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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

Appellate Case No. 2018-00085

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.

APPENDIX

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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

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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10-569

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

ORDER DENYING
THE MOTION OF
DEFENDANT, AVTEX
COMMERCIAL PROPERTIES,
INC., FOR JNOV AND
DENYING THE MOTION
OF DEFENDANT, AVTEX
COMMERCIAL PROPERTIES,
INC., TO DISCLOSE
SETTLEMENT AND FOR SET-
OFF

BACKGROUND

This is a premises liability action. This matter came before this court for a trial on the merits on May 19, 2015, May 20, 2015 and May 21, 2015. Prior to trial, Defendants, Civil Site Environmental, Inc., (hereinafter referred to "CSE") and Chandler Construction Services, Inc., (hereinafter referred to "CCS"), settled with either Plaintiff, William Huck, Plaintiff, Dianne Huck, or both; the terms of the settlement, including the amounts, are unknown to the court.

At the close of the plaintiffs' case, the remaining Defendants, Oakland Wings, LLC b/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), Oakland Properties, LLC, (hereinafter referred to as "Oakland") and Avtex Commercial Properties, Inc., (hereinafter referred to as "Avtex") moved for directed verdict pursuant to Rule 50(a), S.C.R.Civ.P. This

court granted the motion as to Mrs. Huck's consortium cause of action, but denied the motion as to Mr. Huck's negligence cause of action.

At the close of all evidence, Wild Wing, Oakland and Aytex renewed their Rule 50(a) directed verdict motion as to Mr. Huck's negligence cause of action, which the court denied. The matter was then submitted to the jury for determination, which returned a verdict in favor of Mr. Huck against Aytex only in the amount of \$97,640.00, but found that Mr. Huck was fifty percent negligent in bringing about his own injuries. Accordingly this court reduced the verdict by fifty percent to \$48,820.00 and entered judgment against Aytex in the amount of \$48,820.00. The jury also returned verdict in favor of Wild Wing and Oakland and judgment was, accordingly, entered in their favor dismissing them from this action.

On June 3, 2015, Aytex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), S.C.R.Civ.P., and a motion for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlement with CSE and CCS were made in good faith. This matter is now before this court for a determination of Aytex's June 3 motions. For the reasons set forth hereinbelow, both motions are hereby denied.

DISCUSSION

A. RULE 50(B) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

As a preliminary matter, Mr. Huck takes the position that this court cannot consider Aytex's motion for judgment notwithstanding the verdict because it was not timely made. The court disagrees.

Rule 50(b), (e) and (f), S.C.R.Civ.P., respectively provide in relevant part:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may

move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict.

* * * *

The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.

A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion,

(emphasis added). Rule 6(b), S.C.R.Civ.P., provides in pertinent part:

When by these rules . . . or by order of court an act is required or allowed to be done at or within a specified time . . . the court for cause shown may at any time in its discretion . . . order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended. . . . The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

The South Carolina Supreme Court held in *Citizens & S. Nat'l Bank of S.C. v. Easton*, 310 S.C. 458, 427 S.E.2d 640 (1993), the time for filing a motion under Rule 59(b) may not be enlarged or extended beyond the ten day period stated in Rule 59(b).

Mr. Huck takes the position that since Avtex's motion for judgment notwithstanding the verdict was not filed until June 3, 2015, it was not filed within the ten day period proscribed by Rule 50(e), and, as a consequence, Avtex's Rule 50(b) motion for judgment notwithstanding the verdict is untimely, and must be dismissed as the court now lacks jurisdiction to entertain it. However, the court finds that Avtex actually made its motion for judgment notwithstanding the verdict orally immediately following the reading of the verdict which it followed up with a memorandum filed June 3, 2015. Accordingly, in the court's

view, Avtex timely made its motion for judgment notwithstanding the verdict and the court may now entertain it.

Nevertheless, in considering Avtex' motion for judgment notwithstanding the verdict on the merits, the court finds that the motion must be denied. When ruling on a motion for a directed verdict, this Court is concerned with the existence or non-existence of evidence, not its weight. *See Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. *Id.* As the Court finds that there is ample evidence to support the jury's finding that Avtex was negligent, that its negligence brought about Mr. Huck's injuries and that Mr. Huck's damages are \$97,640.00, this court, as it must, hereby deny Avtex' motion for judgment notwithstanding the verdict.

B. MOTION FOR DISCLOSURE OF SETTLEMENT, FOR SET-OFF AND, IN THE ALTERNATIVE, TO DETERMINE WHETHER THE SETTLEMENTS WERE MADE IN GOOD FAITH.

Avtex seeks to have this court compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck. For the reasons explained below this court must deny Avtex's motion.

First, this court, however, is not permitted to compel the disclosure of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both as this is specifically prevented by the South Carolina Rules governing Alternative Dispute Resolution. Rule 2(a). SCADR, defines a mediation as "[a]n informal process in which a third-party mediator facilitates settlement discussions between parties." Rule

6(e), SCADR, provides that "Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." 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.

As required by Rule 2(a) the parties to this action — Aytex and its attorneys included — entered into an Agreement to Mediate designed to protect the confidentiality of the mediation process in this case. A copy of which is attached to this e-mail. The mediation agreement in this case specifically provides, among other things:

1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible into evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

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.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

The settlements with Civil Site and Chandler in this case, if any, were made during the course and scope of the mediation in this matter and are subject to the confidentiality provisions of Rule 6(e) and 8 of the SCADR. See Rule 1, Rule 3, Rule 23 and Rule 24, SCADR. The settlement with CSE was reached at the mediation site. The settlement with CCS was reached a few weeks later during the continuation of the mediation by agreement of Mr. and Mrs. Huck

and CCS; all discussions and negotiations were through the neutral/mediator, John H. Tiller, Esq., who remained involved and who facilitated the settlement negotiations.

What Avtex seeks to have this court do is to compel the production and disclosure of a settlement agreement, assuming there is a settlement agreement, prepared for the purpose of, or in the course of the mediation and then admit its terms into evidence in violation of Rule 6(e) and Rule 8, SCADR, and in violation of the mediation agreement. The Court is barred from inquiring into the confidential settlement discussions and negotiations between Mr. and Mrs. Huck and CSE and CCS or the settlement agreements, if any, consummated as a result or to compel the production of the same. Clearly the settlement agreements, if there are settlement agreements, do not fall within the limited -- to use the word specifically set forth in the Rule 8(b), SCADR -- exceptions to mediation confidentiality set forth in Rule 8(b). Further, even if the settlement agreements, if there are any settlement agreements, are produced or the terms of the settlements, if there were a settlement are disclosed, they cannot be introduced into evidence for consideration by the court. Consequently, the granting of the motion would be in blatant disregard of the Alternative Dispute Rules and must therefore be denied.

In arguing that it is entitled to the production of the settlement agreements, if there are settlement agreements, or the settlement terms, if there are settlement terms, not once does Avtex reference the Alternative Dispute Resolution Rules. This is telling as Avtex would have the Court ignore or overlook them. This the Court cannot do. Further, Avtex's offer of a protective order does not circumvent the Alternative Dispute Resolution Rules.

Avtex specifically agreed in the mediation agreement "[u]nless 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." Avtex attended mediation. It had an opportunity to participate in any settlements arising out of the same, but elected not to. 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 court ignore the South Carolina rules relating to ADR. "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).

In order to compel the disclosure of a "document prepared for the purpose of, or in the course of, the mediation," Avtex must demonstrate that a "'manifest injustice' will result from non-disclosure. Application of the manifest injustice standard requires the party seeking disclosure to demonstrate that the harm caused by non-disclosure will be manifestly greater than the harm caused by disclosure." *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002). As the negotiations with CCS continued through the mediator, those negotiations, and any agreement reached are subject to the South Carolina Rules of Alternative Dispute Resolution. *C.f. Id.* at 635 ("'mediation' is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the OCM. This 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. Instead, 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. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference. Accordingly, until a mediated dispute is dismissed or is otherwise removed from the OCM, all 'statements,

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documents, and discussions' relating to the mediation remain within the bailiwick of the OCM and, therefore, remain confidential."'). Avtex, has failed to make a showing of manifest injustice. In fact, Avtex has failed to make any showing whatsoever.

Further, even if the court were made aware of the terms of the settlement between Mr. and Mrs. Huck and CSE and/or the terms of the settlement agreement between Mr. and Mrs. Huck and CCS, assuming there are such settlement agreements, the court has no jurisdiction to evaluate the "fairness" or "reasonableness" of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate. Nothing in the law or at equity permits this court to conduct such an inquiry.

Avtex cites *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Cl. App. 2014), and *Welch v. Epstein*, 432 S.C. 279, 536 S.E.2d 408 (Cl. App. 2000), in support of its motion for reallocation. Assuming there is even anything to reallocate, Avtex's reliance on *Riley v. Ford Motor Co.*, *supra*, and *Welch v. Epstein*, *supra*, is misplaced as both involve the reallocation of settlement funds between a survival action and a wrongful death action, not the reallocation of settlement funds between two separate living parties with distinct and separate claims. "Any settlement of a wrongful death or survival action must be approved by either a probate court, circuit court. . . ." Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." Thus, in both *Riley v. Ford Motor Co.*, *supra*, and *Welch v. Epstein*, *supra*, the court was required by statute to evaluate the fairness and reasonableness of the survival and wrongful death settlements. No such requirement exists in the instant case and

there is nothing in the law which permits this court to conduct such an inquiry. Accordingly, Avtex's motion should be denied on this basis too.

Avtex argues that the Court's holding in *Riley v. Ford Motor Co., supra*, "hinged on the Court's equitable powers to reallocate an apportionment of settlement money that was not supported by the record, which was clearly designed to achieve an unfair tactical advantage." This statement illustrates Avtex's misunderstanding of the court's holding in *Riley v. Ford Motor Co., supra*, as the holding therein hinged not on the court's equitable powers but rather on the fact that the court was required by statute to approve the settlement. See Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." There is no such statute giving the court the authority to approve the settlements between CCS and Mr. and Mrs. Huck, assuming such a settlement exists, and a settlement between CSE and Mr. and Mrs. Huck, assuming such settlement exists. Accordingly, even if the court had evidence before it that there is in fact a settlements agreement between CCS and Mr. and/or Mrs. Huck and a settlement agreement between CSE and Mr. and/or Mrs. Huck, and also had evidence as to what the terms of the settlement agreements are, the court has no mechanism for "receiv[ing] into evidence those facts that the court considers necessary and proper to evaluate the settlement[s]" and, therefore, unlike the court in *Riley v. Ford Motor Co., supra*, this court has no basis on which to make a determination as to whether there should be a reallocation, assuming there is anything to reallocate.

Avex maintains that "that while Mr. and Mrs. Huck are certainly separate individuals, their financial existence is singular." Avtex's position in this regard hinges on the claim that "a family court would undoubtedly view those funds as marital assets." A family court will only apportion a personal injury settlement if it is unallocated. If allocated, a personal injury settlement is clearly non-marital property. Furthermore, this court, not being a family court, has no jurisdiction to determine what is or is not a marital asset of Mr. or Mrs. Huck or how to equitably apportion the same.

Finally, Avtex maintains it is entitled to contribution from the settling defendants. This position is without merit.

The jury found Avtex fifty percent responsible in bringing about Mr. Huck's injuries. Thus, since Avtex was fifty percent negligent, it is joint and severally liable for the verdict and is entitled to no contribution. See Section 15-38-15, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Consequently, since it has no right of contribution, Avtex motion should be denied on this basis too.

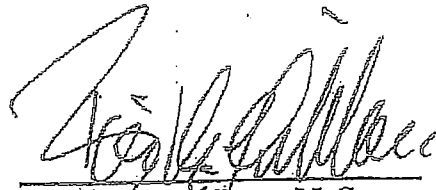
Accordingly, based on the forgoing, Avtex's motion to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck must be denied.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion of Defendant, Avtex Commercial Properties, Inc., for judgment notwithstanding verdict is hereby DENIED and the motion of

Defendant, Avtex Commercial Properties, Inc., to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck is, likewise, hereby DENIED!

AND IT IS SO ORDERED!

July 23, 2015
Chester, South Carolina


THE HONORABLE BRIAN M. GIBBONS
Circuit Court Judge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

WILLIAM HUCK AND DIANE HUCK,

Plaintiff,

vs.

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

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-569

ORDER DENYING MOTION
TO ALTER OR AMEND
JUDGEMENT PURSUANT TO
SCRCP 59(e)

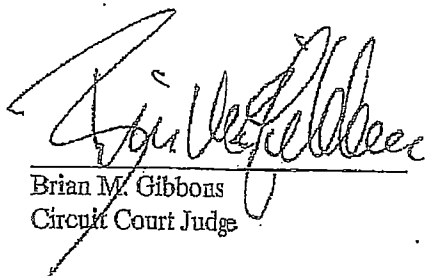
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2015-AUG-18 AM 9:47
JULIE J. ARMSTRONG
CLERK OF COURT

After having considered Defendant's motion to alter or amend judgement in this case and after reviewing the file and the Court's extensive notes, and considering the applicable statutory law, case law and evidence presented, I respectfully deny Defendant's motion. No further briefing or argument is necessary.

AND IT IS SO ORDERED.

Chester, SC .

August 14, 2015


Brian M. Gibbons
Circuit Court Judge

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

28



KENNETH MICHAEL BARFIELD
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CHARLESTON SC 29402-0197

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRC

Order/denying mot to alter or amend judg

CASE NO: 2014CP1000569

William Huck , plaintiff, et al VS Wings Over America Inc , defendant, et al

This judgment was entered on the 18th day of August, 2015, and notice mailed first class on Wednesday, August 19, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

v.

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

Defendants.

CASE NO. 2014-CP-10-

569

SUMMONS

(Jury Trial Demanded)

FILED
2014 JAN 28 AM 10:30
CLERK OF COURT

TO: DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 129 Broad Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

PRITCHARD LAW GROUP, LLC

Edward K. Pritchard, III

Edward K. Pritchard, III

129 Broad Street

Charleston, SC 29401

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ATTORNEY FOR PLAINTIFFS

January 27, 2014

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

v.

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

Defendants.

CASE NO. 2014-CP-10-

569

COMPLAINT
(Jury Trial Demanded)

2014 JAN 28 AM 10:31
CLERK OF COURT

PLAINTIFFS, William Huck and Dianne Huck (hereinafter collectively referred to as "Plaintiffs"), complaining of Defendants, Wings Over America, Inc. d/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), 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") (hereinafter collectively referred to as "Defendants" where applicable), would respectfully show unto the Court the following:

1. PARTIES

1. The Plaintiffs are husband and wife and are and at all times relative hereto were citizens and residents of the County of Charleston, State of South Carolina.
2. That, on information and belief, Wild Wing is a corporation duly organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

3. That, on information and belief, Civil Site is a corporation organized and existing pursuant to the laws of the South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
4. That, on information and belief, Oakland is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
5. That, on information and belief, Chandler is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
6. That, on information and belief, Avtex is a corporation organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

II. JURISDICTION AND VENUE

7. That, on information and belief, this Court has jurisdiction over the subject matter of this action.
8. That, on information and belief, this Court has personal jurisdiction over Wild Wing, Civil Site, Oakland, Chandler and Avtex.
9. That, on information and belief, venue in this matter is proper in this Court.

III. FACTUAL BACKGROUND

10. That on July 13, 2012, at 12:00 p.m., Plaintiff, William Huck (hereinafter "Huck"), went to Wild Wing Café located in The Market at Oakland, Mount Pleasant, South Carolina for the purpose of eating lunch.

11. That Huck, after parking in the parking lot on the south side of South Morgans Point Road, proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café and slipped and fell due to the un-level slippery surface, which was covered by heavy slimy ponding and accumulation of debris blocking normal passage.
12. That as a direct and proximate result, Huck suffered physical harm and bodily injury, all of which has caused him to undergo excruciating pain and suffering, along with surgery causing him to incur medical expenses and great financial loss.
13. That the Town of Mount Pleasant, a political subdivision of the State of South Carolina, issued an Encroachment Permit in July 2009, and amended it in October of 2009 for installation of paver crosswalks, which also included curb cuts and installation of pedestrian ramps.
14. That, on information and belief, Civil Site produced the construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications.
15. That, on information and belief, Oakland is and at all times relative hereto was the property manager of The Market at Oakland, and the applicant for the encroachment permit.
16. That, on information and belief, Chandler performed the construction of the walkway in The Market at Oakland in front of Wild Wing Café located at the intersection of Oakland Market Road and South Morgans Point Road.
17. That, on information and belief, Wing Café, is a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex Is and was on July 13, 2012, at 12:00 p.m. and at all

times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.

18. That, on information and belief, Avtex developed, owns and manages The Market at Oakland in Mount Pleasant, South Carolina, and is and was on July 13, 2012, at 12:00 p.m and at all times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.

**FOR A FIRST CAUSE OF ACTION
(Negligence)**

19. That each and every relevant and consistent allegation set forth in paragraph 1 through paragraph 18 hereinabove is incorporated herein as if fully set forth herein verbatim.
20. That at all times relative hereto, while at The Market at Oakland on July 13, 2012, Huck was an invitee on the premises.
21. That, on information and belief, Civil Site produced faulty construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café.
22. That, on information and belief, Chandler negligently performed the construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café, in that it failed to constructed the same in accordance with the requirements of the International Building Code (IBC), 2006, and in violation of ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions.

23. That, on information and belief, Avtex as the owner in possession of The Market at Oakland at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
24. That, on information and belief, Oakland, as property manager of The Market at Oakland, had a special relationship with Huck as an invitee on the premises, which gave rise to protect him against unreasonable risk of physical harm.
25. That, on information and belief, Wild Wing Café, as a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex and in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
26. That all duties owed to Huck by Wild Wing Café, Oakland and Avtex arose by operation of law.
27. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty of due care to keep the walkway in a reasonably safe condition so that Huck could use it in the ordinary and reasonable way without danger.
28. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty to implement reasonable inspection procedures in order to protect him from foreseeable risks of harm.
29. That on July 13, 2012, and at all times relative hereto, Huck had a right to assume that the walkway would be free from defects or obstructions that might cause injury to him.

30. That Wild Wing, Oakland and Avtex expressly and/or impliedly represented to Huck at the time of entry into the walkway that it was and would be in a reasonably safe condition.
31. That Huck had a right to rely upon this representations of Wild Wing, Oakland and Avtex, as they owed Huck a duty to ensure that the walkway was in a reasonably safe condition.
32. That the un-level slippery surface of the walkway, which was covered by heavy slimy ponding and accumulation of debris was not an open or obvious condition.
33. That, on information and belief, Wild Wing, Oakland, Avtex, Chandler and Civil Site had actual and/or constructive notice of the hazard presented by the un-level walkway, which Huck encountered through no fault of his own and which was indeed an unavoidable latent hazard.
34. That Chandler owed Huck a duty not to created a dangerous condition in violation of the requirements of the International Building Code (IBC), 2006, and ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions in such an area of ingress and egress as to make stepping upon the hazardous condition unavoidable in that it was reasonably foreseeable that Huck and others similarly situated would use the sidewalk for normal pedestrian traffic and in that it was reasonably foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated.
35. That Civil Site owed Huck a duty not to produce construction plans which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications in that it was reasonably foreseeable that Huck and others similarly situated would use the sidewalk for normal pedestrian traffic and in that it was reasonably

foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated.

36. As a direct and proximate result of Wild Wing's, Oakland's, Avtox's, Chandler's and Civil Site's negligent, willful, wonton and reckless breach of the respective duty each owed Huck, Huck suffered severe and permanent physical harm and bodily injury including but not limited to significant left chest, shoulder, arm and hand injuries requiring hospitalization, all of which has caused him to undergo excruciating pain and suffering, surgery, therapy, and which injuries to this day cause Huck pain and restricted mobility and has caused him to incur medical expenses and great financial loss.

37. That the actions of Wild Wing, Civil Site, Oakland Chandler and Avtex complained of herein constitute negligence, gross negligence, recklessness, willfulness, and wantonness, in the following particulars, to-wit:

- a. In failing to maintain the walkway in good order and repair and in a reasonably safe condition;
- b. In failing to exercise due care under the circumstances;
- c. In failing to exercise reasonable and ordinary care to guard Huck against foreseeable risks of physical harm to her person;
- d. In failing to protect Huck against unreasonable risks of physical harm to her person;
- e. In failing to do what a reasonable person or entity would have done under the circumstances;
- f. In failing to exercise due care to discover risks and take safety precautions to warn of or eliminate foreseeable risks;

- g. In failing to post warning signs;
 - h. In failing to keep the walkway in a reasonably safe condition so that Huck could use it on the ordinary and reasonable manner without danger;
 - i. In failing to inspect the walkway or to implement regular maintenance procedures in order to protect the guests from foreseeable danger;
 - j. In failing to eliminate foreseeable risks of harm;
 - k. In failing to warn Huck of foreseeable danger; and,
 - l. In such other particulars as may be determined through discovery or trial.
38. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's respective negligence, gross negligence, reckless, willfulness and wantonness complained of herein, Huck has been injured and damaged in the following particulars, to-wit:

- a. Physical pain;
- b. Suffering;
- c. Mental anguish;
- d. Emotional distress;
- e. Permanent impairment of health and bodily efficiency;
- f. Loss of enjoyment of Huck's life;
- g. Increased susceptibility to future injury of the shoulder injured in the fall giving rise to this action;
- h. Substantial expenses for past and future medical services;
- i. Expenses for transportation to and from medical services;
- j. Such other particulars as may be found through discovery or trial; and,

k. Substantial past, present and future loss of earnings.

39. That Huck had no knowledge of or reason to suspect danger with regard to the defect contained in the walkway.
40. That Huck exercised ordinary and reasonable care for himself at all times while on the walkway.
41. That Wild Wing, Civil Site, Oakland, Chandler and Avtex each are liable to Huck and Huck is entitled to actual, consequential and punitive damages and all other relief as deemed proper by the Court.
42. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's negligent, willful, wanton and gross negligent conduct complained of herein above, Huck is entitled to judgment against Wild Wing, Civil Site, Oakland, Chandler and Avtex in an amount equal to his actual damages as more particularly described herein above, and for punitive damages in an appropriate amount.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

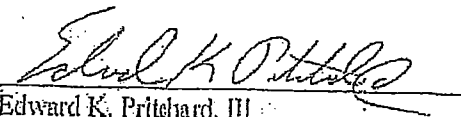
43. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 42 hereinabove is incorporated herein as if fully set forth herein verbatim.
44. As a direct and proximate result of the negligence of Wild Wing, Civil Site, Oakland, Chandler and Avtex, Huck is and has been disabled due to his injuries which have caused him to be delinquent in his conjugal duties towards Plaintiff Dianne Huck.
45. As a further direct and proximate result of the injuries suffered by Huck, Plaintiffs have both suffered great and irreparable loss in the deprivation of society, companionship, consortium and services of each other as spouses, and will continue to be so deprived of the comfort and solace usually and ordinarily provided by a spouse of good health.

WHEREFORE, Plaintiffs, William Huck and Dianne Huck, having complained of Defendants, Wings Over America, Inc. d/b/a Wild Wing Café, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc. and Avtex Commercial Properties, Inc., prays that they be awarded judgment against Defendants, as follows:

- A. In an amount sufficient to compensate Plaintiffs for their injuries and damages as described herein above;
- B. Punitive damages in an appropriate amount up to the amount permitted by law;
- C. In an amount equal to all costs and attorney fees incurred by Plaintiffs in connection with this action;
- D. For a trial before a jury on all issues; and,
- E. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

PRITCHARD LAW GROUP, LLC



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Charleston, South Carolina 29402
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(843) 722-3379 Facsimile
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Attorney for Plaintiffs

January 27, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

CASE NO. 2014-CP-10- J69

AMENDED SUMMONS
(Jury Trial Demanded)

FILED
2014 FEB 20 PM 4:21
JULIE J. ARMSTRONG
CLERK OF COURT

TO: DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 129 Broad Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

~SIGNATURE ON NEXT PAGE~

PRITCHARD LAW GROUP, LLC



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ATTORNEY FOR PLAINTIFFS

February 20, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

CASE NO. 2014-CP-10-569

Plaintiffs,

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.,

AMENDED COMPLAINT
(Jury Trial Demanded)

Defendants.

FILED
2014 FEB 20 PM 1:28
CLERK OF COURT
JAMES H. HARRIS

PLAINTIFFS, William Huck and Dianne Huck (hereinafter collectively referred to as "Plaintiffs"), complaining of Defendants, Oakland Wings, LLC d/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), 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") (hereinafter collectively referred to as "Defendants" where applicable), would respectfully show unto the Court the following:

I. PARTIES

1. The Plaintiffs are husband and wife and are and at all times relative hereto were citizens and residents of the County of Charleston, State of South Carolina.
2. That, on information and belief, Wild Wing is a corporation duly organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

3. That, on information and belief, Civil Site is a corporation organized and existing pursuant to the laws of the South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
4. That, on information and belief, Oakland is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
5. That, on information and belief, Chandler is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
6. That, on information and belief, Avtex is a corporation organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

II. JURISDICTION AND VENUE

7. That, on information and belief, this Court has jurisdiction over the subject matter of this action.
8. That, on information and belief, this Court has personal jurisdiction over Wild Wing, Civil Site, Oakland, Chandler and Avtex.
9. That, on information and belief, venue in this matter is proper in this Court.

III. FACTUAL BACKGROUND

10. That on July 13, 2012, at 12:00 p.m., Plaintiff, William Huck (hereinafter "Huck"), went to Wild Wing Café located in The Market at Oakland, Mount Pleasant, South Carolina for the purpose of eating lunch.

11. That Huck, after parking in the parking lot on the south side of South Morgans Point Road, proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café and slipped and fell due to the un-level slippery surface, which was covered by heavy slimy ponding and accumulation of debris blocking normal passage.
12. That as a direct and proximate result, Huck suffered physical harm and bodily injury, all of which has caused him to undergo excruciating pain and suffering, along with surgery causing him to incur medical expenses and great financial loss.
13. That the Town of Mount Pleasant, a political subdivision of the State of South Carolina, issued an Encroachment Permit in July 2009, and amended it in October of 2009 for installation of paver crosswalks, which also included curbs and installation of pedestrian ramps.
14. That, on information and belief, Civil Site produced the construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications.
15. That, on information and belief, Oakland is and at all times relative hereto was the property manager of The Market at Oakland, and the applicant for the encroachment permit.
16. That, on information and belief, Chandler performed the construction of the walkway in The Market at Oakland in front of Wild Wing Café located at the intersection of Oakland Market Road and South Morgans Point Road.
17. That, on information and belief, Wing Café, is a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex is and was on July 13, 2012, at 12:00 p.m and at all

times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.

18. That, on information and belief, Avtex developed, owns and manages The Market at Oakland in Mount Pleasant, South Carolina, and is and was on July 13, 2012, at 12:00 p.m and at all times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.

**FOR A FIRST CAUSE OF ACTION
(Negligence)**

19. That each and every relevant and consistent allegation set forth in paragraph 1 through paragraph 18 hereinabove is incorporated herein as if fully set forth herein verbatim.
20. That at all times relative hereto, while at The Market at Oakland on July 13, 2012, Huck was an invitee on the premises.
21. That, on information and belief, Civil Site produced faulty construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café.
22. That, on information and belief, Chandler negligently performed the construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café, in that it failed to constructed the same in accordance with the requirements of the International Building Code (IBC), 2006, and in violation of ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions.

23. That, on information and belief, Avtex as the owner in possession of The Market at Oakland at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
24. That, on information and belief, Oakland, as property manager of The Market at Oakland, had a special relationship with Huck as an invitee on the premises, which gave rise to protect him against unreasonable risk of physical harm.
25. That, on information and belief, Wild Wing Café, as a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex and in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
26. That all duties owed to Huck by Wild Wing Café, Oakland and Avtex arose by operation of law.
27. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty of due care to keep the walkway in a reasonably safe condition so that Huck could use it in the ordinary and reasonable way without danger.
28. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty to implement reasonable inspection procedures in order to protect him from foreseeable risks of harm.
29. That on July 13, 2012, and at all times relative hereto, Huck had a right to assume that the walkway would be free from defects or obstructions that might cause injury to him.

30. That Wild Wing, Oakland and Avtex expressly and/or impliedly represented to Huck at the time of entry into the walkway that it was and would be in a reasonably safe condition.
31. That Huck had a right to rely upon this representations of Wild Wing, Oakland and Avtex, as they owed Huck a duty to ensure that the walkway was in a reasonably safe condition.
32. That the un-level slippery surface of the walkway, which was covered by heavy slimy ponding and accumulation of debris was not an open or obvious condition.
33. That, on information and belief, Wild Wing, Oakland, Avtex, Chandler and Civil Site had actual and/or constructive notice of the hazard presented by the un-level walkway, which Huck encountered through no fault of his own and which was indeed an unavoidable latent hazard.
34. That Chandler owed Huck a duty not to created a dangerous condition in violation of the requirements of the International Building Code (IBC), 2006, and ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions in such an area of ingress and egress as to make stepping upon the hazardous condition unavoidable in that it was reasonably foreseeable that Huck and others similarly situated would use the sidewalk for normal pedestrian traffic and in that it was reasonably foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated.
35. That Civil Site owed Huck a duty not to produce construction plans which failed to provide any details or notes for construction of the curb ramps²⁷ adjacent to the roadway modifications in that it was reasonably foreseeable that Huck and others similarly situated would use the sidewalk for normal pedestrian traffic and in that it was reasonably

foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated.

36. As a direct and proximate result of Wild Wing's, Oakland's, Avtex's, Chandler's and Civil Site's negligent, willful, wonton and reckless breach of the respective duty each owed Huck, Huck suffered severe and permanent physical harm and bodily injury including but not limited to significant left chest, shoulder, arm and hand injuries requiring hospitalization, all of which has caused him to undergo excruciating pain and suffering, surgery, therapy, and which injuries to this day cause Huck pain and restricted mobility and has caused him to incur medical expenses and great financial loss.
37. That the actions of Wild Wing, Civil Site, Oakland Chandler and Avtex complained of herein constitute negligence, gross negligence, recklessness, willfulness, and wantonness, in the following particulars, to-wit:
 - a. In failing to maintain the walkway in good order and repair and in a reasonably safe condition;
 - b. In failing to exercise due care under the circumstances;
 - c. In failing to exercise reasonable and ordinary care to guard Huck against foreseeable risks of physical harm to her person;
 - d. In failing to protect Huck against unreasonable risks of physical harm to her person;
 - e. In failing to do what a reasonable person or entity would have done under the circumstances;
 - f. In failing to exercise due care to discover risks and take safety precautions to warn of or eliminate foreseeable risks;

- g. In failing to post warning signs;
- h. In failing to keep the walkway in a reasonably safe condition so that Huck could use it on the ordinary and reasonable manner without danger;
- i. In failing to inspect the walkway or to implement regular maintenance procedures in order to protect the guests from foreseeable danger;
- j. In failing to eliminate foreseeable risks of harm;
- k. In failing to warn Huck of foreseeable danger; and,
- l. In such other particulars as may be determined through discovery or trial.

38. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's respective negligence, gross negligence, reckless, willfulness and wantonness complained of herein, Huck has been injured and damaged in the following particulars, to-wit:

- a. Physical pain;
- b. Suffering;
- c. Mental anguish;
- d. Emotional distress;
- e. Permanent impairment of health and bodily efficiency;
- f. Loss of enjoyment of Huck's life;
- g. Increased susceptibility to future injury of the shoulder injured in the fall giving rise to this action;
- h. Substantial expenses for past and future medical services;
- i. Expenses for transportation to and from medical services;
- j. Such other particulars as may be found through discovery or trial; and,

k. Substantial past, present and future loss of earnings.

39. That Huck had no knowledge of or reason to suspect danger with regard to the defect contained in the walkway.
40. That Huck exercised ordinary and reasonable care for himself at all times while on the walkway.
41. That Wild Wing, Civil Site, Oakland, Chandler and Avtex each are liable to Huck and Huck is entitled to actual, consequential and punitive damages and all other relief as deemed proper by the Court.
42. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's negligent, willful, wanton and gross negligent conduct complained of herein above, Huck is entitled to judgment against Wild Wing, Civil Site, Oakland, Chandler and Avtex in an amount equal to his actual damages as more particularly described herein above, and for punitive damages in an appropriate amount.

**FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)**

43. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 42 hereinabove is incorporated herein as if fully set forth herein verbatim.
44. As a direct and proximate result of the negligence of Wild Wing, Civil Site, Oakland, Chandler and Avtex, Huck is and has been disabled due to his injuries which have caused him to be delinquent in his conjugal duties towards Plaintiff Dianne Huck.
45. As a further direct and proximate result of the injuries suffered by Huck, Plaintiffs have both suffered great and irreparable loss in the deprivation of society, companionship, consortium and services of each other as spouses, and will continue to be so deprived of the comfort and solace usually and ordinarily provided by a spouse of good health.

WHEREFORE, Plaintiffs, William Huck and Dianne Huck, having complained of Defendants, Oakland Wings, LLC d/b/a Wild Wing Café, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc. and Avtex Commercial Properties, Inc., prays that they be awarded judgment against Defendants, as follows:

- A. In an amount sufficient to compensate Plaintiffs for their injuries and damages as described herein above;
- B. Punitive damages in an appropriate amount up to the amount permitted by law;
- C. In an amount equal to all costs and attorney fees incurred by Plaintiffs in connection with this action;
- D. For a trial before a jury on all issues; and,
- E. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

PRITCHARD LAW GROUP, LLC



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(843) 722-3379 Facsimile
epritchard@pritchardlawgroup.com
Attorney for Plaintiffs

February 20, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

vs.

WINGS OVER AMERICA, INC. D/B/A
 WILD WING CARE, CIVIL SITE
 ENVIRONMENTAL, INC., OAKLAND
 PROPERTIES, LLC, CHANDLER
 CONSTRUCTION SERVICES, INC., AND
 AVTEX COMMERCIAL PROPERTIES,
 INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-10-569

DEFENDANT CIVIL SITE
 ENVIRONMENTAL, INC.'S ANSWER TO
 THE PLAINTIFFS' AMENDED
 COMPLAINT

FILED
 2014 MAR 17 PM 1:51
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

COMES NOW, the Defendant Civil Site Environmental, Inc. (hereinafter "Civil Site")
 responding to Plaintiffs' Amended Complaint, and pleads as follows:

FOR A FIRST DEFENSE AND BY WAY OF AN ANSWER

1. Civil Site admits, upon information and belief, the allegations contained in Paragraph 1 of the Plaintiffs' Amended Complaint.
2. Civil Site admits, upon information and belief, the allegations contained in Paragraph 2 of the Plaintiffs' Amended Complaint.
3. The allegations contained in Paragraph 3 of the Plaintiffs' Amended Complaint are admitted.
4. Civil Site admits, upon information and belief, the allegations contained in Paragraph 4 of the Plaintiffs' Amended Complaint.

5. Civil Site admits, upon information and belief, the allegations contained in Paragraph 5 of the Plaintiffs' Amended Complaint.

6. Civil Site admits, upon information and belief, the allegations contained in Paragraph 6 of the Plaintiffs' Amended Complaint.

7. Paragraphs 7, 8 and 9 of the Plaintiffs' Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraphs 7, 8 and 9 state or imply liability on behalf of this Defendant, Civil Site denies the same.

8. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 10, 11, 12 and 13 of the Plaintiffs' Amended Complaint, and to the extent a response is required, those allegations are denied.

9. Civil Site admits, upon information and belief, so much of the allegations contained in Paragraph 14 of the Plaintiffs' Amended Complaint which state that the construction plans were produced by Civil Site in October 2009. The remaining allegations contained in Paragraph 14 of the Plaintiffs' Amended Complaint are denied.

10. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 15, 16, 17 and 18 of the Plaintiffs' Amended Complaint, and to the extent a response is required, those allegations are denied.

11. In response to Paragraph 19 of the Plaintiffs' Amended Complaint, Civil Site reasserts its answers to the previous paragraphs as if set forth verbatim herein.

12. Paragraph 20 of the Plaintiffs' Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraph 20 states or implies liability on behalf of this Defendant, Civil Site denies the same.

13. Civil Site denies the allegations contained in Paragraph 21 of the Plaintiffs' Amended Complaint.

14. The allegations contained in Paragraphs 22, 23, 24, 25, 26, 27 and 28 of the Plaintiffs' Amended Complaint contain allegations which are not directed at Defendant Civil Site to which no response is required. To the extent a response is required and to the extent Paragraphs 22, 23, 24, 25, 26, 27 and 28 state or imply liability on behalf of this Defendant, Civil Site denies the same.

15. Paragraph 29 of the Plaintiffs' Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraph 29 states or implies liability on behalf of this Defendant, Civil Site denies the same.

16. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 30 and 31 of the Plaintiffs' Amended Complaint, and to the extent a response is required, those allegations are denied.

17. The allegations contained in Paragraph 32 of the Plaintiffs' Amended Complaint are denied.

18. The allegations contained in Paragraph 33 of the Plaintiffs' Amended Complaint are denied.

19. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraph 34 of the Plaintiffs' Amended Complaint, and to the extent a response is required, those allegations are denied.

20. The allegations contained in Paragraph 35 of the Plaintiffs' Amended Complaint are denied.

21. The allegations contained in Paragraph 36 of the Plaintiffs' Amended Complaint are denied.

22. The allegations contained in Paragraph 37 of the Plaintiffs' Amended Complaint are denied.

23. The allegations contained in Paragraph 35 of the Plaintiffs' Amended Complaint are denied, including all subparts.

24. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 39 and 40 of the Plaintiffs' Amended Complaint, and to the extent a response is required, those allegations are denied.

25. The allegations contained in Paragraphs 41 and 42 of the Plaintiffs' Amended Complaint are denied.

26. In response to Paragraph 43 of the Plaintiffs' Amended Complaint, Civil Site reasserts its answers to the previous paragraphs as if set forth verbatim herein.

27. The allegations contained in Paragraphs 44 and 45 of the Plaintiffs' Amended Complaint are denied.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRCP)

28. Plaintiffs' Amended Complaint fails to state a claim against Civil Site upon which relief can be granted.

FOR A THIRD DEFENSE
(Acts or Omissions of Third Parties)

29. Any injuries and damages sustained by Plaintiffs are or may have been the result of the negligent acts and omissions of a third party and/or the result of the concurrent acts and omissions of a third party.

FOR A FOURTH DEFENSE
(Unconstitutionality of Punitive Damages)

30. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I § 3 of the South Carolina Constitution in that:

The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantee;

Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

Any award of punitive damages based upon the wealth of Civil Site violates due process guarantees;

The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

The Plaintiffs' claim for punitive damages violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Civil Site.

The Plaintiffs' claims for punitive damages violate the federal doctrine of separation of powers and Article I, § 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A FIFTH DEFENSE
(Open and Obvious)

31. Civil Site asserts that the incident complained of in Plaintiffs' Amended Complaint was the result of an open and obvious condition.

FOR A SIXTH DEFENSE
(Intervening Negligence)

32. Plaintiffs' claims against Civil Site are barred, because even if Civil Site was negligent as alleged by Plaintiffs, which is specifically denied, the intervening and/or superseding negligence of others was the direct and proximate cause of the damages, if any, suffered by the Plaintiffs.

FOR A SEVENTH DEFENSE
(Comparative Negligence)

33. Plaintiffs' damages, if any, must be reduced because even if Civil Site was negligent as alleged by Plaintiffs, which is specifically denied, the alleged negligence of Civil Site must be measured against the negligence of Plaintiffs and/or their agents in failing or refusing to exercise reasonable care.

FOR AN EIGHTH DEFENSE
(Waiver, Estoppel, Laches)

34. Civil Site would allege that Plaintiffs' Amended Complaint is barred by the doctrine of waiver, laches and/or estoppel.

FOR A NINTH DEFENSE
(Unclean Hands)

35. Civil Site would allege that Plaintiffs' Amended Complaint is barred by the doctrine of unclean hands.

FOR A TENTH DEFENSE
(Setoff)

36. Civil Site is entitled to a setoff from any award of damages against it, the amount of any sums, damages or settlement amounts that Plaintiffs receives or is entitled to receive, with respect to the same alleged injuries.

FOR AN ELEVENTH DEFENSE
(Failure to Mitigate)

37. Plaintiffs' claims are or may be barred because they have failed to mitigate their damages as required by law.

FOR A TWELFTH DEFENSE
(Notice)

38. Plaintiffs either knew or should have known of any alleged deficiencies in the subject property and accepted the same with such knowledge. As a result, Plaintiffs' recovery should be barred by the doctrine of notice.

FOR A THIRTEENTH DEFENSE
(Plain View)

39. Civil Site would show Plaintiffs failed to observe objects/conditions in plain view in a location where they are customarily expected to be and his claims are, therefore, barred by the "plain view" doctrine.

FOR A FOURTEENTH DEFENSE
(Ordinary Care)

40. An invitee is charged with exercising ordinary care for personal safety and using ordinary care to avoid the effect of the owner/occupier's negligence after that negligence becomes apparent to the patron or in the exercise of ordinary care the invitee should have learned of it. In the exercise of ordinary care, the patron must use all senses to discover and avoid hurtful things. Assuming, arguendo, Civil Site created a negligent condition in the instant case – Plaintiffs nevertheless failed to exercise ordinary care to discover and avoid hurtful things.

FOR A FIFTEENTH DEFENSE
(Unavoidable Accident)

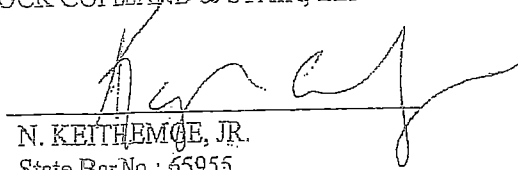
41. Plaintiffs' claims may be barred by the doctrine of unavoidable accident.

42. Civil Site does not waive, and specifically reserve its right to plead additional affirmative defenses.

WHEREFORE, having fully responded to the allegations of Plaintiffs' Amended Complaint, and fully incorporating all prior responses and affirmative defenses thereto, Civil Site respectfully requests that Plaintiffs' Amended Complaint be dismissed in its entirety, with all costs of this action to be cast upon Plaintiffs and that Civil Site be granted costs of defense in this matter and any such other relief the Court deems appropriate.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By: 

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Attorneys for Defendant Civil Site Environmental,
Inc.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WILLIAM HUCK AND DIANNE
HUCK,)

PLAINTIFFS,)

vs.)

OAKLAND WINGS, LLC D/B/A WILD
WING CAFÉ; CIVIL SITE
ENVIRONMENTAL, INC.; OAKLAND
PROPERTIES, LLC; CHANDLER
CONSTRUCTION SERVICES, INC.;
AND AVTEX COMMERCIAL
PROPERTIES, INC.,)

DEFENDANTS.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10-0569ANSWER OF DEFENDANT
OAKLAND WINGS, LLC D/B/A
WILD WING CAFÉ
(Jury Trial Requested)FILED
2014 MAR 19 PM 3:46
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendant above-named, Oakland Wings, LLC d/b/a Wild Wing Café, hereby answers the Plaintiff's Amended Complaint as follows:

1. Each and every allegation of the Plaintiff's Amended Complaint not hereinafter expressly admitted, qualified and/or explained is denied.
2. The Defendant admits the allegations contained in Paragraphs 1 and 2 of the Plaintiff's Amended Complaint.
3. Paragraphs 3, 4, 5 and 6 of the Plaintiff's Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 3, 4, 5 and 6 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

4. Paragraphs 7, 8 and 9 of the Plaintiff's Amended Complaint are statements and/or conclusions of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraphs 7, 8 and 9 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

5. The Defendant lacks sufficient information with which to fully respond to the allegations contained in Paragraphs 10, 11, 12 and 13 of the Plaintiff's Amended Complaint; accordingly, these allegations are denied, and strict proof thereof is demanded.

6. Paragraphs 14, 15 and 16 of the Plaintiff's Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 14, 15 and 16 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

7. In response to Paragraph 17 of the Plaintiff's Amended Complaint. The Defendant craves reference to the lease, and would deny any portion of Paragraph 17 of the Plaintiffs' Amended Complaint inconsistent therewith. By way of further response, to the extent that Paragraph 17 of the Plaintiff's Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

8. Paragraph 18 of the Plaintiff's Amended Complaint is not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraph 18 of the Plaintiff's Amended Complaint attempts to allege or does allege any cause of

action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

9. In response to Paragraph 19 of the Plaintiff's Amended Complaint, the Defendant reiterates each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

10. Paragraph 20 of the Plaintiff's Amended Complaint is a statement and/or conclusion of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraph 20 of the Plaintiff's Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

11. Paragraphs 21, 22, 23 and 24 of the Plaintiff's Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 21, 22, 23 and 24 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

12. Paragraphs 25, 26, 27, 28, 29, 30, 31, 32 and 33 of the Plaintiff's Amended Complaint are statements and/or conclusions of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraphs 25, 26, 27, 28, 29, 30, 31, 32 and 33 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

13. Paragraphs 34 and 35 of the Plaintiff's Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that

Paragraphs 34 and 35 of the Plaintiff's Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

14. The Defendant denies the allegations contained in Paragraphs 36, 37, 38, 39, 40, 41 and 42 of the Plaintiff's Amended Complaint, and strict proof thereof is demanded.

15. In response to Paragraph 43 of the Plaintiff's Amended Complaint, the Defendant reiterates each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

16. The Defendant denies the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Amended Complaint, and strict proof thereof is demanded.

17. The Defendant also denies the allegations contained in the "Wherefore" Paragraph of the Plaintiff's Amended Complaint, which is the remainder of the Plaintiff's Amended Complaint, and strict proof thereof is demanded.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE:
(Comparative Negligence)

18. The Defendant, on information and belief, would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Amended Complaint, which are denied, were due to and were caused and occasioned by the Plaintiff's own acts of comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness, which acts on the part of the Plaintiff combined and contributed and concurred with any negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Defendant, which is denied, without which the alleged incident and resulting alleged damages would not have occurred or have been sustained, and the Defendant does plead such comparative

negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Plaintiff as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Amended Complaint. Accordingly, the Defendant is entitled to a determination as to the percentage with which the Plaintiff's own comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness contributed to this incident and the Plaintiff's alleged injuries and damages and to the reduction of any sum awarded to the Plaintiff by an amount equal to the percentage of the Plaintiff's own comparative negligent, careless, reckless, heedless, willful and wanton conduct.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Unconstitutionality of Punitive Damages)

19. The Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

- a. The Plaintiff's claim for punitive damages violates the Fifth Amendment for the following reasons:
 - i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendant for the same act or omission, and because an award of punitive damages can be imposed upon the Defendant, even though the Defendant was convicted or acquitted of a factually related defense in an underlying criminal proceeding; and
 - ii) The self-incrimination clause is violated because Defendant can be compelled to give testimony against itself;
- b. The Plaintiff's claim for punitive damages violates the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;
- c. The Plaintiff's claim for punitive damages violates the Defendant's right to access to the courts guaranteed by the Seventh and Fourteenth

Amendments because the threat of an award of unlimited punitive damages chills the Defendant's exercise of that right;

- d. The Plaintiff's claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:
- i) The standard or test for determining the requisite mental state of Defendant for imposition of punitive damages is void for vagueness;
 - ii) Insofar as punitive damages are not measured against actual injury to the Plaintiff and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendant's alleged egregious conduct;
 - iii) In cases involving more than one Defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given Defendant;
 - iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given Defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the Defendant is denied equal protection of law; and
 - v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
 (Improper Claim for Punitive Damages)

20. Punitive damages are inappropriate in this case since the Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(S.C. Code Ann. 15-32-510 et. seq.)

21. The Defendant pleads the limitations on damage awards found in S.C. Code Ann. 15-32-510 et. seq., and requests bifurcation in accordance with these code sections.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(No Duty to Warn of the Unknowable)

22. The Defendant had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Assumption of the Risk)

23. The Plaintiff's claims are barred by the doctrine of assumption of the risk and/or applicable statutory law of the State of South Carolina in that assuming, but not admitting, the area in question was dangerous, the Plaintiff discovered and was aware of such, assumed such risk and proceeded unreasonably, thus resulting in the alleged injury.

FURTHER ANSWERING AND FOR
A FURTHER AND AFFIRMATIVE DEFENSE:
(Failure to State a Claim)

24. The Plaintiff's Amended Complaint fails to state any claims upon which relief can be granted as to the Defendant, and the Plaintiff's Amended Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), *SCRPC*.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Assumption of the Risk/Open and Obvious)

25. The Defendant would allege and show that the Plaintiff was, at all times, fully aware of the alleged dangers as set forth in the Amended Complaint, and that the Plaintiff was negligent

and careless in failing to take necessary precautions and that the Plaintiff assumed any alleged risk incident to the allegations set forth in the Amended Complaint, and that this negligent, careless, reckless, heedless, willful and wanton assumption of the risk was the proximate cause of the Plaintiff's alleged injuries and damages as set forth in the Amended Complaint; therefore, the Plaintiff is herein barred from recovery.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Intervening and Superseding Acts and/or Negligence)

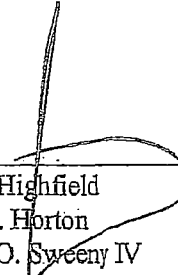
26. The Defendant would allege and show that any injuries and damages sustained by the Plaintiff as alleged in the Amended Complaint, which are denied, were due to and were caused and occasioned by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties, and the Defendant does plead such intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Amended Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Reliance on Additional Defenses)

27. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, the Defendant prays that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper. The Defendant also requests a trial by jury.

YOUNG CLEMENT RIVERS, LLP

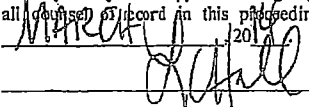
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 Attorneys for the Defendant
 Oakland Wings, LLC d/b/a Wild Wing Café

Charleston, South Carolina

3/19, 2014

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 19th day of March, 2014.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

CASE NO. 2014-CP-10-569

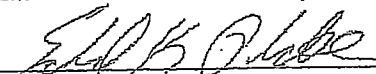
SECOND AMENDED
SUMMONS
(Jury Trial Demanded)

FILED
2014 APR 15 AM 10:52
JULIE J. ARMSTRONG
CLERK OF COURT

TO: DEFENDANTS

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Second Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 129 Broad Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Second Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Second Amended Complaint.

PRITCHARD LAW GROUP, LLC



Edward K. Pritchard, III
Thomas B. Pritchard
129 Broad Street
Charleston, SC 29401
(843) 722-3300 FAX (843) 722-3379
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tpritchard@pritchardlawgroup.com
Attorneys for Plaintiffs

April 15, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

CASE NO. 2014-CP-10-569

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
2014 APR 15 AM 10:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLAINTIFFS, William Huck and Dianne Huck (hereinafter collectively referred to as "Plaintiffs"), complaining of Defendants, Oakland Wings, LLC d/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), 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") (hereinafter collectively referred to as "Defendants" where applicable), would respectfully show unto the Court the following:

I. PARTIES

1. The Plaintiffs are husband and wife and are and at all times relative hereto were citizens and residents of the County of Charleston, State of South Carolina.
2. That, on information and belief, Wild Wing is a corporation duly organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

3. That, on information and belief, Civil Site is a corporation organized and existing pursuant to the laws of the South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
4. That, on information and belief, Oakland is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
5. That, on information and belief, Chandler is a corporation organized and existing pursuant to the laws of the State of South Carolina and has, and at all times relative hereto had, its principle place of business in Charleston County, South Carolina.
6. That, on information and belief, Avtex is a corporation organized and existing pursuant to the laws of the State of South Carolina and does and at all times relative hereto did business in County of Charleston, State of South Carolina.

II. JURISDICTION AND VENUE

7. That, on information and belief, this Court has jurisdiction over the subject matter of this action.
8. That, on information and belief, this Court has personal jurisdiction over Wild Wing, Civil Site, Oakland, Chandler and Avtex.
9. That, on information and belief, venue in this matter is proper in this Court.

III. FACTUAL BACKGROUND

10. That on July 13, 2012, at 12:00 p.m., Plaintiff, William Huck (hereinafter "Huck"), went to Wild Wing Café located in The Market at Oakland, Mount Pleasant, South Carolina for the purpose of eating lunch.

11. That Huck, after parking in the parking lot on the south side of South Morgans Point Road, proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café and slipped and fell due to the un-level slippery surface, which was covered by heavy slimy ponding and accumulation of debris blocking normal passage.
12. That as a direct and proximate result, Huck suffered physical harm and bodily injury, all of which has caused him to undergo excruciating pain and suffering, along with surgery causing him to incur medical expenses and great financial loss.
13. That the Town of Mount Pleasant, a political subdivision of the State of South Carolina, issued an Encroachment Permit in July 2009, and amended it in October of 2009 for installation of paver crosswalks, which also included curb cuts and installation of pedestrian ramps.
14. That, on information and belief, Civil Site produced the construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications pursuant to plaintiffs' expert Affidavit of Robert G. Sisnroy, P.E. attached hereto as Exhibit A.
15. That, on information and belief, Oakland is and at all times relative hereto was the property manager of The Market at Oakland, and the applicant for the encroachment permit.
16. That, on information and belief, Chandler performed the construction of the walkway in The Market at Oakland in front of Wild Wing Café located at the intersection of Oakland Market Road and South Morgans Point Road.

17. That, on information and belief, Wing Café, is a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex is and was on July 13, 2012, at 12:00 p.m. and at all times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.
18. That, on information and belief, Avtex developed, owns and manages The Market at Oakland in Mount Pleasant, South Carolina, and is and was on July 13, 2012, at 12:00 p.m. and at all times relative hereto in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café.

FOR A FIRST CAUSE OF ACTION
(Negligence)

19. That each and every relevant and consistent allegation set forth in paragraph 1 through paragraph 18 hereinabove is incorporated herein as if fully set forth herein verbatim.
20. That at all times relative hereto, while at The Market at Oakland on July 13, 2012, Huck was an invitee on the premises.
21. That, on information and belief, Civil Site produced faulty construction plans in October of 2009, which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café pursuant to plaintiffs' expert Affidavit of Robert G. Sisroy, P.E. attached hereto as Exhibit A..
22. That, on information and belief, Chandler negligently performed the construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café, in that it failed to constructed the same in accordance with the requirements of the International Building Code (IBC), 2006, and in

violation of ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions.

23. That, on information and belief, Avtex as the owner in possession of The Market at Oakland at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
24. That, on information and belief, Oakland, as property manager of The Market at Oakland, had a special relationship with Huck as an invitee on the premises, which gave rise to protect him against unreasonable risk of physical harm.
25. That, on information and belief, Wild Wing Café, as a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex and in possession and control of the walkway into The Market at Oakland in front of Wild Wing Café at all times relative hereto owed Huck, as an invitee, a non-delegable duty of due care to discover risks of harm to him and to take safety precautions to warn of or eliminate unreasonable risks of harm to him, on the premises.
26. That all duties owed to Huck by Wild Wing Café, Oakland and Avtex arose by operation of law.
27. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty of due care to keep the walkway in a reasonably safe condition so that Huck could use it in the ordinary and reasonable way without danger.
28. That on July 13, 2012, and at all times relative hereto, Wild Wing, Oakland and Avtex owed Huck a duty to implement reasonable inspection procedures in order to protect him from foreseeable risks of harm.

29. That on July 13, 2012, and at all times relative hereto, Huck had a right to assume that the walkway would be free from defects or obstructions that might cause injury to him.
30. That Wild Wing, Oakland and Avtex expressly and/or impliedly represented to Huck at the time of entry into the walkway that it was and would be in a reasonably safe condition.
31. That Huck had a right to rely upon this representations of Wild Wing, Oakland and Avtex, as they owed Huck a duty to ensure that the walkway was in a reasonably safe condition.
32. That the un-level slippery surface of the walkway, which was covered by heavy slimy ponding and accumulation of debris was not an open or obvious condition.
33. That, on information and belief, Wild Wing, Oakland, Avtex, Chandler and Civil Site had actual and/or constructive notice of the hazard presented by the un-level walkway, which Huck encountered through no fault of his own and which was indeed an unavoidable latent hazard.
34. That Chandler owed Huck a duty not to created a dangerous condition in violation of the requirements of the International Building Code (IBC), 2006, and ICC/ANSI requirements contributing to the dangerous construction deficiencies resulting in unstable walking conditions in such an area of ingress and egress as to make stepping upon the hazardous condition unavoidable in that it was reasonably foreseeable that Huck and others similarly situated would use the sidewalk for normal pedestrian traffic and in that it was reasonably foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated.
35. That Civil Site owed Huck a duty not to produce construction plans which failed to provide any details or notes for construction of the curb ramps adjacent to the roadway modifications in that it was reasonably foreseeable that Huck and others similarly situated

would use the sidewalk for normal pedestrian traffic and in that it was reasonably foreseeable that that breach of such duty would lead to the creation of a dangerous condition to Huck and others similarly situated pursuant to plaintiffs' expert Affidavit of Robert G. Sisnoy, P.E. attached hereto as Exhibit A..

36. As a direct and proximate result of Wild Wing's, Oakland's, Avtex's, Chandler's and Civil Site's negligent, willful, wonton and reckless breach of the respective duty each owed Huck, Huck suffered severe and permanent physical harm and bodily injury including but not limited to significant left chest, shoulder, arm and hand injuries requiring hospitalization, all of which has caused him to undergo excruciating pain and suffering, surgery, therapy, and which injuries to this day cause Huck pain and restricted mobility and has caused him to incur medical expenses and great financial loss.
37. That the actions of Wild Wing, Civil Site, Oakland Chandler and Avtex complained of herein constitute negligence, gross negligence, recklessness, willfulness, and wantonness, in the following particulars, to-wit:
 - a. In failing to maintain the walkway in good order and repair and in a reasonably safe condition;
 - b. In failing to exercise due care under the circumstances;
 - c. In failing to exercise reasonable and ordinary care to guard Huck against foreseeable risks of physical harm to her person;
 - d. In failing to protect Huck against unreasonable risks of physical harm to her person;
 - e. In failing to do what a reasonable person or entity would have done under the circumstances;

- f. In failing to exercise due care to discover risks and take safety precautions to warn of or eliminate foreseeable risks;
- g. In failing to post warning signs;
- h. In failing to keep the walkway in a reasonably safe condition so that Huck could use it on the ordinary and reasonable manner without danger;
- i. In failing to inspect the walkway or to implement regular maintenance procedures in order to protect the guests from foreseeable danger;
- j. In failing to eliminate foreseeable risks of harm;
- k. In failing to warn Huck of foreseeable danger; and,
- l. In such other particulars as may be determined through discovery or trial.

38. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's respective negligence, gross negligence, reckless, willfulness and wantonness complained of herein, Huck has been injured and damaged in the following particulars, to-wit:

- a. Physical pain;
- b. Suffering;
- c. Mental anguish;
- d. Emotional distress;
- e. Permanent impairment of health and bodily efficiency;
- f. Loss of enjoyment of Huck's life;
- g. Increased susceptibility to future injury of the shoulder injured in the fall giving rise to this action;
- h. Substantial expenses for past and future medical services;

- i. Expenses for transportation to and from medical services;
 - j. Such other particulars as may be found through discovery or trial; and,
 - k. Substantial past, present and future loss of earnings.
39. That Huck had no knowledge of or reason to suspect danger with regard to the defect contained in the walkway.
40. That Huck exercised ordinary and reasonable care for himself at all times while on the walkway.
41. That Wild Wing, Civil Site, Oakland, Chandler and Avtex each are liable to Huck and Huck is entitled to actual, consequential and punitive damages and all other relief as deemed proper by the Court.
42. That as a direct and proximate consequence of Wild Wing's, Civil Site's, Oakland's, Chandler's and Avtex's negligent, willful, wanton and gross negligent conduct complained of herein above, Huck is entitled to judgment against Wild Wing, Civil Site, Oakland, Chandler and Avtex in an amount equal to his actual damages as more particularly described herein above, and for punitive damages in an appropriate amount.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

43. That each and every relevant and consistent allegation set forth in Paragraph 1 through Paragraph 42 hereinabove is incorporated herein as if fully set forth herein verbatim.
44. As a direct and proximate result of the negligence of Wild Wing, Civil Site, Oakland, Chandler and Avtex, Huck is and has been disabled due to his injuries which have caused him to be delinquent in his conjugal duties towards Plaintiff Dianne Huck.
45. As a further direct and proximate result of the injuries suffered by Huck, Plaintiffs have both suffered great and irreparable loss in the deprivation of society, companionship, consortium.

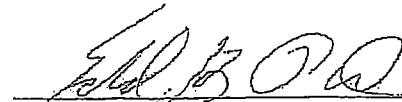
and services of each other as spouses, and will continue to be so deprived of the comfort and solace usually and ordinarily provided by a spouse of good health.

WHEREFORE, Plaintiffs, William Huck and Dianne Huck, having complained of Defendants, Oakland Wings, LLC d/b/a Wild Wing Café, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc. and Avtex Commercial Properties, Inc., prays that they be awarded judgment against Defendants, as follows:

- A. In an amount sufficient to compensate Plaintiffs for their injuries and damages as described herein above;
- B. Punitive damages in an appropriate amount up to the amount permitted by law;
- C. In an amount equal to all costs and attorney fees incurred by Plaintiffs in connection with this action;
- D. For a trial before a jury on all issues; and,
- E. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

PRITCHARD LAW GROUP, LLC



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 (843) 722-3300 Telephone
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 Attorney for Plaintiffs

April 15, 2014
 Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

CASE NO. 2014-CP-10-569

AFFIDAVIT OF
ROBERT G. SISNROY, P.E.

FILED
2014 APR - 1 PM 4:36
JULIE A. SISNROY
CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, Robert G. Sisnroy,

Sisnroy Engineering LLC, whose offices are located at 714 Beauregard Street, Charleston, South Carolina 29412, who first being duly sworn, deposes and sayeth as follows:

1. That he is over the age of eighteen (18) years and mentally competent.
2. That he is, and at all times relative hereto was, retained as an expert to testify relative to the professional standard of care for an engineer in the above-captioned action.
3. That as requested, he completed an investigation of the pedestrian walkway adjacent to the intersection of Oakland Market Road and South Morgans Point Road to determine engineering and construction deficiencies.
4. That the investigation included observations of the pedestrian walkways, curb and gutter; and alignment with adjacent roadways, walkways and landscape.

REL



5. That modifications to existing roadway and walkway elements were also documented with respects to compliance with the International Building Code (IBC).
6. That based on information provided by the Town of Mount Pleasant Legal Department and the Mount Pleasant Transportation Department, curb modifications were accomplished at this location in 2009. An Encroachment Permit 03555 was issued by the Town of Mount Pleasant, July 25, 2009 and amended October 7, 2009 for Installation of Paver Crosswalks, which also included curb cuts and installation of pedestrian ramps.
7. That construction plans produced by Civil, Site, Environmental (CSE), 668 Marina Drive, Charleston, SC are dated October 5, 2009 on last revision. Observations of the construction of the ramp configuration revealed it was not constructed in accordance with the requirements of IBC 2006.
8. That these engineering and construction deficiencies contributed to conditions resulting in unstable walking conditions.
9. According to IBC 2006, Section 1010.1, Ramps, curb ramps shall comply with International Code Council, Inc. (ICC)/American National Standards Institute (ANSI) A 117.1-03, Accessible and Usable Buildings and Facilities. Section 405 Ramps and Section 406 Curb Ramps were the applicable sections for requirements for construction of the ramp.
10. That observations of the ramp revealed the ramp construction did not comply with ICC/ANSI A117.1, particularly in areas that would contribute to unstable walking conditions.

RGS

11. That review of the construction plans titled: Proposed Layout and Geometry for the projects: Oakland Market Road Parking Area, provided by Civil, Site, Environmental (CSE), 668 Marina Drive, Suite B-1, Charleston, SC revealed no details or notes for construction of the curb ramps adjacent to the roadway modifications. This does not meet the requirements for barrier free design of the encroachment permit of the Town of Mount Pleasant Permit Number 03555 amended 10/7/2009.
12. That observations of the ramp and flares revealed construction in violation of ICC/ANSI A 171-03 requirements with respect to the ramp slope and flare slopes. Measurement of ramp flares on the west side revealed 1-5/8" in 10" (1-5/8: 10) to 1-7/8: 10. On the east side, measurements showed 2-1/16:10 to 2-11/16:10. The flared side slopes were in violation of Section 406.3 which requires that ramp flares shall not be steeper than 1:10. Measurements indicated that slopes were as much as 2 and 3 times the maximum slope.
13. That the unacceptable cross slope was documented at the base of the ramp. Measurements indicated 1-15/16:48 nearly double the maximum allowable in violation of ICC/ANSI Section 405.3. Additionally, the top cross slope was also in violation measuring 1-5/8:48.
14. That the excessive slopes contributed to improper walking surfaces on the ramp and flared areas.
15. That observations revealed that the base of the ramp is directly adjacent to the path of curb and gutter drainage from pedestrian walking surfaces and roadway surfaces. The excessive cross slope and negative slope adjacent to the gutter results in ponding at the

PG 5

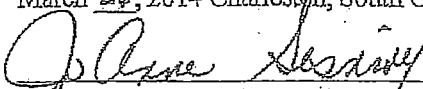
bottom of the ramp in violation of ICC/ANSI A117.1-03 Section 405.10 which requires landings subject to wet conditions shall be designed to prevent accumulation of water.

16. That observations of the base of the ramp revealed evidence of heavy ponding and accumulation of debris. Measurements of the slope of the ramp and curb cut revealed the area is negatively sloped approximately 1-1/8" in 24" or 9/16:12. This condition results in ponding at the base of the ramp during and after precipitation. Ponding and debris contribute to improper walking surfaces in the pedestrian walkway.
17. That all opinions expressed herein are to a reasonable degree of engineering certainty. In my opinion, a claim for professional negligence exists and the engineering and construction did not meet the standard of care according to my observations.

FURTHER DEPONENT SAYETH NOT!


ROBERT G. SISNROY, P.E.

SWORN to and SUBSCRIBED before me on
March 26, 2014 Charleston, South Carolina.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 3-25-23

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. 2014-CP-10-0569

WILLIAM HUCK AND DIANNE
HUCK,

PLAINTIFFS,

vs.

OAKLAND WINGS, LLC D/B/A WILD
WING CAFÉ; CIVIL SITE
ENVIRONMENTAL, INC.; OAKLAND
PROPERTIES, LLC; CHANDLER
CONSTRUCTION SERVICES, INC.;
AND AVTEX COMMERCIAL
PROPERTIES, INC.,

DEFENDANTS.

ANSWER OF DEFENDANT
OAKLAND WINGS, LLC D/B/A
WILD WING CAFÉ TO SECOND
AMENDED COMPLAINT
(Jury Trial Requested)

FILED
2014 APR 17 PM 4:33
JULIE J. ARNSTADT
CLERK OF COURT
BY [Signature]

The Defendant above-named, Oakland Wings, LLC d/b/a Wild Wing Café, hereby answers
the Plaintiffs' Second Amended Complaint as follows:

1. Each and every allegation of the Plaintiffs' Second Amended Complaint not hereinafter expressly admitted, qualified and/or explained is denied.
2. The Defendant admits the allegations contained in Paragraphs 1 and 2 of the Plaintiffs' Second Amended Complaint.
3. Paragraphs 3, 4, 5 and 6 of the Plaintiffs' Second Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 3, 4, 5 and 6 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

4. Paragraphs 7, 8 and 9 of the Plaintiffs' Second Amended Complaint are statements and/or conclusions of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraphs 7, 8 and 9 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

5. The Defendant lacks sufficient information with which to fully respond to the allegations contained in Paragraphs 10, 11, 12 and 13 of the Plaintiffs' Second Amended Complaint; accordingly, these allegations are denied, and strict proof thereof is demanded.

6. Paragraphs 14, 15 and 16 of the Plaintiffs' Second Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 14, 15 and 16 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

7. In response to Paragraph 17 of the Plaintiffs' Second Amended Complaint. The Defendant craves reference to the lease, and would deny any portion of Paragraph 17 of the Plaintiffs' Second Amended Complaint inconsistent therewith. By way of further response, to the extent that Paragraph 17 of the Plaintiffs' Second Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

8. Paragraph 18 of the Plaintiffs' Second Amended Complaint is not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraph 18 of the Plaintiffs' Second Amended Complaint attempts to allege or does allege any

cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

9. In response to Paragraph 19 of the Plaintiffs' Second Amended Complaint, the Defendant reiterates each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

10. Paragraph 20 of the Plaintiffs' Second Amended Complaint is a statement and/or conclusion of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraph 20 of the Plaintiffs' Second Amended Complaint attempts to allege or does allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

11. Paragraphs 21, 22, 23 and 24 of the Plaintiffs' Second Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to the extent that Paragraphs 21, 22, 23 and 24 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

12. Paragraphs 25, 26, 27, 28, 29, 30, 31, 32 and 33 of the Plaintiffs' Second Amended Complaint are statements and/or conclusions of law, and the Defendant is not required to admit or deny the same. By way of further response, to the extent that Paragraphs 25, 26, 27, 28, 29, 30, 31, 32 and 33 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

13. Paragraphs 34 and 35 of the Plaintiffs' Second Amended Complaint are not directed to the Defendant; accordingly, no response is required. By way of further response, to

the extent that Paragraphs 34 and 35 of the Plaintiffs' Second Amended Complaint attempt to allege or do allege any cause of action, claim, act, error or omission as to the Defendant, those allegations are denied, and strict proof thereof is demanded.

14. The Defendant denies the allegations contained in Paragraphs 36, 37, 38, 39, 40, 41 and 42 of the Plaintiffs' Second Amended Complaint, and strict proof thereof is demanded.

15. In response to Paragraph 43 of the Plaintiffs' Second Amended Complaint, the Defendant reiterates each and every prior paragraph of this Answer as fully and completely as if set forth herein verbatim.

16. The Defendant denies the allegations contained in Paragraphs 44 and 45 of the Plaintiffs' Second Amended Complaint, and strict proof thereof is demanded.

17. The Defendant also denies the allegations contained in the "Wherefore" Paragraph of the Plaintiffs' Second Amended Complaint, which is the remainder of the Plaintiffs' Second Amended Complaint, and strict proof thereof is demanded.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE:
(Comparative Negligence)

18. The Defendant, on information and belief, would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Second Amended Complaint, which are denied, were due to and were caused and occasioned by the Plaintiff William Huck's own acts of comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness, which acts on the part of the Plaintiff William Huck combined and contributed and concurred with any negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Defendant, which is denied, without which the alleged incident and resulting alleged damages would not have occurred or have been sustained, and the Defendant

does plead such comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness on the part of the Plaintiff William Huck as the direct and proximate cause of the injuries and damages sustained by the Plaintiff as alleged in the Second Amended Complaint. Accordingly, the Defendant is entitled to a determination as to the percentage with which the Plaintiff William Huck's own comparative negligence, carelessness, recklessness, heedlessness, willfulness and wantonness contributed to this incident and the Plaintiffs' alleged injuries and damages and to the reduction of any sum awarded to the Plaintiffs by an amount equal to the percentage of the Plaintiff William Huck's own comparative negligent, careless, reckless, heedless, willful and wanton conduct.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Unconstitutionality of Punitive Damages)

19. The Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, and Fourteenth Amendments of the Constitution of the United States in the following particulars:

- a. The Plaintiffs' claim for punitive damages violates the Fifth Amendment for the following reasons:
 - i) The double-jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the Defendant for the same act or omission, and because an award of punitive damages can be imposed upon the Defendant, even though the Defendant was convicted or acquitted of a factually related defense in an underlying criminal proceeding; and
 - ii) The self-incrimination clause is violated because Defendant can be compelled to give testimony against itself; -
- b. The Plaintiffs' claim for punitive damages violates the Sixth and Fourteenth Amendments because such damages may be imposed according to the lesser standard of proof applicable in civil cases, whereas punitive damages are a fine or penalty and are quasi-criminal in nature and, as such require the "beyond the reasonable doubt" standard of proof;

- c. The Plaintiffs' claim for punitive damages violates the Defendant's right to access to the courts guaranteed by the Seventh and Fourteenth Amendments, because the threat of an award of unlimited punitive damages chills the Defendant's exercise of that right;
- d. The Plaintiffs' claim for punitive damages violates the due process and equal protection clauses of the Fourteenth Amendment for the following reasons:
 - i) The standard or test for determining the requisite mental state of Defendant for imposition of punitive damages is void for vagueness;
 - ii) Insofar as punitive damages are not measured against actual injury to the Plaintiff and are left up to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be awarded is indeterminate at the time of Defendant's alleged egregious conduct;
 - iii) In cases involving more than one Defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given Defendant;
 - iv) The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given Defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which the suit is filed, such that the Defendant is denied equal protection of law; and
 - v) Punitive damages may be imposed without a requisite showing of hatred, spite, ill will or wrongful motive.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
 (Improper Claim for Punitive Damages)

20. Punitive damages are inappropriate in this case since the Defendant did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages would be based.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(S.C. Code Ann. 15-32-510 et. seq.)

21. The Defendant pleads the limitations on damage awards found in S.C. Code Ann. 15-32-510 et. seq., and requests bifurcation in accordance with these code sections.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(No Duty to Warn of the Unknowable)

22. The Defendant had no duty to warn about possible dangers or hazards, if any, which were not known or which were not capable of being known.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
(Assumption of the Risk)

23. The Plaintiffs' claims are barred by the doctrine of assumption of the risk and/or applicable statutory law of the State of South Carolina in that assuming, but not admitting, the area in question was dangerous, the Plaintiff William Huck discovered and was aware of such, assumed such risk and proceeded unreasonably, thus resulting in the alleged injury.

FURTHER ANSWERING AND FOR
A FURTHER AND AFFIRMATIVE DEFENSE:
(Failure to State a Claim)

24. The Plaintiffs' Second Amended Complaint fails to state any claims upon which relief can be granted as to the Defendant, and the Plaintiffs' Second Amended Complaint should, therefore, be dismissed pursuant to Rule 12(b)(6), *SCRPC*.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

(Assumption of the Risk/Open and Obvious)

25. The Defendant would allege and show that the Plaintiff William Huck was, at all times, fully aware of the alleged dangers as set forth in the Second Amended Complaint, and that the Plaintiff William Huck was negligent and careless in failing to take necessary precautions and that the Plaintiff William Huck assumed any alleged risk incident to the allegations set forth in the Second Amended Complaint, and that this negligent, careless, reckless, heedless, willful and wanton assumption of the risk was the proximate cause of the Plaintiffs' alleged injuries and damages as set forth in the Second Amended Complaint; therefore, the Plaintiffs are herein barred from recovery.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE

(Intervening and Superseding Acts and/or Negligence)

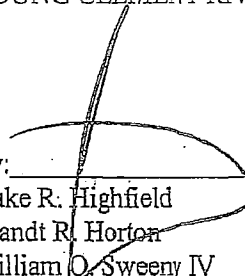
26. The Defendant would allege and show that any injuries and damages sustained by the Plaintiffs as alleged in the Second Amended Complaint, which are denied, were due to and were caused and occasioned by the intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of some other party or parties, and the Defendant does plead such intervening and superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Plaintiffs as alleged in the Second Amended Complaint.

FURTHER ANSWERING AND FOR A FURTHER
AND AFFIRMATIVE DEFENSE
 (Reliance on Additional Defenses)

27. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, the Defendant prays that the same be dismissed, together with the costs and disbursements of this action, and for such other and further relief as this Court deems proper. The Defendant also requests a trial by jury.

YOUNG CLEMENT RIVERS, LLP

By: 
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 Brandt R. Horton
 William O. Sweeny IV
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 Charleston, SC 29402
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 bhorton@ycrlaw.com
 bsweeny@ycrlaw.com
 Attorneys for the Defendant
 Oakland Wings, LLC d/b/a Wild Wing Café

Charleston, South Carolina

4/17, 2014

3427536v

5. Civil Site admits, upon information and belief, the allegations contained in Paragraph 5 of the Plaintiffs' Second Amended Complaint.

6. Civil Site admits, upon information and belief, the allegations contained in Paragraph 6 of the Plaintiffs' Second Amended Complaint.

7. Paragraphs 7, 8 and 9 of the Plaintiffs' Second Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraphs 7, 8 and 9 state or imply liability on behalf of this Defendant, Civil Site denies the same.

8. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 10, 11, 12 and 13 of the Plaintiffs' Second Amended Complaint, and to the extent a response is required, those allegations are denied.

9. Civil Site admits, upon information and belief, so much of the allegations contained in Paragraph 14 of the Plaintiffs' Second Amended Complaint which state that the construction plans were produced by Civil Site in October 2009. The remaining allegations contained in Paragraph 14 of the Plaintiffs' Second Amended Complaint are denied.

10. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 15, 16, 17 and 18 of the Plaintiffs' Second Amended Complaint, and to the extent a response is required, those allegations are denied.

11. In response to Paragraph 19 of the Plaintiffs' Second Amended Complaint, Civil Site reasserts its answers to the previous paragraphs as if set forth verbatim herein.

12. Paragraph 20 of the Plaintiffs' Second Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraph 20 states or implies liability on behalf of this Defendant, Civil Site denies the same.

13. Civil Site denies the allegations contained in Paragraph 21 of the Plaintiffs' Second Amended Complaint.

14. The allegations contained in Paragraphs 22, 23, 24, 25, 26, 27 and 28 of the Plaintiffs' Second Amended Complaint contain allegations which are not directed at Defendant Civil Site to which no response is required. To the extent a response is required and to the extent Paragraphs 22, 23, 24, 25, 26, 27 and 28 state or imply liability on behalf of this Defendant, Civil Site denies the same.

15. Paragraph 29 of the Plaintiffs' Second Amended Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required and to the extent Paragraph 29 states or implies liability on behalf of this Defendant, Civil Site denies the same.

16. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 30 and 31 of the Plaintiffs' Second Amended Complaint, and to the extent a response is required, those allegations are denied.

17. The allegations contained in Paragraph 32 of the Plaintiffs' Second Amended Complaint are denied.

18. The allegations contained in Paragraph 33 of the Plaintiffs' Second Amended Complaint are denied.

19. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraph 34 of the Plaintiffs' Second Amended Complaint, and to the extent a response is required, those allegations are denied.

20. The allegations contained in Paragraph 35 of the Plaintiffs' Second Amended Complaint are denied.

21. The allegations contained in Paragraph 36 of the Plaintiffs' Amended Complaint are denied.

22. The allegations contained in Paragraph 37 of the Plaintiffs' Second Amended Complaint are denied.

23. The allegations contained in Paragraph 35 of the Plaintiffs' Second Amended Complaint are denied, including all subparts.

24. Civil Site is without sufficient knowledge and information to form an opinion as to the truth of the allegations contained in Paragraphs 39 and 40 of the Plaintiffs' Second Amended Complaint, and to the extent a response is required, those allegations are denied.

25. The allegations contained in Paragraphs 41 and 42 of the Plaintiffs' Second Amended Complaint are denied.

26. In response to Paragraph 43 of the Plaintiffs' Second Amended Complaint, Civil Site reasserts its answers to the previous paragraphs as if set forth verbatim herein.

27. The allegations contained in Paragraphs 44 and 45 of the Plaintiffs' Second Amended Complaint are denied.

FOR A SECOND DEFENSE
(Rule 12(b)(6), SCRPC)

28. Plaintiffs' Second Amended Complaint fails to state a claim against Civil Site upon which relief can be granted.

FOR A THIRD DEFENSE
(Acts or Omissions of Third Parties)

29. Any injuries and damages sustained by Plaintiffs are or may have been the result of the negligent acts and omissions of a third party and/or the result of the concurrent acts and omissions of a third party.

FOR A FOURTH DEFENSE
(Unconstitutionality of Punitive Damages)

30. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I § 3 of the South Carolina Constitution in that:

The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;

Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;

Any award of punitive damages based upon the wealth of Civil Site violates due process guarantees;

The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;

Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and

The Plaintiffs' claim for punitive damages violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Civil Site.

The Plaintiffs' claims for punitive damages violate the federal doctrine of separation of powers and Article I, § 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A FIFTH DEFENSE
(Open and Obvious)

31. Civil Site asserts that the incident complained of in Plaintiffs' Second Amended Complaint was the result of an open and obvious condition.

FOR A SIXTH DEFENSE
(Intervening Negligence)

32. Plaintiffs' claims against Civil Site are barred, because even if Civil Site was negligent as alleged by Plaintiffs, which is specifically denied, the intervening and/or superseding negligence of others was the direct and proximate cause of the damages, if any, suffered by the Plaintiffs.

FOR A SEVENTH DEFENSE
(Comparative Negligence)

33. Plaintiffs' damages, if any, must be reduced because even if Civil Site was negligent as alleged by Plaintiffs, which is specifically denied, the alleged negligence of Civil Site must be measured against the negligence of Plaintiffs and/or their agents in failing or refusing to exercise reasonable care.

FOR AN EIGHTH DEFENSE
(Waiver, Estoppel, Laches)

34. Civil Site would allege that Plaintiffs' Second Amended Complaint is barred by the doctrine of waiver, laches and/or estoppel.

FOR A NINTH DEFENSE
(Unclean Hands)

35. Civil Site would allege that Plaintiffs' Second Amended Complaint is barred by the doctrine of unclean hands.

FOR A TENTH DEFENSE
(Setoff)

36. Civil Site is entitled to a setoff from any award of damages against it, the amount of any sums, damages or settlement amounts that Plaintiffs receives or is entitled to receive, with respect to the same alleged injuries.

FOR AN ELEVENTH DEFENSE
(Failure to Mitigate)

37. Plaintiffs' claims are or may be barred because they have failed to mitigate their damages as required by law.

FOR A TWELFTH DEFENSE
(Notice)

38. Plaintiffs either knew or should have known of any alleged deficiencies in the subject property and accepted the same with such knowledge. As a result, Plaintiffs' recovery should be barred by the doctrine of notice.

FOR A THIRTEENTH DEFENSE
(Plain View)

39. Civil Site would show Plaintiffs failed to observe objects/conditions in plain view in a location where they are customarily expected to be and his claims are, therefore, barred by the "plain view" doctrine.

FOR A FOURTEENTH DEFENSE
(Ordinary Care)

40. An invitee is charged with exercising ordinary care for personal safety and using ordinary care to avoid the effect of the owner/occupier's negligence after that negligence becomes apparent to the patron or in the exercise of ordinary care the invitee should have learned of it. In the exercise of ordinary care, the patron must use all senses to discover and avoid hurtful things. Assuming, arguendo, Civil Site created a negligent condition in the instant case — Plaintiffs nevertheless failed to exercise ordinary care to discovery and avoid hurtful things.

FOR A FIFTEENTH DEFENSE
(Unavoidable Accident)

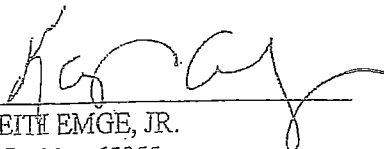
41. Plaintiffs' claims may be barred by the doctrine of unavoidable accident.

42. Civil Site does not waive, and specifically reserve its right to plead additional affirmative defenses.

WHEREFORE, having fully responded to the allegations of Plaintiffs' Second Amended Complaint, and fully incorporating all prior responses and affirmative defenses thereto, Civil Site respectfully requests that Plaintiffs' Second Amended Complaint be dismissed in its entirety, with all costs of this action to be cast upon Plaintiffs and that Civil Site be granted costs of defense in this matter and any such other relief the Court deems appropriate.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP

By: 

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Attorneys for Defendant Civil Site Environmental,
Inc.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-10-569

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

vs.

WINGS OVER AMERICA, INC., d/b/a
WILD WIND CAFÉ, CIVIL SITE
ENVIRONMENTAL, INC., OAKLAND
PROPERTIES, LLC, CHANDLER
CONSTRUCTION SERVICES, CIN.,
AVTEX COMMERCIAL PROPERTIES,
INC.,

Defendants.

) ANSWER OF DEFENDANTS OAKLAND
) PROPERTIES, LLC, AND AVTEX
) COMMERCIAL PROPERTIES, INC., TO
) PLAINTIFFS' AMENDED COMPLAINT
) (JURY TRIAL DEMANDED)

FILED
2014 APR 22 PM 2:18
JULIE J. ANDERSON
CLERK OF COURT

COME NOW Defendants Oakland Wings, LLC, and Avtex Commercial Properties, Inc., (hereinafter referred to as "Defendants"), by and through their undersigned counsel, denying all allegations not hereinafter specifically or expressly admitted and reserving all rights to amend this pleading pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, hereby answering Plaintiffs', William Huck and Dianne Huck's (hereinafter referred to as "Plaintiffs") Complaint as follows:

FOR A FIRST DEFENSE

1. All allegations of the plaintiffs' Complaint not specifically admitted herein are hereby denied.
2. The allegations of paragraph 1 are hereby admitted upon information and belief.

3. The allegations of paragraph 2 are hereby admitted upon information and belief.

4. The allegations of paragraph 3 are hereby admitted upon information and belief.

5. The allegations of paragraph 4 are hereby admitted.

6. The allegations of paragraph 5 are hereby admitted upon information and belief.

7. The allegations of paragraph 6 are hereby admitted upon information and belief.

8. The allegations of paragraph 7 are hereby admitted upon information and belief.

9. The allegations of paragraph 8 are hereby admitted upon information and belief.

10. The allegations of paragraph 9 are hereby admitted upon information and belief.

11. Defendants lack sufficient information with which to respond to the allegations of paragraph 10 and therefore deny the same and demand strict proof thereof.

12. Defendants lack sufficient information with which to respond to the allegations of paragraph 11 and therefore deny the same and demand strict proof thereof.

13. Defendants lack sufficient information with which to respond to the allegations of paragraph 12 and therefore deny the same and demand strict proof thereof.

14. The allegations of paragraph 13 are hereby admitted.

15. The allegations of paragraph 14 are hereby admitted.

16. The allegations of paragraph 15 are admitted only insofar as it alleges that defendant Oakland was the applicant for the encroachment permit for the subject premises. The remaining allegations of paragraph 15 are hereby denied.

17. The allegations of paragraph 16 are hereby admitted.

18. The allegations of paragraph 17 are admitted insofar as said paragraph alleges that defendant Wild Wing is a lessee at the Market at Oakland. Defendants deny that Avtex is the lessor of the property in question. These defendants admit that on or about July 13, 2012, defendant Wild Wing had possession and control of the walkway in question consistent with the terms of its lease with defendant Oakland.

19. The allegations of paragraph 18 are admitted insofar as defendant Avtex manages the Market at Oakland in Mount Pleasant, South Carolina and that it had control of the walkway in question consistent with the terms of its management agreement.

20. In response to paragraph 19 of the Complaint, defendants repeat and reallege their answers to paragraphs 1 through 18 above as if fully set forth herein verbatim.

21. The allegations of paragraph 20 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

22. Defendants lack sufficient information with which to respond to the allegations of paragraphs 21 and therefore deny the same and demand strict proof thereof.

23. Defendants lack sufficient information with which to respond to the allegations of paragraphs 22 and therefore deny the same and demand strict proof thereof.

24. The allegations of paragraph 23 are hereby denied.

25. The allegations of paragraph 24 are hereby denied.

26. The allegations of paragraph 25 are denied insofar as said paragraph alleges that Avtex was the lessor of the subject property. The remaining allegations of paragraph 25 state conclusions of law therefore these defendants deny the same and demand strict proof thereof.

27. The allegations contained in paragraph 26 state conclusions of law and therefore require no response. To the extent that a response may be required these defendants deny the same and demand strict proof thereof.

28. The allegations contained in paragraph 27 state conclusions of law and therefore require no response. To the extent that a response may be required these defendants deny the same and demand strict proof thereof.

29. The allegations of paragraph 28 are hereby denied.

30. The allegations of paragraph 29 are hereby denied.

31. The allegations of paragraph 30 are hereby denied.

32. The allegations of paragraph 31 are hereby denied.

33. To the extent that the conditions alleged have been present at the time of the plaintiffs alleged fall actually existed, the allegations of paragraph 32 are hereby denied.

34. The allegations of paragraph 33 are denied as to defendants Oakland and Avtex.

35. The allegations of paragraph 34 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

36. The allegations of paragraph 35 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

37. The allegations of paragraph 36 are denied as to defendants Aytex and Oakland. To the extent that they are directed at other defendants, these defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

38. The allegations of paragraph 37 are denied as to defendants Aytex and Oakland. To the extent that they are directed at other defendants, these defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

39. The allegations of paragraph 38 are denied as to defendants Aytex and Oakland. To the extent that they are directed at other defendants, these defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

40. The allegations of paragraph 39 are hereby denied.

41. The allegations of paragraph 40 are hereby denied.

42. The allegations of paragraph 41 are hereby denied.

43. The allegations of paragraph 42 are hereby denied.

44. In response to paragraph 43 of the Complaint, defendants repeat and reallege their answers to paragraphs 1 through 42 above as if fully set forth herein verbatim.

45. The allegations of paragraph 44 are hereby denied.

46. The allegations of paragraph 45 are hereby denied.

FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Comparative Negligence)

47. That, upon information and belief, even if the defendants were negligent as described in the Complaint, which is specifically denied, the plaintiffs' alleged injuries and damages, if any, resulted from, or were due to the negligence of the plaintiffs, which combined and concurred with any negligence on the part of the defendants, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Failure to Mitigate)

48. Plaintiffs have failed to mitigate their claimed damages and to protect themselves from avoidable consequences, thus barring or diminishing their recovery.

FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Sole Negligence of Third Parties)

49. Plaintiffs' damages, if any, are the direct and proximate result of sole negligence of third parties not affiliated with defendants and not under their domain or control.

FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Open and Obvious Danger)

50. That any and all claims of the plaintiffs are barred because all danger, if any, associated with the use of the product in question was at all times open and obvious to the plaintiffs.

FOR A SIXTH AFFIRMATIVE DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Superseding/Intervening Negligence)

51. Should it be determined that defendants were negligent, careless, reckless or grossly negligent, which allegations are expressly denied by defendants, then defendants would show this Court that the damages sustained by the plaintiffs, if any, were proximately caused by the intervening and superseding negligence of others, which intervening and superseding negligence proximately caused any damages alleged to have been suffered by the plaintiffs.

WHEREFORE, having fully answered the Amended Complaint of plaintiffs, said defendants pray that the same be dismissed with attorneys' fees, costs, and for such other relief as this Honorable Court deems just and proper.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: *D. Summers Clarke*
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 (843) 577-7700 FAX (843) 577-7708
*Attorneys for Oakland Properties, LLC, and Aytex
 Commercial Properties, Inc.*

Charleston, South Carolina

April 21, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

vs.

WINGS OVER AMERICA, INC., d/b/a
 WILD WIND CAFÉ, CIVIL SITE
 ENVIRONMENTAL, INC., OAKLAND
 PROPERTIES, LLC, CHANDLER
 CONSTRUCTION SERVICES, CIN.,
 AVTEX COMMERCIAL PROPERTIES,
 INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 CASE NO.: 2014-CP-10-569

ANSWER OF DEFENDANTS OAKLAND
 PROPERTIES, LLC, AND AVTEX
 COMMERCIAL PROPERTIES, INC., TO
 PLAINTIFFS' SECOND AMENDED
 COMPLAINT
 (JURY TRIAL DEMANDED)

BY
 JUDITH A. COLEMAN
 CLERK OF COURT
 2014 MAY - 1 PM 2:14
 2014 MAY - 1 PM 2:14

COME NOW Defendants Oakland Properties, LLC, and Avtex Commercial

Properties, Inc., (hereinafter referred to as "Defendants"), by and through their undersigned counsel, denying all allegations not hereinafter specifically or expressly admitted and reserving all rights to amend this pleading pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, hereby answering Plaintiffs', William Huck and Dianne Huck's (hereinafter referred to as "Plaintiffs") Second Amended Complaint as follows:

FOR A FIRST DEFENSE

1. All allegations of the Plaintiffs' Second Amended Complaint not specifically admitted herein are hereby denied.
2. The allegations of paragraph 1 are hereby admitted upon information and belief.

3. The allegations of paragraph 2 are hereby admitted upon information and belief.

4. The allegations of paragraph 3 are hereby admitted upon information and belief.

5. The allegations of paragraph 4 are hereby admitted.

6. The allegations of paragraph 5 are hereby admitted upon information and belief.

7. The allegations of paragraph 6 are hereby admitted upon information and belief.

8. The allegations of paragraph 7 are hereby admitted upon information and belief.

9. The allegations of paragraph 8 are hereby admitted upon information and belief.

10. The allegations of paragraph 9 are hereby admitted upon information and belief.

11. Defendants lack sufficient information with which to respond to the allegations of paragraph 10 and therefore deny the same and demand strict proof thereof.

12. Defendants lack sufficient information with which to respond to the allegations of paragraph 11 and therefore deny the same and demand strict proof thereof.

13. Defendants lack sufficient information with which to respond to the allegations of paragraph 12 and therefore deny the same and demand strict proof thereof.

14. The allegations of paragraph 13 are hereby admitted.

15. The allegations of paragraph 14 are hereby admitted.

16. The allegations of paragraph 15 are admitted only insofar as it alleges that defendant Oakland was the applicant for the encroachment permit for the subject premises. The remaining allegations of paragraph 15 are hereby denied.

17. The allegations of paragraph 16 are hereby admitted.

18. The allegations of paragraph 17 are admitted insofar as said paragraph alleges that defendant Wild Wing is a lessee at the Market at Oakland. Defendants deny that Avtex is the lessor of the property in question. These defendants admit that on or about July 13, 2012, defendant Wild Wing had possession and control of the walkway in question consistent with the terms of its lease with defendant Oakland.

19. The allegations of paragraph 18 are admitted insofar as defendant Avtex manages the Market at Oakland in Mount Pleasant, South Carolina and that it had control of the walkway in question consistent with the terms of its management agreement.

20. In response to paragraph 19 of the Second Amended Complaint, Defendants repeat and reallege their answers to paragraphs 1 through 18 above as if fully set forth herein verbatim.

21. The allegations of paragraph 20 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

22. Defendants lack sufficient information with which to respond to the allegations of paragraphs 21 and therefore deny the same and demand strict proof thereof.

23. Defendants lack sufficient information with which to respond to the allegations of paragraphs 22 and therefore deny the same and demand strict proof thereof.

24. The allegations of paragraph 23 are hereby denied.

25. The allegations of paragraph 24 are hereby denied.

26. The allegations of paragraph 25 are denied insofar as said paragraph alleges that Avtex was the lessor of the subject property. The remaining allegations of paragraph 25 state conclusions of law therefore these Defendants deny the same and demand strict proof thereof.

27. The allegations contained in paragraph 26 state conclusions of law and therefore require no response. To the extent that a response may be required these Defendants deny the same and demand strict proof thereof.

28. The allegations contained in paragraph 27 state conclusions of law and therefore require no response. To the extent that a response may be required these Defendants deny the same and demand strict proof thereof.

29. The allegations of paragraph 28 are hereby denied.

30. The allegations of paragraph 29 are hereby denied.

31. The allegations of paragraph 30 are hereby denied.

32. The allegations of paragraph 31 are hereby denied.

33. To the extent that the conditions alleged have been present at the time of the plaintiffs alleged fall actually existed, the allegations of paragraph 32 are hereby denied.

34. The allegations of paragraph 33 are denied as to Defendants Oakland and Avtex.

35. The allegations of paragraph 34 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

36. The allegations of paragraph 35 state conclusions of law and therefore require no response. To the extent that a response may be required the allegations contained herein are hereby denied.

37. The allegations of paragraph 36 are denied as to Defendants Avtex and Oakland. To the extent that they are directed at other defendants, these Defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

38. The allegations of paragraph 37 are denied as to Defendants Avtex and Oakland. To the extent that they are directed at other defendants, these Defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

39. The allegations of paragraph 38 are denied as to Defendants Avtex and Oakland. To the extent that they are directed at other defendants, these Defendants lack sufficient information with which to respond therefore deny the same and demand strict proof thereof.

40. The allegations of paragraph 39 are hereby denied.

41. The allegations of paragraph 40 are hereby denied.

42. The allegations of paragraph 41 are hereby denied.

43. The allegations of paragraph 42 are hereby denied.

44. In response to paragraph 43 of the Complaint, Defendants repeat and reallege their answers to paragraphs 1 through 42 above as if fully set forth herein verbatim.

45. The allegations of paragraph 44 are hereby denied.

46. The allegations of paragraph 45 are hereby denied.

FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Comparative Negligence)

47. That, upon information and belief, even if the Defendants were negligent as described in the Second Amended Complaint, which is specifically denied, the Plaintiffs' alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiffs, which combined and concurred with any negligence on the part of the Defendants, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Mitigate)

48. Plaintiffs have failed to mitigate their claimed damages and to protect themselves from avoidable consequences, thus barring or diminishing their recovery.

FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Sole Negligence of Third Parties)

49. Plaintiffs' damages, if any, are the direct and proximate result of sole negligence of third parties not affiliated with Defendants and not under their domain or control.

FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Open and Obvious Danger)

50. That any and all claims of the Plaintiffs are barred because all danger, if any, associated with the use of the product in question was at all times open and obvious to the plaintiffs.

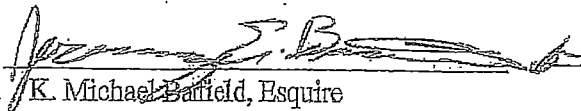
FOR A SIXTH AFFIRMATIVE DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
 (Superseding/Intervening Negligence)

51. Should it be determined that Defendants were negligent, careless, reckless or grossly negligent, which allegations are expressly denied by Defendants, then Defendants would show this Court that the damages sustained by the Plaintiffs, if any, were proximately caused by the intervening and superseding negligence of others, which intervening and superseding negligence proximately caused any damages alleged to have been suffered by the Plaintiffs.

WHEREFORE, having fully answered the Second Amended Complaint of Plaintiffs, said Defendants pray that the same be dismissed with attorneys' fees, costs, and for such other relief as this Honorable Court deems just and proper.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY:

 KMB

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*Attorneys for Oakland Properties, LLC, and Avtex
Commercial Properties, Inc.*

Charleston, South Carolina
April 30, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

William Huck and Dianne Huck,)

Plaintiffs,)

vs.)

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.)

IN THE COURT OF COMMON PLEAS

DEFENDANT CHANDLER
CONSTRUCTION SERVICES, INC.'S
ANSWER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT

C.A. No. 2014-CP-10-569

(JURY TRIAL DEMANDED)

2014 MAY 22 PM 3:17
CLERK OF COURT
J. ARMSTRONG

FILED

Defendant, Chandler Construction Services, Inc., answering the Second Amended Complaint of the Plaintiffs, would allege and show unto the Court as follows:

FIRST DEFENSE

1. Defendant, Chandler Constructive Services, Inc. ("Chandler"), admits the allegations of paragraph 1 on information and belief.
2. Chandler admits the allegations of paragraph 2 on information and belief.
3. Chandler admits the allegations of paragraph 3 on information and belief.
4. Chandler admits the allegations of paragraph 4 on information and belief.
5. Chandler denies that its principal place of business is in Charleston County, South Carolina. It maintains its principal place of business at 1511 Ninety Six Highway, Ninety Six, South Carolina 2966-9261. The remaining allegations of paragraph 5 are admitted.

6. Chandler admits the allegations of paragraph 6 on information and belief.

7. Chandler admits the allegations of paragraph 7 on information and belief.
8. Chandler admits the allegations of paragraph 8 on information and belief.
9. Chandler admits the allegations of paragraph 9 on information and belief.
10. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10, and those allegations are therefore denied.
11. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11, and those allegations are therefore denied.
12. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12, and those allegations are therefore denied.
13. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13, and those allegations are therefore denied due to the unknown location of the alleged incident.
14. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14, and those allegations are therefore denied due to the unknown location of the alleged incident.
15. Chandler admits the allegations of paragraph 15 on information and belief.
16. Chandler admits the allegations of paragraph 16 on information and belief.
17. Chandler admits the allegations of paragraph 17 on information and belief.
18. Chandler is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18, and those allegations are therefore denied due to the unknown location of the alleged incident.
19. In response to the allegations of paragraph 19, Chandler repeats and realleges its responses contained in the preceding paragraphs as if fully set forth herein.

20. The allegations of paragraph 20 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

21. The allegations of paragraph 21 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

22. The allegations of paragraph 22 call for a legal conclusion to which no response is required. To the extent a response is required, Chandler denies that it negligently performed the construction of the curb ramps adjacent to the roadway modifications of the walkway into The Market at Oakland in front of Wild Wing Café. Chandler denies the remaining allegations in paragraph 22 for lack of sufficient information to form a belief as to the truth of the allegations.

23. The allegations of paragraph 23 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

24. The allegations of paragraph 24 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

25. The allegations of paragraph 25 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

26. The allegations of paragraph 26 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

27. The allegations of paragraph 27 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

28. The allegations of paragraph 28 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

29. The allegations of paragraph 29 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

30. The allegations of paragraph 30 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

31. The allegations of paragraph 31 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

32. The allegations of paragraph 32 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

33. The allegations of paragraph 33 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

34. The allegations of paragraph 34 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

35. The allegations of paragraph 35 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

36. The allegations of paragraph 36 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

37. The allegations of paragraph 37 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

38. The allegations of paragraph 38 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

39. The allegations of paragraph 39 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

40. The allegations of paragraph 40 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied for lack of sufficient information to form a belief as to the truth of the allegations.

41. The allegations of paragraph 41 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

42. The allegations of paragraph 42 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

43. In response to the allegations of paragraph 43, Chandler repeats and realleges its responses contained in the preceding paragraphs as if fully set forth herein.

44. The allegations of paragraph 44 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

45. The allegations of paragraph 45 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

46. Chandler denies each and every allegation of Plaintiffs' Second Amended Complaint not specifically explained, modified, or admitted hereinabove.

SECOND DEFENSE
(Failure to State a Claim)

47. Chandler alleges that the Complaint fails to state a claim against Chandler upon which relief can be granted and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

THIRD DEFENSE
(Comparative Negligence)

48. Chandler alleges that even if it was negligent as described in the Second Amended Complaint, which is specifically denied, the Plaintiffs' alleged injuries and damages, if any, resulted from or were due to the negligence of the Plaintiffs, which combined and concurred with any negligence on the part of Chandler, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

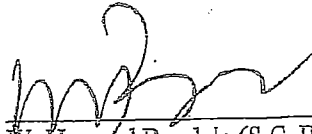
FOURTH DEFENSE
(Superseding Negligence of Third Parties)

49. Chandler alleges that the damages alleged by the Plaintiffs, if any, were not proximately caused by any acts or omissions of Chandler. Instead, Plaintiffs' damages, if any, were directly and proximately caused and contributed to by actions of persons or entities other than Chandler over whom Chandler had no control or authority. If it is determined that Chandler was in any way negligent, which Chandler expressly denies, the intervening, supervening and

superseding negligence of such other third persons or entities insulates Chandler from any and all liability for damages and, further, acts as a bar to such claims.

FIFTH DEFENSE
(Failure to Mitigate Damages)

50. Chandler alleges that should it be determined that Plaintiffs failed to mitigate their alleged damages, Plaintiffs' Second Amended Complaint should be dismissed or, in the alternative, any judgment should be reduced by the amount in which Plaintiffs failed to mitigate their damages as required by law.



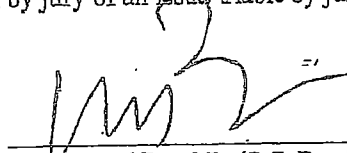
W. Howard Boyd, Jr. (S.C. Bar # 826)
Zachary L. Weaver (S.C. Bar # 101419)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
(864) 271-7502 FAX
hboyd@gwblawfirm.com
zweaver@gwblawfirm.com

May 20, 2014

Greenville, SC

Attorneys for Defendant Chandler
Construction Services, Inc.

This Defendant hereby demands trial by jury of all issues triable by jury.



W. Howard Boyd, Jr. (S.C. Bar # 826)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

vs.

WINGS OVER AMERICA, INC. D/B/A
 WILD WING CAFE, CIVIL SITE
 ENVIRONMENTAL, INC., OAKLAND
 PROPERTIES, LLC, CHANDLER
 CONSTRUCTION SERVICES, INC., AND
 AVTEX COMMERCIAL PROPERTIES,
 INC.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2014-CP-10-569

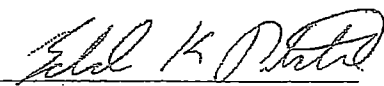
STIPULATION OF DISMISSAL

FILED
 2015 MAY 20 PM 3:07
 JULIE J. ARMSTRONG
 CLERK OF COURT

COMES NOW the Plaintiffs, William Huck and Dianne Huck, pursuant to S.C.R.C.P. 41(a)(1)(B), by and through her counsel of record, and hereby stipulates to the dismissal, with prejudice, of all claims against Defendant, Civil Site Environmental, Inc. in the above captioned action. It is the intent of the parties to forever end this litigation with prejudice between these two parties.

Respectfully submitted,

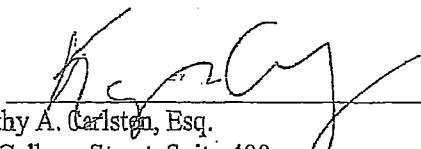
PRITCHARD LAW GROUP, LLC

By: 

Edward K. Pritchard, III, Esq.
 129 Broad Street
 Charleston, SC 29401

Attorneys for Plaintiffs

CARLOCK COPELAND & STAIR LLP

By: 

Kathy A. Carlsten, Esq.
 40 Calhoun Street, Suite 400
 Charleston, SC 29401-3531

Attorneys for Civil Site Environmental

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WILLIAM HUCK AND DIANNE HUCK,)

Plaintiffs,)

vs.)

WINGS OVER AMERICA, INC. D/B/A)

WILD WING CAFE, CIVIL SITE)

ENVIRONMENTAL, INC., OAKLAND)

PROPERTIES, LLC, CHANDLER)

CONSTRUCTION SERVICES, INC., AND)

AVTEX COMMERCIAL PROPERTIES,)

INC.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

STIPULATION OF DISMISSAL
WITH PREJUDICE

C.A. NO.: 2014-CP-10-569

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2015 JUN -1 PM 3:02

FILED

Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Plaintiffs William and Dianne Huck and Defendant, Chandler Construction Services, Inc. ("Chandler Construction"), through their undersigned counsel, enter into this stipulation of dismissal as to all claims asserted by Plaintiffs against Defendant, Chandler Construction Services, Inc. in the above-captioned action. The parties stipulate that all claims asserted in this action against Chandler Construction are hereby dismissed with prejudice, and are henceforth res judicata. Plaintiffs and Defendant, Chandler Construction, will each bear their own attorney's fees and costs.

[SIGNATURE APPEARS ON THE FOLLOWING PAGE]



Edward K. Pritchard

epritchard@pritchardlawgroup.com

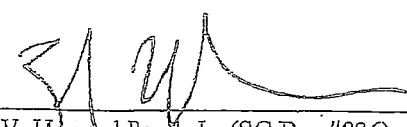
Pritchard Law Group, LLC

129 Broad Street

Charleston, SC 29401

Telephone: (864) 261-3977

Attorney for Plaintiffs



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Gallivan, White & Boyd, P.A.

P.O. Box 10589

Greenville, SC 29603

Telephone: 864-271-5343

Attorneys for Defendant, Chandler
Construction Services, Inc.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-569

Plaintiffs,

vs.

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

Defendants.

DEFENDANT AVTEX COMMERCIAL
PROPERTIES, INC.'S FIRST SET OF
INTERROGATORIES TO PLAINTIFF
WILLIAM HUCK

TO: EDWARD K. PRITCHARD, III, ESQUIRE AND THOMAS B. PRITCHARD, ESQUIRE ATTORNEYS FOR PLAINTIFFS

Defendant Avtex Commercial Properties, LLC requests that Plaintiff William Huck answer, under oath, separately and fully in writing the following interrogatories pursuant to Rule 33 of the South Carolina Rules of Civil Procedure. These interrogatories are deemed to be continuing, and if complete answers to any of them are presently unavailable, supplemental answers are required at the time the information becomes available and prior to trial:

INSTRUCTIONS

A. Every Interrogatory herein shall be deemed a continuing Interrogatory, and you are to supplement your answers promptly, if and when you obtain relevant information in addition to, or in any way inconsistent with your initial answer to any such Interrogatory, in accordance with the Rule 33(b) of the South Carolina Rules of Civil Procedure.

B. Should privilege be claimed as to any information requested herein, the answer must, in each instance, state specifically the information sought, the privilege claimed, and the ground on which the claim or privilege is based. Should Plaintiff William Huck be unable, for reasons other than privilege, to provide the information requested, the answer must, in each instance indicate specifically the information sought, the reason such information is presently unavailable, and an estimate of the time within which the information will be presented to the undersigned.

C. If you object to any portion of an Interrogatory on the ground it seeks privileged information, identify all persons to whom such information has been disclosed, the nature of the privilege asserted, and the dates of any communications for which privilege is asserted.

D. If you object to an Interrogatory on the ground that it is too broad, provide such information, which is concededly relevant and available.

E. If you object to an Interrogatory on the ground that to provide an answer would constitute an undue burden, provide such requested information as can be supplied without undertaking any undue burden. For those portions of any Interrogatory to which you object or otherwise decline to answer, state the reasons for such objection, declination, or burden.

F. When an Interrogatory requests the name of a natural person, the answer should contain the following:

1. The full name of the person.
2. The employer and job title of such person at the time of the event, transaction or occurrence to which the Interrogatory relates.
3. The present employer and job title of the person if known, and if not known, the answer shall so state and shall state in addition the last known address of such person and the last known date that such person resided at that address.

DEFINITIONS

A. The terms "Plaintiff," "You," and "Your" refer to William Huck, or other persons or entities acting, or purporting to act, on behalf of him.

B. The term "Parties" shall refer to the Plaintiffs and anyone acting on behalf of the Plaintiffs, and any of the Defendants, their respective officers, directors, agents, or employees, that are parties to this lawsuit.

C. As used in this request, the term "document" means any handwritten, typewritten, printed, recorded, or graphic matter, including all copies of the above, however produced or reproduced, in the possession, custody, or control of Plaintiffs and/or Plaintiffs' counsel and whether or not claimed to be privileged, including, but not limited to, correspondence, reports, e-mails, meeting minutes, memoranda, notes, schedules, photographs, ledgers, requisitions, journals, books of account, contracts, drawings, blueprints, checks and diaries.

D. "Identify" or "identity" when used in reference to a person, means state his full name, his present or last known address, telephone number, and his present or last known position or business affiliation.

E. "Describe" or "description," if used in reference to a person, means to identify each individual person and, when used in reference to a document, means to state the following as to each document:

1. Nature and contents.
2. Date.
3. Name, present address, and position of the author or signer.
4. The name, address, and position of the addressee, if any.
5. The present location, name, and present address and position of person or persons having custody.

F. "Electronically Stored Information" or "ESI" includes all information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software, including, but not limited to the following: accounting or bookkeeping information stored or accessed with QuickBooks or similar software; email of any type, category, or status, including incoming, outgoing, draft, or deleted email; Social Networking Website postings or commentary; chat room logs, transcripts, archives or commentary; instant messaging logs, archives, or history files; internet

browser temporary files, cache files, cookies, or history information; online discussion group files; blog text, postings, or commentary; and any data stored on a computer network, servers, pop drives, disks, snap drives, flash drives, thumb drives, USB hard drive, cell phone, PDA, Blackberry, Treo, Palm device, iPod, MP3 player, or other electronic device capable of storing data.

INTERROGATORIES

1. If you or your attorneys know of any persons who are or might be witnesses to the facts of this case and allegations of the Plaintiffs' Second Amended Complaint, please give the following information:
 - (a) What are their names and addresses?
 - (b) Do you have either written or recorded statements from any of them?
 - (c) If you do, please state from whom you have such statements.
 - (d) If you have such statements, who is in possession of them?
2. For each person known to Plaintiff William Huck or to counsel to be a witness concerning the facts of the case or to have knowledge of the allegations of Plaintiffs' Second Amended Complaint, please:
 - (a) Set forth a summary of the important facts known to or observed by such witness; or
 - (b) Provide a copy of any written or recorded statements from such witness.
3. Please set forth a list of photographs, plats, sketches or other prepared documents that might be in your possession relating to your claim.
4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.
5. Is Plaintiff eligible for Medicare? If so, please provide the following:
 - a) Date of birth and gender.
 - b) Social security number.
 - c) Please list any other names Plaintiff has been known by.
 - d) Health Insurance Claim number (HICN).
 - e) Has Plaintiff received Medicare benefits? Start date?

- f) Has Plaintiff received Medicare benefits for the injury in which Plaintiff is seeking compensation?
6. If not eligible for Medicare, provide the anticipated date Plaintiff will begin receiving Medicare benefits.
 7. State your full name, present address, date of birth, place of birth, and Social Security Number.
 8. Identify every person known by you to have been present at the scene of the incident at the time thereof or within one (1) hour before or after the incident.
 9. Identify each person with name and address whom you expect to call as an expert witness at the trial of this lawsuit, and for each such expert, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
 10. Identify all documents, including but not limited to invoices, receipts, medical bills, medical reports, expert reports, test results, articles, or texts relating to the claim or defense in this action.
 11. Please list all of your occupations or jobs (full and/or part-time) and employer's name and address and reasons for termination starting with your present employer.
 12. List all of the crimes of any nature, excluding minor traffic offenses, for which you have been arrested, by dates and offenses, the result of the arrest and, if sentenced, the sentence imposed.
 13. If you have ever made a claim for personal injury or property damage or sued anyone before for personal injury or property damage or been sued for personal injury or property damage, please state the insurance carrier or carriers with whom you made the claim, the claim number, the full title of each suit, the court in which the action was instituted, the number of the action, the nature and extent of the injury or damage, and the disposition of the action or claim.

THE ACCIDENT

14. Describe with particularity exactly what occurred in the five minutes prior to the incident which is the subject of the above action (hereinafter referred to as "the accident"), what occurred during the accident, and what occurred during the ten minutes after the accident, including anything said by or to you.
 - (a) Five minutes prior to the accident.
 - (b) During the accident (including a description of how the accident occurred).
 - (c) Ten minutes after the accident.
15. Set forth, with particularity, the exact site where the alleged incident occurred, listing the address by street address, county, city/state, and the date of the alleged incident.

DAMAGES

16. (a) Please state, in chronological order the date, the name, address of each medical care provider (doctor, hospital, clinic, emergency room, therapist, chiropractor or any other) you have seen in the past 20 years and state the reason you sought treatment.
 - (b) Please state what, if any, problems you had (physical or mental) prior to the accident setting forth the name and address of the doctor from whom you sought treatment, and the date.
17. Please state all physical and/or mental injuries you claim as a result of the accident.
18. Please state the name and address of all medical care providers (doctor, hospital, clinic, emergency room, therapist, chiropractor or any other) who have rendered medical and/or ancillary care for you as a result of the accident.
19. Indicate all medical and/or ancillary expenses you incurred as a result of the accident, including, but not limited to, hospital and therapy costs. Indicate also

the names and addresses of those who provided the service and who made the payment for such services.

20. State whether you have ever, either before or after the incident, had any illness, impairment, condition, accident, or injury. If your answer is yes, please state the date of said illness, impairment, condition, accident, or injury, the nature thereof, and identify all doctors and/or hospitals involved with the examination or treatment thereof.
21. To the best of your knowledge or that of your attorney, has any doctor advised you or your attorney as to the diagnosis of any of your injuries? If so, state the diagnosis made of each injury and the name and address of the doctor making said diagnosis. (NOTE: A medical report may be submitted in lieu of a written answer to this question.)
22. To the best of your knowledge or that of your attorney, has any doctor advised you or your attorney as to the prognosis of any of your injuries?
If so, state:
 - (a) Which injuries you have been advised are probably temporary and the doctor making said statements and his/her address.
 - (b) Which injuries you have been advised are probably permanent the nature and location of such injury, and the doctor making said statement and his/her address.
23. State whether you claim to have sustained any loss of income or wages as a result of the incident, and if so, state the amount you are claiming, the name and address of the employer and all days on which you claim to have missed work due to the incident.
24. With respect to the injuries you received as a result of the accident herein, state the nature, extent and location of any cuts or lacerations, fractures, dislocations, bruises, and/or visible injuries and the date that each such injury first manifested itself.
25. If your activities, other than those involving your work, have been restricted as a result of the accident, please state what activities that have been or will be

- restricted or curtailed as a result of the accident. (It should include hobbies, sports, recreation, household and yard activities, and other leisure activities.)
26. If you have been able to resume your normal schedule of activities since the date of the accident, please state the date.
 27. If you are still suffering from any effects of the accident, please state the symptoms, complaints and/or other disabilities you claim resulted from the accident.
 28. State the nature and amount of all future expenses you anticipate will be incurred as a result of the accident.
 29. What loss of earnings, if any, do you believe you will incur in the future as a result of the accident.
 30. If you claim any aggravation of a pre-existing condition as a result of the accident, please state:
 - (a) The nature of the pre-existing condition, and how long it had existed prior to the accident.
 - (b) The date, name, and address of all persons and institutions treating you for pre-existing conditions prior to the time of the accident.
 31. State your general physical condition, including every physical or mental ailment, allergies and defects in vision or hearing, if any, immediately prior to the day of the accident.
 32. Describe in detail all ailments from which you are now suffering which you do not believe resulted from the accident.
 33. State whether you took any drugs or narcotics (including prescription drugs) within 24 hours prior to the accident and if so, specify:
 - (a) The type of each drug.
 - (b) The quantity of each.
 - (c) The time and place each drug was taken.
 - (d) The identity and location of each person known to you who was present when each drug was taken.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: D. Summers Clarke

K. Michael Barfield, Esquire

D. Summers Clarke, II, Esquire

288 Meeting Street, Suite 200 (29401)

Post Office Drawer H

Charleston, SC 29402

843-577-7700 FAX 843-577-7708

mbarfield@barnwell-whaley.comsclarke@barnwell-whaley.com

**ATTORNEYS FOR AVTEX COMMERCIAL
PROPERTIES, INC. AND OAKLAND
PROPERTIES, LLC**

May 19, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	DEFENDANT AVTEX COMMERCIAL
vs.	)	PROPERTIES, INC.'S FIRST SET OF
	)	REQUESTS FOR PRODUCTION TO
OAKLAND WINGS, LLC d/b/a WILD	)	PLAINTIFF WILLIAM HUCK
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC, CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

TO: EDWARD K. PRITCHARD, III, ESQUIRE AND THOMAS B.
PRITCHARD, ESQUIRE ATTORNEYS FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE Defendant Avtex Commercial Properties, Inc. hereby request, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that Plaintiff William Huck within thirty (30) days after the service hereof produce and permit this Defendant to inspect, copy, or photograph each of the following documents or things, which may be in the possession, custody or control of Plaintiff William Huck or his attorney that constitute or contain evidence relating to the claim or defense of this action.

INSTRUCTIONS

A. The term "documents" is used in its broadest possible sense and includes, but is not limited to, final, preliminary, or draft records, reports, books, correspondence, drawings, diagrams, maps, data processing, storage units, tapes, moving pictures,

V46951.DOC

photographs, contracts, invoices, receipts, bills, orders, notes and other written communications, plus all other items identified as documents in Rule 34. This request seeks production of all original documents of any nature whatsoever and all non-identical copies thereof in the possession, custody or control of Plaintiffs or counsel plus identification of any other documents of which Plaintiffs or counsel has knowledge. In all cases where an original is unavailable, "document" also means copies thereof. In the event that any document or thing called for in any of these requests has been destroyed, lost, discarded or otherwise disposed of, identify as completely as possible each such document or thing, including without limitation, the following information: date of disposal, place and manner of disposal, reason for disposal, person authorizing the disposal, and persons disposing of the document or thing.

B. If you object to, or otherwise decline to respond any portion of a request, provide all information called for by that portion of the request to which you did not object or which you do not decline to respond. If you object to a request on the ground that it is too broad, provide such information which is concededly relevant. For those portions of any request to which you object or otherwise decline to respond, state the reason for such objection. If you do not respond to any request because of a claim of privilege, set forth the privilege claimed, the facts upon which you rely to support your claim of privilege, and identify all documents for which such privilege is claimed.

C. These requests shall be deemed continuing so as to require supplemental responses if Plaintiff or counsel obtains further information between the time answers are served and the time of trial.

DEFINITIONS

A. The terms "Plaintiff," "You," and "Your" refer to WILLIAM HUCK, or other persons or entities acting, or purporting to act, on behalf of him.

B. The term "Parties" shall refer to the Plaintiffs, anyone acting their behalf, and any of the Defendants, their respective officers, directors, agents, or employees, that are parties to this lawsuit.

C. In addition to the above instructions, the term "document" also means any handwritten, typewritten, printed, recorded, or graphic matter, including all copies of the above, however produced or reproduced, in the possession, custody, or control of Plaintiffs and/or their counsel and whether or not claimed to be privileged, including, but not limited to, correspondence, reports, e-mails, meeting minutes, memoranda, notes, schedules, photographs, ledgers, requisitions, journals, books of account, contracts, drawings, blueprints, checks and diaries.

D. "Identify" or "identity" when used in reference to a person, means state his full name, his present or last known address, telephone number, and his present or last known position or business affiliation.

E. "Describe" or "description," if used in reference to a person, means to identify each individual person and, when used in reference to a document, means to state the following as to each document:

1. Nature and contents.
2. Date.
3. Name, present address, and position of the author or signer.
4. The name, address, and position of the addressee, if any.
5. The present location, name, and present address and position of person or persons having custody.

F. "Electronically Stored Information" or "ESI" includes all information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software, including, but not limited to the following: accounting or bookkeeping information stored or accessed with QuickBooks or similar software; email of any type, category, or status, including incoming, outgoing, draft, or deleted email; Social Networking Website postings or commentary; chat room logs, transcripts, archives, or commentary; instant messaging logs, archives, or history files; internet browser temporary files, cache files, cookies, or history information; online discussion group files; blog text, postings, or commentary; and any data stored on a computer network, servers, pop drives, disks, snap drives, flash drives, thumb drives, USB hard

drive, cell phone, PDA, Blackberry, Treo, Palm device, iPod, MP3 player, or other electronic device capable of storing data.

REQUESTS FOR PRODUCTION

1. Any and all statements, whether written, recorded, or otherwise having any bearing upon the present litigation.
2. Any and all medical reports, correspondence, office notes, charts, diagrams, x-rays, x-ray reports, evaluations, doctor and hospital records, medical bills, hospital bills, skilled nursing facility records and bills, physical therapy records, discharge summaries, or any other medical information concerning the injuries claimed to have been sustained by Plaintiff William Huck and/or treatment of him by any therapist, physician, chiropractor, psychiatrist, psychologist, or other health care provider as a result of the incident with which this case is concerned.
3. Any and all photographs, slides, videotape, motion pictures, film, data compilations, plats, sketches, diagrams, reports by police or of any other public or private investigations, or other materials having to do with the present litigation.
4. If Plaintiff is making any claim for lost wages or earnings, produce:
 - (a) any and all documentation of lost wages which Plaintiff claims to have arisen from this incident, including any lost wage verifications, and
 - (b) copies of Plaintiff's state and federal tax returns, including W-2 forms, for the year of the incident, the year following the incident, and the two years before the incident.
5. Copies of any and all documents identified in response to all Interrogatories served on Plaintiff.

6. With regard to any expert witnesses identified in Answers to Interrogatories:

- (a) all documents prepared by the expert;
- (b) all documents sent to the expert by Plaintiffs' counsel;
- (c) all documents relied upon by the expert;
- (d) all documents used, consulted, or reviewed by the expert;
- (e) all documents setting forth the compensation agreement between Plaintiff and the expert;
- (f) all documents used, relied upon, consulted, or reviewed by the expert in answering expert witness interrogatories;
- (g) all documents that have been or will be shown to the expert prior to trial testimony; and
- (h) all documents, including a current curriculum vitae, used to establish the expert's qualifications for trial purposes.

7. Any other documents which may be used as exhibits in this litigation.

8. Any and all documents relating to claims for unemployment benefits.

9. Copies of any and all documents that support Plaintiffs' cause of action.

10. Any and all documents obtained by subpoena, FOIA request, or authorization issued by Plaintiffs through counsel.

Please produce for inspection and/or copying the above-listed documents to the undersigned, at the undersigned's address, within thirty (30) days of the date of this Request; in lieu of production of the originals for inspection and/or copying, please forward copies of the above-listed documents to the undersigned, at the undersigned's address.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: D. Summers Clarke

K. Michael Barfield, Esquire

D. Summers Clarke, II, Esquire

288 Meeting Street, Suite 200 (29401)

Post Office Drawer H

Charleston, SC 29402

843-577-7700 FAX 843-577-7708

mbarfield@barnwell-whaley.com

sclarke@barnwell-whaley.com

ATTORNEYS FOR AVTEX COMMERCIAL
PROPERTIES, INC. AND OAKLAND
PROPERTIES, LLC

May 19, 2014

JULIE J. ARMSTRONG
 CLERK OF COURT, C.P. & G.S.
 100 BROAD STREET, SUITE 106
 CHARLESTON, SC 29401-2258
 RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

61



KENNETH MICHAEL BARFIELD
 BARNWELL, WHALEY, PATTERSON & HELMS, LLC
 PO BOX H
 CHARLESTON SC 29402-0197

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Jury Verdict in favor of Pltff

CASE NO: 2014CP1000569

William Huck , plaintiff, et al VS Wings Over America Inc , defendant, et al

This judgment was entered on the 22nd day of May, 2015, and notice mailed first class on Friday, May 22, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-10-00569

William Huck & Dianne Huck

Wings Over America dba/ Wing Wings Café;
Oakland Properties LLC & Avtex Commercial
Properties

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Court	Attorney for : ☐ Plaintiff ☐ Defendant
	or
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☒ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court. The Jury, unanimously, found in favor of the Plaintiff in the amount of 48,820.00 against AVTEX Commercial Properties LLC.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

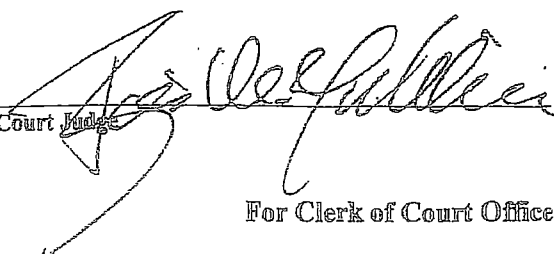
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
William Huck & Dianne Huck	AVTEX Commercial Properties	48,820.00
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


 Circuit Court Judge _____ 2168 _____ 05-21-2015
 Judge Code Date
 For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
 placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
 to parties (when appearing pro se) as follows:

 Edward Pritchard & Liz Fulton

ATTORNEY(S) FOR THE PLAINTIFF(S)

 Kenneth Barfield & Summers Clarke

ATTORNEY(S) FOR THE DEFENDANT(S)

 CLERK OF COURT

Court Reporter: Karen Andersen

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WILLIAM HUCK AND
DIANNE HUCK,

Plaintiffs,)

vs.)

WINGS OVER AMERICA, INC. d/b/a)
WILD WINGS CAFÉ, OAKLAND)
PROPERTIES, LLC, AVTEX)
COMMERCIAL PROPERTIES INC.,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-10-569

VERDICT FORM

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2015 MAY 22 AM 9:13

FILED

1. A. Was the Defendant, WINGS OVER AMERICA, INC. d/b/a WILD WINGS CAFÉ negligent?

 YES - Go to Question 2. A.

✓ NO - Stop deliberations for WINGS OVER AMERICA, INC.

- B. Was the Defendant, OAKLAND PROPERTIES, LLC negligent?

 YES - Go to Question 2. B.

✓ NO - Stop deliberations for OAKLAND PROPERTIES, LLC

- C. Was the Defendant, AVTEX COMMERCIAL PROPERTIES, INC. negligent?

✓ YES - Go to Question 2. C.

 NO - Stop deliberations for AVTEX COMMERCIAL PROPERTIES, INC.

2. A. Was WINGS OVER AMERICA, INC. d/b/a WILD WINGS CAFÉ negligence a proximate cause of the Plaintiff's injuries and damages?

 YES - Go to Question 3

 NO - Stop deliberations for WINGS OVER AMERICA, INC.

- B. Was OAKLAND PROPERTIES, LLC'S negligence a proximate cause of the Plaintiff's injuries and damages?

 YES - Go to Question 3

 NO - Stop deliberations for OAKLAND PROPERTIES, LLC

- C. Was AVTEX COMMERCIAL PROPERTIES, INC.'S negligence a proximate cause of the Plaintiff's injuries and damages?

 ✓ YES - Go to Question 3

Qw/ ~~at~~ NO - Stop deliberations for AVTEX COMMERCIAL PROPERTIES, INC.

3. Did the Plaintiff, William Huck contribute to his injuries and damages by his own negligence?

 ✓ YES - Go to Question 5

 NO

4. State the amount of actual damages, if any, that the Plaintiff is entitled to. You are to determine only the TOTAL amount of the plaintiff's damages and enter that amount below.

\$ 97,640.00

5. What percentage of the injury did each party cause? (The percentages must add up to 100%.)

WINGS OVER AMERICA, INC. 0 %

OAKLAND PROPERTIES, LLC 0 %

AVTEX COMMERCIAL PROPERTIES, INC 50 %

WILLIAM HUCK 50 %

TOTAL 100%

I certify this decision was the unanimous decision of the jury.

Charles W. Kelly

Foreman

May 21, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
OAKLAND WINGS, LLC d/b/a WILD	)	
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC; CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

FILED
 2015 JUN -3 PM 4:57
 JULIE J. ARMSTRONG
 CLERK OF COURT

DEFENDANT AVTEX COMMERCIAL PROPERTIES, INC.'S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant, Avtex Commercial Properties, LLC (hereinafter "Avtex"), by and through its undersigned counsel, hereby moved this Honorable Court, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure for a Judgment Notwithstanding the Verdict.

Judgment Notwithstanding the Verdict (JNOV)

Defendants renew their motions for Directed Verdict as to the negligence cause of action, on the grounds that there is no legally sufficient basis for a jury to find for the Plaintiffs, as previously stated in Defendants' Motion for Directed Verdict at the close of all the evidence. The Motion for Judgment Notwithstanding the Verdict is based on the fact that Plaintiffs failed to introduce evidence sufficient to support a finding that Avtex breached its duty to Mr. Huck.

This Motion is supported by South Carolina statutory and case law and the South Carolina Rules of Civil Procedure, the South Carolina Rules of Evidence, as will be set forth in the Memorandum of Law filed herewith in this matter.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: *D. Summers Clarke*

K. Michael Barfield, Esquire
D. Summers Clarke, Esquire
288 Meeting St., Ste 200 (29401)
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700 FAX (843) 577-7708
Email: mbarfield@barnwell-whaley.com
Email: sclarke@barnwell-whaley.com

Attorney for Avtex Commercial Properties, Inc.

Charleston, South Carolina
June 3, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
OAKLAND WINGS, LLC d/b/a WILD	)	
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC, CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

FILED
 2015 JUN -3 PM 4:57
 JULE J. ARMSTRONG
 CLERK OF COURT

DEFENDANT AVTEX COMMERCIAL PROPERTIES, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant, Avtex Commercial Properties, LLC (hereinafter "Avtex"), by and through its undersigned counsel, submits this Memorandum in Support of Motion for Judgment Notwithstanding the Verdict.

INTRODUCTION

On July 13, 2012, Plaintiff, William Huck, went to eat lunch at the Wild Wing Café, which is located in The Market at Oakland in Mt. Pleasant, South Carolina. After parking in a lot adjacent to the restaurant, Mr. Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café. Mr. Huck allegedly slipped and fell approximately where the crosswalk and the base of the ramp to the sidewalk intersect. It

had rained just prior to Mr. Huck's arrival, and he alleges that the ramp was defective because it was improperly sloped, a puddle of water had accumulated at its base and that debris was present in and around the puddle. Mr. and Mrs. Huck subsequently brought this suit for negligence and loss of consortium.

The Honorable Brian M. Gibbons presided over the jury trial for this matter beginning on May 18, 2015. Trial testimony and jury deliberations were concluded by May 21, 2015. The jury returned an award in favor of Plaintiff for \$97,640.00 and found that Mr. Huck was 50% comparatively negligent, which reduced the verdict against Avtex to \$48,820.00. Judge Gibbons allowed the parties ten business days after the conclusion of the trial to file post-trial motions.

ARGUMENTS

A. The Court Should Grant Judgment to Avtex Notwithstanding the Verdict

1. Governing Legal Standards

A motion for JNOV may be granted if no reasonable jury could have reached the challenged verdict. *See Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). In deciding such motions, the court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *See Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000).

2. Plaintiff Failed to Establish that Avtex Breached its Duty

Plaintiff failed to introduce evidence sufficient to support a finding that Avtex breached its duty to Mr. Huck. In South Carolina, property owners generally have a duty to warn an invitee *only* of latent or hidden dangers of which they have or should have knowledge, not open and obvious hazards. *Larimore v. Carolina Power & Light*, 340 S.C.

438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) (emphasis added). Generally there is no duty to warn of natural weather-related conditions that are open and obvious hazards affecting walking surfaces. Rather, the invitee assumes the risk by choosing to walk on such surfaces, at least when alternative safe routes are available. See *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991) (landowner had no duty to warn its invitee about the wet grass because it was a natural condition, the peril of which was obvious); *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996) (owners could not foresee that tenant, on finding the sidewalk blocked, would choose to walk through the mud rather than take one of several alternate routes around the muddy area). A landowner, such as Avtex, should not be held liable for failing to warn of an open and obvious condition unless the invitee can show that the landowner should have anticipated, not only that the invitee would encounter the condition, but would do so even where reasonable alternatives were available.

First, the puddle near the sidewalk was not a latent or hidden danger. South Carolina law recognizes water on a sidewalk as patently dangerous, so it did not matter that there may have been mud or debris in the puddle. Second, Avtex was not aware that water had ponded near the sidewalk after the thunderstorm that morning. Regardless, within three hours of Mr. Huck's accident, the puddle had evaporated. There is nothing in the record to support that Avtex had any knowledge of any issues with the sidewalk. Finally, Plaintiff, Mr. Huck, admitted throughout the trial that he noticed the puddle before he stepped in it. He also admitted that there was another sidewalk adjacent to the crosswalk that he could have used. By Mr. Huck's own admission, the puddle was open and obvious. Therefore, Mr. Huck assumed the risk when he chose to step in the puddle instead of stepping over it or

taking a nearby alternate route. Under South Carolina law, Avtex had no duty to warn an invitee, such as Mr. Huck, about this open and obvious potential danger.

CONCLUSION

Because Avtex did not breach any duty it purportedly owed to Plaintiff, Plaintiff's claim must fail, and this Court should grant Avtex Judgment Notwithstanding the Verdict. For the foregoing reasons, this Court should grant Avtex's Motion for Judgment Notwithstanding the Verdict.

Respectfully submitted,

BARNWELL WHALEY PATTERSON &
HELMS, LLC

BY: *D. Summers Clarke*
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*Attorney for Avtex Commercial Properties,
Inc.*

Charleston, South Carolina
June 3, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	
	)	
OAKLAND WINGS, LLC d/b/a WILD	)	
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC, CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

FILED
 2019 JUN -3 PM 1:53
 JULIE J. ARMSTRONG
 CLERK OF COURT

DEFENDANT AVTEX COMMERCIAL PROPERTIES, INC.'S
MOTION FOR DISCLOSURE OF SETTLEMENT, MOTION FOR SETOFF, AND IN
THE ALTERNATIVE, MOTION TO DETERMINE WHETHER SETTLEMENTS
WITH CHANDLER CONSTRUCTION SERVICES AND CIVIL SITE
ENVIRONMENTAL, INC. WERE MADE IN GOOD FAITH

Defendant, Avtex Commercial Properties, LLC (hereinafter "Aytex"), by and through its undersigned counsel, hereby moved this Honorable Court, for the following: (1) Motion to Disclose Settlement Terms with Chandler and Civil Site Engineering; (2) Motion for Setoff; and in the alternative, (3) Motion to Determine Whether the Settlements with Chandler and CSE were Made in Good Faith.

This Motion is supported by South Carolina statutory and case law and the South Carolina Rules of Civil Procedure, the South Carolina Rules of Evidence, as will be set forth in the Memorandum of Law filed herewith in this matter.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: D. Summers Clarke

K. Michael Barfield, Esquire

D. Summers Clarke, Esquire

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Attorney for Avtex Commercial Properties, Inc.

Charleston, South Carolina

June 3, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
OAKLAND WINGS, LLC d/b/a WILD	)	
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC, CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

FILED
 2015 JUN -3 PM 4:53
 JULIE J. ARMSTRONG
 CLERK OF COURT

DEFENDANT AVTEX COMMERCIAL PROPERTIES, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISCLOSE SETTLEMENT, MEMORANDUM IN SUPPORT OF
MOTION FOR SETOFF, AND IN THE ALTERNATIVE, MEMORANDUM IN
SUPPORT OF MOTION TO DETERMINE WHETHER THE SETTLEMENTS
WITH CHANDLER CONSTRUCTION SERVICES AND CIVIL SITE
ENVIRONMENTAL, INC. WERE MADE IN GOOD FAITH

Defendant, Avtex Commercial Properties, LLC (hereinafter "Avtex"), by and through its undersigned counsel, submits this combined (1) Memorandum in Support of Motion to Disclose the Settlement Amount with Civil Site Environmental, Inc. and Chandler Construction Services; (2) Memorandum in Support of Motion for Setoff; and in the alternative, (3) Memorandum in Support of Motion to Determine Whether the Settlements with Chandler Construction Services and Civil Site Environmental Were Made in Good Faith.

INTRODUCTION

On July 13, 2012, Plaintiff, William Huck, went to eat lunch at the Wild Wing Café, which is located in The Market at Oakland in Mt. Pleasant, South Carolina. After parking in a lot adjacent to the restaurant, Mr. Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café. Mr. Huck allegedly slipped and fell approximately where the crosswalk and the base of the ramp to the sidewalk intersect. It had rained just prior to Mr. Huck's arrival, and he alleged that the ramp was defective because it was improperly sloped, a puddle of water had accumulated at its base and that debris was present in and around the puddle. Mr. and Mrs. Huck subsequently brought this suit for negligence and loss of consortium.

The Honorable Brian M. Gibbons presided over the jury trial for this matter beginning on May 18, 2015. Trial testimony and jury deliberations were concluded by May 21, 2015. The jury returned an award in favor of Plaintiff for \$97,640.00 and found that Mr. Huck was 50% comparatively negligent, which reduced the verdict against Avtex to \$48,820.00. Judge Gibbons allowed the parties ten business days after the conclusion of the trial to file post-trial motions.

ARGUMENTS

A. Plaintiffs Must Disclose Settlement Amounts with Joint-Tortfeasors

Avtex respectfully requests this Court to require Plaintiffs to disclose the terms of the releases between Plaintiffs and Civil Site Environmental ("CSE") and Plaintiffs and Chandler Construction Services ("Chandler"). Avtex is entitled to discover the terms of both releases to determine whether or not they were given in good faith and to what

extent Avtex is entitled to a setoff against the Plaintiffs' judgment. S.C. Code Ann. § 15-38-50 conditions extinguishment of potential contribution claims by Avtex on the terms of the settlements between Plaintiffs and CSE and Plaintiffs and Chandler both being made in "good faith." In the absence of a good faith settlement, Avtex could have a claim for contribution against Chandler and/or CSE. Further, Avtex is clearly entitled to a setoff at least in the amount of any such settlement funds specifically paid to Mr. Huck and possibly additional funds as argued in this memorandum.

If Plaintiffs object to the production of the settlement documents on the basis that they contain a confidentiality provision, any concerns regarding privacy or confidentiality over the discovery of the settlement agreement can be adequately addressed by a protective order. A confidentiality provision does not operate to shield a settlement agreement from being produced. As recognized by the Fourth Circuit Court of Appeals, "[t]here is an important distinction between privilege and protection of documents, the former acting to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding confidentiality." *Virami v. Novant Health, Inc.*, 259 F.3d 284, 288 n.4 (4th Cir. 2001). Avtex will consent to a protective order to protect disclosure of the settlement documents to parties outside this litigation.

B. Avtex is Entitled to a Setoff

Avtex is entitled to a setoff to account for the amount CSE and Chandler each paid Plaintiffs to settle the claims against them. Plaintiffs brought causes of action for negligence and loss of consortium against Defendants. Prior to the trial of this matter, CSE and Chandler reached settlements with Plaintiffs, the terms of which are unknown to

Avtex. It is Avtex's understanding based on representations by Plaintiffs' counsel that Plaintiffs may have allocated a substantial percentage of the settlements with CSE and Chandler to Mrs. Huck's loss of consortium claim in an effort to deprive Avtex of a setoff. If Plaintiffs allocated the majority of those settlement monies to the loss of consortium claim, that allocation would be unreasonable. See *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (2014). "[I]n the context of a non-settling defendant's claim for setoff, the court should examine whether the percentages allocated to one claim or the other by the settling parties are reasonable. If the allocation is not reasonable, the court may reallocate the funds." *Riley*, 408 S.C. at 16 (internal citations omitted).

During the trial, Plaintiffs presented no evidence to support Mrs. Huck's loss of consortium claim. In fact, the Court granted Defendants' motion for directed verdict as to that claim due to the undisputed lack of evidence or testimony to support a loss of consortium cause of action. Furthermore, Plaintiffs' counsel did not object to or offer any argument opposing Defendants' directed verdict motion. Therefore, the record does not support any allocation of the settlement to either Plaintiff's loss of consortium claim. Moreover, Avtex was neither a party to the settlement negotiations between Plaintiffs and CSE nor Plaintiffs and Chandler, and thus is not bound by their agreements. *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (2014) (citing *Welch v. Epstein*, 432 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000) (holding a defendant who is "not a party to the settlement . . . is not bound by its terms" when requesting setoff)). When presented with this same issue, the South Carolina Court of Appeals recently held

Compensatory damages are intended to make the plaintiff whole. When an agreed-upon allocation of settlement proceeds is not reasonable under the evidence, that policy is not advanced because of the possibility of double recovery. Thus, when an agreed-upon allocation of settlement proceeds is

not reasonably based on the evidence and does not fairly advance the policy of preventing double-recovery, a non-settling defendant who is entitled to a setoff but was not involved in the settlement negotiation is entitled to have the court consider reallocating the proceeds.

Id. (internal citations omitted). The fact that the record is devoid of any evidence to support either Plaintiff's loss of consortium claim weighs in favor of allocating a majority of the proceeds to Mr. Huck's negligence claim. Moreover, based on the jury notes, it is evident that the jury considered Mr. Huck's medical expenses, lost wages, and pain & suffering in reaching a verdict on the negligence claim. See Exhibit A attached hereto. Therefore, Avtex respectfully requests this Court to reallocate the settlement proceeds paid to Plaintiffs by CSE and Chandler to give Avtex a setoff.

C. Plaintiff is Entitled to Contribution from the Settling Defendants

In the alternative, if the Court declines to reapportion the settlement proceeds, Avtex requests that this Court make a determination as to whether the settling parties' allocation of the settlement proceeds is in bad faith and in contravention of public policy. If it is true that the major portions of the settlements were allocated to Mrs. Huck's claim for loss of consortium, the settling parties have purposely structured a settlement to circumvent Avtex's right to a setoff.

According to the South Carolina Contribution Among Tortfeasors Act ("the Act"), where two or more persons become jointly or severally liable in tort for the same injury to property, a right of contribution arises among them, even if judgment has not been recovered against all or any of them. S.C. Code Ann. § 15-38-20(A) (Supp. 2003); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). In these situations, the right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability.

S.C. Code Ann. § 15-38-20(B) (Supp. 2003); *Vermeer*, 336 S.C. at 68, 518 S.E.2d at 309. This right to contribution is subject to certain limitations set forth in the Act. S.C. Code Ann. § 15-38-20(A) (Supp. 2003). One such limitation is laid out in section 15-38-50, which reads, "[w]hen a release . . . is given *in good faith* to one of two or more persons liable in tort for the same injury . . . (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 (Supp. 2003) (emphasis added).

S.C. Code Ann. § 15-38-50 conditions extinguishment of potential contribution claims by Avtex on the terms of the settlements between Plaintiffs and CSE and Plaintiffs and Chandler both being made in "good faith." See *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1430 (D.S.C. 1990) ("[A] Settling Defendant is insulated from later contribution claims by co-tortfeasors if he obtains a good faith release . . . from the Plaintiff."). In the absence of a good faith settlement, Avtex could have a claim for contribution against Chandler and/or CSE. Therefore, if the court declines to reallocate the settlement proceeds, Avtex requests the Court to make a determination as to whether Plaintiffs' allocation is fair and reasonable in light of the total settlement.

Respectfully submitted,

BARNWELL WHALEY PATTERSON &
HELMS, LLC

BY:

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K. Michael Barfield, Esquire

D. Summers Clarke, Esquire

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*Attorney for Avtex Commercial Properties,
Inc.*

Charleston, South Carolina

June 3, 2015

① We all agree that medical should be paid.

②

17 July
30 Aug
21 Sept
68 out
days

~~\$12,500~~ \$13,914

9 Sept
30 Oct
30 Nov
31 Dec
100
days

12/31 \$33,190
168 days

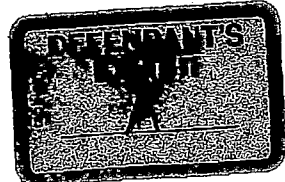
$$72,000 \div 365 = \$197.26$$

\$68

14500 med
33140 wage
50,000 PMS
50% Negl.
97

\$13,414

\$47,000
\$48,500



14,500

33,140

50,000

197,640

.50

198,820

64,000

14,100

62,000

~~388,100~~

140,100

247,900

Historical 64,000

~~Retire 248,000~~ → No

Med 14,000 → Yes

Future Med ~~62,000~~ → No

64,000

14,000

78,000

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-569
WILLIAM HUCK AND DIANNE HUCK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
OAKLAND WINGS, LLC d/b/a WILD	)	
WIND CAFÉ, CIVIL SITE	)	
ENVIRONMENTAL, INC., OAKLAND	)	
PROPERTIES, LLC, CHANDLER	)	
CONSTRUCTION SERVICES, INC.,	)	
AVTEX COMMERCIAL PROPERTIES,	)	
INC.,	)	
	)	
Defendants.	)	

FILED
2015 AUG -7 PM 4:09
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

DEFENDANT AVTEX COMMERCIAL PROPERTIES, INC.'S
MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO SCRPC 59(e)

PLEASE TAKE NOTICE that Defendant, Avtex Commercial Properties, Inc. (hereinafter "Avtex"), moves pursuant to SCRPC Rule 59(e) for this Honorable Court to reconsider and amend its Order denying Avtex's Motion to Disclose Settlement and for Set-Off filed July 27, 2015.

Specifically, Avtex requests that this Honorable Court reconsider its Order with regard to the disclosure of Plaintiffs' pre-trial settlements with other defendant's and for a set-off of any money paid by those Defendants. Further, if it is found that the bulk of those settlement proceeds was paid to plaintiff, Diane Huck, for her loss of consortium claim that this Court use its equitable powers to reallocate those settlement proceeds to conform to the record at trial.

In the alternative, should the Court decline to reallocate those settlement funds, Avtex believes that it is fully entitled to pursue an action for contribution against the settling defendants.

Without completely rehashing its prior arguments, Avtex contends that extending the application of the confidentiality rules that apply to mediations so far as to prevent non-settling defendants from knowing what settling defendants have paid to the plaintiff sets a dangerous precedent. If used strategically, such a broad interpretation of the ADR Rules will swallow defendants' statutory rights to set-off for sums paid to plaintiff by joint tortfeasors. Avtex believes that some portion of the settling defendants' funds were allocated to Mr. Huck's negligence claim. The Court's Order operates to preclude Avtex from getting a setoff for even those amounts, regardless of whether a reallocation of these settlements is appropriate.

With regard to reallocation of inequitably applied settlement amount, Avtex still asserts that the holding of Riley v. Ford Motor Co., 408 S.C. 1, 757 S.E. 2nd 422 (Ct. of App. 2014) stands for the proposition that this Honorable Court has the equitable power to reallocate settlement funds to avoid gamesmanship by plaintiffs, this power must be applied on a case by case basis. To the extent that it is ultimately discovered that the settlement funds paid by settling defendants in this case were allocated to Mrs. Huck's loss of consortium claim, Avtex would again point out that plaintiffs elected not to put up this case at trial and defendant's Motion for Directed Verdict as to Mrs. Huck's consortium claim was granted. Thus, if it is found that the lion's share of these proceeds were allocated to Mrs. Huck, the Court can and should reallocate them to conform to the record.

Finally, in the alternative, Avtex believes that by allowing the settlement amounts to remain undisclosed, its right to seek contribution from the settling defendants has been

prejudiced. Avtex respectfully contends that the Court's final Order conflates two separate principals found Contribution Amongst Joint Tort Feasors Act, S.C. Code Ann. §15-38-15 (1976). It is true that a plaintiff may elect to elect 100% of a joint and several judgment against any single tort feisor who is found by the jury to have been at least 50% at fault for the plaintiff's injuries. However, that section does not stand for the proposition that a defendant found to be at least 50% at fault is foreclosed from seeking contribution from other tort feisors. The best practical example of this concept is that plaintiffs frequently elect to pursue litigation against a single tort feisor. As such, in the absence of comparative fault, any judgment against that tort feisor would appear to be on its face to be a finding of 100% liability. Nevertheless, it is undisputed that a defendant that finds itself in such a situation has the right to pursue any other tort feisors in a separate action for contribution and seek a pro-rata division of the judgment. Nowhere in the Act is there a provision that stands for the proposition that a finding of 50% fault leaves a defendant with no further recourse.

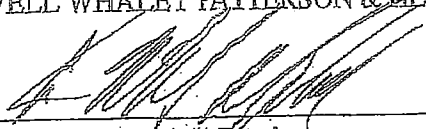
This Motion may be further supported by a Memorandum of Law South Carolina statutory and case law and the South Carolina Rules of Civil Procedure, the South Carolina Rules of Evidence, as will be set forth in the Memorandum of Law filed herewith in this matter.

IT IS SO MOVED.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

K. Michael Barfield, Esquire

D. Summers Clarke, Esquire

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Attorneys for Aytex Commercial Properties, Inc.

Charleston, South Carolina
August 7, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-10-569

FILED
2015 SEP 21 PM 3:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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., and Avtex Commercial Properties,
Inc.....Defendants.

Of whom Avtex Commercial Properties, Inc. is.....Appellant.

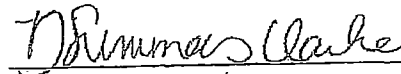
NOTICE OF APPEAL

Avtex Commercial Properties, Inc. ("Appellant") appeals the following Orders (1) Order of the Honorable Brian M. Gibbons dated July 23, 2015 and filed on July 27, 2015, in which he denies the Motion of Avtex Commercial Properties, Inc.'s Motion to Disclose Settlement and For Set-Off, to which Appellant timely filed a Motion to Alter or Amend Judgment Pursuant to SCRCP 59(e) on August 7, 2015; and (2) Order of the Honorable Brian M. Gibbons Denying Motion to Alter or Amend Judgment Pursuant to SCRCP 59(e) issued by Judge Gibbons on August 14, 2015 and filed with the Court on August 18, 2015. The Notice of Entry of Judgment of the Order Denying Appellant's Motion to Alter or Amend that Judgment was received by counsel for Appellant on August 24, 2015. Attached are the July 23, 2015 Order Denying Appellant's Motion to Disclose Settlement and For Set-Off, the

August 14, 2015 Order of the Honorable Brian M. Gibbons Denying Motion to Alter or Amend Judgment Pursuant to SCRCF 59(e) and the Notice of Entry of Judgment of the Order Denying Appellant's Motion to Alter or Amend Judgment. Counsel for Plaintiffs/Respondents are listed below.

Respectfully submitted,

BARNWELL WHALEY
PATTERSON & HELMS, LLC



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September 18, 2015

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Attorneys for Defendant Civil Site Environmental, Inc.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-10-569

FILED
JUL 27 PM 3:08
CLERK OF COURT

WILLIAM HUCK AND DIANNE HUCK,

Plaintiffs,

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.

ORDER DENYING
THE MOTION OF
DEFENDANT, AVTEX
COMMERCIAL PROPERTIES,
INC., FOR JNOV AND
DENYING THE MOTION
OF DEFENDANT, AVTEX
COMMERCIAL PROPERTIES,
INC., TO DISCLOSE
SETTLEMENT AND FOR SET-
OFF

BACKGROUND

This is a premises liability action. This matter came before this court for a trial on the merits on May 19, 2015, May 20, 2015 and May 21, 2015. Prior to trial, Defendants, Civil Site Environmental, Inc., (hereinafter referred to "CSE") and Chandler Construction Services, Inc., (hereinafter referred to "CCS"), settled with either Plaintiff, William Huck, Plaintiff, Dianne Huck, or both; the terms of the settlement, including the amounts, are unknown to the court.

At the close of the plaintiffs' case, the remaining Defendants, Oakland Wings, LLC b/b/a Wild Wing Café (hereinafter referred to as "Wild Wing"), Oakland Properties, LLC, (hereinafter referred to as "Oakland") and Avtex Commercial Properties, Inc., (hereinafter referred to as "Avtex") moved for directed verdict pursuant to Rule 50(a), S.C.R.Civ.P. This

court granted the motion as to Mrs. Huck's consortium cause of action, but denied the motion as to Mr. Huck's negligence cause of action.

At the close of all evidence, Wild Wing, Oakland and Avtex renewed their Rule 50(a) directed verdict motion as to Mr. Huck's negligence cause of action, which the court denied. The matter was then submitted to the jury for determination, which returned a verdict in favor of Mr. Huck against Avtex only in the amount of \$97,640.00, but found that Mr. Huck was fifty percent negligent in bringing about his own injuries. Accordingly this court reduced the verdict by fifty percent to \$48,820.00 and entered judgment against Avtex in the amount of \$48,820.00. The jury also returned verdict in favor of Wild Wing and Oakland and judgment was, accordingly, entered in their favor dismissing them from this action.

On June 3, 2015, Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), S.C.R.Civ.P., and a motion for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlement with CSE and CCS were made in good faith. This matter is now before this court for a determination of Avtex's June 3 motions. For the reasons set forth hereinbelow, both motions are hereby denied.

DISCUSSION

A. RULE 50(B) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

As a preliminary matter, Mr. Huck takes the position that this court cannot consider Avtex's motion for judgment notwithstanding the verdict because it was not timely made. The court disagrees.

Rule 50(b), (e) and (f), S.C.R.Civ.P., respectively provide in relevant part:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may

move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict.

* * * *

The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.

A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

(emphasis added), Rule 6(b), S.C.R.Civ.P., provides in pertinent part:

When by these rules . . . or by order of court an act is required or allowed to be done at or within a specified time . . . the court for cause shown may at any time in its discretion . . . order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended. . . . The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

The South Carolina Supreme Court held in *Citizens & S. Nat'l Bank of S.C. v. Easton*, 310 S.C. 458, 427 S.E.2d 640 (1993), the time for filing a motion under Rule 59(b) may not be enlarged or extended beyond the ten day period stated in Rule 59(b).

Mr. Huck takes the position that since Avtex's motion for judgment notwithstanding the verdict was not filed until June 3, 2015, it was not filed within the ten day period proscribed by Rule 50(e), and, as a consequence, Avtex's Rule 50(b) motion for judgment notwithstanding the verdict is untimely, and must be dismissed as the court now lacks jurisdiction to entertain it. However, the court finds that Avtex actually made its motion for judgment notwithstanding the verdict orally immediately following the reading of the verdict which it followed up with a memorandum filed June 3, 2015. Accordingly, in the court's

view, Avtex timely made its motion for judgment notwithstanding the verdict and the court may now entertain it.

Nevertheless, in considering Avtex' motion for judgment notwithstanding the verdict on the merits, the court finds that the motion must be denied. When ruling on a motion for a directed verdict, this Court is concerned with the existence or non-existence of evidence, not its weight. See *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. *Id.* As the Court finds that there is ample evidence to support the jury's finding that Avtex was negligent, that its negligence brought about Mr. Huck's injuries and that Mr. Huck's damages are \$97,640.00, this court, as it must, hereby deny Avtex' motion for judgment notwithstanding the verdict.

B. MOTION FOR DISCLOSURE OF SETTLEMENT, FOR SET-OFF AND, IN THE ALTERNATIVE, TO DETERMINE WHETHER THE SETTLEMENTS WERE MADE IN GOOD FAITH.

Avtex seeks to have this court compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck. For the reasons explained below this court must deny Avtex's motion.

First, this court, however, is not permitted to compel the disclosure of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both as this is specifically prevented by the South Carolina Rules governing Alternative Dispute Resolution. Rule 2(a). SCADR, defines a mediation as "[a]n informal process in which a third-party mediator facilitates settlement discussions between parties." Rule

6(e), SCADR, provides that "Communications during the mediation settlement conference shall be confidential in accordance with Rule 8." 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.

As required by Rule 2(a) the parties to this action — Aytex and its attorneys included — entered into an Agreement to Mediate designed to protect the confidentiality of the mediation process in this case. A copy of which is attached to this e-mail. The mediation agreement in this case specifically provides, among other things:

1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible into evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

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.

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

The settlements with Civil Site and Chandler in this case, if any, were made during the course and scope of the mediation in this matter and are subject to the confidentiality provisions of Rule 6(e) and 8 of the SCADR. See Rule 1, Rule 3, Rule 23 and Rule 24, SCADR. The settlement with CSE was reached at the mediation site. The settlement with CCS was reached a few weeks later during the continuation of the mediation by agreement of Mr. and Mrs. Huck

and CCS; all discussions and negotiations were through the neutral/mediator, John H. Tiller, Esq., who remained involved and who facilitated the settlement negotiations.

What Avtex seeks to have this court do is to compel the production and disclosure of a settlement agreement, assuming there is a settlement agreement, prepared for the purpose of, or in the course of the mediation and then admit its terms into evidence in violation of Rule 6(e) and Rule 8, SCADR, and in violation of the mediation agreement. The Court is barred from inquiring into the confidential settlement discussions and negotiations between Mr. and Mrs. Huck and CSE and CCS or the settlement agreements, if any, consummated as a result or to compel the production of the same. Clearly the settlement agreements, if there are settlement agreements, do not fall within the limited - to use the word specifically set forth in the Rule 8(b), SCADR - exceptions to mediation confidentiality set forth in Rule 8(b). Further, even if the settlement agreements, if there are any settlement agreements, are produced or the terms of the settlements, if there were a settlement are disclosed, they cannot be introduced into evidence for consideration by the court. Consequently, the granting of the motion would be in blatant disregard of the Alternative Dispute Rules and must therefore be denied.

In arguing that it is entitled to the production of the settlement agreements, if there are settlement agreements, or the settlement terms, if there are settlement terms, not once does Avtex reference the Alternative Dispute Resolution Rules. This is telling as Avtex would have the Court ignore or overlook them. This the Court cannot do. Further, Avtex's offer of a protective order does not circumvent the Alternative Dispute Resolution Rules.

Avtex specifically agreed in the mediation agreement "[u]nless 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." Avtex attended mediation. It had an opportunity to participate in any settlements arising out of the same, but elected not to. 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 court ignore the South Carolina rules relating to ADR. "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).

In order to compel the disclosure of a "document prepared for the purpose of, or in the course of, the mediation," Avtex must demonstrate that a "'manifest injustice' will result from non-disclosure. Application of the manifest injustice standard requires the party seeking disclosure to demonstrate that the harm caused by non-disclosure will be manifestly greater than the harm caused by disclosure." *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002). As the negotiations with CCS continued through the mediator, those negotiations, and any agreement reached are subject to the South Carolina Rules of Alternative Dispute Resolution. *Cf. Id.* at 635 ("'mediation' is not limited to the mediation conference, but continues until the mediated dispute has been either dismissed or is otherwise removed from the OCM. This 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. Instead, 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. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference. Accordingly, until a mediated dispute is dismissed or is otherwise removed from the OCM, all 'statements,

documents, and discussions' relating to the mediation remain within the bailiwick of the OCM and, therefore, remain confidential."). Avtex, has failed to make a showing of manifest injustice. In fact, Avtex has failed to make any showing whatsoever.

Further, even if the court were made aware of the terms of the settlement between Mr. and Mrs. Huck and CSE and/or the terms of the settlement agreement between Mr. and Mrs. Huck and CCS, assuming there are such settlement agreements, the court has no jurisdiction to evaluate the "fairness" or "reasonableness" of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate. Nothing in the law or at equity permits this court to conduct such an inquiry.

Avtex cites *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), and *Welch v. Epstein*, 432 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), in support of its motion for reallocation. Assuming there is even anything to reallocate, Avtex's reliance on *Riley v. Ford Motor Co.*, *supra*, and *Welch v. Epstein*, *supra*, is misplaced as both involve the reallocation of settlement funds between a survival action and a wrongful death action, not the reallocation of settlement funds between two separate living parties with distinct and separate claims. "Any settlement of a wrongful death or survival action must be approved by either a probate court, circuit court. . . ." Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." Thus, in both *Riley v. Ford Motor Co.*, *supra*, and *Welch v. Epstein*, *supra*, the court was required by statute to evaluate the fairness and reasonableness of the survival and wrongful death settlements. No such requirement exists in the instant case and

there is nothing in the law which permits this court to conduct such an inquiry. Accordingly, Avtex's motion should be denied on this basis too.

Avtex argues that the Court's holding in *Riley v. Ford Motor Co.*, *supra*, "hinged on the Court's equitable powers to reallocate an apportionment of settlement money that was not supported by the record, which was clearly designed to achieve an unfair tactical advantage." This statement illustrates Avtex's misunderstanding of the court's holding in *Riley v. Ford Motor Co.*, *supra*, as the holding therein hinged not on the court's equitable powers but rather on the fact that the court was required by statute to approve the settlement. See Section 15-51-41, CODE OF LAWS OF SOUTH CAROLINA, 1976. In an action for approval of a wrongful death and/or survival action, "[t]he court shall schedule a hearing and receive into evidence those facts that the court considers necessary and proper to evaluate the settlement. After conducting this inquiry, the court shall issue its order either approving or disapproving the proposed settlement." There is no such statute giving the court the authority to approve the settlements between CCS and Mr. and Mrs. Huck, assuming such a settlement exists, and a settlement between CSE and Mr. and Mrs. Huck, assuming such settlement exists. Accordingly, even if the court had evidence before it that there is in fact a settlements agreement between CCS and Mr. and/or Mrs. Huck and a settlement agreement between CSE and Mr. and/or Mrs. Huck, and also had evidence as to what the terms of the settlement agreements are, the court has no mechanism for "receiv[ing] into evidence those facts that the court considers necessary and proper to evaluate the settlement[s]" and, therefore, unlike the court in *Riley v. Ford Motor Co.*, *supra*, this court has no basis on which to make a determination as to whether there should be a reallocation, assuming there is anything to reallocate.

Avtex maintains that "that while Mr. and Mrs. Huck are certainly separate individuals, their financial existence is singular." Avtex's position in this regard hinges on the claim that "a family court would undoubtedly view those funds as marital assets." A family court will only apportion a personal injury settlement if it is unallocated. If allocated, a personal injury settlement is clearly non-marital property. Furthermore, this court, not being a family court, has no jurisdiction to determine what is or is not a marital asset of Mr. or Mrs. Huck or how to equitably apportion the same.

Finally, Avtex maintains it is entitled to contribution from the settling defendants. This position is without merit.

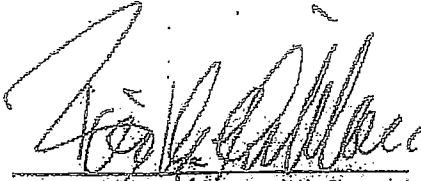
The jury found Avtex fifty percent responsible in bringing about Mr. Huck's injuries. Thus, since Avtex was fifty percent negligent, it is joint and severally liable for the verdict and is entitled to no contribution. See Section 15-38-15, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended. Consequently, since it has no right of contribution, Avtex motion should be denied on this basis too.

Accordingly, based on the forgoing, Avtex's motion to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck must be denied.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion of Defendant, Avtex Commercial Properties, Inc., for judgment notwithstanding verdict is hereby DENIED and the motion of

Defendant, Avtex Commercial Properties, Inc., to compel the production of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and CCS and either Mr. Huck, Mrs. Huck, or both, have the court off-set the settlement amounts against the judgment and to review the settlements to determine if they were made in good faith, and if this court finds that they were not made in good faith, to reallocate the settlement funds between Mr. Huck and Mrs. Huck is, likewise, hereby DENIED!

AND IT IS SO ORDERED!



THE HONORABLE BRIAN M. GIBBONS
Circuit Court Judge

July 22, 2015
Chester, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

WILLIAM HUCK AND DIANE HUCK,

Plaintiff,

vs,

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

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-10-569

ORDER DENYING MOTION
TO ALTER OR AMEND
JUDGEMENT PURSUANT TO
SCRCP 59(c)

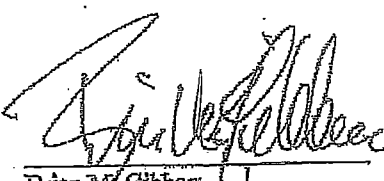
FILED
JUL 16 2015
CLERK OF COURT

After having considered Defendant's motion to alter or amend judgement in this case and after reviewing the file and the Court's extensive notes, and considering the applicable statutory law, case law and evidence presented, I respectfully deny Defendant's motion. No further briefing or argument is necessary.

AND IT IS SO ORDERED.

Chester, SC .

August 14, 2015


Brian M. Gibbon
Circuit Court Judge

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

28

[illegible]

KENNETH MICHAEL BARFIELD
BARNWELL, WHALEY, PATTERSON & HELMS, LLC
PO BOX H
CHARLESTON SC 29402-0197

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRC

Order/denying mot to alter or amend judg

CASE NO: 2014CP1000569

William Huck , plaintiff, et al VS Wings Over America Inc , defendant, et al

This judgment was entered on the 18th day of August, 2015, and notice mailed first class on Wednesday, August 19, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.



D. Summers Clarke, II
 sclarke@Barnwell-Whaley.com

October 19, 2015

Edward K. Pritchard, III, Esquire
 Pritchard Law Group, LLC
 129 Broad Street (29401)
 P. O. Box 630
 Charleston, SC 29402

*Re: William and Diane Huck v. Oakland Wings, LLC d/b/a Wild Wing Café, Civil
 Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction
 Services, Inc. and Aytex Commercial Properties, Inc.
 Lower Court Case No.: 2014-CP-10-569
 Appellate Court Case No.: 2015-002025*

Dear Edward:

We do not intend to order the transcript of the trial proceedings in connection with the above matter. Please let us know immediately if you feel otherwise and believe that the transcript or any portion thereof is necessary for the appellate court proceedings. If you have no objection and do not need a copy of the trial transcript, please sign your signature on the second page of this letter, email a signed copy to us today, if at all possible, and return the original to us via US mail. Thank you for your attention to this matter.

Sincerely,

D. Summers Clarke, II

{00568916.DOC.1}

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 Randall C. Stoney, Jr.
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Edward K. Pritchard, III, Esquire
Page Two
October 19, 2015

DSCII/sbh

c: W. Howard Boyd, Jr., Esquire
N. Keith Emge, Jr., Esquire
Kathy A. Carlsten, Esquire

I, Edward K. Pritchard, III, attorney for William and Diane Huck/Respondents, consent to and do not have any objection to counsel for Avtex Commercial Properties, Inc./Appellant's decision not to order the transcript of the trial proceedings that began May 18, 2015, before the Honorable Brian M. Gibbons, Circuit Court Judge, State of South Carolina, Charleston County, Court of Common Pleas with the lower court case number of 2014-CP-10-569 and Appellate Court Case Number of 2015-002025.



Edward K. Pritchard, III

MEDIATION AGREEMENT

William Huck and Dianne Huck

v.

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

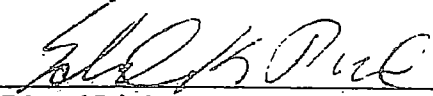
THE UNDERSIGNED PARTIES and their attorneys hereby agree that the above matter shall be submitted to mediation pursuant to the applicable rules, guidelines, and Order of the Court having jurisdiction over this matter, and further agree that:

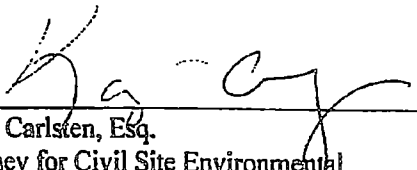
1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.
2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.
3. Evidence of anything said or any admission made in the course of mediation is not admissible into evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.
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.
5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its

disclosure. The parties understand that the mediator does not represent any party, and does not provide legal or financial advice. Parties that are not represented understand that they are urged by the mediator to obtain legal and financial advice from an appropriate professional and the mediator is not responsible for failure to obtain such advice.

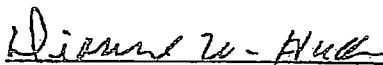
6. The parties agree that any agreements entered into by the parties are made wholly on a voluntary basis, free of any coercion on the part of the mediator. The parties agree that the mediator shall have no liability for any act or omission in connection with the mediation.

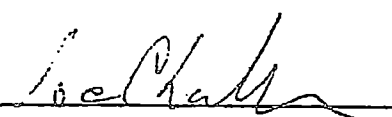
7. The mediator fee is \$350.00 per hour and is to be split between the parties.

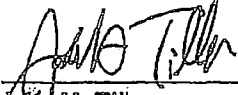

Edward Pritchard, Esq.
Attorney for Plaintiffs


Kathy Carlsten, Esq.
Attorney for Civil Site Environmental

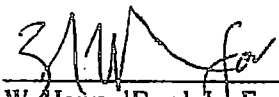

William M. Hill

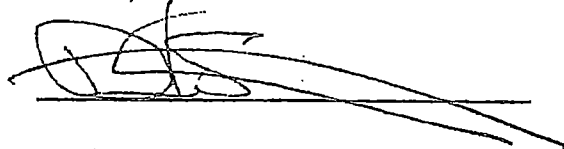

Diane W. Hue

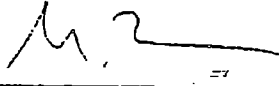

Joe Chalk


John H. Tiller


D. Summers Clarke, II, Esq.
Attorney for Oakland Wings, LLC d/b/a
Wild Wing Café, Oakland Properties, LLC
and Avtex Commercial Properties


W. Howard Boyd, Jr., Esq.
Attorney for Chandler Construction
Services, LLC




W. Howard Boyd, Jr.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Charleston)

PROOF OF ADR OR EXEMPTION

William Huck and Dianne Huck)

Plaintiff,)

vs.)

FILE NO.: 2014-CP-10-056

Oakland Wings, LLC d/b/a Wild Wings)

Café, Civil Site Environmental, Inc.,)

Oakland Properties, LLC, Chandler)

Construction Services, Inc. and Avtex)

Commercial Properties)

Defendants.)

(An original and copy of this form is to be completed and filed with the Office of the Clerk of Court and a copy forwarded to the attorneys for the parties within 10 days of the conclusion of ADR, or within 300 days of the filing date of the action, whichever is earlier.)

PURSUANT to the Court's Standing Order for Alternative Dispute Resolution dated _____

- A. _____ I certify that this case is exempt from ADR for the following reason and the parties wish to exercise that exemption:

Plaintiff/Attorney for Plaintiff

Defendant/Attorney for Defendant

Print Name

Print Name

Phone/Fax

Phone/Fax

Date: _____

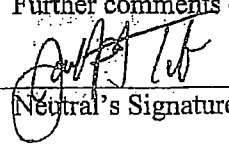
- B. X 1. Alternative Dispute Resolution (ADR) was conducted in the form of:

a mediation

(Note: If binding arbitration has been chosen by the parties but not yet completed, an appropriate order of dismissal must be attached hereto.)

2. The neutral(s) was/were: (Name of arbitrator/mediator):

John H. Tiller

3. The ADR was conducted on March 27, 2015
4. As a result of ADR, this case should be considered (please check one);
- ☐ Fully Settled.
- ☐ by Consent Judgment, to be filed by _____
- or ☐ Voluntary Dismissal to be filed by _____
- ☒ Partially Settled. Only as to Civil Site Environmental Inc.
- ☐ At an Impasse.
- ☐ In need of further ADR I ☐ am ☐ am not willing to continue as a neutral. I recommend that ADR resume as of _____
5. Plaintiff ☒ was present ☐ was not present
 Defendant ☒ was present ☐ was not present
6. Other participants were:
- ☒ Lawyers for Defendant Kathy Carlsten, Summers
Clarke, II, Zack Weaver
- ☒ Lawyer for Plaintiff Edward Pritchard
- ☒ Representative for Insurance Carrier Via Telephone
- ☐ UIM _____
- ☐ Experts _____
- ☐ Others _____
7. Choice of the neutral was by:
- ☒ Stipulation
- ☐ Court Order
8. The total number of hours spent in the ADR 6.0 hours.
 conference was: _____
9. Further comments of the neutral:
- 
 Neutral's Signature
- Date: March 30, 2015



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

January 22, 2016

The Honorable Lisa A. Kinon
Chair, ADR Commission
714 Sweetbriar Lane
Conway, SC 29526

Re: Proposed Amendments to ADR Rule 8

Dear Judge Kinon:

The Court has reviewed the ADR Commission's proposed amendments to Rule 8 of the ADR Rules governing confidentiality. Although the Court appreciates the work of the Commission in examining the current text of the rule, the Court has declined to submit the proposed changes to the General Assembly at this time. However, the Court invites the Commission to resubmit the proposal with a more thorough explanation of the need for the proposed changes and their intended effect.

The proposed changes are quite extensive in that they redefine confidentiality, expand the scope of confidentiality of communications, change the current exceptions for confidentiality, and create an admissibility exception to otherwise confidential information disclosed during a mediation conference. While you have indicated the Commission determined there was a need for clarification of Rule 8, there is no explanation concerning the nature of the questions the Commission received from mediators, or what concerns those questions raised amongst Commission Members. Moreover, while you indicated extensive research was performed on the issue, and that there was considerable discussion about the proposed changes, there is no information in the proposal concerning the nature of the research or the intended effect of the Commission's proposed changes.

Should the Commission elect to resubmit the proposed amendments, the Court would request that any new submission more completely explain the reason for each individual change, as well as the intended effect of each change.

Should you have any questions about the foregoing, please do not hesitate to contact me.

Very truly yours,



CLERK

/bs

CC: South Carolina Bar

Rule 8
Confidentiality

(a) **Confidentiality.** Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be 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; and

(5) All records, reports or other documents created solely for use in the mediation or received by a mediator while serving as a mediator.

(b) **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.

(c) **Limited Exceptions to Confidentiality.** There is no confidentiality attached to information that is disclosed during a mediation:

(1) for which the confidentiality against disclosure has been waived or stipulated to by all parties;

(2) that is wilfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

(3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

(4) offered for the limited purpose of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation; or

(5) offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(d) **Limited disclosures.** A mediation communication disclosed under subsections (c)(3), (c)(4), and (c)(5) remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this rule or by statute.

(e) **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.

(f) **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.

(g) **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.

(h) **Admissible information.** Information that would be admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a mediation.

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

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

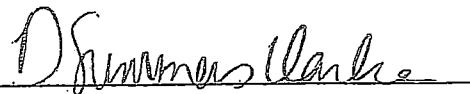
v.

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.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Record on Appeal complies with Rule 210(g),
SCACR.



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D. Summers Clarke, II, Esquire
S.C. State Bar No.: 74829
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*Attorneys for Appellant Avtex Commercial
Properties, Inc.*

March 9, 2015

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.

FINAL BRIEF OF APPELLANT,
AVTEX COMMERCIAL PROPERTIES, INC.

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March 29, 2016
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- A. DID THE TRIAL COURT ERR IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES TO DISCLOSE SETTLEMENT AND IN DENYING THE MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO SCRCP 59(e)?
- B. DID THE TRIAL COURT ERR IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES FOR SET-OFF AND IN DENYING THE MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO SCRCP 59(e)?

STATEMENT OF THE CASE

I. Procedural History

This appeal stems from a premises liability lawsuit filed on January 28, 2014 by Respondents, William Huck and Dianne Huck. On June 3, 2015, Appellant, Avtex Commercial Properties, Inc. filed a Motion for Disclosure of Settlement, Motion for Setoff, and in the Alternative, Motion to Determine Whether Settlements with Chandler Construction Services and Civil Site Environmental, Inc. were Made in Good Faith. (R. p. 144). On July 27, 2015, the trial court issued an Order denying Defendant Avtex Commercial Properties, Inc.'s Motion for JNOV and Motion to Disclose Settlement and for Setoff (R. pp. 4-15). Appellant timely filed a Motion to Alter or Amend Judgment pursuant to SCRCP 59(e) issued by Judge Brian M. Gibbons on August 14, 2015, and filed with the Court on August 7, 2015 (R. p. 156). The Notice of Entry of Judgment of the Order Denying Appellant's Motion to Alter or Amend that Judgment was received by counsel for Appellant on August 24, 2015. (R. p. 17). Avtex Commercial Properties, Inc. ("Appellant") timely appeals the following Orders: (1) Order of the Honorable Brian M. Gibbons dated July 23, 2015 and filed on July 27, 2015, denying the Motion of Avtex Commercial Properties, Inc.'s Motion to Disclose Settlement and for Set-Off (R. p. 4), to which Appellant timely filed a Motion to Alter or Amend Judgment Pursuant to SCRCP

59(e) on August 7, 2015 (R. p. 156); and (2) Order of the Honorable Brian M. Gibbons Denying Avtex's Motion to Alter or Amend Judgment. (R. p. 16).

II. Statement of the Facts

On July 13, 2012, William Huck, went to eat lunch at a Wild Wing Café, which is located in The Market at Oakland in Mt. Pleasant, South Carolina. After parking in a lot adjacent to the restaurant, Mr. Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and entered the walkway into The Market at Oakland in front of Wild Wing Café. Mr. Huck slipped and fell approximately where the crosswalk and the base of the ramp to the sidewalk intersected. It had rained just prior to Mr. Huck's arrival. He alleged that the ramp was defective because it was improperly sloped, a puddle of water had accumulated at its base, and debris was present in and around the puddle. Mr. Huck and his wife (collectively referred to as "Plaintiffs" or "Respondents") subsequently brought this suit for negligence and loss of consortium against Oakland Wings, LLC d/b/a Wild Wing Café ("Wild Wing Café"), Civil Site Environmental, Inc. ("CSE")¹, Oakland Properties, LLC ("Oakland")², Chandler Construction Services, Inc. ("Chandler")³, and Avtex Commercial Properties, Inc. ("Avtex")⁴. Prior to trial, CSE and Chandler settled with Plaintiffs.

Plaintiffs proceeded to a jury trial against Wild Wing Café, Oakland, and Avtex (hereinafter referred to collectively as "Defendants") beginning on May 18, 2015. (R. p. 4) (Order, p. 1). At the conclusion of the Plaintiffs' case in chief, the trial court granted Defendants' Motion for Directed Verdict as to Plaintiff Dianne Huck's loss of consortium

¹ CSE performed design work for the walking surfaces at issue.

² Oakland is the entity created for the ownership of The Market at Oakland.

³ Chandler provided construction services at the area at issue.

⁴ Avtex is the property developer of and property management company for The Market at Oakland.

claim finding that Mrs. Huck had failed to present any evidence in support of that claim. (R. pp. 4-5) (Order, pp. 1-2). Trial testimony and jury deliberations were concluded by May 21, 2015. (R. p. 4) (Order, p. 1). At the close of all evidence, Wild Wing, Oakland, and Avtex renewed their Rule 50(a) directed verdict motion as to Mr. Huck's negligence cause of action, which the trial court denied. The matter was then submitted to the jury for determination, which returned defense verdicts in favor of Oakland and Wild Wings. Judgment was entered in favor of Wild Wing and Oakland, and they were dismissed from the action. However, the jury found in favor of Plaintiff William Huck against Avtex in the amount of \$97,640.00. (R. p. 5) (Order, p. 2). They further found that Mr. Huck was 50% comparatively negligent, which reduced the judgment against Avtex to \$48,820.00. (*Id.*).

ARGUMENTS

A. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES TO DISCLOSE SETTLEMENT AND IN DENYING AVTEX'S MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP 59(e)

Avtex made a post-trial motion to compel the disclosure of the Plaintiffs' settlement terms with CSE and Chandler, which the trial court denied. The trial court erroneously concluded that it "is not permitted to compel the disclosure of the terms of the settlements between CSE and either Mr. Huck, Mrs. Huck, or both, and [Chandler] and either Mr. Huck, Mrs. Huck, or both as this is specifically prevented by the South Carolina Rules governing Alternative Dispute Resolution." (R. p. 7) (Order, p. 4). The trial court improperly relied on the standard applied by the Fourth Circuit in *In re Anonymous*, 283 F.3d 627 (2002). (R. p. 11) (Order, p. 8). That court applied a "manifest injustice" standard, which only applies to a court's decision to compel disclosure of

communications arising out of mediation. (*Id.*) *In re Anonymous* was a federal attorney disciplinary action regarding a fee dispute. 283 F.3d 627 (2002). The court in that matter sought to determine when it might be appropriate to disclose communications within a mediation to a third-party tribunal in an unrelated matter. *Id.* As such, the “manifest injustice” standard has no bearing on the disclosure of settlement amounts for set-offs and/or determining whether claims for contribution among joint tortfeasors may exist. *Id.*

In addition, the trial court relied on Rule 8 of the South Carolina Alternative Dispute Resolution Rules to support the contention it is not permitted to compel the disclosure of the terms of the settlements between the parties that settled prior to trial. Rule 8, SCADR, provides in pertinent part:

(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*

Rule 8, SCADR (emphasis added). All parties in this case attended and participated in a mediation prior to trial during which Respondents reached a settlement with CSE and Chandler. (R. p. 4) (Order, p. 1). Appellant Avtex was not provided with any information concerning the terms of William and Dianne Huck’s settlements with CSE and Chandler. The settlement documents, namely the releases signed by Respondents outlining the terms of the settlement, are not only relevant but are necessary to facilitate proper post trial procedure in this case. *See Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015) (holding that settlement agreement was relevant to defendants’ claim or defense due to the potential for a set-off). The intent of Rule 8 of the South

Carolina Alternative Dispute Resolution Rules is to protect negotiations and discussions within mediation, not settlement agreements arising out of mediation. Using the SCADR rules to circumvent statutory mandates and established law and procedure is improper. This case undisputedly involves issues of joint and several liability among CSE, Chandler, and Avtex. Respondents' Complaint does not distinguish or differentiate the damages between the Defendants. As such, Avtex is entitled to an automatic set-off for the settlement amounts paid by CSE and Chandler pursuant to S.C. Code Ann. § 15-38-50, which is discussed in more detail in the following section.

A confidentiality provision in a mediation agreement or release does not operate to shield a settlement agreement from being produced. As recognized by the Fourth Circuit Court of Appeals, “[t]here is an important distinction between privilege and protection of documents, the former acting to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding confidentiality.” *Virami v. Novant Health, Inc.*, 249 F.3d 284, 288 n.4 (4th Cir. 2001). Several courts have examined and determined that a settlement agreement is relevant and discoverable due to the potential for a set-off. *See, e.g., Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015)(holding that settlement agreement was relevant to defendants’ claim or defense due to the potential for a set-off); *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2014 WL 4760292, at *3 (E.D.N.C. Sept.24, 2014) (“In the present case, the settlement agreement is relevant to assess Defendants' exposure to possible damages.”); *Zlotogura v. Progressive Direct Ins. Co.*, No. CIV-12-516-M, 2013 WL 1855879, at *2 (W.D.Okla. May 3, 2013) (“[T]he Court finds that the

settlement agreement is relevant to the claims and defenses in this action.”); *Tanner v. Johnson*, No. 2:11-cv-00028-TS-DSP, 2013 WL 121158, at *4 (D.Utah Jan.8, 2013) (“Clearly, ... defendants have standing to request discovery of Plaintiffs' and their codefendants' settlement agreement where Plaintiffs originally accused both sets of defendants of joint wrongdoing.”); *Jackson v. Strategic Rests. Acquisition Co.*, No. 11-268-JJB-DLD, 2012 WL 1455213, at *3 (M.D.La. Apr.26, 2012) (finding that the settlement agreements at issue “meet, albeit barely, the threshold requirement that they be relevant to a claim or defense, or may lead to relevant information” and thus “must be produced”); *Oakridge Assocs., LLC v. Auto-Owners Ins. Co.*, No. 3:10-CV-145-DCK, 2010 WL 3788058, at *3 (W.D.N.C. Sept.23, 2010) (“The undersigned finds that the disputed Settlement Agreement should be subject to discovery due to the possibility it contains information relevant to the case.”). As the Western District of Virginia has explained, settlement agreements are relevant “to the amount of setoff to which the non-settling defendants would be entitled” and that the terms of the releases “are relevant to the non-settling defendants' continued liability and right of setoff.” *Selective Way Ins. Co. v. Schulle*, No. 3:13CV00040, 2014 WL 462807, at *2 (W.D.Va. Feb.5, 2014). Appellant Avtex has offered to enter into a protective order to abate any concerns regarding the privacy or confidentiality over the disclosure of the settlement amounts to third parties. Furthermore, to the extent the trial court held that the mediation agreement prohibits it from disclosing the settlement amounts to Avtex, Avtex was a party to the mediation agreement and is willing to maintain the confidentiality of the settlement amounts after disclosure. (Mediation Agreement, p. 1-2).

Extending the application of the confidentiality rules that apply to mediations so far as to prevent non-settling defendants from knowing what settling defendants have paid to the plaintiff sets a dangerous precedent. If used strategically, such a broad interpretation of the ADR Rules will swallow defendants' statutory rights to set-off for sums paid to plaintiff by joint tortfeasors. Avtex believes that some portion of the settling Defendants' funds was allocated to Mr. Huck's negligence claim. The trial court's Order operates to preclude Avtex from getting a set-off for even those amounts, regardless of whether a reallocation of these settlements is appropriate. To the extent that it is ultimately discovered that the settlement funds paid by settling Defendants in this case were allocated to Mrs. Huck's loss of consortium claim, Avtex reiterates that Plaintiffs elected not to put up this case at trial, and Avtex's Motion for Directed Verdict as to Mrs. Huck's consortium claim was granted. (R. pp. 4-5) (Order, pp. 1-2). Thus, if it is found that the majority of these proceeds were allocated to Mrs. Huck, the Court can and should allocate them to conform to the record.

Based on the foregoing, the trial court erroneously denied Appellant's Motion to Disclose Settlement. Therefore, Avtex respectfully requests this Court to reverse the ruling of the trial court denying Appellant's Motion to Disclose the Settlement between Respondents and CSE and Respondents and Chandler and the Order denying Avtex's Motion to Alter or Amend the Judgment.

B. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES FOR SET-OFF AND IN DENYING AVTEX'S MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP 59(e)

Avtex is entitled to a set-off to account for the amounts CSE and Chandler each paid Plaintiffs to settle the claims against them. Respondents William Huck and Dianne

Huck brought causes of action for negligence and loss of consortium against Defendants. Plaintiffs' Second Amended Complaint does not distinguish or differentiate the damages between the Defendants. Prior to the trial of this matter, CSE and Chandler reached undisclosed settlements with Respondents, the terms of which are unknown to Avtex. (R. p. 4) (Order, p. 1). It is Avtex's understanding based on representations by Respondents' counsel that Plaintiffs may have allocated a substantial percentage of the settlements with CSE and Chandler to Respondent Mrs. Huck's loss of consortium claim in an effort to deprive Avtex of a set-off. The purpose of the set-off doctrine is to prevent a plaintiff from a windfall or double recovery. "The Fourth Circuit has never recognized a settlement privilege or required a particularized showing in the context of a subpoena for confidential settlement documents." *Polston v. Eli Lilly & Co.*, No. 3:08-3639, 2010 WL 2926159, 2010 U.S. Dist. LEXIS 74720, at *4 (D.S.C. July 23, 2010). If Respondents allocated the majority of those settlement monies to the loss of consortium claim, that allocation would be unreasonable.

"A set-off is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action, and the principles thereof may be applied both at law and in equity." 80 C.J.S. *Set-off and Counterclaim* 3 (1955). Thus, under certain circumstances, monies already received by the plaintiff are offset against that owed by the defendant. *See id.* Under South Carolina law, a non-settling defendant is entitled to a *pro tanto* reduction, which gives one tortfeasor credit for the amount paid by another tortfeasor in a settlement. *See Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967); *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867, 875 (Ct. App. 1986). South Carolina's setoff rule rests on the "almost universally held [principle]

that there can only be one satisfaction for an injury or wrong.” *Truesdale v. South Carolina Highway Dep’t*, 264 S.C. 221, 213 S.E.2d 740, 746 (1975). Section 15-38-50 of the South Carolina Code applies to the facts of this case and provides in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury . . . :

- (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 reduced the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is the greater.

Set-off under Section 15-38-50 applies when two or more persons are liable for the “same injury.” The South Carolina Court of Appeals has interpreted the term “injury” broadly enough to include all damages which result from the same negligence of the responsible parties. In the present case, Respondents’ claims against Avtex arose out of the same factual scenario. “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.” *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) (quoting *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999) (holding that when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to set-off arises as an operation of law); *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (“[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . . . When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law.”); See also *Check First of Greenville, LLC v. Merchant*

Services of the Upstate, Inc., 2015 WL 6566563 (S.C. Com. Pl.) (Trial Order) (July 17, 2015) (based on the facts of the case, the close connection of all claims involved between all original parties, and in the interests of equity, plaintiff was entitled to partial set-off in light of defendant's settlement with a co-defendant entered the week prior to trial). Accordingly, Avtex is entitled to a set-off in the amount of the settlements from CSE and Chandler.

During the trial, Respondents presented no evidence to support Mrs. Huck's loss of consortium claim. In fact, the Court granted Appellant's Motion for Directed Verdict as to that claim due to the undisputed lack of evidence or testimony to support a loss of consortium cause of action. (R. p. 4) (Order, p. 1). Furthermore, counsel for Respondents did not object to or offer any argument opposing the directed verdict motion as to the loss of consortium claim by Mrs. Huck. The fact that the record is devoid of any evidence to support Respondent's loss of consortium claim weighs in favor of allocating a majority of the proceeds to Mr. Huck's negligence claim. Otherwise, this Court will be allowing strategic gamesmanship by Respondents, potentially resulting in double-recovery by Respondents for the same injury. *See Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 596, 65 USLW 2308 (4th Cir. 1996) ("Were [the Court] to indulge the parties' manipulative attribution of settlement amounts, [it] would compromise South Carolina's policy of permitting setoffs to ensure against multiple recovery for the same injury.").

Alternatively, if it is discovered that the overwhelming majority of settlement funds paid by CSE and Chandler were allocated to Mrs. Huck's unsubstantiated consortium claim. Avtex may have a right to seek contribution from those joint

tortfeasors. Thus, by allowing the settlement amounts to remain undisclosed, its right to seek contribution from the settling Defendants has been prejudiced. According to the South Carolina Contribution Among Tortfeasors Act (the “Act”), where two or more persons become jointly or severally liable in tort for the same injury to property, a right of contribution arises among them, even if judgment as not been recovered against all or any of them. S.C. Code Ann. § 15-38-20(A) (Supp. 2003); *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). In these situations, the right of contribution exists in favor of a tortfeasor who has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(B) (Supp. 2003); *Vermeer*, 336 S.C. at 68, 518 S.E.2d at 309. Section 15-38-50 of the South Carolina Code conditions extinguishment of potential contribution claims by Avtex on the terms of the settlements between both Plaintiffs and CSE and Plaintiffs and Chandler being made in “good faith.” In the absence of a good faith settlement, Avtex could have a claim for contribution against Chandler and/or CSE.

The trial court’s Order erroneously states that “[t]here is no such statute giving the court the authority to approve the settlements between [Chandler] and Mr. and Mrs. Huck . . . and a settlement between CSE and Mr. and Mrs. Huck.” (R. p. 13) (Order, p. 10). In fact, Section 15-38-50 specifically states that “[w]hen a release . . . not to sue or not to enforce judgment *is given in good faith* to one or two more persons liable in tort for the same injury, it does not discharge any of the other tortfeasors from liability for the injury” S.C. Code Ann. § 15-38-50. If the court did not have authority to make the determination of whether this settlement was made in good faith, the “good faith” language would not have been included in the statute. *See Hodges v. Rainey*, 341 S.C.

79, 533 S.E.2d 578 (2000)(citing *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998)(*internal citations omitted*))("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.")

Based on the "good faith" language included in the statutory text, a trial court must order that the settlement terms be disclosed so that Appellant might determine if these settlements were made in good faith, and if not, whether it wishes to pursue contribution against the settling defendants in a separate action. Otherwise, the "good faith" language in the statute has no meaning whatsoever. In the present case, the trial court has failed to order that the settlement terms be disclosed to Avtex so that there may be a determination as to whether the settlements were made in good faith.

Furthermore, Avtex respectfully contends that the trial court's final Order conflates two separate principles found in the Contribution Among Joint Tortfeasors Act, S.C. Code Ann. §§ 15-38-15, *et seq.* (the "Act"). It is true that a plaintiff may decide to elect 100% of a joint and several judgment against any single tortfeasor who is found by the jury to have been at least 50% at fault for a plaintiff's injuries. However, that section does not stand for the proposition that a defendant found to be at least 50% at fault is foreclosed from seeing contribution from other tortfeasors. The best practical example of this concept is that plaintiffs frequently elect to pursue litigation against single tortfeasor. As such, in the absence of comparative fault, any judgment against that tortfeasor would appear to be on its face to be a finding of 100% liability. Nevertheless, it is undisputed that a defendant that finds itself in such a situation has the right to pursue any other tortfeasors in a separate action for contribution and seek a pro-rata division of the

judgment. Nowhere in the Act is there a provision that stands for the proposition that a finding of 50% fault leaves a defendant with no further recourse.

Based on the foregoing, the trial court erroneously denied Appellant's Motion for Set-off. In the alternative, Avtex respectfully requests this court to review the settlements to determine whether they were made in good faith.

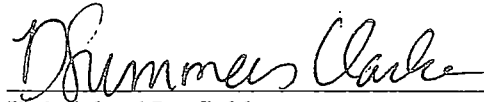
CONCLUSION

For the foregoing reasons, Appellant Avtex Commercial Properties respectfully requests that the Court reverse and vacate the circuit court's Order denying Appellant's Motion for Disclosure of Settlement, Motion for Setoff, and in the alternative, Motion to Determine whether Settlements with Chandler Construction Services and Civil Site Environmental, Inc. were made in good faith and the circuit court's Order denying Appellant's Motion to Alter or Amend Judgment pursuant to SCRCP 59(e).

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

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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,

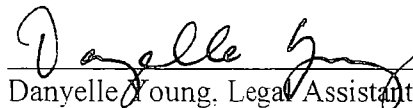
Of Whom Avtex Commercial Properties, Inc. is the.....Appellant.

PROOF OF SERVICE

I, the undersigned, of the law offices of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the Final Initial Brief of Appellant, Avtex Commercial Properties, Inc. herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Commercial Properties, Inc.....Defendants,

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Initial Brief of Appellant, Avtex
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SC Court of Appeals

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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.

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<i>from Daniel E. Shearouse, Clerk, South Carolina Supreme Court.</i>	<i>33</i>
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY DENY THE MOTION OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., TO COMPEL THE PRODUCTION OF THE WRITTEN SETTLEMENT AGREEMENT DOCUMENT MEMORIALIZING THE SETTLEMENT REACHED DURING MEDITATION BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC.?
- II. DID THE TRIAL COURT PROPERLY DENY THE MOTION OF APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., TO COMPEL THE PRODUCTION OF THE WRITTEN SETTLEMENT AGREEMENT DOCUMENT MEMORIALIZING THE SETTLEMENT REACHED DURING MEDITATION BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC.?
- III. ARE THERE ANY EXCEPTIONS TO THE CONFIDENTIALITY REQUIREMENT OF RULE 8, SCADR?
- IV. DID THE TRIAL COURT PROPERLY DECIDE THAT IT CANNOT REAPPORTION THE SETTLEMENT PROCEEDS PAID BY DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC., IF ANY, TO RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, SO AS TO MAXIMIZE THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., IS ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT?
- V. DID THE TRIAL COURT PROPERLY DECIDE THAT IT CANNOT REAPPORTION THE SETTLEMENT PROCEEDS PAID BY DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC., IF ANY, TO RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, SO AS TO MAXIMIZE THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., IS ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT?
- VI. IS THE SET-OFF TO WHICH APPELLANT, AVTEX COMMERCIAL PROPERTIES, INC., ENTITLED, IF ANY, AGAINST THE JUDGMENT ENTERED AGAINST IT TO THE ACTUAL SETTLEMENT PROCEEDS PAID TO RESPONDENT, WILLIAM HUCK, IF ANY, PURSUANT TO THE SETTLEMENT AGREEMENT BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CIVIL SITE ENVIRONMENTAL, INC., AND THE SETTLEMENT AGREEMENT BETWEEN RESPONDENTS, WILLIAM HUCK AND DIANE HUCK, AND DEFENDANT, CHANDLER CONSTRUCTION SERVICES, INC.?

STATEMENT OF THE CASE¹

This action is a premises liability action. Plaintiff/Respondent, 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 Complaint² each time denying the material allegations of the Amended Complaint or the

¹ Counsel is well aware that Rule 208(b)(4), SCACR, requires William Huck's brief to "contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged." However, as this appeal is more about what Avtex failed to do as it is about what actually happened and largely arises out of mediation, the universe of material available to be cited to is limited. This is further compounded by the fact that Avtex did not order the transcript of the trial. *R.p.177 – p.178.* Consequently, there is a dearth of available material to reference.

² 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.

Second Amended Complaint, as the case may be, and raising various affirmative defenses as more particularly set forth therein, none of which are germane to this appeal. *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, with John H. Tiller, Esq., serving as mediator. *R.* p.181 – p.182. All parties were present. *R.* p.181 – p.182. During the course of the mediation, Mr. Tiller declared an impasse as to Wild Wing, Oakland and Avtex, whereupon Wild Wing, Oakland and Avtex and their counsel discontinued the mediation process and left the mediation site. The Hucks, Civil Site and Chandler, however, continued in the mediation process. Prior to the conclusion of the formal 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. Though Chandler did not settle with the Hucks during the formal face-to-face mediation on March 27, 2015, by agreement, the Hucks and Chandler continued the mediation process in the same manner as they had during the formal face-to-face mediation on March 27, 2015, negotiating and communicating through Mr. Tiller. After a little more than a month of continuous negotiations, Chandler reached a confidential settlement agreement with the Hucks, and Chandler 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 the remaining defendants, Wild Wing, Oakland and Avtex. *R.* p.4 – p.15; p.132 – p.137. On May 21, 2015, the jury returned a verdict against William Huck 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.

Avtex moved for Judgment Notwithstanding the Verdict, 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 on June 3, 2015. *R.* p.138 – p.139; p.144 – p.145. By order dated July 23, 2015, and filed July 27, 2015, both motions were denied by The Honorable Brian M. Gibbons, Circuit Court Judge (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. This appeal followed September 21, 2015. *R.* p.160 – p.161.

FACTS

On July 13, 2012, William Huck went to Wild Wing Café located in The Market at Oakland, Mount Pleasant, South Carolina, for the purpose of meeting a friend for lunch. *R.* p.59 – p.69. After parking in the parking lot on the south side of South Morgans Point Road, William Huck proceeded to the intersection of Oakland Market Road and South Morgans Point Road and crossed the street in the marked cross walk in front of Wild Wing Café. *R.* p.59 – p.69. As William Huck exited the cross walk and entered the curb ramp, he slipped and fell to the ground due to the unlevel slippery surface, which was covered by heavy slimy ponding and accumulation of debris blocking normal passage. *R.* p.59 – p.69. As a consequence of his fall, William Huck suffered severe and significant injuries, which,

among other things, necessitated that he undergo surgery and retire from his job as a post-operative care nurse. *R.* p.59 – p.69.

Avtex developed, owns and manages The Market at Oakland, and on July 13, 2012, was in possession and control of the crosswalk and curb ramp where William Huck fell. *R.* p.59 – p.69. At the time of the Incident, Oakland was the property manager of The Market at Oakland. *R.* p.59 – p.69. Wild Wing was a lessee at The Market at Oakland leasing property as a tenant of lessor Avtex. *R.* p.59 – p.69. Civil Site produced the construction plans for the crosswalk and curb ramps. *R.* p.59 – p.69. Chandler constructed the crosswalk and curb ramp. *R.* p.59 – p.69.

ARGUMENT

I. THE HUCKS CANNOT BE COMPELLED TO DISCLOSE THE TERMS OF THE SETTLEMENT AGREEMENTS WITH CIVIL SITE AND CHANDLER

Confidentiality is central to, and at the very core of, the alternative dispute resolution process. In the absence of an ironclad and absolute assurance that all statements, actions, negotiations and events which take place in the course and scope of mediation will be held in complete confidence and undiscoverable without qualification³, participants in the mediation process will be reluctant to fully participate in the mediation process, substantially reducing its usefulness and effectiveness.

This appeal presents this court with an opportunity to: (1) uphold the discovery rules set forth in the South Carolina Rules of Civil Procedure, and (2) affirm, preserve and honor the sanctity of and reverence to strict adherence to the confidential nature of the mediation process. If the relief sought by Avtex is granted, the South Carolina Rules of

³ Except to the limited extent specifically set forth in Rule 8(b). SCADR.

Civil Procedure discovery rules will be meaningless and mediation confidentiality shall henceforth be qualified. This is clearly contrary to public policy. For this reason, as well as the reasons specified hereinbelow, the Order dated July 23, 2015, and filed July 27, 2015, wherein Judge Gibbons denied Avtex's motions for disclosure of settlement, for set-off and, in the alternative, to determine whether the settlement with Civil Site and Chandler were made in good faith must be affirmed⁴.

A. Avtex failed to properly raise the issue before the lower court.

As discussed above, on June 3, 2015, Avtex moved 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 faith⁵. As this was not the proper method for raising the issue of disclosure before the lower court, the lower court's order must be affirmed.

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):

⁴ Avtex has not appealed that portion of the Order denying Avtex's motion for Judgment Notwithstanding the Verdict. Accordingly, the portion of the Order denying Avtex's motion for Judgment Notwithstanding the Verdict is the law of this case and the jury's verdict must henceforth remain intact and undisturbed. See *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997), *cert. denied* (1998) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling 'is an abandonment of the issue and precludes consideration on appeal.' The unchallenged ruling, 'right or wrong, is the law of the case and requires affirmance.'") (quoting *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)); see also, e.g., *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 249 - 250, 772 S.E.2d 505, 509 (2015) ("An unappealed ruling is the law of the case and requires affirmance." Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.) (quoting *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)).

⁵ Though not specified in the motion, Avtex's motion could have only been directed to William Huck as Diann Huck's claim had been dismissed by that point. Further, as Avtex's ultimate goal is a set off, since the verdict was awarded only to William Huck, the motion was clearly directed to him

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).

A party to an action “may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions.” Rule 26(a), S.C.R.Civ.P. A party to an action,

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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), S.C.R.Civ.P. (emphasis added). “[T]he court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . the following: . . . that the discovery may be had only on specified terms and conditions. . . .” Rule 26(c), S.C.R.Civ.P. “[T]he party requesting discovery shall serve the request on other counsel or parties. . . .” Rule 26(g)(1), S.C.R.Civ.P.

[A]ny party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish such information as is available to the party. . . . The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Rule 33(a), S.C.R.Civ.P. "Any party may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. . . ." Rule 34(a), S.C.R.Civ.P. "The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. . . . The party upon whom the request is served shall serve a written response within 30 days after the service of the request. . . ." Rule 34(b), S.C.R.Civ.P. If "a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request." Rule 37(a)(2), S.C.R.Civ.P.

Though styled as a motion for disclosure of settlement, it is in reality nothing more than a Rule 37(a)(2) motion to compel⁶. Specifically, with regard to its motion Avtex states:

Avtex is entitled to discover the terms of both releases. . . . If Plaintiffs [sic] object to the production of the settlement documents on the basis that they contain a confidentiality provision, any concerns regarding privacy or

⁶ This would be a motion made pursuant to Rule 37(a)(2).

confidentiality over the discovery of the settlement agreement⁷ [*sic*] can be adequately addressed by a protective order.

R. p.147 - p.148 (emphasis added). Avtex itself acknowledges it is seeking discovery of the confidential settlement agreements. Though it fails to mention Rule 26(c), it wrongfully suggests that any confidentiality concerns can be adequately addressed by a Rule 26(c) protective order. Without question the South Carolina Rules of Civil Procedure provide an adequate mechanism for discovering the terms of the settlement agreement – a Rule 34(a) request for production - which Avtex clearly recognizes, but failed to utilize. Thus, because in substance Avtex's motion for disclosure of settlement is a motion to compel, the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler, 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)(equitable principle 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

⁷ Avtex's motion for disclosure of settlement does not specify whether it is seeking information related to the terms of the settlement agreement between William Huck and Civil Site and information relating to the terms of the settlement agreement between William Huck and Chandler, and, thus, whether the nature of its discovery is more appropriately the subject of a Rule 33 interrogatory, or whether it seeks production of the written documents memorializing the terms of the settlement themselves which is more appropriately the subject of a Rule 34 request for production. However, as the memorandum inferentially makes clear, Avtex is seeking production of the written documents memorializing the settlements. In any event, for purposes of this discussion, it will be assumed that Avtex should have sought the production of the written documents memorializing the settlements pursuant to Rule 34

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); accord *Patterson v. Kim*, 2009 WL 1911819 (W.D. Mich. 2009)(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); see *Heilman v. Silva*, 2015 WL 1632693 (S.D. Cal. 2015)(motion to compel denied because moving party failed to serve FED.R.Civ.P. 45 Subpoena); *Ameri v. GEICO Gen. Ins. Co.*, *supra*; *Simon v. Taylor*, 2014 WL 6633917, 27 (D.N.M. 2014)(motion to compel denied because moving party failed to serve FED.R.Civ.P. 34 request for production; “courts have rejected parties’ attempts to compel the production of documents without filing a formal discovery request”); *Dang v. Eslinger*, 2014 WL 3611324 (M.D. Fla. 2014)(motion to compel denied because moving party failed to serve deposition notice); *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); *DeWitt v. Sw. Bell Tel. Co.*, 2014 WL 695744 (D. Kan. 2014)(motion to compel denied because moving party failed to serve FED.R.Civ.P. 34 request for production); *Susko v. City of Weirton*, 2011 WL 98557 (N.D. W.Va. 2011)(motion to

compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Acuity Mut. Ins. Co. v. Frye*, 2010 WL 1409126, 3 (E.D. Tenn. 2010)(“Paradoxically, while Plaintiff’s motion was filed extremely late in the discovery process, it is nonetheless premature because Plaintiff never formally requested that Mr. Frye produce social security records.”); *Calderon v. Reederei Claus-Peter Offen GMBH & Co.*, 2009 WL 3242008 (S.D. Fla. 2009)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Rosenthal v. Shiraz*, 2009 WL 1941272 (S.D. Fla. 2009)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 45 Subpoena); *Patterson v. Kim*, *supra*; *Garrison v. Dutcher*, 2008 WL 938159 (W.D. Mich. 2008)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Cont’l Cas. Co. v. Multiservice Corp.*, 2008 WL 73345 (D. Kan. 2008)(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); *Sithon Maritime Co. v. Mansion*, 1998 WL 182785 (D. Kan. 1998)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Ledbetter v. United States*, 1996 WL 739036 (N.D. Tex. 1996)(motion to compel denied because moving party failed to serve FED.R.CIV.P. 34 request for production); *Haifley v. Naylor*, 1996 WL 539212 (D. Neb. 1996)(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. Nelh*, 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).

Three widely accepted grounds have been offered for requiring a party seeking an order compelling discovery to have first served a proper discovery request pursuant to the rules of civil procedure on the opposing party. One ground given is:

The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of Fed.R.Civ.P. 37, governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules. Formal requests may be filed under some circumstances; not letter requests. Formal requests require certificates of conferring and service. Letters do not. Formal requests certify representations of counsel under Fed.R.Civ.P. 11(b). Letters do not. Formal requests clearly implicate the duties of opposing parties to respond pursuant to Fed.R.Civ.P. 34. Letters do not. Formal requests may occasion sanctions. Letters usually do not. To treat correspondence between counsel as formal requests for production under Rule 34 would create confusion and chaos in discovery. Fed.R.Civ.P. 37(a)(2)(B) permits a party to move to compel production of documents ‘if a party, in response to a request for

inspection submitted under Rule 34, fails to respond.' An evasive or incomplete response is a failure to respond, within the meaning of Rule 37(a)(2)(B).

Fed.R.Civ.P. 34(a) establishes the permissible scope of production. Fed.R.Civ.P. 34(b) establishes the procedure for submitting the request and for responding to it. . . . Although both informal investigation and formal discovery have their proper place in the litigation arena, the Federal Rules of Civil Procedure address only formal discovery.

Sithon Maritime Co. v. Mansion, *supra* at 2 (citations omitted); *accord Calderon v. Reederei Claus-Peter Offen GMBH & Co.*, *supra*; *Rosenthal v. Shiraz*, *supra*; *Patterson v. Kim*, *supra*; *Garrison v. Dutcher*, *supra*; *Cont'l Cas. Co. v. Multiservice Corp.*, *supra*; *James v. Wash Depot Holdings, Inc.*, *supra*. A second ground given is:

Informal discovery has its place, and obviously it can be very efficient and useful in some situations. But informal discovery has drawbacks and limitations. Besides Fed.R.Civ.P. 37(a)'s clear language as to when a motion to compel a discovery response may be made, other judges . . . have refused to compel a party to respond to informal discovery requests. The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of Fed.R.Civ.P. 37, governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules.

Cont'l Cas. Co. v. Multiservice Corp., *supra* at 8; *accord DeWitt v. Sw. Bell Tel. Co.*, *supra*.

A third ground given is:

The Federal Rules of Civil Procedure are designed to enable a relatively small judiciary to deal in an orderly way with a virtually limitless number of disputes. Even when parties sedulously *comply* with the rules of procedure, courts must struggle to keep abreast of their ever-growing dockets. By pioneering their own ad hoc procedure, parties do themselves and the courts a disservice. It is far easier and quicker to make a formal document request pursuant to Rule 34 than it is to construct and articulate an argument why an *informal* letter should be *treated* as a Rule 34 request so as to enable it to be *enforced* under Rule 37. When parties fashion their own procedure, they remove their cases from the litigative stream and, when a dispute later arises, almost invariably consume more than their fair share of judicial time.

Schwartz v. Mktg. Publg. Co., *supra* at 21 (emphasis added); *accord Ameri v. GEICO Gen. Ins. Co.*, *supra*; *Simon v. Taylor*, *supra*; *Susko v. City of Weirton*, *supra*.

Avtex never served a Rule 33(a) interrogatory seeking information relating to the terms of the settlement between the Hucks and Civil Site or seeking information relating to the terms of the settlement between the Hucks and Chandler. *See R. p.117 – p.125*⁸. Nor did Avtex ever serve a Rule 34(a) request for production seeking the production of the written document memorializing the settlement between the Hucks and Civil Site or the production of the written document memorializing the settlement between the Hucks and Chandler. *R. p.126 – p.121*⁹. Avtex did not write the Hucks a letter requesting information relating to or the production of the settlement agreements, not that such a letter would support a motion to compel. Instead Avtex moved for disclosure of settlement¹⁰ without first serving Rule 34(a) requests for production seeking the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler. Because Avtex failed to serve Rule 33(a) interrogatories seeking information relating to the terms of the settlement between the Hucks and Civil Site and information relating to the terms of the settlement between the Hucks and Chandler, or Rule 34(a)

⁸ The interrogatories served by Avtex on William Huck contained in the record are the only interrogatories Avtex served on William Huck during the course of this litigation. Avtex served no other interrogatories on William Huck.

⁹ 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.

¹⁰ Avtex's motion for disclosure is nothing more than a motion compel the production of the written document memorializing the settlement between the Hucks and Civil Site and the production of the written document memorializing the settlement between the Hucks and Chandler.

requests for production seeking the written document memorializing the settlement between the Hucks and Civil Site and the written document memorializing the settlement between the Hucks and Chandler, the lower court had no basis upon which to entertain Avtex's motion for disclosure of settlement/motion to compel production¹¹. Accordingly, this court must affirm the Order on the grounds that Avtex failed to first serve a Rule 33(a) interrogatory seeking information relating to the terms of the two settlement agreements or a Rule 34(a) request for production seeking the production of the two written documents

¹¹ Of course Avtex's failure to serve a Rule 33 interrogatory and/or a Rule 34 request for production on William Huck seeking information related to or the production of the two settlement agreements is the reason why there is a paucity of material in the Record on Appeal in this case on which this Court can base its decision in this matter. Had Avtex served a Rule 33 interrogatory and/or a Rule 34 request for production on William Huck seeking information related to or the production of the two settlement agreements, William Huck would have had an obligation to formally respond in writing thirty days after either or both were served on him setting forth a statement of its position as to why he was prohibited from disclosing the information sought by Avtex with a description of the information or documents prohibited from disclosure sufficient to allow the lower court to rule on a motion to compel, assuming one was filed; if William Huck had failed to answer or respond, the lower court would have compelled him to respond, again assuming a motion was filed. See Rules 11(a), 33(a), 34(b) and 37(a)(2), S.C.R.Civ.P. It is axiomatic that Axtex, as appellant, bears the burden of presenting to this Court a record sufficient to make a decision. See *Harkins v. Greenville Cnty*, 340 S.C. 606, 533 S.E.2d 886 (2000)(appellant has the burden of presenting appellate court with an adequate record; as appellant failed to include relevant county ordinances in the Record on Appeal, the Court was unable to determine whether appellant had exhausted his administrative remedies, and, therefore, affirmed the lower court's order in regard this issue); *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 772 S.E.2d 544 (Ct. App. 2015)(appellant has the burden of presenting appellate court with an adequate record; as the record did not contain a motion for JNOV, the Court of Appeals would not consider the appellant's argument regarding the JNOV motion); *Shupe v. Settle*, 315 S.C.510, 517, 445 S.E.2d 651, 655 (Ct. App. 1994)(appellant has the burden of presenting appellate court with an adequate record; as "[i]t is clear Hartford relied on the policy as evidence to support its motion for summary judgment, but the Shupes failed to include the policy in the record. Accordingly, we must assume Hartford put forth evidence supporting its motion. The Shupes failed to defeat that motion as they are not allowed to rely upon the allegation in their complaint that they were third-party beneficiaries. Neither is Mrs. Shupe's conclusory statement in her affidavit sufficient to resist summary judgment. Accordingly, the order granting summary judgment to Hartford is affirmed."). "The transcript of record is the source of . . . [the court's] information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto."); *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 128 S.E.2d 179 (1962).

memorializing the settlement agreements before filing its motion for disclosure of settlement/motion to compel production¹².

B. Compelling the production of the settlement agreements would be an affront to the confidential nature of the mediation process.

Rule 1, SCADR, states in pertinent part:

These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply. These rules govern Alternative Dispute Resolution (ADR) processes in the courts of this State as follows:

(a) With the exceptions stated in Rule 3, these rules govern court-annexed ADR processes in South Carolina Circuit Courts in civil suits . . . :

- (1) in all counties in South Carolina;
- (2) as required by statute; or
- (3) as ordered by a court of competent jurisdiction.

(b) With the exception of Rules 3, 4, 5, 6, 7(e) and (f), 9(b) and (d), and Rule 10(a), these rules shall govern ADR processes that are neither court mandated nor required by statute in all cases pending in the courts of this State.

Mediation is “[a]n informal process in which a third-party mediator facilitates settlement discussions between parties.” Rule 2(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

¹² 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.

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.

“Communications during the mediation settlement conference shall be confidential in accordance with Rule 8.” Rule 6(e), SCADR. “Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. 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).

Few courts have had the opportunity to address mediation confidentiality requirements. Those that have addressed them consistently 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. For instance, in *Wimsatt v. Superior Court*, *supra*, the Court upheld the confidential nature of mediation though doing so prevented the party seeking to part the veil of confidentiality from pursuing a malpractice claim explaining:

Mediation, which can take many forms, is one type of alternative dispute resolution. . . . [L]itigants should be encouraged to participate in these proceedings as one alternative to 'formal court proceedings which it found to be 'unnecessarily costly, time-consuming, and complex.' . . . 'In appropriate cases, mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.'

'[C]onfidentiality is essential to effective mediation . . . and, in some cases required. . . . '[M]ediation confidentiality provisions . . . encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings.'

[E]videntiary restriction 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. . . ." [S]uch evidence [is also] not subject to discovery.

* * * *

The Supreme Court has repeatedly resisted attempts to narrow the scope of mediation confidentiality. The court has refused to judicially create exceptions . . . even in situations where justice seems to call for a different result. Rather, the Supreme Court has broadly applied the mediation confidentiality statutes and has severely curtailed courts' ability to formulate exceptions. The court has stated that '[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications [and writings] made during mediation absent an express statutory exception.'

In *Foxgate [Homeowners Ass'n, Inc. v. Bramalea California, Inc.]*, 26 Cal.4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117 [(2001)], a mediator's report indicated the attorney for one party had engaged in a pattern of tactics that were in bad faith and intended solely to delay. The report and the declarations of the opposing counsel were submitted in support of a motion for sanctions. By crafting a nonstatutory exception to mediation confidentiality, the court of appeal held that the report was admissible. The court of appeal reasoned that disclosure was necessary because the Legislature did not intend to statutorily mandate confidentiality to shield parties who obstructed the mediation process. The Supreme Court disagreed. It held that the motion and the trial court's consideration of the

motion and attached documents violated the Evidence Code. *Foxgate* reasoned that the mediation confidentiality statutes 'are clear. [Evidence Code] section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation.'

Foxgate recognized its conclusion left unpunished sanctionable conduct—conduct that obstructed the mediation process—and in effect, undermined the entire purpose of mediation. However, *Foxgate* deferred to the Legislature to balance competing public policies and to create exceptions to the statutory scheme. *Foxgate* stated: 'The mediator and the Court of Appeal here were troubled by what they perceived to be a failure of [the defendant] to participate in good faith in the mediation process. Nonetheless, the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. . . . 'The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.'

* * * *

The Supreme Court again broadly interpreted mediation confidentiality in *Rojas* [*v. Superior Court*], 33 Cal.4th 407, 15 Cal.Rptr.3d 643, 93 P.3d 260 [(2004)] to preclude exceptions other than those expressly contained in the statutes. In *Rojas*, contractors and subcontractors settled a construction defect case brought by the owner of an apartment complex in which it was alleged 'that water leakage due to construction defects had produced toxic molds and other microbes on the property. . . .' A settlement was reached during mediation. Thereafter, several hundred tenants of the apartment complex sued many of the entities who had been involved in the development and construction of the complex, as well as the complex's owner. Among other allegations, the tenants alleged numerous health problems associated with construction defects. The tenants served deposition subpoenas and demanded production of a number of items prepared during the prior litigation including, the 'entire files' relating to the construction defect case, witness statements, test samples, physical evidence removed from the building, analyses of raw data, videotapes, and photographs.

Rojas acknowledged that the trial court expressed concern that, without the requested discovery, the tenants might not have been able to obtain much of the necessary evidence. However, *Rojas* held that the mediation confidentiality statutes are not subject to a 'good cause' exception.' *Rojas* concluded that the requested items were *not* discoverable because they were 'prepared for the purpose of, in the course of, or pursuant to, [the] mediation' in the underlying construction action. In reaching this conclusion, *Rojas* focused on the strong public policy favoring mediation and the need for confidentiality in the mediation process.

As *Rojas* explained, the Legislature intended a broad and expansive confidentiality rule: 'Before [Evidence Code] section 1119's passage, former section 1152.5 governed mediation confidentiality. [When 1119 was enacted, the Legislature substantially followed the recommendation of the Law Revision Commission to provide broad protection in section 1119, subdivision (b)] to all types of writings, including photographs. At the same time, the Legislature also sought to expand protection for oral communications. Whereas subdivision (a)(2) of former section 1152.5 protected documents 'prepared for the purpose of, or in the course of, or pursuant to, the mediation,' subdivision (a)(1) protected only those oral communications and admissions 'made ... in the course of the mediation.' The Commission's recommendation explained that, under these provisions, the protection for documents was 'broader' than the protection for oral communications and admissions, and '[t]o encourage frankness in discussions relating to mediation, the Commission propose[d] ... eliminat[ing] this distinction [by] protect[ing] 'evidence of anything said or of any admission made for the purpose of, or in the course of, or pursuant to,' the mediation. Again, the Legislature followed suit by protecting, in subdivision (a) of section 1119, 'evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation.' The Commission's official comment explains that this section 'extends [protection] to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.'

The Courts of Appeal also strictly construe the mediation confidentiality statutes, even when the equities in the case suggest contrary results.

In *Eisendrath [v Superior Court]*, 109 Cal.App.4th 351, 134 Cal.Rptr.2d 716 [(2003)], a former husband moved to correct a spousal support agreement negotiated in mediation. Noting that at the time he negotiated and executed the agreement, he had not been represented by counsel, the former husband argued many of the conversations that occurred before the agreement was signed would demonstrate it did not accurately reflect the parties' understanding. *Eisendrath* held the discussions, which purportedly were inconsistent with the finalized mediated agreement, were

inadmissible. *Eisendrath* concluded that, in contrast to the privileges found in Evidence Code section 910 et. seq. (e.g., the attorney-client privilege (§ 950)), mediation confidentiality cannot be impliedly waived. The Legislature mandated this result, even if it gave great power to the spouse who refused to expressly waive mediation confidentiality. *Eisendrath* stated: ‘In explaining that the Legislature had balanced conflicting policies in enacting this scheme, the *Foxgate* court recognized that the scheme effectively gives control over evidence of some sanctionable misconduct to the *party engaged in the misconduct*. On this matter, the court in *Foxgate* remarked that ‘none of the confidentiality statutes currently make an exception for reporting bad faith conduct. . . .’

In *Doe 1 v. Superior Court* . . . 132 Cal.App.4th 1160, 34 Cal.Rptr.3d 248 [(2005)] (*Doe 1*), 26 Catholic priests were successful in stopping the Los Angeles Archdiocese from disclosing written summaries of personnel records of priests who were accused of sexually molesting minors. The summaries were confidential because they had been prepared for the mediation of 500 cases alleging child sexual molestation.

Id. at 208 - 213, 152 Cal.App.4th at 150 – 156 (citations omitted, except where noted). The Court then went on to prohibit disclosure of the mediation brief and e-mails between counsel and the mediator.

In *In re Residential Capital, LLC*, 536 B.R. 132 (S.D.N.Y. 2015), the court denied a motion to permit discovery of communications concerning a settlement, including communications related to mediation, noting:

[T]hat ‘[c]onfidentiality is an important feature of the mediation and other alternative dispute resolution processes.’ ‘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.’ ‘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.’

Id. at 150 (citations omitted).

In *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002), the Court was faced with whether to sanction some of the participants in a mandatory mediation who disclosed to a Virginia State Bar Association arbitration panel the substance of discussions which took place during and after the mediation and provided the panel with a copy of the settlement points prepared during the mediation and with a copy of the settlement agreement which was entered into following mediation. In *In re Anonymous, supra*, the plaintiff received a substantial jury verdict in the District Court which was reduced pursuant to a statutory cap. *Id.* Plaintiff appealed the reduction and the Court referred the matter to mediation through the Court's mediator¹³. *Id.*

Plaintiff attended the mediation with her local counsel and an attorney from Florida who did not represent her in the appealed action. *Id.* Though the case was settled at mediation, a dispute arose during the mediation between plaintiff and her local counsel regarding the payment of litigation expenses. *Id.* The dispute continued following mediation and plaintiff and local counsel subsequently agreed to submit their dispute to the panel for resolution with the attorney from Florida who attended mediation acting as plaintiff's counsel before the panel. *Id.*

Plaintiff through the Florida attorney submitted the aforementioned information and documents to the panel. *Id.* The expense dispute came to the court's attention when local counsel contacted the mediator and "informed her of the dispute concerning the reimbursement of expenses and costs, and requested her consent to the disclosure of statements made during the mediation conference." *Id.* at 632. During the course of her conversation with the mediator, local counsel advised the mediator that plaintiff and her

¹³ See 4th Cir. R. 33

Florida counsel had already submitted materials to the panel containing confidential mediation information. *Id.* Yet, despite being told by the mediator she would need the Court's permission to comply, and despite being directed by the mediator to seek approval from the Court to submit confidential mediation information to the panel, without seeking permission from the Court, local counsel went ahead and submitted confidential mediation information to the panel anyway. *Id.* Local counsel subsequently submitted interrogatories to the mediator and advised her that if she would answer the questions she would not call her to testify before the panel. *Id.*

The mediator brought the situation to the attention of the Court, which in turn directed Plaintiff, local counsel and Florida counsel to appear before the Court's Standing Panel on Attorney Discipline to address whether the submissions to the panel breached the mediation confidentiality provisions. *Id.* The matter then went before the Court to determine what, if any sanctions should be imposed on plaintiff, local counsel and Florida counsel for breaching the mediation confidentiality rules. *Id.*

The Court first rejected the parties' claim that the mediation confidentiality rules were not breached because the matters disclosed were not central to the issues being mediated. *Id.* In so doing the Court declined to create an exception permitting disclosure of matters collaterally related to the mediation because "the confidentiality provision as written provides clear guidance in the form of a bright line rule." *Id.* at 633.

The Court next dismissed the parties' argument that the mediation confidentiality rules were not breached because the disclosures were made to a confidential tribunal noting that "the unambiguous text of Rule 33 does not provide an exception for disclosures

made to a confidential forum. Rather, it has at all relevant times restricted disclosures 'to any other person outside the mediation program participants.'" *Id.*

The Court also disagreed with the parties' position that that the mediation confidentiality requirements offend due process in that application of the confidentiality requirement in this context denies client and local counsel of the opportunity to resolve their expense dispute. *Id.* The Court pointed out that the mediation confidentiality requirements do not deprive the parties of a forum to resolve the dispute, but rather limits the availability and use of information learned during, generated during and arising out of mediation in subsequent proceedings. *Id.* The Court further pointed out that the mediation rules provided a mechanism for granting a waiver of the confidentiality requirement where manifest injustice would result¹⁴. *Id.*

The Court held that 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. In so holding, the court reasoned:

it is plain that the '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]. This 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. Instead, 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. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference. Accordingly, until a mediated dispute is dismissed or is otherwise removed from the . . . [Office of the Circuit Mediator], all

¹⁴ The South Carolina Alternative Dispute Resolution Rules have no corresponding provision, and thus, do not allow for disclosure of confidential mediation information in such circumstances. See Rule 8(b), SCADR. Avtex argues that the lower court's application of the "manifest injustice" standard was inappropriate. *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, pp.3-4. Since Avtex contends that application of the "manifest injustice" standard was inappropriate, *a fortiori* this court cannot reverse the Order and compel the disclosure of the settlement agreements even if it finds that failure to do will result in a "manifest injustice."

'statements, documents, and discussions' relating to the mediation remain within the bailiwick of the . . . [Office of the Circuit Mediator] and, therefore, remain confidential.

Id. at 635.

The Court then addressed whether the parties should be granted a limited waiver of confidentiality to permit the arbitration panel to consider their previously-submitted disclosures in resolving the expense dispute. In granting conditional consent for local counsel and plaintiff to disclose to the panel information relating to conversations which took place during the mediation regarding the expense dispute and their notes, or portions thereof, regarding the settlement negotiations corroborating these conversations and the settlement agreement and notes regarding the settlement agreement to the extent the materials explain or relate to the disbursement of the settlement funds, the Court engaged in the following discussion¹⁵:

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

¹⁵ Significant to the Court's holding was the fact that: (1) local counsel and plaintiff agreed that disclosure of information related to the mediation was critical to resolution of their dispute; (2) the genesis of the dispute occurred during the mediation conference; (3) all of the other parties to the mediation consented to local counsel's and plaintiff's disclosure of the information and documents in issue; and (4) any harm resulting from disclosure would be slight, in that the disclosures relate to matters collateral to the mediation and not the mediated dispute so little mention needed to be made regarding the substantive merits of the mediated issue and in that the panel proceedings and outcome are confidential. The Court conditioned its consent on the panel agreeing in writing to abide by 4th Cir. R. 33's confidentiality provision.

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.'

On the other hand, we must recognize that under certain circumstances, non-disclosure may result in an untenable 'loss of information to the public and the justice system.' Thus, in determining whether waiver is appropriate, we must balance the public interest in protecting the confidentiality of the settlement process and countervailing interests, such as the right to every person's evidence.

We believe that the balance between these interests is best resolved by disallowing disclosure unless the party seeking such disclosure can demonstrate that 'manifest injustice' will result from non-disclosure. Application of the manifest injustice standard requires the party seeking disclosure to demonstrate that the harm caused by non-disclosure will be manifestly greater than the harm caused by disclosure¹⁶.

Id. at 636 - 637 (citations omitted, except where noted)(*quoting 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), *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp.2d 1164, 1176 n. 9 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000) and SARAH R. COLE *et al.*, *MEDIATION: LAW, POLICY & PRACTICE* § 9:2 (2d ed. 2001)).

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. For instance in *Frank v.*

¹⁶ As noted, unlike 4th Cir. R. 33, the South Carolina Alternative Dispute Resolution Rules contain no "manifest injustice" exception and Avtex condemns adoption of one. See footnote 14 *supra*. Accordingly, the Court should not and cannot adopt a "manifest injustice" exception to Rule 8's confidentiality requirement.

L.L. Bean, Inc., 377 F.Supp.2d 233 (D. Maine 2005), the Court imposed sanctions on the plaintiff 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 confidentiality . . . be punished with sanctions" even though the defendant cannot demonstrate prejudice. *Id.* at 240 (emphasis original). In *Bernard v. Galen Group, Inc.*, 901 F.Supp. 778 (S.D.N.Y. 1995), the Court imposed sanctions on the plaintiff as a result of his counsel's disclosure to the court of two settlement offers made by the defendant during mediation and in the process of doing so the Court reinforced the importance of confidentiality in the mediation process, stating thusly:

'It is essential to the proper functioning of the Civil Appeals Management Plan 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. . . .'

Id. at 784 (quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, *supra* at 930). Finally, in *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So.2d 725 (Fla. Ct. App. 1997), the Court affirmed the trial court's order striking the plaintiff's pleadings resulting in dismissal of the case with prejudice based on the plaintiff's disclosure of the defendant's settlement offer made during the course of mediation.

The written document memorializing the settlement between William Huck and Civil Site and the written document memorializing the settlement between William Huck and Chandler fall within the scope of the mediation confidentiality requirements of Rule 8.

'[M]ediation' is not limited to the mediation conference, but continues until the mediated dispute has been [resolved or the mediation process has been terminated]. This 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. Instead, 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. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference.

In re Anonymous, *supra* at 635. 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 two written settlement agreement documents are part and parcel of the mediation in this matter. They arose out of and were made pursuant to the mediation in this matter. Both are materially related to and fostered the mediation process. Neither would exist but for the mediation. The written document memorializing the settlement between William Huck and Civil Site and the written document memorializing the settlement between William Huck and Chandler are each irrefutably subject to mediation confidentiality.

As the two written settlement agreement documents 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 refers to as “**Limited Exceptions to Confidentiality.**” None of the “limited exceptions” specified in Rule 8(b) are applicable to the situation at hand, and, in fact, Avtex itself does not argue in its *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, that any of the provisions of Rule 8(b) are applicable to the situation; in fact Avtex does not even mention Rule 8(b)¹⁷.

¹⁷ “Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” Rule 208(b)(1)(B), SCACR; e.g., *Richland Cnty. Sch. Dist. Two v. S.C. Dep’t. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999). Moreover, it is axiomatic that an issue not argued

Consequently, Rule 8(a) prohibits William Huck from producing the two settlement agreement documents to Avtex.

What Avtex seeks is to have this Court a judicially created “good cause” exception to Rule 8(a)’s strict mediation confidentiality requirement similar to the “good cause” exception rejected by the Court in *Wimsatt v. Superior Court*, *supra*. Even if this Court has the authority to do so – which it does not – strong public policy compels this Court to reject Avtex’ invitation for three reasons.

First, the proper way to create exceptions is to formally amend the ADR Rules. Even assuming this Court has the authority to do so, which it does not¹⁸, circumventing the amendment procedures is ill advised as it eliminates the required public and legislative input¹⁹. 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 Avtex is essentially advocating in this appeal –

in one’s brief is deemed abandoned and will not be considered, even if raised in the statement of issues on appeal. *E.g., Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992).

¹⁸ See S.C. CONST. art. V, § 4A; Sections 14-3-940 and 950, CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended.

¹⁹ It should not go unmentioned that the Supreme Court recently rejected an amendment to Rule 8 which would, in effect, make settlement agreements exempt from confidentiality. On January 28, 2016, the South Carolina Supreme 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. The Supreme 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. It would indeed be ironic if, at Avtex urging, this Court were to adopt by judicial fiat an amendment to Rule 8 which the Supreme Court recently specifically declined to adopt through the formal rule making process.

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. As noted, “South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution. . . .” *C-Sculptures, LLC v. Brown, supra* at 56, 742 S.E.2d at 360. “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 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 mediation²⁰. 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 South Carolina has adopted mandatory mediation in most civil actions in all counties. *See Order 2015-11-12-04*.

Third, a “good cause” exception to confidentiality is the quintessential slippery slope. As any 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 rifle 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 a “good cause” 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 by mediation participants that his, her it or their situation requires exemption from mediation confidentiality for “good cause” if it is advantageous for him, her, it or them to do so. Where is the line to be drawn as to what is

²⁰ 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.

“good cause?” Will it 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 a rule will have a chilling effect on mediation.

Further, it is neither unreasonable nor unforeseeable that if a “good cause” exception is created, that the mediation confidentiality rule will become so riddled with judicially created exceptions such that confidentiality becomes the exception, not the rule.

It would, thus, be unwise to create a “good cause” exception to mediation confidentiality as sound public policy demands a bright line rule. 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.

Avtex appears to take five different positions as to why the Order should be reversed. All are without merit²¹. As two are meritless for essentially the same reason, they will be addressed together.

Avtex maintains (1) that “[t]he settlement documents, namely the releases signed by the Respondents outlining the terms of the settlement, are not only relevant but are necessary to facilitate proper post trial procedure in this case;” and (2) that “[a] confidentiality provision in a mediation agreement or release does not operate to shield a

²¹ One of Avtex’s positions is that the Circuit Court erred in applying the “manifest injustice” standard discussed *In Re Anonymous*, *supra*. As this issue as already been addressed, there is no point in addressing it a second time. *See* footnotes 14 and 16, *supra*. Another of Avtex’s arguments is that the settlement agreements do not fall within the scope of Rule 8(a)’s mediation confidentiality requirement. As it has already been clearly demonstrated above that the settlement agreements are clearly within the scope of Rule 8’s confidentiality provisions, that issue will not be discussed a second time.

settlement agreement from being produced.” *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.4 - p.5. Both positions completely miss the point.

William Huck does not take and has never taken the position that the settlement agreements are not relevant²² or that a confidentiality provision in a release in and of itself operates to shield a settlement agreements from production under ordinary circumstances²³, assuming, of course, Avtex had properly sought its production, which it did not. Rather William Huck’s position is that Rule 8 both bars him from producing them to Avtex and bars Avtex from seeking them²⁴. In taking these positions Avtex is mistakenly argues that the settlement agreements are properly the subject of discovery under the rules of civil procedure²⁵ when in reality Rule 8 is essentially an evidentiary rule

²² To suggest that production of the settlement agreements is “necessary to facilitate proper post trial procedure in this case” is, to be kind, both overly dramatic and a gross over exaggeration. Avtex’s whole argument is premised on the notion that it is entitled to an off-set, which it is not.

²³ As will be explained below, however, in certain circumstances, such as the one presented in this matter, a confidentiality provision in combination with Rule 8(a)’s mediation confidentiality requirement does shield a settlement agreement from disclosure.

²⁴ None of the cases cited by Avtex hold that a confidential settlement agreement reached at mediation is discoverable despite mediation confidentiality requirements. *See Virami v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001)(Peer review records); *Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. 2015)(plaintiff argued settlement agreement was not reasonably calculated to lead to the discovery of admissible evidence; mediation confidentiality not mentioned); *Selective Way Ins. Co. v. Schulle*, 2014 WL 462807 (W.D. Va. 2014)(settlement agreements entered into prior to mediation); *Spilker v. Medtronic, Inc.*, 2014 WL 4760292 (E.D.N.C. 2014)(pre-suit non-mediation related settlement agreement); *Zlotogura v. Progressive Direct Ins. Co.*, 2013 WL 1855879 (W.D. Okla. 2013)(non-mediation settlement agreement); *Tanner v. Johnston*, 2013 WL 121158 (D. Utah 2013)(non-mediation related settlement agreement); *Strategic Rests Acquisition Co.*, 2012 WL 1455213 (M.D. La. 2012) (non-mediation related settlement agreements in different actions); *Oakridge Assoc., LLC v. Auto-Owners Ins. Co.*, 2010 WL 3788058 (W.D.N.C. 2010)(non-mediation related settlement agreements in other case).

²⁵ Non-privileged, non-protected documents and information which is either relevant to the subject matter involved in the pending action or information which is reasonably calculated to lead to the discovery of admissible evidence, “whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”

prohibiting disclosure²⁶, though also a shield to disclosure under the Rules of Civil Procedure.

Avtex claims in conclusory fashion that “[u]sing the SCDAR rules to circumvent statutory mandates and established law and procedure is improper.” *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.4. Avtex cites no authority nor does it make any further argument in support of this position. Given the lack of citation to authority and the conclusory nature of the argument, Avtex has abandoned this issue. *See, e.g., Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

Avtex argues that the confidentiality requirement of Rule 8 cannot prevent it from discovering information or documents which arose out of and were made pursuant to mediation and which are materially related to the mediation if the effect is to deprive it of its right to a set-off²⁷. This is simply not the case.

Mediation confidentiality rules are uniformly strictly construed even when the equities in the case suggest contrary results. As noted in *Wimsatt v. Superior Court*, *supra* at 219-220, 152 Cal.App.4th at 163-164:

Peter Robinson, the associate director of the Straus Institute for Dispute Resolution and assistant professor of law at Pepperdine University School of Law, has gathered a number of cases across the country in which courts have been asked to enforce or avoid mediated agreements. . . . The nonexhaustive list of cases includes situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The situations include cases where a party was lied to by her own attorney, the mediator, and a third party; a scrivener's error in a mediated settlement lead to a \$600,000 windfall to one party; parties claimed their own attorney

²⁶ Avtex suggestion that a “protective order can alleviate problems and concerns regarding confidentiality” serves emphasizes Avtex’s confusion as protective orders address discovery not evidentiary issues. *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, p.5.

²⁷ Throughout its brief, Avtex seems to assume that if William Huck received any settlement proceeds from Civil Site or Chandler, it has an automatic God given right to a set-off. As will be discussed, Avtex is mistaken

coerced them into signing a settlement agreement; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement.

[Mediation confidentiality provisions have] allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation, foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards, precluded a *propria persona* litigant from proving the terms of a mediated agreement and shielded from view evidence of criminal conduct.

In each of the above 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 described above, the possible deprivation of Avtex's phantom off-set rights is *de minimis*.

Avtex apparently misses the fact that urging this Court to permit it to discover the settlement agreements is little more than a fool's errand: even were this Court to permit Avtex to discover the settlement agreements, they are not admissible into evidence in support of its reapportionment and set-off motions.

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. Since Avtex failed to raise or argue this point, Avtex 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).

Further, Avtex overlooks the fact that it 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 were 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 and its attorneys 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:

1. All statements made during the course of mediation are privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding.

2. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or to testify in any proceeding about (i) any records, reports, or other documents received or prepared by the mediator or (ii) information disclosed or representations made in the course of the mediation or otherwise communicated to the mediator in confidence.

3. Evidence of anything said or any admission made in the course of mediation is not admissible into evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

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.*

5. Nothing in this Agreement to Mediate shall limit the admissibility of any particular evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

R. p.179 – p.180. Avtex participated in mediation and entered into the Mediation Agreement, as did all of the other participants to the mediation. 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 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 same, but elected not to. As noted, Avtex elected, instead, 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 affirmed²⁸. See *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015).

C. Avtex failed to join all of the necessary parties in the motion to disclose.

Avtex's motion to 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 was directed only to the Hucks. *R.* p.144 – p.145. The motion was not directed to Chandler or Civil Site and neither were served with a copy of the same. *R.* p.144 – p.145. Chandler and Civil Site were both participants at mediation and parties to the respective confidential settlement agreements. Both had and have an interest in the settlement agreements, the confidential nature of the settlement agreements, the confidential nature of the mediation and an expectation that the settlement agreements would and will not be subject to disclosure or admissible in evidence in any proceeding. Avtex did not claim nor did it introduce at the hearing any evidence that either consented to the disclosure of the settlement agreements or the introduction of either settlement agreement into evidence. Accordingly, as Avtex failed to join Chandler or Civil Site in the motion, it denied them with an opportunity to oppose disclosure if they wished to do so²⁹. Clearly both have an interest in the confidentiality of the mediation and the confidentiality provisions in the

²⁸ 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 pre-maturely disengaging from the mediation process as Avtex did in this case.

²⁹ Avtex argues in its brief that it may be entitled to contribution from Civil Site and Chandler. In view of this Avtex cannot now take the position that Civil Site and Chandler have no standing to oppose disclosure. Clearly, there participation was essential to the resolution of this issue.

settlement agreements. Accordingly, this Court must affirm the Order on this basis too³⁰.

See Rule 220(c); *I'on, LLC v. Town of Mt. Pleasant*, *supra*.

**II. ASSUMING THERE IS A DIVISION OF THE SETTLEMENT PROCEEDS
IN THE SETTLEMENT AGREEMENTS BETWEEN THE HUCKS AND
CIVIL SITE AND BETWEEN THE HUCKS AND CHANDLER,
THIS COURT AND THE LOWER COURT HAVE NO AUTHORITY
TO REAPPORTION THE SETTLEMENT PROCEEDS.**

Avtex contends that it is entitled to a set-off and that if there is an allocation of the settlement proceeds between William Huck and Dianne Huck, the Court has the authority to review the fairness of the allocation and reallocate the settlement funds if it finds the settlement allocation unreasonable. This position is patently without merit.

“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 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

³⁰

Of course, had Avtex followed proper discovery procedure under the South Carolina Rules of Civil Procedure it would have been required to serve discovery and a motion to compel on Civil Site and Chandler too, which would have alleviated the problem of not having Civil Site and Chandler before the lower court. Yet another reason to affirm the Order based on Avtex's failure to follow proper discovery procedure

(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."").

Ironically, in the lower court, Avtex relied heavily on *Riley v. Ford Motor Co.*, 408 S.C. 1, 757 S.E.2d 422 (Ct. App. 2014), *rev'd*, 414 S.C. 185, 777 S.E.2d 824 (2015) in support of its motion for reallocation, which was subsequently reversed several months later³¹. In reversing the Court of Appeals and rejecting its reapportionment of the agreed-upon allocation of settlement proceeds, the Supreme Court explained 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.

* * * *

³¹ Not surprisingly Avtex conveniently fails to mention *Riley v. Ford Motor Co.*, *supra*, in its *Final Brief of Appellant Avtex Commercial Properties Inc.*

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 the instant action, Avtex's sole ground for seeking reapportionment is based solely on its unsubstantiated assumption that the allocation of settlement proceeds is based on the purported impropriety of an apportionment favoring Dianne Huck. As the Supreme Court specifically rejected this as a basis for reapportionment of settlement proceeds, Avtex's argument must be rejected.

Avtex argues at length in its *Final Brief of Appellant, Avtex Commercial Properties, Inc.*, without citation to authority, the fact that Dianne Huck's claim for loss of consortium was dismissed at trial is a basis for reapportionment of the settlement proceeds. Assuming, for purposes of discussion, without agreeing that any of the settlement proceeds were apportioned to Dianne Huck's loss of consortium claim, such apportionment is irrelevant.

As settlement agreement is just that: an agreement between the parties to the agreement. Settlement agreements resolve disputed claims and often times contain provisions whereby the defendant specifically disclaims liability. That the ultimate outcome of the case results in a finding of no liability as to the non-settling defendant certainly does not give the settling party or parties – in this case Civil Site and Chandler – the right to a return of any monies either paid Diane Huck pursuant to the settlement agreements. Likewise, had the jury returned a verdict for Avtex too, Civil Site and Chandler could not seek a return of any monies either paid William Huck under the settlement agreements. Similarly, 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 monies either paid William Huck under the settlement agreements.

Given that Chandler and Civil Site can in no way benefit from the directed verdict against Dianne Huck and 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 to rewrite the settlement agreements to its benefit and to the detriment of 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 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.

Accordingly, in the event Avtex is entitled to disclosure of the settlement agreements, and in the event there was an apportionment of the settlement proceeds paid by Civil Site and Chandler between William Huck and Diane Huck, as the Supreme Court pointed out in *Riley v. Ford Motor Co.*, *supra* a reapportionment of the settlement process would not be appropriate under the circumstances of this case. Therefore, the Order should be affirmed.

III. AVTEX'S SET OFF RIGHTS ARE LIMITED TO THE FUND'S ACTUALLY RECEIVED BY WILLIAM HUCK

Assuming William Huck received any of the settlement proceeds paid by Chandler and Civil Site under the Settlement agreements, Avtex's set off is limited to the amount actually received by William Huck. Though “[a] non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action,” the set-off is limited to the amount actually received by the plaintiff. *Id.*; accord *Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). Consequently, should this court

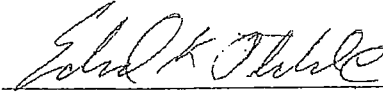
order disclosure of the settlement agreements, it should remand with instructions that any set-off Avtex is entitled to is limited to the amount of money actually paid to William Huck.

CONCLUSION

As Avtex (1) failed to properly seek the production of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler, (2) as the confidentiality requirements of Rule 8, SCADR, prohibit the Hucks from providing a copy of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler, (3) as the confidentiality requirements of Rule 8, SCADR, prohibit Avtex from introducing into evidence a copy of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler in connection with its motion for set off (4) as Avtex agreed in the mediation agreement that it would not seek to compel the production of the settlement agreement between the Hucks and Civil Site and the settlement agreement between the Hucks and Chandler and that it would not seek to introduce the same in connection with its motion for set off, and (5) as Avtex failed to join Civil Site and Chandler in its motion to disclose/compel. The trial Court properly denied Avtex's motion to disclose/compel. Further, as the lower court had no grounds for reapportioning the settlement proceeds paid Civil Site to the Hucks, if any, pursuant to the settlement agreement between the Hucks and Civil Site, if the settlement proceeds were allocated between William Huck and Dianne Huck, and as the lower court had no grounds for reapportioning the settlement proceeds paid Chandler to the Hucks, if any, pursuant to the settlement agreement between the Hucks and Chandler, if the settlement proceeds were allocated between William Huck and Dianne Huck, the lower court properly denied Avtex's motion for reapportionment. Finally, to the extent that Avtex is entitled to a set

off as to the judgment against it, the set off is limited to the amount actually received by William Huck, if any. Accordingly the Order must be affirmed.

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April 7, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 11 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Brian M. Gibbons, Circuit Court Judge

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

Appellate Case No. 2015-002025

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

v.

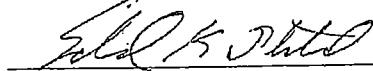
OAKLAND WINGS, LLC d/b/a WILD WING CAFÉ,
CIVIL SITE ENVIRONMENTAL, INC.,
OAKLAND PROPERTIES, LLC,
CHANDLER CONSTRUCTION SERVICES, INC.,
AVTEX COMMERCIAL PROPERTIES, INC.,.....Defendants,

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent, William Huck and Dianne Huck complies with Rule 211(b), SCACR

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April 4, 2016

Charleston, South Carolina

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

Case No. 2014-CP-10-0569

Appellate Case No. 2015-002025

RECEIVED

APR 11 2016

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,

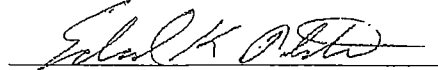
Of Whom AVTEX COMMERCIAL PROPERTIES, INC.....Appellant.

PROOF OF SERVICE

I hereby certify that I have served all counsel in this action with a copy of
RESPONDENT'S FINAL BRIEF herein specified below by depositing a copy of the same
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April 7, 2016
Charleston, South Carolina

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.

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March 29, 2016
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ARGUMENTS

A. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES TO DISCLOSE SETTLEMENT

Appellant Avtex filed a post-trial motion, styled *Motion for Disclosure of Settlement, Motion for Setoff, and in the Alternative, Motion to Determine Whether the Settlements with Chandler Construction Services and Civil Site Environmental Were Made in Good Faith* (the “Motion for Disclosure and Setoff”) to determine Plaintiffs’ settlement terms with Chandler Construction Services (“Chandler”) and Civil Site Environmental (“CSE”) (collectively referred to as the “Settling Defendants”), which the trial court denied on July 27, 2015. (R. pp. 144 and 4, respectively). The trial court relied on its interpretation of the South Carolina Rules governing Alternative Dispute Resolution in reaching its finding that the court is prevented from disclosing the terms of the settlements between Respondents and the Settling Defendants. (R. p. 7) (Order, p. 4). Avtex timely filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e) requesting the trial court to reconsider and amend its Order, which was denied on August 14, 2015 (the “Rule 59(e) Motion”). (R. pp. 156 and 16, respectively). Thereafter, this appeal was timely filed to appeal both of the trial court’s orders.

Respondents claim that Appellant did not follow the proper procedures to determine the settlement terms between Respondents and the Settling Defendants by filing the Motion for Disclosure and Setoff, Rule 59(e) Motion, and subsequent appeal of the lower court’s orders denying the motions. Instead, Respondents assert that Appellant was required to seek this information pursuant to the discovery rules, including Rule 26(a), Rule 34(a), Rule 34(b) and Rule 34(c) of the South Carolina Rules of Civil Procedure.

Contrary to Respondents' assertions, Appellant's motions were the appropriate mechanism for Appellant to seek to determine the settlement amounts and terms of the settlement, which information became pertinent only after a verdict was rendered in this case. Respondents rely on a litany of irrelevant and non-binding case law to support their arguments. Appellant was not required to request the terms of the settlement agreements through pre-trial discovery in order to be entitled to determine the settlement amounts. Prior to the verdict in this case, Appellant did not need to discover the settlement amounts, and dissemination of the terms of the settlement agreements was not likely to generate admissible evidence for trial. Because the proportionate liability among the remaining co-defendants did not need to be determined until final judgment, it was not necessary for Appellant to move to obtain this information until a verdict was rendered. Once the Motion for Disclosure and Setoff and the Rule 59(e) Motion were denied, it was proper for Appellant to file this appeal.

Respondents are attempting to obfuscate the proper issues in this appeal by manufacturing procedural problems, including failure to comply with discovery rules and the inability of the trial court to compel production of the settlement amounts due to the confidentiality of the mediation. Appellant was not asking the trial court, and likewise, is not asking this Court to reopen the pre-trial discovery process. Furthermore, Appellant is not requesting that the Court disclose anything that would circumvent the "confidentiality of the [mediation] process." Rule 8, SCADR. Moreover, the portions of the Mediation Agreement dated March 27, 2015, referred to by Respondents do not shield the settlement amounts from disclosure. Appellant is not seeking any documents "prepared for the purpose of, or in the course of, the mediation." (R. p. 179). Appellant is only

requesting that Respondents be required to disclose the settlement terms and/or settlement agreements between Respondents and the Settling Defendants, CSE and Chandler, which memorialize those settlements, to the lower court for post-trial setoff purposes, as contemplated by the South Carolina Contribution Among Tortfeasors Act (the “Act”). S.C. Code Ann. §§ 15-38-10 to 70 (2005 and Supp. 2014).

In addition, Respondents and the trial court rely on Rule 8 of the South Carolina Alternative Dispute Resolution Rules to support the contention the court is not permitted to compel the disclosure of the terms of the settlements between the parties that settled prior to trial. Rule 8, SCADR, provides in pertinent part:

(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*

Rule 8, SCADR (emphasis added). The intent of Rule 8 of the South Carolina Alternative Dispute Resolution Rules is to protect negotiations and discussions within mediation, not settlement agreements and releases arising out of mediation. Mediation is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution, whereas a settlement agreement is a document that memorializes the terms of the agreement. The mediation process is protected. The outcome of the mediation is not. Neither a confidentiality provision in a mediation agreement nor Rule 8, SCADR operates to shield a settlement agreement from being produced for setoff purposes. As recognized by the Fourth Circuit Court of Appeals, “[t]here is an important distinction between privilege and protection of

documents, the former acting to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding confidentiality.” *Virami v. Novant Health, Inc.*, 249 F.3d 284, 288 n.4 (4th Cir. 2001). The settlement documents, namely the releases and settlement agreements signed by Respondents and the Settling Defendants are not only relevant but are necessary to facilitate proper post-trial procedure in this case. *See Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015)(holding that settlement agreement was relevant to defendants’ claim or defense due to the potential for a setoff). Furthermore, settlement agreements are relevant “to the amount of setoff to which the non-settling defendants would be entitled” and the terms of the releases “are relevant to the non-settling defendants’ continued liability and right of setoff.” *Selective Way Ins. Co. v. Schulle*, No. 3:13CV00040, 2014 WL 462807, at *2 (W.D.Va. Feb.5, 2014). Therefore, it is appropriate to require the disclosure of the settlement terms because it is relevant to the amount of setoff of the settlement amount from any verdict in favor of Respondents. *Id.*

Furthermore, Rule 8(a) of the South Carolina Rules of Civil Procedure delineates several examples of confidential oral or written communications, which occurred during the mediation, including the following:

- (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
- (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
- (3) Proposals made or views expressed by the mediator;
- (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator: or

- (5) All records, reports or other documents created solely for use in the mediation.

Rule 8(a), SCADR. Rule 8(a)(5) only contemplates the confidentiality of “documents created solely for use *in* the mediation.” *Id.* (emphasis added). Interestingly, Rule 8(a) does not mention that settlement agreements or releases are confidential. Had the legislature intended for settlement agreements and releases to be confidential for all purposes, including post-trial motions for setoff, it certainly could have included that language in the rule. Furthermore, Rule 8(b) provides that the confidentiality provisions do not prohibit “[a]ny disclosures required by law. . . .” Rule 8(b), SCACR. This exception allows courts to require the disclosure of settlement amounts, releases, and settlement agreements in order to comply with the law, including the South Carolina Joint Tortfeasors Act.

If Respondents are allowed to use the mediation process to shield the disclosure of settlement amounts with joint tortfeasors, this exception would completely prevent the application of the South Carolina Contribution Among Tortfeasors Act in many tort actions. Therefore, it is appropriate for this Court to remand this case and request the lower court to require the disclosure of the settlement amounts included in the settlement agreements and releases. This case undisputedly involves issues of joint and several liability among CSE, Chandler, and Avtex. Respondents’ Complaint does not distinguish or differentiate the damages between the Defendants. (R. p. 39-40) (Amended Compl. ¶ 42). Shielding the disclosure of settlement amounts for setoff purposes would allow plaintiffs double-recovery, which certainly was not intended by the Act. *See Welch v. Epstein*, 536 S.E.2d 279, 536 S.E.2d 408 (Ct. App. 2000)(“A nonsettling defendant is

entitled to credit for the amount paid by another defendant who settles. The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him.” (internal citations omitted)). As such, Avtex is entitled to an automatic setoff for the settlement amounts paid by CSE and Chandler pursuant to S.C. Code Ann. § 15-38-50, which is discussed in more detail in the following section.

As previously discussed, the trial court improperly relied on Fourth Circuit’s holding in *In re Anonymous*, 283 F.3d 627 (2002) to deny Appellant’s motions. (R. p. 11) (Order, p. 8). The case involved a federal attorney disciplinary action regarding a fee dispute. The court considered whether it would be manifestly unjust to not disclose information revealed during the mediation. The case did not address and has no bearing on whether it is appropriate to disclose settlement amounts or settlement agreements and releases for setoff purposes or for determining whether claims for contribution among joint tortfeasors may exist. The approach to the application of the “manifest injustice” standard in *In re Anonymous* is not relevant to the issues in the present case, as Appellant is not seeking to obtain any confidential information disclosed during the mediation. Furthermore, Appellant is not seeking to find out what Respondents discussed with each of the Settling Defendants or any disclosures made during any mediation conference. Appellant is simply seeking disclosure of either the settlement amounts or agreements that manifested as a result of those conversations. Moreover, Appellant is not challenging the amounts CSE and Chandler each paid to resolve the case. Appellant is simply requesting that this Court require the lower court to apply the law and statutes applicable in this case, which mandates setoff. See *Green v. Bauerie*, 2016 WL 453490

(S.C. Ct. App. Feb. 3, 2016) (*not reported*). If it were necessary to consider whether not producing the settlement agreements would be manifestly unjust, clearly the Appellant would undoubtedly be harmed by non-disclosure of the settlement amounts because it would not be able to obtain a setoff, which would contravene the South Carolina Contribution Among Tortfeasors Act.

Based on the foregoing, the trial court erroneously denied Appellant's Motion to Disclose the Settlement. Therefore, Avtex respectfully requests this Court to reverse the ruling of the trial court denying Appellant's Motion to Disclose the Settlement between Respondents and CSE and Respondents and Chandler and the Order denying Avtex's Motion to Alter or Amend the Judgment.

B. THE TRIAL COURT ERRED IN DENYING THE MOTION OF AVTEX COMMERCIAL PROPERTIES FOR SETOFF AND IN THE ALTERNATIVE TO DETERMINE WHETHER THE SETTLEMENTS WITH CSE AND CHANDLER WERE MADE IN GOOD FAITH

Respondents William Huck and Dianne Huck brought causes of action for negligence and loss of consortium against the Appellant and the Settling Defendants and did not distinguish or differentiate the purported damages among the joint tortfeasors. Therefore, Avtex is entitled to a setoff for the amounts the joint tortfeasors, CSE and Chandler, each paid to Respondents to settle the claims against them.

"A non-settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Riley v. Ford*, 414 S.C. 185, 195, 777 S.E.2d 824 (2015)(internal citations omitted). Therefore, when Section 15-38-50 of the South Carolina Code applies, courts have no discretion in applying setoff. *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012). "The right to setoff has existed at common law in South Carolina for over 100 years." *Riley*, 414 S.C. at 195.

“[T]hese equitable principles were codified as part of the South Carolina Contribution Among Tortfeasors Act” *Id.* Section 15-38-50 provides in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury . . . :

- (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 consideration paid for it, whichever is the greater.

S.C. Code Ann. §§ 15-38-50 (2005 and Supp. 2014). Setoff under Section 15-38-50 applies when two or more persons are liable for the “same injury.” *Id.* The South Carolina Court of Appeals has interpreted the term “injury” broadly enough to include all damages which result from the same negligence of the responsible parties. *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 106, 113 (Ct. App. 1999). In the present case, Respondents’ claims against Appellant Avtex and the Settling Defendants arose out of the same factual scenario.

The South Carolina Court of Appeals considered “whether the set-off requirement pursuant to [S.C. Code] § 15-38-50 arises by operation of law” or whether the “party entitled to the set-off must make a timely motion pursuant to the rules of civil procedure.” *Id.* When considering this issue, the South Carolina Court of Appeals addressed the rules of statutory interpretation in relation to Section 15-38-50 of the South Carolina Code:

The court's primary concern in interpreting a statute is to ascertain and effectuate legislative intent. *State v. Four Video Slot Machs.*, 317 S.C. 397, 453 S.E.2d 896 (1995); *Spartanburg County Dep't of Soc. Servs. v. Little*, 309 S.C. 122, 420 S.E.2d 499 (1992). “A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *Spartanburg*, 309 S.C. at 125, 420 S.E.2d at 501. “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably

discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). “Where the terms of the statute are clear, the court must apply those terms according to their literal meaning.” *Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *see also Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 442 S.E.2d 177 (1994).

Ellis v. Oliver, 335 S.C. 106, 109-110 (Ct. App. 1999). This Court held that “Section 15-38-50 grants the court no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors.” *Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999); *See also Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (“[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . . . When the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law.”); *See also Check First of Greenville, LLC v. Merchant Services of the Upstate, Inc.*, 2015 WL 6566563 (S.C. Com. Pl.) (Trial Order) (July 17, 2015) (based on the facts of the case, the close connection of all claims involved between all original parties, and in the interests of equity, plaintiff was entitled to partial setoff in light of defendant’s settlement with a co-defendant entered the week prior to trial). Accordingly, Avtex is entitled to a setoff in the amount of the settlements from CSE and Chandler. Otherwise, this Court will be allowing strategic gamesmanship by Respondents, potentially resulting in double-recovery by Respondents for the same injury. *See Riley v. Ford*, 414 S.C. 185, 196, 777 S.E.2d 824 (2015)(“[T]he Act represents the Legislature’s determination of the proper balance between preventing double-recovery and South

Carolina's 'strong public policy favoring the settlement of disputes.'"); *Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 596, 65 USLW 2308 (4th Cir. 1996)("Were [the Court] to indulge the parties' manipulative attribution of settlement amounts, [it] would compromise South Carolina's policy of permitting setoffs to ensure against multiple recovery for the same injury.").

Respondents argue that Appellant has waived its right to join all necessary parties in the Motion for Disclosure and Setoff. Appellant contends that it was not required to direct its motion to the settling defendants, as they were no longer parties to the case and were not required to be notified that Appellant was requesting the trial court to implement the statutorily mandated setoff procedures. Furthermore, neither the appearance of CSE nor Chandler is necessary or required for the trial court to demand that Respondents disclose the settlement amounts for setoff purposes. If those settlements were made in good faith, the setoff rules would apply automatically, which would not require the participation of the settling defendants in any way. Conversely, if it appears that the settlements were not made in good faith, any subsequent motions or actions for contribution may require the participation of the Settling Defendants. However, that is not the subject of this appeal, and it would be improper to engage in speculation.

Based on the foregoing, the trial court erroneously denied Appellant's Motion for Disclosure and Setoff and Rule 59(e) Motion. In the alternative, Appellant respectfully requests that the case be remanded for the trial court to review the settlements to determine whether they were made in good faith.

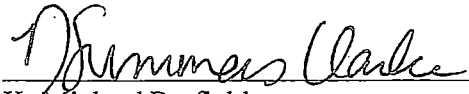
CONCLUSION

For the foregoing reasons, Appellant Avtex Commercial Properties respectfully requests that this Court reverse the circuit court's Orders denying the following: (1) *Appellant's Motion for Disclosure of Settlement, Motion for Setoff, and in the alternative, Motion to Determine whether Settlements with Chandler Construction Services and Civil Site Environmental, Inc. were made in Good Faith*; and (2) *Appellant's Motion to Alter or Amend Judgment pursuant to SCRCP 59(e)*.

[SIGNATURES ON FOLLOWING PAGE]--

Respectfully submitted,

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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.

PROOF OF SERVICE

I, the undersigned, of the law offices of Barnwell Whaley Patterson & Helms, LLC,
attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy
of the Final Reply Brief of Appellant, Avtex Commercial Properties, Inc. herein below specified
by mailing a copy of the same by United States Mail, postage prepaid, to the following
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March 29, 2016

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

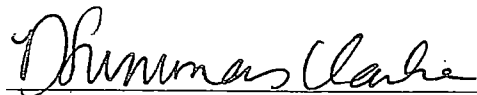
v.

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.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Reply Brief of Appellant, Avtex
Commercial Properties, Inc. complies with Rule 211(b), SCACR.



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March 29, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Huck and Dianne Huck, 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. is the
Appellant.

Appellate Case No. 2015-002025

Appeal From Charleston County
Brian M. Gibbons, Circuit Court Judge.

Opinion No. 5500
Heard May 2, 2017 – Filed July 19, 2017

REVERSED AND REMANDED

Kenneth Michael Barfield and Diane Summers Clarke, II,
both of Barnwell Whaley Patterson & Helms, LLC, of
Charleston, for Appellant.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton,
both of Pritchard Law Group, LLC, of Charleston, for
Respondents.

LEE, A.J.: In this appeal arising from a premises liability lawsuit, Avtex Commercial Properties, Inc. (Avtex) argues the trial court erred in denying its motion to disclose settlement and motion for setoff. We reverse and remand.

FACTS

William Huck slipped and fell while walking into Wild Wing Café in Mount Pleasant. Huck and his wife, Dianne Huck, filed a complaint against Wild Wing Café and Avtex, as the building's owner, among other parties. Huck alleged he suffered bodily injury, causing him to have surgery and incur medical costs. Huck asserted causes of action for negligence and loss of consortium. Dianne also asserted a cause of action for loss of consortium. Prior to trial, a settlement was entered into with defendants Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The terms of the settlement, including the amounts, were not disclosed to the trial court. At the close of the Hucks' case, the court granted the remaining defendants' motions for directed verdict on Dianne's loss of consortium claim.

The jury returned a verdict in favor of Huck against Avtex only in the amount of \$97,640, but the jury found Huck was fifty percent negligent in bringing about his own injuries. Accordingly, the court reduced the verdict by fifty percent to \$48,820 and entered judgment against Avtex in that amount. Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCPP. It also filed a motion for disclosure of settlement and setoff, or in the alternative, to determine if the settlement was made in good faith. The trial court denied both motions. Avtex made a motion to alter or amend judgment pursuant to Rule 59(e), SCRCPP, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). "[A] factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.*

LAW/ANALYSIS

I. Motion to Disclose Settlement

Avtex argues the trial court erred in denying its motion to disclose settlement. We agree.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

"When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004).

Rule 8 of the South Carolina Alternative Dispute Resolution Rules provides:

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*

Rule 8(a), SCADR (emphases added).

This court must give the words of Rule 8 their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *See Green*, 314 S.C. at 304, 443 S.E.2d at 907; *Stark Truss Co.*, 360 S.C. at 508, 602 S.E.2d at 102.

Avtex argues the trial court erred in concluding the South Carolina rules governing alternative dispute resolution prevented it from compelling disclosure of the terms

of the settlements between the Hucks and Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The Hucks argue the settlement agreement is protected because it was a part of the mediation process.

We find the trial court erred in denying Avtex's motion to disclose settlement. The 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. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. The request for production of the settlement documents does not disclose confidential information from the mediation (i.e., it does not disclose or discuss information the parties utilized to reach the settlement). Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions. Accordingly, we reverse the trial court on this issue.

II. Motion for Setoff

Avtex argues the trial court erred in denying its motion for setoff. We agree.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")).

"The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall ex rel. Andrews*, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute*. "In other words, there can be only one satisfaction for an injury or wrong." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "However, the reduction in the judgment must be from a settlement for the same cause of action." *Id.*

Section 15-38-50 of the South Carolina Code (2005) 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.

"Section 15-38-50 grants the court no discretion in determining the equities involved in applying a [setoff] once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012).

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. It was the trial court's function to determine the amount of the setoff. 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. 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.

CONCLUSION

Accordingly, the trial court's order is

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

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

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.

RESPONDENTS' PETITION FOR REHEARING
AND REQUEST FOR REHEARING EN BANC

REHEARING

Pursuant to Rule 221, SCACR, Respondents William Huck and Diane Huck, hereby submit this petition for rehearing of this Court's opinion, No. 5500, filed July 19, 2017. Respondents notes the following points overlooked or misapprehended by the Court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HEARING EN BANC

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

CONCLUSION

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

Respectfully Submitted,
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July 29, 2017

Charleston, South Carolina

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

Case No. 2014-CP-10-0569

Appellate Case No. 2015-002025

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

v.

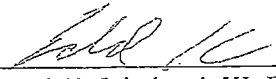
OAKLAND WINGS, LLC d/b/a WILD WING CAFÉ.
CIVIL SITE ENVIRONMENTAL, INC.,
OAKLAND PROPERTIES, LLC,
CHANDLER CONSTRUCTION SERVICES, INC.,
AVTEX COMMERCIAL PROPERTIES, INC., ...Defendants,
Of Whom AVTEX COMMERCIAL PROPERTIES, INC.....Appellant.

PROOF OF SERVICE

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

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July 29, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Huck and Dianne Huck, 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. is the
Appellant.

Appellate Case No. 2015-002025

Appeal From Charleston County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5500
Heard May 2, 2017 – Filed July 19, 2017
Withdrawn, Substituted and Refiled March 28, 2018

REVERSED AND REMANDED

Kenneth Michael Barfield and Diane Summers Clarke, II,
both of Barnwell Whaley Patterson & Helms, LLC, of
Charleston, for Appellant.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton,
both of Pritchard Law Group, LLC, of Charleston, for
Respondents.

LEE, A.J.: In this appeal arising from a premises liability lawsuit, Avtex Commercial Properties, Inc. (Avtex) argues the trial court erred in denying its motion to disclose settlement and motion for setoff. We reverse and remand.

FACTS

William Huck slipped and fell while walking into Wild Wing Café in Mount Pleasant. Huck and his wife, Dianne Huck, filed a complaint against Wild Wing Café and Avtex, as the building's owner, among other parties. Huck alleged he suffered bodily injury, causing him to have surgery and incur medical costs. Huck asserted causes of action for negligence and loss of consortium. Dianne also asserted a cause of action for loss of consortium. Prior to trial, a settlement was entered into with defendants Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The terms of the settlement, including the amounts, were not disclosed to the trial court. At the close of the Hucks' case, the court granted the remaining defendants' motions for directed verdict on Dianne's loss of consortium claim.

The jury returned a verdict in favor of Huck against Avtex only in the amount of \$97,640, but the jury found Huck was fifty percent negligent in bringing about his own injuries. Accordingly, the court reduced the verdict by fifty percent to \$48,820 and entered judgment against Avtex in that amount. Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP. It also filed a motion for disclosure of settlement and setoff, or in the alternative, to determine if the settlement was made in good faith. The trial court denied both motions. Avtex made a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). "[A] factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.*

LAW/ANALYSIS

I. Motion to Disclose Settlement

Avtex argues the trial court erred in denying its motion to disclose settlement. We agree.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997).

"When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004).

Rule 8 of the South Carolina Alternative Dispute Resolution Rules provides:

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*

Rule 8(a), SCADR (emphases added).

This court must give the words of Rule 8 their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *See Green*, 314 S.C. at 304, 443 S.E.2d at 907; *Stark Truss Co.*, 360 S.C. at 508, 602 S.E.2d at 102.

Avtex argues the trial court erred in concluding the South Carolina rules governing alternative dispute resolution prevented it from compelling disclosure of the terms

of the settlements between the Hucks and Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The Hucks argue the settlement agreement is protected because it was a part of the mediation process.¹

We find the trial court erred in denying Avtex's motion to disclose settlement. The 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. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. The request for production of the settlement documents does not disclose confidential information from the mediation (i.e., it does not disclose or discuss information the parties utilized to reach the settlement). Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions. Accordingly, we reverse the trial court on this issue.

II. Motion for Setoff

Avtex argues the trial court erred in denying its motion for setoff. We agree.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967)). ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")).

"The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which

¹ The Hucks argue Avtex failed to properly raise this issue to the trial court. They assert the SCRCF provides an adequate mechanism for discovering the terms of the settlement agreement—a Rule 34(a), SCRCF, request for production, and they claim this was the proper motion to make instead of waiting until after the verdict and making a motion to disclose settlement. However, Avtex had no reason to request the settlement agreement prior to the verdict against it. Once the verdict was rendered, setoff became an issue and disclosure of the settlement agreement was relevant.

has already been paid to him." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall ex rel. Andrews*, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute*. "In other words, there can be only one satisfaction for an injury or wrong." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "However, the reduction in the judgment must be from a settlement for the same cause of action." *Id.*

Section 15-38-50 of the South Carolina Code (2005) 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.

"Section 15-38-50 grants the court no discretion in determining the equities involved in applying a [setoff] once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). When the settlement is for the same injury as a matter of law, "the right to setoff arises as an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012).

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. *See Smith*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); *id.* at 472, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law."); *id.* ("Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off.'" (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272)); *id.* at 474, 724 S.E.2d at 191 ("[T]he right to setoff arises as an operation of law, and the circuit court must award a setoff."). 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. 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.

CONCLUSION

Accordingly, the trial court's order is

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

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

Appellate Case No. 2018-00085

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.

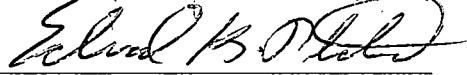
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Appendix complies with Rules 242 and 267
SCACR.

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WILLIAM HUCK AND DIANE HUCK

May 8, 2018

Charleston, South Carolina