



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Brandon Crider

Plaintiff,

Vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS  
THE FIFTH JUDICIAL CIRCUIT

Case No. 2015-CP-40-<sup>5678</sup>02240

**ORDER DENYING PLAINTIFF'S  
MOTION FOR RECONSIDERATION**

RICHLAND COUNTY  
FILED  
2016 OCT 26 AM 9:42  
JEANETTE H. NEBRIDE  
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiff's May 16, 2016, Motion to Reconsider this Court's Order Granting Defendants' Motion to Dismiss pursuant to Rule 59(e) SCRPC. Specifically, Plaintiff asks this Court to reconsider its Order Granting Defendants' Motion to Dismiss dated May 3, 2016 and filed May 4, 2016.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiff's May 16, 2016, Motion under Rule 59(e) SCRPC to reconsider this Court's Order that was filed May 4, 2016.

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Pursuant to Rule 59(f) SCRCP the Court is of the opinion that oral argument is not necessary.

**IT IS SO ORDERED.**

C. Wood, South Carolina  
October 25, 2016

G. Thomas Cooper, Jr.  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

Note: This Motion to Reconsider was not in Compliance with 59 (g) SCRCP in that no copy of the Motion or the Response in Opposition to the Motion was timely provided to the Court

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4005698

Brandon Crider

Jeffrey Scott Clayton

PLAINTIFF(S)

Carolina Casualty Insurance Company  
DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRCP;  Rule 41(a), SCRCP (Vol. Nonsuit);  
 Rule 43(k), SCRCP (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCP;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code 2126 Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the 7 day of May, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 5 day of May, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

A. Camden Lewis

John Robert Murphy

Wesley Brian Sawyer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride

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RICHLAND COUNTY  
FILED  
2015 MAY 4 AM 11:00  
JEANETTE W. MCBRIDE  
CLERK C.P. & D.S.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2015-CP-40-05698

Brandon Crider,

Plaintiff,

v.

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

Defendant.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

RICHLAND COUNTY  
FILED  
2016 MAY 4 AM 10:28  
JEANETTE HARRIS  
C.C.P. CLERK

This matter comes before the Court upon Defendants' Motion to Dismiss. A hearing was held on April 4, 2016. Appearing on behalf of the Plaintiff was A. Camden Lewis, Esquire. Appearing on behalf of the Defendants was J.R. Murphy, Esquire. After reviewing the pleadings, submissions including legal memorandum, and hearing the able arguments of counsel, the Court grants Defendants' Motion to Dismiss.

**SUMMARY**

This case arises out of an alleged breach of the confidentiality provisions in a Mediation Agreement. At its essence, Plaintiff alleges that Carolina Casualty attended a mediation in an underlying case filed by Brandon Crider against Carolina Casualty's insured, the Walker & Morgan law firm, and learned information at the mediation that may have had an impact on coverage. Carolina Casualty issued a reservation of rights letter to its insured after the mediation. Plaintiff alleges that this breached the confidentiality provisions in a Mediation Agreement. However, the Complaint fails to allege any facts that constitute a breach of the

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agreement. Moreover, by accepting the Offer of Judgment in the underlying lawsuit, Plaintiff is unable to claim damages in this case.

### FACTS

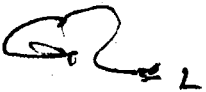
The relevant factual allegations of the Amended Complaint are limited. For purposes of this Motion, the Court assumes the truth of the factual allegations in the Amended Complaint. Plaintiff filed an underlying legal malpractice suit against Carolina Casualty's insured. Carolina Casualty provided a defense, and the parties mediated the case on July 20, 2015 subject to a Mediation Agreement. The parties were unable to reach a resolution at the mediation, but everyone left with the understanding that good-faith, meaningful negotiations would continue with the mediator's assistance.

After mediation, Carolina Casualty allegedly used information it obtained during the mediation to notify its own insureds that insurance coverage may not exist for the underlying suit. Plaintiff alleges in his Amended Complaint that Carolina Casualty then used the information to withdraw all offers made. However, the Amended Complaint goes on to allege that Defendants made an offer of judgment of \$500,000, which Plaintiff accepted. The Amended Complaint does not allege that Defendants shared any information from mediation with anyone who was not a party to the mediation or the Mediation Agreement.

On September 2, 2015, Plaintiff accepted the Offer of Judgment. A judgment was entered, and Plaintiff filed a Satisfaction of Judgment in the Greenville County Court of Common Pleas on September 15, 2015.<sup>1</sup> On September 16, 2015, Plaintiff filed the present action against the Defendants for allegedly violating the confidentiality provisions in the

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<sup>1</sup> The Court may look to public records, including filings with the State Courts in consideration of a motion to dismiss without converting the motion into one for summary judgment. See *Witthohn v. Federal Ins. Co.*, 164 Fed. Appx. 395, 397 (4th Cir. 2006) (citing *Blue Tree Hotels v. Starwood Hotels & Resorts*, 369 F.3d 212, 217 (2d Cir. 2004)).



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Mediation Agreement. Defendants filed a Motion to Dismiss, and Plaintiff filed an Amended Complaint on November 16, 2015.

The Mediation Agreement – which is attached as an exhibit to the Amended Complaint – provides in pertinent part:

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

(emphasis added). The Amended Complaint does not allege what information Defendants used or why the Mediation Agreement precluded use of the information.

The Amended Complaint alleges claims for breach of contract, breach of contract with fraudulent intent, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code § 39-5-10 *et seq.* On October 30, 2015, Defendants filed the present Motion to Dismiss all causes of action for failure to state facts sufficient to constitute a cause of action.

**RULE 12(B)(6) STANDARD**

“A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015) (citations omitted). The Court must “construe the

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complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (citations omitted). However, the Court is not required to assume the truth of legal conclusions alleged in a Complaint. *See Papasan v. Allain*, 478 U.S. 265, 286, 109 S.Ct. 2932, 2944 (1986).

### LAW

At the hearing on the motion, Plaintiff conceded that the Amended Complaint fails to assert a cause of action for breach of contract with fraudulent intent. Therefore, the Court’s analysis is limited to the breach of contract and SCUTPA claims. For the reasons set forth below, the Amended Complaint fails to allege facts constituting a breach of contract, and the SCUTPA does not apply because the conduct alleged against the Defendants falls within the practice and business of insurance.

#### **I. The Complaint fails to allege a breach of contract.**

“The elements of a breach of contract are the existence of a contract, its breach, and damages caused by such breach.” *Hotel and Motel Holdings, LLC*, 414 S.C. at 652 (quoting *S. Glass & Plastics Co. v. Kemper*, 339 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012)). Plaintiff alleges that Defendants breached the confidentiality provisions of the Mediation Agreement. Defendant argues that the confidentiality provision was not breached because Defendants did not disclose the information to any third parties or use the information in any judicial proceeding, the information was not confidential, and Plaintiff has failed to allege any damages. The Court will address each argument in turn.

#### **A. The Amended Complaint does not allege Defendants disclosed any confidential information to third parties or in a judicial proceeding.**

“Generally, the construction of contracts is a question of law for the court.” *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014) (citation omitted). “When

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the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (citation omitted). "The court's duty is to enforce the contract made by the parties' regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* at 456, 756 S.E.2d at 162 (citation omitted). Therefore, the Court's analysis is limited to the terms of the written Mediation Agreement and whether the factual allegations in the Amended Complaint assert a breach of the terms of the agreement.

The plain language of the Mediation Agreement demonstrates the confidentiality provision is designed to preclude the disclosure of mediation communications in two contexts: (1) disclosure to third parties, and (2) use of mediation communications in any judicial proceeding. First, the provision states that such information "will not be disclosed to third parties." Second, the provision provides that statements and materials prepared for mediation "are confidential and inadmissible at any subsequent evidentiary proceeding" and are "inadmissible for any purpose, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions." The former discusses disclosure to third parties outside of a judicial proceeding, the latter address use of mediation statements or materials in a judicial proceeding. The Amended Complaint does not allege either.

Disclosure to a third party or use of confidential information in a judicial proceeding is a necessary element of a claim that Defendants breached a confidentiality agreement. *See* Mediation Agreement ("All admissions, offers, promises, and statements, made in the course of mediation by any of the parties or the Mediator, their agents, employees, experts and attorneys, are confidential and inadmissible. Such offers, promises, conduct, and statements *will not be*



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*disclosed to third parties.*" (emphasis added)). The Amended Complaint alleges Plaintiff, Carolina Casualty, and its insured all attended and participated in the mediation. Plaintiff does not allege that Defendants shared any information disclosed at mediation with non-parties to the mediation or that Defendants attempted to use any confidential mediation information in a judicial proceeding. Therefore, the Amended Complaint fails to allege facts showing that Defendants breached the Mediation Agreement.

**B. The Amended Complaint fails to allege facts that show the information was confidential.**

Defendants argue that disclosure of information at mediation could not render the information protected from subsequent inquiry. The Plaintiff bears the burden of asserting sufficient factual information to state his cause of action. *See* Rule 8, SCRCF. Plaintiff fails to allege what information was disclosed at mediation and allegedly used by the Defendants. However, the parties appear to agree that the information involved facts that could have had an impact on the application of insurance coverage.

Once again, the Court's analysis must start with the plain language of the Mediation Agreement, which provides, "Notwithstanding the foregoing, evidence, that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation." The Amended Complaint alleges that Defendants learned information at mediation that had an apparent impact on coverage, and then raised that coverage issue with its insured after mediation. The Amended Complaint does not allege any facts that show why information that would impact coverage would not be "otherwise admissible or discoverable." In fact, if information would impact coverage, it is precisely the sort of information that would be admissible or, at a minimum, discoverable. Therefore, the Amended Complaint does not allege facts that show why the undescribed information does not fall within this provision.

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Public policy supports this conclusion. South Carolina has a strong public policy favoring out-of-court settlements. See e.g., *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015). A party cannot reveal significant facts at mediation and then claim that the facts are no longer subject to discovery or use at trial. Such a construction of the Mediation Agreement's confidentiality provision would encourage gamesmanship and sandbagging by the parties. Such an interpretation would preclude parties from participating in any mediation until all discovery has been completed. Such a rule could reduce – rather than increase – mediations, and discourage out-of-court settlements.

The language of the Mediation Agreement mirrors the scope of the ADR confidentiality rule. Rule 8(a) of the ADR rules provides:

**(a) Confidentiality.** Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

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

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

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The factual allegations of the Amended Complaint do not indicate any conduct by the Defendants that violated the terms of the Mediation Agreement. Carolina Casualty learned of factual information at mediation that potentially impacted coverage. Such factual information "shall not be rendered inadmissible or not discoverable as a result of its use at mediation." Therefore, by the plain terms of the Mediation Agreement, Defendants were free to investigate the coverage issue after mediation.

**C. The Amended Complaint fails to allege damages.**

Despite the coverage issues, Defendants extended an offer of judgment in the amount of \$500,000.00. Plaintiff accepted that offer. A Rule 68 Offer of Judgment is different from an out-of-court settlement. When a party accepts a Rule 68 Offer of Judgment, a judgment is entered against the defendant and in favor of the plaintiff. Rule 68, SCRPC. The judgment is binding and has all of the consequences of entry of a judgment by the court. Therefore, by accepting the offer, Plaintiff is bound to a conclusion that his damages equal no more than \$500,000.00 and he is estopped from arguing otherwise in this case. *See Continental Nat. Bank v. Dolan*, 39 Colo. App. 16, 564 P.2d 955 (1977) (holding that an offer of judgment constitutes a final determination of amounts owed in a claim on a promissory note even as to potentially-liable parties who are not part of the offer); *McCutcheon v. Hertz Corp.*, 463 So. 2d 1226 (Fla. Dist. Ct. App. 4th Dist. 1985), *pet. For cert. denied*, 476 So. 2d 674 (Fla. 1985) (holding that acceptance of an offer of judgment precluded subsequent suit against another tortfeasor because the judgment constituted the measure of plaintiff's damages); *Hanley v. Mazda Motor Corp.*, 239 Mich. App. 596, 609 N.W.2d 203 (Ct. App. 2000) (holding that Rule 68 judgment constitutes a judgment on the merits and a binding determination of plaintiff's damages arising out of a tort injury).



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If Plaintiff believed his case was worth more, then his proper relief was to proceed in the tort case against the insured. Instead, he chose to accept the offer. Therefore, Plaintiff has failed to allege facts to show the essential element of damages in his breach of contract action.

**II. Plaintiff's claim for violation of the SCUTPA fails because the Act expressly states that it does not apply to the handling of insurance claims.**

In the third cause of action, Plaintiff seeks recovery for violations of the SCUTPA. However, the SCUTPA explicitly excludes the insurance industry from the scope of the Act. South Carolina Code Annotated Section 39-5-40 states, "This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320."

The United States District Court for the District of South Carolina has consistently read the SCUTPA and § 38-57-10 to prohibit SCUTPA claims against insurers. In *Colonial Life & Accident Insurance Company v. American Family Life Assurance Company of Columbus*, 846 F. Supp. 454 (D.S.C. 1994), the court held that a claim for an insurer's false advertising could not proceed under the SCUTPA. Likewise, in *Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Co.*, 868 F. Supp. 128 (D.S.C. 1994), a claim against insurance adjusters for unfair trade practices in adjusting a claim did not survive summary judgment. After citing § 39-5-40(c), the court held: "Chapter 57 clearly is intended to define and regulate all unfair trade practices in the business of insurance." *Id.* at 130. "Therefore, *all* unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act, §§ 38-57-10 *et seq.* and are exempt from the coverage of SCUTPA." *Id.* at 130-31.

The General Assembly explicitly exempted the insurance industry from the scope of the SCUTPA. The Amended Complaint alleges conduct that falls squarely within the ambit of insurance claims handling. Plaintiff alleges that Defendants participated in mediation as an

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insurance carrier, learned facts relevant to insurance coverage, and then raised coverage concerns with its insured and sought additional information relating to the coverage issues. These actions fall plainly within the insurance industry. Therefore, Plaintiff's claim against an insurance company and its agents for purported violations of the SCUTPA fails as a matter of law.

### CONCLUSION

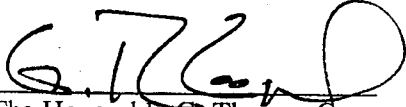
For the above-stated reasons, the Court finds that the Amended Complaint fails to allege facts sufficient to constitute a cause of action. The breach of contract cause fails because there is no allegation that Defendants published any confidential information to third parties or tried to submit confidential information in any judicial proceeding. Moreover, the Amended Complaint fails to allege any confidential information that was not otherwise admissible or discoverable. Also, by accepting the Offer of Judgment, Plaintiff is estopped from arguing that his damages in the underlying lawsuit exceeded \$500,000. Therefore, the Amended Complaint fails to allege a breach of the contract and any damages resulting therefrom.

The SCUTPA claim fails because the General Assembly exempted the insurance industry from the scope of the Act. All of the acts asserted in the Amended Complaint against Defendants constitute the practice of insurance and the business of insurance. Therefore, the SCUTPA does not apply to the conduct alleged in the Amended Complaint.

Therefore, it is ORDERED that the Defendant's Motion to Dismiss is GRANTED.

It is so ORDERED.

This the 3<sup>rd</sup> day of May, 2016.

  
The Honorable G. Thomas Cooper, Jr.  
Presiding Judge of the 5<sup>th</sup> Judicial Circuit

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