

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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Case No. 2014-CP-10-0569

AUG 01 2017

Appellate Case No. 2015-002025

SC Court of Appeals

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

v.

OAKLAND WINGS, LLC d/b/a WILD WING CAFÉ,
CIVIL SITE ENVIRONMENTAL, INC.,
OAKLAND PROPERTIES, LLC,
CHANDLER CONSTRUCTION SERVICES, INC.,
AVTEX COMMERCIAL PROPERTIES, INC.,Defendants,

Of Whom AVTEX COMMERCIAL PROPERTIES, INC.,Appellant.

**RESPONDENTS' PETITION FOR REHEARING
AND REQUEST FOR REHEARING EN BANC**

REHEARING

Pursuant to Rule 221, SCACR, Respondents William Huck and Diane Huck, hereby submit this petition for rehearing of this Court's opinion, No. 5500, filed July 19, 2017.

Respondents notes the following points overlooked or misapprehended by the Court:

A. The Court Failed to Address Respondent's First Argument

This Court completely ignored and failed to address or refer to Respondents' first argument that Appellant, Avtex Commercial Properties, Inc. (hereinafter referred to as "Avtex") failed to properly raise its request for disclosure of settlement agreement through the mandatory procedural requirements set forth in, Rule 33, Rule 34 and Rule 37, South Carolina Rules of Civil Procedure, and are accordingly barred from seeking disclosure of the Agreement as a matter of law. *See Respondents' Final Brief*, pp.5 – 15.

Avtex acknowledged it was seeking discovery of confidential settlement agreements. Without question the South Carolina Rules of Civil Procedure provide the exclusive mechanism for discovering the terms of the settlement agreement – a Rule 34(a) request for production - which Avtex failed to utilize. Instead Avtex moved for disclosure of settlement (really a motion to compel) without first serving Rule 34(a) requests for production seeking the production of the written document memorializing the settlement agreements at issue. Because Avtex failed to serve Rule 33(a) interrogatories seeking information relating to the terms of the settlement, or Rule 34(a) requests for production seeking the written document memorializing the settlements, the lower court had no basis upon which to entertain Avtex's motion for disclosure of settlement/motion to compel production. Accordingly, this court must affirm the Order on the ground that Avtex failed to properly request the settlement information as required by the South Carolina Rules of Civil Procedure.

B. Appellant is Barred From Obtaining a Copy of the Settlement Agreement.

In the alternative, while this Court did address the confidentiality terms attached to mediations governed by the South Carolina Alternative Dispute Resolution Rules ("SCADR"), it misconstrued the terms "mediation settlement conference" and "mediation proceeding" contained in Rule 8, SCADR as limited to a physical, set place and not to the ongoing mediation

process and not encompassing documents memorializing what took place in the mediation. In regards to the mediation process, the ADR rules clearly contemplate that mediation can extend beyond one set meeting. *See*, Rule 6(f), SCADR. (“Upon reaching an agreement, the parties shall, *before the adjournment of the mediation*, reduce the agreement to writing and sign along with their attorneys....”)(emphasis added). A confidential settlement between Respondents and Civil Site was reached during the physical mediation. It was not until a month later that Respondents reached a confidential settlement with Chandler. Accordingly, these two settlement agreements were both reduced to writing prior to adjournment of the mediation. Avtex, on the other hand, abandoned mediation before the physical mediation ended.

Further, Rule 8, SCADR makes abundantly clear that not only are documents materially related to, arose out of and were made pursuant to mediation are not discoverable, but a participant in the mediation “shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding. . . .” Thus, Avtex, as a party to the mediation, is barred from using the settlement agreements in support of its motions for reapportionment and set-off.

C. The Court Confuses Set-Off with Contribution among Joint Tortfeasors

This Court erroneously and inappropriately merged the common law doctrine of set-off into the statutorily created Uniform Contribution Among Tortfeasors Act (hereinafter referred to as the “UCATA”) found in Section 15-38-10 through 70, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. In effect, this Court judicially amended the statutorily created UCATA. It also, essentially, indirectly reverses the Supreme Court’s recent holding in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E. 2d 824 (2015).

“A setoff . . . is not a claim for relief. It occurs at the end of litigation and ‘is a means by which a debtor may satisfy in whole or in part a judgment or claim held against him out of a judgment or claim which he has subsequently acquired against his judgment creditor.’” *Keith G. v. Suzanne H.*, 72 Cal.Rptr.2d 525, 530, 62 Cal.App.4th 853, 860 – 861 (quoting *Salaman v. Bolt*, 141 Cal.Rptr. 841, 847, 74 Cal.App.3d 907, 918 (1977)).

“Most jurisdictions setoff reciprocal damages awards. The rule is well established in common law. Its purpose is to speedily and effectively satisfy judgments, and ‘to avoid the unnecessary expense of issuing and levying executions in favor of the respective parties.’” *Hogren v. Schlueter*, 355 N.W.2d 762, 764 (Minn. Ct. App. 1984)(citations omitted)(citing *Martin County National Bank of Fairmont v. Bird*, 92 Minn. 110, 111-12, 99 N.W. 780, 781 (1904)).

The question of setting off one judgment against the other suggests interesting questions. The words equity and law are often loosely used. There is no real difference. Equity is nothing more than administering law in accordance with procedure in Courts of Equity as distinguished from Courts of Law. It is therefore simply a system of practicing law. The Courts of Law and Equity each apply the law. A strong appeal can be made on so-called equitable principles in favor of the proposition that a plaintiff or libellant should not be permitted to collect a judgment in his favor leaving unpaid a judgment against him. In ordinary cases this should not be permitted.

Taylor v. Calmar S. S. Co., 35 F.Supp. 335, 336 (E.D. Penn. 1938).

“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action. ‘The trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.’ Allowing this credit prevents an injured person from obtaining a double recovery for the damage he sustained, for it is “almost universally held that there can be only one satisfaction for an injury or wrong.”” *Rutland v. South Carolina Dept. of Transp.*, 400 S.C. 209,

216, 734 S.E.2d 142, 145 (2012)(citations omitted)(quoting *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000) and *Truesdale v. S.C. Highway Dept.*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)). “A set-off is not necessarily founded upon any statute or fixed rule of court but grows out of the inherent equitable jurisdiction of the court.” *Rutland v. South Carolina Dept. of Transp.*, 390 S.C. 78, 83, 700 S.E.2d 451, 454 (Ct. App. 2010), *affirmed as modified on other grounds*, 400 S.C. 209, 734 S.E.2d 142 (2012); *accord Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); *Tolbert v. Harrison*, 17 S.C.L. (1 Bail.) 599 (1830); *see also Beutel v. Dallas County Flood Control Dist., No. 1*, 916 S.W.2d 685, 693 (Tex. Ct. App. 1996)(““There is no doubt of the power of courts independent of statute to set off mutual judgments against each other.””).

““The common law rule against contribution was abrogated in 1988 when our General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act. . . .” Because the Act is in derogation of the common law, it must be strictly construed. Moreover, “[i]n a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law of his own state to establish a right to contribution between wrongdoers.” *G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 86 – 87, 591 S.E.2d 42, 44- 45 (Ct. App. 2003)(footnotes omitted)(quoting *Vermeer v. Wood/Chuck Chipper*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct.App.1999) and 18 AM.JUR.2d *Contribution* § 126, at 129 (1985)); *accord Cowden Enter., Inc. v. East Coast Millwork Distrib.*, 363 S.C. 540, 611 S.E.2d 259 Ct. App. 2005), *cert. denied*, (2006); “[T]he UCATA controls only in situations involving joint tortfeasors.” *Andrade v. Johnson*, 345 S.C. 216, 226, 546 S.E.2d 665, 671 (Ct. App. 2001), *rev’d on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003). As the UCATA applies only to contribution among joint tortfeasors, a tortfeasor cannot seek contribution under the UCATA from the injured party since one cannot be a “tortfeasor as to . . .

[one's] own injury, let alone a joint tortfeasor.” *G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. at 90, 591 S.E.2d at 46; see *Gordon v. Phillips Util., Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005)(UCATA does not permit contribution against injured workers’ employer since UCATA only permits contribution from another who is jointly or severally liable in tort for the same injury and the employer is immune from suit in tort by the workers’ compensation act).

As explained by the South Carolina Supreme Court in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017):

[A]chieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the . . . [UCATA]. We disagree that fair apportionment was the only underlying policy goal. Indeed, when the Act is read as a whole, with each section and subsection given effect, it is apparent that the legislature was not solely attempting to protect nonsettling defendants. Rather, the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements.

Id. at 556 – 557, 591 S.E.2d at 483 – 484. “[T]he Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's ‘strong public policy favoring the settlement of disputes.’ ” *Riley v. Ford Motor Co.*, *supra* at 196, 777 S.E.2d at 830 (quoting *Chester v. South Carolina Dept. of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010)).

In its decision, the court erroneously held that Section 15-38-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, empowers the trial court to determine if the release given to the settling defendants by Respondents was given in good faith. This is a clear misreading of Section 15-38-50 and effectively overrules the Supreme Court’s opinion in *Riley v. Ford Motor Co.*, *supra*.

Section 15-38-50(1) specifically provides that “When a release . . . is given in good faith to one of two or more persons *liable in tort for the same injury* . . . it reduces the claim against the *others* to the extent of any amount stipulated by the release. . . .” Clearly Section 15-38-50(1), by

its plain language, applies only to reduce a claim for contribution against a joint tortfeasor. Accordingly, a “good faith” determination made pursuant to Section 15-38-50(1) may only be made in the context of a contribution claim. It, therefore, does not grant a trial court the authority to determination whether the amount of an off-set is reasonable with regard to reduction of the judgment against it as to the plaintiff, since the plaintiff is not a tortfeasor, let alone a joint tortfeasor. In applying Section 15-38-50 to the determination ow whether the settlement in this matter is reasonable, the Court has not only failed to strictly construe UCATA, it has actually amended it to apply to a situation not involving a claim for contribution against a joint tortfeasor..

In this case, Appellant seeks a set-off against the judgment awarded Respondents for the amounts Respondents received from the settling defendants as oppose to the settling defendants seeking a reduction in the amount of contribution sought by Appellant. In fact, Appellant has sought no contribution from the settling defendants at all. Respondents, the injured parties, are not tortfeasors, let alone, joint tortfeasors. Thus, the provisions of the UCATA are inapplicable to the resolution of the issues before the court, which only apply the rights and duties of joint tortfeasors. Thus, the good faith provision of Section 15-38-50 is inapplicable to the determination of the issue involved in this case.

Moreover, as the jury specifically found that Avtex was fifty percent at fault, it became jointly and severally liable for the entire damage, and thus, is no longer entitled to contribution. *See*, Section 15-38-15(a); *Smith v. Tiffany, supra*. Accordingly, even if the UCATA applied to the issue currently before the Court – which it does not - Section 15-38-50 would not apply since Avtex was fifty percent at fault and liability of less than fifty percent is required for a tortfeasot to avail itself of the provisions of the UCATA.

Finally, should this Court deny Respondent's petition for rehearing and affirm its previous decision, its directive to the trial court to look at the settlement agreement to determine if Appellant is entitled to a set-off is in conflict with the Supreme Court's opinion in *Riley v. Ford Motor Co.*, *supra*. In *Riley v. Ford Motor Co.*, *supra*, the Supreme Court unequivocally reinforced that "any 'reduction in the judgment must be from a settlement for the *same cause of action*' ... [and] where a settlement involves more than one claim, the allocation of settlement proceeds between various causes of action impacts the amount a non-settling defendant may be entitled to offset." *Id.* at 196, 777 S.E. 2d at 830. (internal citations omitted)(emphasis added). In reviewing a set-off between separate causes of action, the Supreme Court also held that the lower erred in reapportioning settlement proceeds on "the sole basis that that the particular agreed-upon allocation between the survival and wrongful death claims did not seem to be, in the court of appeals' view, proportionately reasonable." *Id.* (We believe it was error to disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the Estate.). To the extent a set-off exists, Avtex seeks that settlement amounts apportioned to Diane Huck's loss of consortium claim be reapportioned to Mr. Huck's negligence claim. Yet, Avtex has put forth no other argument for reapportionment other than the argument that the allocation may have been advantageous to Mr. Huck. Accordingly, this Court must revise its opinion that Avtex is not entitled to any reallocation by the trial court, pursuant to the Supreme Court's opinion in *Riley*, *supra*.

HEARING EN BANC

A rehearing en banc is required in this matter because: (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, and (2) the proceeding involves a question of exceptional importance.

CONCLUSION

By not withdrawing its opinion in this matter, this Court is rewarding Avtex for not participating in the mediation process and other defendants who will take this opinion as a sign to manipulate the ADR system. Avtex had an opportunity to participate in mediation, but elected not to while the other participants persevered. It also failed to make a proper discovery request for the settlement agreements prior to filing its motion for set-off or reapportionment. Avtex now stands to potentially reap the benefits of settling parties despite the jury specifically finding that it was fifty percent negligent in causing Mr. Huck's injuries. Moreover, this Court's Judicial Amendment of the UCATA will further contribute to and intensify the confusion and uncertainty which already surrounds the UCATA. The UCATA needs no assistance in this regard from this Court. Accordingly, for the reasons set forth above, Respondents respectfully petition this Honorable Court for a rehearing on the opinion rendered in this matter and for a decision in favor of Respondents.

Respectfully Submitted,
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July 29, 2017
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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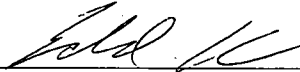
Of Whom AVTEX COMMERCIAL PROPERTIES, INC..... Appellant.

PROOF OF SERVICE

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

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SC Court of Appeals

RE: William Huck, et. al. v. Avtex Commercial Properties
In the Court of Appeals, South Carolina
Appellate Case No. 2015-002025

Dear Ms. Kitchings:

Enclosed, please find an original and seven (7) copies of *Respondents' Petition for Rehearing*, in addition to a check in the amount of \$25.00 in connection with the above-referenced case. Please return one (1) clocked copy in the enclosed self-addressed, postage prepaid envelope.

By copy of this correspondence, I am providing counsel for Appellant, with a copy of the same. Should you have any questions or require anything further, please do not hesitate to contact me.

With warmest personal regards, I am

Yours very truly,



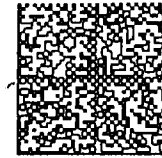
Edward K. Pritchard, III, Esq.

Enclosure

cc: K. Michael Barfield, Esq.
D. Summers Clarke, II, Esq.



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