IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-002355

Brandon Crider, ... Appellant,

v.

Jeffrey Scott Clayton, individually and as agent for Carolina Casualty Insurance Company; James DeLucia, individually and as agent for Carolina Casualty Insurance Company; and Carolina Casualty Insurance Company..... Respondents.

FINAL BRIEF OF RESPONDENTS

J.R. Murphy, Esquire
S.C. Bar # 7941
Wesley B. Sawyer, ESquire
S.C. Bar # 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
jrmurphy@murphygrantland.com
wsawyer@murphygrantland.com
Attorneys for Respondents

February 28, 2017

Other Counsel of Record:

A. Camden Lewis
Ariail E. King
J. Ryan Heiskell
LEWIS BABCOCK LLP
Post Office Box 11208
Columbia, SC 29211
Attorneys for Brandon Crider

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STATEMENT OF THE CASE

This appeal arises out of Appellant Brandon Crider's attempt to assert a claim for violation of a mediation agreement. In an underlying action, Crider filed a legal malpractice action against Respondent Carolina Casualty Insurance Company's insureds. Carolina Casualty defended the action under the terms of its insurance policy and participated in mediation in an effort to resolve the matter. Crider, Carolina Casualty's representatives, and the insured attended and participated in the mediation.[1] During mediation, counsel for Crider disclosed information that, if true, could have impacted coverage for Carolina Casualty's insured under the terms of the insurance policy. The case did not settle at mediation. After mediation, Carolina Casualty issued a Reservation of Rights letter to its insured and requested information relevant to the coverage issue.

Shortly after the mediation, Carolina Casualty authorized an Offer of Judgment in the underlying case in the amount of $500,000. (R. p. 80). On September 2, 2015, Appellant accepted the offer. (R. pp. 76–77). As a result, a judgment was entered against Carolina Casualty's insured and in favor of Appellant in the underlying action. On September 15, 2015, Appellant filed the satisfaction of judgment. (R. pp. 83–84).

[1] Respondent Jeffrey Scott Clayton is a local independent adjuster who attended mediation on Carolina Casualty's behalf. Respondent Jim DeLucia was Carolina Casualty's monitoring counsel for the claim and attended the mediation by telephone.

The following day, Appellant filed this action alleging breach of contract, fraudulent breach of contract, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA). (R. pp. 13–18). On October 30, 2015, Respondents moved to dismiss for failure to state a claim. (R. pp. 62–63). Appellant filed an Amended Complaint on November 16, 2015, and Respondents supplemented their Motion to Dismiss on December 3, 2015. (R. p. 23–29); (R. p. 90). Appellant abandoned his claim for fraudulent breach of contract in his Amended Complaint.

The Honorable G. Thomas Cooper, Jr. held a hearing on the Motion to Dismiss on April 4, 2016. On May 3, 2016, the Circuit Court signed an Order granting Respondents' Motion to Dismiss on multiple grounds. (R. pp. 3–12). First, the Circuit Court held the Complaint failed to allege a breach of the Mediation Agreement's confidentiality provision because Respondents did not disclose confidential communications to a third party or attempt to use mediation communications in a judicial proceeding. (R. pp. 6-8). The Circuit Court reasoned the information allegedly used by Respondents was not confidential and Appellant could not render otherwise discoverable information undiscoverable simply be mentioning it at mediation. (R. pp. 8–10). Second, the Circuit Court held Appellant failed to allege any damages caused by the alleged breach of contract. Appellant's acceptance of the Offer of Judgment in the underlying case estopped him from arguing that his damages in the underlying case were actually greater than the amount of the judgment he obtained. (R. pp. 10-11). Third, the Circuit Court held the Amended Complaint failed to state a claim for violation of the SCUTPA because South Carolina Code Section 39-5-40 expressly exempts insurance companies from the scope of the Act. (R. pp. 11-12).

On May 16, 2016, Appellant filed a Motion to Alter or Amend. (R. pp. 107–112). Respondents filed a Response opposing the motion on June 6, 2016, and the Circuit Court entered

an Order denying the motion on October 26, 2016. (R. pp. 114–119); (R. pp. 1–2). This appeal follows.

STATEMENT OF THE FACTS

Appellant filed an underlying legal malpractice suit against Carolina Casualty's insured.[2] (R. p. 25, ¶¶ 20-21). Carolina Casualty provided a defense, and the parties mediated the case on July 20, 2015 subject to a Mediation Agreement. (R. p. 25, ¶ 22). The mediation was unsuccessful, but the parties left with the understanding that negotiations would continue with the mediator's assistance. (R. p. 26, ¶ 23).

The Mediation Agreement provided in pertinent part:

> With the sole exception of a written settlement agreement described in Paragraph 13 below, the mediation sessions and all materials prepared for mediation are ***confidential and inadmissible at any subsequent evidentiary proceeding.*** All admissions, offers, promises, and statements, made in the course of mediation by any of the parties or the Mediator, their agents, employees, experts and attorneys, are confidential and inadmissible. Such offers, promises, conduct, and statements ***will not be disclosed to third parties and are privileged and inadmissible for any purpose,*** including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions. ***Notwithstanding the foregoing, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation.***

(R. p. 86, ¶ 1) (emphasis added). After mediation, Carolina Casualty allegedly used information it obtained during the mediation to notify its own insureds that insurance coverage may not exist for the underlying suit. (R. p. 26, ¶ 24). Appellant alleges Carolina Casualty used this information to withdraw all offers made. (R. p. 26, ¶ 25). However, the Amended Complaint goes on to allege

[2] The facts set forth in this section come from Appellant's Amended Complaint. Because this Appeal comes after the grant of a Motion to Dismiss, the Court must assume the truth of the well-pleaded facts in the Amended Complaint. Respondents strongly dispute many of the factual allegations in the Amended Complaint, but assert them as true for the purposes of this appeal only.

Carolina Casualty made an Offer of Judgment of $500,000, which Appellant accepted. (R. p. 26, ¶ 27).

As a result of Appellant's decision to accept the Offer of Judgment, a judgment was entered in the underlying legal malpractice case, and Carolina Casualty satisfied the judgment. (R. pp. 83–84). Appellant filed a Satisfaction of Judgment in the Greenville County Court of Common Pleas on September 15, 2015. This breach of contract action was filed on the following day. (R. pp. 13–18).

As the Circuit Court held in its Order granting Respondent's Motion to Dismiss, the Amended Complaint does not allege Defendants shared any information from the mediation with anyone who was not a party to the mediation or the Mediation Agreement. Likewise, the Amended Complaint does not allege what information Carolina Casualty allegedly used from mediation as a basis to withdraw any offers it had made.[3]

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). When considering a motion to dismiss for failure to allege facts sufficient to state a cause of action, "the trial court must base its ruling solely on

[3] However, Appellant's Amended Complaint ***does*** violate the plain terms of the Mediation Agreement by alleging what offers were communicated at the mediation. Appellant committed an even more blatant violation of the Mediation Agreement when he submitted a Memorandum in Opposition to the Motion to Dismiss in which Appellant recounts negotiations that took place in mediation. (R. pp. 98-99). Respondents brought this violation to the Court's attention and to Appellant's attention by a letter to Judge Cooper on April 6, 2016. (R. pp. 121–122). Nonetheless, Appellant continues to violate the Mediation Agreement by listing his Memorandum in Opposition to the Motion to Dismiss in his Designation of Matters to be Included in the Record on Appeal, which would put those confidential mediation negotiations in yet another publicly-filed court document.

allegations set forth in the complaint." *Id.* (citation omitted). Dismissal is appropriate when, in the light most favorable to the plaintiff, the complaint fails to state any valid claim for relief. *Id.* (citation omitted). Although Appellant argues dismissal should not have been granted because he believes this case raises novel issues, the general rule against dismissal in cases involving novel issues "does not apply when the determinative facts are not in dispute." *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 168, 785 S.E.2d 595, 599 (2016). "Where, as here, the question is one of simple statutory construction" – or similarly contract construction – "a trial court should not deny a meritorious motion merely because the question is one of first impression." *Id.*

ARGUMENT

The Circuit Court properly held disclosure of confidential information to a third party is an essential element to a claim for breach of a Mediation Agreement's confidentiality provision. The Amended Complaint fails to allege any disclosure to a third party – either in a judicial proceeding or otherwise. Moreover, the Amended Complaint fails to allege facts showing the information was not "discoverable." In fact, the information was readily discoverable. Therefore, the Circuit Court properly granted Respondents' Motion to Dismiss.

The Circuit Court also properly held Appellant is estopped from arguing in this case that his damages in the underlying lawsuit were greater than $500,000. Plaintiff accepted an Offer of Judgment in the underlying case in the amount of $500,000. Unlike a settlement agreement, acceptance of an Offer of Judgment results in entry of a judgment along with all the consequences that accompany a judgment. The judgment constitutes a binding determination of Appellant's damages in the underlying lawsuit. Therefore, he is estopped from arguing here that his damages in that case were actually greater than $500,000. Because Appellant cannot show his damages in

that case exceed the judgment that has been satisfied, the Amended Complaint fails to allege any damages resulting from the alleged breach of the Mediation Agreement.

The Circuit Court also correctly held insurance companies conducting the business of insurance are not subject to the South Carolina Unfair Trade Practices Act. By its plain language, the SCUTPA exempts the insurance business from the scope of the Act. *See* S.C. Code Ann. 39-5-40(c). Defending an insured, participating in mediation, and investigating coverage issues are all actions that fall squarely within the business of insurance claims handling and are exempt from the SCUTPA. Therefore, the Amended Complaint fails to allege a cause of action for violation of the SCUTPA.

I. The Circuit Court properly held Respondents did not breach the Mediation Agreement because Respondents did not disclose any mediation communications to a third party and the mediation communication at issue was not confidential.

It is axiomatic that a party does not violate a confidentiality agreement by communicating amongst the parties to the agreement. At mediation, counsel for Appellant disclosed information that had a potential impact on coverage.[4] As participants in the mediation, Carolina Casualty and its insured both heard the statement. After mediation, Carolina Casualty raised the potential coverage issue with its insured by issuing a reservation of rights letter and asking for information regarding the coverage issue outside of the mediation setting. The Amended Complaint does not allege Respondents shared any information with anyone that was not a party to the Mediation Agreement. Moreover, the Mediation Agreement plainly states "***evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation.***" (R. p. 86, ¶ 1) (emphasis added). The Amended Complaint fails to allege

[4] The Complaint does not allege what information was disclosed at mediation. Rather, the Amended Complaint only alleges Respondents used the information to raise coverage issues. (R. p. 26, ¶ 24).

facts showing the information disclosed at mediation was not "otherwise admissible or discoverable" such that it would preclude Carolina Casualty from seeking discoverable information ***outside*** of mediation on that topic.

A. Appellant failed to allege Respondents either disclosed confidential mediation communications to a third party or attempted to use confidential mediation communications in any judicial proceeding.

The terms of the Mediation Agreement are plain and unambiguous: "Such offers, promises, conduct, and statements will not be ***disclosed to third parties*** and are ***privileged and inadmissible for any purpose, including impeachment*** . . . ." (R. p. 86, ¶ 1). The Amended Complaint does not allege a breach of the terms of the Mediation Agreement.

"Generally, construction of contracts is a question of law for the court." *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014) (citation omitted). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (citation omitted). "The court's only duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* at 456, 756 S.E.2d at 162 (citation omitted).

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015) (quoting *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012)). Moreover, although there exists an implied covenant of good faith and fair dealing in every contract, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Id.* at 653, 780 S.E.2d at 273.

Because Appellant's action lies in contract, he bears the burden of alleging facts showing a breach of the terms of the contract. Not surprisingly, Appellant fails to cite a single case where

a party to a mediation agreement – or any confidentiality provision for that matter – violated a confidentiality requirement by discussing ***with*** a party to the agreement information already disclosed ***to*** the party to the agreement. That is exactly what Appellant alleges in the Amended Complaint. Appellant alleges he disclosed information at mediation ***to*** Carolina Casualty and its insured and that Carolina Casualty then raised that information to its insured.

Instead of citing any case law to support his position, Appellant attempts to avoid the plain language of the Mediation Agreement by repeatedly using a phrase that is not found in the Mediation Agreement. Appellant contends, "The mediation agreement here specifically states that information obtained during the mediation was confidential, privileged, and inadmissible for any purpose." (Appellant's Brief, pp. 5 & 9). However, rather than relying on a paraphrase of part of a contractual provision, the Court in a breach of contract action must look to the actual terms used by the parties to the contract. *Watson*, 407 S.C. at 455, 756 S.E.2d 161.

The plain language of the Mediation Agreement provides two possibilities for breach of the confidentiality provisions: (1) disclosure to third parties, or (2) use of mediation communications in any judicial proceeding – neither of which are alleged in the Amended Complaint. First, the provision states mediation communications "will not be disclosed ***to third parties***." (R. p. 86, ¶ 1) (emphasis added). Second, the provision provides that sessions and materials prepared for mediation "are confidential and inadmissible ***at any subsequent evidentiary proceeding***" and are "inadmissible for any purpose, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions." (R. p. 86, ¶ 1) (emphasis added). The former phrase discusses disclosure to third parties outside of a judicial proceeding, while the latter phrase addresses use of mediation

statements or materials in a judicial proceeding. As the Circuit Court held in its Order, the Amended Complaint alleges neither.

The Mediation Agreement complements Rule 8, SCADRR. Like the Mediation Agreement, Rule 8 provides participants in mediation "shall not rely on, or introduce as evidence ***in any arbitral, judicial or other proceeding***, any oral or written communications having occurred in a mediation proceeding . . . ." Rule 8(a), SCADRR. Therefore, the Mediation Agreement's limitation of the confidentiality requirements to disclosures to third parties and use in a subsequent judicial proceeding follows South Carolina's ADR Rules.

The Amended Complaint fails to allege facts showing a breach of the plain language of the contract's confidentiality provision. The Mediation Agreement prohibits disclosure of confidential mediation statements to third parties and use of confidential mediation statements in a subsequent judicial proceeding. The Amended Complaint alleges neither here. Appellants do not allege Respondents disclosed mediation statements to anyone who did not participate in the mediation, and Appellants do not allege Respondents attempted to use any statements made at mediation in a subsequent judicial proceeding. Therefore, the Amended Complaint fails to allege a breach of the confidentiality provision, and the Circuit Court's dismissal of the Amended Complaint was proper.

B. A party cannot render otherwise admissible or discoverable evidence privileged by waiting until mediation before its disclosure.

South Carolina has a strong public policy favoring out-of-court settlement. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015). The Alternative Dispute Resolution Rules are designed to promote this public policy. *See* Rule 1, SCADRR. In this case, Appellant seeks a rule that would make early mediations impossible. Appellant contends that a party can disclose highly relevant evidence at mediation and thereby insulate that evidence from

any subsequent discovery. If Appellant is correct, only the most foolish of attorneys would agree to an early mediation. By design, neither the Mediation Agreement nor the ADR rules support Appellant's interpretation of the mediation rules.

The Mediation Agreement provides, "Notwithstanding the foregoing, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation." (R. p. 86, ¶ 1). Therefore, a party cannot insulate relevant information by using it at mediation. If that were not the rule – as Appellant suggests – then mediation would become little more than a game of "gotcha" in which each side would disclose all of its secrets at mediation so that it could never thereafter be used regardless of how relevant and discoverable that information may be.

For example, suppose parties mediate a motor vehicle accident case. Prior to mediation, counsel for plaintiff sent interrogatories, but did not include an interrogatory asking what, if any, intoxicating substances the defendant consumed during the hours leading up to the accident. During opening statements in the mediation, the defendant quickly discloses he consumed eight beers shortly before the accident. Under Appellant's interpretation of the Mediation Agreement and the ADR Rules, the plaintiff in the hypothetical is now precluded from asking the defendant in a subsequent deposition or at trial whether he had anything to drink prior to the accident. Moreover, the plaintiff would be precluded from subpoenaing the defendant's hospital records to look for a post-accident toxicology screen. Such a rule would defeat the truth-seeking function of the litigation process. Fortunately, Appellant's interpretation of the Mediation Agreement and ADR rules is misguided.

In the example, the ADR Rules and the Mediation Agreement would preclude the plaintiff from using the admission made by the defendant in mediation to cross examine the defendant at

trial or in a deposition. However, because the information is "otherwise admissible or discoverable," neither the ADR Rules nor the Mediation Agreement preclude the plaintiff from conducting discovery on the highly relevant underlying issue of whether the defendant had consumed a significant amount of alcohol immediately prior to the accident.

The provision in the Mediation Agreement providing that evidence which is otherwise admissible or discoverable will not be rendered undiscoverable or inadmissible by its use at mediation is not unique to this Mediation Agreement or this state. *See e.g.*, London Court of International Arbitration (LCIA) Mediation Rules, Rule 10.4[5]; Georgia Alternative Dispute Resolution Rules, Rule VII.A ("Otherwise discoverable material is not rendered immune from discovery by use in a mediation . . . ."); Uniform Mediation Act, § 4(c) ("Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation."). The provision is common place, and commentators agree the provision is intended to prevent a party from immunizing discoverable evidence by revealing the evidence at mediation.

For example, the Uniform Law Commission's Comments to the Uniform Mediation Act explain the purpose of the provision:

> This provision acknowledges the importance of the availability of relevant evidence to the truth-seeking function of courts and administrative agencies, and makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a mediation. For purposes of the mediation privilege, it is the communication that is made in a mediation that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in a mediation is subject to discovery, just as it would be if the mediation had not taken place.

[5] http://www.lcia.org/Dispute_Resolution_Services/LCIA_Mediation_Rules.aspx

> There is no "fruit of the poisonous tree" doctrine in the mediation privilege. For example, a party who learns about a witness during a mediation is not precluded by the privilege from subpoenaing that witness. This is a common exemption in mediation privilege statutes and is also found in Uniform Rule of Evidence 408.

UMA, §4, Cmt. 5. Likewise, the Georgia Commission on Dispute Resolution explains that a settlement offer prepared for use in mediation is protected by the confidentiality provision, but "production by a party of bank records otherwise discoverable would not later render the bank records confidential and immune from discovery." *Georgia Comm'n on Dispute Resolution, Advisory Opinion 8*, p. 3.

The information at issue in this case falls squarely within the category of information that is "otherwise admissible or discoverable." (R. p. 86, ¶ 1). Appellant revealed that Carolina Casualty's insured may have been aware of its potential liability for malpractice prior to the effective policy period. (Appellant's Brief, p. 13). Because the Carolina Casualty policy was a claims-made policy, the date on which the insured learned of its potential liability was highly relevant to the coverage issue. Moreover, the date on which an insured learns of a potential claim is information that is "discoverable." The date on which Carolina Casualty's insured learned of its potential liability would be the proper subject of discovery in a subsequent coverage dispute. *See e.g., National American Ins. Co. v. American Re-Insurance Co.*, 358 F.3d 736, 738 (10th Cir. 2004) (explaining that, for coverage to apply in a claims-made policy, "the discovery of the injury and the claim-filing date must fall within the policy period.").

Moreover, Appellant believed the date on which Carolina Casualty's insured learned of its potential liability was relevant and admissible in the underlying case: "It was merely mentioned that Appellant had received information . . . that [Carolina Casualty's insured] had notice of Appellant's claim prior to their notifying their insurer of the same and that, should such a claim be proven, ***it could affect a jury verdict.***" (Appellant's Brief, p. 14). Clearly, if Appellant believed

the date on which Carolina Casualty's insured learned of its potential liability could affect a jury verdict, then Appellant believed the information was "otherwise admissible" at trial.

Like the example provided above by the Uniform Law Commission, the statement made by Crider's attorney in mediation was privileged, but the underlying evidence – the date on which Carolina Casualty's insured actually learned of its potential liability – was not privileged. As a result, the disclosure did not preclude Carolina Casualty from seeking the underlying evidence from its insured after the mediation. That is exactly what Carolina Casualty did. After mediation, Carolina Casualty issued a reservation of rights letter and requested information ***outside*** of mediation as to when the insured first learned about the claim. Carolina Casualty's actions complied with the plain terms of the Mediation Agreement and the ADR rules.

Appellant cites multiple cases that actually support the Circuit Court's ruling in this case. For example, Appellant cites this Court's unpublished decision in *Hicks v. Hicks*, No. 2011-UP-124, 2011 WL 11733613 (Ct. App. March 24, 2011), for the rule that communications during a mediation settlement conference shall be confidential. However, this Court's holding in *Hicks* actually confirms that otherwise discoverable information cannot be rendered immune from discovery merely because it was used at mediation. In *Hicks*, a husband argued certain medical expenses incurred by his wife should not have been admitted into evidence at a final hearing because the bills were presented during a mediation. *Id.* at *2. This Court rejected that argument, holding, "the Alternative Dispute Resolution Rules do not expressly restrict the admission of evidentiary material provided during mediation if that material was not created solely for the mediation." *Id.* at *3. Therefore, the family court did not err in admitting the expenses.

Appellant also cites *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000), for the rule that an admission made in a mediation is not admissible or

discoverable in a subsequent litigation. Of course, that rule is correct. However, the information Carolina Casualty sought was not an admission made in mediation. Instead, Carolina Casualty asked its own insured for information ***outside*** of mediation about when it learned of the potential suit. The District Court in *Sheldone* specifically recognized that statements or knowledge obtained ***outside*** of mediation were ***not*** protected from discovery: "The Court notes, though, that the rationale underlying the mediation privilege does not justify precluding the Plaintiffs' discovery of the alleged admission or the facts underlying it independent and outside the scope of the mediation process." *Id.* at 515 (citing Fed. R. Evid. 408) ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."). Therefore, the holdings in *Hicks* and *Sheldone* actually support Respondents' position here.

The South Carolina ADR Rules do not suggest that otherwise discoverable information can be rendered immune from discovery by being disclosed at mediation. In fact, a review of the list of "confidential" communications in Rule 8, SCADRR, displays that evidence is not even the sort of information contemplated by the rule's drafters. Rule 8 lists the following examples of protected mediation communications:

> (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
> (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
> (3) Proposals made or views expressed by the mediator;
> (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
> (5) All records, reports or other documents created solely for use in the mediation.

Rule 8(a), SCADRR. The enumerated list clearly indicates the intended scope of the confidentiality provision in the rules. The confidentiality provision protects from a party using

admissions or settlement discussions. For example, if a party concedes in mediation he will likely lose on a particular defense, that concession will not be admissible at trial. However, the confidentiality provision does not extend to the mere existence of substantive evidence.

The alternative interpretation of the ADR Rules – suggested by Appellant here – would create untenable and counterproductive motivations. A party could attend mediation, discuss every piece of negative evidence that has yet to be discovered, and then argue the opposing party is barred from conducting discovery on those issues. Such a rule would encourage gamesmanship and sandbagging by the parties. Parties would be unable to mediate a case until all discovery had been completed. Even then, parties would be loath to participate in a mediation that may close the door on a potential defense or favorable evidence. Moreover, the rule would harm the truth-seeking function of the litigation process. The language in the Mediation Agreement expressly disavows any such result, and provides – consistent with the ADR Rules – that otherwise discoverable or admissible evidence remains discoverable and admissible even if it is disclosed at mediation. The Amended Complaint does not allege Carolina Casualty used any confidential evidence that was not otherwise admissible or discoverable. Therefore, the Circuit Court properly held the Amended Complaint failed to allege facts sufficient to state a cause of action.

II. By obtaining a judgment in the amount of $500,000 in the underlying case, Appellant is estopped from arguing here that his damages were actually greater than $500,000.

Appellant's case rests on the idea that he was forced to accept a smaller sum for his damages in the underlying action because Carolina Casualty used information from the mediation to argue that coverage under its policy may not apply. However, damages are an essential element of his breach of contract claim. *Hotel and Motel Holdings, LLC*, 414 S.C. at 652, 780 S.E.2d at 272. Therefore, to succeed on his claim for breach of the Mediation Agreement, Appellant must

show that, but for the alleged breach, he would have recovered more than $500,000 in the underlying lawsuit. His acceptance of the Offer of Judgment precludes that argument.

The Circuit Court correctly held a substantial difference exists between a Rule 68 Offer of Judgment and an out-of-court settlement. When parties settle out of court, no judgment is entered against the defendant. The court's power is limited to its ability to enforce the settlement under contract law. However, when a party accepts a Rule 68 Offer of Judgment, the court enters a judgment against the defendant. Rule 68, SCRCP. The judgment is binding and has all the consequences of entry of judgment by the court.

The judgment works both ways. Appellant obtained a binding judgment against Carolina Casualty's insured in the amount of $500,000. By doing so, Carolina Casualty's insured is precluded from coming back and arguing that Appellant's damages in the underlying case were actually less than $500,000. Likewise, Appellant is bound by the amount of the judgment, and he cannot be heard to argue here that his damages actually exceeded $500,000. The judgment is a final, conclusive judgment and has all of the consequences of a final judgment.

This Court adopted the doctrine of non-mutual offensive collateral estoppel in *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). Thereafter, the South Carolina Supreme Court confirmed non-mutual offensive collateral estoppel as the law of this State in *South Carolina Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). This Court explained the doctrine's application in *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison, S.P.A.*, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995):

> Under the doctrine of offensive non-mutual collateral estoppel, a party may be prevented from relitigating issues actually determined in a prior court action so long as the party estopped had a full and fair opportunity to litigate the issue in the first action and there are

> no circumstances which justify according him an opportunity to retry the issue.

Id. at 475, 465 S.E.2d at 796. Each element is satisfied here. Appellant was the plaintiff in the underlying legal malpractice case against Carolina Casualty's insured. He had every opportunity and motivation to fully litigate the issue of his damages, and he ultimately obtained a binding judgment against Carolina Casualty's insured establishing his damages to be $500,000. The judgment was satisfied, and Appellant executed a Satisfaction of Judgment acknowledging "satisfaction and payment ***in full*** of the judgment entered . . . against" Carolina Casualty's insured. (R. p. 83) (emphasis added). Therefore, offensive collateral estoppel applies. Appellant cannot attempt to relitigate the underlying lawsuit in this action to argue that he could have received ***more*** damages in that case.

The Colorado Court of Appeals addressed a similar situation in *Continental National Bank v. Dolan*, 39 Colo. App. 16, 564 P.2d 955 (Colo. App. 1997), *cert. denied.* A bank sued seeking recovery of a debt under the terms of a promissory note executed by one corporation and guaranteed by individual guarantors. *Id.* at 18, 564 P.2d at 957-58. The corporation submitted a Rule 68 Offer of Judgment, which the bank accepted. *Id.* As a result, a Rule 68 judgment was entered against the corporation. *Id.* Then, the bank proceeded against the individual defendants and obtained a judgment in excess of the amount of the Offer of Judgment from the corporation.

On appeal, the Court of Appeals held the trial court was required to reduce the judgments against the individual guarantors to equal the amount of the Rule 68 judgment obtained against the corporation pursuant to the Offer of Judgment. The acceptance of the Offer of Judgment against the corporation was "wholly determinative of plaintiff's claim against it as the principal debtor." *Id.* at 19, 564 P.2d at 957. Because the debt owed by the individual guarantors could not exceed the amount owed by the principal debtor – the corporation, the bank's acceptance of the offer of

judgment precluded the bank from arguing the individual guarantors owed more than the amount of the accepted judgment. Therefore, the Court of Appeals held judgment against the co-defendants had to be reduced to the amount of the offer of judgment. *Id.* at 19-20, 564 p.2d at 957-58; *see also McCutcheon v. Hertz Corp.* 463 So. 2d 1226 (Fla. 4th Dist. Ct. App. 1985), *pet. for cert. denied,* 476 So. 2d 674 (1985) (holding acceptance of an offer of judgment precluded subsequent suit against another tortfeasor because the judgment constituted the measure of plaintiff's damages); *Hanley v. Mazda Motor Corp.*, 239 Mich. App. 596, 609 N.W.2d 203 (Ct. App. 2000) (holding Rule 68 judgment constitutes a judgment on the merits and a binding determination of plaintiff's damages arising out of a tort injury).[6]

Acceptance of an Offer of Judgment has consequences for both parties. As a result of Appellant's acceptance, a judgment was entered against Carolina Casualty's insured with all the legal effects of a judgment. However, Appellant – as the plaintiff in the underlying case – must be subjected to the same legal effects of the judgment. The judgment determined Appellant's maximum damages in that case equaled $500,000.00. The judgment has been satisfied. Therefore, Appellant is estopped from arguing that his damages in that case should have been greater. Because he is bound by the judgment, Appellant cannot prove damages resulting from the alleged breach of the Mediation Agreement. Thus, Appellant cannot establish an essential element of his

[6] Appellant argues this case should be treated as if Respondents are joint tortfeasors with Carolina Casualty's insured in the underlying legal malpractice case. However, the rule of joint tortfeasors does not apply here. Respondents do not contend they are joint tortfeasors with Carolina Casualty's insured. Instead, Respondents argue Appellant bears the burden of showing damages flowing from the alleged breach of the Mediation Agreement. The only damages he could show are that his damages in the underlying legal malpractice case were greater than the amount he recovered in that case. However, by accepting the $500,000 Offer of Judgment, Appellant's damages in that case were determined to be $500,000. Because the judgment was satisfied, Appellant recovered the full $500,000. Therefore, he is barred from making the argument in this case that his damages in the underlying malpractice case exceeded $500,000.

breach of contract cause of action, and the Circuit Court properly dismissed Appellant's breach of contract claim.

III. The Circuit Court's dismissal of Appellant's SCUTPA cause of action was proper because the General Assembly chose to exclude the business of insurance from the scope of the SCUTPA.

The Circuit Court correctly held the SCUTPA does not apply to the business of insurance. Instead, the General Assembly has enacted the Claims Practices Act and Insurance Trade Practices Act to govern an insurer's conduct while handling a claim. In fact, the General Assembly made this position clear: "This article [the SCUTPA] does not supersede ***or apply to*** unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320."[7] S.C. Code Ann. § 39-5-40(c) (emphasis added). In Section 38-57-10, the General Assembly plainly stated the purpose of the Insurance Trade Practices Act is to encompass ***all*** conduct in the insurance business which constitutes an unfair or deceptive act:

> The purpose of this chapter is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, ***all the practices*** in this State which constitute unfair methods of competition or unfair or deceptive acts or

[7] The reference in § 39-5-40(c) contains an error that this Court has previously recognized. "[T]he Insurance Trade Practices Act, which was codified as Chapter 55, was recodified as Chapter 57 in 1987, and section 39-5-40(c) was not revised to reflect that change. Clearly, the legislature intended SCUTPA to exempt cases of unfair trade practices regarding the insurance business because the Insurance Trade Practices Act specifically covers such cases." *Cleveland Ridge Homeowner's Ass'n, Inc. v. State Farm Fire and Cas. Co.*, 2006 UP-295, 2006 WL 7286092, *3 (S.C. Ct. App. June 26, 2006) (unpublished) (citing *Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 130-31 (D.S.C. 1994)).

> practices and by prohibiting the trade practices so defined or determined.

S.C. Code Ann. § 38-57-10 (emphasis added).[8] Because the Insurance Trade Practice Act aims to govern "all" practices in the "business of insurance" that constitute unfair or deceptive acts, Section 39-5-40(c) exempts the entire business of insurance from the SCUTPA.

Although South Carolina's appellate courts have never addressed this question in a published opinion, the United States District Court for the District of South Carolina has repeatedly held the SCUTPA does not apply to insurance companies.[9] The District Court in *Trustees of Grace Reformed Episcopal Church*, held "Chapter 57 clearly is intended to define and regulate all unfair trade practices regarding the insurance business . . . . ." 868 F. Supp. at 130. "Therefore, ***all*** unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act . . . and are exempt from the coverage of SCUTPA." *Id.* at 130-31 (emphasis added). *See also Colonial Life & Accident Ins. Co. v. American Family Life Assurance Co. of Columbus*, 846 F. Supp. 454 (D.S.C. 1994) (holding claim for insurer's false advertising could not proceed under the SCUTPA because the SCUTPA exempted insurance trade practices).

The SCUTPA expressly exempts the business of insurance from its reach. Defending an insured, participating in mediation, and raising coverage issues are all basic components of the

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[8] Appellant could not state a claim for violation of the Insurance Trade Practices Act because the Act does not create a private cause of action. *See Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001) (holding that neither the Insurance Trade Practices Act nor the Claims Practices Act create a private right of action).

[9] This Court agreed with the District Courts in an unpublished decision. *See Cleveland Ridge Homeowners Ass'n, Inc.*, 2006 WL 7286092 at *3 ("Clearly, the legislature intended the SCUTPA to exempt cases of unfair trade practices regarding the insurance business because the Insurance Trade Practice Act specifically covers such cases.").

business of insurance. Therefore, the Circuit Court properly held the SCUTPA does not apply to the conduct alleged in the Amended Complaint.

CONCLUSION

For the above-stated reasons, the Circuit Court's Order dismissing the Amended Complaint should be affirmed. The Appellant's Amended Complaint fails to allege a valid cause of action under South Carolina law.

The Amended Complaint fails to allege any breach of the Mediation Agreement. First, the Amended Complaint does not allege Respondents communicated any confidential mediation communications to any third parties or attempted to use the communications in a judicial proceeding. Moreover, the information contained in the communication was "otherwise admissible or discoverable." Therefore, Appellant's use of the information at mediation did not render the information immune from subsequent discovery outside of the mediation. That is all Carolina Casualty did here. It asked for information ***outside*** of the mediation about a topic that was both discoverable and admissible. The Mediation Agreement, consistent with South Carolina's ADR Rules, expressly provided such information could not be "rendered inadmissible or not discoverable as a result of its use in the mediation."

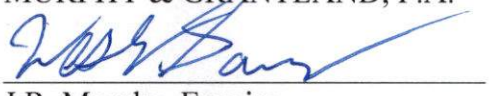
Second, the Amended Complaint also fails to allege damages resulting from the alleged breach. To prevail, Appellant must be able to show that, but for the alleged breach of the Mediation Agreement, he would have recovered more in the underlying lawsuit. However, Appellant accepted an Offer of Judgment and obtained a judgment against Carolina Casualty's insured in the underlying lawsuit. Therefore, he is estopped from arguing in this subsequent action that his damages in that case were actually more than the amount of the judgment he obtained by virtue of accepting the Offer of Judgment.

The Circuit Court's dismissal of Appellant's SCUTPA claims was proper. The Circuit Court correctly read South Carolina Code § 39-5-40(c) as exempting the entire business of insurance from the scope of the SCUTPA. The District Courts have ruled the business of insurance is exempt from the SCUTPA and is instead left to the administrative supervision of the Department of Insurance. The General Assembly stated its intent in the statute in unambiguous terms: the SCUTPA "does not . . . apply to unfair trade practices covered and regulated" by the Insurance Trade Practices Act. S.C. Code Ann. § 39-5-40(c). The Insurance Trade Practices Act sets out to define "all the practices . . . which constitute . . . unfair or deceptive acts or practices . . . ." S.C. Code Ann. § 38-57-10.

Therefore, the Circuit Court's Order dismissing the Amended Complaint should be affirmed.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
S.C. Bar # 7941
Wesley B. Sawyer, Esquire
S.C. Bar # 100229
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondents

Columbia, South Carolina
February __, 2017

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-002355

Brandon Crider, ... Appellant,

v.

Jeffrey Scott Clayton, individually and as agent for Carolina Casualty Insurance Company; James DeLucia, individually and as agent for Carolina Casualty Insurance Company; and Carolina Casualty Insurance Company..... Respondents.

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondents, certify that the Final Brief of Respondents complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondents

February 28, 2017