

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

Lower Court Case No. 2014-CP-10-0569
Appellate Case No. 2015-002025

RECEIVED

OCT 19 2017

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' REPLY TO APPELLANT'S RETURN TO RESPONDENTS'
PETITION FOR REHEARING**

Appellant takes the position that the South Carolina Rules of Civil Procedure are nothing more than unimportant, optional, discretionary guidelines to be ignored whenever a party feels inconvenienced by their requirements. This is obviously incorrect: the Rules are binding, mandatory and obligatory and govern every aspect of procedure in civil actions in the Courts of South Carolina. Rules 1 and 81, S.C.Civ.P. While dismissive of the purpose of the Rules, Appellant does not deny it failed to properly serve discovery requests seeking information on prior settlements and it waited until the conclusion of the trial wherein a favorable verdict was reached in favor of Respondents before demanding to

know what other parties had been paid. Now, it asks this Court to excuse its failure to comply with the rules of procedure because it now finds the Rules of Civil Procedure inconvenient and believes the Rules of Civil Procedure are not binding on it despite governing authority to the contrary. *See Id.*

Next, Appellant argues that Avtex and the Court have “statutory” rights to know the terms of settlements between Respondents and settling joint tortfeasors. In making this argument, it cites no such statutory authority, but merely falls back on the Court’s interpretation of Rule 8, SCADR, whose opinion also lacks statutory authority. In fact, Rule 8, SCADR specifically states the opposite. It does not allow for the disclosure of documents materially related to, arising out of and made pursuant to mediation 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. . . .”

Regardless, assuming Appellant actually did properly serve discovery requests pursuant to Rule 33 and Rule 34, SCRCF, trial courts have previously declined to allow disclosure of a settlement agreement. *Polston v. Eli Lilly & Co.*, No. 3:08-3639, 2010 WL 2926159 (D.S.C. July 23, 2010) (attached as Exhibit A); *Foust v. Hill Tire & Auto Center, Inc., et. al*, Case No. 2012-CP-15-427 (S.C.Com.Pl.) (attached as Exhibit B). In both of these matters, the respective state and federal trial court judges denied the request for the production of written settlement agreements, noting the information sought was not likely to lead to the discovery of admissible evidence, but held that the requesting defendant was entitled to know the terms of the settlement agreements between Plaintiff and former co-Defendants for purposes of set-off under Section 15-38-50. South Carolina Code of Laws.

but only at the judgment phase of litigation. *Polston, supra* (declining to order production of a settlement agreement pursuant to a subpoena); *Foust, supra* (denying motion to compel settlement agreement).

Regarding Section 15-38-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, Appellant still fails to grasp that this statutory provision for set-off is separate and distinct from the common law doctrine of set-off. *See, Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475, 482 (Ct. App. 2017)(Despite a defendant's entitlement to setoff, *whether at common law or under section 15-38-50*, any “reduction in the judgment must be from a settlement for the same cause of action.” Thus, 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)(citation omitted)(emphasis added).

It is for this reason, among others, that Respondents seek a rehearing *en banc*. Assuming Appellant is entitled to a setoff, such a remedy would be at common law – NOT pursuant to the Uniform Contribution Among Tortfeasors Act (hereinafter referred to as the “UCATA”) because Appellant was determined to be 50 percent negligent. Section 15-38-15(a), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended (Joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier

of fact). Accordingly, any set-off determinations applicable to this matter should be determined under common law and not pursuant to the UCATA.

Appellant argues that the relative fault between Avtex and the two settling defendants has yet to be determined so that their preclusion from seeking a setoff under Section 15-38-50 is premature. Once again, Appellant misunderstands the purpose and intent of the UCATA, which bars any apportionment between non-settling parties and defendants. *See*, Section 15-38-15(c)(3)(upon a motion by at least one defendant, where there is a verdict ... for damages against two or more defendants for the same indivisible injury... specify in a separate verdict ... the percentage of liability that proximately caused the indivisible injury ... that is attributable to each defendant whose actions are a proximate cause of the indivisible injury...)(emphasis added); *see also*, *Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 485–86 (2017) (Our legislature determined that fault may be allocated only to “the plaintiff and to the defendants” and requires that “the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent.” Thus, guided by the language of the Act and with respect for the legislature’s prerogative, this Court held that fault may not be apportioned to an immune nonparty under the Act) (internal citations omitted). As Appellant was the only defendant among the three remaining defendants found liable by the jury, and no motion was made to reallocate between the remaining defendants, the jury’s finding that Appellant was fifty percent at fault cannot be disturbed. Likewise, pursuant to Section 15-38-50, the prior released parties are immune from contribution and fault cannot be reapportioned among them. Thus, were Appellant entitled to an offset, it would be at common law and not under the UCATA.

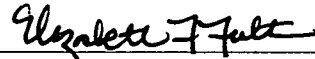
Finally, Appellant is making an assumption that there were settlements reached between Respondents and co-Defendants, and they were not made in good faith, thereby entitling it to a reallocation and/or review by the trial court. Assuming for discussion purposes only that Appellant is correct, the trial court has no authority to reallocate a settlement made between a Plaintiff and a co-Defendant. The UCATA only applies to joint tortfeasors; it does not apply to the Plaintiff – who is not a tortfeasor. Furthermore, even if the Appellant was correct – which it is not – and the UCATA did apply to an agreement between the Plaintiff and a defendant, the jury found Appellant fifty percent at fault, thus Appellant is not entitled to invoke the Act anyway.

Conclusion

The trial court opinions in *Poston* and *Foust* are instructive as to how prior settlements should be disclosed among co-defendants, specifically that, following a discovery request, the *terms* contained with settlement agreements are not discoverable until after a judgment has been rendered and pursuant to the discretion of the trial judge. As Appellant failed to serve Respondents (or the other parties for that matter) with discovery requests seeking information as to written settlement agreements, they are now barred from seeking the Court's enforcement in obtaining the information. Furthermore, the opinion reached by this Court is in direct conflict with the decision reached by the South Carolina Supreme Court in *Smith v. Tiffany*, and the subsequent South Carolina Court of Appeals opinion in *Oaks at Rivers Edge Prop. Owners Ass'n, Inc. v. Daniel Island Riverside Developers, LLC*, that distinguishes the difference between common law setoff and recovery under the UCATA. Accordingly, for the reasons set forth above,

Respondents respectfully petition this Honorable Court for a rehearing *en banc* on the opinion rendered in this matter and for a decision in favor of Respondents.

Respectfully Submitted,
PRITCHARD LAW GROUP, LLC



Edward K. Pritchard, III, Esquire
Bar No. 9710
Elizabeth F. Fulton, Esquire
Bar No. 100611
129 Broad Street (29401)
Post Office Box 620
Charleston, South Carolina 29402
Phone: (843) 722-3300
Fax: (843) 722-3379
epritchard@pritchardlawgroup.com
liz@pritchardlawgroup.com
ATTORNEYS FOR RESPONDENTS

October 16, 2017
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

OCT 19 2017

The Honorable Brian M. Gibbons, Circuit Court Judge

SC Court of Appeals

Lower Court Case No. 2014-CP-10-0569

Appellate Case No. 2015-002025

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.

PROOF OF SERVICE

I hereby certify that I have served Appellant in this action with a copy of *Respondents' Reply to Appellant's Return to Respondents' Petition for Rehearing* herein specified below by depositing a copy of the same in the United States Mail, postage prepaid, on October 16, 2017, to their attorneys of record as follows:

K. Michael Barfield, Esq.
D. Summers Clarke, II, Esq.
Barnwell Whaley Patterson & Helms LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

PRITCHARD LAW GROUP, LLC


Elizabeth F. Fulton

KeyCite Yellow Flag - Negative Treatment
Distinguished by *Wilshire v. WFOI, LLC*, D.S.C., April 14, 2015

2010 WL 2926159

Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina,
Columbia Division.

Kelly POLSTON, Plaintiff,

v.

ELI LILLY AND COMPANY, Defendant.

C/A No. 3:08-3639.

July 23, 2010.

Attorneys and Law Firms

Frederick J. Jekel, Motley Rice, Mt Pleasant, SC, Robert B. Ransom, Leventis and Ransom, Columbia, SC, for Plaintiff.

Ian S. Ford, Jane Thompson Davis, Nelson Mullins Riley and Scarborough, Charleston, SC, for Defendant.

ORDER

JOSEPH F. ANDERSON, JR., District Judge.

*1 This matter comes before the court on defendant Eli Lilly and Company's motion to compel (ECF No. 8) the South Carolina Medical Malpractice Joint Underwriting Association ("JUA") and Dr. Robert Borucki to comply with a May 6, 2010 subpoena seeking discovery of a confidential settlement agreement between them and plaintiff Kelly Polston. The agreement at issue arose out of the South Carolina state court case of *Kelly Polston v. Robert Borucki, MD et alia*, C/A No.2008-CP-40-2659. *Borucki* was a medical malpractice suit that settled confidentially in August 2009. The matter currently before the court arises from an action originally filed in this district, but now pending in the Zyprexa multidistrict litigation before Judge Jack Weinstein in the United States District Court of the Eastern District of New York. This matter is before this court because Lilly's subpoena

issued from this district. Fed.R.Civ.P. 45(a)(2)(C). The parties have fully briefed the motion and the court heard argument at a July 20, 2010 hearing.

I. Standard

As with any discovery dispute, Rule 26(b)(1) provides the general rule:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....

Fed.R.Civ.P. 26. Relevant information is a broader concept than admissible evidence. To be relevant, information need only be calculated to lead to the discovery of admissible evidence, it need not be admissible itself. "Relevant evidence" is defined to mean evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R.Evid. 401.

"On relevancy matters, the trial court has broad discretion." *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 489 (4th Cir.1992). The court may restrict the discovery of otherwise allowable information if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(C)(iii).

Broad discretion is afforded a district court's decision to grant or deny a motion to compel. *Erdmann v. Preferred Research Inc.*, 852 F.2d 788, 792 (4th Cir.1988).

II. Discussion

The question before the court is whether Lilly may obtain disclosure of the terms of a confidential settlement agreement. To be discoverable, the settlement agreement

must be, at least, reasonably calculated to lead to the discovery of admissible evidence. The court notes that a variety of courts have recognized a "settlement privilege," see *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir.2003) ("[W]e believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized."); *Olin Corp. v. Ins. Co. of N. Am.*, 603 F.Supp. 445, 449–50 (S.D.N.Y.1985) (same), or required a "particularized showing that admissible evidence will be generated" prior to allowing the discovery of a confidential settlement agreement, see *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y.1982). Many have not. See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Mediateck, Inc.*, No. C–05–3148 MMC (JCS), 2007 WL 963975, at *4 (C.D.Cal. Mar.30, 2007); *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F.Supp.2d 201 (D.D.C.2005); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F.Supp. 1516, 1531 (D.Colo.1993). The Fourth Circuit has never recognized a settlement privilege or required a particularized showing in the context of a subpoena for confidential settlement documents. Nor can the court find any statute or rule excepting a confidential settlement agreement from Rule 26(b)(1). Accordingly, the only question before the court is whether any information in the *Borucki* agreement is relevant, and not unduly burdensome to produce. To that end, Lilly seeks access to the *Borucki* agreement so that it may (1) value any set-off it may be entitled to pursuant to section 15–38–50 of the South Carolina Code, and (2) assess the potential effect of the agreement on Dr. Borucki's testimony in the present action.

A. S.C.Code Ann. § 15–38–50

*2 Lilly seeks access to the *Borucki* agreement so that it may value the amount of any set-off it may be entitled to pursuant to S.C.Code Ann. § 15–38–50. Section 15–38–50 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; and

(2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C.Code Ann. § 15–38–50. South Carolina courts have found that the "same injury" or

"same wrongful death" terms should be construed to encompass the same the injury rather than the same claim. By way of example, damages for wrongful death and survival may differ in amount, but "[i]njury, as used in the statute, is broad enough to include all damages, including those attributable to both survival and wrongful death causes of action which result from the joint negligence of the various responsible parties." *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268, 272 (S.C.App.1999). "Section 15–38–50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Id.* Accordingly, Lilly argues that section 15–38–50 should apply automatically, by operation of law, as a credit toward Polston's claim. The court agrees that section should apply automatically as a credit, but only against a judgment. *Id.* at 271. Accordingly, there is no reason, for the purposes of the section, to order the disclosure of the amount of the credit until a verdict finding liability on the part of Lilly has been reached. See *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y.1982) ("Even then, the settlement would not be evidence relevant to any issue in this case other than the ministerial apportionment of damages, a mathematical computation which the Court rather than the jury will perform. Hence, the amount of the settlement is not relevant to any issue in this case at this time.").

B. Witness Bias

Lilly contends that because Dr. Borucki and Dr. Alana Williams are likely to be called as witnesses in the present case, disclosure of the terms of the *Borucki* agreement are necessary in order to assess their potential biases and prejudices. Lilly argues that disclosure of the amount

of the settlement is necessary to assess whether the termination of prior litigation fairly valued the plaintiff's claim, or whether it left money on the table with a view to making up the difference against Lilly. In Lilly's view, disclosure of the amount of the settlement would allow it to assess whether the settlement terms incentivize favorable testimony. The court finds that it is unsuited to making such a determination and that Lilly is likely entitled to use the settlement agreement for impeachment at trial. *See Fed.R.Evid. 408*. However, as no trial looms, the court will deny Lilly's motion to compel without prejudice, and revisit the issue closer to trial.

III. *Conclusion*

*3 Based on the foregoing, the court denies Lilly's motion to compel without prejudice. The court notes that the full terms of the agreement are likely admissible at trial as impeachment evidence pursuant to **Rule 408**, and, upon appropriate motion, the court will examine the issue again closer to trial.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2926159

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

KRISTINA CAROLINE FOUST)

Plaintiff,)

v.)

HILL TIRE & AUTO CENTER, INC. d/b/a HILL)
TIRE CENTERS TOTAL CAR CARE, FRANKIE'S)
TIRES, INC. d/b/a FRANKIE TIRE CENTER,)
ROYAL AUTO SALES, LLC, and TOTAL MINI &)
BMW SERVICES, INC.)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2012-CP-15-427

**ORDER DENYING DEFENDANTS'
MOTION TO COMPEL**

2014 MAR 19 PM 12:06

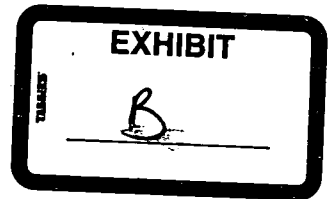
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

This matter came before the Court upon Defendant Hill Tire's Motion to Compel the settlement terms reached between Plaintiff and former co-Defendants Michelin North America, Inc. ("MNA") and Frankie's Tires, Inc. ("Frankie's Tires"). A hearing on this motion was held on February 19, 2014 in Colleton County. Present at that hearing were Ronnie L. Crosby and Austin H. Crosby on behalf of Plaintiff and Amy F. Bower on behalf of Defendant Hill Tire. After considering the arguments of counsel, the applicable law, and legal memoranda submitted by the parties, the Court hereby DENIES Defendant Hill Tire's Motion to Compel.

#1
PMB

FACTUAL FINDINGS

Plaintiff has entered into settlement agreements with former co-Defendants MNA and Frankie's Tires. Through its Supplemental Requests for Production of Documents to Plaintiff, Defendant Hill Tire now seeks the production of "any and all documents, memoranda, reports, statements, or other materials, including settlement release and settlement check, relating to any settlement reached by the Plaintiff..." with each former co-Defendant. Defendant Hill Tire & Auto Center Inc.'s Supplemental Requests for Production of Documents to Plaintiff.



Plaintiff's settlement agreement with MNA was a confidential settlement agreement. Plaintiff's settlement agreement with Frankie's Tires was not a confidential settlement agreement. A third former co-Defendant, General Motors, LLC ("GM"), was dismissed from the case with no settlement agreement between the Plaintiff and GM.

Defendant Hill Tire argues that the settlement agreements, confidential or not, are discoverable for two reasons. First, for purposes of set-off pursuant to Section 15-38-50 of the South Carolina Code. Second, for case evaluation purposes in light of the mandatory mediation requirements for all civil actions pending in the Fourteenth Judicial Circuit.

LEGAL STANDARD

In this discovery dispute, Rule 26(b)(1) of the South Carolina Rules of Civil Procedure provides the general rule:

42
PMS
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it related to the claim or defense of the party seeking discovery or to the claim or defense of any other party...

SCRPC, Rule 26. In order to be relevant, the information sought must be, at least, reasonably calculated to lead to the discovery of admissible evidence. "Relevant evidence" is defined to mean evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. South Carolina Rules of Evidence, Rule 401.

The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Osborne v. Adams*, 338 S.C. 82, 525 S.E.2d 268 (Ct. App. 1999). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); *Osborne, supra*.

DISCUSSION

The issue now before the Court is whether Defendant Hill Tire may obtain, at this time in the present status of the litigation, disclosure of the terms of the Plaintiff's settlement agreements with former co-Defendants MNA and Frankie's Tires. In order to be discoverable, the settlement agreements must be, at least, reasonably calculated to lead to the discovery of admissible evidence. The Court finds that disclosure of these settlement agreements would not be reasonably calculated to lead to the discovery of admissible evidence.

Defendant Hill Tire seeks the disclosure of the settlement agreements so that it may value the amount of any set-off it may be entitled to pursuant to S.C. Code Ann. § 15-38-50. That Section 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:

#3
MB
(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; and

(2) it discharges the tortfeasors to whom it is given from all liability for contribution to any other tortfeasors.

S.C. Code Ann. § 15-38-50. The "same injury" or "same wrongful death" language used in the statute has been interpreted by South Carolina courts to encompass the same injury, rather than the same claim. "Injury, as used in the statute, is broad enough to include all damages, ... which result from the joint negligence of the various responsible parties." *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999).

What is more, the non-settling defendant's right to set-off arises by operation of law, and, under such a circumstance, "Section 15-38-50 grants the court no discretion... in applying a set-off." *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012) (quoting *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272); see also *Vortex Sports & Ent'm't, Inc. v. Ware*, 378 S.C. 197,

210, 662 S.E.2d 444, 451 (Ct. App. 2008). Therefore, set-off is handled as a matter of law by the Court by virtue of Section 15-38-50, but only against a judgment. As a result, there is no reason to order Plaintiff to disclose to Defendant Hill Tire the terms of its settlement agreements with former co-Defendants MNA and Frankie's Tires until the judgment phase of litigation.

Finally, the Court finds consistency for this ruling in the result reached in *Polston v. Eli Lilly and Company*, 2010 WL 2926159 (D.S.C. July 23, 2010). In *Polston*, the Honorable Joseph Anderson considered an objection to a subpoena issued in the District of South Carolina by Eli Lilly seeking the terms of a confidential settlement agreement reached by the plaintiff and a physician insured by the Joint Underwriters Association. Judge Anderson denied the request to discover the terms of that confidential settlement, finding that the information sought was not likely to lead to the discovery of admissible evidence.

#4
m/s

In ruling this way, Judge Anderson noted that, "a variety of courts have recognized a 'settlement privilege', see *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003)("[W]e believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized."); *Olin Corp. v. Ins. Co. of N. Am.*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985)(same), or required a 'particularized showing that admissible evidence will be generated' prior to allowing the discovery of a confidential settlement agreement, see *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (E.D.N.Y. 1982)." Judge Anderson went on to note that many courts have not recognized such a privilege, see, e.g., *Matsushita Elec. Indus. Co., Ltd. V. Mediateck, Inc.*, No. C-05-3148 MMC (JCS), 2007 WL 963975, at 4* (C.D. Cal. Mar. 30, 2007); *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F.Supp. 2d 201 (D.D.C. 2005); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F.Supp. 1516, 15311 (D. Colo. 1993), including the Fourth Circuit. Furthermore, Judge Anderson could find no

"statute or rule excepting a confidential settlement agreement from Rule 26(b)(1)." *Polston*,
2010 WL 2926159.

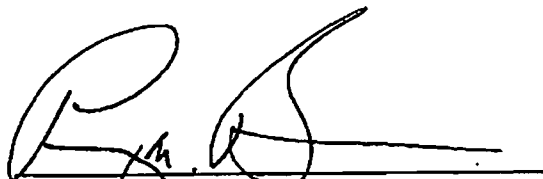
CONCLUSION

Because no showing has been made by Defendant Hill Tire that discovery of the terms of the settlement agreements between Plaintiffs and former co-Defendants MNA and Frankie's Tires is likely to lead to admissible evidence, the Court finds that the requested discovery is not discoverable under the Rule 26(b)(1) standard. Furthermore, because Rule 26(b)(1) of the South Carolina Rules of Civil Procedure and Rule 26(b)(1) of the Federal Rules are identical, the Court finds Judge Anderson's opinion instructive. Finally, the Court finds that Defendant Hill Tire is entitled to know the terms of the settlement agreements between former co-Defendants MNA and Frankie's Tires for purposes of set-off under Section 15-38-50, but only at the judgment phase of litigation.

Accordingly, Defendant Hill Tire's motion is denied without prejudice, and this issue may be revisited upon a judgment finding liability on the part of Defendant Hill Tire.

IT IS THEREFORE ORDERED that Defendant Hill Tire's Motion to Compel is hereby DENIED.

AND IT IS SO ORDERED.


Perry M. Buckner
Presiding Judge, Fourteenth Judicial Circuit

#5

Walterboro, South Carolina

March 6, 2014

Elizabeth F. Fulton, Esquire
Direct Dial: (843) 576-3535
liz@pritchardlawgroup.com

October 16, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
OCT 19 2017
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' Reply to Appellant's Return to Respondents' Petition for Rehearing*, 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,



Elizabeth F. Fulton

Enclosure

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