

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

RECEIVED

FEB 24 2017

SC Court of Appeals

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.

RECORD ON APPEAL

A. Camden Lewis
Ariail E. King
J. Ryan Heiskell
David L. Paavola
LEWIS BABCOCK LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000
Facsimile: 803-733-3541

ATTORNEYS FOR APPELLANT

J.R. Murphy
Wesley B. Sawyer
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

ATTORNEYS FOR RESPONDENTS

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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
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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-40-02240 ⁵⁶¹⁸

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

RICHLAND COUNTY
FILED
2016 OCT 26 AM 9:42
JEANETTE M. MCBRIDE
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.

Cameron, South Carolina
October 25, 2016

G. T. 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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
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 10 AM 10:28
JEANETTE B. MCNEEL
C. CLERK, S.C.

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.

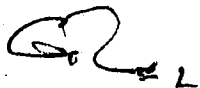
FACTS

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, 2015.¹ On September 16, 2015, Plaintiff filed the present action against the Defendants for allegedly violating the confidentiality provisions in the

¹ 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, SCRCF. 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-labile 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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SCANNED

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

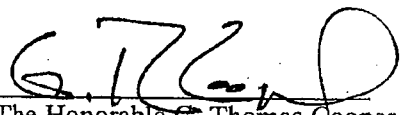
For the above-stated reasons, the Court finds that the Amended Complaint fails to allege facts sufficient to constitute a cause of action. The breach of contract cause fails because there is no allegation that Defendants published any confidential information to third parties or tried to submit confidential 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 3rd day of May, 2016.


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

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.

COMPLAINT
(JURY TRIAL DEMANDED)

RICHLAND COUNTY
FILED
2015 SEP 16 PM 2:29
JEANETTE M. HOSKIN
CLERK OF COURT

Plaintiff Brandon Crider, complaining of Defendants 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 (hereinafter "Defendants"), would, through undersigned counsel, respectfully show unto the Court as follows:

PARTIES

1. Plaintiff Brandon Crider, is a citizen and resident of Greenville County, South Carolina.
2. Defendant Jeffrey Scott Clayton is representative for Carolina Casualty Insurance Company and was an active participant to the mediation held on July 20, 2015. He agreed to and was party to the contract of mediation. *See Exhibit A, Contract of Mediation.*
3. Defendant James DeLucia, is representative for Carolina Casualty Insurance Company and was an active participant at the mediation held on July 20, 2015. He agreed to and was party to the contract of mediation. *See Exhibit A.*

4. Defendant Carolina Casualty Insurance Company was created and exists under the laws of a state other than South Carolina, with its principal place of business in Jacksonville, Florida, but it does a considerable amount of business in the State of South Carolina.

JURISDICTION AND VENUE

5. This Court has jurisdiction and venue over these matters based upon S.C. Code Ann. §15-7-30(C)(2), as the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Richland County, South Carolina.

FACTS

6. On June 16, 2006, when he was thirteen (13) years old, Plaintiff Brandon Crider was threatened and chased by a group of young men, who were throwing rocks and other objects at him.

7. In a desperate attempt to avoid the bullying and the direct hits of the rocks being hurled in his direction, Plaintiff sought refuge by climbing the nearest tree.

8. Unfortunately, due to the negligence of the power company, the tree that Plaintiff climbed was not properly trimmed away from the active power line running very close to the tree.

9. As the young boy climbed the tree, it began to sway and caused him to lose his grip of the branches. He reached out for something to grab to avoid a significant fall from the tree but, unfortunately grabbed ahold of the active power line.

10. Immediately, thousands of volts electricity shot through Brandon's body and exited out of the tops of both of his feet, causing him to fall approximately twenty feet from the tree to the ground.

11. As a result of the negligence of the power company in failing to follow its own procedures, guidelines, and protocol, as well as the law, Plaintiff Brandon Crider suffered very serious injuries.

12. At the time of his injuries, Plaintiff was residing in a foster home. The South Carolina Department of Social Services ("DSS") had legal custody of Plaintiff.

13. Following the accident, DSS discouraged Plaintiff and his foster mother from meeting with attorneys to discuss a potential lawsuit against the power company and/or any other potential defendants.

14. However, a month after Plaintiff 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. The fee agreement between Plaintiff and Walker & Morgan was executed on April 4, 2011.

15. Plaintiff 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.

16. Despite assurances that the case would progress in the proper manner, Walker & Morgan negligently failed to ever file a complaint on Brandon's behalf.

17. Defendants never contacted Plaintiff to instruct him that they would not be pursuing the case for him.

18. Because he was a minor at the time of the accident and pursuant to S.C. Code §15-3-40, Plaintiff had one year in which to file a lawsuit against the power company for his injuries. His statute, therefore, passed on his birthday in March of 2012.

19. As a result, Plaintiff's claims against the power company and/or any other potential defendant are now time-barred by the statute of limitations.

20. Plaintiff brought an action against Walker & Morgan and its partners for professional negligence in their handling of Mr. Crider's underlying case.

21. Walker & Morgan and its lawyers were insured by Defendant Carolina Casualty Insurance Company at the time of the alleged negligence.

22. After some initial discovery, the Defendants agreed to mediate the case with the help of Mediator Robert M. Erwin, Jr., Esq. The mediation was held on July 20, 2015. Defendants attended the mediation. All attending parties signed a mediation contract or agreed to the terms of

the mediation contract, which required strict confidentiality of any information shared during settlement negotiations. *See* Exhibit A.

23. 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.

24. Soon after, however, Plaintiff learned Defendants were using information it obtained during the confidential mediation to threaten and strong arm the Plaintiff and even its own insureds with the contention that insurance coverage may not exist on Plaintiff's claims.

25. Defendants used this information as a basis for withdrawing all offers made and utilized this illegal hammer to beat down any further offers.

26. Defendants continued to utilize information obtained during the confidential mediation despite having been subsequently notified by Plaintiff that such was in violation of the Mediation Agreement.

27. Defendants then made an offer of judgment for \$500,000.00, which was the offer at mediation, still threatening Plaintiff that they would not move and would continue to deny coverage based upon the illegal use of the information obtained at mediation.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)

28. Paragraphs 1 through 27 hereinabove are reiterated and re-alleged as though set forth verbatim.

29. Plaintiff and Defendants were parties to a mediation contract on July 20, 2015. *See* Exhibit A.

30. 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.

31. Defendants breached the mediation contract and their agreement by using information they obtained during the confidential mediation to threaten Plaintiff, and even its own insureds, with

the contention that insurance coverage may not exist on Plaintiff's claims and did so with fraudulent intent.

32. Defendant Carolina Casualty Insurance Company used this information as a basis for withdrawing all offers made and further intended to utilize the confidential statements as a basis for refusing future negotiations.

33. Defendants fraudulently continued to utilize information obtained during the confidential mediation despite having been subsequently notified by Plaintiff that the facts upon which Defendant was relying to challenge coverage and made an offer of judgment for \$500,000.00.

34. As a direct and proximate result of Defendants breach of contract and fraudulent actions, Plaintiff has suffered actual and consequential damages, for which Defendants are liable.

35. Furthermore, the actions of Defendants have been willful, wanton, fraudulent, thereby entitling Plaintiff to punitive damages.

FOR A SECOND CAUSE OF ACTION
(VIOLATION OF UNFAIR TRADE PRACTICES ACT)

36. Paragraphs 1 through 35 hereinabove are reiterated and re-alleged as though set forth verbatim.

37. Defendants engaged in an unfair and/or deceptive act during the course of negotiations following the mediation held on July 20, 2015.

38. Defendants used confidential information obtained during the course of the mediation held on July 20, 2015 to attempt to avert insurance coverage and strong arm the settlement value that is an unfair and less than their own insured wanted.

39. These acts created a conflict of interest between Defendants and their insured and a violation of the Mediation Agreement.

40. These unfair and/or deceptive practices affected the interests of not only Defendants named clients, those of Brandon Crider, but also impact the interests of the general public as there is

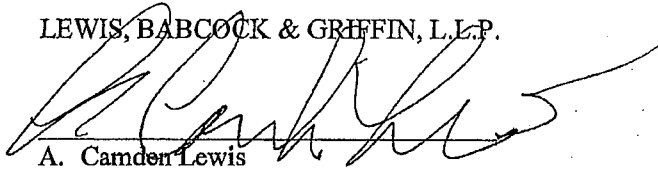
a likelihood of repetition, both previously and in the future, of this treacherous practices.

41. As a direct result of Defendants above-listed instances of unfair and/or deceptive practices, Plaintiff Brandon Crider has suffered actual and consequential monetary damages in an amount to be determined by a jury.

42. Furthermore, the actions of Defendants have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Crider, thereby entitling him to treble damages under the Act.

WHEREFORE, Plaintiff prays for judgment against Defendants for breach of contract with fraudulent intent cause of action, for violation of the Unfair Trade Practices Act, and for actual, consequential, and punitive damages in an amount in to be more specifically proven at trial; together with attorneys' fees and the costs of this action, if permitted by law, and for such other and further relief as this Honorable Court may deem just and proper.

LEWIS, BABCOCK & GRIFFIN, L.L.P.



A. Camden Lewis
J. Ryan Heiskell
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211-1208
Tel.: (803) 771-8000
Fax: (803) 733-3541
Email: ac@lbglegal.com
jrh@lbglegal.com

Attorneys for Plaintiff

Columbia, South Carolina
September 16, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
 Brandon Crider,	)	
	)	
Plaintiff,	)	
	)	
vs	)	MEDIATION AGREEMENT
	)	15-CP-232-02029
Walker & Morgan, LLC, William	)	
P. Walker, Jr., and S. Kirkpatrick	)	
Morgan, Jr.,	)	
	)	
Defendants.	)	

This is an Agreement by the parties to the above-captioned action to submit the same to mediation. The purpose of the mediation is to attempt to arrive at a mutually acceptable resolution of this dispute.

By executing this Agreement, the parties agree and stipulate:

1) 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 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. 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.

- 2) In the event the Mediator meets privately with any party during the course of the mediation, the Mediator will not reveal what is said by one of us to the other without permission.
- 3) To facilitate a resolution, the Mediator, the parties, and their counsel will work to ensure that each party appreciates the strengths and weaknesses of each side's factual and legal contentions. Both in the exchange of information and opinions, and in the evaluation of that information, each party will have the opportunity and responsibility candidly to disclose to the Mediator the facts, theories, and opinions on which it intends to rely with regard to the matters in dispute.
- 4) The mediation process will focus on the interests and objectives of the parties and possible solutions that the parties believe would be fair, equitable, and mutually beneficial. Each party will work with the Mediator in considering and evaluating solutions that would satisfy its own interests and those of the other parties.
- 5) Representatives of the parties with full settlement authority will attend the mediation session.
- 6) The parties will follow the recommendation of the Mediator regarding the agenda most likely to resolve the dispute. All parties will participate in the mediation process in good faith until discharged by the Mediator or until the Mediator declares an impasse.
- 7) The Mediator is not acting as an attorney nor providing legal advice on behalf of any party in the course of this mediation.
- 8) Robert M. Erwin, Jr., of Greenwood, South Carolina, shall serve as Mediator in this case.

9) The mediation will be held at the law offices of Brian Comer, Columbia, South Carolina. The session will begin at 10:00 a.m. on Monday, July 20, 2015.

10) As a part of the mediation process, Mr. Erwin will conduct premediation activities, which will include, but not be limited to, the submission of a premediation brief or memorandum by each of the parties. In addition, the premediation activities may include document submissions, meeting or telephone conferences with each of the parties, and general information exchanged.

10) Mr. Erwin will bill for his services at his normal hourly rate of Three Hundred Seventy Five (\$375.00). Actual expenses will be billed at cost.

11) Unless otherwise agreed upon, each party agrees to divide the mediation fees and expenses on an equal basis, depending upon the number of parties actually participating in the mediation process.

12) Any settlement agreement reached through this process shall be reduced to writing and signed by all parties participating in such settlement.

13) It is expressly understood by the parties and their representatives that the mediator does not offer legal advice in this mediation and is not functioning as an attorney. In this mediation, the mediator's role is to aid the parties in seeking a fair agreement in accordance with their respective interests. The construction of a proposed agreement and any question of law should be referred by the parties to their own legal counsel.

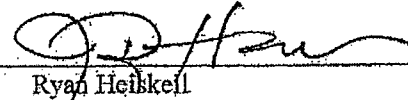
AGREED, this ____ day of July, 2015.

COLLINS & LACY

BY: 
Brian Comer
1330 Lady St.
Columbia, SC 29201
(803) 256-2660

Attorneys for Defendants

LEWIS BARCOCK & GRIFFIN

BY: 
Ryan Heikkell
P.O. Box 11208
Columbia, SC 29211
(803) 771-8000

Attorneys for Plaintiff

4. Defendant Carolina Casualty Insurance Company was created and exists under the laws of a state other than South Carolina, with its principal place of business in Jacksonville, Florida, but it does a considerable amount of business in the State of South Carolina.

JURISDICTION AND VENUE

5. This Court has jurisdiction and venue over these matters based upon S.C. Code Ann. §15-7-30(C)(2), as the most substantial part of the alleged act or omission giving rise to the cause of action occurred in Richland County, South Carolina.

FACTS

6. On June 16, 2006, when he was thirteen (13) years old, Plaintiff Brandon Crider was threatened and chased by a group of young men, who were throwing rocks and other objects at him.

7. In a desperate attempt to avoid the bullying and the direct hits of the rocks being hurled in his direction, Plaintiff sought refuge by climbing the nearest tree.

8. Unfortunately, due to the negligence of the power company, the tree that Plaintiff climbed was not properly trimmed away from the active power line running very close to the tree.

9. As the young boy climbed the tree, it began to sway and caused him to lose his grip of the branches. He reached out for something to grab to avoid a significant fall from the tree but, unfortunately grabbed ahold of the active power line.

10. Immediately, thousands of volts electricity shot through Brandon's body and exited out of the tops of both of his feet, causing him to fall approximately twenty feet from the tree to the ground.

11. As a result of the negligence of the power company in failing to follow its own procedures, guidelines, and protocol, as well as the law, Plaintiff Brandon Crider suffered very serious injuries.

12. At the time of his injuries, Plaintiff was residing in a foster home. The South Carolina Department of Social Services ("DSS") had legal custody of Plaintiff.

13. Following the accident, DSS discouraged Plaintiff and his foster mother from meeting with attorneys to discuss a potential lawsuit against the power company and/or any other potential defendants.

14. However, a month after Plaintiff 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. The fee agreement between Plaintiff and Walker & Morgan was executed on April 4, 2011.

15. Plaintiff 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.

16. Despite assurances that the case would progress in the proper manner, Walker & Morgan negligently failed to ever file a complaint on Brandon's behalf.

17. Defendants never contacted Plaintiff to instruct him that they would not be pursuing the case for him.

18. Because he was a minor at the time of the accident and pursuant to S.C. Code §15-3-40, Plaintiff had one year in which to file a lawsuit against the power company for his injuries. His statute, therefore, passed on his birthday in March of 2012.

19. As a result, Plaintiff's claims against the power company and/or any other potential defendant are now time-barred by the statute of limitations.

20. Plaintiff brought an action against Walker & Morgan and its partners for professional negligence in their handling of Mr. Crider's underlying case.

21. Walker & Morgan and its lawyers were insured by Defendant Carolina Casualty Insurance Company at the time of the alleged negligence.

22. After some initial discovery, the Defendants agreed to mediate the case with the help of Mediator Robert M. Erwin, Jr., Esq. The mediation was held on July 20, 2015. Defendants attended the mediation. All attending parties signed a mediation contract or agreed to the terms of

the mediation contract, which required strict confidentiality of any information shared during settlement negotiations. *See* Exhibit A.

23. 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.

24. Soon after, however, Plaintiff learned Defendants were using information it obtained during the confidential mediation to threaten and strong arm the Plaintiff and even its own insureds with the contention that insurance coverage may not exist on Plaintiff's claims.

25. Defendants used this privileged, confidential information as a basis for withdrawing all offers made and utilized this illegal hammer to beat down any further offers, despite the fact that no evidence was discovered or existed that the information was true and accurate.

26. Defendants continued to utilize the privileged, confidential information obtained during the confidential mediation despite having been subsequently notified by Plaintiff that such was in violation of the Mediation Agreement and that there was no evidence known to him or his Counsel that supported the statement made during the mediation was true.

27. Defendants then made an offer of judgment for \$500,000.00, which was the offer at mediation, still threatening Plaintiff that they would not move and would continue to deny coverage based upon the illegal use of the information obtained at mediation, despite the fact that Walker & Morgan had authorized their Counsel to offer \$800,000 to settle the claim. Given the threats made by Defendants that they would be challenging coverage on Plaintiff's, based solely upon a bald, statement made during the confidential mediation, Plaintiff was forced to accept the lower offer.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

28. Paragraphs 1 through 27 hereinabove are reiterated and re-alleged as though set forth verbatim.

29. Plaintiff and Defendants were parties to a mediation contract on July 20, 2015. *See* Exhibit A.

30. The express terms of the contract and the agreement to participate in mediation required strict confidentiality for any purpose with respect to any information and/or statements shared during the mediation process.

31. Defendants breached the mediation contract and their agreement by using information they obtained during the confidential mediation to threaten Plaintiff, and even its own insureds, with the contention that insurance coverage may not exist on Plaintiff's claims.

32. Defendant Carolina Casualty Insurance Company used this information as a basis for withdrawing all offers made and further intended to utilize the confidential statements as a basis for refusing future negotiations.

33. Defendants continued to utilize a statement made during the confidential mediation despite having been subsequently notified by Plaintiff that the facts upon which Defendant was relying to challenge coverage and made an offer of judgment for \$500,000.00.

34. As a direct and proximate result of Defendants breach of contract and fraudulent actions, Plaintiff has suffered actual and consequential damages, for which Defendants are liable.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)

35. Paragraphs 1 through 34 hereinabove are reiterated and re-alleged as though set forth verbatim.

36. Plaintiff and Defendants were parties to a mediation contract on July 20, 2015. *See* Exhibit A.

37. 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.

38. Defendants breached the mediation contract and their agreement by using a statement they obtained during the confidential mediation to threaten Plaintiff, and even its own insureds, with the contention that insurance coverage may not exist on Plaintiff's.

39. Defendants fraudulently continued to utilize information obtained during the confidential mediation despite having been subsequently notified by Plaintiff that the facts upon which Defendant was relying to challenge coverage and made an offer of judgment for \$500,000.00.

40. As a direct and proximate result of Defendants breach of contract and fraudulent, unfair actions, Plaintiff has suffered actual and consequential damages, for which Defendants are liable.

41. Furthermore, the actions of Defendants have been willful, wanton, fraudulent, thereby entitling Plaintiff to punitive damages.

FOR A THIRD CAUSE OF ACTION
(VIOLATION OF UNFAIR TRADE PRACTICES ACT)

42. Paragraphs 1 through 41 hereinabove are reiterated and re-alleged as though set forth verbatim.

43. Defendants engaged in an unfair and/or deceptive act during the course of negotiations following the mediation held on July 20, 2015.

44. Defendants used confidential information obtained during the course of the mediation, held on July 20, 2015, to attempt to strong arm Plaintiff into an unfair settlement, which was less than even their own insured wanted to pay for their negligence.

45. These acts created a conflict of interest between Defendants and their insured and was a violation of the Mediation Agreement.

46. These unfair and/or deceptive practices affected the interests of not only Defendants' named clients, those of Brandon Crider, but also impact the interests of the general public as there is

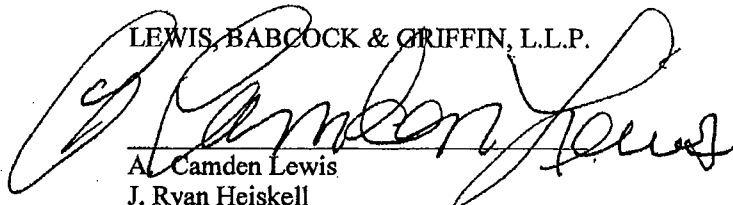
a likelihood of repetition, both previously and in the future, of this treacherous practices.

47. As a direct result of Defendants above-listed instances of unfair and/or deceptive practices, Plaintiff Brandon Crider has suffered actual and consequential monetary damages in an amount to be determined by a jury.

48. Furthermore, the actions of Defendants have been willful, wanton, reckless, and performed with a conscious indifference to the rights of the Plaintiff Crider, thereby entitling him to treble damages under the Act.

WHEREFORE, Plaintiff prays for judgment against Defendants for breach of contract with fraudulent intent cause of action, for violation of the Unfair Trade Practices Act, and for actual, consequential, and punitive damages in an amount in to be more specifically proven at trial; together with attorneys' fees and the costs of this action, if permitted by law, and for such other and further relief as this Honorable Court may deem just and proper.

LEWIS, BABCOCK & GRIFFIN, L.L.P.



At Camden Lewis
J. Ryan Heiskell
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211-1208
Tel.: (803) 771-8000
Fax: (803) 733-3541
Email: acl@lbglegal.com
jrh@lbglegal.com

Attorneys for Plaintiff

Columbia, South Carolina
November 16, 2015.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)
) CIVIL ACTION NO.: 2015-CP-40-05698

) CIVIL ACTION NO.: 2015-CP-40-05698

)
)
)

CERTIFICATE OF SERVICE

employee of Lewis Babcock L.L.P, attorneys for

copy of the following **Amended Summons** a

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-40-05698

ANSWER TO AMENDED COMPLAINT

TO: A. CAMDEN LEWIS, ESQUIRE, ATTORNEY FOR PLAINTIFF, AND TO THE PLAINTIFF ABOVE NAMED:

Defendants, answering the Plaintiff's Complaint herein, would respectfully show unto the Court that:

FOR A FIRST DEFENSE

1. These Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.
2. Paragraph 1 of the Plaintiff's Complaint is admitted upon information and belief.
3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, Defendant Scott Clayton is a licensed professional adjuster. Defendant Clayton is not an employee of Carolina Casualty, but admits that he appeared on Carolina Casualty's behalf at the mediation held on July 20, 2015. Defendant Clayton did not sign the mediation agreement, but he agreed to participate in the mediation pursuant to the agreement.

4. In response to Paragraph 3 of the Plaintiff's Complaint, Defendant James DeLucia is not an employee of Carolina Casualty, but admits that he acted in his capacity as a representative of Carolina Casualty Insurance Company by attending the mediation by telephone on July 20, 2015. Defendant DeLucia did not sign the mediation agreement, but he agreed to participate in the mediation pursuant to the agreement.
5. In response to Paragraph 4 of the Plaintiff's Complaint, Defendant Carolina Casualty Insurance Company is an insurance company created and existing under the laws of a State other than South Carolina with its principal place of business in a State other than South Carolina. Carolina Casualty further admits that it does business in the State of South Carolina. The remaining allegations contained in Paragraph 4 are denied.
6. Paragraph 5 of the Plaintiff's Complaint states a legal conclusion to which no response is required. However, to the extent that a response is required, Paragraphs 5 is denied.
7. In response to the allegations contained in Paragraphs 6 through 19, these Defendants lack sufficient knowledge and information to form a response and therefore deny the same.
8. Paragraph 20 of the Plaintiff's Complaint is admitted.
9. In response to the allegations contained in Paragraph 21, Defendant Carolina Casualty Insurance Company admits that it has issued policies to Walker & Morgan at certain times, but lacks sufficient knowledge and information to form a response as to whether a policy issued by Carolina Casualty insured Walker & Morgan at the time of the alleged negligence and therefore denies the same.
10. In response to Paragraph 22 of the Plaintiff's Complaint, these Defendants admit that they participated in a mediation on July 20, 2015. Defendants deny that they signed a mediation contract or agreement, but admit that they impliedly or expressly agreed to the mediation

agreement. Defendants crave reference to the mediation agreement for all of its terms and conditions. The remaining allegations contained in paragraph 22 are expressly denied.

11. Paragraph 23 of the Plaintiff's Complaint is admitted upon information and belief.
12. Paragraphs 24 through 26 of the Plaintiff's Complaint are denied.
13. In response to the allegations contained in Paragraph 27 of the Plaintiff's Complaint, defendants admit that Carolina Casualty extended an Offer of Judgment through and on behalf of its insured Walker & Morgan in the amount of \$500,000 which Plaintiff accepted. That judgment has been paid and satisfied. The remaining allegations contained in Paragraph 27 of the Complaint are denied
14. In response to Paragraph 28 of the Plaintiff's Complaint, these Defendants repeat and reallege their responses to Paragraphs 1 through 27 above as if set forth fully verbatim below.
15. In response to Paragraph 29 of the Plaintiff's Complaint is admitted.
16. Paragraph 30 of the Plaintiff's Complaint is denied and Defendants crave reference to the mediation agreement for its express terms and conditions.
17. Paragraphs 31 through 35 of the Plaintiff's Complaint are denied.
18. In response to Paragraph 36 of the Plaintiff's Complaint, these Defendants repeat and reallege their responses to Paragraphs 1 through 35 above as if set forth fully verbatim below.
19. Paragraphs 37 through 42 of the Plaintiff's Complaint are denied.
20. Plaintiff's wherefore Paragraph is denied.

FOR A SECOND DEFENSE

21. The Complaint fails to state a claim upon which relief can be based and accordingly, these Defendants are entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

22. These Defendants would show, upon information and belief that any conduct by the Defendants were expressly or impliedly consented to by the Plaintiffs' participation in mediation and revealing the information, and the Defendants plead Consent as a complete defense to the Plaintiff's Complaint.

FOR A FOURTH DEFENSE

23. These Defendants allege, alternatively, that no contract exists between these Defendants the Plaintiff, no breach of any contract occurred and no claim for breach of contract and/or breach of contract accompanied by a fraudulent act against these Defendants exists.

FOR A FIFTH DEFENSE

24. The Plaintiff is estopped from asserting an action because he accepted the Offer of Judgment in the underlying tort action which has been satisfied and therefore Plaintiff has suffered no damages.

FOR A SIXTH DEFENSE

25. Any award of punitive damages should not exceed the greater of three (3) times the amount of compensatory damages as provided for in S.C. Code Ann. §15-32-530.

FOR A SEVENTH DEFENSE

26. Pursuant to S.C. Code Ann. §15-32-520, any proceeding to determine punitive damages should be bifurcated from any trial to determine liability and compensatory damages.

FOR AN EIGHTH DEFENSE

27. These Defendants would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that these Defendants could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because these Defendants can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates these Defendants' right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills these Defendants' exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A NINTH DEFENSE

28. The Plaintiff's claims against these Defendants are barred in whole or in part, in that the Plaintiff has failed to mitigate its damages, if any, which are specifically denied.

FOR A TENTH DEFENSE

29. These Defendants allege that the Plaintiff's Complaint fails to plead a cause of action for breach of contract accompanied by fraud with sufficient particularity as required by Rule 9(b), SCRPC.

FOR AN ELEVENTH DEFENSE

30. These Defendants would assert that the Plaintiff has failed to properly serve these Defendants and that this matter should be dismissed for insufficiency of process and insufficiency of service of process in accordance with Rule 12(b)(4) and Rule 12(b)(5) of the *South Carolina Rules of Civil Procedure*.

FOR A TWELFTH DEFENSE

31. These Defendants would show, upon information and belief, that the Court lacks jurisdiction over the Defendant James DeLucia in that Defendant DeLucia is a citizen and resident of New York without sufficient minimum contacts to justify jurisdiction over his person. Therefore, Defendant James DeLucia pleads lack of personal jurisdiction as a complete defense in this action.

FOR A THIRTEENTH DEFENSE

32. Defendants would show, upon information and belief, that this action is barred by the Doctrine of Res Judicata based on the Plaintiff's acceptance of an Offer of Judgment establishing the precise value of his claim in the underlying malpractice action filed

against Walker & Morgan. That Judgment was entered in Plaintiff's favor and, therefore, he is estopped from relitigating the value of his claim.

FOR A FOURTEENTH DEFENSE

33. The Plaintiff is without proper standing to assert any cause of action against these Defendants.

FOR A FIFTEENTH DEFENSE

34. Some or all of the Plaintiff's claims may be barred by the statute of frauds.

FOR A SIXTEENTH DEFENSE

35. These Defendants will show, upon information and belief that he who comes to equity must come with clean hands. In his Complaint, Plaintiff breaches the terms of the Mediation Agreement by revealing confidential settlement negotiations that are expressly protected by the terms of the agreement. Therefore, these Defendants plead the doctrine of "unclean hands" as a complete defense to the Complaint.

FOR A SEVENTEENTH

36. These Defendants specifically reserve the right to assert any further defenses as may be revealed by additional information acquired during discovery or otherwise from any other party herein. These Defendants further reserve the right to amend this Answer to assert any other applicable defenses, to assert any applicable cross and/or counterclaims, and to implead any other applicable parties.

WHEREFORE, having fully answered, the Defendants pray that the Plaintiff's Complaint be dismissed with costs.

The Defendants demand a jury trial.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

CIVIL ACTION NO: 2015-CP-23-02029

Brandon Crider,

Plaintiff,

v.

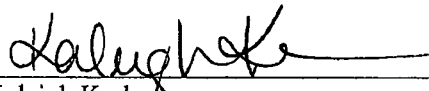
Walker & Morgan, LLC, William P. Walker,
Jr., and S. Kirkpatrick Morgan, Jr.,

Defendant.

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Defendants, do hereby certify that on **December 1, 2015**, I have served a copy of the foregoing **Defendants' Answer to Amended Complaint, and Defendants' Supplement to Defendants' Motion to Dismiss** to the Plaintiff in connection with the above-referenced case placing same in the U.S. mail, postage paid to:

A. Camden Lewis, Esquire
Lewis, Babcock & Hawkins
1513 Hampton St.
P.O. Box 11208
Columbia, SC 29211


Kaleigh Karlson

Columbia, South Carolina

IN THE CIVIL COURT

BRANDON CRIDER,

Plaintiff,

- VS -

JEFFREY SCOTT CLAYTON,
ET AL,

Defendants.

TRANSCRIPT OF RECORD

2015-CP-40-05698

April 4, 2016
Columbia, South Carolina

B E F O R E:

HONORABLE G. THOMAS COOPER, JR., Judge.

A P P E A R A N C E S:

A. CAMDEN LEWIS, Esquire
Attorney for the Plaintiff

JOHN R. MURPHY, Esquire
WESLEY BRIAN SAYWER, ESQUIRE
Attorneys for the Defendants

L. COCONUT PANTSARI, R.P.R.
Circuit Court Reporter

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INDEX OF WITNESSES

(Court Reporter's Note: There was no direct or cross examination of any witnesses).

INDEX OF EXHIBITS

(Court Reporter's Note: No exhibits were marked or received into evidence).

1 (The following proceedings are reported on
2 April 4, 2016.)

3 THE COURT: Good morning, Mr. Lewis,
4 Mr. Murphy. This is Brandon Crider versus Jeffrey
5 Clayton.

6 Mr. Murphy?

7 MR. MURPHY: May it please the Court, Your
8 Honor.

9 THE COURT: Yes, sir.

10 MR. MURPHY: Your Honor, I represent the
11 defendants, Scott Clayton, Jim DeLucia (phonetic), and
12 Carolina Casualty in a lawsuit that has been brought for
13 their alleged breach of a mediation agreement.

14 The cause of actions that have been alleged
15 are breach of contract with a fraudulent act -- the best
16 we can tell -- and violation of the South Carolina
17 Unfair Trade Practices Act.

18 Your Honor, the allegations of the complaint
19 just fail to establish any cause of action recognized or
20 under the cumulative facts of this case. First and
21 foremost, there is no allegation that the mediation
22 agreement was breached.

23 The mediation agreement clearly does not
24 render information that is discussed during the
25 mediation from being investigated or discovered

1 subsequent thereto just because it was mentioned during
2 the mediation, and that is the sum and substance of the
3 allegation.

4 THE COURT: How about the Rules of Civil
5 Procedure?

6 MR. MURPHY: Well, it's consistent with the
7 ADR rules because none of this was confidential. Nobody
8 tried to put a witness on the stand and gain an
9 admission or impeach them with something that that
10 person said in the confines of the mediation.

11 What happened was when information was
12 presented in the session of mediation from my
13 understanding and based on the allegations, it raised
14 certain issues.

15 It's not unusual at all in my experience to be
16 at a mediation, hear the other side's presentation, and
17 realize there may be issues you have overlooked,
18 underestimated or been unaware of.

19 The fact that those issues are addressed does
20 not prevent a party from investigating those issues and
21 making or finding admissible or discoverable evidence on
22 those issues.

23 I can think of, perhaps, in an automobile
24 accident, evidence someone that was intoxicated or maybe
25 even intended to hit someone with their car, the fact

1 that is mentioning the first time at mediation, would
2 not prevent a defense attorney from investigating it to
3 try to defend it or refute it.

4 It would not prevent an insurance carrier, who
5 had a representative there, from changing whether that
6 impacted coverage adversely to the insured, which is the
7 sum and substance of the allegations in this case.

8 What happened here was a reservation of rights
9 letter was issued after the mediation based on arguments
10 or positions that were espoused during the mediation,
11 and there is nothing that prevents that.

12 The information itself was not used. In this
13 instance no witness was compelled to testify about it
14 and no documents that were prepared just for the
15 mediation were attempted to be discovered.

16 Secondly, Your Honor, Mr. Crider accepted an
17 offer of judgment after mediation in the amount of
18 \$500,000. That pretty well moots everything we are
19 talking about. It was a voluntary settlement.

20 I have never known Mr. Lewis in my 30 years to
21 be coerced into a settlement by a mere reservation of
22 rights or some insinuation that coverage may not exist,
23 particularly in dealing with the particular defendants
24 in the underlying case.

25 It was offer of judgment that was accepted,

1 and pretty much there is no damage that has been alleged
2 from that. There is an allegation that maybe someone
3 thought more money could be paid, but the amount of
4 it --

5 THE COURT: Someone thought some more money
6 could be paid?

7 MR. MURPHY: It's an allegation that someone
8 authorized.

9 What is ironic about all of this, Your Honor,
10 is that in a case to sue someone for damages for
11 using -- allegedly using -- confidential information
12 from a mediation, plaintiff is using nothing but
13 confidential information from the mediation which would
14 be the actual sum and terms of settlement negotiations.

15 THE COURT: Where did the \$800,000 potential
16 offer come from?

17 MR. MURPHY: To my knowledge there was never
18 an offer of \$800,000. That was the plaintiff's demand.
19 The offer that was accepted was 500,000.

20 THE COURT: Right.

21 MR. MURPHY: All I'm saying is what is alleged
22 is that supposedly the insured authorized -- which
23 insureds don't control the amounts that are paid or the
24 defense -- but they supposedly authorized it.

25 Certainly, an insured who would authorize 800

1 would jump for joy if it was settled for 500. That's
2 what this case was by virtue of the acceptance of an
3 offer of judgment.

4 So the voluntary acceptance of that amount
5 really renders moot any other problems with this case.
6 There was never even a declaratory judgment filed on
7 coverage or anything, merely a reservation of rights
8 letter was issued.

9 Mr. Crider thought his case was worth \$500,000
10 in the underlying matter. He can't come into this court
11 and say it was actually worth much, much more.

12 Lastly, Your Honor, just the second cause of
13 action for unfair trade practices, we've cited several
14 of the cases that insurance is exempt from the Unfair
15 Trade Practices Act because it is a regulated industry
16 with its own claims practices act.

17 Of course, that statute does not give rise to
18 a private cause of action. So the SCUTPA claim is
19 invalid for that reason as well.

20 THE COURT: All right.

21 Mr. Lewis?

22 MR. LEWIS: Yes, sir. This is an unusual
23 case, and it should be because mediation agreements are
24 not supposed to be breached. They don't have and they
25 can't have this kind of activity for mediation to

1 survive.

2 Now, he sits up here and tells you that we
3 have nothing on 800,000. We have -- and this is part of
4 the proof. Of course you don't offer proof here -- but
5 each has said there is only the allegation that the
6 defendants said it should be 800,000.

7 Well, the defendants did say it was 800,000;
8 and they argued with the defendants, and they threatened
9 them with the denial of coverage. And lucky for us --
10 let me tell the theory behind this and it was our theory
11 and a good one.

12 We had a young man, Mr. Crider, who was an
13 orphan. He was a foster kid, no money, got
14 electrocuted; and he had recovered somewhat but he had
15 no mother, no father, nothing.

16 We were in mediation and they offered 500,000.
17 After mediation they withdrew it. But lucky for us,
18 they put back on the table an offer of judgment of
19 \$500,000.

20 After using the information we gave them at
21 mediation in which to leverage against coverage -- and
22 they wrote letters and people had to hire lawyers, and
23 they fought about coverage.

24 But during that they put the \$500,000 in an
25 offer of judgment and we said, "What luck. What a

1 terrible mistake the insurance company has made. We can
2 now fight the insurance company for their bad activities
3 and still get our boy his money."

4 Because you know why? An offer of judgment
5 only requires a satisfaction of judgment. It doesn't
6 release any other tort-feasor or anybody else, and it
7 doesn't act as res judicata on anything. All it does is
8 release the parties in the lawsuit. The parties in the
9 lawsuit was the law firm.

10 So we took the money, as we should have, for
11 our little boy, gave it to him, and then sued the real
12 culprit, the insurance company, for the breach of the
13 mediation contract.

14 They say, "Well, you can't do that because we
15 can use anything we get in mediation to be able to
16 discover things in the future." They came back from
17 mediation. No discovery was done. Nothing was done,
18 except to utilize the information they got in the
19 mediation.

20 We were sitting there. We are trying --
21 during mediation you are trying to put forth your best
22 case. It's not always the strongest of proof. Whatever
23 we said somehow, they said, led them to believe there
24 might have been no coverage. They jumped on the no
25 coverage. They never discovered no coverage. They

1 never did, except deny coverage at that time.

2 Now, their memorandum that Your Honor has
3 before him, on the first page says exactly what our
4 case is. It says -- and I will quote as soon as I
5 get my glasses on -- "At mediation plaintiff claimed
6 that Walker and Morgan was aware of its potential
7 liability for malpractice prior to the effective policy
8 period."

9 We didn't say that. We didn't even know when
10 the policy period was. But let's suppose we did say
11 that. Therefore, Carolina issued a reservation of
12 rights letter after mediation and asked for its insured
13 for additional information.

14 What we did was we said the facts. We never
15 said "We don't know what their coverage is or when they
16 applied for it or what reasons they did." But what they
17 do is they say right there that they used the
18 information that they got from Walker and Morgan in the
19 mediation against Walker and Morgan to deny malpractice
20 coverage.

21 They can't do that. That's utilizing and
22 breaching the agreement because the agreement says that
23 the information at mediation was confidential,
24 privileged, and inadmissible for any -- any -- purpose.

25 Now, this is a novel case -- and you know and

1 I know that novel cases in South Carolina aren't
2 supposed to be dismissed on the pleadings. They are
3 supposed to go through the merits so we can see it.

4 We haven't had a chance to do the merits
5 because of their -- where we are now. They moved to
6 dismiss, and we are trying to schedule depositions. Of
7 course, scheduling the defendant's deposition is the
8 only time that lawyers are busy every day of the week
9 for the next six months. So we are trying very hard to
10 do that.

11 THE COURT: How about your unfair trade
12 practices claim?

13 MR. LEWIS: That's interesting. I don't know
14 what the answer to that is, but I will tell you this.
15 If an unfair trade practices claim is not here, that
16 means that any breach of contract -- this isn't over
17 insurance -- this is over a breach of contract.

18 THE COURT: But you are suing the insurance
19 company.

20 MR. LEWIS: Well, they means any insurance
21 company can't be sued for breach of contract?

22 THE COURT: I didn't say that. I am just
23 asking you.

24 MR. LEWIS: I think it goes that far. It has
25 to do with the insurance contract. What if they go out

1 and buy a truck load of paper. They come in and say,
2 "We are the insurance company. We buy a truckload of
3 paper, and we don't pay for it."

4 They do that four or five times. They say,
5 "Okay. We will bring an Unfair Trade Practices Act."
6 They say, "No, you can't do that because we are an
7 insurance company." What if they go out and they run
8 over somebody in a car and they say, "You can't do that
9 because we are an insurance company."

10 What you have to do is be within the insurance
11 industry to be protected. This isn't the insurance
12 industry. This is a breach of contract. It's never
13 been stretched that far.

14 If you look at the cases they cite under
15 unfair trade practices, it's the practice of insurance
16 that they are being sued over. It's the business of
17 insurance. So we say --

18 THE COURT: Does it have to be under the
19 statute?

20 MR. LEWIS: Yes, sir. They have to be an
21 insurance, an activity of insurance, not a breach of a
22 contract.

23 As to the fraudulent contract with fraudulent
24 intent, we need to replead that. I will agree to that.
25 I haven't done it specifically enough. If we do it

1 specifically enough, we will replead that one because we
2 didn't do a very good job on that.

3 But the other two, the unfair trade practices,
4 you have to rule that all an insurance company has to be
5 is a defendant; and if he's a defendant and it's called
6 an insurance company, he cannot be sued for unfair trade
7 practices. That simply is not the law.

8 As to this case in chief, we have alleged
9 there was a contract. They have agreed that they were
10 under the contract, that they performed under the
11 contract -- that is the defendants.

12 We allege that they breached the contract by
13 using the secret information to their advantage. They
14 didn't do it for purposes -- and I'm not sure they can
15 even do that. But Mr. Murphy says they can discover
16 stuff on that. Well, that's like -- what is it
17 called -- the poison apple in criminal cases?

18 THE COURT: Fruit of the poisonous tree.

19 MR. LEWIS: Sir?

20 THE COURT: Fruit of the poisonous tree.

21 MR. LEWIS: That's right. You can find it
22 some third way, but they didn't do that. They used it
23 directly out of the mediation. And when they used it
24 directly out of mediation, they violated the
25 confidential privilege for any purpose requirements of

1 mediation.

2 We cited a bunch of the cases in this thing
3 that show why mediation is so important, show why it's
4 so much a part of mediation that you keep things that
5 you learn in mediation out of the litigation.
6 Otherwise, mediation goes nowhere.

7 If we rule that you can't give them your whole
8 story, then you have to make sure you give them only
9 what they have discovered. You can't be free to sit
10 there and talk about things.

11 You can't be free to say -- now, if they learn
12 them otherwise, like the pill of the tree or the poison
13 tree, they learn them outside, that's is different. But
14 that's not the case here. They admit that.

15 They went right out of the mediation, withdrew
16 coverage. The defendants had to hire lawyers. They
17 fought back and forth. Then lucky for me they put
18 forward a settlement demand and an offer of judgment,
19 which was like manna from heaven for me and my little
20 boy.

21 He took it. He has got it, at least that
22 amount of money. He is living better than he has done
23 in his whole life. What we want to do is make sure that
24 the insurance company -- because their people asked them
25 and they said that here -- their people asked them to

1 pay \$800,000 and they refused.

2 We were at the point of 500, and we were
3 supposed to wait for another offer. All of a sudden,
4 they got up and left because they were going to withdraw
5 coverage at mediation because of what was said in the
6 mediation.

7 That means if we are in mediation and we have
8 to start worrying about what the insurance company might
9 learn while they are sit there in mediation that they
10 can deny coverage? That will certainly discourage
11 mediation, Your Honor.

12 THE COURT: Let me hear from Mr. Murphy.

13 MR. MURPHY: Just a couple of things, Your
14 Honor. I just want to quote from the mediation
15 agreement. It's there on page 3. It says,
16 "Notwithstanding the foregoing, evidence that is
17 otherwise admissible or discoverable shall not be
18 rendered inadmissible or not discoverable as a result of
19 its use in the mediation."

20 At best, on their best day, that is all they
21 have alleged. They have not alleged anything that would
22 not be inadmissible or not discoverable was used or
23 disclosed, even they have done a lot of that themselves.

24 Your Honor, the scope of disclosure at
25 mediation is a risk you always run. It's a risk you run

1 if you file a motion for summary judgment. You might
2 tip off the other side as to what is weak about their
3 case or maybe what is weak about your case.

4 The plaintiff who says in mediation, "Oh, I
5 smoked a joint before the accident," you can't impeach
6 him with, "Did you say at mediation you smoked a joint
7 before the accident?"

8 But you can go get his hospital records and
9 you can try to prove it. Just because he said it at
10 mediation does not prevent a defense lawyer from using
11 that information and finding and discovering if you can.
12 If you can't find it, you can't put him or the mediator
13 or his lawyer on the stand to say, "Didn't you say at
14 mediation?"

15 So in this case what was done was when the
16 presentation that was made that indicated notice may
17 have preexisted because they were possibly aware of the
18 potential claim against them for Mr. Crider at a certain
19 point in time well before Mr. Crider actually filed the
20 lawsuit and the law firm notified its insurer.

21 That evidence is evidence that can be
22 investigated and a reservation of rights would be proper
23 at that time. An insurance company who failed to issue
24 a reservation of rights might not be able to use that
25 information later if they didn't immediately advise

1 their insured that they were aware of some facts that
2 could jeopardize coverage.

3 However, the fact that the case settled for
4 \$500,000 and was an offer of judgment accepted pretty
5 much shows that it wasn't relied on very heavily; and
6 the case settled after mediation. That's why no
7 coverage litigation was instituted at all.

8 But if defense or plaintiff, either side,
9 cannot take information that the other side presents in
10 a mediation and then if it creates an issue in your mind
11 that you had overlooked or you had never heard about
12 before, if you are not allowed under this language from
13 following up on that, then we will never have mediation.

14 Because a side can use all their good
15 information at mediation but then prevent people from
16 filing lawsuits against people, to prevent them from
17 doing their job on a case, whether it's investigating
18 the defense, the damages, or even coverage.

19 Lastly, Your Honor, to say that this is not
20 the practice of insurance, defending an insured in a
21 civil lawsuit against them under a liability,
22 professional liability policy, participating in
23 mediation settling that case, if that's not insured,
24 there is no such thing.

25 THE COURT: All right. Anything further?

1 MR. LEWIS: No, Your Honor.

2 THE COURT: Proposed orders. Ten days. Thank
3 you.

4 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 C E R T I F I C A T E

2 I, the undersigned L. Coconut Pantsari, Official
3 Reporter for the Fifth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is
5 a true, accurate, and complete Transcript of Record of
6 all the proceedings had and the evidence introduced in
7 the hearing of the captioned cause, relative to appeal,
8 in the Civil Court for Richland County, South Carolina,
9 on the 4th day of April, 2016.

10 I do further certify that I am neither of kin,
11 counsel, nor interest to any party hereto.

12
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14 November 11, 2016

15
16 s/L. Coconut Pantsari

17 Court Reporter
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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-40-05698

MOTION TO DISMISS

TO: A. CAMDEN LEWIS, ESQUIRE, ATTORNEY FOR PLAINTIFF, AND TO THE PLAINTIFF ABOVE NAMED:

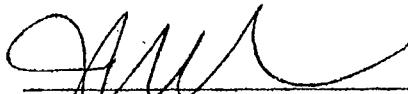
YOU WILL PLEASE TAKE NOTICE that the Defendants, by their undersigned counsel, will move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard for an Order dismissing the Plaintiff's Complaint pursuant to Rules 12(b) (2) and (6) of the South Carolina Rules of Civil Procedure. Plaintiff's Complaint purports to allege two causes of action: (1) Breach of Contract with Fraudulent Intent, and (2) Violation of Unfair Trade Practices Act. The Complaint fails to allege a breach of contract and specific facts to support the allegations of fraud. Also, the Unfair Trade Practices Act does not apply to insurance. Therefore, Plaintiff has failed to state facts sufficient to constitute a cause of action and the case should be dismissed.

James DeLucia is a citizen of New York whose residency is in New York. He does not have sufficient minimum contacts in this State to support personal jurisdiction. Therefore, this

Court lacks personal jurisdiction over him, and he should be dismissed as a defendant in this case.

This motion will be supported by a memorandum of law along with exhibits and applicable law, cases, and statutes as cited.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1233
(803) 782-4140 (facsimile)
Email: wsawyer@murphygrantland.com

Columbia, South Carolina
October 15, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-40-05698

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

Defendants, by and through their undersigned counsel, respectfully submit this
Memorandum of Law in support of their Motion to Dismiss:

SUMMARY

In an underlying action, Plaintiff sued Carolina Casualty's insured, the law firm of Walker & Morgan, for legal malpractice arising out of an electricity burn case. At the mediation of that case, 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 the mediation and asked its insured for additional information on the coverage issue. It is this conduct for which Plaintiff now asserts these third-party claims against Defendants. In essence, he claims that by revealing relevant, factual information at mediation, the information became shielded from subsequent investigation or discovery. The plain language of the Mediation Agreement states otherwise. According to the terms of the agreement "evidence, that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its

use in the mediation.” Therefore, Carolina Casualty had every right to investigate the newly discovered coverage issue. Moreover, any rule making such information unusable would encourage gamesmanship and dissuade parties from participating in mediation.

Plaintiff’s Complaint purports to assert two causes of action: (1) breach of contract accompanied by fraudulent act; and (2) violation of the South Carolina Unfair Trade Practices Act (SCUTPA). However, the Complaint fails to allege facts that constitute a breach of contract, fails to allege an accompany fraudulent act, and fails to allege any resulting damages. Moreover, when the General Assembly enacted the SCUTPA, it expressly excluded the insurance industry from the scope of the Act. Because the Complaint alleges claims against Carolina Casualty in its handling and adjustment of claims under an insurance policy, the Complaint fails to allege a cognizable claim under the SCUTPA.¹

ALLEGATIONS OF THE COMPLAINT

Plaintiff vaguely alleges that Defendants breached a mediation agreement.² Paragraphs six through twenty-two of the Complaint merely allege Crider’s underlying cause of action against Walker & Morgan, P.A, who is not a party. The only factual allegations that could arguably support Plaintiff’s claim in this case are contained in paragraphs twenty-two through twenty-seven. The crux of these paragraphs allege that Defendants participated in the mediation of Plaintiff’s

¹ Defendant James DeLucia is a resident of New York who attended the mediation by phone. He has raised lack of personal jurisdiction as a defense in the motion. That issue is included in the Motion to Dismiss in order to preserve the defense. However, because the issues raised in this motion may render the personal jurisdiction question moot, personal jurisdiction is not being addressed in the memorandum. Defendant DeLucia reserves the right to argue personal jurisdiction in a separately filed motion in the future.

² The Mediation Agreement is attached to Plaintiff’s Complaint as Exhibit A. Therefore, the Mediation Agreement is incorporated by reference and the Court is free to consider the terms of the agreement without converting this motion to dismiss into a motion for summary judgment. See *Brazell v. Windsor*, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) (holding that trial court does not convert a 12(b)(6) motion into a motion for summary judgment by considering documents incorporated by reference into a complaint).

case against Walker & Morgan and then used "information it obtained during the confidential mediation to threaten and strong arm the Plaintiff and even its own insureds with the contention that insurance coverage may not exist on Plaintiff's claims." (Compl. ¶¶ 22-24). Ultimately, "Defendants then made an offer of judgment of \$500,000.00, which was the offer at mediation, still threatening Plaintiff that they would not move and would continue to deny coverage based upon the illegal use of the information obtained at mediation." (Compl. ¶ 27).

Although Plaintiff fails to tell the Court in his Complaint, he accepted the offer of judgment.³ (Ex. A, Notice of Acceptance of Offer of Judgment and Judgment in Favor of Plaintiff). Defendant Carolina Casualty Insurance Company fully protected its insured and the suit filed by Plaintiff against Carolina Casualty's insured was fully resolved. (Ex. B, Satisfaction of Judgment).

The Mediation Agreement – which, according to the copy attached to Plaintiff's Complaint was only signed by counsel for Plaintiff and counsel for the defendant in the underlying lawsuit – provides the following confidentiality provision:

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*

³ 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 Wittohn 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)).

mediation.

(Mediation Agreement, Ex. C). The Complaint does not allege what information Defendants utilized or why the Mediation Agreement precluded use of the information. Moreover, the Complaint does not allege that any confidential information was disclosed to any third parties. Upon information and belief, the Complaint may refer to information disclosed by Crider or his counsel at mediation that Carolina Casualty's insured may have had notice of the claim prior to the policy period during which Carolina Casualty received formal notice of the claim. Such information would indeed jeopardize coverage under the claims made policy issued by Carolina Casualty to its insured. Therefore, Carolina Casualty requested information on this issue subsequent to the mediation. In other words, Carolina Casualty asked for discoverable information relating to the coverage question, which could not be rendered inadmissible or not discoverable as a result of its use in the mediation.

I. Plaintiff's Complaint fails to allege facts to show a breach of contract.

"To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach."⁴ *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004) (citations omitted). The Complaint must allege a fraudulent act independent of the act constituting the breach of contract. *Minter v. GOCT, Inc.*, 322 S.C. 525, 529-30, 473 S.E.2d 67, 70-71 (Ct. App. 1996).

⁴ The Complaint calls the first cause of action "Breach of Contract with Fraudulent Intent." South Carolina does not recognize a cause of action by that name. Rather, South Carolina recognizes separate causes of action for breach of contract and breach of contract accompanied by a fraudulent act.

A. The Complaint fails to allege facts that show use of confidential information.

The relevant portion of the Mediation Agreement provides that evidence "that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its use in the mediation." In other words, a party cannot reveal significant facts at mediation and then claim that the facts are no longer subject to discovery or use at trial. Despite the plain language of the Mediation Agreement, this is exactly the sort of information that Plaintiff now claims was protected. At mediation, he revealed that Carolina Casualty's insured might have had knowledge of the claim prior to the beginning of the claims-made policy period. This factual information is highly relevant and would have been admissible and discoverable both in the underlying tort case and in any subsequent declaratory judgment action regarding coverage. By the plain terms of the Mediation Agreement, Plaintiff could not render this information confidential by waiting until mediation to reveal it.

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), SCRCPP. 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. For example, if a defendant admits at mediation that he was intoxicated at the time of an automobile collision, the opposing side cannot use the admission at trial to impeach the defendant. However, the confidentiality provision does not extend to the mere existence of substantive evidence or legal arguments. Therefore, after the mediation, the plaintiff in the intoxication example would be free to send a subpoena for medical records relating to intoxication or to ask the defendant whether he was intoxicated at a post-mediation deposition. Otherwise, a party could attend mediation, discuss every piece of negative evidence that has yet to be discovered, and then argue that the opposing party is barred from conducting discovery on those issues. Obviously, the rules are not intended to permit this. Rather, as the enumerated list shows, the confidentiality is more limited in scope to provide protection for traditional settlement negotiations, i.e. offers, demands, and admissions.

If Plaintiff's Complaint were actionable, then he could reveal important facts at mediation and then use the confidentiality provision as a shield from any discovery or use of that fact at trial. Such a rule would encourage gamesmanship and harm the truth-seeking function of the litigation process. The language in the Mediation Agreement expressly disavows any such rule, and provides that otherwise discoverable or admissible facts remain discoverable and admissible even if they are disclosed at mediation. The Complaint does not allege any confidential facts that were

not otherwise admissible or discoverable that Carolina Casualty used.⁵

The South Carolina Court of Appeals addressed this issue in an unpublished decision, *Hicks v. Hicks*, 2011 WL 11733613 (Ct. App. March 24, 2011) (unpublished). In that divorce matter, Husband argued that certain financial records produced during mediation were confidential and inadmissible. The Court of Appeals rejected this argument: “the Alternative Dispute Resolution Rules do not expressly restrict the admission of evidentiary material provided during mediation if that material was not created solely for the mediation.” Therefore, information regarding the insured’s notice of the possible claim is not protected by Rule 8.

Plaintiff through his counsel at mediation asserted that the insured had notice of the claim prior to the policy period in force when it reported the claim to Carolina Casualty. Because Carolina Casualty issued a claims-made policy, the date of notice of the claim has a direct relation to whether the claim would be covered. The date of notice of a claim is significant and highly relevant to coverage. The information would be admissible and discoverable in any declaratory action. Moreover, Plaintiff knew that Carolina Casualty was present at the mediation when he disclosed this information. Rather than making the information confidential, the plain terms of the Mediation Agreement clearly expressed that Carolina Casualty was free to then go and look further into the situation.⁶ Because this is all that the Complaint alleges, the Complaint fails to allege facts sufficient to constitute a breach of contract.

⁵ In fact, the Complaint fails to even allege what “confidential” information Carolina Casualty used after mediation. The failure to allege any particular facts renders the Complaint defective on its face.

⁶ Ironically, Plaintiff has breached the confidentiality agreement in his Complaint. The amount of settlement offers is precisely the kind of information that is protected by the confidentiality provision in the Mediation Agreement and the ADR rules. Nonetheless, Plaintiff breaches the agreement and the ADR rules by stating in his Complaint the amount of offers or demands at mediation. (Compl. ¶ 27).

B. The Complaint fails to allege publication of confidential facts to third parties.

Another necessary fact to show a breach of the Mediation Agreement requires disclosure of confidential information to a third party. The Mediation Agreement states that “such offers, promises, conduct, and statements will not be disclosed *to third parties*” (emphasis added). The Complaint merely alleges that Carolina Casualty communicated its coverage concerns with its own insured – who was a party to the Mediation Agreement. Therefore, the Complaint fails to allege a necessary fact to show a claim of breach of contract: publication of confidential information to a third party.

II. Plaintiff’s Complaint fails to satisfy the Rule 9(b) requirement that allegations of fraud must be stated with particularity.

The second and third elements of Plaintiff’s breach of contract claim accompanied by fraudulent act claim require fraudulent intent and conduct, including (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach.” Rule 9(b) provides that “[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.” *RoTec Services, Inc.*, 359 S.C. at 470, 597 S.E.2d at 883. Rule 9(b), SCRPC. “Because Plaintiff alleges breach of contract accompanied by a fraudulent act, Plaintiff must plead the allegations of fraud with particularity as required by the heightened pleading standard in Rule 9(b)” *Advanced Pain Therapies, LLC v. Hartford Financial Services Group, Inc.*, 2014 WL 4402800 (Sept. 3, 2014). Furthermore, the fraudulent act must stand independent of the act that constitutes a breach of the contract. *Minter*, 322 S.C. at 529-30, 473 S.E.2d at 70-71.

Rather than plead with particularity facts constituting a fraudulent act, Plaintiff has alleged no fraud whatsoever. Instead, the Complaint merely alleges that Carolina Casualty breached the Mediation Agreement by informing its insured that facts revealed at mediation may have an impact

on coverage under the policy. This is not a fraudulent act. The Complaint fails to allege any pretense or any hidden action by Carolina Casualty. In fact, the Complaint alleges the exact opposite: Carolina Casualty was forthright in its conduct. It learned facts indicating a coverage question and promptly notified its insured and requested information relating to the issue. (Compl. ¶ 24).

The Supreme Court addressed the fraudulent act requirement in the seminal case of *Branham v. Wilson Motor Co.*, 188 S.C. 1 (1938). The plaintiff entered into a contract for the purchase of a used automobile. The seller agreed to obtain insurance for the vehicle, and charged an additional fee for the premium. However, the dealer never purchased the requisite policy and used the funds for its own purposes. The Plaintiff's vehicle suffered damage and he sued for breach of contract accompanied by a fraudulent act. The Plaintiff alleged that the dealer never intended to purchase the insurance policy and that it always intended to use the funds for its own purposes. Looking at these factual allegations, the Supreme Court held that the Complaint failed to allege a breach of contract accompanied by fraudulent act. *Id.* at 418. At most, the Complaint merely alleged breach of a contract with fraudulent intent, which is insufficient to state a cause of action beyond mere breach of contract. *Id.* The Supreme Court held, "there must be a fraudulent act accompanying the breach, with fraudulent intent in order to sustain a claim for punitive damages." *Id.* Otherwise, the Complaint could state nothing more than a breach of contract and Plaintiff's damages were limited to traditional contractual damages. *Id.*

Carolina Casualty did not breach the Mediation Agreement. But assuming arguendo that it did, the Complaint does not allege any accompanying fraudulent act beyond the breach itself. Carolina Casualty did not act fraudulently. It learned of facts relating to coverage, raised its coverage concerns with its insured, and requested additional information to investigate the issue.

Even as alleged in the Complaint, these facts simply do not constitute fraudulent conduct. The Complaint's allegations are a far cry from the sort of particularity required by Rule 9(b).

III. Plaintiff fails to allege any damages.

Despite the coverage question, Carolina Casualty extended an offer of judgment in the amount of \$500,000.00. Plaintiff accepted that offer. This is not a case where Carolina Casualty denied coverage and refused to pay. Carolina Casualty offered and Plaintiff accepted \$500,000.00. If he believed his case was worth more, then his proper relief was to proceed in the tort case against the insured. By accepting the offer, Plaintiff is bound to a conclusion that his damages equal no more than \$500,000.00 and he is collaterally estopped from arguing otherwise in this case. Therefore, Plaintiff cannot show any damages suffered as a result of the alleged conduct.

IV. 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 second cause of action, Plaintiff seeks recovery for violations of the South Carolina Unfair Trade Practice Act (SCUTPA), S.C. Code § 39-5-10 et seq. However, the SCUTPA explicitly excludes the insurance industry from the scope of the Act. South Carolina Code Annotated Section 39-5-40 states that "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." Title 38 of the South Carolina Code deals with and regulates the insurance industry and Chapter 57 -- called the Insurance Trade Practices Act -- sets out the definitions of and consequences for insurance unfair trade practices. In particular, § 38-57-10 declares:

The purpose of this chapter is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all the practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

S.C. Code Ann. § 38-57-10. By setting out to encompass all acts constituting an unfair trade practice in the insurance industry, the General Assembly left no crumbs for the SCUTPA.

The United States District Court for the District of South Carolina has consistently read the SCUTPA and § 38-57-10 in this way. In *Colonial Life & Accident Insurance Company v. American Family Life Assurance Company of Columbus*, 846 F. Supp. 454 (D.S.C. 1994), Judge Shedd considered whether a claim for an insurer's false advertising could proceed under the SCUTPA. After citing § 39-5-40(c) and § 38-57-50, he held that the purported conduct (false advertising) fell within the exemption from the SCUTPA. Therefore, the defendant was entitled to summary judgment on that claim. *Id.* at 463.

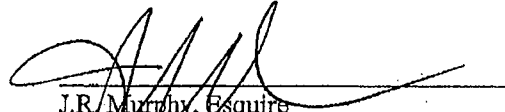
Likewise, in *Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Co.*, 868 F. Supp. 128 (D.S.C. 1994), Judge Currie considered whether a claim against insurance adjusters for unfair trade practices in adjusting a claim could survive summary judgment. After citing § 39-5-40(c), Judge Currie 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 Complaint alleges conduct that falls squarely within the ambit of insurance claims handling. Plaintiff alleges that Carolina Casualty participated in mediation as an insurance carrier, learned facts relevant to insurance coverage, and then raised coverage concerns with its insured and sought additional information relating to the coverage issue. Few actions fall more 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, Plaintiff's Complaint fails to allege facts sufficient to constitute a cause of action. The first cause of action for breach of contract accompanied by a fraudulent act fails because the facts show neither a breach of contract nor a fraudulent act. The SCUTPA claim fails because the General Assembly expressly left the insurance industry outside of the scope of the SCUTPA. Also, the Complaint fails to allege any damages. Therefore, the Complaint should be dismissed in its entirety.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1233
(803) 782-4140 (facsimile)
Email: wsawyer@murphygrantland.com

Columbia, South Carolina
October 15, 2015

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C/A NO. TO BE DETERMINED

BRANDON CRIDER,

Plaintiff,

vs.

WALKER & MORGAN, LLC, WILLIAM P.
WALKER, JR., AND S. KIRKPATRICK
MORGAN, JR.
Defendants,

NOTICE OF ACCEPTANCE OF
OFFER OF JUDGMENT AND
JUDGMENT IN FAVOR OF
PLAINTIFF

TO: DEFENDANTS AND THEIR COUNSEL, JOEL W. COLLINS, JR., ESQUIRE,
AND BRIAN A. COMER, ESQUIRE OF COLLINS AND LACY, P.C.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Brandon Crider, by and through
his undersigned counsel hereby accepts Defendants' Offer of Judgment in the amount of Five
Hundred Thousand and 00/100 Dollars (\$500,000.00) filed with the Lexington County Clerk of
Court¹ on August 19, 2015, a copy of which is attached hereto as Exhibit A.

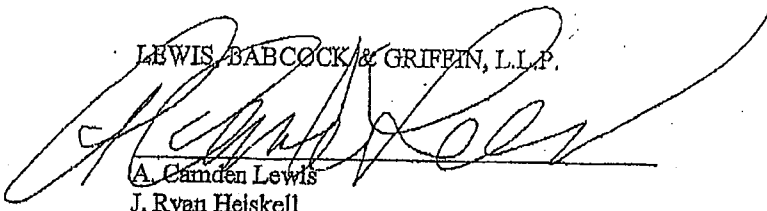
THEREFORE, pursuant to the attached Offer of Judgment, a judgment against the
Defendants, Walker & Morgan, LLC, William P. Walker, Jr., and S. Kirkpatrick Morgan, Jr., in
the amount of Five Hundred Thousand and 00/100 Dollars (\$500,000.00) shall be recorded with
the Court of Common Pleas in the County of Lexington.

(SIGNATURE PAGE TO FOLLOW)

¹ This case was originally filed with the Greenville County Court of Common Pleas, Case No. 2015-CP-23-2029.
Counsel for Defendants moved to have the case transferred to Lexington County Court of Common Pleas, and
counsel for Plaintiff consented. To date, counsel for Defendants have not filed the appropriate documentation with
Greenville County to transfer and part of the case still resides with Greenville County.



LEWIS, BABCOCK & GRIFFIN, L.L.P.



A. Camden Lewis

J. Ryan Heiskell

P.O. Box 11208

1513 Hampton Street (29201)

Columbia, SC 29211

Tel: 803-771-8000

Fax: 803-733-3541

Email: ac@lbglegal.com

jrh@lbglegal.com

Attorney for Plaintiff

Columbia, South Carolina
September 2, 2015

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C/A NO. TO BE DETERMINED

BRANDON CRIDER,

Plaintiff,

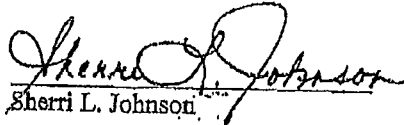
vs.

WALKER & MORGAN, LLC, WILLIAM P.
WALKER, JR., AND S. KIRKPATRICK
MORGAN, JR.
Defendants.

CERTIFICATE OF SERVICE

I, Sherri L. Johnson, the undersigned employee of Lewis Babcock & Griffin L.L.P., attorneys for Plaintiff do hereby certify that I have served a copy of the foregoing Notice of Acceptance of Offer of Judgment and Judgment in Favor of Plaintiff in connection with the above-referenced case via hand delivery, to the following addresses:

Joel W. Collins, Jr., Esq.
Brian A. Comer, Esq.
Collins & Laoy, P.A.
1330 Lady Street, Sixth Floor
Columbia, SC 29201


Sherri L. Johnson

September 2, 2015

EXHIBIT A



Brian A. Comer | D: 803.266.0448 | E: boomer@collinsandlacy.com

August 19, 2015

VIA UNITED STATES MAIL

The Honorable Beth Carrigg
Lexington County Clerk of Court
205 East Main Street, Suite 146
Lexington, SC 29072-3599

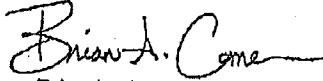
Re: Brandon Crider v. Walker Morgan, LLC, et al.
Civil Action No.: TO BE DETERMINED
Claim No. 30363
C&L File No. 001326-00115

Dear Ms. Carrigg:

Enclosed for filing with your office are an original and one (1) copy of Defendants' Offer of Judgment in the above-referenced action. Please file the original and return a clocked copy to us in the envelope enclosed for your convenience.

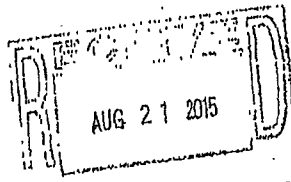
By copy of this letter, we are hereby serving Plaintiff's counsel with a copy of the same.

Sincerely,


Brian A. Comer

BAC/kyn
Enclosures

cc: A. Camden Lewis, Esquire



COLLINS & LACY, P.C. 1330 Lady Street, Sixth Floor | Columbia, SC 29201 | Post Office Box 12487 (29211)
P: 803.266.2660 P: 803.771.4484 collinsandlacy.com

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Brandon Crider,

Plaintiff,

vs.

Walker Morgan, LLC; William P. Walker,
Jr., and S. Kirkpatrick Morgan, Jr.,

Defendants,

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: To Be Determined

DEFENDANTS'
OFFER OF JUDGMENT

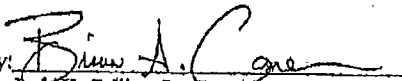
Defendants Walker Morgan, LLC, William P. Walker, Jr., and S. Kirkpatrick Morgan, Jr. (collectively, "Defendants"), by and through their undersigned attorneys, and pursuant to Rule 68 of the South Carolina Rules of Civil Procedure and South Carolina Code section 15-35-400, hereby offer to allow judgment to be taken by Plaintiff Brandon Crider against Defendants in the amount of Five Hundred Thousand and 00/100 Dollars (\$500,000.00) in this action. If this Offer of Judgment is not accepted within twenty (20) days after notification, or prior to or on the tenth (10th) day before the actual trial date, whichever occurs first, the Offer of Judgment shall be considered rejected.

If this Offer of Judgment is not accepted, it shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. If this Offer of Judgment is expressly rejected and Defendants subsequently obtain a verdict or a determination on the merits at least as favorable as the rejected Offer of Judgment, Defendants will petition the Court for the recovery of costs, interest, attorney's fees, and other recoverable monies as provided by the law. This Offer of Judgment is not, and should not, be construed as an admission by Defendants of any liability whatsoever in this action or any other action.

EXHIBIT A

Respectfully Submitted,

COLLINS & LACY, PC

By: 

Joel W. Collins, Jr., Esquire

jcollins@collinsandlacy.com

Brian A. Comer, Esquire

bcomer@collinsandlacy.com

1330 Lady Street, 6th Floor (29201)

Post Office Box 12487

Columbia, SC 29211

803.256.2660

803.771.4484 (fax)

ATTORNEYS FOR WALKER MORGAN, LLC;
WILLIAM F. WALKER, JR. AND S.
KIRKPATRICK MORGAN, JR.

Columbia, South Carolina
August 19, 2015

EXHIBIT A

CERTIFICATE OF SERVICE

The undersigned does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

A. Camden Lewis
J. Ryan Heiskell
Lewis Babcock & Griffin, LLP
Post Office Box 11208
Columbia, SC 29211
ACL@LBGLegal.com
JRH@LBGLegal.com
Counsel for Plaintiff

PLEADING(S): DEFENDANTS' OFFER OF JUDGMENT

Susan R. M. O.

Columbia, South Carolina
August 19, 2015

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C/A NO. 2015-CP-23-2029

BRANDON CRIDER,
Plaintiff,

vs.

WALKER & MORGAN, LLC, WILLIAM P.
WALKER, JR., AND S. KIRKPATRICK
MORGAN, JR.
Defendant.

SATISFACTION OF JUDGMENT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. EICKENSHIMER
2015 SEP 15 AM 10 53

TO: DEFENDANTS AND THEIR COUNSEL, JOEL W. COLLINS, JR., ESQUIRE,
AND BRIAN A. COMER, ESQUIRE OF COLLINS AND LACY, P.C.

For and in consideration of payment received in the amount of Five Hundred Thousand
and 00/100 Dollars (\$500,000.00), Plaintiff, by and through his undersigned attorneys,
acknowledge satisfaction and payment in full of the judgment entered by the Clerk of Court for
the Greenville County Court of Common Pleas on September 8, 2015 against Walker & Morgan,
LLC, William P. Walker, Jr., and S. Kirkpatrick Morgan, Jr.

Accordingly, Plaintiff hereby authorizes the Clerk of Court to satisfy the Judgment on its
records, thus, ending the matter pursuant to Rule 68 of the South Carolina Rules of Civil
Procedure.

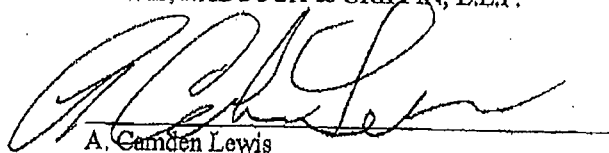
Verified

(SIGNATURE PAGE TO FOLLOW)

ENTERED COMPUTER



LEWIS, BABCOCK & GRIFFIN, L.L.P.



A. Camden Lewis

J. Ryan Heiskell

P.O. Box 11208

1513 Hampton Street (29201)

Columbia, SC 29211

Tel: 803-771-8000

Fax: 803-733-3541

Email: ac@lbglegal.com

[jr@lbglegal.com](mailto:jrh@lbglegal.com)

Columbia, South Carolina
September 10, 2015

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C/A NO. 2015-CP-23-2029

BRANDON CRIDER,

Plaintiff,

vs.

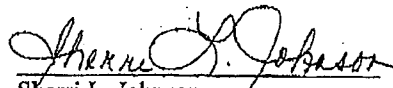
WALKER & MORGAN, LLC, WILLIAM P.
WALKER, JR., AND S. KIRKPATRICK
MORGAN, JR.
Defendants.

CERTIFICATE OF SERVICE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL E. WICKENSIMER
2015 SEP 15 AM 10 53

I, Sherri L. Johnson, the undersigned employee of Lewis Babcock & Griffin L.L.P.,
attorneys for Plaintiff do hereby certify that I have served a copy of the foregoing **Satisfaction of**
Judgment in connection with the above-referenced case via hand delivery, to the following
addresses:

Joel W. Collins, Jr., Esq.
Brian A. Comer, Esq.
Collins & Lacy, P.A.
1330 Lady Street, Sixth Floor
Columbia, SC 29201


Sherri L. Johnson

September 10, 2015

ENTERED COMPUTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Brandon Crider,)
Plaintiff,)
vs)
Walker & Morgan, LLC, William)
P. Walker, Jr., and S. Kirkpatrick)
Morgan, Jr.,)
Defendants.)

MEDIATION AGREEMENT
15-CP-232-02029

This is an Agreement by the parties to the above-captioned action to submit the same to mediation. The purpose of the mediation is to attempt to arrive at a mutually acceptable resolution of this dispute.

By executing this Agreement, the parties agree and stipulate:

1) 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 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. 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.



- 2) In the event the Mediator meets privately with any party during the course of the mediation, the Mediator will not reveal what is said by one of us to the other without permission.
- 3) To facilitate a resolution, the Mediator, the parties, and their counsel will work to ensure that each party appreciates the strengths and weaknesses of each side's factual and legal contentions. Both in the exchange of information and opinions, and in the evaluation of that information, each party will have the opportunity and responsibility candidly to disclose to the Mediator the facts, theories, and opinions on which it intends to rely with regard to the matters in dispute.
- 4) The mediation process will focus on the interests and objectives of the parties and possible solutions that the parties believe would be fair, equitable, and mutually beneficial. Each party will work with the Mediator in considering and evaluating solutions that would satisfy its own interests and those of the other parties.
- 5) Representatives of the parties with full settlement authority will attend the mediation session.
- 6) The parties will follow the recommendation of the Mediator regarding the agenda most likely to resolve the dispute. All parties will participate in the mediation process in good faith until discharged by the Mediator or until the Mediator declares an impasse.
- 7) The Mediator is not acting as an attorney nor providing legal advice on behalf of any party in the course of this mediation.
- 8) Robert M. Erwin, Jr., of Greenwood, South Carolina, shall serve as Mediator in this case.

9) The mediation will be held at the law offices of Brian Comer, Columbia, South Carolina. The session will begin at 10:00 a.m. on Monday, July 20, 2015.

10) As a part of the mediation process, Mr. Erwin will conduct premediation activities, which will include, but not be limited to, the submission of a premediation brief or memorandum by each of the parties. In addition, the premediation activities may include document submissions, meeting or telephone conferences with each of the parties, and general information exchanged.

10) Mr. Erwin will bill for his services at his normal hourly rate of Three Hundred Seventy Five (\$375.00). Actual expenses will be billed at cost.

11) Unless otherwise agreed upon, each party agrees to divide the mediation fees and expenses on an equal basis, depending upon the number of parties actually participating in the mediation process.

12) Any settlement agreement reached through this process shall be reduced to writing and signed by all parties participating in such settlement.

13) It is expressly understood by the parties and their representatives that the mediator does not offer legal advice in this mediation and is not functioning as an attorney. In this mediation, the mediator's role is to aid the parties in seeking a fair agreement in accordance with their respective interests. The construction of a proposed agreement and any question of law should be referred by the parties to their own legal counsel.

AGREED, this ____ day of July, 2015.

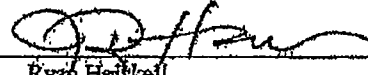
COLLINS & LACY

BY: 

Brian Comer
1330 Lady St.
Columbia, SC 29201
(803) 256-2660

Attorneys for Defendants

LEWIS BARCOCK & GRIFFIN

BY: 

Ryan Heidkeil
P.O. Box 11208
Columbia, SC 29211
(803) 771-8000

Attorneys for Plaintiff

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.

**SUPPLEMENT TO DEFENDANTS' MOTION
TO DISMISS**

**TO: A. CAMDEN LEWIS, ESQUIRE, ATTORNEY FOR PLAINTIFF, AND TO THE
PLAINTIFF ABOVE NAMED:**

Defendants' Motion to Dismiss was filed with the Richland County Court on October 30, 2015. On November 16, 2015, Plaintiff filed an Amended Summons and Complaint. The grounds for the original motion apply with equal force to the Amended Complaint. Therefore, Defendants request that the Motion to Dismiss proceed and that the Clerk schedule the motion for a hearing.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1233
(803) 782-4140 (facsimile)
Email: wsawyer@murphygrantland.com

Columbia, South Carolina
December 1, 2015

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) CASE NO.: 2015-CP-40-05698

PLAINTIFF'S MEMORANDUM
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

POSTAL ADDRESS
NUMBER
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157 ROUTE 1A, COVINGTON
CO, LA 70038

INTRODUCTION

Plaintiff and Defendants entered into a mediation contract¹ 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, Defendants admit exactly what Plaintiff 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.

It is this conduct for which Plaintiff now asserts these third-party claims² against Defendants. In essence, he claims that by revealing

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 Plaintiff has not brought third-party claims; he and Defendants entered into a contract upon which he has brought

relevant, factual information at mediation, the information became shielded from subsequent investigation or discovery...

Defendants 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. Defendants continued to utilize information obtained during the confidential mediation despite having been subsequently notified that such was in violation of the Mediation Agreement.³ Despite their admission, which tracks Plaintiff's allegations in this case, Defendants assert that Plaintiff's claims should be dismissed because he fails to allege facts to constitute a breach of contract.

BACKGROUND

On June 16, 2006, when he was thirteen (13) years old, Plaintiff Brandon Crider was threatened and chased by a group of young men, who were throwing rocks and other objects at him. In a desperate attempt to avoid the bullying and the direct hits of the rocks being hurled in his direction, Plaintiff sought refuge by climbing the nearest tree. Unfortunately, due to the negligence of the power company, the tree that Plaintiff climbed was not properly trimmed away from the active power line running very close to the tree. As the young boy climbed the tree, it began to sway and caused him to lose his grip of the branches. He reached out for something to grab to avoid a significant fall from the tree but, unfortunately grabbed ahold of the active power line. Immediately, thousands of volts of electricity shot through Brandon's body and exited out of the tops of both of his feet, causing him to fall approximately twenty feet from the tree to the ground. As a result of the negligence of the power company in failing to follow its own procedures, guidelines, and protocol, as well as the law, Plaintiff Brandon Crider suffered very

suit.

³ While this is not a motion for summary judgment, Plaintiff did notify Defendants by letter that the confidential information obtained had no basis in fact.

serious injuries.

At the time of his injuries, Plaintiff was residing in a foster home. The South Carolina Department of Social Services ("DSS") had legal custody of Plaintiff. Following the accident, DSS discouraged Plaintiff and his foster mother from meeting with attorneys to discuss a potential lawsuit against the power company and/or any other potential defendants. However, a month after Plaintiff 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. The fee agreement between Plaintiff and Walker & Morgan was executed on April 4, 2011.

Plaintiff 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. Despite assurances that the case would progress in the proper manner, Walker & Morgan negligently failed to ever file a complaint on Brandon's behalf. Defendants never contacted Plaintiff to instruct him that they would not be pursuing the case for him. Because he was a minor at the time of the accident and pursuant to S.C. Code §15-3-40, Plaintiff had one year in which to file a lawsuit against the power company for his injuries. His statute, therefore, passed on his birthday in March of 2012. As a result, Plaintiff's claims against the power company and/or any other potential defendant are now time-barred by the statute of limitations.

Plaintiff brought an action against Walker & Morgan and its partners for professional negligence in their handling of Mr. Crider's underlying case. Walker & Morgan and its lawyers were insured by Defendant Carolina Casualty Insurance Company at the time of the alleged negligence. After some initial discovery, Defendants agreed to mediate the case with the help of Mediator Robert M. Erwin, Jr., Esq. ("Bob Erwin"). The mediation was held on July 20, 2015.

Defendants attended the mediation. 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**, Mediation Agreement. 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.

Soon after, Plaintiff learned that Defendants were using information it obtained during the confidential mediation to threaten and strong arm Plaintiff, and even its own insureds, with the contention that insurance coverage may not exist on Plaintiff's claims; confidential information that was learned from mediation. Defendants used this information as a threat for withdrawing all offers made and utilized this illegitimate hammer to beat down any further offers. Defendants continued to utilize information obtained during the confidential mediation despite having been subsequently notified that such was in violation of the Mediation Agreement. Since the offer was withdrawn and given back as an offer of judgment, no release was required and, therefore, Plaintiff would be able to get \$500,000.00 without releasing the bad actors. Plaintiff was alone, had no mother, and no family, this was the best course of action for Plaintiff given the Defendants' breach of the mediation contract.

STANDARD

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). 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*, at 116, 628 S.E.2d at 874 (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; *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.

ARGUMENT

1. 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).

Plaintiff alleges in his Complaint that he and Defendants 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. Plaintiff further alleges that Defendants breached the mediation contract and their agreement by using information they obtained during the confidential mediation to threaten Plaintiff, and even its own insureds, with the contention that insurance coverage may not exist on Plaintiff's claims. Plaintiff alleges that Defendant Carolina Casualty Insurance Company used this information as a basis for withdrawing all offers made and further intended to utilize the confidential statements as a basis for refusing future negotiations. Plaintiff also alleges that he suffered damages, as more fully described below, as a result of Defendants' breach of the terms of the Mediation Agreement.

This is a novel issue of fact and law, but Plaintiff has clearly met his burden of properly pleading his causes of actions to survive a motion to dismiss under Rule 12(b) 6 as more fully described below.⁴

All parties, through their respective Counsel, entered into a contract to conduct a confidential mediation of Plaintiff's claims in his underlying lawsuit. Specifically, those in attendance and bound by the contract's terms were: Defendants Jeffrey Clayton, James DeLucia, individually and on behalf Carolina Casualty Insurance, Kirk Morgan, Defendant in the underlying suit, their Counsel, and Plaintiff and his Counsel. Defendant DeLucia attended by telephone pursuant to an agreement between the parties.

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...

Exhibit A, Mediation Agreement.

Defendants entered into the confidentiality agreement as a pre-condition of its participation in the mediation. This agreement,⁵ which was prepared in compliance with Rule 601 of the South Carolina Court-Annexed Rules for Alternate Dispute Resolution, requires the absolute confidentiality of information obtained during mediation. Rule 8 of Rule 601 provides as follows:

⁴ As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRPC, 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).

⁵ Defendants' use of the information they obtained during mediation should be considered a direct violation of this Rule.

(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;

...

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

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

SC R ADR Rule 8; *See Burch v. Burch*; 395 S.C. 318 717 S.E.2d 757; *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).

After several hours of negotiations between the parties, with the help of Mediator Bob Erwin, Defendants’ offer had risen to \$500,000 to settle Plaintiff’s claims. Mr. Erwin, however, indicated to Plaintiff that there was substantially more money available to meet the valuation Defendants had placed on the case. Specifically, upon information and belief, the case had been

valued at around \$800,000, and that Walker & Morgan had authorized Defendants to offer and pay that amount, which was well within their limits of coverage.

Again, Defendants admit exactly what Plaintiff 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.

It is this conduct for which Plaintiff now asserts these third-party claims⁶ against Defendants. In essence, he claims that by revealing relevant, factual information at mediation, the information became shielded from subsequent investigation or discovery...

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, participants in the mediation process will be reluctant to fully participate in the mediation process, substantially reducing its usefulness and effectiveness to the limited extent specifically set forth in Rule 8(b), SCADR.⁷ Courts recognize that "[t]he assurance of confidentiality is essential to the integrity and success of the Court's mediation program, in that confidentiality encourages candor between the parties

⁶ Plaintiff has not brought third-party claims; he and Defendants entered into a contract upon which he has brought suit.

⁷ Rule 8 should also be read in conjunction with Rule 10, SC R ADR:

(b) Sanctions. If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRPC; Rule 10, SC R ADR.

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.” *RegScan, Inc. v. Bureau of Nat. Affairs, Inc.*, No. 1:11CV1129 JCC/JFA, 2012 WL 2994075, at 8 (E.D. Va. July 19, 2012)(quoting *In re Anonymous*, 283 F.3d 627, 636 (4th Cir.2002)). Indeed, using confidential mediation communications would have the effect of seriously impairing, if not destroying, the effectiveness of the confidential mediation program by forcing mediation participants to conduct themselves in a “cautious, tight-lipped, non-committal manner.” *In re Anonymous*, 283 F.3d 627, 636 (4th Cir. 2002) (quoting *In re Lake Utopia Paper Ltd.*, 608 F.2d 928, 930 (2d Cir. 1979)). Defendants have done just that in this case; they have violated the mediation program by using confidential information obtained during mediation to take advantage of the settlement negotiations.

As admitted to in their brief, Defendants used confidential communication made at the mediation at issue in this case and that improperly used information had no basis in fact; it was merely mentioned that Plaintiff had received information from a questionable informant that Defendants had notice of Plaintiff’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. Defendants 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, Defendants continued to use the baseless comment as a battering ram against both Plaintiff and its own insured to force a settlement. Although not directly communicated to Defendants by Plaintiff, 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).

Additionally, Defendants vaguely argue that the named Defendants are not necessarily individually liable for the alleged breaches, as only counsel for Walker & Morgan signed the Agreement. However, such an assertion is absolutely refuted by their admissions in their Answer at ¶¶ 3-4 and the Rule:

Parties participate in a mediation and have a stake in resolving the dispute, having either been requested or judicially ordered to attend, or having entered into a mediation submission agreement. Necessary participants are the mediator and the opposing parties and their representatives; experts may be included where mediation involves technical matters (e.g., architects, engineers) or family issues (e.g., child psychologist, social worker). **As to mediation confidentiality, the term participants includes more than the mediation parties or disputants. Other persons attending mediation on behalf of the disputants, such as their counsel, are themselves distinct participants** (and may be subject to contractual or statutory nondisclosure of confidential mediation-related communications they made or received).

SC R ADR Rule 10; *see also, 50 Causes of Action 2d 609* (Originally published in 2011)(Emphasis added).

In addition, and as noted above, Defendants have admitted to their violation of the express language of the Mediation Agreement, specifically the language which states that information obtained during mediation was *confidential, privileged, and inadmissible for any*

purpose. On the first page of their Memorandum, Defendants admit exactly what Plaintiff 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.

It is this conduct for which Plaintiff now asserts these third-party claims⁸ against Defendants. In essence, he claims that by revealing relevant, factual information at mediation, the information became shielded from subsequent investigation or discovery... Carolina Casualty had every right to investigate the newly discovered coverage issue.

What is left out of Defendants' admission are the additional facts accompanying their breach of the Mediation Agreement. Defendants obtained the confidential information and immediately used the same to inappropriately terminate the mediation process. Defendants used the confidential information for the purpose of threatening Plaintiff, and even their insured, in violation of the Mediation Agreement.

Defendants' actions during and after the confidential mediation process were done in bad faith and in violation of the Rules. The most obvious reason to require parties to negotiate in "good faith" is to prevent tolerance of abusive behavior in mediation. As the number of participants in court-annexed mediation grows, sophisticated repeat players have begun to develop tactics to take advantage of disputants. *See* John Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. REV. 69, 78 (2002) (noting that without a "good faith" standard of some sort, participants may just "go through the motions" during the mediation or may try to take advantage of lesser-situated opponents for information or using mediation to harass an

⁸ Plaintiff has not brought third-party claims; he and Defendants entered into a contract upon which he has brought suit.

opponent.) While our State has not statutorily imposed a good-faith requirement upon participants of a mediation, South Carolina does imply such a duty in every contract entered into in this State that would apply in this case, "There exists in every contract an implied covenant of good faith and fair dealing." *Time Warner Cable v. Condo Services, Inc.*, 672 S.E.2d 816 (S.C. Ct. App. 2009). *See also*, 30 S.C. Jur. Contracts A § 47. Defendants have violated that implied covenant by improperly using confidential information obtained during the mediation which was not to be used for **any purpose**; information they knew to be without any factual basis.

Plaintiff has properly and adequately pleaded his cause of action for breach of contract; Defendants entered into a contract with Plaintiff, breached the express terms of that contract, and caused damage to Plaintiff.

2. BREACH OF CONTRACT WITH FRAUDULENT INTENT

In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct.App.1986). The fraudulent act is any act characterized by dishonesty in fact or unfair dealing. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921).

Plaintiff has properly and adequately pleaded a breach of contract, as described above and detailed in his Complaint. Defendants breached the mediation contract and their agreement by using a statement they obtained during the confidential mediation to threaten Plaintiff, and even its own insureds, with the contention that insurance coverage may not exist on Plaintiff's claims. Plaintiff further alleges that this breach was accompanied by Defendants' fraudulently continued use of information obtained during the confidential mediation, despite having been subsequently notified by that there was no evidence to support that confidential information upon which they were relying to challenge coverage. Plaintiff also alleges that Defendants' breach of contract and fraudulent, unfair, and dishonest acts have caused Plaintiff to suffer actual and consequential damages, for which Defendants are liable. Compl. ¶¶ 38-40.

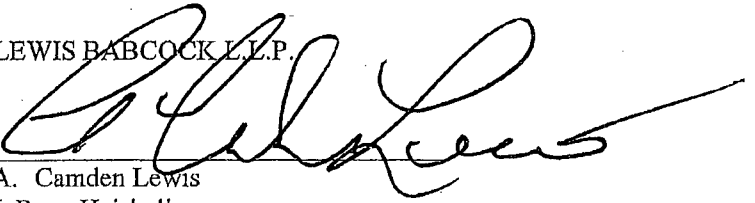
Despite the assertions of Defendants, the dishonest, fraudulent intent and acts complained of are separate and distinct from the making of the contract and are described with particularity in the Complaint and herein. Again, Plaintiff has alleged that the breach was accompanied by Defendants' fraudulently continued use of information obtained during the confidential mediation, despite having been subsequently notified by that there was no evidence to support that confidential information upon which they were relying to challenge coverage. As such, Defendants' Motion to Dismiss this cause of action should be dismissed.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss as to the causes of action of Breach of Contract and breach of Contract with Fraudulent Intent should be dismissed.

(SIGNATURE ON FOLLOWING PAGE)

LEWIS BABCOCK LLP.



A. Camden Lewis
J. Ryan Heiskell
1513 Hampton Street (29201)
Post Office Box 11208
Columbia, South Carolina 29211-1208
Tel.: (803) 771-8000
Fax: (803) 733-3541
Email: acl@lewisbabcock.com
jrh@lewisbabcock.com

Attorneys for Plaintiff

Columbia, South Carolina
April 4, 2016

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.: 2015-CP-40-05698

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J. R. Murphy, Esq.
Wesley B. Sawyer, Esq.
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, South Carolina 29260

Sherri L. Johnson

16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CASE NO.: 2015-CP-40-05698
Brandon Crider,	)	
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MOTION TO ALTER OR
	)	AMEND, PURSUANT TO RULE 59(e)
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.	)	

Pursuant to Rule 59(e), Plaintiff Brandon Crider hereby moves to alter or amend the Order Granting Defendants' Motion to Dismiss filed May 4, 2016. This motion is based on the fact that the Order misstated the facts and/or law in the following ways:

1. The court misunderstood the effect of an acceptance of an offer of judgment and misapplied the doctrine of collateral estoppel. The Order concludes that by accepting an offer of judgment, the Plaintiff 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, a rudimentary understanding of collateral estoppel¹ indicates that it has no application here.

¹ The order does not indicate whether collateral or equitable estoppel supposedly applies to Plaintiff. 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.

“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 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.

2. The 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.²

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 death." Williams v. Arai Hirotake, Ltd., 931 F.2d 755, 757 (11th Cir. 1991).³ 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.

3. The Order found that the Defendants 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 Defendants are exempt grossly oversimplifies the law which contains the exemption. SCUTPA only exempts

² Of course, here, Defendants may actually be **subsequent** tortfeasors who clearly were not released by the acceptance of the offer of judgment. Plaintiff's damages for the subsequent tort is the amount of recovery Plaintiff could have had in the original malpractice case but for Defendants' breach of contract.

³ 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)

“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];⁴ fraudulently inducing a person to lapse, forfeit, or retain a policy [§ 38-57-60]; 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, Defendants have breached a contract and misused confidential mediation information, which are not acts governed by the Insurance Trade Practices Act.⁵ In other words, the exemption in SCUTPA cannot apply to an insurance company’s misuse of confidential information in breach of a mediation contract.

4. The Order completely misinterpreted the confidentiality requirements of mediation, ruling that because there was no disclosure to third parties or use of confidential

⁴ 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 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.

⁵ In fact, the phrase “breach of contract” does not even appear in the Insurance Trade Practices Act.

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 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 Defendants 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.

Defendants obtained confidential information during mediation and used that information as a threat for withdrawing the offers made and utilized this illegitimate 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.⁶

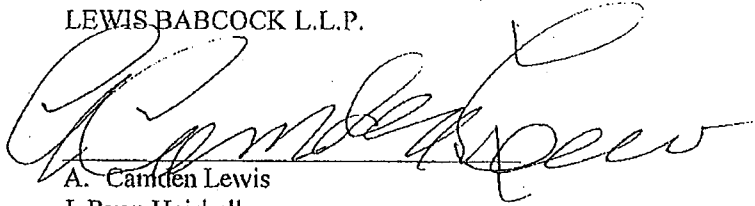
CONCLUSION

As set forth above, the court should alter or amend its order and reinstate Plaintiff’s complaint and allow this case to proceed.

(SIGNATURE ON FOLLOWING PAGE)

⁶ As the defendant DeLucia has already been informed, an attorney that is an insurance company’s agent cannot use the confidential relationship to gather information to deny the insurance coverage. Parson v. Continental National Am. Group, 550 P. 2d 94 (Az. 1976).

LEWIS BABCOCK L.L.P.



A. Camden Lewis

J. Ryan Heiskell

Ariail E. King

1513 Hampton Street (29201)

Post Office Box 11208

Columbia, South Carolina 29211-1208

Tel.: (803) 771-8000

Fax: (803) 733-3541

Email: acl@lewisbabcock.com

jrh@lewisbabcock.com

Attorneys for Plaintiff

Columbia, South Carolina
May 16, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-40-05698

**RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO ALTER OR
AMEND**

Defendants, by and through their undersigned counsel, respectfully submit this Response in Opposition to Plaintiff's Motion to Alter or Amend, Pursuant to Rule 59(e):

SUMMARY

The Court's May 4, 2016 Order accurately states the law and applies the plain language of the mediation agreement. Plaintiff's attempts to attack the Order fail to address any error in the Court's May 4, 2016 Order. Because Plaintiff's Motion to Alter or Amend fails to point to any error of law or fact, the motion should be denied.

I. The Court correctly held that Plaintiff's Amended Complaint fails to allege a breach of the Mediation Agreement.

Although the Court's Order begins with the fundamental question of whether the Amended Complaint even alleges a breach of the Mediation Agreement, Plaintiff only addresses this issue at the end of his motion. More importantly, Plaintiff's Motion fails to show how the Amended Complaint alleges facts that constitute a breach of the Mediation Agreement. The Mediation Agreement provides that information disclosed at mediation "will not be disclosed *to third parties*"

and that it is “confidential and inadmissible *at any subsequent evidentiary proceeding*” or is “*inadmissible* for any purpose, including impeachment, under Rule 408”

The Court correctly held that the Amended Complaint fails to allege that Defendants either disclosed confidential mediation communications to third parties or used mediation statements or materials in a judicial proceeding. Because the Amended Complaint fails to allege facts to support a necessary element of the claim for breach of contract, the Court correctly dismissed the Amended Complaint.¹

II. Acceptance of an offer of judgment creates a binding judgment on the merits as to Plaintiff’s damages in the underlying tort case.

The Court’s Order correctly holds that a plaintiff who accepts an offer of judgment is bound to a conclusion that his damages equal no more than the amount of the resulting judgment. Here, to prove damages for breach of contract, Plaintiff must show that, but for the conduct alleged in the Complaint, he would have recovered a larger judgment in the underlying tort matter. However, the judgment that he elected to accept of \$500,000 determines the totality of his damages as a matter of law. Therefore, he is estopped from arguing in this case that his damages in the underlying case should have been more than \$500,000, which he has already recovered.

Plaintiff argues that estoppel does not apply because Defendants were not parties to the underlying tort case. Respectfully, this is an incorrect statement of the law. To apply collateral estoppel, Defendants need only show that *Plaintiff* was a party to the underlying litigation:

“The doctrine of non-mutual offensive collateral estoppel was adopted in this State by this court in *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984), and was confirmed as the law of this State by our Supreme Court in *South Carolina Prop. and Cas. Ins.*

¹ Notably, Plaintiff’s Motion to Alter Amend also fails to state why the information was confidential. As the Court held on page six of its Order, Plaintiff bears the burden of asserting sufficient factual information to state his cause of action. See Rule 8, SCRPC. The Amended Complaint fails to allege what information was disclosed at mediation or why that information would not be “otherwise admissible or discoverable.” (Mediation Agreement).

Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). Under the doctrine of offensive non-mutual collateral estoppel, a party may be prevented from relitigating issues actually determined in a prior court action so long as the party estopped had a full and fair opportunity to litigate the issue in the first action and there are no circumstances which justify according him an opportunity to retry the issue.

Middleborough horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 475, 465 S.E.2d 765, 796 (Ct. App. 1995). Because Plaintiff obtained a judgment as to the amount of his damages, offensive collateral estoppel applies and he is unable to argue in this case that his damages in the underlying suit were more than the judgment he obtained.²

Although the Court cites three cases in its Order that support its determination that Plaintiff's damages in the underlying case were established by entry of the Offer of Judgment, Plaintiff only attacks one – the *McCutcheon* case. In doing so, Plaintiff relies upon the Eleventh Circuit's decision in *Williams v. Arai Hirotake, Ltd.*, 931 F.2d 755 (11th Cir. 1991), and South Carolina's Contribution Among Joint Tortfeasors Statute. S.C. Code § 15-38-50. However, the facts at issue in *Williams* and those in the present case are different.

In *Williams*, the Eleventh Circuit merely recognized that the settlement in that case did prevent the settling plaintiff from suing another tortfeasor because the second tortfeasor could be liable for *separate* damages from those for which the settling defendant may have been liable. In other words, the judgment in that case was not a determination of the Plaintiff's *total* damages

² The Court's Order accurately cites three cases for this rule of law. See Order, p. 8 (citing *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); *Hanley v. Mazda Motor Corp.*, 239 Mich. App. 596, 609 N.W.2d 203 (Ct. App. 2000) (holding a Rule 68 judgment constitutes a judgment on the merits and a binding determination of plaintiff's damages arising out of a tort injury); and *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).

from the underlying accident, but only the proportional damages for which the settling defendant may have been liable. *Id.* at 758 (“Nevertheless, the parties negotiated a release of the state court defendants with the understanding that apportionment potentially applied under § 768.81, *i.e. that the defendants were potentially liable only for the percentage of the injury based on their own fault.*”) (emphasis added). Here, the same issues do not apply. Defendants are not joint tortfeasors with the defendants in the underlying lawsuit, and the issue here is not whether Defendants in this case are jointly liable for the conduct of the tortfeasors in the underlying case. Rather, the issue is that Plaintiff cannot prove damages in this case because he obtained a \$500,000 judgment in his prior lawsuit and he is estopped from now arguing that his damages *in that same prior lawsuit* against those *same defendants* were more than the judgment he obtained. The Eleventh Circuit’s holding in *Williams* does not contradict the Court’s finding here. Therefore, *Williams* is inapplicable.

In contrast, the conclusions reached in *McCutcheon*, *Continental Nat. Bank v. Dolan*, and *Hanley v. Mazda Motor Corp.*, each supports this Court’s conclusion. Because the underlying judgment estops plaintiff from now arguing that he could have recovered more in that case, he cannot prove damages under his breach of contract claim.

III. The SCUTPA does not apply to Plaintiff’s claim against an insurance company and its agents for conduct that took place in the business of insurance.

This Court correctly followed the decisions of the District Court in holding that the SCUTPA does not apply to conduct of an insurer taken in the course of defending its insured or disputing coverage with its insured. The SCUTPA “does not supersede or apply to unfair trade practices covered and regulated under” the Insurance Trade Practices Act. S.C. Code Ann. § 39-5-40. In its declaration of purpose, the General Assembly plainly stated its intent in creating the Insurance Trade Practices Act:

The purpose of this chapter is to regulate practices in the business of insurance . . . by defining, or providing for the determination of *all the practices* in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

S.C. Code Ann. § 38-57-10. This Court properly relied upon the District Court's conclusion in *Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Company*, 868 F. Supp. 128, 130 (D.S.C. 1994), which held that "Chapter 57 clearly is intended to define and regulate all unfair trade practices regarding the insurance business . . ." "Therefore, *all* unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act . . . and are exempt from the coverage of SCUTPA." *Id.* at 130-31.

The Insurance Claims Practices Act also specifically addresses misrepresentations made in adjusting a claim. *See* S.C. Code Ann. § 38-57-70 ("No person may, in connection with adjusting any claim . . . misrepresent to an insured, or any other person having an interest in the proceeds payable under the contract . . . coverage or effect of the contract or policy, for the purpose and with the intent of effecting a settlement of the claim . . . on less favorable terms than those proposed or contemplated in the policy."). Therefore, to the extent that Plaintiff alleges Defendants breached the contract by misrepresenting either the agreement at mediation or in any other way, this conduct falls squarely within the scope of the Claims Practices Act.

The SCUTPA expressly exempts the business of insurance from its reach. Defending an insured, participating in mediation, and raising coverage issues are all basic components of the business of insurance. Therefore, the Court properly held that the SCUTPA does not apply to the conduct alleged in the Amended Complaint.

CONCLUSION

For the above-stated reasons, Plaintiff's Motion to Alter or Amend should be denied. The Court's May 4, 2016 Order fully addresses the issues and accurately states the law. Plaintiff's

Motion fails to point to any mistake of law or misapprehension of the case. Moreover, the Order is right. Plaintiff's Complaint fails to allege facts constituting a breach of the terms of the Mediation Agreement or damages. Also, the General Assembly exempted the business of insurance from the scope of the SCUTPA. Therefore, the Court's Order should stand, and Plaintiff's Motion should be denied.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1233
(803) 782-4140 (facsimile)
Email: wsawyer@murphygrantland.com

Columbia, South Carolina
June 1, 2016

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-40-05698

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys
for Defendants, do hereby certify that on **June 1, 2016**, I have served a copy of the foregoing
Defendants' Response in Opposition to Plaintiff's Motion to Alter or Amend to the Plaintiff
in connection with the above-referenced case placing same in the U.S. mail, postage paid to:

A. Camden Lewis, Esquire
Lewis, Babcock & Hawkins
1513 Hampton St.
P.O. Box 11208
Columbia, SC 29211


Kaleigh Karlson

Columbia, South Carolina



MURPHY & GRANTLAND, P.A.

J. R. Murphy
Direct dial 803-454-1231
jrmurphy@murphygrantland.com

April 6, 2016

VIA U.S. MAIL AND EMAIL

The Honorable G. Thomas Cooper, Jr.
P.O. Box 192
Columbia, SC 29202

Brandon Crider 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

Civil Action No.: 2015-CP-40-05698

Claim No.: 30363

Our File No.: 1580-0009

Dear Judge Cooper:

I am writing to you in a follow up to the motion hearing held before you this past Monday, April 4, 2016 at the Richland County Courthouse. I represent the Defendants and filed the pending Motion to Dismiss on their behalf. At the start of the hearing, opposing counsel handed up Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, which had just been filed the same day and was provided to me at the same time. Because I did not have an opportunity to review the memorandum until after the hearing, I am writing to advise the Court of my strong objection to the contents of the Memorandum.

As you know, Plaintiff in this case alleges that Defendants breached the confidentiality provision of a Mediation Agreement in a legal malpractice action Plaintiff previously brought against the firm of Walker & Morgan. Respectfully, Plaintiff uses information in his Memorandum that is protected by the terms of the same Mediation Agreement. The use of this information in a Court pleading not only violates the agreement, but it violates Rule 8 of the South Carolina ADR Rules. In particular, Plaintiff alleges the following: "After several hours of negotiations between the parties, with the help of Mediator Bob Erwin, Defendants' offer had risen to \$500,000 to settle Plaintiff's claims. Mr. Erwin, however, indicated to Plaintiff that there was substantially more money available to meet the valuation Defendants had placed on the case." (Pl's Mem. in Opp. To Def's Mot. to Dismiss, p. 8). Moreover, the memorandum does not state where Plaintiff obtained the "information and belief" that the case had been valued at around \$800,000 and that Walker & Morgan had authorized Defendants to offer that amount, but if that information was disclosed at mediation, it is highly inappropriate to include it in a public court filing.

Telephone 803-782-4100 • Facsimile 803-782-4140
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

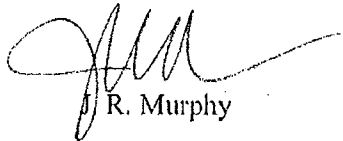
J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr
Alice P. Adams Tim J. Newton Chris A. Majure Robert M. Peele, III Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III
*Member-American Board of Trial Advocates

Moreover, as set forth in Defendant's Memorandum, Carolina Casualty simply advised its insured that a coverage issue may have existed by issuing a reservation of rights letter after the mediation and requesting additional information, which was its right to do. The importance of this issue cannot be overstated. Plaintiff's Complaint does not allege that Defendants shared anything disclosed at mediation with anyone who did not attend mediation. Plaintiff, on the other hand, has made a public filing of information that is clearly confidential and protected by the Mediation Agreement and the ADR Rules. By including these allegations in a publicly-filed memorandum, Plaintiff has blatantly breached the confidentiality rules.

I am writing to note my objection to the information and argument placed in Plaintiff's memorandum. Not only do they violate the confidentiality requirements of the ADR rules and the Mediation Agreement, but in a Motion to Dismiss, they are not the proper subject of the Court's consideration because they go well beyond the allegations of the Amended Complaint. We are filing our proposed Order also requested by the Court and will submit it to you this week.

By copy of this letter, I am advising Attorney Lewis of my objection to his Memorandum and my communication with the court regarding the same. With warm personal regards, I am

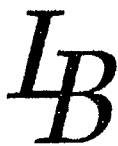
Sincerely yours,



J. R. Murphy

JRM/wbs

cc: A. Camden Lewis, Esquire (via email)
Shelagh M. Savino, Esquire (via email)



LAW OFFICES OF
**LEWIS
BABCOCK**
L.L.P.

A. CAMDEN LEWIS
ATTORNEY AT LAW

Post Office Box 11208
Columbia, South Carolina 29211
o. 803-771.8000 f. 803-733-3534
ACL@lewisbabcock.com

April 6, 2016

VIA EMAIL (GCOOPERLC@SCCOURTS.ORG & GCOOPERJ@SCCOURTS.ORG)

The Honorable G. Thomas Cooper, Jr.
P. O. Box 192
Columbia, SC 29202

Re: Brandon Crider 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
Case No.: 2015-CP-40-05698

Dear Judge Cooper:

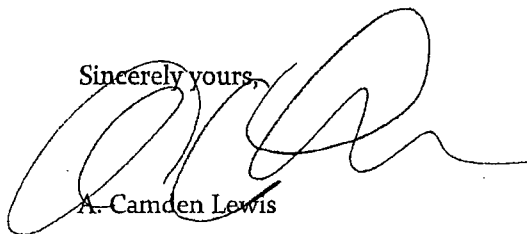
I am in receipt of Mr. Murphy's letter to you dated April 6, 2016, in regard to the above-referenced matter. I am not in the habit of engaging in a letter writing war. However, Mr. Murphy has taken this opportunity to write you this letter rather than submitting the proposed Order as requested by the Court.

There is no secret that a \$500,000.00 offer was made. An Offer of Judgment was made by the Defendants in the underlying litigation and was accepted as explained at the hearing. Mr. Murphy represents the insurance company and his letter would seem to imply that he has no knowledge of the \$800,000 figure. Mr. Murphy's lack of knowledge is contradicted by a letter written to his clients, Carolina Casualty Insurance and James DeLucia, from Walker Morgan's attorney, George Kefalos, Esq., attached hereto as Exhibit A.

All information included in our memorandum finds its basis in the out of mediation documents, i.e. Offer of Judgment, Satisfaction of Judgment and Exhibit A.

We will be forwarding to you our proposed Order as requested.

Sincerely yours,



A. Camden Lewis

ACL/kc

Enclosure: as stated

cc: J. R. Murphy (via email: JRMurphy@murphygrantland.com)
Wesley B. Sawyer (via email: WSawyer@murphygrantland.com)



George J. Kefalos P.A.
ATTORNEYS AT LAW

George J. Kefalos, Esquire
george@kefaloslaw.com

August 4, 2015

Via email: james.delucia@mendes.com

James DeLucia, Esquire
Mendes & Mount, LLP
750 Seventh Avenue
New York, NY 10019

Re: Lawyers Professional Liability Insurance
Carolina Casualty Insurance Company
Policy No.: 1332052
Policy Period: December 22, 2014 to December 22, 2015
Insured: Walker & Morgan, LLC
Claimant: Brandon Crider
Monitor Claim No.: 30363
Our File: 415,556

Dear Mr. DeLucia:

I am in receipt of a copy of your letter to William P. Walker, Esq., dated July 21, 2015. I represent Walker & Morgan, LLC and write to respond. I understand Carolina Casualty has obtained information during the recent Crider mediation that it apparently believes might affect coverage for my clients. As a result you have asked Walker & Morgan for additional information. I object to your inquiry.

Carolina Casualty signed a confidentiality agreement as a pre-condition of its participation in the mediation. This agreement, which was prepared in compliance with Rule 601 of the South Carolina Court-Annexed Rules for Alternate Dispute Resolution, requires the absolute confidentiality of information obtained during mediation. Rule 8 of Rule 601 provides in relevant part as follows:

"Rule 8

Confidentiality

(a) Confidentiality. Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an approved [*16] Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall

Page 2
James DeLucia, Esquire
August 4, 2015

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..."

Any attempt to use the information Carolina Casualty obtained during mediation will be considered a direct violation of this rule and will result in legal proceedings against Carolina Casualty Insurance Company.

Beyond that, you as the attorney claims representative for the Crider claim owe a duty of fidelity to Walker & Morgan. In South Carolina, this duty is extensive:

An attorney in South Carolina who represents an insured owes the insured a duty of loyalty and cannot, for example, communicate information detrimental to the insured to the insurance company. S.C. App. Ct. R. 407:1.8(b), 1.6. As S.C. App. Ct. R. 413:7 explains, a violation of these rules could lead to sanctions such as suspension, public reprimand, or disbarment. These possibilities, coupled with the threat of bad faith actions or malpractice actions if a lawyer violates these rules, provide strong external incentives for attorneys to comply with their ethical obligations. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Bev. Co. of S.C., LP*, 433 F.3d 365, 367 (4th Cir. 2005)

The law on this issue is clear. Neither you, nor Carolina Casualty may use any information you obtained in a confidential proceeding, as the basis for the denial of coverage for the Crider claim:

When an attorney who is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy in the garnishment proceeding, such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under an exclusionary clause in the policy. *Parsons v. Continental National Am. Group*. Ariz. 223; 550 P.2d 94; 1976 Ariz. LEXIS 269 (1976)

That being said, I can tell you that Morgan & Walker was not aware of this claim before the Carolina Casualty policy inception date. I also enclose a copy of a letter I have received from A. Camden Lewis, Esq., the attorney representing the Plaintiff Mr. Crider, explaining he has no witness or evidence regarding when Morgan & Walker learned of the statute of limitations issue.

Page 3
James DeLucia, Esquire
August 4, 2015

I am advised that the Plaintiff has made an offer of judgment in the amount of \$800,000. This appears to be a very reasonable offer, under the circumstances. It is certainly within the ball park of what I understand to be Carolina Casualty's value range and most importantly within the policy limits and I urge Carolina Casualty to settle the case.

Very truly yours,

GEORGE J. KEFALOS, P.A.

s/George

George J. Kefalos

GJK/sec
enclosure

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM RICHLAND COUNTY

FEB 24 2017

Court of Common Pleas
The Honorable G. Thomas Cooper

SC Court of Appeals

2015-CP-40-05698

Brandon Crider,

Plaintiff/Appellant,

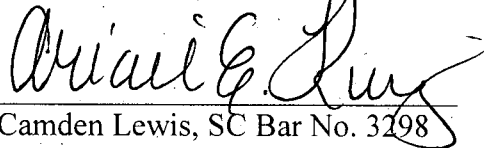
v.

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. The undersigned also certifies that this Record on Appeal complies with the Supreme Court's order of April 15, 2014 on personal identifiers.



A. Camden Lewis, SC Bar No. 3298
Ariail E. King, SC Bar No. 8952
J. Ryan Heiskell, SC Bar No. 76960
David L. Paavola, SC Bar No. 100714
LEWIS BABCOCK LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
Telephone: 803-771-8000

February 23, 2017

ATTORNEYS FOR APPELLANT