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

Lower Court Case No. 2014-CP-10-569
Appellate Case No.2015-002025

William Huck and Dianne Huck.....Respondents,

v.

Oakland Wings, LLC d/b/a Wild Wing Cafe, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc., Avtex Commercial Properties, Inc., ...Defendants,

Of Whom Avtex Commercial Properties, Inc. is the.....Appellant.

APPELLANT'S RETURN TO RESPONDENTS' PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC

Appellant submits this Return to Respondents' Petition for Rehearing and Request for Rehearing En Banc pursuant to Rule 240, SCACR and respectfully requests that the Court's opinion in this matter be left intact without further proceedings.

A. <u>The Court correctly ascertained that the rules governing the conduct of discovery have no bearing on the issues on appeal.</u>

Respondents have argued consistently that Appellant should be precluded from learning the terms of settlement between Respondents and the two defendants that settled prior to trial because the information was not sought first via the discovery process, specifically, under Rules 33, 34, and 37, SCRCP. This argument, as with others raised by Respondents, places form before substance and

encourages procedural gamesmanship. This Court correctly held that the terms of settlements between Plaintiffs and joint tortfeasors must be disclosed for at least two very important reasons. First, pursuant to the Uniform Contribution Among Joint Tortfeasors Act, S.C. Code Ann. § 15-38-10, et seq., the trial court is obligated to apply a set-off against any judgment against non-settling defendants in an amount equal to sums paid by settling defendants. Secondly, if the trial court finds that the terms of such settlements were not made in good faith, as required by S.C. Code Ann. § 15-38-50 (1), the settling defendants would not be entitled to protection from being sued for contribution by the non-settling defendant that they would otherwise receive.

While Appellant certainly could have requested the details of the settling defendants' settlements through discovery, there is absolutely no authority that stands for the proposition that doing so is mandatory. As with Respondents' arguments that settlements reached at mediation should be confidential without exception, to throw up a procedural roadblock using the discovery rules would result in an exception that would swallow the rule that set-offs are mandatory. Further, Respondents' argument is disingenuous because there is no doubt that had Appellant sought the terms of the co-defendants' settlements through discovery, Respondents would have objected on the grounds that such a request was premature and/or that it did not seek the production of admissible evidence, not to mention Respondents' reliance upon their argument that settlements arising from the mediation process are absolutely confidential. In other words, the disclosure of the settlement terms was an issue that was fated to be addressed by the trial court. The vehicle through which that issue came before the court and the timing of such are immaterial to the substantive questions before this Court. As such, it was completely proper for this Court to omit an analysis of Appellant's position on this issue from its opinion.

B. Appellant and the trial court have statutory rights to know the terms of settlements between Respondents and settling joint tortfeasors.

The Appellant is at a loss to counter Respondents' interpretation of the confidentiality provisions of the South Carolina Rules of Alternative Dispute Resolution in a different or better way than the rationale expressed in the Opinion of this Honorable Court. The Court was absolutely correct in holding,

> . . . [T]he documents referred to in Rule 8 are designed to protect any documents prepared for use by the mediator and the parties to the mediation itself. Once the parties reach a settlement, documents prepared in conjunction with the settlement and release are not for the purpose of, or in the course of, mediation. Rather, they are documents prepared in connection with the litigation and to bring the litigation to a close.

Huck v. Oakland Wings, LLC, Op. No. 5500 (S.C. Ct. App. Dated July 19, 2017)

Once again, if parties were allowed to conceal the terms of settlements with joint tortfeasors from non-settling defendants, not to mention the trial court itself, trial judges would be stymied in applying their statutory obligation to grant set-offs, thereby creating an opportunity for double recovery and unnecessarily introducing an unseemly element of gamesmanship into the mediation process. That process is by its very nature intended to encourage open dialogue between parties and equitable settlement of claims.

C. The Court did not confuse set-off with the Contributions Among Joint Tortfeasors Act.

This Court correctly surmised the significant negative impact of adopting Appellant's arguments as to the ability of trial judges to fulfill their obligation to apply statutorily mandated set-offs. This Court further noted that the terms of settlements between plaintiffs and joint tortfeasor defendants must be disclosed to the trial court as well as non-settling defendants, so that each might examine such settlements to determine if they were made in good faith. If not made in good faith, non-settling defendants saddled with judgments would be free to pursue contribution actions against those defendants that settled in bad faith with the plaintiff.

Ironically, it is the Respondents, not the Court, that have conflated separate concepts of South Carolina jurisprudence. Respondents argue that the Court, by holding the settlement terms may not be confidential as to all parties, has somehow run afoul of the South Carolina Supreme Court's recent holding in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E. 2d 824 (2015). *See Respondents' Petition, p. 3.*

First, it is important to note that the *Riley* case is not mentioned anywhere in this Court's Opinion. Substantively, *Riley* dealt with the scope of a trial court's ability to reallocate settlement funds using its equity powers should it determine that a settlement was unfairly apportioned amongst multiple causes of action to achieve a desired strategic advantage. This Court did determine that a trial judge must have the ability to review settlements to determine if they are made in good faith under S.C. Code Ann. § 15-38-50, a much different analysis. The dichotomy between *Riley* and the good faith component of Section 15-38-50 invokes a similar pair of concepts in the common law of contracts. On the one hand, *Riley* deals with the court's ability to remake the agreed upon terms of a settlement, much like the question of when and under what circumstances the court may "blue pencil" a contract. By comparison, Section 15-38-50 is likened to a court's analysis of whether a contract should be voided as a matter of law. It is a thumbs up or thumbs down analysis that is mandated by statute and which does not require or allow the trial court to remake the terms of such a settlement.

Despite the absence of a discussion of *Riley* and its opinion, Respondents have included an interesting quote from that case in their Petition. In discussing the Uniform Contribution Among Joint Tortfeasors Act, the *Riley* court stated, "the 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 Department of Public Safety*, 388 S.C. 343, 346, 698 S.E. 2d, 559, 560 (2010)). *See Respondents' Petition, p. 6.*

Thus, *Riley* underscores the universally recognized prohibition against double recovery, a principle the Respondents seek to undermine by refusing to disclose, even to the Court, the terms of settlements with joint tortfeasors.

Finally, Respondents utterly misconstrue the holding of *Smith v. Tiffany*, 419 S.C. 548, 799, S.E.2d 479 (2017), stating, "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 Respondents' Petition, p. 7.*

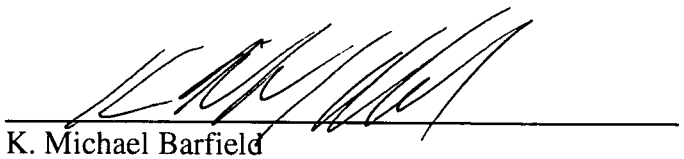
The *Smith* case reaffirmed the doctrine that it is the plaintiff's right to sue only those tortfeasors they elect to sue and that a defendant does not have the right to force non-party joint tortfeasors into a case against the plaintiff's wishes. While a defendant may certainly "argue the empty chair," trial courts are loathe to include joint tortfeasors on verdict forms for purposes of apportionment. The Uniform Contribution Among Joint Tortfeasors Act affords such defendants an opportunity to pursue joint tortfeasors which are not parties to the underlying case to achieve relief from the burden of having to pay one hundred percent of a judgment. Respondents argue that the jury's allocation of fifty percent fault to Avtex precludes Appellant from seeking contribution against the settling defendants in the event that their settlements are determined to have been in bad faith. However, that allocation of fault is only between Avtex and the Respondents. The relative fault between Avtex and the two settling defendants has yet to be determined.

Conclusion

For the reasons set forth above, Appellant respectfully asks this Honorable Court to deny

Respondents' petition for rehearing and affirm its opinion in this matter.

Barnwell Whaley Patterson & Helms, LLC



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October 9, 2017
Charleston, South Carolina

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PROOF OF SERVICE

I hereby certify that a true and correct copy of Appellant Avtex Commercial Properties, Inc.'s Return to Respondents' Petition for Rehearing was served on this 9th day of October, 2017 via U.S. mail, postage pre-paid, upon the following counsel of record:

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reply to Charleston office

October 9, 2017

187.108
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: William Huck v. Avtex Commercial
Appellate Case No. 2015-002025

Dear Madam Clerk:

Please find enclosed an original and seven copies of Appellant Avtex Commercial Properties, Inc.'s Return to Respondents' Petition for Rehearing. We would greatly appreciate your returning a date-stamped copy of the Return in the enclosed, self-addressed envelope.

As evidenced by the enclosed Proof of Service, we are serving a copy of the Return on attorneys for Appellant.

With regards,

Janet Segell, Legal Assistant to
K. Michael Barfield

/jas
enclosures

c: Edward K. Pritchard, III, Esq.
Elizabeth F. Fulton, Esq.

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