THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge

Lower Court Case No. 2014-CP-10-569
Appellate Case No.2015-002025

William Huck and Dianne Huck.....Respondents,

v.

Oakland Wings, LLC d/b/a Wild Wing Cafe, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc., Avtex Commercial Properties, Inc., ...Defendants,

Of Whom Avtex Commercial Properties, Inc. is the.....Appellant.

INITIAL BRIEF OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC.

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STATEMENT OF THE CASE

I. Procedural History

This appeal stems from a premises liability lawsuit filed on January 28, 2014 by Respondents, William Huck and Dianne Huck. On June 3, 2015, Appellant, Avtex Commercial Properties, Inc. filed a Motion for Disclosure of Settlement, Motion for Setoff, and in the Alternative, Motion to Determine Whether Settlements with Chandler Construction Services and Civil Site Environmental, Inc. were Made in Good Faith. (See Defendant Avtex's Motion dated June 3, 2015). On July 27, 2015, the trial court issued an Order denying Defendant Avtex Commercial Properties, Inc.'s Motion for JNOV and Motion to Disclose Settlement and for Setoff (See Order dated July 27, 2015). Appellant timely filed a Motion to Alter or Amend Judgment pursuant to SCRCP 59(e) issued by Judge Brian M. Gibbons on August 14, 2015, and filed with the Court on August 18, 2015 (See Defendant Avtex's Motion dated August 7, 2015). The Notice of Entry of Judgment of the Order Denying Appellant's Motion to Alter or Amend that Judgment was received by counsel for Appellant on August 24, 2015. Avtex Commercial Properties, Inc. ("Appellant") timely appeals the following Orders: (1) Order of the Honorable Brian M. Gibbons dated July 23, 2015 and filed on July 27, 2015, denying the Motion of Avtex Commercial Properties, Inc.'s Motion to Disclose Settlement and for Set-Off, to which Appellant timely filed a Motion to Alter or Amend Judgment Pursuant to SCRCP 59(e) on August 7, 2015;

and (2) Order of the Honorable Brian M. Gibbons Denying Avtex's Motion to Alter or Amend Judgment.

II. Statement of the Facts

On July 13, 2012, William Huck, went to eat lunch at a Wild Wing Café, which is located in The Market at Oakland in Mt. Pleasant, South Carolina. After parking in a lot adjacent to the restaurant, Mr. Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café. Mr. Huck slipped and fell approximately where the crosswalk and the base of the ramp to the sidewalk intersected. It had rained just prior to Mr. Huck's arrival. He alleged that the ramp was defective because it was improperly sloped, a puddle of water had accumulated at its base, and debris was present in and around the puddle. Mr. Huck and his wife (collectively referred to as "Plaintiffs" or "Respondents") subsequently brought this suit for negligence and loss of consortium against Oakland Wings, LLC d/b/a Wild Wing Café ("Wild Wing), Civil Site Environmental, Inc. ("CSE")[1], Oakland Properties, LLC ("Oakland")[2], Chandler Construction Services, Inc. ("Chandler")[3], and Avtex Commercial Properties, Inc. ("Avtex")[4]. Prior to trial, CSE and Chandler settled with Plaintiffs.

Plaintiffs proceeded to a jury trial against Wild Wing, Oakland, and Avtex (hereinafter referred to collectively as "Defendants") beginning on May 18, 2015. (Order, p. 1). At the conclusion of the Plaintiffs' case in chief, the trial court granted Defendants' Motion for Directed Verdict as to Plaintiff Dianne Huck's loss of consortium claim finding that Mrs. Huck had failed to present any evidence in support of that claim. (Order, pp. 1-2). Trial testimony and jury deliberations were concluded by May 21, 2015. (Order, p. 1). At the close of all evidence, Wild

[1] CSE performed design work for the walking surfaces at issue.
[2] Oakland is the entity created for the ownership of The Market at Oakland.
[3] Chandler provided construction services at the area at issue.
[4] Avtex is the property developer of and property management company for The Market at Oakland.

Wing, Oakland, and Avtex renewed their Rule 50(a) directed verdict motion as to Mr. Huck's negligence cause of action, which the trial court denied. The matter was then submitted to the jury for determination, which returned defense verdicts in favor of Oakland and Wild Wing. Judgment was entered in favor of Wild Wing and Oakland, and they were dismissed from the action. However, the jury found in favor of Plaintiff William Huck against Avtex in the amount of $97,640.00. (Order, p. 2). They further found that Mr. Huck was 50% comparatively negligent, which reduced the judgment against Avtex to $48,820.00. (*Id.*).

ARGUMENTS

A. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES TO DISCLOSE SETTLEMENT AND IN DENYING AVTEX'S MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP 59(e)

Avtex made a post-trial motion to compel the disclosure of the Plaintiffs' settlement terms with CSE and Chandler, which the trial court denied. The trial court erroneously concluded that it "is not permitted to compel the disclosure of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and [Chandler] and either Mr. Huck, Mrs. Huck, or both as this is specifically prevented by the South Carolina Rules governing Alternative Dispute Resolution." (Order, p. 4). The trial court improperly relied on the standard applied by the Fourth Circuit in *In re Anonymous*, 283 F.3d 627 (2002). (Order, p. 8). That court applied a "manifest injustice" standard, which only applies to a court's decision to compel disclosure of communications arising out of mediation. (*Id.*) *In re Anonymous* was a federal attorney disciplinary action regarding a fee dispute. 283 F.3d 627 (2002). The court in that matter sought to determine when it might be appropriate to disclose communications within a mediation to a third-party tribunal in an unrelated matter. *Id.* As such, the "manifest injustice"

standard has no bearing on the disclosure of settlement amounts for set-offs and/or determining whether claims for contribution among joint tortfeasors may exist. *Id.*

In addition, the trial court relied on Rule 8 of the South Carolina Alternative Dispute Resolution Rules to support the contention it is not permitted to compel the disclosure of the terms of the settlements between the parties that settled prior to trial. Rule 8, SCADR, provides in pertinent part:

> **(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*** . . . .

Rule 8, SCADR (emphasis added). All parties in this case attended and participated in a mediation prior to trial during which CSE reached a settlement with Plaintiffs. Several weeks later, Chandler reached a settlement with Plaintiffs. (Order, p. 1). Appellant Avtex was not provided with any information concerning the terms of William and Dianne Huck's settlements with CSE and Chandler. The settlement documents, namely the releases signed by Respondents outlining the terms of the settlement, are not only relevant but are necessary to facilitate proper post-trial procedure in this case. *See Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015) (holding that settlement agreement was relevant to defendants' claim or defense due to the potential for a set-off). The intent of Rule 8 of the South Carolina Alternative Dispute Resolution Rules is to protect negotiations and discussions within mediation, not settlement agreements arising out of mediation. Using the SCADR rules to circumvent statutory mandates and established law and procedure is improper. This case undisputedly involves issues of joint and several liability among CSE, Chandler, and Avtex. Respondents' Complaint does not distinguish or differentiate the damages between the Defendants. As such, Avtex is entitled to an

automatic set-off for the settlement amounts paid by CSE and Chandler pursuant to S.C. Code Ann. § 15-38-50, which is discussed in more detail in the following section.

A confidentiality provision in a mediation agreement or release does not operate to shield a settlement agreement from being produced. As recognized by the Fourth Circuit Court of Appeals, "[t]here is an important distinction between privilege and protection of documents, the former acting to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding confidentiality." *Virami v. Novant Health, Inc.*, 249 F.3d 284, 288 n.4 (4th Cir. 2001). Several courts have examined and determined that a settlement agreement is relevant and discoverable due to the potential for a set-off. *See, e.g., Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015)(holding that settlement agreement was relevant to defendants' claim or defense due to the potential for a set-off); *Spilker v. Medtronic, Inc.*, No. 4:13–CV–76–H, 2014 WL 4760292, at *3 (E.D.N.C. Sept.24, 2014) ("In the present case, the settlement agreement is relevant to assess Defendants' exposure to possible damages."); *Zlotogura v. Progressive Direct Ins. Co.*, No. CIV–12–516–M, 2013 WL 1855879, at *2 (W.D.Okla. May 3, 2013) ("[T]he Court finds that the settlement agreement is relevant to the claims and defenses in this action."); *Tanner v. Johnson,* No. 2:11–cv–00028–TS–DSP, 2013 WL 121158, at *4 (D.Utah Jan.8, 2013) ("Clearly, ... defendants have standing to request discovery of Plaintiffs' and their codefendants' settlement agreement where Plaintiffs originally accused both sets of defendants of joint wrongdoing."); *Jackson v. Strategic Rests. Acquisition Co.*, No. 11–268–JJB–DLD, 2012 WL 1455213, at *3 (M.D.La. Apr.26, 2012) (finding that the settlement agreements at issue "meet, albeit barely, the threshold requirement that they be relevant to a claim or defense, or may lead to relevant information" and thus "must be produced"); *Oakridge Assocs., LLC v. Auto–Owners Ins. Co.*, No. 3:10–CV–145–DCK, 2010

WL 3788058, at *3 (W.D.N.C. Sept.23, 2010) ("The undersigned finds that the disputed Settlement Agreement should be subject to discovery due to the possibility it contains information relevant to the case."). As the Western District of Virginia has explained, settlement agreements are relevant "to the amount of setoff to which the non-settling defendants would be entitled" and that the terms of the releases "are relevant to the non-settling defendants' continued liability and right of setoff." *Selective Way Ins. Co. v. Schulle,* No. 3:13CV00040, 2014 WL 462807, at *2 (W.D.Va. Feb.5, 2014). Appellant Avtex has offered to enter into a protective order to abate any concerns regarding the privacy or confidentiality over the disclosure of the settlement amounts to third parties. Furthermore, to the extent the trial court held that the mediation agreement prohibits it from disclosing the settlement amounts to Avtex, Avtex is willing to maintain the confidentiality of the settlement amounts after disclosure.

Extending the application of the confidentiality rules that apply to mediations so far as to prevent non-settling defendants from knowing what settling defendants have paid to the plaintiff sets a dangerous precedent. If used strategically, such a broad interpretation of the ADR Rules will swallow defendants' statutory rights to set-off for sums paid to plaintiff by joint tortfeasors. Avtex believes that some portion of the settling Defendants' funds was allocated to Mr. Huck's negligence claim. The trial court's Order operates to preclude Avtex from getting a set-off for even those amounts, regardless of whether a reallocation of these settlements is appropriate. To the extent that it is ultimately discovered that the settlement funds paid by settling Defendants in this case were allocated to Mrs. Huck's loss of consortium claim, Avtex reiterates that Plaintiffs elected not to put up this case at trial, and Avtex's Motion for Directed Verdict as to Mrs. Huck's consortium claim was granted. (Order, pp. 1-2). Thus, if it is found that the majority of these proceeds were allocated to Mrs. Huck, the Court can and should allocate them to conform to the record.

Based on the foregoing, the trial court erroneously denied Appellant's Motion to Disclose Settlement. Therefore, Avtex respectfully requests this Court to reverse the ruling of the trial court denying Appellant's Motion to Disclose the Settlement between Respondents and CSE and Respondents and Chandler and the Order denying Avtex's Motion to Alter or Amend the Judgment.

B. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES FOR SET-OFF AND IN DENYING AVTEX'S MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP 59(e)

Avtex is entitled to a set-off to account for the amounts CSE and Chandler each paid Plaintiffs to settle the claims against them. Respondents William Huck and Dianne Huck brought causes of action for negligence and loss of consortium against Defendants. Plaintiffs' Second Amended Complaint does not distinguish or differentiate the damages between the Defendants. Prior to the trial of this matter, CSE and Chandler reached undisclosed settlements with Respondents, the terms of which are unknown to Avtex. (Order, p. 1). It is Avex's understanding based on representations by Respondents' counsel that Respondents may have allocated a substantial percentage of the settlements with CSE and Chandler to Respondent Mrs. Huck's loss of consortium claim in an effort to deprive Avtex of a set-off. The purpose of the set-off doctrine is to prevent a plaintiff from a windfall or double recovery. "The Fourth Circuit has never recognized a settlement privilege or required a particularized showing in the context of a subpoena for confidential settlement documents." *Polston v. Eli Lilly & Co.*, No. 3:08-3639, 2010 WL 2926159, 2010 U.S. Dist. LEXIS 74720, at *4 (D.S.C. July 23, 2010). If Respondents allocated the majority of those settlement monies to the loss of consortium claim, that allocation would be unreasonable.

"A set-off is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action, and the principles thereof may be applied both at law and in equity." 80 C.J.S. *Set-off and Counterclaim* 3 (1955). Thus, under certain circumstances, monies already received by the plaintiff are offset against that owed by the defendant. *See id.* Under South Carolina law, a non-settling defendant is entitled to a *pro tanto* reduction, which gives one tortfeasor credit for the amount paid by another tortfeasor in a settlement. *See Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867, 875 (Ct. App. 1986). South Carolina's setoff rule rests on the "almost universally held [principle] that there can only be one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dep't*, 264 S.C. 221, 213 S.E.2d 740, 746 (1975). Section 15-38-50 of the South Carolina Code applies to the facts of this case and provides in pertinent part:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury . . .:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduced the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is the greater.

Set-off under Section 15-38-50 applies when two or more persons are liable for the "same injury." The South Carolina Court of Appeals has interpreted the term "injury" broadly enough to include all damages which result from the same negligence of the responsible parties. In the present case, Respondents' claims against Avtex arose out of the same factual scenario. "Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) (*quoting Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999)

(holding that when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to set-off arises as an operation of law); *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . . . When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law."); *See also Check First of Greenville, LLC v. Merchant Services of the Upstate, Inc.*, 2015 WL 6566563 (S.C. Com. Pl.) (Trial Order) (July 17, 2015) (based on the facts of the case, the close connection of all claims involved between all original parties, and in the interests of equity, plaintiff was entitled to partial set-off in light of defendant's settlement with a co-defendant entered the week prior to trial). Accordingly, Avtex is entitled to a set-off in the amount of the settlements from CSE and Chandler.

During the trial, Respondents presented no evidence to support Mrs. Huck's loss of consortium claim. In fact, the Court granted Appellant's Motion for Directed Verdict as to that claim due to the undisputed lack of evidence or testimony to support a loss of consortium cause of action. (Order, p. 1). Furthermore, counsel for Respondents did not object to or offer any argument opposing the directed verdict motion as to the loss of consortium claim by Mrs. Huck. The fact that the record is devoid of any evidence to support Respondent's loss of consortium claim weighs in favor of allocating a majority of the proceeds to Mr. Huck's negligence claim. Otherwise, this Court will be allowing strategic gamesmanship by Respondents, potentially resulting in double-recovery by Respondents for the same injury. *See Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 596, 65 USLW 2308 (4th Cir. 1996)("Were [the Court] to indulge the parties' manipulative attribution of settlement amounts, [it] would compromise South Carolina's policy of permitting setoffs to ensure against multiple recovery for the same injury.").

Alternatively, if it is discovered that the overwhelming majority of settlement funds paid by CSE and Chandler were allocated to Mrs. Huck's unsubstantiated consortium claim, Avtex may have a right to seek contribution from those joint tortfeasors. Thus, by allowing the settlement amounts to remain undisclosed, its right to seek contribution from the settling Defendants has been prejudiced. According to the South Carolina Contribution Among Tortfeasors Act (the "Act"), where two or more persons become jointly or severally liable in tort for the same injury to property, a right of contribution arises among them, even if judgment as not been recovered against all or any of them. S.C. Code Ann. § 15-38-20(A) (Supp. 2003); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). In these situations, the right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(B) (Supp. 2003); *Vermeer*, 336 S.C. at 68, 518 S.E.2d at 309. Section 15-38-50 of the South Carolina Code conditions extinguishment of potential contribution claims by Avtex on the terms of the settlements between both Plaintiffs and CSE and Plaintiffs and Chandler being made in "good faith." In the absence of a good faith settlement, Avtex could have a claim for contribution against Chandler and/or CSE.

The trial court's Order erroneously states that "[t]here is no such statute giving the court the authority to approve the settlements between [Chandler] and Mr. and Mrs. Huck . . . and a settlement between CSE and Mr. and Mrs. Huck." (Order, p. 10). In fact, Section 15-38-50 specifically states that "[w]hen a release . . . not to sue or not to enforce judgment ***is given in good faith*** to one or two more persons liable in tort for the same injury, it does not discharge any of the other tortfeasors from liability for the injury . . . ." S.C. Code Ann. § 15-38-50. If the court did not have authority to make the determination of whether this settlement was made in good faith, the "good faith" language would not have been included in the statute. *See Hodges v.*

Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)(*citing In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998)(*internal citations omitted*)("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

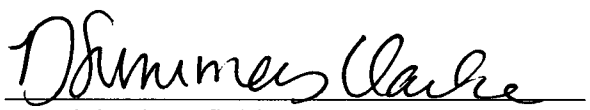
Based on the "good faith" language included in the statutory text, a trial court must order that the settlement terms be disclosed so that Appellant might determine if these settlements were made in good faith, and if not, whether it wishes to pursue contribution against the settling defendants in a separate action. Otherwise, the "good faith" language in the statute has no meaning whatsoever. In the present case, the trial court has failed to order that the settlement terms be disclosed to Avtex so that there may be a determination as to whether the settlements were made in good faith.

Furthermore, Avtex respectfully contends that the trial court's final Order conflates two separate principles found in the Contribution Among Joint Tortfeasors Act, S.C. Code Ann. §§ 15-38-15, *et seq.* (the "Act"). It is true that a plaintiff may decide to elect 100% of a joint and several judgment against any single tortfeasor who is found by the jury to have been at least 50% at fault for a plaintiff's injuries. However, that section does not stand for the proposition that a defendant found to be at least 50% at fault is foreclosed from seeing contribution from other tortfeasors. The best practical example of this concept is that plaintiffs frequently elect to pursue litigation against single tortfeasor. As such, in the absence of comparative fault, any judgment against that tortfeasor would appear to be on its face to be a finding of 100% liability. Nevertheless, it is undisputed that a defendant that finds itself in such a situation has the right to pursue any other tortfeasors in a separate action for contribution and seek a pro-rata division of the judgment. Nowhere in the Act is there a provision that stands for the proposition that a finding of 50% fault leaves a defendant with no further recourse.

Based on the foregoing, the trial court erroneously denied Appellant's Motion for Set-off and Motion to Alter or Amend the Judgment. In the alternative, Avtex respectfully requests this court to review the settlements to determine whether they were made in good faith.

CONCLUSION

For the foregoing reasons, Appellant Avtex Commercial Properties respectfully requests that the Court reverse and vacate the circuit court's Order denying Appellant's Motion for Disclosure of Settlement, Motion for Setoff, and in the alternative, Motion to Determine whether Settlements with Chandler Construction Services and Civil Site Environmental, Inc. were made in good faith and the circuit court's Order denying Appellant's Motion to Alter or Amend Judgment pursuant to SCRCP 59(e).



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PROOF OF SERVICE

I, the undersigned, of the law offices of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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