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

Opinion No. 5500 (S.C. Ct. App. Filed March 28, 2018)
Appellate Case No. 2018-000805

William Huck and Dianne Huck .....Plaintiffs/Petitioners,

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 .....Respondent.

RESPONDENT'S RETURN TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Respondent Avtex Commercial Properties, Inc. submits this Return to William and Dianne Huck's Petition for a Writ of Certiorari pursuant to Rule 242(f), SCACR and respectfully requests that the Court's opinion in this matter be left intact without further proceedings.

COUNTERSTATEMENT OF THE CASE

I. Background Facts

On July 13, 2012, William Huck, drove to The Market at Oakland in Mt. Pleasant, South Carolina to eat lunch at Wild Wing Café. 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," "Petitioners" or "the Hucks") 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" or "Respondent")[4]. Prior to trial, CSE and Chandler (collectively referred to as the "Settling Defendants") settled with the Hucks.

II. Procedural History

The Hucks 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 Hucks case in chief, the trial court granted Defendants' Motion for Directed Verdict as to Plaintiff Dianne Huck's loss of consortium 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,

[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.

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.*)

On June 3, 2015, Respondent 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 Avtex's Motion for JNOV and Motion to Disclose Settlement and for Setoff (R. pp. 4-15). Avtex 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 Avtex's Motion to Alter or Amend that Judgment was received by counsel for Avtex on August 24, 2015. (R. p. 17). Avtex timely appealed 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 Avtex 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).

On May 2, 2017, oral arguments in this matter were held before the South Carolina Court of Appeals. On July 19, 2017, the Court of Appeals issued an opinion in this matter reversing the Order and remanding for a determination as to whether Avtex is entitled to a set-off. On July 29, 2017, Plaintiffs filed a petition for rehearing. On March 28, 2018, the South Carolina Court

of Appeals denied the Hucks' petition for rehearing, withdrew its earlier opinion, and substituted and refiled a new opinion. On April 27, 2018, the Hucks filed a Petition for Writ of *Certiorari*. This Return to Petitioners' Writ of *Certiorari* follows.

ARGUMENTS

I. William Huck and Dianne Huck Have Not Shown that this is a Proper Case for Review

The Hucks' Petition for Writ of *Certiorari* is defective in that it has not shown "special and important reasons" why this case is appropriate for this Court's consideration. Rather, the Hucks simply argue that the Court of Appeals erred in its analysis of this case. Avtex respectfully submits that, in light of the absence of significant factors warranting Supreme Court review, this Honorable Court should decline to exercise its discretion to review this case.

The Appellate Court Rules set forth numerous guidelines to govern this Court's analysis of a request for a writ of *certiorari*:

> A writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted **only where there are special and important reasons**. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
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> (2) Where there is a dissent in the decision of the Court of Appeals.
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> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.A.C.R., Rule 226(b) (emphasis added). The Hucks have not shown that any reasons of such character exist in this case, supporting review by this Court.

As discussed below, Petitioners' legal arguments are flawed and not well-supported. However, aside from those substantive legal reasons, the Court should deny the Hucks' Petition for Writ of Certiorari because it does not present any novel questions of law that require clarification from this Court. Moreover, there was no dissenting opinion in the Court of Appeals suggesting the existence of a legal question necessitating Supreme Court review. Although, the Hucks argue that the Court of Appeals' decision directly conflicts with a prior decision of the Court of Appeals or this Court, their interpretation is incorrect. In addition, this case does not involve any constitutional issues or federal questions.

The Hucks Petition for Writ of *Certiorari* does not argue that any "special and important reasons" in this case justify the exercise of this Court's discretion to hear the case. To the contrary, the Hucks simply argue that the Court of Appeals committed an error in reversing the trial court's decision. Without more, Avtex submits that this Court should not grant review of this case.

II. Avtex Properly Raised the Issue of Disclosure of the Settlement Agreement Before the Lower Court and was Not Required to Join Settling Defendants, CSE and Chandler, in Its Motion for Disclosure and Setoff

Petitioners argue that Avtex has waived its right to join all necessary parties in the Motion for Disclosure and Setoff and did not follow the proper procedures to determine the settlement terms between the Hucks 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, Petitioners assert that Avtex 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.

Avtex 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 Avtex 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.

Contrary to Petitioners' assertions, Avtex's motions were the appropriate mechanism for Avtex 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. Petitioners rely on a litany of irrelevant and non-binding case law to support their arguments. Avtex 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, Avtex 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 Avtex to move to obtain this information until a verdict was rendered. Furthermore, CSE and Chandler, settled out of the case, and it was not necessary or appropriate for them to be a part of any post-trial motions. The Hucks insisted on the confidentiality of the settlement agreements in an attempt to deprive Avtex of a setoff. Once the Motion for

Disclosure and Setoff and the Rule 59(e) Motion were denied, it was proper for Avtex to file an appeal. Based on the foregoing, Avtex properly raised the issue of disclosure of the settlement agreement before the lower court and did not fail to properly join necessary parties in its Motion to Disclose.

III. The Court of Appeals Properly Ruled that Compelling the Production of the Settlement Agreements Would Not be a Violation of Rule 8(a)

The Hucks 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. Avtex was not asking the trial court, and likewise, is not asking this Court to reopen the pre-trial discovery process. Furthermore, Avtex 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 the Hucks do not shield the settlement amounts from disclosure. Avtex is not seeking any documents "prepared for the purpose of, or in the course of, the mediation." (R. p. 179). Avtex is only requesting that Petitioners be required to disclose the settlement terms and/or settlement agreements between the Hucks 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, the Hucks 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. At the time of the trial and the appeal, Rule 8, SCADR, provided 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). On May 1, 2018, the South Carolina General Assembly approved the South Carolina Supreme Court's Order of January 31, 2018, making substantive revisions to Rule 8 of the South Carolina Alternative Dispute Resolution Rules. This revision had not been approved at the time the Hucks filed their Petition for Writ of *Certiorari*. The revised SCADR, Rule 8 provides:

> **(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 . . . .
>
> **(b) Waiver of Confidentiality**. Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to the terms of the agreement, 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;
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> ***
>
> (4) offered for the limited purpose in judicial proceedings of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation.
>
> (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 revised rule provides more clarity as to the parameters of confidentiality during the course of mediation proceedings.

To the extent these changed do not render this entire issue moot, they significantly bolster Avtex's position. The Waiver of Confidentiality provisions specifies that "[u]pon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to the terms of the agreement, unless otherwise agreed to by the parties." Rule 8(b), SCADR. Avtex did not stipulate that the terms of the settlements reached at the mediation would be confidential. Furthermore, the Limited Exceptions to Confidentiality provision allows a party seeking a setoff to obtain information about the settlement "or the limited purpose in judicial proceedings of establishing . . . a settlement agreement reached during a mediation." Rule 8(c)(4), SCADR. In addition, the rule provides that "[i]nformation 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." Rule 8(h), SCADR.

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 the Hucks 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 the Hucks. *Id.*

Furthermore, Rule 8(a) of the South Carolina Alternative Dispute Resolution Rules was not revised. It 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 Petitioners 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. The Hucks' Complaint does not distinguish or differentiate the damages between CSE, Chandler, Avtex, Wild Wing, and Oakland. (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 the Fourth Circuit's holding in *In re Anonymous*, 283 F.3d 627 (2002) to deny Avtex'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 Avtex is not seeking to obtain any confidential information disclosed during the mediation. Furthermore, Avtex is not seeking to find out what the Hucks discussed with each of the Settling Defendants or any disclosures made during any mediation conference. Avtex is simply seeking disclosure of either the settlement amounts or agreements that manifested as a result of those conversations. Moreover, Avtex is not challenging the amounts CSE and Chandler each paid to resolve the case. Avtex 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 Avtex 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 South Carolina Court of Appeals was correct in holding that

compelling the production of the settlement agreements would not violate the confidentiality provisions of Rule 8(a), SCADR.

IV. The Court of Appeals Correctly Ruled That Avtex is Entitled to a Setoff and the Court Must Review the Settlement Documents to Determine Whether the Release was Given in Good Faith

Petitioners William Huck and Dianne Huck brought causes of action for negligence and loss of consortium against CSE, Chandler, Avtex, Wild Wing, and Oakland 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 the Hucks to settle the claims against them. The trial court has the authority to reapportion the settlement proceeds paid by the Settling Defendants.

"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, the Hucks claims against CSE, Chandler, Avtex, Wild Wing, and Oakland 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 the Hucks, potentially resulting in double-recovery by the Hucks 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.").

Based on the foregoing, the South Carolina Court of Appeals correctly ruled that Avtex is entitled to a setoff, and the trial court must review the settlement documents to determine whether the release was given in good faith.

V. The Court did not Effectively Overrule *Riley v. Ford Motor Co.* and Did Not Confuse Common Law Set-off with Statutory Contribution Among Joint Tortfeasors, Section 15-38-50, Code of Laws of South Carolina

The South Carolina Court of Appeals correctly surmised the significant negative impact of adopting the Hucks' arguments as to the ability of trial judges to fulfill their obligation to apply statutorily mandated setoffs. It further noted that the terms of settlements between plaintiffs and joint tortfeasor defendants must be disclosed to the trial court as well as non-settling defendants, so that each might examine such settlements to determine if they were made in good faith. If not made in good faith, non-settling defendants saddled with judgments would be free to pursue contribution actions against those defendants that settled in bad faith with the plaintiff. Ironically, it is the Hucks, not the Court, that have conflated separate concepts of South Carolina jurisprudence. The Hucks argue that the Court, by holding the settlement terms may not be confidential as to all parties, has somehow run afoul of the South Carolina Supreme Court's recent holding in *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E. 2d 824 (2015).

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

matter of law. It is a thumbs up or thumbs down analysis that is mandated by statute and which does not require or allow the trial court to remake the terms of such a settlement.

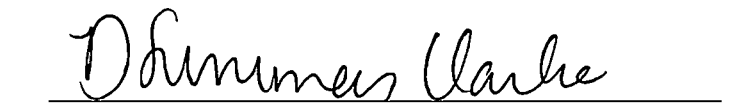
Despite the absence of a discussion of *Riley* and its opinion, the Hucks included an interesting quote from that case in their Petition for Rehearing. In discussing the Uniform Contribution Among Joint Tortfeasors Act, the *Riley* court stated, "the Act represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Riley v. Ford Motor Co.*, *supra* at 196, 777 S.E.2d at 830 (*quoting Chester v. South Carolina Department of Public Safety*, 388 S.C. 343, 346, 698 S.E. 2d, 559, 560 (2010)).

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

CONCLUSION

For all of the reasons set forth herein, this Court should deny William and Dianne Huck's Petition for Writ of *Certiorari*.

Barnwell Whaley Patterson & Helms, LLC



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June 18, 2018
Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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

William Huck and Dianne Huck.....Plaintiffs/Petitioners,

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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 .....Respondent.

PROOF OF SERVICE

I hereby certify that I have served Respondent's Return to Petition for Writ of Certiorari, by depositing copies in the United States Mail, postage prepaid, on June 18, 2018 addressed to Petitioners' attorney of record Edward K. Pritchard, III, Esquire, P.O. Box 630, Charleston, SC 29402.

Barnwell Whaley Patterson & Helms, LLC

Janet Segell, Legal Assistant