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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 5500 (S.C. Ct. App. filed March 28, 2018)

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

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., is.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 28, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that Respondent, Avtex Commercial Properties, Inc., improperly raised the issue of disclosure of the settlement agreement before the lower court?

2. Did the Court of Appeals err in failing to find that Respondent, Avtex Commercial Properties, Inc., failed to properly join necessary parties in the motion to disclose?

3. Did the Court of Appeals err in failing to find that compelling the production of the settlement agreements violates the confidentiality provision of Rule 8(a), SCADR?

4. Did the Court of Appeals err in failing to find that the trial court does not have the authority to reapportion the settlement proceeds, if any, paid by the other defendants?

5. Did the Court of Appeals err in effectively overruling this court's opinion in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015)?

6. Did the Court of Appeals err in confusing common law set-off with statutory contribution among joint tortfeasors, Section15-38-50, Code of Laws of South Carolina, 1976, as amended?

STATEMENT OF THE CASE

This action is a premises liability action. Plaintiff/Petitioner, William Huck (hereinafter "William Huck"), and his wife, Plaintiff, Diane Huck (hereinafter referred to as "Diane Huck") (William Huck and Diane Huck hereinafter collectively referred to as the "Hucks"), initiated this action against Wings Over America, Inc., d/b/a Wild Wing Café, Civil Site Environmental, Inc., (hereinafter referred to as "Civil Site"), Oakland Properties, LLC, (hereinafter referred to as "Oakland"), Chandler Construction Services, Inc., (hereinafter referred to as "Chandler"), and Avtex Commercial Properties, Inc. (hereinafter referred to as "Avtex"), on January 28, 2014, by filing a Summons and Complaint with the Office of the Charleston County Clerk of Common Pleas. *R.* p.18 - p.28. The Complaint was subsequently amended on February 20, 2014, to substitute Oakland Wings, LLC, d/b/a Wild Wing Café (hereinafter referred to as "Wild Wing") for Wings Over America, Inc., d/b/a Wild Wing Café as a party defendant. *R.* p.29 – p.40. The Complaint was amended a second time on April 15, 2014. *R.* p.59 – p.69. Civil Site, Wild Wing, Oakland and Avtex each timely answered the Amended Complaint and Civil Site, Wild Wing, Oakland, Chandler and Avtex each timely answered the Second Amended Complaint each time denying the material allegations of the Amended Complaint and the Second Amended Complaint and raising various affirmative defenses, none of which are germane to this appeal[1]. *R.* p.41 –p.58; p.74 - p.113. In this action, William Huck seeks damages for injuries he sustained when he slipped and fell (hereinafter referred to as the "Incident") and Diane Huck seeks damages for loss of consortium. *R.* p.59 – p.69.

This matter was mediated on March 27, 2015. *R.* p.181 – p.182. All parties were present. *R.* p.181 – p.182. During the course of the mediation, an impasse as to Wild Wing, Oakland and Avtex was declared, whereupon Wild Wing, Oakland and Avtex discontinued the mediation process and left the mediation site. The Hucks, Civil Site and Chandler continued in the mediation. Prior to the conclusion of the face-to-face mediation on March 27, 2015, The Hucks reached a confidential settlement agreement with Civil Site. *R.* p. 114; p.181 – p.182. By agreement, the Hucks and Chandler continued the mediation process in the same manner as they had during the face-to-face

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1 The Complaint was amended before the original Complaint was served on any of the Defendants; therefore, no answer to the original Complaint was put in by any of the defendants. Because Chandler was not served until after the Complaint was amended the second time, it filed no answer to the Amended Complaint.

mediation on March 27, 2015, negotiating and communicating through the mediator. After a little more than a month of continuous negotiations, Chandler reached a confidential settlement agreement with the Hucks, and was dismissed from this action. *R.* p.115 – p.116.

This matter was tried to a jury before The Honorable Brian M. Gibbons, Circuit Court Judge, on May 19, 2015, May 20, 2015, and May 21, 2015, against Wild Wing, Oakland and Avtex. *R.* p.4 – p.15; p.132 – p.137. On May 21, 2015, the jury returned a verdict in favor of Wild Wing and Oakland and a verdict in favor of William Huck against Avtex in the amount of $97,640.00. As the jury also found that William Huck was fifty percent at fault in bringing about his own injuries, the court reduced the award by fifty percent and entered judgment in favor of William Huck in the amount of $48,820.00. *R.* p.4 – p.15; p.132 – p.137.

On June 3, 2015, Avtex moved for j.n.o.v., for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlements with Civil Site and Chandler were made in good faith. *R.* p.138 – p.139; p.144 – p.145. By order dated July 23, 2015, both motions were denied (hereinafter referred to as the "Order"). *R.* p.4 – p.15. Avtex thereafter moved to have the Court alter or amend the Order on August 7, 2015. *R.* p.156 – p.159. Avtex's motion to alter or amend was denied August 14, 2015. *R.* p.16 – p.17. Avtex filed a Notice of Intent to Appeal on September 21, 2015. *R.* p.160 – p.161.

Oral Argument in this matter was held before the South Carolina Court of Appeals on May 2, 2017. On July 19, 2017, the Court of Appeals issued a written opinion in this matter reversing the Order and remanding for a determination as to whether Avtex is entitled to an off-set.

On July 29, 2017, the Hucks filed a petition for rehearing. On March 28, 2018, the South Carolina Court of Appeals denied the Hucks petition for rehearing, withdrew its earlier opinion, and substituted and refiled a new opinion. This petition for writ of certiorari followed.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT, AVTEX COMMERCIAL PROPERTIES, INC., FAILED TO PROPERLY RAISE THE ISSUE OF DISCLOSURE OF THE SETTLEMENT AGREEMENT BEFORE THE LOWER COURT

The South Carolina Rules of Civil Procedure "govern the procedure in all South Carolina

courts in all suits of a civil nature whether cognizable as cases at law or in equity. . . ." Rule 1, S.C.R.CIV.P. As noted by the South Carolina Supreme Court in *Wofford v. Ethyl Corp.*, 316 S.C. 75, 77, 447 S.E.2d 187, 189 (1994):

> While modern discovery rules and liberal pleading requirements *virtually eliminate* the need to resort to an independent action in the form of an equitable proceeding for discovery, they do not totally displace the traditional equitable jurisdiction of the court to issue appropriate orders for independent discovery *when effective discovery cannot otherwise be obtained* and the ends of justice served. The equity powers of the Court may allow discovery *when the Rules do not provide a mechanism.*

Id. (holding that the trial court did not error in ordering a non-party to an action to permit the inspection of its plant pursuant Rule 34(c), S.C.R.CIV.P., even though there was no action pending at the time)(citations omitted)(emphasis added). The South Carolina Rules of Civil Procedure provide an adequate mechanism for discovering the terms of the settlement agreements, assuming their terms are discoverable – Rule 33(a)), S.C.R.CIV.P., interrogatories and Rule 34(a), S.C.R.CIV.P., requests for production - which Avtex failed to utilize.

The substance Avtex's motion for disclosure of settlement is a Rule 37(a), S.C.R.CIV.P., motion to compel the production of the settlement agreements between the Hucks and Civil Site and the production of the settlement agreements between the Hucks and Chandler and it should be treated as such. *Cf. Leighton v. Swan*, 1991 WL 220290, 3 (D.N.J. 1991)(court treated motion for request for interrogatories as motion to compel discovery under FED.R.CIV.P. 37(a)(2)); *Thomas v. Vaughn*, 1998 WL 770597 (E,D. Penn. 1998)(court treated letter seeking information as a FED.R,CIV.P. 37 motion to compel); *Regions Bank v. Wingard Prop.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)(substance over form).

> [A] party may file a motion to compel discovery when: (i) a deponent fails to answer a question; (ii) a party fails to answer an interrogatory; (iii) a party fails to respond to

> a rule 34 request for production; or (iv) a corporate party fails to designate a representative to respond on its behalf to discovery In addition to the usual formal requirements for filing motions, a party must satisfy a two threshold requirements before filing a motion to compel: (i) serve a formal discovery request on the responding party pursuant to rules 30, 31, 33 . . . 34 . . . [or 45, S.C.R.CIV.P.]; and (ii) confer or attempt to confer with the responding party in good faith to attempt to obtain the discovery.

Ameri v. GEICO Gen. Ins. Co., 2015 WL 4461212, 10 (D.N.M. 2015)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production). "It is axiomatic that a court may not compel the production of documents under Rule 37 unless the party seeking such an order has served a proper discovery request on the opposing party." *Texas Democratic Party v. Dallas Cnty., Texas*, 2010 WL 5141352, 1 (N.D. Texas 2010)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); s*ee Trask v. Olin Corp.*, 298 F.R.D. 244 (W.D. Penn. 2014)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *James v. Wash Depot Holdings, Inc.*, 240 F.R.D. 693 (S.D. Fla. 2006)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Suid v. Cigna Corp.*, 203 F.R.D. 227 (D.V.I. 2001)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Roberts v. Americable Int'l Inc.*, 883 F.Supp. 499, 501 n. 2 (E.D. Cal. 1995)("[A party's] informal request for production of documents made at deposition is not recognized as an appropriate discovery request under the Federal Rules, i.e. such discovery vehicle does not exist under the Federal Rules of Civil Procedure. [The] motion to compel is inappropriate and is denied for this reason."); *Schwartz v. Mktg. Publg. Co.*, 153 F.R.D. 16 (D. Conn.1994)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Hilgenberg v. Neth*, 93 F.R.D. 325 (E.D. Tenn. 1981)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for

production); *Grissom v. Nat'l Labor Relations Bd.*, 364 F. Supp. 1151, 1154 (M.D. La. 1973), *aff'd sub nom.*, 497 F.2d 43 (5th Cir.1974)("[U]ntil the mover . . . makes a request for such documents and is improperly refused, this Court will not entertain any motion to compel their production."); *Miller v. State Farm Mut., Auto. Ins. Co.*, 2015 Ohio 280, 27 N.E.3d 980 (2015)(motion to compel denied because moving party failed to serve interrogatories or requests for production).

Avtex never served Rule 33(a) interrogatories seeking information relating to the terms of the settlements between the Hucks and Civil Site or the settlements between the Hucks and Chandler. *See R.* p.117 – p.125. Nor did Avtex serve Rule 34(a) requests for production seeking the production of the written documents memorializing the settlements between the Hucks and Civil Site or the settlements between the Hucks and Chandler. *R.* p.126 – p.132. Instead Avtex moved for disclosure of settlement without ever serving Rule 33 interrogatories or Rule 34(a) requests for production. Because Avtex failed to serve Rule 33(a) interrogatories or Rule 34(a) requests for, 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 reverse the Court of Appeals and affirm the Order on the grounds that Avtex failed to serve Rule 33(a) interrogatories or Rule 34(a) requests for production before filing its motion for disclosure of settlement/motion to compel production[3].

Further, it seems to have been lost on the Court of Appeals that the Hucks were not the only

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2 The requests for production served by Avtex on William Huck contained in the record are the only requests for production Avtex served on William Huck during the course of this litigation. Avtex served no other requests for production on William Huck.

3 This Court may, of course, affirm the Order "upon any ground(s) appearing in the Record on Appeal." *See* Rule 220(c), SCACR; *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). Furthermore, it is well settled that "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. *Id.* at 419, 526 S.E.2d at 724.

parties to the Settlement Agreements: Civil Site and Chandler too were parties and neither were before the trial court or were given notice of Avtex's motion to seek disclosure of the settlement terms. Clearly as parties to the respective settlement agreements Civil Site and Chandler each had an interest in the confidentiality of the settlement agreements. Had Avtex complied with the provisions of the South Carolina Rules of Civil Procedure, it would have been required to serve Civil Site and Chandler with the Rule 33 interrogatories and/or Rule 34(a) requests for production and with the Rule 37(a) motion to compel. *See* Rule 26(g)(1) and 37(a). However, by operating outside of the South Carolina Rules of Civil Procedure, two necessary parties with interests in the settlement agreements and whose rights were potentially affected by the outcome of the motion to compel were not before the Court and had no opportunity to have input into whether the terms of the settlement agreements were disclosed.

Avtex's failure to operate within the South Carolina Rules of Civil Procedure alone is reason enough to reverse the Court of Appeals and reinstate the Order[4].

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4 The Court of Appeals dismisses Avtex;s failure to follow the South Carolina Rules of Civil Procedure because "Avtex had no reason to request the settlement agreement prior to the verdict against it." Aside from making no sense, this statement misses the point.

First, Avtex's need and desire to know the terms of the settlement agreements – which were entered into weeks before trial – did not magically come to fruition upon entry of judgment. Like all other information it deemed necessary to properly defend itself and to assert whatever positions it thought available or potentially available to it, it was incumbent on Avtex to seek discovery of the same without regard to whether it actually ever needed the information or not (for instance, plaintiffs routinely seek and obtain financial information from defendants related only to punitive damages, but only in rare cases in which the trial advances to the punitive damage phase does the financial information obtained become useful or relevant; the Court of Appeals approach would seemingly require the plaintiff to wait until the jury returned a finding of recklessness, witfulness and wantonness before the plaintiff had the right to seek the defendant's financial information). Avtex had ample opportunity to seek the terms of the settlement agreements prior to trial. The suggestion that Avtex had to wait until after verdict was entered is not only absurd, but completely ignorant of the litigation discovery process.

Moreover, there is nothing in the South Carolina Rules of Civil Procedure from which in any way suggest that the discovery rules contained within the South Carolina Rules of Civil Procedure are no longer available once a jury returns a verdict. Avtex could have availed itself of Rule 33(a), 34(a) and 37(a) after the verdict was entered, but simply chose not to.

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT COMPELLING THE PRODUCTION OF THE SETTLEMENT AGREEMENTS WOULD BE A VIOLATION OF THE CONFIDENTIALITY PROVISION OF RULE 8(a), SCADR.

"Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." Rule 6(e), SCADR. Rule 8, SCADR, 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.
>
> **(b) Limited Exceptions to Confidentiality.** This rule does not prohibit:
>
> (1) Disclosures as may be stipulated by all parties;
>
> (2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;
>
> (3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

(4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

(5) Any disclosures required by law or a professional code of ethics.

(c) Private Consultation/Confidentiality. The mediator may meet and consult individually with any party or parties or their counsel during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(d) No Waiver of Privilege. No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.

(e) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

"Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. If the parties envision a more formal agreement, the mediator shall assign one of the parties' attorneys to prepare the agreement." Rule 6(f), SCADR.

"South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution. . . ." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013). Consequently, mediation rules should be broadly construed to effectuate their intent, "even if there are conflicting public policies and even if the equities in a particular case suggest a contrary result." *Wimsatt v. Superior Court,* 61 Cal.Rptr.3d 200, 203, 152 Cal.App.4th 137, 142 (2007).

The assurance of confidentiality is essential to the integrity and success of the Court's mediation program, in that confidentiality encourages candor between the parties 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. As the Second Circuit properly has observed:

> If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals. . . .
>
> In a program like ours, where participation is mandatory and the mediation is directed and sanctioned by the Court, 'the argument for protecting confidential communications may be even stronger because participants are often assured that all discussions and documents related to the proceeding will be protected from forced disclosure.'

"The assurance of confidentiality is essential to the integrity and success of [mediation] in that confidentiality encourages candor between the parties 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." *In re Anonymous*, 283 F.3d 627 at 636 (4th Cir. 2002).

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Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir.1979), *cert. denied,* 444 U.S. 1076, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980). "[W]here participation [in mediation] is mandatory and the mediation is directed and sanctioned by the Court, 'the argument for protecting confidential communications may be even stronger because participants are often assured that all discussions and documents related to the proceeding will be protected from forced disclosure.' *In re Anonymous*, *supra* at 637.

Generally speaking, mediation confidentiality rules are uniformly strictly construed even when the equities in the case suggest contrary results. *See Wimsatt v. Superior Court, supra.* Though few courts have had the opportunity to address the scope mediation confidentiality requirements, those that have broadly enforce the confidentiality of mediation, even in circumstances in which mediation confidentiality operates to deprive the party seeking to penetrate the veil of confidentiality of a substantive claim or right. *See Id.* at 633 (holding that: (1) the mediation confidentiality rules were breached even though matters disclosed were not central to the issues being mediated because "the confidentiality provision as written provides clear guidance in the form of a bright line rule"; (2) the mediation confidentiality rules were breached even though the disclosures were made to a confidential tribunal as "the unambiguous text of Rule 33 does not provide an exception for disclosures made to a confidential forum, but rather prohibits disclosures ""to any other person outside the mediation program participants;" (3) disclosure of conversations relating to the mediated dispute which took place as the parties were leaving the mediation conference, likewise, breached the mediation confidentiality rules because ""mediation' is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the . . . [Office of the Circuit Mediator] as [t]his conception of the duration of mediation is a practical necessity of the process itself, in that the mediated dispute is rarely conclusively resolved during the mediation conference, [but i]nstead, the parties to the dispute often resume mediation, or refine aspects of the settlement agreement, subsequent to the mediation conference, and many times do so outside the presence of the mediator, [so t]hese conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference; and (4) "until a mediated dispute is dismissed

or is otherwise removed from the . . . [Office of the Circuit Mediator], all 'statements, documents, and discussions' relating to the mediation remain within the bailiwick of the . . . [Office of the Circuit Mediator] and, therefore, remain confidential."); *In re Residential Capital, LLC*, 536 B.R. 132 (S.D.N.Y. 2015)(denying a motion to permit discovery of communications concerning a settlement, including communications related to mediation); *Wimsatt v. Superior Court, supra*, (upholding the confidential nature of mediation though doing so prevented the party seeking to part the veil of confidentiality from pursuing a malpractice action). Similarly, other courts which have been called upon to address a breach of an applicable mediation confidentiality provision have aggressively upheld the confidentiality rules and sanctioned the offending party, often acting punitively. *See Frank v. L.L. Bean, Inc.*, 377 F.Supp.2d 233, 240 (D. Maine 2005)(imposing sanctions for disclosing to a material witness information regarding the defendant's settlement position learned through mediation because "[i]t is essential for the effectiveness of mediation in this district that all but the most *de minimis* breaches of confidentially . . . be punished with sanctions" even though the defendant cannot demonstrate prejudice.); *Bernard v. Galen Group, Inc.*, 901 F.Supp. 778, 784 (S.D.NY. 1995)(imposing sanctions as a result of disclosure to the court of two settlement offers made during mediation noting that: ""It is essential . . . that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion. . . . If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the

effectiveness of a program. . . .'"); *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So.2d 725 (Fla. Ct. App. 1997)(affirming the trial court's order striking the plaintiff's pleadings resulting in dismissal of the case with prejudice based on the plaintiffs disclosure of the defendants settlement offer made during the course of mediation). In each of these cases, the court concluded that the importance of upholding mediation confidentiality outweighed the potential harm resulting from non-disclosure. In comparison to some of the circumstances in the above cases, the possible deprivation of Avtex's phantom off-set rights is *de minimis*.

Mediation confidentiality is "not limited to those communications made 'in the course of mediation.' [T]he restriction applies to any written or oral communication made 'for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' as well as all "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation. . . .'" *Wimsatt v. Superior Court, supra* at 217, 152 Cal.App.4th at 150 – 160. "Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. Mediation confidentiality is to be applied where the writing, or statement would not have existed but for a mediation communication, negotiation, or settlement discussion." *Id.* at 208 - 209, 152 Cal.App.4th at 150 – 151. Written settlement agreements "epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure." *Cf. Id.* at 215, 152 Cal.App.4th at 158 (mediation briefs).

Settlement agreements "are part and parcel of the mediation negotiation process." *Id.* Rule 6(f) clearly contemplates this by requiring that prior to "the adjournment of the mediation" the agreement reached during mediation is to be reduced to writing and signed by the parties along with their attorneys and by further requiring the mediator to assign to one of the parties' attorneys the duty

of preparing a more formal written agreement in the event the parties agree that a more formal written agreement is necessary.

The settlement agreements between the Hucks and Civil Site and the Hucks and Chandler fall within the scope of the mediation confidentiality requirements of Rule 8. The settlement agreements are part and parcel of the mediation in this matter. They arose out of and were created as a result of the mediation in this matter. Both are materially related to and fostered the mediation process. Neither would existed but for the mediation. The settlement agreements are, thus, irrefutably subject to mediation confidentiality.

As the settlement agreements are clearly subject to mediation confidentiality, not only can William Huck ***not be compelled*** to produce them, but is, in fact ***prohibited*** from producing them by Rule 8(a). *See In re Anonymous*, *supra*; *Frank v. L.L. Bean, Inc.*, *supra*; *Bernard v. Galen Group, Inc.*, *supra*; *Paranzino v. Barnett Bank of S. Fla., N.A.*, *supra*. The confidentiality provision of Rule 8(a) as written provides clear guidance in the form of a bright line rule. *See In re Anonymous, supra.* There is nothing in Rule 8 which creates an exception to the confidentiality provisions of Rule 8(a), except those set forth in Rule 8(b), which the language of Rule 8(b) specifically referrers to as "**Limited Exceptions to Confidentiality.**" None of the "limited exceptions" specified in Rule 8(b) are applicable to the situation at hand. Consequently, Rule 8(a) prohibits William Huck from producing the two settlement agreement documents to Avtex.

The Court of Appeals essentially amended Rule 8(a)'s strict mediation confidentiality requirement. The Court of Appeals' *ultra vires*[5] de facto amendment of Rule 8 is erroneous and bad

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5 *See* S.C. CONST. art. V, § 4A; Sections 14-3-940 and 950, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

policy for three reasons.

First, the proper way to create exceptions is to formally amend the ADR Rules. Circumvention of the amendment procedures eliminates the required public and legislative input[6]. *See* S.C. CONST. art. V, § 4A; Sections 14-3-940 and 950, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended; *Order of the South Carolina Supreme Court*, No. 2006-05-03-04. Participants at mediation need certainty as to the rules under which they are operating. An ad hoc, case-by-case, judicially crafted approach to creating exceptions to mediation confidentiality – the approach the Court of Appeals took – will lead to confusion and uncertainty as to which information and documents are confidential and which are not, which in turn will greatly inhibit the effectiveness of the mediation process. "Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether." *In re Residential Capital, LLC*, *supra* at 150.

Second, participants in a mediation rely on all parties, themselves included, being bound by the strict confidentiality provisions of Rule 8. "The assurance of confidentiality is essential to the integrity and success of . . . mediation . . . , in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect . . . mediation . . . from

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6 In fact, this Court rejected an amendment to Rule 8 which would, in effect, make settlement agreements exempt from confidentiality. On January 28, 2016, this Court submitted to the General Assembly proposed changes to Rules 1, 4, 20, 23 and 24 of the Alternative Dispute Resolution Rules. *See Order of the South Carolina Supreme Court*, Appellate Case No. 2015-002643, dated January 28, 2016. This Court declined, however, to submit an amendment to Rule 8 which would include a new subsection (b), which, as proposed, reads: "**Waiver of Confidentiality.** Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived unless otherwise agreed to by the parties." *See R.* p.183 – p.186. The Court of Appeals essentially adopted an amendment to Rule 8 which this Court declined to adopt through the formal rule making process. Such a result cannot stand.

being used as a discovery tool for creative attorneys." *In re Anonymous, supra* at 636; *accord Bernard v. Galen Group, Inc., supra*; *Wimsatt v. Superior Court, supra.* ""Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally.' Accordingly, parties' reliance on the confidentiality provided under a mediation order 'counsel[s] in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation.'" *In re Residential Capital, LLC, supra* at 150; *accord Bernard v. Galen Group, Inc., supra*; *Wimsatt v. Superior Court, supra.* ""If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of"" mediation. *In re Anonymous, supra* at 636 – 637; *accord Bernard v. Galen Group, Inc., supra*; *Wimsatt v. Superior Court, supra.* Altering the promise of mediation confidentially in any way is unwise. To do so would erode confidence in the mediation process and impede the current trend of having most cases resolve through mediation[7]. The policy reasons for providing clear guidance in the form of a bright line rule of unqualified strict adherence to mediation confidentiality are even stronger now that mediation is mandatory in most civil actions in all counties. *See Order* 2015-11-12-04.

Third, any exception to confidentiality is the quintessential slippery slope. As any

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7 It is certainly possible that no settlement agreement would have been reached between the Hucks and Civil Site or the Hucks and Chandler in the absence of a belief that the strict confidentiality requirement of Rule 8(a) would be strictly enforced without exception.

experienced archer or marksman knows - no matter how proficient and accurate he or she is – an arrow should never be allowed to leave the bow and a bullet should never be allowed to leave the barrel in the absence of a proper backstop; for if there is no backstop in place, there is no way to prevent the errant arrow or bullet from inflicting harm. As there is no way to backstop an exception to mediation confidentiality, no matter how well crafted, it would be unwise to create one. If adopted, there will likely be no end to claims made that a situation requires exemption from confidentiality if it is advantageous to do so. Where is the line to be drawn as to when confidentiality is inapplicable? Is it ot be decided based on a case-by-case ad hoc basis? If so, how will a mediation participant know during mediation whether the mediation communications are truly confidential? The uncertainty created by such an approach will have a chilling effect on mediation. Further, it is neither unreasonable nor unforeseeable that if an exception is created, the mediation confidentiality rule may become so riddled with judicially created exceptions that confidentiality becomes the exception, not the rule.

Sound public policy demands a bright line rule for mediation confidentiality. In the absence of a bright line rule regarding mediation confidentiality, the effectiveness of the mediation process will be severely eroded to the point that the number of cases being resolved through mediation will likely be reduced to a slow trickle.

Rule 8 is essentially an evidentiary rule prohibiting disclosure, though also a shield to disclosure under the Rules of Civil Procedure. Rule 8 makes abundantly clear that not only are documents materially related to and which fostered, arose out of and were made pursuant to mediation 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. . . ." *See also Wimsatt v. Superior Court, supra* (mediation confidentiality is among other things an evidentiary restriction). Thus, even if this Court were to find that Avtex could discover the settlement agreements, Avtex is barred from using them in support of its motions for reapportionment and set-off[8].

Moreover, The Court of Appeals glosses over the fact that Avtex specifically agreed that "no document prepared for the purpose of, or in the course of, the mediation, or copy thereof," is discoverable and that even it was entitled to discover the settlement agreements, it is barred from introducing them into evidence in support of its motion for re-allocation and its motion for set-off. As required by Rule 2(a), the parties to this action – Avtex included – entered into an Agreement to Mediate designed to protect the confidentiality of the mediation process in this case. *R.* p.179 – p.180. The mediation agreement in this case specifically provides, among other things:

> 4. Unless a document provides otherwise, no document prepared for the purpose of, or in the course of, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

R. p.179 – p.180. Avtex participated in mediation and entered into the Mediation Agreement. All of the participants to the mediation, the Hucks included, had and continue to have a justifiable expectation that all of the other participants are bound by the terms of the mediation agreement, especially the confidentiality provision. Having agreed (1) that it would not compel disclosure of

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8 Avtex failed to raise or argue this point, and, thus, has abandoned this issue and is now barred from taking the position that it can introduce the settlement agreements into evidence. *See* Rules 208(b)(1)(B) and 220(c), SCACR; *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)(This Court may, of course, affirm the Order "upon any ground(s) appearing in the Record on Appeal"); *Richland Cnty. Sch. Dist. Two v. S.C. Dep't. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999)("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992)(issue not argued in brief is deemed abandoned and will not be considered, even if raised in the statement of issues on appeal).

documents materially related to and which fostered, arose out of and were made pursuant to mediation, (2) that it will not attempt to introduce such a document into evidence, and (3) having failed to challenge the mediation agreement and its duties and obligations under the same in the lower court, Avtex is now bound by its agreement and may not raise these issues for the first time on appeal. *See Id.*

Avtex had an opportunity to participate in any settlements arising out of the mediation, but instead elected to withdraw from the mediation process while the other participants persevered and soldiered on. The time for addressing concerns about confidentiality and specifically what it was agreeing to in the mediation agreement, was at the time of the mediation. That Avtex failed to do so is no basis for requesting that the provisions of Rule 8 be ignored. Accordingly, the Order should be affirmed[9]. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015).

III. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE LOWER COURT DOES NOT HAVE THE AUTHORITY TO REAPPORTION THE SETTLEMENT PROCEEDS, IF ANY, PAID BY THE OTHER DEFENDANTS

"The [South Carolina] courts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or assistance." *Darden v. Witham*, 258 S.C. 380, 388, 188 S.E.2d 776, 778 (1972). "'In South Carolina jurisprudence, settlement agreements are viewed as contracts.'" *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012), *cert. denied*, (2104)(*quoting Pee Dee Stores, Inc. v. Doyle,* 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009)). "General contract principles are applied in the construction of a settlement agreement because . . . a settlement agreement is a

9 Affirming the Order will likely have the effect of promoting mediation settlements in cases which might not otherwise be settled in that it will probably have the effect of discouraging mediation participants from prematurely disengaging from the mediation process as Avtex did in this case.

contract." *Pee Dee Stores, Inc. v. Doyle, supra* at 241 – 242, 672 S.E.2d at 803. The courts "are without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enter., Inc. v. S,C. Health & Human Serv. Fin. Com'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). Rather, the Court's "duty is limited to the interpretation of the contract made by the parties themselves '. . . regardless of its . . . apparent unreasonableness. . . .'" *Id.* at 378, 373 S.E.2d at 587. Generally one who is a stranger to a contract is not permitted to attack its terms or validity. *See Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527, 587 (Ct. App. 2009)("'Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.'").

In *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), this Court reversed the Court of Appeals and rejected its reapportionment of an agreed-upon allocation of settlement proceeds, explaining that Section 15-38-50, Code of Laws of South Carolina, 1976, as amended, "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.'" *Id.* at 196, 777 S.E.2d at 830 (*quoting Chester v. S.C. Dep't of Pub. Safety,* 388 S.C. 343, 698 S.E.2d 559 (2010)). The Court then went on to observe:

> 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.
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> * * * *
>
> We find the court of appeals erred in reapportioning the settlement proceeds on the sole basis 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. Given the totality of the circumstances, and particularly in light of the reasonableness of the overall amount of $20,000 and the evidence in the record of Riley's conscious pain and suffering, we believe it was error to disturb the settling parties' agreed-upon allocation solely because the apportionment may have been advantageous to the Estate.

Indeed, we agree with the approach taken by the Illinois Court of Appeals, which stated:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

The court of appeals erred in accepting Ford's invitation to reapportion the agreed-upon allocation of settlement proceeds based on the purported impropriety of an apportionment favoring the Estate. Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting Ford. Here, the trial court-approved allocation is unquestionably reasonable under the facts. In fact, Ford has never suggested that $20,000 for the survival action is unreasonable. Ford's effort to invalidate the allocation of settlement proceeds based on a "percentages" analysis is manifestly without merit under these circumstances. We reverse the court of appeals and hold that Ford is entitled to set off only the $5,000 the settlement agreement apportioned to the wrongful death claim.

Id. at 196 – 198, 777 S.E.2d at 830 – 831 (citations omitted)(*quoting Hawkins v. Pathology Assocs. of Greenville, P.A.,* 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct. App.1998) and *Lard v. AM/FM Ohio, Inc.,* 387 Ill.App.3d 915, 327 Ill.Dec. 273, 901 N.E.2d 1006, 1018 (2009)).

In addressing the set-off issue, the Court of Appeals states:

> Avtex argues it is entitled to a setoff to account for the amounts Civil Site Environmental, Inc. and Chandler Construction Services, Inc. each paid the Hucks to settle the claims against them. Avtex asserts the Hucks allocated a substantial percentage of the settlement with Civil Site Environmental, Inc. and Chandler Construction Services, Inc. to Dianne's loss of consortium claim in an effort to deprive Avtex of a setoff. Therefore, Avtex argues the trial court erred in finding it 'has no jurisdiction to evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate,' and '[n]othing in the law or at equity permits this court to conduct such an inquiry.' The Hucks argue the trial court did not have any authority to reapportion the settlement proceeds.
>
> Pursuant to section 15-38-50, we agree Avtex is entitled to a setoff. There is no right to setoff until there is a verdict against a defendant. Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any. To determine if the nonsettling tortfeasor is entitled to a setoff as a preliminary matter, the documents must be reviewed to determine if their terms shield the settling tortfeasor from the requirements of section 15-38-50(2). Therefore, the court must review the documents to determine the amount of the settlement and its terms[10]. Under section 15-38-50, the court also must determine if the release or covenant was 'given in good faith.' Because the trial court did not conduct such a review, we remand the case for the trial court to look at the settlement agreement and determine if Avtex is entitled to a setoff.

Huck v. Oakland Wings, LLC, Op. No. 5500 (S.C. Ct. App, filed March 28, 2018).

While the Court of Appeals unequivocally addressed Avtex's "fairness" and "reasonableness" argument, noting that "[u]nder section 15-38-50, the court also must determine if the release or covenant was 'given in good faith,'" it curiously ignores Avtex's claim that the Circuit Court has the authority to reallocate the settlements. Nevertheless, it must be assumed that it meant

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10 One point of clarification. The Hucks concede that Avtex is not entitled to a setoff for any funds received by William Huck if it can prove its entitlement to the same, agree Avtex had no right to set-off until a verdict was entered against and agree that once the verdict was entered against Avtex it became the trial court's function to determine whether the Avtex is entitled to a setoff and the amount of the setoff, if any. The Hucks, however, as explained above, do not agree that Avtex is entitled to disclosure of the terms of the settlement agreement. If is, of course, Avtex's burden to prove its entitlement to a set-off and the amount of the set-off. The Hucks also do not agree that the trial court does not have the power or authority to increase the amount of the offset by reallocating settlement proceeds.

to as reviewing the settlement agreements to ascertain whether the settlements were "given in good faith" for the sake of it without the power to reallocate the settlements if they were not "given in good faith" would be a pointless and futile exercise.

The settlements in this matter involve more than one claim: Diane Huck's claim and William Huck's, which are distinct and separate claims with different damages. The Court of Appeals, it would seem, empowers a trial court to reapportion the settlement proceeds on the sole basis that the particular agreed-upon allocation between the William Huck's claim and Dianne Huck's claims, if, in the trial court's view, the agreed upon allocation does not seem proportionately reasonable. The Court of Appeals decision is, of course, diametrically opposed to this Court's holding in *Riley v. Ford Motor Co.*, *supra*, and, if allowed to stand, basically overrules it.

Settlement agreements resolve disputed claims and often times contain provisions whereby the defendant specifically disclaims liability. Though the jury returned a verdict for Avtex, Civil Site and Chandler are not entitled to recover any of the settlement proceeds either paid Diane Huck and/or William Huck. Conversely, had the jury returned a verdict for Avtex, Civil Site and Chandler would have had no right to a return of any of the settlement proceeds paid Diane Huck and/or Willliam Huck. Moreover, even though the jury found William Huck fifty percent at fault in bringing about his own injuries, Civil Site and Chandler cannot seek recovery of fifty percent of the settlement proceeds either paid William Huck. Given that Chandler and Civil Site can in no way benefit from the directed verdict against Dianne Huck, the jury's verdict against Avtex or the jury' apportionment of fifty percent of the fault to William Huck, it would be a curious result indeed if Avtex – a stranger to the settlement agreements - were allowed to rewrite the settlement agreements to its benefit but with no benefit to Civil Site and Chandler which took the commendable course of

settling their differences with the Hucks "'without the courts' intervention or assistance.'" *Darden v. Witham*, *supra* at 388, 188 S.E.2d at 778. Simply stated, this situation is a "consequence of . . . [Avtex's] refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do." *Riley v. Ford Motor Co.*, *supra* at 197, 777 S.E.2d at 831.

Moreover, the Court of Appeals' reliance on Section 15-38-50, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, as a basis for empowering a trial court to determine if the release given to Civil Site and Chandler by the Hucks was given in good faith is misplaced. Section 15-38-50(1) provides that "[w]hen 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. . . ." Section 15-38-50(1), by its plain language, applies only to reduce a claim for contribution against a joint torfeasor. Accordingly, a "good faith" determination made pursuant to Section 15-38-50(1) may only be made in the context of a contribution claim, not a claim for off-set, as a plaintiff is not a tortfeasor, let alone a joint tortfeasor. In applying Section 15-38-50 the Court of Appeals has amended the UCATA to apply to a situation not involving a claim for contribution against a joint tortfeasor.

Avtex seeks a set-off against the judgment awarded the Hucks for the amounts the Hucks received from Civil Site and Chandler as oppose to seeking contribution from Civil Site and Chandler. The Hucks, however, are the injured parties, not tortfeasors, let alone, joint torfeasors. 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.

Furthermore, as the jury specifically found that Avtex was fifty percent at fault, Avtex is not 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 as liability of less than fifty percent is required for a tortfeasor to avail itself of the provisions of the UCATA.

CONCLUSION

As this Petition presents novel questions of law – whether Avtex was required to follow the provisions of Rules 33, 34 and 37, SC.R.CIV.P., when seeking production of the settlement agreements terms and the scope and applicability of Rule 8 of the SCADR Rules - and the Court of Appeals' decision is in conflict with a prior decision of the Supreme Court - *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015) – this Petition for Certiorari should be granted. *See* Rule 242(b)(1) and (3), SCACR.

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April 27, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Opinion No. 5500 (S.C. Ct. App. filed March 28, 2018)

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

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., is.....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that *The Petition for Wit of Certiorari* and the *Appendix* filed in connection therewith in this matter complies with Rules 242 and 267, SCACR

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April 27, 2018
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
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The Honorable Brian M. Gibbons, Circuit Court Judge

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Of Whom AVTEX COMMERCIAL PROPERTIES, INC., is.....Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Clerk of the South Carolina Court of Appeals with a copy of *Petition for Writ of Certiorari* herein specified by hand delivering a copy of the same as follows:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

I hereby further certify that I have served all counsel in this action with a copy of *Petition for Writ of Certiorari* 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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April 27, 2016
Charleston, South Carolina