# Mediation, Confidentiality and Set-Off

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The title to this article could have been Mediation – Where the Confidentially Ends and Set-Off Begins, Revisited. However, the wonderful and talented people who edit my edits told me that title is too long. Nonetheless, that is exactly what the court examined in *Huck v. Oakland Wings, LLC d/b/a Wild Wing Café, et al* 2018 WL 1559876. This opinion, which is substituted for the opinion addressed here on August 1, 2017, is largely as the original, but perhaps creates added nuance.

In the recent *Huck* opinion, the court reiterated that the language of a court rule is construed pursuant to the same basic rule governing interpretation of a statute; its words must be given their plain, ordinary meaning without any forced interpretation to expand or contract the statute's operation. To that end, the court also reiterated Rule 8 of Alternative Dispute Resolution Rules mandates that communications during a mediation conference shall be kept confidential.

As addressed earlier, any agreement reached as a result of mediation and any documents created relative to the settlement and release are not for the purpose or part of the mediation process. Consequently, a request for the production of settlement documents is not violative of the confidentiality mandates for mediation. If, however, the parties do not want certain matters disclosed, they can accomplish that protection through the court, including confidentiality provisions.

The court's conclusions as to mediation and confidentiality go hand in hand with the right of a non-settling defendant to credit for amounts paid by a settling defendant. This entitlement assures there can be only one recovery for an injury or damage suffered. The reduction is applied to any judgment against a non-settling party if the settlement was for the same cause of action.

Following the almost universal rule, S.C. Code §15-38-50 provides that a release, covenant not to sue or covenant not to enforce judgment given in *good faith* to one of two or more liable in tort for the same injury does not discharge the other tortfeasors, but reduces the claims against them to the extent of the amount stipulated by the release or covenant, or the amount paid for it, whichever is greater. There is no right to set-off until a verdict is entered against a defendant. While the court has no discretion in applying a set-off when a verdict is returned, it is the court's duty to review the settlement documents to determine whether there is entitlement to a set-off and the amount thereof. Pursuant to §15-38-50, the court must also determine if the release or covenant was given in *good faith*. Thus, the potential nuance of the second *Huck* opinion.

The non-settling defendant in *Huck* alleged, among other things, that a substantial portion of the monies paid by the settling parties were allocated to Ms. Hucks' loss of consortium claim in an effort to deprive the non-settling defendant of a set off. Recognizing it has no discretion in applying a set-off, could the court be emphasizing its obligation to determine if the release or covenant was given in *good faith* in an effort to create a path to assure the purpose of set-off is fairly accomplished. The case was remanded.

Stand by for part three.

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