STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10-569

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

v.

OAKLAND WINGS, LLC d/b/a WILD WING CAFÉ,
CIVIL SITE ENVIRONMENTAL, INC.,
OAKLAND PROPERTIES, LLC,
CHANDLER CONSTRUCTION SERVICES, INC.,
AVTEX COMMERCIAL PROPERTIES, INC.,

Defendants.

ORDER DENYING THE MOTION OF DEFENDANT, AVTEX COMMERCIAL PROPERTIES, INC., FOR JNOV AND DENYING THE MOTION OF DEFENDANT, AVTEX COMMERCIAL PROPERTIES, INC., TO DISCLOSE SETTLEMENT AND FOR SET-OFF

BACKGROUND

This is a premises liability action. This matter came before this court for a trial on the merits on May 19, 2015, May 20, 2015 and May 21, 2015. Prior to trial, Defendants, Civil Site Environmental, Inc., (hereinafter referred to "CSE") and Chandler Construction Services, Inc., (hereinafter referred to "CCS"), settled with either Plaintiff, William Huck, Plaintiff, Dianne Huck, or both; the terms of the settlement, including the amounts, are unknown to the court.

At the close of the plaintiffs' case, the remaining Defendants, Oakland Wings, LLC b/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), Oakland Properties, LLC, (hereinafter referred to as "Oakland") and Avtex Commercial Properties, Inc., (hereinafter referred to as "Avtex") moved for directed verdict pursuant to Rule 50(a), S.C.R.Civ.P. This

court granted the motion as to Mrs. Huck's consortium cause of action, but denied the motion as to Mr. Huck's negligence cause of action.

At the close of all evidence, Wild Wing, Oakland and Avtex renewed their Rule 50(a) directed verdict motion as to Mr. Huck's negligence cause of action, which the court denied. The matter was then submitted to the jury for determination, which returned a verdict in favor of Mr. Huck against Avtex only in the amount of $97,640.00, but found that Mr. Huck was fifty percent negligent in bringing about his own injuries. Accordingly this court reduced the verdict by fifty percent to $48,820.00 and entered judgment against Avtex in the amount of $48,820.00. The jury also returned verdict in favor of Wild Wing and Oakland and judgment was, accordingly, entered in their favor dismissing them from this action.

On June 3, 2015, Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), S.C.R.Civ.P., and a motion for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlement with CSE and CCS were made in good faith. This matter is now before this court for a determination of Axtex's June 3 motions. For the reasons set forth hereinbelow, both motions are hereby denied.

DISCUSSION

A. RULE 50(B) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

As a preliminary matter, Mr. Huck takes the position that this court cannot consider Axtex's motion for judgment notwithstanding the verdict because it was not timely made. The court disagrees.

Rule 50(b), (e) and (f), S.C.R.Civ.P., respectively provide in relevant part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may

> move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict.
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> * * * *
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> The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court ***not later than 10 days thereafter***.
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> A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

(emphasis added). Rule 6(b), S.C.R.Civ.P., provides in pertinent part:

> When by these rules . . . or by order of court an act is required or allowed to be done at or within a specified time . . . the court for cause shown may at any time in its discretion . . . order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended. . . . The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

The South Carolina Supreme Court held in *Citizens & S. Nat'l Bank of S.C. v. Easton*, 310 S.C. 458, 427 S.E.2d 640 (1993), the time for filing a motion under Rule 59(b) may not be enlarged or extended beyond the ten day period stated in Rule 59(b).

Mr. Huck takes the position that since Avtex's motion for judgment notwithstanding the verdict was not filed until June 3, 2015, it was not filed within the ten day period proscribed by Rule 50(e), and, as a consequence, Avtex's Rule 50(b) motion for judgment notwithstanding the verdict is untimely, and must be dismissed as the court now lacks jurisdiction to entertain it. However, the court finds that Avtex actually made its motion for judgment notwithstanding the verdict orally immediately following the reading of the verdict which it followed up with a memorandum filed June 3, 2015. Accordingly, in the court's

view, Avtex timely made its motion for judgment notwithstanding the verdict and the court may now entertain it.

Nevertheless, in considering Avtex' motion for judgment notwithstanding the verdict on the merits, the court finds that the motion must be denied. When ruling on a motion for a directed verdict, this Court is concerned with the existence or non-existence of evidence, not its weight. *See Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. *Id.* As the Court finds that there is ample evidence to support the jury's finding that Avtex was negligent, that its negligence brought about Mr. Huck's injuries and that Mr. Huck's damages are $97,640.00, this court, as it must, hereby deny Avtex' motion for judgment notwithstanding the verdict.

B. MOTION FOR DISCLOSURE OF SETTLEMENT, FOR SET-OFF AND, IN THE ALTERNATIVE, TO DETERMINE WHETHER THE SETTLEMENTS WERE MADE IN GOOD FAITH.

Avtex seeks to have this court compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck. For the reasons explained below this court must deny Avtex's motion.

First, this court, however, is not permitted to compel the disclosure of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both as this is specifically prevented by the South Carolina Rules governing Alternative Dispute Resolution. Rule 2(a). SCADR, defines a mediation as "[a]n informal process in which a third-party mediator facilitates settlement discussions between parties." Rule

6(e), SCADR, provides that "Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." Rule 8, SCADR, provides:

> **(a) Confidentiality.** Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and 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, including, but not limited to:
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> (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
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> (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
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> (3) Proposals made or views expressed by the mediator;
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> (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
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> (5) All records, reports or other documents created solely for use in the mediation.
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> **(b) Limited Exceptions to Confidentiality.** This rule does not prohibit:
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> (1) Disclosures as may be stipulated by all parties;
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> (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;
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> (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;
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> (4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and
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> (5) Any disclosures required by law or a professional code of ethics.
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> **(c) Private Consultation/Confidentiality.** The mediator may meet and consult individually with any party or parties or their counsel during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.
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> **(d) No Waiver of Privilege.** No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.
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> **(e) Mediator Not to be Called as Witness.** The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and

other documents received by the mediator while serving in that capacity shall be confidential.

As required by Rule 2(a) the parties to this action – Avtex and its attorneys included – entered into an Agreement to Mediate designed to protect the confidentiality of the mediation process in this case. A copy of which is attached to this e-mail. The mediation agreement in this case specifically provides, among other things:

> 1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.
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> 2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.
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> 3. Evidence of anything said or any admission made in the course of mediation is not admissible into evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
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> 4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
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> 5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

The settlements with Civil Site and Chandler in this case, if any, were made during the course and scope of the mediation in this matter and are subject to the confidentiality provisions of Rule 6(e) and 8 of the SCADR. *See* Rule 1, Rule 3, Rule 23 and Rule 24, SCADR. The settlement with CSE was reached at the mediation site. The settlement with CCS was reached a few weeks later during the continuation of the mediation by agreement of Mr. and Mrs. Huck

and CCS; all discussions and negotiations were through the neutral/mediator, John H. Tiller, Esq., who remained involved and who facilitated the settlement negotiations.

What Avtex seeks to have this court do is to compel the production and disclosure of a settlement agreement, assuming there is a settlement agreement, prepared for the purpose of, or in the course of the mediation and then admit its terms into evidence in violation of Rule 6(e) and Rule 8, SCADR, and in violation of the mediation agreement. The Court is barred from inquiring into the confidential settlement discussions and negotiations between Mr. and Mrs. Huck and CSE and CCS or the settlement agreements, if any, consummated as a result or to compel the production of the same. Clearly the settlement agreements, if there are settlement agreements, do not fall within the ***limited*** – to use the word specifically set forth in the Rule 8(b), SCADR – exceptions to mediation confidentiality set forth in Rule 8(b). Further, even if the settlement agreements, if there are any settlement agreements, are produced or the terms of the settlements, if there were a settlement are disclosed, they cannot be introduced into evidence for consideration by the court. Consequently, the granting of the motion would be in blatant disregard of the Alternative Dispute Rules and must therefore be denied.

In arguing that it is entitled to the production of the settlement agreements, if there are settlement agreements, or the settlement terms, if there are settlement terms, not once does Avtex reference the Alternative Dispute Resolution Rules. This is telling as Avtex would have the Court ignore or overlook them. This the Court cannot do. Further, Avtex's offer of a protective order does not circumvent the Alternative Dispute Resolution Rules.

Avtex specifically agreed in the mediation agreement "[u]nless a document provides otherwise, no document prepared for the purpose of, or in the course of, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in

any civil action." Avtex attended mediation. It had an opportunity to participate in any settlements arising out of the same, but elected not to. The time for addressing concerns about confidentiality and specifically what it was agreeing to in the mediation agreement, was at the time of the mediation. That Avtex failed to do so is no basis for requesting that court ignore the South Carolina rules relating to ADR. "South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution. . . ." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013).

In order to compel the disclosure of a "document prepared for the purpose of, or in the course of, the mediation," Avtex must demonstrate that a "'manifest injustice' will result from non-disclosure. Application of the manifest injustice standard requires the party seeking disclosure to demonstrate that the harm caused by non-disclosure will be manifestly greater than the harm caused by disclosure." *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002). As the negotiations with CCS continued through the mediator, those negotiations, and any agreement reached are subject to the South Carolina Rules of Alternative Dispute Resolution. *C.f. Id.* at 635 ("'mediation' is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the OCM. This conception of the duration of mediation is a practical necessity of the process itself, in that the mediated dispute is rarely conclusively resolved during the mediation conference. Instead, the parties to the dispute often resume mediation, or refine aspects of the settlement agreement, subsequent to the mediation conference, and many times do so outside the presence of the mediator. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference. Accordingly, until a mediated dispute is dismissed or is otherwise removed from the OCM, all 'statements,

documents, and discussions' relating to the mediation remain within the bailiwick of the OCM and, therefore, remain confidential."). Avtex, has failed to make a showing of manifest injustice. In fact, Avtex has failed to make any showing whatsoever.

Further, even if the court were made aware of the terms of the settlement between Mr. and Mrs. Huck and CSE and/or the terms of the settlement agreement between Mr. and Mrs. Huck and CCS, assuming there are such settlement agreements, the court has no jurisdiction to evaluate the "fairness" or "reasonableness" of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate. Nothing in the law or at equity permits this court to conduct such an inquiry.

Avtex cites *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), and *Welch v. Epstein*, 432 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), in support of its motion for reallocation. Assuming there is even anything to reallocate, Avtex's reliance on *Riley v. Ford Motor Co., supra*, and *Welch v. Epstein, supra*, is misplaced as both involve the reallocation of settlement funds between a survival action and a wrongful death action, not the reallocation of settlement funds between two separate living parties with distinct and separate claims. "Any settlement of a wrongful death or survival action must be approved by either a probate court, circuit court. . . ." Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." Thus, in both *Riley v. Ford Motor Co., supra*, and *Welch v. Epstein, supra*, the court was required by statute to evaluate the fairness and reasonableness of the survival and wrongful death settlements. No such requirement exists in the instant case and

there is nothing in the law which permits this court to conduct such an inquiry. Accordingly, Avtex's motion should be denied on this basis too.

Avtex argues that the Court's holding in *Riley v. Ford Motor Co., supra*, "hinged on the Court's equitable powers to reallocate an apportionment of settlement money that was not supported by the record, which was clearly designed to achieve an unfair tactical advantage." This statement illustrates Avtex's misunderstanding of the court's holding in *Riley v. Ford Motor Co., supra*, as the holding therein hinged not on the court's equitable powers but rather on the fact that the court was required by statute to approve the settlement. *See* Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." There is no such statute giving the court the authority to approve the settlements between CCS and Mr. and Mrs. Huck, assuming such a settlement exists, and a settlement between CSE and Mr. and Mrs. Huck, assuming such settlement exists. Accordingly, even if the court had evidence before it that there is in fact a settlements agreement between CCS and Mr. and/or Mrs. Huck and a settlement agreement between CSE and Mr. and/or Mrs. Huck, and also had evidence as to what the terms of the settlement agreements are, the court has no mechanism for "receiv[ing] into evidence those facts that the court considers necessary and proper to evaluate the settlement[s]" and, therefore, unlike the court in *Riley v. Ford Motor Co., supra*, this court has no basis on which to make a determination as to whether there should be a reallocation, assuming there is anything to reallocate.

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Avex maintains that "that while Mr. and Mrs. Huck are certainly separate individuals, their financial existence is singular." Avtex's position in this regard hinges on the claim that "a family court would undoubtedly view those funds as marital assets." A family court will only apportion a personal injury settlement if it is unallocated. If allocated, a personal injury settlement is clearly non-marital property. Furthermore, this court, not being a family court, has no jurisdiction to determine what is or is not a marital asset of Mr. or Mrs. Huck or how to equitably apportion the same.

Finally, Avtex maintains it is entitled to contribution from the settling defendants. This position is without merit.

The jury found Avtex fifty percent responsible in bringing about Mr. Huck's injuries. Thus, since Avtex was fifty percent negligent, it is joint and severally liable for the verdict and is entitled to no contribution. *See* Section 15-38-15, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Consequently, since it has no right of contribution, Atex motion should be denied on this basis too.

Accordingly, based on the forgoing, Avtex's motion to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck must be denied.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion of Defendant, Avtex Commercial Properties, Inc., for judgment notwithstanding verdict is hereby **DENIED** and the motion of

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Defendant, Avtex Commercial Properties, Inc., to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck is, likewise, hereby **DENIED!**

AND IT IS SO ORDERED!

THE HONORABLE BRIAN M. GIBBONS
Circuit Court Judge

July 23, 2015
Chester, South Carolina