# South Carolina Damages
## Second Edition

## TABLE OF CONTENTS

### PART I
#### DAMAGES IN GENERAL

**Chapter 1 - DAMAGES IN GENERAL** .................................................. 1  
A. Necessity of Damages In Actions At Law ................................. 1  
  1. Actions at Law Versus Actions in Equity .......................... 2  
  2. Recovery is Premised on the Existence of Damages .......... 2  
  3. Restrictions on the Right to Recover Damages ................... 3  
B. Types of Damages and the Purposes They Serve ....................... 4  
  1. Compensatory Damages ............................................ 4  
  2. Nominal Damages .................................................. 5  
  3. Punitive Damages .................................................. 6  
C. Proof Required for Recovery of Damages ............................... 6  
  1. Actual Damages .................................................... 6  
  2. Nominal Damages .................................................. 9  

### PART II
#### COMPENSATORY DAMAGES

**Chapter 2 - SOUTH CAROLINA MODIFIED COMPARATIVE NEGLIGENCE** ............................... 15  
A. Introduction ............................................................................. 15  
B. Contributory Negligence as a Total Bar to Recovery .................. 16  
  1. Assumption of the Risk .............................................. 17  
  2. Last Clear Chance Doctrine .......................................... 19  
  3. Concepts Clouded by the Adoption of Comparative Fault .......... 19  
C. Adoption of Comparative Negligence: Reducing Rather Than Barring Recovery .......................................................... 19  
  1. Apportionment of Responsibility .................................. 20
# Table of Contents

2. Multiple Defendants ................................................. 20
3. Computation of Damages ........................................... 21
4. Limits on Liability .................................................. 21
5. Comparative Negligence and Minors ............................... 22

D. Exceptions to Comparative Negligence .............................. 23
   1. Assumption of the Risk ......................................... 23
   2. Last Clear Chance Doctrine .................................... 23
   3. Intentional Torts ............................................... 24
   4. Defendant’s Reckless Behavior ................................. 24
   5. Violation of Statute ............................................ 25
   6. Defendant’s Special Duty to Protect Plaintiff
      Against Plaintiff’s Own Negligence ......................... 25

E. Distinguishing Between Failure of Causation
   and Comparative Negligence ..................................... 28

F. Application of Comparative Negligence
   to Strict Products Liability Claims .............................. 29

G. Imputed Contributory Negligence and Comparative Negligence ........................................... 29

H. Jury Instructions .................................................... 30
   1. Jury Instructions When There is One Plaintiff and One Defendant ........................................... 31
   2. Special Verdict Form in a One Plaintiff v. One Defendant Comparative Negligence Case ......................... 32

I. Conclusion .......................................................... 32

### Chapter 3 - Personal Injury Damages .................................. 33

A. Tangible Losses Available for Personal Injury ...................... 33
   1. Medical Expenses ............................................. 33
   2. Lost Earnings .................................................. 48

B. Intangible Losses Available in Personal Injury Cases ............... 52
   1. Pain and Suffering ............................................ 52
   2. Disfigurement and Disability ................................. 56
   3. Emotional/Mental Distress .................................... 61
   4. Loss of Consortium ........................................... 72
   5. Loss of Enjoyment of Life .................................... 79
# Table of Contents

**Chapter 4 - Tort Damages Involving Property**

- **A. Injury/Invasion of Real Property**
  - 1. Nuisance
  - 2. Trespass
  - 3. Strict Liability
  - 4. Negligence

- **B. Physical Injury to or Loss to Chattels**
  - 1. Introduction
  - 2. General Damages—Chattel Has a Fair Market Value
  - 3. General Damages—Chattel Has No Fair Market Value or Fair Market Value Will Not Compensate Plaintiff For Loss
  - 4. Loss of Use
  - 5. Conversion

- **C. Eminent Domain/Condemnation**
  - 1. Origins of Condemnation
  - 2. South Carolina’s Statutory Scheme
  - 3. Just Compensation
  - 4. The Process of Valuation
  - 5. Attorney Fees and Interest

**Chapter 5 - Contract Damages**

- **A. Elements of Damages**
  - 1. Actual or General Damages
  - 2. Special Damages for Breach of Contract
  - 3. Incidental and Consequential Damages
  - 4. Punitive Damages for Breach of Contract
  - 5. Goodwill
  - 6. Attorney’s Fees and Costs

- **B. Measure of Contract Damages**
  - 1. Mitigation of Damages
  - 2. Lost Profits and New Business Rule
  - 3. Liquidated Damages
  - 4. Economic Loss Doctrine
C. Issues Related to Contact Damages .................................................. 124
   1. Promissory Estoppel ................................................................. 124
   2. Quantum Meruit ................................................................. 125

PART III
PUNITIVE DAMAGES

Chapter 6 - PUNITIVE DAMAGES ...................................................... 131
A. Nature and Purpose of Punitive Damages ........................................ 131
   1. Historical roots of punitive damages ........................................ 131
   2. Goals of punitive damages ..................................................... 133
B. Grounds for and Limits Upon Punitive Damages ................................ 138
   1. Statutory theories ............................................................... 138
   2. Common law theory .......................................................... 146
C. Amount of Award ........................................................................ 147
D. Bifurcation and Trifurcation of Cases ............................................ 152
   1. State Court ........................................................................... 152
   2. Federal Court ...................................................................... 153
E. Constitutional Issues ..................................................................... 154
   1. Reprehensibility .................................................................... 154
   2. Ratio between actual harm and punitive award .......................... 158
   3. Punitive damage award versus civil penalties imposed in similar cases ................................................ 161
   4. Other issues ......................................................................... 161
F. Review of Punitive Damages on Appeal .......................................... 164
   1. Federal Court ....................................................................... 164
   2. State Court ......................................................................... 166
G. Punitive Damages in Federal Maritime Cases .................................. 168
H. Conclusion .................................................................................. 171

PART IV
MISCELLANEOUS DAMAGES TOPICS

Chapter 7 - SET-OFF OF SETTLEMENT AGAINST VERDICT IN
WRONGFUL DEATH AND SURVIVAL ACTIONS ............................... 175
# Table of Contents

Chapter 8 - Prejudgment and Post-Judgment Interest  ......... 181

A. Prejudgment Interest: General Rule and Theories of Recovery .... 181
   1. Statutory Legal Rate of Interest .......................... 181
   2. Interest in Contractual Agreements ......................... 181

B. Simple Versus Compound Interest ............................ 182

C. “Account Stated” and “Sum Certain” for Statutory Interest ....... 182

D. Discount and Setoff ........................................ 184

E. Pleading Prejudgment Interest ............................... 184

F. Specific Actions .............................................. 185
   1. Eminent Domain ............................................ 185
   2. Consumer Protection Code: (1) Interest on the Use of Money or Commodities, (2) “Legal Rate of Interest” Defined, and (3) Interest on Life Insurance Policy Loans .............................. 185
   3. Overpayment of Child Support .............................. 186
   4. Corporations, Partnerships, and Associations ............... 186
   5. South Carolina Tort Claims Act ............................ 187
   7. Claims for the Improvement of Real Estate ................. 188
   8. Uniform Land Sales Practice Act .......................... 189
   9. Disbursements from the Military Fund ...................... 189
   10. Delinquent Tax Sales ..................................... 190
   11. Diversity Actions in Federal Court ....................... 190

G. Interest and Damages ......................................... 191
   1. General Rule ............................................... 191
   2. Inverse Condemnation ..................................... 191
   3. Failure to Pay Amount Due Under Fire Insurance Policy .... 192

H. Post-judgment Interest: Purpose and Theories of Recovery ...... 193
   1. Statutory Rate of Post-Judgment Interest .................. 193
   2. Interest in Contractual Agreements ......................... 194

I. Pleading Post-judgment Interest ............................... 195

J. Interest Accrual in Appeals .................................. 195

K. Stay of Interest Accrual under Rule 67, SCRCP ................. 196
   1. Payment of Money into Court under Rule 67 ............... 196
<table>
<thead>
<tr>
<th>Table of Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Terms of Contract Prevail Over Rule 67, SCRCP .................. 197</td>
</tr>
<tr>
<td>3. Matter of Discretion .................................................. 198</td>
</tr>
<tr>
<td>L. Specific Cases ......................................................... 198</td>
</tr>
<tr>
<td>1. Equitable Distribution Awards ........................................ 198</td>
</tr>
<tr>
<td>2. Interest from Time of Verdict or Report ............................ 198</td>
</tr>
<tr>
<td>3. Interest on Judgments by Confession ............................... 199</td>
</tr>
<tr>
<td>4. Tender of Arbitration Award ......................................... 199</td>
</tr>
<tr>
<td>5. Attorneys’ Fees ......................................................... 200</td>
</tr>
<tr>
<td>6. Eminent Domain .......................................................... 200</td>
</tr>
<tr>
<td>M. Conclusion ............................................................... 200</td>
</tr>
</tbody>
</table>

**Chapter 9 - Collateral Source Rule** ........................................ 201

A. History and Purpose of the Collateral Source Rule .................... 201
   1. History ................................................................. 201
   2. Purposes/Justifications ............................................... 202

B. South Carolina Law .......................................................... 204
   1. General ................................................................. 204
   2. Jury Charges .......................................................... 204
   3. Applications .......................................................... 205

C. Future of the Collateral Source Rule ..................................... 210
   1. Proposed changes in South Carolina ............................... 210
   2. National Trends ....................................................... 211

**Chapter 10 - The Taxation of Settlements and Judgments** ............ 213

A. Introduction ............................................................... 213
   1. Taxpayer’s Burden of Proof .......................................... 213
   2. Unexpected Tax Results of Payments ............................... 213
   3. Lack of Deference for Delayed Resolution of Tax Issues ...... 214
   4. IRS Scrutiny of Settlements and Judgments ....................... 214
   5. Ability to Utilize Tax Treatment of Payment in Negotiations .. 214
   6. Tax Treatment of Payment Must be Determined at Some Point .. 214

B. Origin of the Claim Doctrine .............................................. 215
### Table of Contents

C. Plaintiff’s Characterization of the Payment: Non-Taxable Payment or Taxable Payment (as Ordinary Income or Capital Gains) ............................. 215

D. Defendant’s Characterization of the Payment: Deductible Expense, Capital Expenditure or Non-Deductible, Non-Capital Payment ............... 218

E. Cases Involving Multiple Claims .................................................. 219

F. Miscellaneous Tax Issues ............................................................ 220
   1. Identifying the Payor ............................................................. 220
   2. Employment-Related Lawsuits .............................................. 220
   3. Tax Reporting ................................................................. 222
   4. Tax Treatment of Attorney Fees ........................................... 223

G. Additional Authorities ............................................................... 225

Chapter 11 - LIMITATIONS ON DAMAGES AGAINST THE STATE OF SOUTH CAROLINA AND CHARITABLE ORGANIZATIONS ........................................... 227

A. The Abolition of Sovereign Immunity in South Carolina .................. 227
   1. Background ........................................................................... 227
   2. Waiver of Sovereign Immunity ............................................. 228

B. Statutory Limitations on Damages in Tort Actions Against the State ... 229
   1. The South Carolina Tort Claims Act .................................... 229
   2. Judicial Interpretation of Statutory Caps and Legislative Responses ........................................ 230
   3. Constitutionality of Statutory Caps ...................................... 232
   4. Current Limits on Damages ................................................... 232

C. Limitations on Damages Against Charitable Organizations ................ 233

PART V PERMISSIBLE ARGUMENTS ON DAMAGES IN CLOSING ARGUMENTS

Chapter 12 - PERMISSIBLE ARGUMENTS ON DAMAGES IN CLOSING ARGUMENTS ........................................ 239

A. Right to Closing Argument ....................................................... 239

B. Permissible Scope of Closing Argument ..................................... 240
   1. What is Allowed ................................................................... 240
   2. What is Prohibited ............................................................. 243
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.</td>
<td>Curing Improper Arguments</td>
<td>246</td>
</tr>
<tr>
<td>1.</td>
<td>Timely Objections</td>
<td>246</td>
</tr>
<tr>
<td>2.</td>
<td>Curative Instructions</td>
<td>247</td>
</tr>
<tr>
<td></td>
<td><strong>PART VI</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>DAMAGES FOR SPECIFIC CAUSES OF ACTION</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 13 - <strong>ADMIRALTY</strong></td>
<td></td>
<td>251</td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>251</td>
</tr>
<tr>
<td>1.</td>
<td>Scope of Chapter</td>
<td>251</td>
</tr>
<tr>
<td>2.</td>
<td>Pleading Maritime Damages</td>
<td>254</td>
</tr>
<tr>
<td>3.</td>
<td>Forum</td>
<td>254</td>
</tr>
<tr>
<td>4.</td>
<td>Basic Maxim of Damages in Admiralty</td>
<td>255</td>
</tr>
<tr>
<td>B.</td>
<td>Allocation of Damages in Admiralty</td>
<td>256</td>
</tr>
<tr>
<td>1.</td>
<td>Vessel Solely at Fault</td>
<td>256</td>
</tr>
<tr>
<td>2.</td>
<td>Proportionate Fault: Proportionate Damages</td>
<td>256</td>
</tr>
<tr>
<td>3.</td>
<td>Proportionate Damages in Cases Involving Third Parties</td>
<td>256</td>
</tr>
<tr>
<td>C.</td>
<td>Damages for Injury to Vessel—Total Loss</td>
<td>257</td>
</tr>
<tr>
<td>1.</td>
<td>Measure of Recovery</td>
<td>257</td>
</tr>
<tr>
<td>2.</td>
<td>Valuation of Vessel</td>
<td>257</td>
</tr>
<tr>
<td>3.</td>
<td>Net Freight Pending</td>
<td>258</td>
</tr>
<tr>
<td>4.</td>
<td>Loss of Use</td>
<td>259</td>
</tr>
<tr>
<td>5.</td>
<td>Prejudgment Interest</td>
<td>259</td>
</tr>
<tr>
<td>6.</td>
<td>Expenses of Raising and Removal (Recovery Costs)</td>
<td>263</td>
</tr>
<tr>
<td>D.</td>
<td>Damages for Injury to Vessel—Partial Loss</td>
<td>264</td>
</tr>
<tr>
<td>1.</td>
<td>Measure of Recovery</td>
<td>264</td>
</tr>
<tr>
<td>2.</td>
<td>Repair Costs</td>
<td>264</td>
</tr>
<tr>
<td>3.</td>
<td>Miscellaneous Expenses Incidental to Repair Costs</td>
<td>265</td>
</tr>
<tr>
<td>4.</td>
<td>Recovery Costs</td>
<td>266</td>
</tr>
<tr>
<td>5.</td>
<td>Prejudgment Interest</td>
<td>266</td>
</tr>
<tr>
<td>6.</td>
<td>Loss of Use or Lost Profits</td>
<td>267</td>
</tr>
<tr>
<td>7.</td>
<td>Incidental Expenses</td>
<td>279</td>
</tr>
</tbody>
</table>
# Table of Contents

E. Damages for Injury to Land-Based Structure .......................... 281
   1. General Principles .................................................. 281
   2. New-for-Old, Betterment, and Depreciation ....................... 281

F. Additional Property Damage Rules in Admiralty .................... 283
   1. Nominal Damages .................................................... 283
   2. Punitive Damages ................................................... 283
   3. Attorney Fees ...................................................... 284
   4. Mitigation of Damages .............................................. 285

G. Research Aids ......................................................... 285
   1. Bibliography ....................................................... 285
   2. Finding the Maritime Case ......................................... 286

**Chapter 14 - Anti-Trust Damages Under**
**South Carolina Anti-Trust Statute** ........................................ 287

A. Introduction .......................................................... 287

B. Limits on Damages Under Present Precedent ......................... 288
   1. The Intrastate Commerce Requirement .......................... 288
   2. The Direct Purchaser Requirement ............................... 288
   3. Prohibition of Class Actions ..................................... 289

C. Potential Theories of Recovery ....................................... 289
   1. Recovery Under Federal Law ...................................... 289
   2. Recovery Under State Law ........................................ 290

D. Conclusion ............................................................ 291

**Chapter 15 - Auto Accidents** ............................................ 293

A. Scope of Chapter ..................................................... 293

B. Compensable Damages ............................................... 293
   1. Property Damage .................................................. 293
   2. Punitive Damages .................................................. 295

C. Mitigation and Reduction of Damages ................................ 295
   1. Duty to Minimize Vehicle Rental Costs ......................... 296
   2. Duty to Wear Seat Belt .......................................... 296
<table>
<thead>
<tr>
<th>Chapter 16 - Civil Conspiracy</th>
<th>299</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Introduction</strong></td>
<td>299</td>
</tr>
<tr>
<td><strong>B. Civil Conspiracy Defined</strong></td>
<td>299</td>
</tr>
<tr>
<td><strong>C. Special Damages Defined</strong></td>
<td>300</td>
</tr>
<tr>
<td>1. The Todd/Vaught Definition</td>
<td>300</td>
</tr>
<tr>
<td>2. Recent Developments</td>
<td>300</td>
</tr>
<tr>
<td>3. Summary</td>
<td>303</td>
</tr>
<tr>
<td><strong>D. Requesting Damages Makes the Action One at Law</strong></td>
<td>304</td>
</tr>
<tr>
<td><strong>E. Damages in the Damages Phase</strong></td>
<td>304</td>
</tr>
<tr>
<td>1. General Tort Principles Apply</td>
<td>304</td>
</tr>
<tr>
<td>2. Specific Items of Damage</td>
<td>304</td>
</tr>
<tr>
<td>3. Each Conspirator Liable for Wrongful Acts of All</td>
<td>306</td>
</tr>
<tr>
<td>4. Punitive Damages</td>
<td>306</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 17 - Civil Rights</th>
<th>309</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Introduction</strong></td>
<td>309</td>
</tr>
<tr>
<td><strong>B. Potential Defendants</strong></td>
<td>309</td>
</tr>
<tr>
<td>1. States</td>
<td>311</td>
</tr>
<tr>
<td>2. Official and Individual Capacities</td>
<td>311</td>
</tr>
<tr>
<td>3. State Officials</td>
<td>312</td>
</tr>
<tr>
<td>4. Local Governmental Entities and Officials</td>
<td>313</td>
</tr>
<tr>
<td>5. “State” vs. “Local” Status</td>
<td>313</td>
</tr>
<tr>
<td><strong>C. Damages</strong></td>
<td>315</td>
</tr>
<tr>
<td>1. Actual Damages</td>
<td>315</td>
</tr>
<tr>
<td>2. Punitive Damages</td>
<td>318</td>
</tr>
<tr>
<td><strong>D. Attorney’s Fees and Costs</strong></td>
<td>320</td>
</tr>
<tr>
<td>1. Entitlement to Fees: “Prevailing Party” Status</td>
<td>321</td>
</tr>
<tr>
<td>2. Reasonableness of Fees</td>
<td>323</td>
</tr>
<tr>
<td>3. Costs</td>
<td>327</td>
</tr>
</tbody>
</table>
# Table of Contents

## Chapter 18 - Class Actions  
A. Overview of Class Action Theory .................................................. 329
B. The Substantive Law of Damages Applies to Class Actions ................. 332
C. The Remedy Requested Will Control the Class Action Procedure Utilized in Every Case .................................................. 333
D. The Damages in a Class Action Must Exceed One Hundred Dollars for Each Class Member .................................................. 333
E. Class Action Damages Determination and Distribution Through Litigation ............................................................................ 335
F. Formulating a Trial Plan that Contemplates Damages Calculation ...... 335
G. Proving Aggregate Monetary Damages on a Class-Wide Basis .......... 336
H. Distribution of Proceeds after Judgment ........................................ 337
I. Procedures for Awarding Damages Dependent Upon Type of Injury .... 338
J. Injury and Damages to Individuals .................................................. 338
K. Pre-Judgment Interest ...................................................................... 338
L. The Claims Filing or Damage Distribution Process—Notice to Members ............................................................................ 340
M. Members Must Prove Entitlement .................................................. 340
N. Distribution Only to Current Members ........................................... 340
O. Class Action Damage Distribution by Settlement ............................. 341
P. Aggregate Damages and “Fluid Verdicts” ....................................... 341
Q. Unclaimed Balances ......................................................................... 341
   1. Cy Pres Distributions .................................................................... 342
   2. Pro Rata Distributions to Class Members .................................... 343
   3. Escheat of Funds ......................................................................... 344
   4. Reversion Back to Defendant ..................................................... 344
R. Arbitration of Class Action Damages ............................................ 344
S. Shareholder Derivative Action Litigation ...................................... 345
T. Defendant Class Actions ................................................................. 346

## Chapter 19 - Construction Contracts .............................................. 349
A. Introduction .................................................................................... 349
B. Damages Generally .......................................................................... 349
## Table of Contents

C. Owner v. Contractor .......................................................... 350  
   1. Breach of Contract .................................................. 350  
   2. Negligence ............................................................ 351  
   3. Warranties ............................................................. 352  
   4. Miscellaneous—Damage or Destruction of the Building .......... 353  
D. Contractor v. Owner ....................................................... 354  
   1. Contract Balances .................................................. 354  
   2. Contract Interference ............................................. 354  
   3. Increase Scope of the Work .................................... 354  
E. Limitations on Damages .................................................. 355  
   1. Liquidated Damages ............................................... 355  
   2. No Damage for Delay Clause ................................... 355  
   3. Arbitration Clause ................................................ 355  
   4. The Economic Loss Rule ........................................ 356  
F. Mechanic’s Liens ........................................................... 356  
   1. Supplier of Labor or Materials ................................ 357  
   2. Notice of Project Commencement ................................ 357  
G. Conclusion ................................................................. 357  

### Chapter 20 - Defamation and Invasion of Privacy ......................... 359  
A. Defamation ................................................................. 359  
   1. Definitions and Distinctions ..................................... 360  
   2. Alleging Damages .................................................. 363  
   3. Evidence and Burden of Proof ................................... 364  
   4. Elements and Measure of Damages ............................ 368  
   5. Mitigation of Damages ............................................ 369  
   6. Constitutional Restrictions on Recovery of Damages ......... 370  
B. Invasion of Privacy ....................................................... 371  
   1. Forms of Invasion of Privacy ................................... 371  
   2. Elements and Measure of Damages ............................ 375  
   3. Constitutional Considerations ................................... 376
<table>
<thead>
<tr>
<th>Chapter 21 - DRAM SHOP LIABILITY</th>
<th>377</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>377</td>
</tr>
<tr>
<td>B. Scope of Liability</td>
<td>377</td>
</tr>
<tr>
<td>C. Dram Shop Liability Based on Common Law Negligence</td>
<td>379</td>
</tr>
<tr>
<td>D. Dram Shop Liability Based on Negligence Per Se</td>
<td>381</td>
</tr>
<tr>
<td>E. Defenses to Dram Shop Liability</td>
<td>382</td>
</tr>
<tr>
<td>F. Damages for Dram Shop Liability</td>
<td>383</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 22 - FRAUD AND MISREPRESENTATION</th>
<th>385</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Fraud</td>
<td>385</td>
</tr>
<tr>
<td>B. Negligent Misrepresentation</td>
<td>386</td>
</tr>
<tr>
<td>C. Breach of Contract Accompanied by a Fraudulent Act</td>
<td>387</td>
</tr>
<tr>
<td>D. Damages</td>
<td>388</td>
</tr>
<tr>
<td>E. Punitive Damages for Fraud and Misrepresentation</td>
<td>389</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 23 - INSURANCE BAD FAITH</th>
<th>393</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>393</td>
</tr>
<tr>
<td>B. Actual and Consequential Damages</td>
<td>399</td>
</tr>
<tr>
<td>C. Unsettled Questions on the Scope of Consequential Damages</td>
<td>401</td>
</tr>
<tr>
<td>1. Acceleration of Future Benefits</td>
<td>401</td>
</tr>
<tr>
<td>2. Physical, Mental, and Emotional Distress</td>
<td>405</td>
</tr>
<tr>
<td>3. Attorneys’ Fees</td>
<td>405</td>
</tr>
<tr>
<td>D. Prejudgment Interest</td>
<td>406</td>
</tr>
<tr>
<td>E. Punitive Damages</td>
<td>407</td>
</tr>
<tr>
<td>F. Limitations</td>
<td>409</td>
</tr>
<tr>
<td>G. Conclusion</td>
<td>412</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 24 - INSURANCE STACKING</th>
<th>413</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Automobile Insurance in South Carolina</td>
<td>413</td>
</tr>
<tr>
<td>B. Introduction to Stacking</td>
<td>414</td>
</tr>
<tr>
<td>C. Class I Insured v. Class II Insured</td>
<td>415</td>
</tr>
<tr>
<td>D. Ownership of a Vehicle and Involvement in an Accident</td>
<td>415</td>
</tr>
<tr>
<td>E. Mandatory and Optional Insurance Coverages</td>
<td>416</td>
</tr>
</tbody>
</table>
Table of Contents

F. Liability Insurance ................................................................. 416
   1. Liability Insurance for Owned Vehicles ............................... 416
   2. Liability Coverage for Non-owned Vehicles ....................... 417
G. Uninsured Motorist Coverage .................................................. 418
H. Underinsured Motorist Coverage ............................................. 419
   1. “Basic” UIM .................................................................. 419
I. The Rules of Stacking .............................................................. 422
   1. What type of coverage is available? ................................. 423
   2. What is the status or “class” of the individual making the claim? ... 424
   3. Was there an “owned vehicle” “involved” in the accident? .... 428
   4. How much coverage may be stacked? ............................... 429
J. Stacking of Excess UIM or UM by Class I Insured ...................... 431
   1. Per policy cap on excess UIM ........................................ 431
   2. Stacking UIM and liability from same policy ...................... 432
   3. Stacking UIM and liability from different policies .............. 432
K. Case Law Concerning Set-Off .................................................. 433
   1. Single limits policies ................................................... 434
   2. Personal injury protection policies ................................. 435
   3. Stacking of PIP and set-off .......................................... 435

Chapter 25 - INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS .......... 437
   A. The Tort of Outrage: Defining Damages ............................ 437
   B. Proof of Emotional Distress ........................................... 438
      1. Physical v. Emotional Manifestation ............................. 438
      2. Expert Testimony ................................................... 439
   C. Nominal Damages ......................................................... 440
   D. Punitive Damages ......................................................... 440
   E. Alternative Remedies ..................................................... 441

Chapter 26 - INTERFERENCE WITH CONTRACTUAL
   AND BUSINESS RELATIONS ............................................. 443
   A. Introduction ............................................................... 443
# Table of Contents

B. Intentional Interference with Existing Contract .......................... 443  
1. Theory of Tort ........................................... 443  
2. Elements of Cause of Action .................................. 445  
C. Intentional Interference with Prospective Contractual Relations ...... 446  
1. Theory of Tort ........................................... 446  
2. Elements of Cause of Action .................................. 448  
D. Damages and Other Relief .............................................. 449  
1. Elements of Damages and Other Relief .............................. 449  
2. Degree of Certainty or Specificity Required ......................... 451  
3. Duty to Mitigate ........................................... 454  
4. Lost Profits ................................................ 455  
5. Lost Volume Seller Doctrine ....................................... 456  
6. Punitive Damages ............................................ 457  
7. Disallowance of Double Recovery ................................... 458  
E. Parties, Joint and Several Liability, Burden of Proof, and Evidence .... 458  
1. Parties to Action ........................................... 458  
2. Joint and Several Liability ....................................... 459  
3. Burden of Proof and Evidence ..................................... 461  

## Chapter 27 - Land Sale Contracts .......................................... 463  
A. Introduction .................................................. 463  
B. Recovery by the Seller ............................................. 463  
1. Breach of Contract ........................................... 463  
2. Rescission .................................................. 474  
3. Seller’s Retention of Both Land and Payments ....................... 480  
C. Recovery by the Buyer ............................................. 481  
1. Introduction .................................................. 481  
2. Breach of Contract ........................................... 482  
3. Rescission .................................................. 491  
4. Equitable Conversion ........................................... 499  

## Chapter 28 - Legal Malpractice ........................................... 501  
A. Types of Legal Malpractice ......................................... 501
## Table of Contents

### B. Method of Determining Damages ........................................ 501
   1. Attorney Negligence in Prosecuting or Defending a Claim: The Case-Within-a-Case Method ........................................ 501
   2. Expert Testimony ................................................................ 504
   3. Negligently Drafted Documents ........................................ 506
   4. Damages in Malpractice Cases as a Result of Conflict of Interest ... 507

### C. Types of Damages Recoverable ........................................ 508

### D. Damages Not Recoverable under Legal Malpractice ............... 508

### Chapter 29 - Marital and Relational Torts .............................. 511

#### A. Introduction .............................................................. 511

#### B. Marital and Family Torts .............................................. 512
   1. Alienation of Affection and Criminal Conversation .................. 512
   2. Assault and Battery ..................................................... 512
   3. False Imprisonment ..................................................... 514
   4. Negligent Transmission of Sexual Disease ........................... 514
   5. Wrongful Death .......................................................... 515
   6. Abuse of Process ....................................................... 516
   7. Defamation ............................................................... 516
   8. Invasion of Privacy ..................................................... 517
   9. Intentional Infliction of Emotional Distress .......................... 518
  10. Breach of Fiduciary Duty ............................................... 519
  11. Constructive Trust ...................................................... 521
  12. Fraudulent Conveyance/Statute of Elizabeth ....................... 521
  13. Civil Conspiracy .......................................................... 522
  14. Tortious Interference with Parental Rights .......................... 523
  15. Intentional Interference with Inheritance ............................ 524
  16. Undue Influence/Influenced Transactions ............................. 525
  17. Violation of the Omnibus Adult Protection Act (South Carolina Code sections 43-35-5 through 43-35-350) ............. 527
  18. Wiretapping, Violation of the Stored Communications Privacy Act .......................................................... 528
<table>
<thead>
<tr>
<th>Chapter 30 - Medical Malpractice</th>
<th>531</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Overview</td>
<td>531</td>
</tr>
<tr>
<td>B. Actual Damages</td>
<td>532</td>
</tr>
<tr>
<td>1. Negligence</td>
<td>533</td>
</tr>
<tr>
<td>2. Breach of Contract</td>
<td>539</td>
</tr>
<tr>
<td>C. Punitive Damages</td>
<td>540</td>
</tr>
<tr>
<td>D. Offer of Judgment</td>
<td>541</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 31 - Premises Liability</th>
<th>543</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>543</td>
</tr>
<tr>
<td>B. Injuries Arising From Breaches of Common-Law Duties Owed by a Possessor of Land and From Negligence: Actual Damages for Personal Injury</td>
<td>544</td>
</tr>
<tr>
<td>1. Generally</td>
<td>544</td>
</tr>
<tr>
<td>2. Duty to Mitigate Damages</td>
<td>546</td>
</tr>
<tr>
<td>3. Pre-Existing Condition</td>
<td>546</td>
</tr>
<tr>
<td>4. Nominal Damages for Violations of Legal Rights, <em>De Minimus Non Curat Lex</em>, and Punitive Damages as They Relate to Nominal Damages</td>
<td>546</td>
</tr>
<tr>
<td>5. Particular Types of Personal Injuries on Premises</td>
<td>549</td>
</tr>
<tr>
<td>C. Injuries Caused by Dangerous Substances or Conditions on Real Property, Including Nuisance</td>
<td>552</td>
</tr>
<tr>
<td>D. Permanent Impairment Versus Disability</td>
<td>552</td>
</tr>
<tr>
<td>E. Attorneys’ Fees</td>
<td>553</td>
</tr>
<tr>
<td>F. Practical Tips on Proving Damages</td>
<td>554</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 32 - Qui Tam Damages</th>
<th>557</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>557</td>
</tr>
<tr>
<td>1. False Claims Act</td>
<td>557</td>
</tr>
<tr>
<td>2. Qui Tam Provisions of the False Claims Act</td>
<td>560</td>
</tr>
<tr>
<td>3. Damage Provisions of the False Claims Act</td>
<td>561</td>
</tr>
</tbody>
</table>
# Table of Contents

B. Calculating Damages under the False Claims Act  .................................. 569
   1. Procurement Fraud .................................................. 569
   2. Government Contract for Services/Products  ......................... 570
   3. Kickbacks .......................................................... 572
   4. Health Care ......................................................... 572
   5. Reverse False Claims Provision  .................................. 574
   6. Use of Statistical Sampling to Estimate Damages and Penalties  .... 574
   7. Limitations on Damages/Penalties ................................ 576
C. Determining the Relator’s Share .................................................. 578
   1. Factors Considered for a Possible Increase in the Percentage .... 578
   2. Factors for Consideration for a Possible Decrease in the Percentage 579
D. Alternative/Simultaneous Remedies .............................................. 580
   1. Administrative Actions .............................................. 580
   2. Other Civil Statutes .................................................. 581
   3. Equitable Remedies .................................................. 582
   4. Criminal Prosecution ............................................... 583

**Chapter 33 - S ALE OF G OODS / U NIFORM C OMERCIAL C ODE**  ................ 585
A. Article 2—Sales ..................................................................... 585
   1. Seller’s Damages under Article 2 .................................. 585
   2. Buyer’s Damages under Article 2 .................................. 588
B. Damages as a Remedy under Article 9 of the UCC ...................... 592
   1. Consumer Provisions Under Article 9  .............................. 593
   2. Damages Relating to Enforcement Issues Under Article 9 ........ 594

**Chapter 34 - S ECURITIES L AWS** ................................................. 601
A. Introduction ........................................................................... 601
B. Damages for Individual Claims Brought  
   Under the Securities Act of 1933 .......................................... 601
   1. Registration Statement Misrepresentation Under Section 11:  
      Title 15, Section 77k of the United States Code .......... 601
   2. Section 12(a)(1) for Section 5 Violations ....................... 602
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Section 12(a)(2) for Prospectus Misrepresentations</td>
<td>603</td>
</tr>
<tr>
<td>4</td>
<td>Control Person Liability Under § 15</td>
<td>603</td>
</tr>
<tr>
<td></td>
<td>1. Stock Manipulation Liability Under § 9(e)</td>
<td>604</td>
</tr>
<tr>
<td></td>
<td>2. Misrepresentation in Filed Reports Under § 18</td>
<td>604</td>
</tr>
<tr>
<td></td>
<td>3. Proxy Statement Misrepresentation Under Rule 14a-9</td>
<td>604</td>
</tr>
<tr>
<td></td>
<td>4. Tender Offer Fraud Under § 14(e) and Rule 14e-3</td>
<td>606</td>
</tr>
<tr>
<td></td>
<td>5. Short Swing Trading Under § 16(b)</td>
<td>607</td>
</tr>
<tr>
<td></td>
<td>6. 10b-5 Causes of Action</td>
<td>608</td>
</tr>
<tr>
<td>D</td>
<td>Damages in Securities Class Actions</td>
<td>616</td>
</tr>
<tr>
<td></td>
<td>1. Impact of the Public Securities Litigation Reform Act of 1995</td>
<td>616</td>
</tr>
<tr>
<td></td>
<td>2. Impact of Securities Litigation Uniform Standards Act of 1998</td>
<td>618</td>
</tr>
<tr>
<td>E</td>
<td>Civil RICO’s Tiny Open Window</td>
<td>619</td>
</tr>
<tr>
<td>F</td>
<td>State Law Securities Causes of Action</td>
<td>619</td>
</tr>
<tr>
<td></td>
<td>1. Express Civil Remedies</td>
<td>619</td>
</tr>
<tr>
<td></td>
<td>2. Shareholders’ Remedies for Misleading Proxies Under Section 33-7-220(i) of the South Carolina Code</td>
<td>620</td>
</tr>
<tr>
<td>G</td>
<td>Common Law Remedies</td>
<td>620</td>
</tr>
<tr>
<td>H</td>
<td>Mitigation Issues</td>
<td>621</td>
</tr>
<tr>
<td>I</td>
<td>Prejudgment Interest</td>
<td>622</td>
</tr>
<tr>
<td>J</td>
<td>Contribution and Indemnity Issues</td>
<td>622</td>
</tr>
<tr>
<td></td>
<td>1. Contribution</td>
<td>622</td>
</tr>
<tr>
<td></td>
<td>2. Indemnity</td>
<td>623</td>
</tr>
<tr>
<td><strong>Chapter 35 - Service Contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A</td>
<td>Scope of Chapter</td>
<td>625</td>
</tr>
<tr>
<td>B</td>
<td>Theories of Recovery</td>
<td>625</td>
</tr>
<tr>
<td></td>
<td>1. Damages Proximately Caused by the Breach</td>
<td>626</td>
</tr>
<tr>
<td></td>
<td>2. Reasonable Value of Services Rendered</td>
<td>626</td>
</tr>
<tr>
<td></td>
<td>3. Cost of Replacement</td>
<td>627</td>
</tr>
<tr>
<td></td>
<td>4. Case Specific Examples</td>
<td>627</td>
</tr>
<tr>
<td></td>
<td>5. Statutory Requirements</td>
<td>630</td>
</tr>
</tbody>
</table>
Chapter 36 - South Carolina Tort Claims Act

A. Background: Sovereign Immunity in South Carolina, 1820-1985 631
B. Exceptions to Waiver of Immunity: South Carolina Code Section 15-78-60 632
C. Limitations on Damages 633
   1. South Carolina Code Section 15-78-120 633
   2. Maximizing Damages Under the Tort Claims Act 633
D. Strange Interlude: Southeastern Freight Lines, Its Progeny, and the South Carolina General Assembly’s Responses 639
   1. Southeastern Freight Lines v. City of Hartsville 639
   2. The First Reenactment of the Repealed Sections: 1994 Act No. 497 640
   3. McClain v. South Carolina Department of Education 640
   4. Knoke v. South Carolina Dep’t of Parks, Recreation & Tourism 640
   5. The Second Reenactment: 1997 Act No. 155 641
   6. Steinke v. South Carolina Department of Labor, Licensing & Regulation 641
   8. Simmons v. Greenville Hospital System 643
E. The Federal Tort Claims Act 644
   1. Background: Sovereign Immunity 645
   2. Exceptions to Waiver of Immunity 645
   3. Damages Under the Federal Tort Claims Act 646
   4. Additional Information about the Federal Tort Claims Act 646

Chapter 37 - South Carolina Unfair Trade Practices Act 649

A. Introduction 649
   1. Actual Damages 649
   2. Treble Damages 650
C. Attorney Fees and Costs 651
D. Punitive Damages 655
### Table of Contents

**Chapter 38 - DAMAGES IN TITLE VII CASES** ........................................ 657

A. Legal (Monetary) Remedies ...................................................... 657
   1. Compensatory and Punitive Damages ............................ 657
   2. Back Pay ................................................................. 660
   3. Interest ................................................................. 664

B. Equitable Remedies ............................................................. 665
   1. Reinstatement ........................................................... 665
   2. Front Pay ............................................................... 665
   3. Injunctive Relief ....................................................... 666

C. Attorney’s Fees ................................................................. 666

**Chapter 39 - WORKERS’ COMPENSATION** ...................................... 669

A. History and Purposes .......................................................... 669

B. Indemnity (or “Wage Loss”) Benefits ..................................... 670
   1. Temporary total disability ........................................ 671
   2. Temporary partial disability ...................................... 673
   3. Permanent partial disability compensation .................. 673
   4. Permanent total disability ......................................... 674
   5. Death benefits ........................................................ 675
   6. Disfigurement .......................................................... 676
   7. “Average weekly wage” and compensation rate ............. 676

C. Medical Compensation ........................................................ 678
   1. Vocational rehabilitation services ............................. 679
   2. Attendant care services ............................................ 680

D. The Future of Workers’ Compensation .................................... 682

**Chapter 40 - WRONGFUL DEATH & SURVIVAL ACTIONS** ................... 685

A. Historical Evolution .......................................................... 685

B. Scope of the Wrongful Death Act ......................................... 686

C. Who Can Enforce the Wrongful Death Act ............................. 686

D. Beneficiaries ................................................................. 686

E. Measure of Damages .......................................................... 687

F. Trial of a Wrongful Death Action .......................................... 688

xxi
**Table of Contents**

G. Evidentiary Considerations .................................................. 690  
H. Death by Lynching ................................................................. 691  
I. Settlement of a Wrongful Death or Survival Action .................. 691  
J. Survival Actions ................................................................. 691  
   1. Measure of Damages ....................................................... 691  
   2. Consolidation of Wrongful Death and Survival Actions ......... 692

**Chapter 41 - Wrongful Discharge & Employment Contracts** ........ 693  
A. Employment Contracts ....................................................... 693  
   1. Breach of Employment Contract by Employer ....................... 693  
   2. Breach of Employment Contract by Employee ....................... 714  
   3. Violation of Covenants Not to Compete .............................. 716  
B. Wrongful Discharge in Violation of Public Policy ................. 721  
   1. Types of Damages Available When Discharge Violates Public Policy ................. 721  
   2. Tort Damages ............................................................. 725  
   3. Equitable Remedies ..................................................... 729
C. Additional Considerations .................................................. 732  
   1. Other Employment Issues ............................................. 732  
   2. Alternative Causes of Action ....................................... 735  
   3. Mitigation .............................................................. 738  
   4. Offsets ................................................................. 741  
   5. Checklists ............................................................ 746

Index ..................................................................................... 749