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 REPLY OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC.

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A. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES TO DISCLOSE SETTLEMENT

Appellant Avtex filed a post-trial motion, styled *Motion for Disclosure of Settlement, Motion for Setoff, and in the Alternative, Motion to Determine Whether the Settlements with Chandler Construction Services and Civil Site Environmental Were Made in Good Faith* (the "Motion for Disclosure and Setoff") to determine Plaintiffs' settlement terms with Chandler Construction Services ("Chandler") and Civil Site Environmental ("CSE") (collectively referred to as the "Settling Defendants"), which the trial court denied on July 23, 2015. The trial court relied on its interpretation of the South Carolina Rules governing Alternative Dispute Resolution in reaching its finding that the court is prevented from disclosing the terms of the settlements between Respondents and the Settling Defendants. (Order, p. 4). Avtex timely filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) requesting the trial court to reconsider and amend its Order, which was denied on August 14, 2015 (the "Rule 59(e) Motion"). (Motion to Alter or Amend). Thereafter, this appeal was timely filed to appeal both of the trial court's orders.

Respondents claim that Appellant did not follow the proper procedures to determine the settlement terms between Respondents and the Settling Defendants by filing the Motion for Disclosure and Setoff, Rule 59(e) Motion, and subsequent appeal of the lower court's orders denying the motions. Instead, Respondents assert that Appellant was required to seek this information pursuant to the discovery rules, including Rule 26(a), Rule 34(a), Rule 34(b) and Rule 34(c) of the South Carolina Rules of Civil Procedure.

Contrary to Respondents' assertions, Appellant's motions were the appropriate mechanism for Appellant to seek to determine the settlement amounts and terms of the settlement, which information became pertinent only after a verdict was rendered in this case. Respondents rely on a litany of irrelevant and non-binding case law to support their arguments. Appellant was not required to request the terms of the settlement agreements through pre-trial discovery in order to be entitled to determine the settlement amounts. Prior to the verdict in this case, Appellant did not need to discover the settlement amounts, and dissemination of the terms of the settlement agreements was not likely to generate admissible evidence for trial. Because the proportionate liability among the remaining co-defendants did not need to be determined until final judgment, it was not necessary for Appellant to move to obtain this information until a verdict was rendered. Once the Motion for Disclosure and Setoff and the Rule 59(e) Motion were denied, it was proper for Appellant to file this appeal.

Respondents are attempting to obfuscate the proper issues in this appeal by manufacturing procedural problems, including failure to comply with discovery rules and the inability of the trial court to compel production of the settlement amounts due to the confidentiality of the mediation. Appellant was not asking the trial court, and likewise, is not asking this Court to reopen the pre-trial discovery process. Furthermore, Appellant is not requesting that the Court disclose anything that would circumvent the "confidentiality of the [mediation] process." Rule 8, SCADR. Moreover, the portions of the Mediation Agreement dated March 27, 2015, referred to by Respondents do not shield the settlement amounts from disclosure. Appellant is not seeking any documents "prepared for the purpose of, or in the course of, the mediation." Appellant is only requesting that

Respondents be required to disclose the settlement terms and/or settlement agreements between Respondents and the Settling Defendants, CSE and Chandler, which memorialize those settlements, to the lower court for post-trial setoff purposes, as contemplated by the South Carolina Contribution Among Tortfeasors Act (the "Act). S.C. Code Ann. §§ 15-38-10 to 70 (2005 and Supp. 2014).

In addition, Respondents and the trial court rely on Rule 8 of the South Carolina Alternative Dispute Resolution Rules to support the contention the court 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). The intent of Rule 8 of the South Carolina Alternative Dispute Resolution Rules is to protect negotiations and discussions within mediation, not settlement agreements and releases arising out of mediation. Mediation is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution, whereas a settlement agreement is a document that memorializes the terms of the agreement. The mediation process is protected. The outcome of the mediation is not. Neither a confidentiality provision in a mediation agreement nor Rule 8, SCADR operates to shield a settlement agreement from being produced for setoff purposes. 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). The settlement documents, namely the releases and settlement agreements signed by Respondents and the Settling Defendants 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 setoff). Furthermore, settlement agreements are relevant "to the amount of setoff to which the non-settling defendants would be entitled" and 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). Therefore, it is appropriate to require the disclosure of the settlement terms because it is relevant to the amount of setoff of the settlement amount from any verdict in favor of Respondents. *Id.*

Furthermore, Rule 8(a) of the South Carolina Rules of Civil Procedure delineates several examples of confidential oral or written communications, which occurred during the mediation, including the following:

(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), SCADR. Rule 8(a)(5) only contemplates the confidentiality of "documents created solely for use ***in*** the mediation." *Id.* (emphasis added). Interestingly, Rule 8(a) does not mention that settlement agreements or releases are confidential. Had the legislature intended for settlement agreements and releases to be confidential for all purposes, including post-trial motions for setoff, it certainly could have included that language in the rule. Furthermore, Rule 8(b) provides that the confidentiality provisions do not prohibit "[a]ny disclosures required by law. . . ." Rule 8(b), SCACR. This exception allows courts to require the disclosure of settlement amounts, releases, and settlement agreements in order to comply with the law, including the South Carolina Contribution Among Joint Tortfeasors Act.

If Respondents are allowed to use the mediation process to shield the disclosure of settlement amounts with joint tortfeasors, this exception would completely prevent the application of the South Carolina Contribution Among Tortfeasors Act in many tort actions. Therefore, it is appropriate for this Court to remand this case and request the lower court to require the disclosure of the settlement amounts included in the settlement agreements and releases. 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. (*See Complaint*). Shielding the disclosure of settlement amounts for setoff purposes would allow plaintiffs double-recovery, which certainly was not intended by the Act. *See Welch v. Epstein*, 536 S.E.2d 279, 536 S.E.2d 408 (Ct. App. 2000)("A nonsettling defendant is entitled to credit for the

amount paid by another defendant who settles. The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." (internal citations omitted)). As such, Avtex is entitled to an automatic setoff 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.

As previously discussed, the trial court improperly relied on Fourth Circuit's holding in *In re Anonymous*, 283 F.3d 627 (2002) to deny Appellant's motions. (Order, p. 8). The case involved a federal attorney disciplinary action regarding a fee dispute. The court considered whether it would be manifestly unjust to not disclose information revealed during the mediation. The case did not address and has no bearing on whether it is appropriate to disclose settlement amounts or settlement agreements and releases for setoff purposes or for determining whether claims for contribution among joint tortfeasors may exist. The approach to the application of the "manifest injustice" standard in *In re Anonymous* is not relevant to the issues in the present case, as Appellant is not seeking to obtain any confidential information disclosed during the mediation. Furthermore, Appellant is not seeking to find out what Respondents discussed with each of the Settling Defendants or any disclosures made during any mediation conference. Appellant is simply seeking disclosure of either the settlement amounts or agreements that manifested as a result of those conversations. Moreover, Appellant is not challenging the amounts CSE and Chandler each paid to resolve the case. Appellant is simply requesting that this Court require the lower court to apply the law and statutes applicable in this case, which mandates setoff. *See Green v. Bauerie*, 2016 WL 453490

(S.C. Ct. App. Feb. 3, 2016) (*not reported*). If it were necessary to consider whether not producing the settlement agreements would be manifestly unjust, clearly the Appellant would undoubtedly be harmed by non-disclosure of the settlement amounts because it would not be able to obtain a setoff, which would contravene the South Carolina Contribution Among Tortfeasors Act.

Based on the foregoing, the trial court erroneously denied Appellant's Motion to Disclose the 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 SETOFF AND IN THE ALTERNATIVE TO DETERMINE WHETHER THE SETTLEMENTS WITH CSE AND CHANDLER WERE MADE IN GOOD FAITH

Respondents William Huck and Dianne Huck brought causes of action for negligence and loss of consortium against the Appellant and the Settling Defendants and did not distinguish or differentiate the purported damages among the joint tortfeasors. Therefore, Avtex is entitled to a setoff for the amounts the joint tortfeasors, CSE and Chandler, each paid to Respondents to settle the claims against them.

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Riley v. Ford*, 414 S.C. 185, 195, 777 S.E.2d 824 (2015)(internal citations omitted). Therefore, when Section 15-38-50 of the South Carolina Code applies, courts have no discretion in applying setoff. *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012). "The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195.

"[T]hese equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act . . . ." *Id.* Section 15-38-50 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 reduces 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.

S.C. Code Ann. §§ 15-38-50 (2005 and Supp. 2014). Setoff under Section 15-38-50 applies when two or more persons are liable for the "same injury." *Id.* 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. *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 106, 113 (Ct. App. 1999). In the present case, Respondents' claims against Appellant Avtex and the Settling Defendants arose out of the same factual scenario.

The South Carolina Court of Appeals considered "whether the set-off requirement pursuant to [S.C. Code] § 15-38-50 arises by operation of law" or whether the "party entitled to the set-off must make a timely motion pursuant to the rules of civil procedure." *Id.* When considering this issue, the South Carolina Court of Appeals addressed the rules of statutory interpretation in relation to Section 15-38-50 of the South Carolina Code:

> The court's primary concern in interpreting a statute is to ascertain and effectuate legislative intent. *State v. Four Video Slot Machs.*, 317 S.C. 397, 453 S.E.2d 896 (1995); *Spartanburg County Dep't of Soc. Servs. v. Little,* 309 S.C. 122, 420 S.E.2d 499 (1992). "A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Spartanburg,* 309 S.C. at 125, 420 S.E.2d at 501. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably

> discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). "Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *see also Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 442 S.E.2d 177 (1994).

Ellis v. Oliver, 335 S.C. 106, 109-110 (Ct. App. 1999). This Court held that "Section 15-38-50 grants the court no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999); *See also Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); *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 setoff in light of defendant's settlement with a co-defendant entered the week prior to trial). Accordingly, Avtex is entitled to a setoff in the amount of the settlements from CSE and Chandler. Otherwise, this Court will be allowing strategic gamesmanship by Respondents, potentially resulting in double-recovery by Respondents for the same injury. *See Riley v. Ford*, 414 S.C. 185, 196, 777 S.E.2d 824 (2015)("[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South

Carolina's 'strong public policy favoring the settlement of disputes.'"); *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.").

Respondents argue that Appellant has waived its right to join all necessary parties in the Motion for Disclosure and Setoff. Appellant contends that it was not required to direct its motion to the settling defendants, as they were no longer parties to the case and were not required to be notified that Appellant was requesting the trial court to implement the statutorily mandated setoff procedures. Furthermore, neither the appearance of CSE nor Chandler is necessary or required for the trial court to demand that Respondents disclose the settlement amounts for setoff purposes. If those settlements were made in good faith, the setoff rules would apply automatically, which would not require the participation of the settling defendants in any way. Conversely, if it appears that the settlements were not made in good faith, any subsequent motions or actions for contribution may require the participation of the Settling Defendants. However, that is not the subject of this appeal, and it would be improper to engage in speculation.

Based on the foregoing, the trial court erroneously denied Appellant's Motion for Disclosure and Setoff and Rule 59(e) Motion. In the alternative, Appellant respectfully requests that the case be remanded for the trial 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 this Court reverse the circuit court's Orders denying the following: (1) *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 (2) *Appellant's Motion to Alter or Amend Judgment pursuant to SCRCP 59(e).*

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, of the law offices of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the Initial Reply of Appellant, Avtex Commercial Properties, Inc. herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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