaratory judgment actions against the Greenville Hospital System and its chairman (the "Hospital"), which challenged the Hospital's procurement of construction contracts. Specifically, Plaintiffs contended that the Hospital was a "governmental body" of the State, as defined by the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, et seq. (the "Procurement Code"), and was thus subject to the provisions of the Procurement Code.

The Procurement Code provides that a "governmental body" is "a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch." S.C. Code Ann. § 11-35-310(18). Plaintiffs contended that the Hospital constituted a state government board under this definition.

The trial court and the South Carolina Supreme Court disagreed, holding that the Hospital was a "political subdivision" of the State. Under the Procurement Code, a "political subdivision" is defined as "all counties, municipalities, school districts, public service or special purpose districts." S.C. Code Ann. § 11-35-310(23). While the Hospital did not fit clearly into either category, the Court emphasized the Hospital's focus on serving local needs, and held that the Hospital most closely resembled a "special purpose district" under the definition of a "political subdivision."

The significance in the distinction between the "governmental body" and "political subdivision" categorization is that it determined the procurement requirements for the Hospital. While "governmental bodies" are subject to the requirements of the Procurement Code, "political subdivisions" may promulgate their own procurement policies, so long as the codes "embody sound principles of appropriately competitive procurement." S.C. Code Ann. § 11-35-50.

As an alternative argument, Plaintiffs contended that the Hospital's procurement procedures violated this statutory requirement. Specifically, Plaintiffs challenged the Hospital's omission of a competitive sealed bidding requirement, as well as the Hospital's threshold project amounts of $100,000 and $350,000 to trigger application of the policy (in contrast to the Procurement Code's $25,000 threshold). Plaintiffs' position was that the Hospital had the burden of creating procurement requirements which closely reflected those in the Procurement Code.

The Court disagreed, holding that Plaintiffs bore the burden of showing that the challenged provisions violated the requirements of § 11-35-50, which they failed to do. The Court emphasized that the purpose of § 11-35-50 was to grant flexibility to local governments in determining their own competitive procurement procedures. The Court refused to impose a blanket requirement for sealed competitive bidding or maximum threshold, as such requirements would effectively strip local governments of this flexibility. Sloan v. Greenville Hosp. Sys., 694 S.E.2d 532 (S.C. 2010).

- **Contractor Has Private Right of Action for Governmental Entity's Failure to Require Statutory Bonds**

The City entered into a contract with a general contractor to construct a municipal building for approximately $875,000 (the "Project"). The City did not require the contractor to furnish a payment bond. The contractor entered into various subcontracts, including agreements with the plaintiff subcontractors ("Subcontractors"). The Subcontractors claimed they performed their work under the subcontracts and that the contractor failed to pay them in full. The Subcontractors filed an action against the City and contractor, alleging violation of the Subcontractors' and Suppliers' Payment Protection Act ("SSPPA"), negligence, quantum meruit, and third party beneficiary status arising from contractor's failure to pay all monies owed to them and the City's failure to secure a payment bond from the general contractor on a construction project. The issue before the court was whether the SSPPA, S.C. Code Ann. § 29-6-210 et seq., provides a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded.

The court held that where a governmental entity hires a contractor to construct a building but fails to require the contractor to provide a labor and material payment bond, subcontractors who were not paid by the contractor can sue the governmental entity both in tort and contract (as third party beneficiaries). the Court found that where a subcontractors' claim is brought under S.C. Code Ann. § 29-6-250 as a tort, it is properly asserted according to the South Carolina Supreme Court's holding in Sloan Constr. Co. v. Southco Grassing, Inc., 659 S.E.2d 158 (S.C. 2008). Thus, because the Subcontractors' tort claim alleged negligence arising out of the City's breach of its duty to require the contractor to provide a bond, the court held that the Subcontractors were entitled to proceed under the SSPPA. However, the City's liability is limited to the remaining balance on the general contract that had not been paid at the time the Subcontractors notified the City of the contractor's non-payment. Shirley's Iron Works, Inc. v. City of Union, 693 S.E.2d 1 (S.C. Ct. App. 2010)

II. SOUTH CAROLINA PROCUREMENT CODE DECISIONS

- **Wall Panel Manufacturer Responsible Bidder**

Agency took bids for a modular wall panel system. The second low bidder protested the award of the contract to the low bidder, claiming the apparent low bidder did not hold the appropriate contractor's licenses and was therefore not responsible.

The low bidder argued that installation of the pre-fabricated moveable wall panels was not "contracting work" and that no contractors' license was required to perform the work. The CPOC conferred with the South Carolina Contractor's Licensing Board. The Licensing Board advised the CPOC that the Board had adopted the position that the installation of ceiling height moveable modular wall panels does constitute construction as contemplated by the Contractor's Licensing Act. However, this Board also advised that a manufacturer does not need to possess a contractor's license to provide and install the wall panel system as long as the manufacturer uses a licensed contractor to perform the installation and the cost of the manufacturer's product is more than 51% of the total cost of the work.

The manufacturer presented testimony that the cost of the manufactured wall panels was at least 75% of the total cost of the work and the manufacturer subcontracts the installation of the panels to others. Accordingly, the CPOC determined that the manufacturer could offer to provide the work without possessing a contractor's license as long as the panels were installed by a licensed installation subcontractor. The bid form had not required the bidders to list an installation subcontractor.

The second low bidder also argued that the apparent low bidder had listed an electrical subcontractor that was not properly licensed and therefore the low bidder was not responsible on that basis. The manufacturer produced the quote for its electrical subcontractor showing that the electrical work was less than $5,000.00. A mechanical contractor's license is not required when the total cost of the electrical work is less than $5,000.00. The CPOC therefore determined that the listed electrical subcontractor was not required to hold a mechanical contractor's license. Therefore, the CPOC held that the low bidder's bid was responsible and denied the protest. In the Matter of Bid Protest: Spartanburg-TRB Front Office Phase 1 Modular Office/Wall System, State Project H59-N518-JM, (Aug. 7, 2009).

- **Failure to Acknowledge Addendum Minor Informality**

Apparent low bidder failed to acknowledge an addendum on its bid. Another bidder protested the notice of award, claiming the low bidder's bid was nonresponsive due to the failure to acknowledge the addendum. The CPOC reviewed the application Procurement Code Section, S.C. Code Ann. §11-35-1520 (13), which provides that a bidder's failure to acknowledge an addendum is a minor informality under the following conditions: (1) if the bid, on its face, clearly indicates that the bidder received the addendum and the bidder states under oath that it received the addendum; or (2) the addendum has no effect on price or quality or merely a trivial or negligible effect on quality.

In this solicitation, the addendum only modified a detail on a drawing. The CPOC examined the modification and found that the change was merely a change in form not substance and had no effect on price or quality. Accordingly, the low bidder's failure to acknowledge the addendum was a minor informality under the Procurement Code and the CPOC denied the Protest. In the Matter of Bid Protest: Orangeburg Vocational Rehabilitation Center Truck Entrance, State Project H73-9587-PG, (Oct. 9, 2009).

- **Bid Protest No Substitute for Timely Solicitation Protest**

A manufacturer submitted a protest, stating that it was protesting the decision of the project's architect not to list the manufacturer as an approved supplier for the metal building for the project. The project was advertised for bids on September 7, 2009 and bids were to be received on October 8, 2009. The manufacturer submitted its protest on October 9, 2009.

The CPOC dismissed the protest because the protest failed to state a claim and because the protest was untimely. The protest failed to state a claim because the agency's architect had not violated any duty as required by the solicitation or the Procurement Code. The solicitation required that all requests for substitutions and approved equals be submitted in writing at least ten days prior to the date of the bid. The supplier had failed to submit its written request for approval in the time period set forth in the bidding documents.

The CPOC also found that the protest was untimely. The Procurement Code requires that all protests of solicitations be made within 15 days of the issuance of the solicitation documents. In this matter, the solicitation documents were issued on September 7, 2009. The supplier should have been aware of its product was not listed in the original solicitation documents. The supplier did not was filed a protest until October 9, 2009, more than a month after the solicitation. On

these facts, the CPOC dismissed the protest. In the Matter of Bid Protest: Wateree River Correctional Institute Farm Dairy Expansion Milking Center Project, State Project N047-9674-MJ-C, (Nov. 2, 2009).

- **Bidder Should Be Allowed Opportunity to Correct Bid Bond Amount**

Agency solicited bids for indefinite delivery contract. The bidding documents required a bid bond in the amount of $7,500.00. The low bidder submitted a bid bond in the amount of 5% of the bid. The agency determined that the bid bond was deficient and found the apparent low bidder's bid was nonresponsive. Low bidder protested the agency's determination.

The bidder and its surety thought that the bid bond was proper and were unaware that the bid bond had been deemed insufficient until the Notice of Intent to Award was posted. The Procurement Code provides that "a bidder who fails to provide bid security in the proper amount . . . must be given on working day from the bid opening to cure the deficiencies." S.C. Code Ann. § 11-35-3030(1)(c). At the protest hearing, the agency testified that it did not notify the bidder that the agency considered the bid bond deficient any time prior to posting the Notice of Intent to Award. Therefore, the agency did not give the bidder the opportunity to cure the deficiency in the bond within one working day of the bid opening as required by the Procurement Code. The CPOC determined that the bidder was not given the opportunity to cure the deficiency in the bond amount as required by S.C. Code Ann. § 11-35-3030(1)(c), cancelled the Notice of Intent to Award and remanded the matter back to the agency with so that the agency could award the contract in a manner that complied with the provisions of the Procurement Code. In the Matter of Bid Protest: Trident Technical College HVAC & Mechanical Systems Indefinite Delivery Contract, State Project H59-D582-PG, (Nov. 19, 2009).

- **Withdrawal of Bids Appropriate**

After the bid opening, the apparent low bidder realized it had made a mistake in its bid and notified the agency and the CPOC of the mistake the same day as the bid. The low bidder stated that it had discovered a data entry error in their bid takeoff in the amount of $635,582. The CPOC requested the bidder to provide supporting documents. The supporting documents showed that the bidder had used a price for the tensile fabric structure that was unrelated to the structure.

The Procurement Code allows a bidder to withdraw an inadvertently erroneous bid upon written determination by the CPOC that withdrawal is appropriate under the facts of the case.

The procurement regulations further provide that a bidder may request to either correct or withdraw a bid and provide documentation that the bidder's mistake was clearly and error and will cause the bidder a substantial loss. The CPOC found that the bidder had mistakenly keyed in a wrong price in its bid and that the error would cause the bidder to sustain a substantial loss. Under these facts, the CPOC determined that it was appropriate to allow the bidder to withdraw its inadvertently erroneous bid without forfeiting its bid bond. In the Matter of Bid Withdrawal: South Carolina Criminal Justice Academy CJA Village Construction Phase I & II, State Project N20-9607-DC, (Jan. 14, 2010).

Another bid withdraw request, arose from a project that required the bidder to submit a price for base bid one and base bid two. Base bid two was to include all the work in base bid one plus additional work that was not included in base bid one. The apparent low bidder made a mistake on its bid form and only listed the price of the additional work for base bid two. The bidder requested to be allowed to correct the error or in the alternative, to withdraw its bid.

The Procurement Code allows correction of bid mistakes under certain circumstances; however, the intended bid price must be evident on the face of the bid. The CPOC found that there was no way to determine the intended bid price from the face of the bid. The CPOC next determined whether was appropriate to allow the bidder to withdraw its bid. The CPOC found withdrawal appropriate as the mistake was clear on the face of the bid and would cause the bidder a substantial loss. South Carolina Department of Metal Health Crafts Farrow Building #16 Chiller Replacement, State Project J12-9714-DC, (Feb. 24, 2010).

- **Vendor Preferences Not Applicable to Construction Procurement**

Agency requested the CPOC to cancel the award of a contract because the agency had inappropriately applied the resident vendor preference in determining the low bidder. S.C. Code Ann. § 11-35-1524(5) provides that resident vendor preferences to do apply to acquisition of services related to construction. The CPOC found that the project clearly fell within the definition of construction and that it was error to apply resident vendor preferences for the purposes of making an award. Accordingly, the CPOC found that it was appropriate to cancel the Notice of Award because the agency had committed administrative error and the error was discovered prior to contract performance. In the Matter of: South Carolina Department of Juvenile Justice Demolition & Recycle Project, RFQ10-2000051164, (Apr. 28, 2010).

- **Failure to Acknowlege Addendum Not a Minor Informality**

Apparent low bidder failed to acknowledge an addendum on its bid and the agency declared the bid nonresponsive. The apparent low bidder protested the agency's determination, arguing that its failure to acknowledge the addendum was a minor informality. The bidder also claimed that its failure to acknowledge the addendum should be excused because the agency's architect had not provided the addendum to the bidder.

The CPOC reviewed the application Procurement Code Section, S.C. Code Ann. §11-35-1520 (13), which provides that a bidder's failure to acknowledge an addendum is a minor informality under the following conditions: (1) if the bid, on its face, clearly indicates that the bidder received the addendum and the bidder states under oath that it received the addendum; or (2) the addendum has no effect on price or quality or merely a trivial or negligible effect on quality.

The apparent low bidder argued that since its listed subcontractors who had acknowledge the addendum, the requirements of S.C. Code Ann. §11-35-1520 (13)(d)(I) were satisfied. The CPOC disagreed. Even though the subcontractor's quotes indicated the receipt of the addendum, the quotes were not a part of the bidder's bid. Nothing on the face of the bid clearly indicated that the bidder had received the addendum. Therefore, the bid did not meet the statutory criteria even though the bidder had submitted a sworn statement that it had received the addendum subsequent to the bid opening. The CPOC noted that the integrity of the competitive bid system would be compromised if bidders were allowed to get "two bites at the apple" by acknowledging an addendum independent of the bidder's bid.

The CPOC then reviewed whether the addendum had no effect on price or quality or merely a trivial or negligible effect on quality. Testimony at the hearing established that the addendum did affect price. Therefore, the CPOC found that the apparent low bidder did not meet any of the criteria set forth in S.C. Code Ann. §11-35-1520 (13).

Next, the CPOC reviewed the bidder's argument that its failure to acknowledge the addendum was the fault of the agency's architect. The CPOC rejected this argument, finding that it was the bidder's responsibility to ascertain prior to bidding whether it has received the addendum. Moreover, the duty to acknowledge an addendum is solely the duty of the bidder. Therefore, the CPOC found the agency's determination that the bidder's bid was nonresponsive was proper and dismissed the protest. In the Matter of Bid Protest: South Carolina School for the

Deaf and the Blind Multi-handicapped School New Construction/Herbert Center Renovation, State Project H75-9542-JM, (Jun. 7, 2010).

III. SOUTH CAROLINA LEGISLATIVE UPDATE

- **Attorneys Fees – State Initiated Actions**

  See attached Act to Amend S.C. Code Ann. § 15-77-300.

- **Uniform Interstate Depositions and Discovery Act**

  See Attached Act.

South Carolina General Assembly
118th Session, 2009-2010

A132, R138, S21

STATUS INFORMATION

General Bill
Sponsors: Senator Hayes
Document Path: l:\council\bills\ms\7071zw09.docx

Introduced in the Senate on January 13, 2009
Introduced in the House on March 25, 2009
Passed by the General Assembly on February 26, 2010
Governor's Action: March 30, 2010, Signed

Summary: Uniform Interstate Depositions and Discovery Act

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
12/10/2008	Senate	Prefiled
12/10/2008	Senate	Referred to Committee on **Judiciary**
1/13/2009	Senate	Introduced and read first time SJ-82
1/13/2009	Senate	Referred to Committee on **Judiciary** SJ-82
1/23/2009	Senate	Referred to Subcommittee: L.Martin (ch), Rankin, Hutto, Bright, Davis
2/11/2009	Senate	Committee report: Favorable with amendment **Judiciary** SJ-26
2/12/2009		Scrivener's error corrected
3/17/2009	Senate	Committee Amendment Adopted SJ-14
3/17/2009	Senate	Read second time SJ-14
3/24/2009	Senate	Read third time and sent to House SJ-21
3/25/2009	House	Introduced and read first time HJ-11
3/25/2009	House	Referred to Committee on **Judiciary** HJ-11
2/17/2010	House	Committee report: Favorable **Judiciary** HJ-3
2/25/2010	House	Read second time HJ-51
2/25/2010	House	Unanimous consent for third reading on next legislative day HJ-52
2/26/2010	House	Read third time and enrolled HJ-8
3/25/2010		Ratified R 138
3/30/2010		Signed By Governor
4/1/2010		Effective date See Act for Effective Date
4/13/2010		Act No. 132

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VERSIONS OF THIS BILL

12/10/2008
2/11/2009
2/12/2009
3/17/2009
2/17/2010

(A132, R138, S21)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 47 TO TITLE 15 SO AS TO ENACT THE "UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT", TO PROVIDE AN EFFICIENT AND INEXPENSIVE PROCEDURE FOR LITIGANTS TO DEPOSE OUT-OF-STATE INDIVIDUALS AND FOR THE PRODUCTION OF DISCOVERABLE MATERIALS THAT MAY BE LOCATED OUT OF STATE.

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

Uniform Interstate Depositions and Discovery Act

SECTION 1. Title 15 of the 1976 Code is amended by adding:

"CHAPTER 47

Uniform Interstate Depositions and Discovery Act

Section 15-47-100. This chapter may be cited as the 'Uniform Interstate Depositions and Discovery Act'.

Section 15-47-110. As used in this chapter:

(1) 'Clerk of court' means a clerk of court who is duly elected for that county elected in each county pursuant to Section 14-17-10 and who is ex officio clerk of the court of general sessions, the family court, and all other courts of record in the county except as may be provided by the law establishing the other courts.

(2) 'Foreign jurisdiction' means a state other than South Carolina.

(3) 'Foreign subpoena' means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(4) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(5) 'State' means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, federally recognized Indian tribes, or any territory or insular possession subject to the jurisdiction of the United States.

(6) 'Subpoena' means a document, however denominated, issued under authority of a court of record requiring a person to:

(a) attend and give testimony at a deposition;

(b) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(c) permit inspection of premises under the control of the person.

Section 15-47-120. (A) To request issuance of a subpoena under this chapter, a party must submit a foreign subpoena to the clerk of court of the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this chapter does not constitute an appearance in the courts of this State.

(B) When a party submits a foreign subpoena to a clerk of court in this State, the clerk, in accordance with the rules of court, promptly shall issue a subpoena for service upon the person to which the foreign subpoena is directed. The subpoena must incorporate the terms used in the foreign subpoena and contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

Section 15-47-130. A subpoena issued by a clerk of court under Section 15-47-120 must be served in compliance with the applicable rules of court or statutes relating to the service of a subpoena in this State.

Section 15-47-140. When a subpoena issued under Section 15-47-120 commands a person to attend and give testimony at a deposition, produce designated books, documents, records, electronically stored information, or tangible items, or permit inspection of premises, the time and place and the manner of the taking of the deposition, the production, or the inspection must comply with the South Carolina Rules of Civil Procedure relating to discovery.

Section 15-47-150. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 15-47-120 must comply with the applicable rules or statutes of this State and be submitted to the court in the county in which discovery is to be conducted.

Section 15-47-160. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."

Time effective

SECTION 2. This act takes effect upon approval by the Governor and applies to requests for discovery in cases pending on that date.

Ratified the 25th day of March, 2010.

Approved the 30th day of March, 2010.

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South Carolina General Assembly
118th Session, 2009-2010

A125, R124, S186

STATUS INFORMATION

General Bill
Sponsors: Senators McConnell and Campsen
Document Path: l:\s-jud\bills\mcconnell\jud0010.js.docx

Introduced in the Senate on January 13, 2009
Introduced in the House on March 24, 2009
Last Amended on January 20, 2010
Passed by the General Assembly on February 2, 2010
Governor's Action: February 24, 2010, Signed

Summary: Attorney fees

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
12/17/2008	Senate	Prefiled
12/17/2008	Senate	Referred to Committee on **Judiciary**
1/13/2009	Senate	Introduced and read first time SJ-157
1/13/2009	Senate	Referred to Committee on **Judiciary** SJ-157
1/23/2009	Senate	Referred to Subcommittee: L.Martin (ch), Rankin, Hutto, Bright, Davis
3/4/2009	Senate	Committee report: Favorable with amendment **Judiciary** SJ-17
3/10/2009	Senate	Special order, set for March 10, 2009 SJ-23
3/11/2009	Senate	Committee Amendment Amended and Adopted SJ-43
3/11/2009	Senate	Amended SJ-43
3/11/2009	Senate	Read second time SJ-43
3/17/2009	Senate	Read third time and sent to House SJ-36
3/24/2009	House	Introduced and read first time HJ-19
3/24/2009	House	Referred to Committee on **Judiciary** HJ-19
5/20/2009	House	Recalled from Committee on **Judiciary** HJ-34
5/21/2009	House	Debate adjourned until Friday, May 22, 2009 HJ-17
1/13/2010	House	Requests for debate-Rep(s). Hart, JE Smith, Sellers, Gunn, McLeod, Weeks, Govan, Hodges, King, Harrison, and GM Smith HJ-29
1/13/2010	House	Debate adjourned until Thursday, January 14, 2010 HJ-39
1/14/2010	House	Debate adjourned until Tuesday, January 19, 2010 HJ-549
1/20/2010	House	Amended HJ-20
1/20/2010	House	Read second time HJ-22
1/20/2010	House	Roll call Yeas-95 Nays-3 HJ-22
1/21/2010	House	Read third time and returned to Senate with amendments HJ-33
2/2/2010	Senate	Concurred in House amendment and enrolled SJ-17
2/18/2010		Ratified R 124

2/24/2010	Signed By Governor
3/3/2010	Effective date 02/24/10
3/10/2010	Act No. 125

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VERSIONS OF THIS BILL

12/17/2008
3/4/2009
3/11/2009
5/20/2009
1/20/2010

(A125, R124, S186)

AN ACT TO AMEND SECTION 15-77-300, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO ALLOWANCE OF ATTORNEY'S FEES IN STATE-INITIATED ACTIONS, SO AS TO LIMIT ATTORNEY'S FEES TO A REASONABLE TIME EXPENDED AT A REASONABLE RATE AND TO PROVIDE FACTORS THAT MUST BE CONSIDERED IN MAKING THIS DETERMINATION.

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

Attorney's fees, state-initiated actions

SECTION 1. Section 15-77-300 of the 1976 Code is amended to read:

"Section 15-77-300. (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

(B) Attorney's fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:

(1) the nature, extent, and difficulty of the case;
(2) the time devoted;
(3) the professional standing of counsel;
(4) the beneficial results obtained; and
(5) the customary legal fees for similar services.

The judge must make specific written findings regarding each factor listed above in making the award of attorney's fees. However, in no event shall a prevailing party be allowed to shift attorney's fees

pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions."

Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 18th day of February, 2010.

Approved the 24th day of February, 2010.

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