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.

REPLY BRIEF OF APPELLANT

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Introduction

The question before the Court is whether a mediating party breaches its confidentiality obligations when it uses confidential information obtained during mediation to its own strategic advantage outside the confines of the mediation and to the detriment of the other mediating parties. Because this case was dismissed at the pleadings stage, Appellant's allegations are considered as true. *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015) (case citations omitted).

For purposes of appellate review, it is taken as true that Respondents used confidential information obtained during mediation for their strategic advantage outside of the mediation process by threatening to deny insurance coverage and thereby eventually forcing Appellant to accept an offer of judgment for an amount that was greatly depressed compared to his damages and significantly lower than what the defendant had authorized Respondents to settle for. (Am. Compl. ¶¶ 24-27.) Respondents acted in such a manner despite being informed that Appellant's confidential statement—concerning when the insured learned of the claim—was unsubstantiated. (Am. Compl. ¶¶ 26-27.) Respondents further used this same information to threaten and strong-arm their own insured. (Am. Compl. ¶ 24.)

Assuming the truth of these allegations, Appellant is entitled to relief on a theory that Respondents engaged in unfair trade practices and breached their contractual duty of confidentiality under the Mediation Agreement and Rule 8, SCADR. The lower court misinterpreted the confidentiality obligations flowing from the Mediation Agreement and Rule 8, SCADR, when it ruled that because there was no alleged disclosure of confidential information to a third party or an alleged use of confidential information in a judicial proceeding, that there could be no breach of confidentiality. (Order, p. 5.)

Mediation's purpose and unique character demand broad confidentiality. Mediation confidentiality is breached when a mediating party uses confidential information outside the confines of the mediation to the detriment of the other mediating parties. That is what is alleged to have happened in this case, and, accordingly, the lower court's dismissal should be reversed.

I. The Lower Court Erred in Not Addressing All of Appellant's Theories of Liability.

In their Mediation Agreement, Respondents, Appellant, and the defendant law firm Walker & Morgan agreed that:

> **All admissions, offers, promises, and statements, made in the course of the 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.

(Exhibit A to Am. Compl. ¶ 1 (emphasis added).) This contractual provision incorporated the confidentiality requirements of Rule 8, SCADR, which provides, in pertinent part, that: "Communications during a mediation settlement conference shall be confidential. . . . To [protect the confidentiality of the process], 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 communication having occurred in a mediation proceeding** . . . ." Rule 8, SCADR (emphasis added).

Appellant's amended complaint alleged that Respondents relied on and used confidential statements made by Appellant during the mediation to shape their post-mediation litigation strategy, which was to threaten to deny insurance coverage and thereby strong-arm Appellant and their own insured to abandon continued settlement discussions and for Appellant to accept an offer of judgment that was substantially lower than the value of the case. (Am. Compl. ¶¶ 24-27.) The

lower court did not address whether these actions by Respondents were sufficient to constitute a cause of action for breach of the mediation agreement or unfair trade practices. Instead, the lower court applied a hyper-restrictive interpretation of the Mediation Agreement and Rule 8, SCADR, ruling that Respondents' duty of confidentiality could only be breached by disclosing a confidential statement to a third party or in a judicial proceeding. (Order, p. 5.) This ruling ignored the broad confidentiality provisions included in the parties' Mediation Agreement and Rule 8, SCADR, and failed to address whether Appellant's allegations where sufficient to alleged a breach of the mediation privilege that applies to all statements made during mediation, or sufficient to allege a breach of the prohibition against relying on any statement made during mediation. These prohibitions are separate and in addition to the prohibition against disclosure to third parties and judicial proceedings. (Exhibit A to Am. Compl. ¶ 1.) The lower court's failure to address these theories of liability was error and warrants reversal.

II. The Lower Court's Hyper-Restrictive View of Mediation Confidentiality Contradicts Policy Considerations Underlying Mediation.

The lower court misapprehended the purpose of confidentiality in the context of mediation. Affirming the dismissal of this case will result in less candor and lower expectations of confidentiality and resolution for all future mediations.

Respondents urge this Court to accept a standard of mediation confidentiality where there are no bounds on the use of confidential information obtained during mediation as long as the information obtained in confidence is not disclosed to a third party or used in a judicial proceeding. (Resp. Br. 10.) In essence, Respondents' position in this litigation is that any and all information obtained during mediation, regardless of confidentiality, may be used to their own strategic advantage and to advance their own interests outside the confines of the mediation, but for these

two limited exceptions. This approach is contrary to the intent and purpose of mediation and will diminish its effectiveness.

Respondents' position, and the lower court's ruling affirming Respondents' actions, are anathema to the mediation process. Mediation is intended to encourage dispute resolution by affording a safe place for the parties to engage in a candid discussion of their dispute. *Cassel v. Superior Court*, 244 P.3d 1080, 1087 (Cal. 2011). The purpose of mediation confidentiality "is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant." *Id.* at 1088 (finding mediation discussions between attorney and client confidential and impermissible for later legal malpractice suit).

The promise of confidentiality in mediation "promotes the free flow of information that may result in the settlement of a dispute, and protect[s] the integrity of alternative dispute resolution generally." *In re Teligent, Inc.*, 640 F.3d 53, 57-58 (2d Cir. 2011). "Courts routinely have recognized the substantial interest of preserving confidentiality in mediation proceedings as justifying restrictions on the use of information obtained during the mediation." *In re Anonymous*, 283 F.3d 627, 634 (4th Cir. 2002) (citation omitted).

> The willingness of mediation parties to 'open up' is essential to the success of the process. The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests and possible solutions to the parties' conflict. Mediation's private setting invites parties to speak openly, with complete candor. . . . 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. Participation will diminish if perceptions of confidentiality are not matched by reality.**

Town of Clinton v. Geological Servs. Corp., No. 04-0462A, 2006 WL 3246464, at *2 (Mass. Super. Nov. 8, 2006) (quoting 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) (emphasis added)).

Without strong confidentiality protections and the assurance that statements made during the course of mediation will not be used against a mediating party outside the confines of the mediation, the incentive to engage in mediation and a candid exchange of information all but disappears. This will be the result if the lower standard of confidentiality applied by the trial court is upheld.

III. Upholding Confidentiality Does Not Shield Relevant Facts From Discovery.

Respondents argue at great length that Appellant's position cannot be correct because otherwise discoverable evidence does not become shielded from discovery by its disclosure in mediation. (Resp't Br. 8-14.) Respondents miss the point. Appellant is not arguing that the confidential statement shared during mediation either was or was not discoverable or admissible in court; rather, Appellant is arguing that facts revealed through mediation, if properly discoverable, must be obtained through proper means of discovery. Mediation is not a discovery tool. *In re Anonymous*, 283 F.3d at 636 ("confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys.").

This is in accord with the Mediation Agreement, which treats all statements and admissions as confidential and shields them from being relied upon, disclosed to third parties, or used in judicial proceedings. The Mediation Agreement separately provides that evidence "otherwise admissible or discoverable"—meaning discovered in a manner other than through mediation—"shall not be rendered inadmissible or not discoverable as a result of its use in the mediation." (Exhibit A to Am. Compl. ¶ 1.)

The lower court's order, and Respondents' argument, improperly collapses these distinct concepts of confidentiality and discoverability. The lower court's order incorrectly concludes that if relevant facts are discussed during mediation and these facts are otherwise discoverable, then these facts no longer remain confidential. (Order, p. 6-8.) This is the same faulty argument advanced by Respondents. (Resp't Br. at 10).

Upholding the confidentiality of statements made during mediation offers separate and distinct protections to the mediating parties apart from the civil discovery rules. There is no conflict in finding that facts revealed in mediation are confidential and also potentially discoverable through proper means of discovery. Mediation is simply not a shortcut or end-around to obtaining facts through proper discovery processes. *See In re Anonymous*, 283 F.3d at 636.

IV. Collateral Estoppel is Not Applicable to This Case.

The lower court erred in concluding that accepting an offer of judgment precludes Appellant from claiming that he was damaged by Respondents' alleged breach of mediation confidentiality. 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 v. Wells Fargo Fin., Inc.*, 664 F. Supp. 2d 537, 542 (D.S.C. 2009).

In this case, there are different defendants (the lawyers from the first action vs. the insurance company) and different issues (legal malpractice vs. breach of contract). These

differences alone prevent the application of collateral estoppel. Respondents have not established all of the required elements to apply collateral estoppel to this case.

Respondents rely heavily on a 1977 case from Colorado, *Continental National Bank v. Dolan*, 564 P.2d 955 (Col. App. 1977); however, this case does not involve a subsequent litigation over actions taken by one party during the first litigation, as is the case here. *Dolan* involves a bank attempting in a subsequent litigation to collect additional monies for the same exact debt that was the subject of the first litigation. *Id. Dolan* is not persuasive or informative for the purpose of reviewing the allegation in this case and it does not support the application of collateral estoppel.

Contrary to Respondents' characterizations, Appellant is not attempting to obtain additional monies from the defendant in the original legal malpractice case, the Walker & Morgan law firm, nor is he attempting to sue for the same conduct underlying the legal malpractice—missed statute of limitations. Rather, Appellant is seeking to recover for Respondents' alleged bad acts during the underlying litigation. Clearly, these are separate issues and collateral estoppel is not applicable.

V. The Lower Court Mistakenly Held that the South Carolina Unfair Trade Practices Act Does Not Apply to an Alleged Breach of a Mediation Agreement by an Insurance Company.

The lower court erred in concluding that Appellant's unfair trade practices cause of action was precluded merely because Respondents are an insurance company. The court failed to explain how the breach of a mediation agreement qualifies as the "business of insurance." Respondents also fails to explain this critical link between the alleged breach of the mediation agreement and its insurance business. The two cases relied on by Respondents to support their argument both clearly arise out of the context of insurance business. *Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 129 (D.S.C. 1994) (litigation arising out of an

insurance claim for hurricane damage); *Colonial Life & Acc. Ins. Co. v. Am. Family Life Assur. Co. of Columbus*, 846 F. Supp. 454, 463 (D.S.C. 1994) (litigating claim for false advertising in the insurance industry).

Here, Respondents have breached a mediation contract and misused confidential mediation information, which are not acts governed by the Insurance Trade Practices Act. 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

The lower court failed to adequately address all of Appellant's theories of recovery because it accepted an unduly restrictive view of mediation confidentiality that is limited to disclosure to third parties and in judicial proceedings. The lower court's dismissal of this case evidences a misunderstanding of the scope of confidentiality protections for mediation. Appellant and Respondents agreed to treat all statements made during mediation as strictly confidential and to not rely on any statements made during mediation. Instead of abiding by this agreement, Respondents used confidential statements made during mediation to their own strategic advantage after the mediation to force a resolution of the case at a greatly depressed value.

Respondents advocate for a rule that would permit the use of any and all information obtained during mediation, regardless of confidentiality, for a party's own strategic advantage and to advance its own interests outside the confines of the mediation as long as that information is not disclosed to a third party or in a judicial proceeding. This position is directly contrary to the parties' Mediation Agreement and Rule 8, SCADR, and undercuts the policy of utilizing mediation as a resolution tool. For these reasons, the lower court's order dismissing this case should be reversed.

[Signature on the following page]

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Columbia, South Carolina

February 1, 2017

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PROOF OF SERVICE

I, Connie W. Grugan, legal assistant to the law firm of Lewis Babcock L.L.P, hereby certify that I have served a copy of the Reply Brief of Appellant upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to opposing counsel at the following address:

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This 1st day of February, 2017

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February 1, 2017

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: Brandon Crider v. Jeffrey Scott Clayton, et al.
Appellate Case No. 2016-002355
Our file 15-568

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Reply Brief of Appellant in the above-referenced matter for filing with your office. Please return a clocked copy via our courier.

By copy of this letter, I am hereby serving a copy of same upon opposing counsel.

Sincerely yours,

David L. Paavola

DLP:cg
Enclosure
cc: J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire