IN 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

Case No. 2014-CP-10-0569

Appellate Case No. 2015-002025

WILLIAM HUCK AND DIANE HUCK.....Plaintiffs/Respondents,

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,

Of Whom AVTEX COMMERCIAL PROPERTIES, INC., ...Appellant.

RESPONDENT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

RULES

ORDERS

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY DENY THE MOTION OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., TO COMPELL THE PRODUCTION OF THE WRITTEN SETTLEMENT AGREEMENT DOCUMENT MEMORIALIZING THE SETTLEMENT REACHED DURING MEDITAION BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC.?

II. DID THE TRIAL COURT PROPERLY DENY THE MOTION OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., TO COMPELL THE PRODUCTION OF THE WRITTEN SETTLEMENT AGREEMENT DOCUMENT MEMORIALIZING THE SETTLEMENT REACHED DURING MEDITAION BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC.?

IIII. ARE THERE ANY EXCEPTIONS TO THE CONFIDENTIALITY REQUIREMENT OF RULE 8, SCADR?

IV. DID THE TRIAL COURT PROPERLY DECIDE THAT IT CANNOT REAPPORTION THE SETTLEMENT PROCEEDS PAID BY DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC., IF ANY, TO RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, SO AS TO MAXIMIZE THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., IS ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT?

V. DID THE TRIAL COURT PROPERLY DECIDE THAT IT CANNOT REAPPORTION THE SETTLEMENT PROCEEDS PAID BY DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC., IF ANY, TO RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, SO AS TO MAXIMIZE THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., IS ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT?

VI. IS THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT TO THE ACTUAL SETTLEMENT PROCEEDS PAID TO RESPONDENT, WILLIAM HUCK, IF ANY, PURSUANT TO THE SETTLEMENT AGREEMENT BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC., AND THE SETTLEMENT AGREEMENT BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC.?

STATEMENT OF THE CASE[1]

This action is a premises liability action. Plaintiff/Respondent, William Huck (hereinafter "William Huck"), and his wife, Plaintiff, Diane Huck (hereinafter referred to as "Diane Huck") (William Huck and Diane Huck hereinafter collectively referred to as the "Hucks"), initiated this action against Wings Over America, Inc., d/b/a Wild Wing Café, Civil Site Environmental, Inc., (hereinafter referred to as "Civil Site"), Oakland Properties, LLC, (hereinafter referred to as "Oakland"), Chandler Construction Services, Inc., (hereinafter referred to as "Chandler"), and Avtex Commercial Properties, Inc. (hereinafter referred to as "Avtex"), on January 28, 2014, by filing a Summons and Complaint with the Office of the Charleston County Clerk of Common Pleas. *R.* p.18 - p.28 The Complaint was subsequently amended on February 20, 2014, to substitute Oakland Wings, LLC, d/b/a Wild Wing Café (hereinafter referred to as "Wild Wing") for Wings Over America, Inc., d/b/a Wild Wing Café as a party defendant. *R.* p.29 – p.40. The Complaint was amended a second time on April 15, 2014. *R.* p.59 – p.69. Civil Site, Wild Wing, Oakland and Avtex each timely answered the Amended Complaint and Civil Site, Wild Wing, Oakland, Chandler and Avtex each timely answered the Second Amended Complaint[2] each time denying the material allegations of the Amended Complaint or the

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[1] Counsel is well aware that Rule 208(b)(4), SCACR, requires William Huck's brief to "contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged." However, as this appeal is more about what Avtex failed to do as it is about what actually happened and largely arises out of mediation, the universe of material available to be cited to is limited. This is further compounded by the fact that Avtex did not order the transcript of the trial. *R.*p.177 – p.178. Consequently, there is a dearth of available material to reference.

[2] The Complaint was amended before the original Complaint was served on any of the Defendants; therefore, no answer to the original Complaint was put in by any of the defendants. Because Chandler was not served until after the Complaint was amended the second time, it filed no answer to the Amended Complaint.

Second Amended Complaint, as the case may be, and raising various affirmative defenses as more particularly set forth therein, none of which are germane to this appeal. *R.* p.41 – p.58; p.74 - p.113. In this action, William Huck seeks damages for injuries he sustained when he slipped and fell (hereinafter referred to as the "Incident") and Diane Huck seeks damages for loss of consortium. *R.* p.59 – p.69.

This matter was mediated on March 27, 2015, with John H. Tiller, Esq., serving as mediator. *R.* p.181 – p.182. All parties were present. *R.* p.181 – p.182. During the course of the mediation, Mr. Tiller declared an impasse as to Wild Wing, Oakland and Avtex, whereupon Wild Wing, Oakland and Avtex and their counsel discontinued the mediation process and left the mediation site. The Hucks, Civil Site and Chandler, however, continued in the mediation process. Prior to the conclusion of the formal face-to-face mediation on March 27, 2015, The Hucks reached a confidential settlement agreement with Civil Site. *R.* p. 114; p.181 – p.182. Though Chandler did not settle with the Hucks during the formal face-to-face mediation on March 27, 2015, by agreement, the Hucks and Chandler continued the mediation process in the same manner as they had during the formal face-to-face mediation on March 27, 2015, negotiating and communicating through Mr. Tiller. After a little more than a month of continuous negotiations, Chandler reached a confidential settlement agreement with the Hucks, and Chandler was dismissed from this action. *R.* p.115 – p.116.

This matter was tried to a jury before The Honorable Brian M. Gibbons, Circuit Court Judge, on May 19, 2015, May 20, 2015, and May 21, 2015, against the remaining defendants, Wild Wing, Oakland and Avtex. *R.* p.4 – p.15; p.132 – p.137. On May 21, 2015, the jury returned a verdict against William Huck in favor of Wild Wing and Oakland

and a verdict in favor of William Huck against Avtex in the amount of $97,640.00. As the jury also found that William Huck was fifty percent at fault in bringing about his own injuries, the court reduced the award by fifty percent and entered judgment in favor of William Huck in the amount of $48,820.00. *R.* p.4 – p.15; p.132 – p.137.

Avtex moved for Judgment Notwithstanding the Verdict, for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlements with Civil Site and Chandler were made in good faith on June 3, 2015. *R.* p.138 – p.139; p.144 – p.145. By order dated July 23, 2015, and filed July 27, 2015, both motions were denied by The Honorable Brian M. Gibbons, Circuit Court Judge (hereinafter referred to as the "Order"). *R.* p.4 – p.15. Avtex thereafter moved to have the Court alter or amend the Order on August 7, 2015. *R.* p.156 – p.159. Avtex's motion to alter or amend was denied August 14, 2015. *R.* p.16 – p.17. This appeal followed September 21, 2015. *R.* p.160 – p.161.

FACTS

On July 13, 2012, William Huck went to Wild Wing Café located in The Market at Oakland, Mount Pleasant, South Carolina, for the purpose of meeting a friend for lunch. *R.* p.59 – p.69. After parking in the parking lot on the south side of South Morgans Point Road, William Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and crossed the street in the marked cross walk in front of Wild Wing Café. *R.* p.59 – p.69. As William Huck exited the cross walk and entered the curb ramp, he slipped and fell to the ground due to the unlevel slippery surface, which was covered by heavy slimy ponding and accumulation of debris blocking normal passage. *R.* p.59 – p.69. As a consequence of his fall, William Huck suffered severe and significant injuries, which,

among other things, necessitated that he undergo surgery and retire from his job as a post-operative care nurse. *R.* p.59 – p.69.

Avtex developed, owns and manages The Market at Oakland, and on July 13, 2012, was in possession and control of the crosswalk and curb ramp where William Huck fell. *R.* p.59 – p.69. At the time of the Incident, Oakland was the property manager of The Market at Oakland. *R.* p.59 – p.69. Wild Wing was a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex. *R.* p.59 – p.69. Civil Site produced the construction plans for the crosswalk and curb ramps. *R.* p.59 – p.69. Chandler constructed the crosswalk and curb ramp. *R.* p.59 – p.69.

ARGUMENT

I. THE HUCKS CANNOT BE COMPELLED TO DISCLOSE THE TERMS OF THE SETTLEMENT AGREEMENTS WITH CIVIL SITE AND CHANDLER

Confidentiality is central to, and at the very core of, the alternative dispute resolution process. In the absence of an ironclad and absolute assurance that all statements, actions, negotiations and events which take place in the course and scope of mediation will be held in complete confidence and undiscoverable without qualification[3], participants in the mediation process will be reluctant to fully participate in the mediation process, substantially reducing its usefulness and effectiveness.

This appeal presents this court with an opportunity to: (1) uphold the discovery rules set forth in the South Carolina Rules of Civil Procedure, and (2) affirm, preserve and honor the sanctity of and reverence to strict adherence to the confidential nature of the mediation process. If the relief sought by Avtex is granted, the South Carolina Rules of

[3] Except to the limited extent specifically set forth in Rule 8(b), SCADR.

Civil Procedure discovery rules will be meaningless and mediation confidentiality shall henceforth be qualified. This is clearly contrary to public policy. For this reason, as well as the reasons specified hereinbelow, the Order dated July 23, 2015, and filed July 27, 2015, wherein Judge Gibbons denied Avtex's motions for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlement with Civil Site and Chandler were made in good faith must be affirmed[4].

A. Avtex failed to properly raise the issue before the lower court.

As discussed above, on June 3, 2015, Avtex moved for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlements with Civil Site and Chandler were made in good faith[5]. As this was not the proper method for raising the issue of disclosure before the lower court, the lower court's order must be affirmed.

The South Carolina Rules of Civil Procedure "govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity. . . ." Rule 1, S.C.R.CIV.P. As noted by the South Carolina Supreme Court in *Wofford v. Ethyl Corp.*, 316 S.C. 75, 77, 447 S.E.2d 187, 189 (1994):

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[4] Avtex has not appealed that portion of the Order denying Avtex's motion for Judgment Notwithstanding the Verdict. Accordingly, the portion of the Order denying Avtex's motion for Judgment Notwithstanding the Verdict is the law of this case and the jury's verdict must henceforth remain intact and undisturbed. *See Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997), *cert. denied* (1998)("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling 'is an abandonment of the issue and precludes consideration on appeal.' The unchallenged ruling, 'right or wrong, is the law of the case and requires affirmance.'")(*quoting Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)); *see also, e.g., Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249 - 250, 772 S.E.2d 505, 509 (2015)("'An unappealed ruling is the law of the case and requires affirmance.' Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.)(*quoting Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

[5] Though not specified in the motion, Avtex's motion could have only been directed to William Huck as Diann Huck's claim had been dismissed by that point. Further, as Avtex's ultimate goal is a set off, since the verdict was awarded only to William Huck, the motion was clearly directed to him.

> While modern discovery rules and liberal pleading requirements *virtually eliminate* the need to resort to an independent action in the form of an equitable proceeding for discovery, they do not totally displace the traditional equitable jurisdiction of the court to issue appropriate orders for independent discovery *when effective discovery cannot otherwise be obtained* and the ends of justice served. The equity powers of the Court may allow discovery *when the Rules do not provide a mechanism.*

Id. (holding that the trial court did not error in ordering a non-party to an action to permit the inspection of its plant pursuant Rule 34(c), S.C.R.CIV.P., even though there was no action pending at the time)(citations omitted)(emphasis added).

A party to an action "may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions." Rule 26(a), S.C.R.CIV.P. A party to an action,

> may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), S.C.R.CIV.P. (emphasis added). "[T]he court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . the following: . . . that the discovery may be had only on specified terms and conditions. . . ." Rule 26(c), S.C.R.CIV.P. "[T]he party requesting discovery shall serve the request on other counsel or parties. . . ." Rule 26(g)(1), S.C.R.CIV.P.

> [A]ny party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish such information as is available to the party. . . .The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Rule 33(a), S.C.R.CIV.P. "Any party may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. . . ." Rule 34(a), S.C.R.CIV.P. "The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. . . . The party upon whom the request is served shall serve a written response within 30 days after the service of the request. . . ." Rule 34(b), S.C.R.CIV.P. If "a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request." Rule 37(a)(2), S.C.R.CIV.P.

Though styled as a motion for disclosure of settlement, it is in reality nothing more than a Rule 37(a)(2) motion to compel[6]. Specifically, with regard to its motion Avtex states:

> Avtex is entitled to ***discover*** the terms of both releases. . . . If Plaintiffs [*sic*] object to the production of the settlement documents on the basis that they contain a confidentiality provision, any concerns regarding privacy or

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6 This would be a motion made pursuant to Rule 37(a)(2).

> confidentiality over the ***discovery*** of the settlement agreement[7] [*sic*] can be adequately addressed by a protective order.

R. p.147 - p.148 (emphasis added). Avtex itself acknowledges it is seeking discovery of the confidential settlement agreements. Though it fails to mention Rule 26(c), it wrongfully suggests that any confidentiality concerns can be adequately addressed by a Rule 26(c) protective order. Without question the South Carolina Rules of Civil Procedure provide an adequate mechanism for discovering the terms of the settlement agreement – a Rule 34(a) request for production - which Avtex clearly recognizes, but failed to utilize. Thus, because in substance Avtex's motion for disclosure of settlement is a motion to compel, the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler, it should be treated as such. *Cf. Leighton v. Swan*, 1991 WL 220290, 3 (D.N.J. 1991)(court treated motion for request for interrogatories as motion to compel discovery under FED.R.CIV.P. 37(a)(2)); *Thomas v. Vaughn*, 1998 WL 770597 (E,D. Penn. 1998)(court treated letter seeking information as a FED.R,CIV.P. 37 motion to compel); *Regions Bank v. Wingard Prop.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)(equitable principle substance over form).

> [A] party may file a motion to compel discovery when: (i) a deponent fails to answer a question; (ii) a party fails to answer an interrogatory; (iii) a party fails to respond to a rule 34 request for production; or (iv) a corporate party fails to designate a representative to respond on its behalf to discovery In

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[7] Avtex's motion for disclosure of settlement does not specify whether it is seeking information related to the terms of the settlement agreement between William Huck and Civil Site and information relating to the terms of the settlement agreement between William Huck and Chandler, and, thus, whether the nature of its discovery is more appropriately the subject of a Rule 33 interrogatory, or whether it seeks production of the written documents memorializing the terms of the settlement themselves which is more appropriately the subject of a Rule 34 request for production. However, as the memorandum inferentially makes clear, Avtex is seeking production of the written documents memorializing the settlements. In any event, for purposes of this discussion, it will be assumed that Avtex should have sought the production of the written documents memorializing the settlements pursuant to Rule 34.

> addition to the usual formal requirements for filing motions, a party must satisfy a two threshold requirements before filing a motion to compel: (i) serve a formal discovery request on the responding party pursuant to rules 30, 31, 33 . . . 34 . . . [or 45, S.C.R.CIV.P.]; and (ii) confer or attempt to confer with the responding party in good faith to attempt to obtain the discovery.

Ameri v. GEICO Gen. Ins. Co., 2015 WL 4461212, 10 (D.N.M. 2015)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *accord Patterson v. Kim*, 2009 WL 1911819 (W.D. Mich. 2009)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production). "It is axiomatic that a court may not compel the production of documents under Rule 37 unless the party seeking such an order has served a proper discovery request on the opposing party." *Texas Democratic Party v. Dallas Cnty., Texas*, 2010 WL 5141352, 1 (N.D. Texas 2010)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); s*ee Heilman v. Silva*, 2015 WL 1632693 (S.D. Cal. 2015)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 45 Subpoena); *Ameri v. GEICO Gen. Ins. Co.*, *supra*; *Simon v. Taylor*, 2014 WL 6633917, 27 (D.N.M. 2014)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production; "courts have rejected parties' attempts to compel the production of documents without filing a formal discovery request"); *Dang v. Eslinger*, 2014 WL 3611324 (M.D. Fla. 2014)(motion to compel denied because moving party failed to serve deposition notice); *Trask v. Olin Corp.*, 298 F.R.D. 244 (W.D. Penn. 2014)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *DeWitt v. Sw. Bell Tel. Co.*, 2014 WL 695744 (D. Kan. 2014)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Susko v. City of Weirton*, 2011 WL 98557 (N.D. W.Va. 2011)(motion to

compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Acuity Mut. Ins. Co. v. Frye*, 2010 WL 1409126, 3 (E.D. Tenn. 2010)("Paradoxically, while Plaintiff's motion was filed extremely late in the discovery process, it is nonetheless premature because Plaintiff never formally requested that Mr. Frye produce social security records."); *Calderon v. Reederei Claus-Peter Offen GMBH & Co.*, 2009 WL 3242008 (S.D. Fla. 2009)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Rosenthal v. Shiraz*, 2009 WL 1941272 (S.D. Fla. 2009)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 45 Subpoena); *Patterson v. Kim*, *supra*; *Garrison v. Dutcher*, 2008 WL 938159 (W.D. Mich. 2008)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Cont'l Cas. Co. v. Multiservice Corp.*, 2008 WL 73345 (D. Kan. 2008)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *James v. Wash Depot Holdings, Inc.*, 240 F.R.D. 693 (S.D. Fla. 2006)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Suid v. Cigna Corp.*, 203 F.R.D. 227 (D.V.I. 2001)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Sithon Maritime Co. v. Mansion,* 1998 WL 182785 (D. Kan. 1998)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Ledbetter v. United States*, 1996 WL 739036 (N.D. Tex. 1996)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Haifley v. Naylor,* 1996 WL 539212 (D. Neb. 1996)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Roberts v. Americable Int'l Inc.,* 883 F.Supp. 499, 501 n. 2 (E.D. Cal.

1995)("[A party's] informal request for production of documents made at deposition is not recognized as an appropriate discovery request under the Federal Rules, i.e. such discovery vehicle does not exist under the Federal Rules of Civil Procedure. [The] motion to compel is inappropriate and is denied for this reason."); *Schwartz v. Mktg. Publg. Co.,* 153 F.R.D. 16 (D. Conn.1994)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Hilgenberg v. Neth*, 93 F.R.D. 325 (E.D. Tenn. 1981)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Grissom v. Nat'l Labor Relations Bd.*, 364 F. Supp. 1151, 1154 (M.D. La. 1973), *aff'd sub nom.,* 497 F.2d 43 (5th Cir.1974)("[U]ntil the mover . . . makes a request for such documents and is improperly refused, this Court will not entertain any motion to compel their production."); *Miller v. State Farm Mut., Auto. Ins. Co.*, 2015 Ohio 280, 27 N.E.3d 980 (2015)(motion to compel denied because moving party failed to serve interrogatories or requests for production).

Three widely accepted grounds have been offered for requiring a party seeking an order compelling discovery to have first served a proper discovery request pursuant to the rules of civil procedure on the opposing party. One ground given is:

> The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of Fed.R.Civ.P. 37, governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules. Formal requests may be filed under some circumstances, not letter requests. Formal requests require certificates of conferring and service. Letters do not. Formal requests certify representations of counsel under Fed.R.Civ.P. 11(b). Letters do not. Formal requests clearly implicate the duties of opposing parties to respond, pursuant to Fed.R.Civ.P. 34. Letters do not. Formal requests may occasion sanctions. Letters usually do not. To treat correspondence between counsel as formal requests for production under Rule 34 would create confusion and chaos in discovery. Fed.R.Civ.P. 37(a)(2)(B) permits a party to move to compel production of documents 'if a party, in response to a request for

> inspection submitted under Rule 34, fails to respond.' An evasive or incomplete response is a failure to respond, within the meaning of Rule 37(a)(2)(B).
>
> Fed.R.Civ.P. 34(a) establishes the permissible scope of production. Fed.R.Civ.P. 34(b) establishes the procedure for submitting the request and for responding to it. . . . Although both informal investigation and formal discovery have their proper place in the litigation arena, the Federal Rules of Civil Procedure address only formal discovery.

Sithon Maritime Co. v. Mansion, supra at 2 (citations omitted); *accord Calderon v. Reederei Claus-Peter Offen GMBH & Co., supra*; *Rosenthal v. Shiraz, supra*; *Patterson v. Kim, supra*; *Garrison v. Dutcher, supra*; *Cont'l Cas. Co. v. Multiservice Corp., supra*; *James v. Wash Depot Holdings, Inc., supra.* A second ground given is:

> Informal discovery has its place, and obviously it can be very efficient and useful in some situations. But informal discovery has drawbacks and limitations. Besides Fed.R.Civ.P. 37(a)'s clear language as to when a motion to compel a discovery response may be made, other judges . . . have refused to compel a party to respond to informal discovery requests. The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of Fed.R.Civ.P. 37, governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules.

Cont'l Cas. Co. v. Multiservice Corp., supra at 8; *accord DeWitt v. Sw. Bell Tel. Co., supra.*

A third ground given is:

> The Federal Rules of Civil Procedure are designed to enable a relatively small judiciary to deal in an orderly way with a virtually limitless number of disputes. Even when parties sedulously *comply* with the rules of procedure, courts must struggle to keep abreast of their ever-growing dockets. By pioneering their own ad hoc procedure, parties do themselves and the courts a disservice. It is far easier and quicker to make a formal document request pursuant to Rule 34 than it is to construct and articulate an argument why an *informal* letter should be *treated* as a Rule 34 request so as to enable it to be *enforced* under Rule 37. When parties fashion their own procedure, they remove their cases from the litigative stream and, when a dispute later arises, almost invariably consume more than their fair share of judicial time.

Schwartz v. Mktg. Publg. Co., supra at 21 (emphasis added); *accord Ameri v. GEICO Gen. Ins. Co., supra*; *Simon v. Taylor, supra*; *Susko v. City of Weirton, supra.*

Avtex never served a Rule 33(a) interrogatory seeking information relating to the terms of the settlement between the Hucks and Civil Site or seeking information relating to the terms of the settlement between the Hucks and Chandler. *See R.* p.117 – p.125[8]. Nor did Avtex ever serve a Rule 34(a) request for production seeking the production of the written document memorializing the settlement between the Hucks and Civil Site or the production of the written document memorializing the settlement between the Hucks and Chandler. *R.* p.126 – p.121[9]. Avtex did not write the Hucks a letter requesting information relating to or the production of the settlement agreements, not that such a letter would support a motion to compel. Instead Avtex moved for disclosure of settlement[10] without first serving Rule 34(a) requests for production seeking the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler. Because Avtex failed to serve Rule 33(a) interrogatories seeking information relating to the terms of the settlement between the Hucks and Civil Site and information relating to the terms of the settlement between the Hucks and Chandler, or Rule 34(a)

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8 The interrogatories served by Avtex on William Huck contained in the record are the only interrogatories Avtex served on William Huck during the course of this litigation. Avtex served no other interrogatories on William Huck.

9 The requests for production served by Avtex on William Huck contained in the record are the only requests for production Avtex served on William Huck during the course of this litigation. Avtex served no other requests for production on William Huck.

10 Avtex's motion for disclosure is nothing more than a motion compel the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler.

requests for production seeking the written document memorializing the settlement between the Hucks and Civil Site and the written document memorializing the settlement between the Hucks and Chandler, the lower court had no basis upon which to entertain Avtex's motion for disclosure of settlement/motion to compel production[11]. Accordingly, this court must affirm the Order on the grounds that Avtex failed to first serve a Rule 33(a) interrogatory seeking information relating to the terms of the two settlement agreements or a Rule 34(a) request for production seeking the production of the two written documents

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[11] Of course Avtex's failure to serve a Rule 33 interrogatory and/or a Rule 34 request for production on William Huck seeking information related to or the production of the two settlement agreements is the reason why there is a paucity of material in the Record on Appeal in this case on which this Court can base its decision in this matter. Had Avtex served a Rule 33 interrogatory and/or a Rule 34 request for production on William Huck seeking information related to or the production of the two settlement agreements, William Huck would have had an obligation to formally respond in writing thirty days after either or both were served on him setting forth a statement of its position as to why he was prohibited from disclosing the information sought by Avtex with a description of the information or documents prohibited from disclosure sufficient to allow the lower court to rule on a motion to compel, assuming one was filed; if William Huck had failed to answer or respond, the lower court would have compelled him to respond, again assuming a motion was filed. *See* Rules 11(a), 33(a), 34(b) and 37(a)(2), S.C.R.Civ.P. It is axiomatic that Axtex, as appellant, bears the burden of presenting to this Court a record sufficient to make a decision. *See Harkins v. Greenville Cnty*, 340 S.C. 606, 533 S.E.2d 886 (2000)(appellant has the burden of presenting appellate court with an adequate record; as appellant failed to include relevant county ordinances in the Record on Appeal, the Court was unable to determine whether appellant had exhausted his administrative remedies, and, therefore, affirmed the lower court's order in regard this issue); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015)(appellant has the burden of presenting appellate court with an adequate record; as the record did not contain a motion for JNOV, the Court of Appeals would not consider the appellant's argument regarding the JNOV motion); *Shupe v. Settle*, 315 S.C.510, 517, 445 S.E.2d 651, 655 (Ct. App. 1994)(appellant has the burden of presenting appellate court with an adequate record; as "[i]t is clear Hartford relied on the policy as evidence to support its motion for summary judgment, but the Shupes failed to include the policy in the record. Accordingly, we must assume Hartford put forth evidence supporting its motion. The Shupes failed to defeat that motion as they are not allowed to rely upon the allegation in their complaint that they were third-party beneficiaries. Neither is Mrs. Shupe's conclusory statement in her affidavit sufficient to resist summary judgment. Accordingly, the order granting summary judgment to Hartford is affirmed."). "The transcript of record is the source of . . . [the court's] information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto."); *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 128 S.E.2d 179 (1962).

memorializing the settlement agreements before filing its motion for disclosure of settlement/motion to compel production[12].

B. Compelling the production of the settlement agreements would be an affront to the confidential nature of the mediation process.

Rule 1, SCADR, states in pertinent part:

> These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply. These rules govern Alternative Dispute Resolution (ADR) processes in the courts of this State as follows:
>
> **(a)** With the exceptions stated in Rule 3, these rules govern court-annexed ADR processes in South Carolina Circuit Courts in civil suits . . . :
>
> (1) in all counties in South Carolina;
>
> (2) as required by statute; or
>
> (3) as ordered by a court of competent jurisdiction.
>
> **(b)** With the exception of Rules 3, 4, 5, 6, 7(e) and (f), 9(b) and (d), and Rule 10(a), these rules shall govern ADR processes that are neither court mandated nor required by statute in all cases pending in the courts of this State.

Mediation is "[a]n informal process in which a third-party mediator facilitates settlement discussions between parties." Rule 2(a), SCADR. "Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." Rule 6(e), SCADR. 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

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[12] This Court may, of course, affirm the Order "upon any ground(s) appearing in the Record on Appeal." *See* Rule 220(c), SCACR; *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). Furthermore, it is well settled that "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. *Id.* at 419, 526 S.E.2d at 724.

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:

(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.

(b) Limited Exceptions to Confidentiality. This rule does not prohibit:

(1) Disclosures as may be stipulated by all parties;

(2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

(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;

(4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

(5) Any disclosures required by law or a professional code of ethics.

(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.

> **(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.
>
> **(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.

"Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." Rule 6(e), SCADR. "Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. If the parties envision a more formal agreement, the mediator shall assign one of the parties' attorneys to prepare the agreement." Rule 6(f), SCADR.

"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). Consequently, mediation rules should be broadly construed to effectuate their intent, "even if there are conflicting public policies and even if the equities in a particular case suggest a contrary result." *Wimsatt v. Superior Court,* 61 Cal.Rptr.3d 200, 203, 152 Cal.App.4th 137, 142 (2007).

Few courts have had the opportunity to address mediation confidentiality requirements. Those that have addressed them consistently enforce the confidentiality of mediation, even in circumstances in which mediation confidentiality operates to deprive the party seeking to penetrate the veil of confidentiality of a substantive claim or right. For instance, in *Wimsatt v. Superior Court, supra*, the Court upheld the confidential nature of mediation though doing so prevented the party seeking to part the veil of confidentiality from pursuing a malpractice claim explaining:

Mediation, which can take many forms, is one type of alternative dispute resolution. . . . . [L]itigants should be encouraged to participate in these proceedings as one alternative to 'formal court proceedings which it found to be 'unnecessarily costly, time-consuming, and complex.'. . .' 'In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.'

'[C]onfidentiality is essential to effective mediation . . . and, in some cases required. . . . '[M]ediation confidentiality provisions . . . encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings.'

[E]videntiary restriction is not limited to those communications made 'in the course of mediation.' [T]he restriction applies to any written or oral communication made 'for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' as well as all "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation. . . .' [S]uch evidence [is also] not subject to discovery.

* * * *

The Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality. The court has refused to judicially create exceptions . . . even in situations where justice seems to call for a different result. Rather, the Supreme Court has broadly applied the mediation confidentiality statutes and has severely curtailed courts' ability to formulate exceptions. The court has stated that '[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications [and writings] made during mediation absent an express statutory exception.'

In *Foxgate* [*Homeowners Ass'n, Inc. v. Bramalea California, Inc.*], 26 Cal.4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117 [(2001)], a mediator's report indicated the attorney for one party had engaged in a pattern of tactics that were in bad faith and intended solely to delay. The report and the declarations of the opposing counsel were submitted in support of a motion for sanctions. By crafting a nonstatutory exception to mediation confidentiality, the court of appeal held that the report was admissible. The court of appeal reasoned that disclosure was necessary because the Legislature did not intend to statutorily mandate confidentiality to shield parties who obstructed the mediation process. The Supreme Court disagreed. It held that the motion and the trial court's consideration of the

motion and attached documents violated the Evidence Code. *Foxgate* reasoned that the mediation confidentiality statutes 'are clear. [Evidence Code] section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation.'

Foxgate recognized its conclusion left unpunished sanctionable conduct—conduct that obstructed the mediation process—and in effect, undermined the entire purpose of mediation. However, *Foxgate* deferred to the Legislature to balance competing public policies and to create exceptions to the statutory scheme. *Foxgate* stated: 'The mediator and the Court of Appeal here were troubled by what they perceived to be a failure of [the defendant] to participate in good faith in the mediation process. Nonetheless, the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. . . . 'The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.'

* * * *

The Supreme Court again broadly interpreted mediation confidentiality in *Rojas* [*v. Superior Court*], 33 Cal.4th 407, 15 Cal.Rptr.3d 643, 93 P.3d 260 [(2004)] to preclude exceptions other than those expressly contained in the statutes. In *Rojas,* contractors and subcontractors settled a construction defect case brought by the owner of an apartment complex in which it was alleged 'that water leakage due to construction defects had produced toxic molds and other microbes on the property. . . .' A settlement was reached during mediation. Thereafter, several hundred tenants of the apartment complex sued many of the entities who had been involved in the development and construction of the complex, as well as the complex's owner. Among other allegations, the tenants alleged numerous health problems associated with construction defects. The tenants served deposition subpoenas and demanded production of a number of items prepared during the prior litigation including, the 'entire files' relating to the construction defect case, witness statements, test samples, physical evidence removed from the building, analyses of raw data, videotapes, and photographs.

Rojas acknowledged that the trial court expressed concern that, without the requested discovery, the tenants might not have been able to obtain much of the necessary evidence. However, *Rojas* held that the mediation confidentiality statutes are not subject to a' 'good cause' exception.' *Rojas* concluded that the requested items were *not* discoverable because they were' 'prepared for the purpose of, in the course of, or pursuant to, [the] mediation' ' in the underlying construction action. In reaching this conclusion, *Rojas* focused on the strong public policy favoring mediation and the need for confidentiality in the mediation process.

As *Rojas* explained, the Legislature intended a broad and expansive confidentiality rule: 'Before [Evidence Code] section 1119's passage, former section 1152.5 governed mediation confidentiality. [When 1119 was enacted, the Legislature substantially followed the recommendation of the Law Revision Commission to provide broad protection in section 1119, subdivision (b)] to all types of writings, including photographs. At the same time, the Legislature also sought to expand protection for oral communications. Whereas subdivision (a)(2) of former section 1152.5 protected documents 'prepared for the purpose of, or in the course of, or pursuant to, the mediation,' subdivision (a)(1) protected only those oral communications and admissions 'made ... in the course of the mediation.' The Commission's recommendation explained that, under these provisions, the protection for documents was 'broader' than the protection for oral communications and admissions, and '[t]o encourage frankness in discussions relating to mediation, the Commission propose[d] ... eliminat[ing] this distinction [by] protect[ing] 'evidence of anything said or of any admission made for the purpose of, or in the course of, or pursuant to,' the mediation. Again, the Legislature followed suit by protecting, in subdivision (a) of section 1119, 'evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation.' The Commission's official comment explains that this section 'extends [protection] to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.'

The Courts of Appeal also strictly construe the mediation confidentiality statutes, even when the equities in the case suggest contrary results.

In *Eisendrath* [*v Superior Court*], 109 Cal.App.4th 351, 134 Cal.Rptr.2d 716 [(2003)], a former husband moved to correct a spousal support agreement negotiated in mediation. Noting that at the time he negotiated and executed the agreement, he had not been represented by counsel, the former husband argued many of the conversations that occurred before the agreement was signed would demonstrate it did not accurately reflect the parties' understanding. *Eisendrath* held the discussions, which purportedly were inconsistent with the finalized mediated agreement, were

> inadmissible. *Eisendrath* concluded that, in contrast to the privileges found in Evidence Code section 910 et. seq. (e.g., the attorney-client privilege (§ 950)), mediation confidentiality cannot be impliedly waived. The Legislature mandated this result, even if it gave great power to the spouse who refused to expressly waive mediation confidentiality. *Eisendrath* stated: 'In explaining that the Legislature had balanced conflicting policies in enacting this scheme, the *Foxgate* court recognized that the scheme effectively gives control over evidence of some sanctionable misconduct to the *party engaged in the misconduct.* On this matter, the court in *Foxgate* remarked that 'none of the confidentiality statutes currently make an exception for reporting bad faith conduct. . . .'
>
> In *Doe 1 v. Superior Court* . . . 132 Cal.App.4th 1160, 34 Cal.Rptr.3d 248 [(2005)] (*Doe 1*), 26 Catholic priests were successful in stopping the Los Angeles Archdiocese from disclosing written summaries of personnel records of priests who were accused of sexually molesting minors. The summaries were confidential because they had been prepared for the mediation of 500 cases alleging child sexual molestation.

Id. at 208 - 213, 152 Cal.App.4th at 150 – 156 (citations omitted, except where noted). The Court then went on to prohibit disclosure of the mediation brief and e-mails between counsel and the mediator.

In *In re Residential Capital, LLC*, 536 B.R. 132 (S.D.N.Y. 2015), the court denied a motion to permit discovery of communications concerning a settlement, including communications related to mediation, noting:

> [T]hat '[c]onfidentiality is an important feature of the mediation and other alternative dispute resolution processes.' 'Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally.' Accordingly, parties' reliance on the confidentiality provided under a mediation order 'counsel[s] in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation.' 'Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether.'

Id. at 150 (citations omitted).

In *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002), the Court was faced with whether to sanction some of the participants in a mandatory mediation who disclosed to a Virginia State Bar Association arbitration panel the substance of discussions which took place during and after the mediation and provided the panel with a copy of the settlement points prepared during the mediation and with a copy of the settlement agreement which was entered into following mediation. In *In re Anonymous*, *supra*, the plaintiff received a substantial jury verdict in the District Court which was reduced pursuant to a statutory cap. *Id.* Plaintiff appealed the reduction and the Court referred the matter to mediation through the Court's mediator[13]. *Id.*

Plaintiff attended the mediation with her local counsel and an attorney from Florida who did not represent her in the appealed action. *Id.* Though the case was settled at mediation, a dispute arose during the mediation between plaintiff and her local counsel regarding the payment of litigation expenses. *Id.* The dispute continued following mediation and plaintiff and local counsel subsequently agreed to submit their dispute to the panel for resolution with the attorney from Florida who attended mediation acting as plaintiff's counsel before the panel. *Id.*

Plaintiff through the Florida attorney submitted the aforementioned information and documents to the panel. *Id.* The expense dispute came to the court's attention when local counsel contacted the mediator and "informed her of the dispute concerning the reimbursement of expenses and costs, and requested her consent to the disclosure of statements made during the mediation conference." *Id.* at 632. During the course of her conversation with the mediator, local counsel advised the mediator that plaintiff and her

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[13] *See* 4th Cir. R. 33.

Florida counsel had already submitted materials to the panel containing confidential mediation information. *Id.* Yet, despite being told by the mediator she would need the Court's permission to comply, and despite being directed by the mediator to seek approval from the Court to submit confidential mediation information to the panel, without seeking permission from the Court, local counsel went ahead an submitted confidential mediation information to the panel anyway. *Id.* Local counsel subsequently submitted interrogatories to the mediator and advised her that if she would answer the questions she would not call her to testify before the panel. *Id.*

The mediator brought the situation to the attention of the Court, which in turn directed Plaintiff, local counsel and Florida counsel to appear before the Court's Standing Panel on Attorney Discipline to address whether the submissions to the panel breached the mediation confidentiality provisions. *Id.* The matter then went before the Court to determine what, if any sanctions should be imposed on plaintiff, local counsel and Florida counsel for breaching the mediation confidentiality rules. *Id.*

The Court first rejected the parties claim that the mediation confidentiality rules were not breached because the matters disclosed were not central to the issues being mediated. *Id.* In so doing the Court declined to create an exception permitting disclosure of matters collaterally related to the mediation because "the confidentiality provision as written provides clear guidance in the form of a bright line rule." *Id.* at 633.

The Court next dismissed the parties' argument that the mediation confidentiality rules were not breached because the disclosures were made to a confidential tribunal noting that "the unambiguous text of Rule 33 does not provide an exception for disclosures

made to a confidential forum. Rather, it has at all relevant times restricted disclosures 'to any other person outside the mediation program participants.'" *Id.*

The Court also disagreed with the parties' position that that the mediation confidentiality requirements offend due process in that application of the confidentiality requirement in this context denies client and local counsel of the opportunity to resolve their expense dispute. *Id.* The Court pointed out that the mediation confidentiality requirements do not deprive the parties of a forum to resolve the dispute, but rather limits the availability and use of information learned during, generated during and arising out of mediation in subsequent proceedings. *Id.* The Court further pointed out that the mediation rules provided a mechanism for granting a waiver of the confidentiality requirement where manifest injustice would result[14]. *Id.*

The Court held that disclosure of conversations relating to the mediated dispute which took place as the parties were leaving the mediation conference, likewise, breached the mediation confidentiality rules. In so holding, the court reasoned:

> it is plain that the 'mediation' is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the . . . [Office of the Circuit Mediator]. 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 . . . [Office of the Circuit Mediator], all

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[14] The South Carolina Alternative Dispute Resolution Rules have no corresponding provision, and thus, do not allow for disclosure of confidential mediation information in such circumstances. *See* Rule 8(b), SCADR. Avtex argues that the lower court's application of the "manifest injustice" standard was inappropriate. *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, pp.3-4. Since Avtex contends that application of the "manifest injustice" standard was inappropriate, *a fortiori* this court cannot reverse the Order and compel the disclosure of the settlement agreements even if it finds that failure to do will result in a "manifest injustice."

> 'statements, documents, and discussions' relating to the mediation remain within the bailiwick of the . . . [Office of the Circuit Mediator] and, therefore, remain confidential.

Id. at 635.

The Court then addressed whether the parties should be granted a limited waiver of confidentiality to permit the arbitration panel to consider their previously-submitted disclosures in resolving the expense dispute. In granting conditional consent for local counsel and plaintiff to disclose to the panel information relating to conversations which took place during the mediation regarding the expense dispute and their notes, or portions thereof, regarding the settlement negotiations corroborating these conversations and the settlement agreement and notes regarding the settlement agreement to the extent the materials explain or relate to the disbursement of the settlement funds, the Court engaged in the following discussion[15]:

> The assurance of confidentiality is essential to the integrity and success of the Court's mediation program, in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys. As the Second Circuit properly has observed:
>
> > If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of

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[15] Significant to the Court's holding was the fact that: (1) local counsel and plaintiff agreed that disclosure of information related to the mediation was critical to resolution of their dispute; (2) the genesis of the dispute occurred during the mediation conference; (3) all of the other parties to the mediation consented to local counsel's and plaintiff's disclosure of the information and documents in issue; and (4) any harm resulting from disclosure would be slight, in that the disclosures relate to matters collateral to the mediation and not the mediated dispute so little mention needed to be made regarding the substantive merits of the mediated issue and in that the panel proceedings and outcome are confidential. The Court conditioned its consent on the panel agreeing in writing to abide by 4th Cir. R. 33's confidentiality provision.

> a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals. . . .
>
> In a program like ours, where participation is mandatory and the mediation is directed and sanctioned by the Court, 'the argument for protecting confidential communications may be even stronger because participants are often assured that all discussions and documents related to the proceeding will be protected from forced disclosure.'
>
> On the other hand, we must recognize that under certain circumstances, non-disclosure may result in an untenable 'loss of information to the public and the justice system.' Thus, in determining whether waiver is appropriate, we must balance the public interest in protecting the confidentiality of the settlement process and countervailing interests, such as the right to every person's evidence.
>
> We believe that the balance between these interests is best resolved by disallowing disclosure unless the party seeking such disclosure can demonstrate that '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[16].

Id. at 636 - 637 (citations omitted, except where noted)(*quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir.1979), *cert. denied,* 444 U.S. 1076, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980), *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp.2d 1164, 1176 n. 9 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000) and SARAH R. COLE *et al.*, MEDIATION: LAW, POLICY & PRACTICE § 9:2 (2d ed. 2001)).

Similarly, other courts which have been called upon to address a breach of an applicable mediation confidentiality provision have aggressively upheld the confidentiality rules and sanctioned the offending party, often acting punitively. For instance in *Frank v.*

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[16] As noted, unlike 4th Cir. R. 33, the South Carolina Alternative Dispute Resolution Rules contain no "manifest injustice" exception and Avtex condemns adoption of one. *See* footnote 14 *supra.* Accordingly, the Court should not and cannot adopt a "manifest injustice" exception to Rule 8's confidentiality requirement.

L.L. Bean, Inc., 377 F.Supp.2d 233 (D. Maine 2005), the Court imposed sanctions on the plaintiff for disclosing to a material witness information regarding the defendant's settlement position learned through mediation because "[i]t is essential for the effectiveness of mediation in this district that all but the most *de minimis* breaches of confidentially . . . be punished with sanctions" even though the defendant cannot demonstrate prejudice. *Id.* at 240 (emphasis original). In *Bernard v. Galen Group, Inc.*, 901 F.Supp. 778 (S.D.NY. 1995), the Court imposed sanctions on the plaintiff as a result of his counsel's disclosure to the court of two settlement offers made by the defendant during mediation and in the process of doing so the Court reinforced the importance of confidentiality in the mediation process, stating thusly:

> 'It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion. . . . If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program. . . .'

Id. at 784 (*quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc., supra* at 930). Finally, in *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So.2d 725 (Fla. Ct. App. 1997), the Court affirmed the trial court's order striking the plaintiff's pleadings resulting in dismissal of the case with prejudice based on the plaintiffs disclosure of the defendants settlement offer made during the course of mediation.

The written document memorializing the settlement between William Huck and Civil Site and the written document memorializing the settlement between William Huck and Chandler fall within the scope of the mediation confidentiality requirements of Rule 8.

> '[M]ediation' is not limited to the mediation conference, but continues until the mediated dispute has been [resolved or the mediation process has been terminated]. 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.

In re Anonymous, *supra* at 635. Mediation confidentiality is "not limited to those communications made 'in the course of mediation.' [T]he restriction applies to any written or oral communication made 'for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' as well as all "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation. . . .'" *Wimsatt v. Superior Court, supra* at 217, 152 Cal.App.4th at 150 – 160. "Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. Mediation confidentiality is to be applied where the writing, or statement would not have existed but for a mediation communication, negotiation, or settlement discussion." *Id.* at 208 - 209, 152 Cal.App.4th at 150 – 151. Written settlement agreements "epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure." *Cf. Id.* at 215, 152 Cal.App.4th at 158 (mediation briefs). Settlement agreements "are part and parcel of the mediation negotiation process." *Id.* Rule 6(f) clearly contemplates this by requiring that prior to "the adjournment of the mediation" the agreement reached during mediation is to be reduced to writing and signed by the parties along with their attorneys and by further requiring the mediator to assign to one of the parties' attorneys the duty of preparing a more

formal written agreement in the event the parties agree that a more formal written agreement is necessary.

The two written settlement agreement documents are part and parcel of the mediation in this matter. They arose out of and were made pursuant to the mediation in this matter. Both are materially related to and fostered the mediation process. Neither would existed but for the mediation. The written document memorializing the settlement between William Huck and Civil Site and the written document memorializing the settlement between William Huck and Chandler are each irrefutably subject to mediation confidentiality.

As the two written settlement agreement documents are clearly subject to mediation confidentiality, not only can William Huck ***not be compelled*** to produce them, but is, in fact ***prohibited*** from producing them by Rule 8(a). *See In re Anonymous*, *supra*; *Frank v. L.L. Bean, Inc.*, *supra*; *Bernard v. Galen Group, Inc.*, *supra*; *Paranzino v. Barnett Bank of S. Fla., N.A.*, *supra*. The confidentiality provision of Rule 8(a) as written provides clear guidance in the form of a bright line rule. *See In re Anonymous, supra*. There is nothing in Rule 8 which creates an exception to the confidentiality provisions of Rule 8(a), except those set forth in Rule 8(b), which the language of Rule 8(b) specifically referrers to as "**Limited Exceptions to Confidentiality**." None of the "limited exceptions" specified in Rule 8(b) are applicable to the situation at hand, and, in fact, Avtex itself does not argue in its *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, that any of the provisions of Rule 8(b) are applicable to the situation; in fact Avtex does not even mention Rule 8(b)[17].

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[17] "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR; *e.g., Richland Cnty. Sch. Dist. Two v. S.C. Dep't. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999). Moreover, it is axiomatic that an issue not argued

Consequently, Rule 8(a) prohibits William Huck from producing the two settlement agreement documents to Avtex.

What Avtex seeks is to have this Court a judicially created "good cause" exception to Rule 8(a)'s strict mediation confidentiality requirement similar to the "good cause" exception rejected by the Court in *Wimsatt v. Superior Court, supra.*. Even if this Court has the authority to do so – which it does not – strong public policy compels this Court to reject Avtex' invitation for three reasons.

First, the proper way to create exceptions is to formally amend the ADR Rules. Even assuming this Court has the authority to do so, which it does not[18], circumventing the amendment procedures is ill advised as it eliminates the required public and legislative input[19]. *See* S.C. CONST. art. V, § 4A; Sections 14-3-940 and 950, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended; *Order of the South Carolina Supreme Court*, No. 2006-05-03-04. Participants at mediation need certainty as to the rules under which they are operating. An ad hoc, case-by-case, judicially crafted approach to creating exceptions to mediation confidentiality – the approach Avtex is essentially advocating in this appeal –

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in one's brief is deemed abandoned and will not be considered, even if raised in the statement of issues on appeal. *E.g., Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992).

[18] *See* S.C. CONST. art. V, § 4A; Sections 14-3-940 and 950, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

[19] It should not go unmentioned that the Supreme Court recently rejected an amendment to Rule 8 which would, in effect, make settlement agreements exempt from confidentiality. On January 28, 2016, the South Carolina Supreme Court submitted to the General Assembly proposed changes to Rules 1, 4, 20, 23 and 24 of the Alternative Dispute Resolution Rules. *See Order of the South Carolina Supreme Court*, Appellate Case No. 2015-002643, dated January 28, 2016. The Supreme Court declined, however, to submit an amendment to Rule 8 which would include a new subsection (b), which, as proposed, reads: "**Waiver of Confidentiality.** Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived unless otherwise agreed to by the parties." *See R.* p.183 – p.186. It would indeed be ironic if, at Avtex urging, this Court were to adopt by judicial fiat an amendment to Rule 8 which the Supreme Court recently specifically declined to adopt through the formal rule making process.

will lead to confusion and uncertainty as to which information and documents are confidential and which are not, which in turn will greatly inhibit the effectiveness of the mediation process. "Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether." *In re Residential Capital, LLC*, *supra* at 150.

Second, participants in a mediation rely on all parties, themselves included, being bound by the strict confidentiality provisions of Rule 8. As noted, "South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution. . . ." *C-Sculptures, LLC v. Brown*, *supra* at 56, 742 S.E.2d at 360. "The assurance of confidentiality is essential to the integrity and success of . . . mediation . . . , in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect . . . mediation . . . from being used as a discovery tool for creative attorneys." *In re Anonymous, supra* at 636; *accord Bernard v. Galen Group, Inc.*, *supra*; *Wimsatt v. Superior Court, supra.* "'Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally.' Accordingly, parties' reliance on the confidentiality provided under a mediation order 'counsel[s] in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation.'" *In re Residential Capital, LLC*, *supra* at 150; *accord Bernard v. Galen Group, Inc.*, *supra*; *Wimsatt v. Superior Court, supra.* "'If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel

constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of'" mediation. *In re Anonymous, supra* at 636 – 637; *accord Bernard v. Galen Group, Inc., supra*; *Wimsatt v. Superior Court, supra.* Altering the promise of mediation confidentially in any way is unwise. To do so would erode confidence in the mediation process and impede the current trend of having most cases resolve through mediation[20]. The policy reasons for providing clear guidance in the form of a bright line rule of unqualified strict adherence to mediation confidentiality are even stronger now that South Carolina has adopted mandatory mediation in most civil actions in all counties. *See Order* 2015-11-12-04.

Third, a "good cause" exception to confidentiality is the quintessential slippery slope. As any experienced archer or marksman knows - no matter how proficient and accurate he or she is – an arrow should never be allowed to leave the bow and a bullet should never be allowed to leave the rifle in the absence of a proper backstop; for if there is no backstop in place, there is no way to prevent the errant arrow or bullet from inflicting harm. As there is no way to backstop a "good cause" exception to mediation confidentiality, no matter how well crafted, it would be unwise to create one. If adopted, there will likely be no end to claims made by mediation participants that his, her it or their situation requires exemption from mediation confidentiality for "good cause" if it is advantageous for him, her, it or them to do so. Where is the line to be drawn as to what is

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[20] It is certainly possible that no settlement agreement would have been reached between the Hucks and Civil Site or the Hucks and Chandler in the absence of a belief that the strict confidentiality requirement of Rule 8(a) would be strictly enforced without exception.

"good cause?" Will it be decided based on a case-by-case ad hoc basis? If so, how will a mediation participant know during mediation whether the mediation communications are truly confidential? The uncertainty created by such a rule will have a chilling effect on mediation.

Further, it is neither unreasonable nor unforeseeable that if a "good cause" exception is created, that the mediation confidentiality rule will become so riddled with judicially created exceptions such that confidentiality becomes the exception, not the rule.

It would, thus, be unwise to create a "good cause" exception to mediation confidentiality as sound public policy demands a bright line rule. In the absence of a bright line rule regarding mediation confidentiality, the effectiveness of the mediation process will be severely eroded to the point that the number of cases being resolved through mediation will likely be reduced to a slow trickle.

Avtex appears to take five different positions as to why the Order should be reversed. All are without merit[21]. As two are meritless for essentially the same reason, they will be addressed together.

Avtex maintains (1) that "[t]he settlement documents, namely the releases signed by the Respondents outlining the terms of the settlement, are not only relevant but are necessary to facilitate proper post trial procedure in this case;" and (2) that "[a] confidentiality provision in a mediation agreement or release does not operate to shield a

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[21] One of Avtex's positions is that the Circuit Court errored in applying the "manifest injustice" standard discussed *In Re Anonymous, supra.* As this issue as already been addressed, there is no point in addressing it a second time. *See* footnotes 14 and 16, *supra.* Another of Avtex's arguments is that the settlement agreements do not fall within the scope of Rule 8(a)'s mediation confidentiality requirement. As it has already been clearly demonstrated above that the settlement agreements are clearly within the scope of Rule 8's confidentiality provisions, that issue will not be discussed a second time.

settlement agreement from being produced." *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.4 - p.5. Both positions completely miss the point.

William Huck does not take and has never taken the position that the settlement agreements are not relevant[22] or that a confidentiality provision in a release in and of itself operates to shield a settlement agreements from production under ordinary circumstances[23], assuming, of course, Avtex had properly sought its production, which it did not. Rather William Huck's position is that Rule 8 both bars him from producing them to Avtex and bars Avtex from seeking them[24]. In taking these positions Avtex is mistakenly argues that the settlement agreements are properly the subject of discovery under the rules of civil procedure[25] when in reality Rule 8 is essentially an evidentiary rule

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22 To suggest that production of the settlement agreements is "necessary to facilitate proper post trial procedure in this case" is, to be kind, both overly dramatic and a gross over exaggeration. Avtex's whole argument is premised on the notion that it is entitled to an off-set, which it is not.

23 As will be explained below, however, in certain circumstances, such as the one presented in this matter, a confidentiality provision in combination with Rule 8(a)'s mediation confidentiality requirement does shield a settlement agreement from disclosure.

24 None of the cases cited by Avtex hold that a confidential settlement agreement reached at mediation is discoverable despite mediation confidentiality requirements. *See Virami v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001)(Peer review records); *Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. 2015)(plaintiff argued settlement agreement was not reasonably calculated to lead to the discovery of admissible evidence; mediation confidentiality not mentioned); *Selective Way Ins. Co. v. Schulle*, 2014 WL 462807 (W.D. Va. 2014)(settlement agreements entered into prior to mediation); *Spilker v. Medtronic, Inc.*, 2014 WL 4760292 (E.D.N.C. 2014)(pre-suit non-mediation related settlement agreement); *Zlotogura v. Progressive Direct Ins. Co.*, 2013 WL 1855879 (W.D. Okla. 2013)(non-mediation settlement agreement); *Tanner v. Johnston*, 2013 WL 121158 (D. Utah 2013)(non-mediation related settlement agreement); *Strategic Rests Acquisition Co.*, 2012 WL 1455213 (M.D. La. 2012) (non-mediation related settlement agreements in different actions); *Oakridge Assoc., LLC v. Auto-Owners Ins. Co.*, 2010 WL 3788058 (W.D.N.C. 2010)(non-mediation related settlement agreements in other case).

25 Non-privileged, non-protected documents and information which is either relevant to the subject matter involved in the pending action or information which is reasonably calculated to lead to the discovery of admissible evidence, "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."

prohibiting disclosure[26], though also a shield to disclosure under the Rules of Civil Procedure.

Avtex claims in conclusory fashion that "[u]sing the SCDAR rules to circumvent statutory mandates and established law and procedure is improper." *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.4. Avtex cites no authority nor does it make any further argument in support of this position. Given the lack of citation to authority and the conclusory nature of the argument, Avtex has abandoned this issue. *See, e.g., Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

Avtex argues that the confidentiality requirement of Rule 8 cannot prevent it from discovering information or documents which arose out of and were made pursuant to mediation and which are materially related to the mediation if the effect is to deprive it of its right to a set-off[27]. This is simply not the case.

Mediation confidentiality rules are uniformly strictly construed even when the equities in the case suggest contrary results. As noted in *Wimsatt v. Superior Court, supra* at 219-220, 152 Cal.App.4th at 163-164:

> Peter Robinson, the associate director of the Straus Institute for Dispute Resolution and assistant professor of law at Pepperdine University School of Law; has gathered a number of cases across the country in which courts have been asked to enforce or avoid mediated agreements. . . . The nonexhaustive list of cases includes situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The situations include cases where a party was lied to by her own attorney, the mediator, and a third party; a scrivener's error in a mediated settlement lead to a $600,000 windfall to one party; parties claimed their own attorney

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26 Avtex suggestion that a "protective order can alleviate problems and concerns regarding confidentiality" serves emphasizes Avtex's confusion as protective orders address discovery not evidentiary issues. *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.5.

27 Throughout its brief, Avtex seems to assume that if William Huck received any settlement proceeds from Civil Site or Chandler, it has an automatic God given right to a set-off. As will be discussed, Avtex is mistaken.

> coerced them into signing a settlement agreement; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement.
>
> [Mediation confidentiality provisions have] allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation, foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards, precluded a propria persona litigant from proving the terms of a mediated agreement and shielded from view evidence of criminal conduct.

In each of the above cases, the court concluded that the importance of upholding mediation confidentiality outweighed the potential harm resulting from non-disclosure. In comparison to some of the circumstances described above, the possible deprivation of Avtex's phantom off-set rights is *de minimis*.

Avtex apparently misses the fact that urging this Court to permit it to discover the settlement agreements is little more than a fool's errand: even were this Court to permit Avtex to discover the settlement agreements, they are not admissible into evidence in support of its reapportionment and set-off motions.

Rule 8 makes abundantly clear that not only are documents materially related to and which fostered, arose out of and were made pursuant to mediation not discoverable, but a participant in the 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. . . ." *See also Wimsatt v. Superior Court, supra* (mediation confidentiality is among other things an evidentiary restriction). Thus, even if this Court were to find that Avtex could discover the settlement agreements, Avtex is barred from using them in support of its motions for reapportionment and set-off. Since Avtex failed to raise or argue this point, Avtex has abandoned this issue and is now barred from taking the position that it can introduce the settlement agreements into evidence. *See* Rules

208(b)(1)(B) and 220(c), SCACR; *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)(This Court may, of course, affirm the Order "upon any ground(s) appearing in the Record on Appeal"); *Richland Cnty. Sch. Dist. Two v. S.C. Dep't. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999)("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992)(issue not argued in brief is deemed abandoned and will not be considered, even if raised in the statement of issues on appeal).

Further, Avtex overlooks the fact that it specifically agreed that "no document prepared for the purpose of, or in the course of, the mediation, or copy thereof," is discoverable and that even it were entitled to discover the settlement agreements, it is barred from introducing them into evidence in support of its motion for re-allocation and its motion for set-off.

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. *R.* p.179 – p.180. 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.
>
> 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.

> 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.
>
> *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.*
>
> 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.

R. p.179 – p.180. Avtex participated in mediation and entered into the Mediation Agreement, as did all of the other participants to the mediation. All of the participants to the mediation, the Hucks included, had and continue to have a justifiable expectation that all of the other participants are bound by the terms of the mediation agreement, especially the confidentiality provision. Having agreed (1) that it would not compel disclosure of documents materially related to and which fostered, arose out of and were made pursuant to mediation, (2) that it will not attempt to introduce such a document into evidence, and (3) having failed to challenge the mediation agreement and its duties and obligations under the same in the lower court, Avtex is now bound by its agreement and may not raise these issues for the first time on appeal. *See Id.*

Avtex had an opportunity to participate in any settlements arising out of the same, but elected not to. As noted, Avtex elected, instead, to withdraw from the mediation process while the other participants persevered and soldiered on. 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 the provisions of Rule 8 be ignored. Accordingly, the Order should be affirmed[28]. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015).

C. Avtex failed to join all of the necessary parties in the motion to disclose.

Avtex's motion to disclosure of settlement, for set-off and, in the alternative, to determine whether the settlements with Civil Site and Chandler were made in good faith was directed only to the Hucks. *R.* p.144 – p.145. The motion was not directed to Chandler or Civil Site and neither were served with a copy of the same. *R.* p.144 – p.145. Chandler and Civil Site were both participants at mediation and parties to the respective confidential settlement agreements. Both had and have an interest in the settlement agreements, the confidential nature of the settlement agreements, the confidential nature of the mediation and an expectation that the settlement agreements would and will not be subject to disclosure or admissible in evidence in any proceeding. Avtex did not claim nor did it introduce at the hearing any evidence that either consented to the disclosure of the settlement agreements or the introduction of either settlement agreement into evidence. Accordingly, as Avtex failed to join Chandler or Civil Site in the motion, it denied them with an opportunity to oppose disclosure if they wished to do so[29]. Clearly both have an interest in the confidentiality of the mediation and the confidentiality provisions in the

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[28] Affirming the Order will likely have the effect of promoting mediation settlements in cases which might not otherwise be settled in that it will probably have the effect of discouraging mediation participants from pre-maturely disengaging from the mediation process as Avtex did in this case.

[29] Avtex argues in its brief that it may be entitled to contribution form Civil Site and Chandler. In view of this Avtex cannot now take the position that Civil Site and Chandler have no standing to oppose disclosure. Clearly, there participation was essential to the resolution of this issue.

settlement agreements. Accordingly, this Court must affirm the Order on this basis too[30]. *See* Rule 220(c); *I'on, LLC v. Town of Mt. Pleasant, supra.*

II. ASSUMING THERE IS A DIVISION OF THE SETTLEMENT PROCEEDS IN THE SETTLEMENT AGREEMENTS BETWEEN THE HUCKS AND CIVIL SITE AND BETWEEN THE HUCKS AND CHANDLER, THIS COURT AND THE LOWER COURT HAVE NO AUTHORITY TO REAPPORTION THE SETTLEMENT PROCEEDS.

Avtex contends that it is entitled to a set-off and that if there is an allocation of the settlement proceeds between William Huck and Dianne Huck, the Court has the authority to review the fairness of the allocation and reallocate the settlement funds if it finds the settlement allocation unreasonable. This position is patently without merit.

"The [South Carolina] courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance." *Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972). "'In South Carolina jurisprudence, settlement agreements are viewed as contracts.'" *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012), *cert. denied*, (2104)(*quoting Pee Dee Stores, Inc. v. Doyle,* 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009)). "General contract principles are applied in the construction of a settlement agreement because . . . a settlement agreement is a contract." *Pee Dee Stores, Inc. v. Doyle, supra* at 241 – 242, 672 S.E.2d at 803. The courts "are without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enter., Inc. v. S,C. Health & Human Serv. Fin. Com'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587

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30 Of course, had Avtex followed proper discovery procedure under the South Carolina Rules of Civil Procedure it would have been required to serve discovery and a motion to compel on Civil Site and Chandler too, which would have alleviated the problem of not having Civil Site and Chandler before the lower court. Yet another reason to affirm the Order based on Avtex's failure to follow proper discovery procedure.

(1988). Rather, the Court's "duty is limited to the interpretation of the contract made by the parties themselves '. . . regardless of its . . . apparent unreasonableness. . . .'" *Id.* at 378, 373 S.E.2d at 587. Generally one who is a stranger to a contract is not permitted to attack its terms or validity. *See Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527, 587 (Ct. App. 2009)("'Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.'").

Ironically, in the lower court, Avtex relied heavily on *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), *rev'd*, 414 S.C. 185, 777 S.E.2d 824 (2015) in support of its motion for reallocation, which was subsequently reversed several months later[31]. In reversing the Court of Appeals and rejecting its reapportionment of the agreed-upon allocation of settlement proceeds, the Supreme Court explained that Section 15-38-50, Code of Laws of South Carolina, 1976, as amended, "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.'" *Id.* at 196, 777 S.E.2d at 830 (*quoting Chester v. S.C. Dep't of Pub. Safety,* 388 S.C. 343, 698 S.E.2d 559 (2010)). The Court then went on to observe:

> Despite a defendant's entitlement to setoff, whether at common law or under section 15–38–50, any 'reduction in the judgment must be from a settlement for the same cause of action.' Thus, where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset.
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> * * * *

[31] Not surprisingly Avtex conveniently fails to mention *Riley v. Ford Motor Co.*, *supra*, in its *Final Brief of Appellant, Avtex Commercial Properties, Inc.*

We find the court of appeals erred in reapportioning the settlement proceeds on the sole basis that the particular agreed-upon allocation between the survival and wrongful death claims did not seem to be, in the court of appeals' view, proportionately reasonable. Given the totality of the circumstances, and particularly in light of the reasonableness of the overall amount of $20,000 and the evidence in the record of Riley's conscious pain and suffering, we believe it was error to disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the Estate.

Indeed, we agree with the approach taken by the Illinois Court of Appeals, which stated:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

The court of appeals erred in accepting Ford's invitation to reapportion the agreed-upon allocation of settlement proceeds based on the purported impropriety of an apportionment favoring the Estate. Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting Ford. Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that $20,000 for the survival action is unreasonable. Ford's effort to invalidate the allocation of settlement proceeds based on a "percentages" analysis is manifestly without merit under these circumstances. We reverse the court of appeals and hold that Ford is entitled to set off only the $5,000 the settlement agreement apportioned to the wrongful death claim.

Id. at 196 – 198, 777 S.E.2d at 830 – 831 (citations omitted)(*quoting Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App.1998) and

Lard v. AM/FM Ohio, Inc., 387 Ill.App.3d 915, 327 Ill.Dec. 273, 901 N.E.2d 1006, 1018 (2009)).

In the instant action, Avtex's sole ground for seeking reapportionment is based solely on its unsubstantiated assumption that the allocation of settlement proceeds is based on the purported impropriety of an apportionment favoring Dianne Huck. As the Supreme Court specifically rejected this as a basis for reapportionment of settlement proceeds, Avtex's argument must be rejected.

Avtex argues at length in its *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, without citation to authority, the fact that Dianne Huck's claim for loss of consortium was dismissed at trial is a basis for reapportionment of the settlement proceeds. Assuming, for purposes of discussion, without agreeing that any of the settlement proceeds were apportioned to Dianne Huck's loss of consortium clam, such apportionment is irrelevant.

As settlement agreement is just that: an agreement between the parties to the agreement. Settlement agreements resolve disputed claims and often times contain provisions whereby the defendant specifically disclaims liability. That the ultimate outcome of the case results in a finding of no liability as to the non-settling defendant certainly does not give the settling party or parties – in this case Civil Site and Chandler – the right to a return of any monies either paid Diane Huck pursuant to the settlement agreements. Likewise, had the jury returned a verdict for Avtex too, Civil Site and Chandler could not seek a return of any monies either paid William Huck under the settlement agreements. Similarly, even though the jury found William Huck fifty percent at fault in bringing about his own injuries, Civil Site and Chandler cannot seek recovery of fifty percent of the monies either paid William Huck under the settlement agreements.

Given that Chandler and Civil Site can in no way benefit from the directed verdict against Dianne Huck and the jury' apportionment of fifty percent of the fault to William Huck, it would be a curious result indeed if Avtex – a stranger to the settlement agreements - were to rewrite the settlement agreements to its benefit and to the detriment of Civil Site and Chandler which took the commendable course of settling their differences with the Hucks "'without the courts' intervention or assistance.'" *Darden v. Witham*, *supra* at 388, 188 S.E.2d at 778. Simply stated, this is a "consequence of . . . [Avtex's] refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." *Riley v. Ford Motor Co.*, *supra* at 197, 777 S.E.2d at 831.

Accordingly, in the event Avtex is entitled to disclosure of the settlement agreements, and in the event there was an apportionment of the settlement proceeds paid by Civil Site and Chandler between William Huck and Diane Huck, as the Supreme Court pointed out in *Riley v. Ford Motor Co.*, *supra* a reapportionment of the settlement process would not be appropriate under the circumstances of this case. Therefore, the Order should be affirmed.

III. AVTEX'S SET OFF RIGHTS ARE LIMITED TO THE FUND'S ACTUALLY RECEIVED BY WILLIAM HUCK

Assuming William Huck received any of the settlement proceeds paid by Chandler and Civil Site under the Settlement agreements, Avtex's set off is limited to the amount actually received by William Huck. Though "'[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action,'" the set-off is limited to the amount actually received by the plaintiff. *Id.*; *accord Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). Consequently, should this court

order disclosure of the settlement agreements, it should remand with instructions that any set-off Avtex is entitled to is limited to the amount of money actually paid to William Huck.

CONCLUSION

As Avtex (1) failed to properly seek the production of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler, (2) as the confidentiality requirements of Rule 8, SCADR, prohibit the Hucks from providing a copy of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler, (3) as the confidentiality requirements of Rule 8, SCADR, prohibit Avtex from introducing into evidence a copy of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler in connection with its motion for set off (4) as Avtex agreed in the mediation agreement that it would not seek to compel the production of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler and that it would not seek to introduce the same in connection with its motion for set off, and (5) as Avtex failed to join Civil Site and Cahndler in its motion to disclose/compel. The trial Court properly denied Avtex's motion to disclose/compel. Further, as the lower court had no grounds for reapportioning the settlement proceeds paid Civil Site to the Hucks, if any, pursuant to the settlement agreement between the Hucks and Civil Site, if the settlement proceeds were allocated between William Huck and Dianne Huck, and as the lower court had no grounds for reapportioning the settlement proceeds paid Chandler to the Hucks, if any, pursuant to the settlement agreement between the Hucks and Chandler, if the settlement proceeds were allocated between William Huck and Dianne Huck, the lower court properly denied Avtex's motion for reapportionment. Finally, to the extent that Avtex is entitled to a set

off as to the judgment against it, the set off is limited to the amount actually received by William Huck, if any. Accordingly the Order must be affirmed.

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April 7, 2016
Charleston, South Carolina

IN 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-10-0569

Appellate Case No. 2015-002025

WILLIAM HUCK AND DIANE HUCK.....Plaintiffs/Respondents,

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,

Of Whom AVTEX COMMERCIAL PROPERTIES, INC,.....Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent, William Huck and Dianne Huck complies with Rule 211(b), SCACR

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April 4, 2016
Charleston, South Carolina

IN 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

Case No. 2014-CP-10-0569

Appellate Case No. 2015-002025

WILLIAM HUCK AND DIANE HUCK.....Plaintiffs/Respondents,

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,

Of Whom AVTEX COMMERCIAL PROPERTIES, INC.....Appellant.

PROOF OF SERVICE

I hereby certify that I have served all counsel in this action with a copy of *RESPONDENT'S FINAL BRIEF* herein specified below by depositing a copy of the same in the United States Mail, postage prepaid, to their attorney of record as follows:

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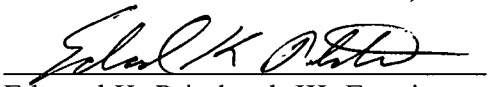

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April 7, 2016
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