IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
The Honorable G. Thomas Cooper

C/A No. 2015-CP-40-05698

Brandon Crider,

Plaintiff/Appellant,

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,

Defendants/Respondents.

INITIAL BRIEF OF APPELLANT

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Introduction

Appellant and Respondents entered into a mediation contract[1] in the underlying litigation, which specifically states that information obtained during the mediation was ***confidential, privileged, and inadmissible for any purpose.*** On the first page of their Memorandum, Respondents admit exactly what Appellant has complained of in the instant matter:

> At the mediation, Plaintiff claimed that Walker & Morgan was aware of its potential liability for malpractice prior to the effective policy period. Therefore, Carolina Casualty issued a reservation of rights letter after mediation and asked its insured for additional information on the coverage issue.

Memorandum in Support of Motion to Dismiss, p. 1.

Respondents obtained confidential information during mediation and used that information as a threat for withdrawing all offers made and utilized this illegitimate hammer to beat down any further offers. Respondents continued to utilize information obtained during the confidential mediation despite having been subsequently notified that such was in violation of the Mediation Agreement.[2] Despite their admission, which tracks Appellant's allegations in this case, Respondents assert that Appellant's claims should be dismissed because he fails to allege facts to constitute a breach of contract.

Standard of Review

On review a dismissal pursuant to Rule 12(b)(6), an appellate tribunal applies the same standard of review that was implemented by the trial court. *Williams v. Condon*, 347 S.C. 227,

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[1] Defendants Clayton and DeLucia admit in their Answer that, while neither of them signed the actual Agreement, they did agree to participate in the mediation pursuant to the terms of the Agreement. Defs' Ans. at ¶¶ 3-4.

[2] While this is not a motion for summary judgment, Appellant did notify Defendants by letter that the confidential information obtained had no basis in fact. (Aug. 4, 2015 letter of G.Kefalos); Am Cmpt. ¶27.

353 S.E.2d 496 (Ct. App. 2001). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.*; *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding whether or not to grant a motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence v. Spence*, 368 S.C. 106, 116 628 S.E.2d 874, 869 (2006).

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413,415 (Ct. App. 2003); *see Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999); *see also Baird v. Charleston County, 333 S.C. 519,527, 511 S.E.2d 69,73* (1999) (declaring that if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (concluding that motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874.

Factual History

On June 16, 2006, when he was thirteen (13) years old, Appellant Brandon Crider was chased by a group of young men and sought refuge by climbing the nearest tree. Am.Cmpt. ¶6-7. Unfortunately, due to the negligence of the power company, the tree that Appellant climbed was not properly trimmed away from the active power line running very close to the tree and

Appellant accidentally grabbed an active power line, suffering serious injuries. Am.Cmpt. ¶ 8-11.

At the time of his injuries, South Carolina Department of Social Services ("DSS") had legal custody of Appellant and he resided in a foster home. Am.Cmpt. ¶12. DSS discouraged Appellant and his foster mother from meeting with attorneys to discuss a potential lawsuit against the power company. Am.Cmpt. ¶13. However, a month after Appellant turned eighteen (18) years old, he signed a fee agreement with the Walker & Morgan law firm to pursue his claims against the power company and/or any other potential defendants. Am.Cmpt. ¶14. The fee agreement between Appellant and Walker & Morgan was executed on April 4, 2011. Am.Cmpt. ¶ 14.

Appellant was told by Walker & Morgan attorneys that they had investigated his claim, determined it to be a strong case against the power company, and that they even already had an expert who would opine in his favor as to the negligence of the power company. Am.Cmpt. ¶15. Despite assurances that the case would progress in the proper manner, Walker & Morgan negligently failed to ever file a complaint on Appellant's behalf. Am.Cmpt. ¶16. Walker & Morgan never contacted Appellant to instruct him that they would not be pursuing the case for him. Am.Cmpt. ¶ 17. Because he was a minor at the time of the accident and pursuant to S.C. Code §15-3-40, Appellant had one year in which to file a lawsuit against the power company for his injuries. Am.Cmpt. ¶ 18. His statute, therefore, passed on his birthday in March of 2012. Am.Cmpt. ¶ 18. As a result, Appellant's claims against the power company and/or any other potential defendant are now time-barred by the statute of limitations. Am.Cmpt. ¶ 19.

Appellant brought an action against Walker & Morgan and its partners for professional negligence in their handling of Appellant's underlying case. Am.Cmpt. ¶ 20. Walker & Morgan and its lawyers were insured by Respondent Carolina Casualty Insurance Company at the time of

the alleged negligence. Am.Cmpt. ¶ 21. After some initial discovery, Respondents agreed to mediate the case with the help of Mediator Robert M. Erwin, Jr., Esq. ("Bob Erwin"). Am.Cmpt. ¶ 22. The mediation was held on July 20, 2015. Am.Cmpt. ¶ 22. Respondents attended the mediation. Am.Cmpt. ¶22 All attending parties, through their respective Counsel, signed a mediation contract and agreed to the terms of the mediation contract, which required strict confidentiality of any information shared during settlement negotiations. Exhibit A to Am. Complaint. The terms of the mediation contract included the following language:

> 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...***

Id. (emphasis added). The parties were unable to reach a resolution on the day of the mediation, however, everyone left with the understanding that good-faith, meaningful negotiations would continue with the assistance of Mr. Erwin. Am.Cmpt. ¶23.

Soon after, Appellant learned that Respondents were using confidential (and unsubstantiated) information it obtained during the mediation-- that Walker & Morgan may have been aware of its potential liability for malpractice prior to the effective policy period-- to threaten and strong arm Appellant, and even its own insureds, with the contention that insurance coverage may not exist on Appellant's claims. Am.Cmpt. ¶24. Respondents withdrew all offers made and utilized this illegal hammer to beat down any further offers. [3]Am.Cmpt. ¶25.

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[3]Improperly using the confidential information learned at mediation, Respondents withdrew the settlement offer and later made offer of judgment for $500,000. Since, no release was required, Appellant would be able to get $500,000.00 and still pursue this action for Respondent's breach of contract. Am.Cmpt. ¶27.

Respondents continued to utilize information obtained during the confidential mediation despite having been subsequently notified that such was in violation of the Mediation Agreement. Am.Cmpt. ¶26.

ARGUMENT

I. The lower court erred in ruling that Appellant had not sufficiently alleged a breach of contract.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." *S.C. Fed. Sav. Bank v. Thornton–Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct.App.1990).

The lower court held that Appellant had not alleged a breach of contract because the Amended Complaint: a) did not assert that Respondents disclose or misuse any confidential information; b) did not allege facts to show the information was confidential; and c) failed to allege damages. The lower court erred in so ruling, as set forth below.

A. Respondents misused confidential information.

The lower court's Order completely misinterpreted the confidentiality requirements of mediation, ruling that because there was no disclosure to third parties or use of confidential information as evidence in a proceeding, there can be no breach of the mediation contract. The mediation agreement here specifically states that information obtained during the mediation was ***confidential, privileged, and inadmissible for any purpose***. The Order focuses only on the inadmissibility provision and holds that "[d]isclosure to a third party or use of confidential

information in a judicial proceeding is a necessary element of claim that Respondents breached a confidentiality agreement." (Order, p. 5). The court ignores the confidentiality requirement, which is also addressed in Rule 6 of the South Carolina Rules of Alternate Dispute Resolution, stating that "parties and other persons present shall maintain the confidentiality of the mediation and **shall not rely on**, or introduce as evidence...**any communications having occurred in a mediation proceedings**...." (emphasis added). This court's ruling completely guts the purpose of mediation.

Respondents obtained confidential information during mediation and used that information to withdraw the offers made and utilized this illegal hammer to beat down any further offers. The lower court's ruling that the agreement only applies to disclosure of confidential information in a court proceeding eviscerates the confidentiality needed to ensure fair and open mediation.

B. The information disclosed was confidential and not "otherwise discoverable," contrary to the lower court's ruling.

According to the lower court, the Mediation Agreement stated that "evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in mediation." Order p. 6. The lower court claimed that Appellant had not sufficiently alleged that the information disclosed at mediation was sufficiently confidential and not otherwise discoverable. This is a novel issue of fact and law, but Appellant has clearly met his burden of properly pleading his causes of actions to survive a motion to dismiss under Rule 12(b).[4]

Confidentiality is a key to mediation:

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[4] As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (citing *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980).

> Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law. Without adequate legal protection, a party's candor in mediation might well be "rewarded" by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation.

Alan Kirtley, The Mediation Privilege's Transition from Theory to Implementation: Designing A Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. Disp. Resol. 1 (1995). Both South Carolina law and the mediation reflect this need for confidentiality. Rule 601 of the South Carolina Court-Annexed Rules for Alternate Dispute Resolution, requires the absolute confidentiality of all information obtained during mediation. Rule 8 of Rule 601 provides, in relevant part, as follows:

> **(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;

SCADR, Rule 8. *See also, Burch v. Burch;* 395 S.C. 318 717 S.E.2d 757 (2011); *see also, Hicks v. Hicks*, No. 2011-UP-124, 2011 WL 11733613, at *3 (S.C. Ct. App. Mar. 24, 2011)(citing Rule 8(a), SC R ADR, "*Communications* during a mediation settlement conference shall be confidential." (emphasis added)); *See generally*, Rule 8(a)(5), ADR (prohibiting the reliance on

or introduction as evidence in any proceeding "[a]ll records, reports or other documents *created solely for use in the mediation*") (emphasis added).

The terms of the mediation contract included the following language:

> **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...**

(Mediation Agreement) (emphasis added).

To get around these provisions requiring the confidentiality of communications, the lower court claims that the information was factual information that impacted insurance coverage and therefore was "otherwise discoverable." The lower court's order fails to explain *how* this information would have otherwise been discovered. The information was merely a rumor, with no substantiation or identifiable witness.[5] Am. Cmpt. 27. Thus, Appellant's statements, if anything, were similar to an admission, which is clearly privileged and confidential under the Mediation Agreement. Moreover, courts have considered an admission at mediation, previously unknown to any one, and held that it is a communication that would not have otherwise been discovered, and thus confidential:

> This analysis presents the most compelling basis for adopting and applying the mediation privilege in this case. If the Commission had not participated in the Mediation, the admission against interest purportedly made by one of its attorneys would not likely have come into being. **This Court sees no reasoned basis for allowing the Plaintiffs to enjoy the benefit of an alleged admission arising through the mediation process when it seems doubtful that such an admission would have otherwise come into existence**.

[5] Moreover, at the pleading stage, the lower court was required to accept the allegation that the information was confidential, not to test the confidentiality on the merits.

Sheldone v. Pennsylvania Tpk. Comm'n, 104 F. Supp. 2d 511, 515 (W.D. Pa. 2000), aff'd (Aug. 8, 2000)(emphasis added).[6]

In the Amended Complaint, Appellant alleged that he and Respondents were parties to a mediation contract on July 20, 2015. He alleges that the express terms of the contract and the agreement to participate in mediation required strict confidentiality with respect to any information shared during the mediation process. Appellant further alleges that Respondents breached the mediation contract and their agreement by using information they obtained during the confidential mediation to threaten Appellant, and even its own insureds, with the contention that insurance coverage may not exist on Appellant's claims. Appellant also alleged that even though there was substantially more money to settle the claim, and that Walker & Morgan had authorized a settlement of $800,000, Respondent Carolina Casualty Insurance Company used the confidential information that Walker & Morgan may have been aware of its potential liability for malpractice prior to the effective policy period to withdraw all offers made and further intended to utilize the confidential statements as a basis for refusing future negotiations.

Respondents admit exactly what Appellant has complained of in the instant matter:

> At the mediation, Plaintiff claimed that Walker & Morgan was aware of its potential liability for malpractice prior to the effective policy period. Therefore, Carolina Casualty issued a reservation of rights letter after mediation and asked its insured for additional information on the coverage issue.

Memorandum in Support of Motion to Dismiss, p. 1. As admitted in their brief, Respondents improperly used the confidential communication about Walker Morgan's potential knowledge of

[6] The only other way that Defendants could have discovered the information would be a communication from Walker Morgan and their attorneys. That communication would also be protected and it would be unethical to use it for the detriment of the client. Parson v. Continental National Am. Group, 550 P. 2d 94 (Az. 1976)(an insurance company's agent cannot use the confidential relationship to gather information to deny the insurance coverage).

liability, made at the mediation -- information that had no basis in fact. Am. Cmpt. ¶27; Aug. 4, 2015 Kefalos letter. It was merely mentioned that Appellant had received information from a questionable informant that Respondents had notice of Appellant's claim prior to their notifying their insurer of the same and that, should such a claim be proven, it could affect a jury verdict. Respondents try throughout their Memorandum to justify their use of protected information and to confuse the issue by stating that the information was "factual" and "highly relevant." The information was unfairly obtained in the confidence of mediation, as admitted. Despite that fact, Respondents continued to use the baseless comment as a battering ram against both Appellant and its own insured to force a settlement. Although not directly communicated to Respondents by Appellant, this information, received and forwarded through the mediation process, is afforded the same confidentiality and could not be used ***for any purpose***:

> Mediation confidentiality extends beyond utterances or writings in the course of a mediation and, thus, is not confined to communications that occur between mediation disputants during the mediation proceeding itself. The scope of the confidentiality umbrella includes all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, including those between a mediation disputant and their own counsel, even if these do not occur in the presence of the mediator or other disputant. The protection afforded by mediation confidentiality is not limited by the identity of the communicator, or their status as a party, disputant, or participant in the mediation itself; or by the communication's nature; or by its specific potential for damage to a disputing party. *Cassel v. Superior Court*, 51 Cal. 4th 113, 119 Cal. Rptr. 3d 437, 244 P.3d 1080 (2011); *See also* 50 Causes of Action 2d 609 (Originally published in 2011).

Respondents obtained the confidential information and immediately used the same to inappropriately terminate the mediation process. Respondents used the confidential information

for the purpose of threatening Appellant, and even their insured, in violation of the Mediation Agreement and the law.

II. The lower court erred in ruling that the Amended Complaint failed to allege damages.

The lower court's Order concluded that by accepting an offer of judgment, the Appellant is "bound to the conclusion that his damages cannot exceed $500,000.00" and that he is "estopped from claiming otherwise." (Order, p. 8). However, the lower court misunderstood the effect of an acceptance of an offer of judgment and misapplied the doctrine of collateral estoppel. A rudimentary understanding of collateral estoppel[7] indicates that it has no application here.

"Collateral estoppel, or issue preclusion, provides that once a court of competent jurisdiction actually and necessarily determines an issue, that determination remains conclusive in subsequent suits, based on a different cause of action but involving the same parties, or privies, to the previous litigation." Whitt v. Wells Fargo Fin., Inc., 664 F. Supp. 2d 537, 542 (D.S.C. 2009). In order for an issue to be precluded in subsequent litigation, five elements must be established: 1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. Whitt 664 F. Supp. 2d 537, 542. Of

[7] The order does not indicate whether collateral or equitable estoppel supposedly applies to Appellant. However, an "affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). Whether the elements of equitable estoppel have been met depends upon depends on the facts not present in the pleadings, including "reliance, intent, and the existence of an inconsistency." T. Leigh Anenson, The Triumph of Equity: Equitable Estoppel in Modern Litigation, 27 Rev. Litig. 377, 422 (2008). Obviously, an inquiry into the unpled and necessary facts related to equitable estoppel would go beyond a motion to dismiss.

course, here there are different defendants (the lawyers in the first action vs. the insurance company) and different issues (legal malpractice vs. breach of contract). Those two differences alone prevent the application of collateral estoppel.

The lower court's Order held that the acceptance of an offer of judgment precludes a party from filing a subsequent action against another tortfeasor. This holding completely ignores the law on joint tortfeasors. South Carolina Code provides:

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

S.C. Code § 15-38-50. Thus, a plaintiff can accept the offer of a judgment from one joint tortfeasor and still pursue an action against the other tortfeasor. Collateral estoppel has no application in the context of joint tortfeasors.[8]

The court cited to McCutcheon v. Hertz Corp., 463 So. 2d 1226, 1227 (Fla. Dist. Ct. App. 1985) as support for its position. However, the Eleventh Circuit Court of Appeals clarified, in a later case, that McCutcheon ignored the Florida statute on tortfeasors, similar to South Carolina's, which provided: "A release or covenant not to sue as to one (1) tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or

[8] Of course, here, Defendants may actually be **subsequent** tortfeasors who clearly were not released by the acceptance of the offer of judgment. Appellant's damages for the subsequent tort is the amount of recovery Appellant could have had in the original malpractice case but for Defendants' breach of contract.

death." Williams v. Arai Hirotake, Ltd., 931 F.2d 755, 757 (11th Cir. 1991).[9] As noted above, in South Carolina, settlement with one tortfeasor does not release another tortfeasor. A party cannot obtain a double recovery but none is sought here. The McCutcheon case provides no basis for this court's ruling.

III. The Respondents' conduct is not exempted from the South Carolina Unfair Trade Practices Act.

The lower court's Order incorrectly held that the Respondents were immune from any violations of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, et seq. because the insurance industry is excluded from the Act (Order, p. 9). The court's conclusion that Respondents are exempt grossly oversimplifies the law which contains the exemption. SCUTPA only exempts "unfair trade practices covered and regulated" by the Insurance Trade Practices Act. S.C. Code § 39-5-40(c); Lewis v. Omni Indem. Co., 970 F. Supp. 2d 437, 451 (D.S.C. 2013) ("The Unfair Trade Practices Act does not apply to unfair trade practices covered and regulated under the South Carolina Insurance Trade Practices Act").

In order to determine which practices or acts are exempt from SCUTPA, one must look to the Insurance Trade Practices Act, which regulates: false advertising of policies [S.C. Code § 38-57-10 through -50];[10] fraudulently inducing a person to lapse, forfeit, or retain a policy [§ 38-57-

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[9] The *Williams* case also noted that in *McCutcheon*, it was undisputed that plaintiff's claim and acceptance of the offer of judgment included not only the damages caused by Hertz's driver but also the damages allegedly caused by another tortfeasor. In contrast, in *Williams*, as here, "neither the defendants' offer of judgment, the [plaintiff's] acceptance, nor the judgment order contained any language indicating the injuries for which the [plaintiffs] were compensated or the claims that were satisfied." *Williams,* 931 F.2d 755, 756 (11th Cir. 1991)

[10] One of the cases upon which the court erroneously relies is Colonial Life & Acc. Ins. Co. v. Am. Family Life Assur. Co. of Columbus, 846 F. Supp. 454 (D.S.C. 1994), in which the plaintiff tried to sue an insurance company for false advertising. False advertising is one of the express areas covered by the Insurance Trade Practices Act and thus the insurance company in that case was properly exempt from SCUTPA. However, Colonial Life provides no support for the

60]; misrepresentation of the terms of the policy [§ 38-57-70]; vehicle glass repair procedures [§38-57-75]; false financial statements [§ 38-57-80]; boycotts [§38-57-100]; defamation [§ 38-57-90]; use of coercion of business by sellers/lenders [§38-57-110]; use of unfair discrimination in life insurance [§38-57-120] and other similar fraudulent conduct concerning the content, advertising, and sale of insurance.

Here, Respondents have breached a contract and misused confidential mediation information, which are not acts governed by the Insurance Trade Practices Act.[11] In other words, the exemption in SCUTPA cannot apply to an insurance company's misuse of confidential information in breach of a mediation contract.

CONCLUSION

Both the law and the Mediation Agreement require absolute confidentiality of all statements made at mediation. Appellant has pled that Defendants used confidential information obtained at mediation to terminate the mediation process and threaten Appellant and even their insured in violation of the Mediation Agreement and the law. The lower court is bound to accept the allegations as true, and this matter should not have been dismissed. In addition, Respondents' actions are not subject to the exemption in the South Carolina Unfair Trade Practices Act. Thus, the lower court erred in dismissing this matter and its order should be reversed.

(SIGNATURE ON FOLLOWING PAGE)

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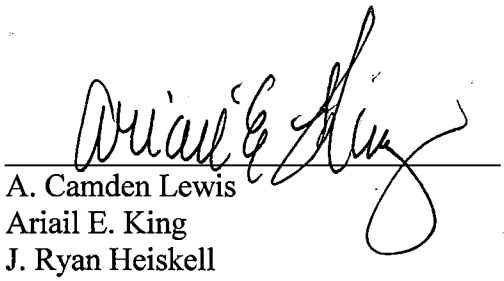
assertion that an insurance company or insurance adjustor's breach of contract – one that is not even a contract of insurance -- is exempt from SCUTPA.

[11] In fact, the phrase "breach of contract" does not even appear in the Insurance Trade Practices Act.



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CERTIFICATE OF SERVICE

I, Kathy A. Collins, the undersigned employee of Lewis Babcock L.L.P, attorneys for Plaintiff do hereby certify that I have served a copy of the following Initial Brief of Appellant in connection with the above-referenced case via hand-delivery, to the following addresses:

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November 22, 2016.