

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

19589

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2007-CP-10-3920

Progressive Max Insurance Company, ... Appellant,

v.

Floating Caps, Inc. d/b/a Silver Dollar Café, ... Respondents.

RECORD ON APPEAL

RECEIVED
FEB 27 2012
SC Court of Appeals

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February 9, 2012

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff,

v.

Floating Caps, Inc., d/b/a Silver Dollar Cafe,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No.: 2007-CP-10-3920

**ORDER DENYING PROGRESSIVE
MAX INSURANCE CO.'S MOTION TO
RECONSIDER**

FILED
2011 JUL 21 AM 10:13
JULIE ARMSTRONG
CLERK OF COURT

This matter originally came before me upon motion of the Defendant Floating Caps, Inc., d/b/a Silver Dollar Café's ("Silver Dollar") for summary judgment pursuant to SCRCP 56. That motion was granted and Plaintiff filed a motion to reconsider. For the reasons set forth below, the Court denies the motion to reconsider. Therefore, the Order granting summary judgment in favor of the Defendant stands.

Plaintiff Progressive Max Insurance Company ("Progressive") has filed a contribution claim against Silver Dollar, pursuant to the South Carolina Contribution Among Tortfeasors Act, S.C. Code § 15-38-10 et seq., alleging Defendant is jointly liable for the damages caused to the plaintiff Robert Witherspoon in the underlying case of Robert M. Witherspoon, IV v. Ryan, Kevin and Betty McGuire, Civil Action No. 2:06-1089-DCN. Arguments for and against the motion were heard on May 25, 2010. The Plaintiff was represented by Adam J. Neil. The Defendant was represented by Francis M. Ervin, II.

The Court finds that the Motion to Reconsider was properly made pursuant to Rule 59(e), SCRCP. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue

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for appellate review.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Progressive raised the issue of the timing, including the “relation back”, of the second covenant not to execute in its filings and at the oral argument of the motion for summary judgment. However, the Court’s order granting the Defendant’s motion for summary judgment did not specifically address Progressive’s argument that the fact that the second covenant corrected a mutual mistake in the first, it “relates back” to the first covenant such that the covenant was executed in a timely fashion according to the requirements of the statute.

At issue in this case is whether the agreement to settle all claims in the underlying case properly complied with the statute and preserved the contribution action even though the original Covenant Not to Execute signed by the parties in the underlying case on April 20, 2007, did not specifically reference any potential liability of Silver Dollar. A second covenant not to execute that Progressive argues did discharge the liability of Silver Dollar was executed by the parties to the underlying suit on July 31, 2007.

In this case, S.C. Code Ann. § 15-38-40(D) applies because a settlement was reached prior to the entry of any judgment. When no judgment has been entered against the tortfeasor seeking contribution (in this case Progressive as subrogee McGuire), its right is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant’s right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution. S.C. Code § 15-38-40(D). When a release or covenant not to sue and/or not to enforce a judgment is given to one of two or more persons liable in tort

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for the same injury, said covenant "does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide." S.C. Code § 15-38-50(1).

It is undisputed that Progressive entered the first covenant on April 20, 2007, approximately five months after the statute of limitations ran on Witherspoon's personal injury claims. Therefore, Progressive may maintain its contribution action against Silver Dollar only if it has met the requirements set forth under S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1).

Progressive argues that it has complied with both statutory requirements. Progressive points to the affidavit of attorney Johnny Driggers which recites that the parties in the underlying suit agreed to discharge the liability of Silver Dollar as part of the settlement. Thus, Progressive argues, it had an agreement to discharge the liability of Silver Dollar while the Witherspoon action was pending as is required by §15-38-40(D)(2)¹.

Moreover, Progressive argues, that it has complied with § 15-38-50 because the second covenant not to execute included a term that expressly discharged the liability Silver Dollar. Progressive argues that §15-38-50 has no timing requirement and, therefore, the fact that the liability of Silver Dollar was formally discharged, in writing, after the suit was dismissed and after the statute of limitations had run was of no effect. The Court rejects this argument.

Progressive also argues that the second covenant is merely a correction of the mutual mistake of failing to preserve the contribution claim in the first covenant. Therefore, it should be deemed executed as of the date of the first covenant – April 20, 2007. A party seeking to reform a release or covenant on the basis of a mutual mistake must demonstrate that "the mistake is common to both parties and, by reason of it, each has done what neither intended." Chet Adams

¹ There is no dispute about the fact that this contribution action was brought within the one year period mandated by the statute.

Co. v. James F. Perersen Co., 308 S.C. 410, 413, 418 S.E. 2d 337, 339 (Ct. App. 1992). In this case, Progressive contends that the evidence demonstrates at least a question of fact regarding whether both parties to the agreement mistakenly failed to include a discharge of Silver Dollar's liability. The Court agrees that such evidence is in the record.

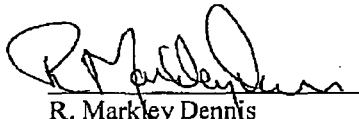
Progressive then argues that the Court should treat the second covenant not to execute as a reformed version of the original covenant not to execute. Accordingly, Progressive argues, the reformation should relate back to the date of the original covenant. See Lawrence v. Clark, 115 S.C. 67, 104 S.E. 330 (1920). The Court disagrees. I am not persuaded by this argument and find that the second covenant not to execute did not satisfy the statutory requirements for preserving a contribution claim.

S.C. Code § 15-38-40(D)(2) expressly states that a party's right to contribution will not be preserved unless the joint tortfeasors liability has been discharged by agreement "while the action is pending." Once the underlying Witherspoon case was dismissed on May 8, 2007, Progressive's subsequent execution of the July 31, 2007 covenant could not preserve any right to contribution against the Defendant. Therefore, I find that any right of contribution that Progressive may have had against Silver Dollar was barred once the Witherspoon case was dismissed on May 8, 2007.

Having determined that the original motion for summary judgment was properly granted, the Plaintiff's motion to reconsider is **DENIED**.

IT IS SO ORDERED.

Dated: July 19, 2011
Charleston, South Carolina


R. Markley Dennis
Presiding Judge Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Progressive Max Insurance Company,)
Plaintiff,)
v.)
Floating Caps, Inc., d/b/a Silver Dollar Cafe,)
Defendant.)

IN THE COURT OF COMMON PLEAS

C/A No.: 2007-CP-10-3920 BY

ORDER GRANTING DEFENDANT FLOATING
CAPS, INC., D/B/A SILVER DOLLAR CAFÉ'S
MOTION FOR SUMMARY JUDGMENT

FILED
2009 AUG 20 AM 9:22
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before me upon motion of Defendant Floating Caps, Inc., d/b/a Silver Dollar Café for summary judgment pursuant to SCRPC 56. Plaintiff Progressive Max Insurance Company has filed a contribution claim against Defendant, pursuant to S.C. Code § 15-38-10 et seq. (South Carolina Contribution Among Tortfeasors Act), alleging Defendant is jointly liable for the damages caused in the underlying case of Robert M. Witherspoon, IV v. Ryan, Kevin and Betty McGuire, Civil Action No. 2:06-1089-DCN. Arguments for and against the motion were heard on August 3, 2009. In addition to oral arguments, both parties submitted legal memoranda which were incorporated into the record on the date of the hearing. Defendant was represented by Francis M. Ervin, II. Plaintiff was represented by Adam J. Neil.

At issue in this case is whether the Covenant Not to Execute signed by the parties in the underlying case on April 20, 2007 properly preserved Plaintiff's right to seek contribution against Defendant pursuant to S.C. Code § 15-38-40 (D)(1)-(2) and S.C. Code § 15-38-50(1). Where two or more persons become jointly or severally liable in tort for the same injury to person or property, there is a right of contribution among them, even though judgment has not been recovered against all or any of them. S.C. Code § 15-38-20(A). This right of contribution only exists in favor of a tortfeasor which has paid more than its pro rata share. S.C. Code § 15-38-20(B). A tortfeasor which enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor "whose liability for the injury or wrongful death is not extinguished by the settlement." S.C. Code § 15-38-20(D). One entitled to contribution may seek same against another tortfeasor by separate action, whether or not a judgment has been entered in an action against two or more tortfeasors. S.C. Code § 15-38-40(A).

If no judgment has been entered against the tortfeasor seeking contribution, his right is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution. S.C. Code § 15-38-40(D)(1)-(2). When a release or covenant not to sue and/or not to enforce a judgment is given to one of two or more persons liable in tort for the same injury, said covenant "does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide." S.C. Code § 15-38-50(1).

Based on the undisputed fact that Plaintiff entered the April 20, 2007 covenant approximately five months after the statute of limitations ran on the claimant's claim in the underlying Witherspoon case, I find that S.C. Code § 15-38-40(D)(1) does not apply to this case. Therefore, Plaintiff may only maintain its contribution action against Defendant if it has met the requirements set forth under S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1). After careful examination of the April 20, 2007 Covenant Not to Execute entered into between the Plaintiff and the claimant in the underlying Witherspoon case, I find as a matter of law that said covenant did not extinguish or discharge the alleged liability of Defendant herein. The April 20, 2007 covenant did not mention or expressly state the intention of the parties thereto to extinguish or discharge the liability of Defendant.

Subsequent to the execution of the April 20, 2007 covenant, the record before me established, and Plaintiff acknowledged, that the underlying Witherspoon case was dismissed by consent order on May 8, 2007. However, on July 31, 2007, it appears the Plaintiff and the claimant in the underlying case executed another Covenant Not to Execute, attempting to preserve Plaintiff's right to seek contribution against Defendant herein. At the hearing, counsel for Plaintiff acknowledged that the intent of the parties to the April 20, 2007 covenant was not clear with respect to Plaintiff's intent to seek contribution against Defendant. Counsel for Plaintiff asserted that the July 31, 2007 covenant was executed to correct this deficiency in the April 20, 2007 covenant, and said execution should relate back to the date of the signing of the first covenant. Plaintiff argued that there is evidence in the record, including the affidavit of attorney Johnny Driggers, who was the attorney for Mr. Witherspoon, that the parties intended for the original

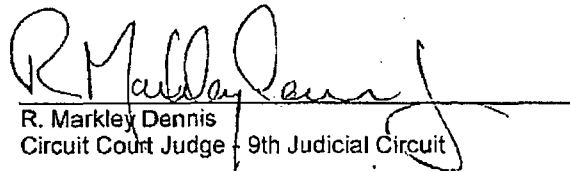
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covenant to preserve Plaintiff's right to assert a contribution claim against Defendant herein. Accordingly, Plaintiff argued that the second covenant was merely a correction of the mutual mistake of failing to preserve the contribution claim in the first covenant. Therefore, Plaintiff argued, it should be deemed executed as of the date of the first covenant – April 20, 2007. I am not persuaded by this argument, and furthermore, the requirements of S.C. Code § 15-38-40(D)(2) have not been met with respect to the July 31, 2007 covenant.

S.C. Code § 15-38-40(D)(2) expressly states that a party's right to contribution will not be preserved unless the joint tortfeasors' liability has been discharged by agreement "while the action is pending". Once the underlying Witherspoon case was dismissed on May 8, 2007, Plaintiff's subsequent execution of the July 31, 2007 covenant could not, as a matter of law, preserve any right to contribution against Defendant. Therefore, I find as a matter of law that any right to contribution Plaintiff may have had against Defendant was forever barred once Witherspoon was dismissed on May 8, 2007.

A trial court may properly grant a motion for summary judgment when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Having determined for the foregoing reasons that there are no genuine issues of material fact, Defendant's Motion for Summary Judgment is granted.

AND IT IS SO ORDERED.


R. Markley Dennis
Circuit Court Judge - 9th Judicial Circuit

Dated: August 17, 2009
Charleston, ~~South~~ Carolina

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-10-3920

PROGRESSIVE MAX INSURANCE CO

v

FLOATING CAPS INC etc.

PLAINTIFF(S)

DEFENDANT(S)

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other ☐
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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:

Defendant's motion for summary judgment is granted. Attorney Ervin will submit formal order to the Court.

Dated at , South Carolina, this 3rd day of Aug, 20 09


PRESIDING JUDGE

This judgment was entered on the day of , 20, and a copy mailed first class this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 07-CP-10-3920

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

SUMMONS

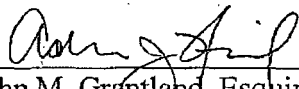
FILED
2007 SEP 25 PM 1:02
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Amended Complaint upon the subscribers at 4406-B Forest Drive, Post Office Box 6648, Columbia, South Carolina 29260 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, Plaintiff(s) will apply to the Court for the relief demanded in the Amended Complaint and judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

This the 21 day of Sept, 2007, in Columbia, South Carolina.

MURPHY & GRANTLAND, P.A.


John M. Grantland, Esquire
Adam J. Neil, Esquire
4406-B Forest Drive (29206)
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
September 21, 2007

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO:

AMENDED COMPLAINT

2007 SEP 25 PM 1:02
JULIE L. ARMSTRONG
CLERK OF COURT

FILED

The Plaintiff, Progressive Max Insurance Company complaining of the Defendant herein, would respectfully allege and show to the court the following:

JURISDICTION

1) Plaintiff Progressive Max Insurance Company (hereinafter "Progressive") is an insurance company organized and existing pursuant to the laws of the State of Ohio, which conducts business and writes insurance policies in the State of South Carolina.

2) Upon information and belief, the Defendant, Floating Caps, Inc. is a corporation organized and existing pursuant to the laws of the State of South Carolina. Floating Caps, Inc. owns and operates the Silver Dollar Café, a business operating in Charleston County, South Carolina as a bar. The Defendant is hereinafter referred to as "The Silver Dollar."

3) At all times relevant hereto, Progressive provided an automobile liability insurance policy to Kevin McGuire and his wife Betty McGuire, which also provided automobile liability coverage to their son Ryan McGuire.

4) This is a contribution action brought pursuant to the South Carolina Contribution Act, S.C. Code Ann. § 15-38-10 through 15-38-70.

FACTS

5) On or about November 17, 2003, Ryan McGuire, while driving the vehicle owned by his parents Kevin and Betty McGuire, struck a pedestrian, Robert M Witherspoon, IV, on King Street in Charleston, South Carolina outside of The Silver Dollar bar. Mr. Witherspoon was injured as a result of the incident.

6) Prior to the time that Mr. Witherspoon was struck by the vehicle being driven by Ryan McGuire, Ryan McGuire had been a patron at The Silver Dollar.

7) At all times relevant to this suit, Ryan McGuire had not yet reached twenty-one (21) years of age, the legal age for consuming alcohol in the State of South Carolina.

8) While patronizing The Silver Dollar, Ryan McGuire consumed several alcoholic beverages.

9) Ryan was sold these alcoholic beverages and was allowed to consume them by employees and managers of The Silver Dollar both during regular business hours and after the bar closed. Ryan McGuire was allowed to consume alcoholic beverages to the point that he became intoxicated.

10) The employees and managers of The Silver Dollar, were, at all times relevant to this suit, acting as agents, servants, or employees of The Silver Dollar and were acting within the course and scope of their agency, service, or employment to make The Silver Dollar liable for their actual admissions under the theory of respondeat superior.

11) Following this incident, Mr. Witherspoon brought an action against Ryan McGuire, Kevin McGuire, and Betty McGuire. In the United States District Court for the District of South Carolina, Charleston Division, case number 2:06-1089-DCN (the "underlying lawsuit").

12) Generally, in the underlying suit, Mr. Witherspoon set forth a negligence cause of action against Ryan McGuire and a negligent entrustment cause of action against Kevin McGuire and Betty McGuire.

13) Ryan McGuire, Kevin McGuire, and Betty McGuire, answered, denied liability, and actively engaged in defense in the action. At the time of the incident involving Mr. McGuire, there was in effect a policy of insurance ("policy"), issued by Progressive to Kevin McGuire and Betty McGuire as named insured. Progressive's policy also provided insurance coverage to Ryan McGuire pursuant to the terms of the insurance contract.

14) Progressive agreed to defend and indemnify the McGuires pursuant to the terms of this policy.

15) During the course of the underlying lawsuit, settlement negotiations were undertaken. Eventually Progressive agreed to pay \$180,000.00 to settle the case on behalf of all potential liable parties, including, but not limited to the defendant named herein.

16) Under the terms of the Settlement Agreement, Mr. Witherspoon released the McGuires and The Silver Dollar. However, The Silver Dollar did not contribute to the settlement of the claim.

17) As part of the settlement, Progressive reserved the right to pursue The Silver Dollar for contribution on account of the fact that it did not contribute its pro-rata share to the settlement of this claim.

18) The Silver Dollar is a joint tortfeasor on account of its negligence in providing excessive amounts of alcoholic beverages to an under aged Ryan McGuire. Specifically, the Defendant, by and through the acts and/or omissions of its agents or employees, with its

negligence, carelessness, recklessness, grossly negligence, willful, and wanting in the following particulars:

- A) Failing to properly train and supervise its employees;
- B) Allowing persons not of legal age to consume alcohol on its premises;
- C) In aiding and embedding the illegal sale of alcohol to Ryan McGuire;
- D) In allowing a vehicle to be operated by an individual that it knew, or should have known that the operator was under the influence of alcohol at the time;
- E) Allowing an intoxicated minor driver to drive away from its premises;
- F) In failing to take measures to ensure that only those of the legal age consume alcohol at its premises;
- G) In failing to exercise degree of care and caution when a reasonable business establishment would have exercised under the same in similar circumstances; and
- H) Such other and further particulars of the evidence at trial may show.

All of which combined contributed as a direct and proximate cause of the injuries and damages suffered by Mr. Witherspoon, set acts being in violation of the laws of the State of South Carolina.

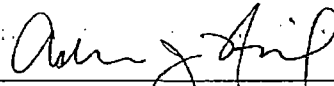
19) Progressive is informed and believes that it has a right of contribution provided for by South Carolina code § 15-38-10, et seq., in that this Defendant had a common liability to Mr. Witherspoon, in addition to the liability of Ryan McGuire, Kevin McGuire, and Betty McGuire.

20) Thus Progressive is informed and believes that the settlement in this case of \$180,000.00 and obtaining full release and favor of all parties, including the Defendant herein, Progressive has paid a disproportionate share of the common liability to the Plaintiff in the underlying lawsuit. Progressive is, therefore, entitled to pursue this contribution claim against the

Defendant. Progressive is further informed and believes that it is entitled to a Judgment against this Defendant for its pro-rata share of this settlement; together with interest thereon at the legal rate from the time Progressive paid its disproportionate share of the liability to Mr. Witherspoon until such time as a verdict is satisfied according to South Carolina code § 15-38-20, § 15-38-30, and § 15-38-40.

WHEREFORE, Progressive prays for a Judgment against this Defendant in the amount of its pro-rata share of the settlement paid to Mr. Witherspoon, together with interest thereon from the date of the settlement payment until such time that this judgment is paid and satisfied together with the cost of this action and for such other and further relief if the court may be unjust and proper.

MURPHY & GRANTLAND, P.A.



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Adam J. Neil, Esquire
4406-B Forest Drive (29206)
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
September 21, 2007

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

IN THE COURT OF COMMON PLEAS

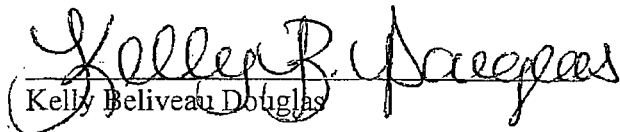
CIVIL ACTION NO: 07-CP-10-3920

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Progressive Max Insurance Company, do hereby certify that I have served a copy of the foregoing, Acceptance of Service, Summons for Floating Caps, Inc. d/b/a Silver Dollar Café, and Amended Complaint, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Jonathan S. Altman, Esquire
Derfner, Altman, & Wilborn, LLC
P.O. Box 600
40 Calhoun Street, Suite 410
Charleston, SC 29402-0600

Columbia, South Carolina
September 26, 2007


Kelly Beliveau Douglas

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff(s)

vs.

Steven Shur d/b/a The Silver Dollar,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

07 - CP - 10 - 3920

(Please Print)

Submitted By: Adam J. Neil, Esquire

Address: P.O. Box 6648 (29260)

Columbia, SC 29204

Telephone #: 803-782-4100

Fax #: 803-782-4140

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

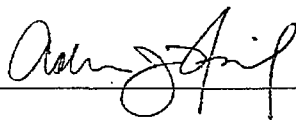
*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|--|--|
| Contracts | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☒ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Notice/ File Med Mal (230) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | ☐ Other (299) | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Other (399) | ☐ Building Code Violation (460) |
| | | | ☐ Other (499) |
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Sexual Predator (510) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Mandamus (520) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Habeas Corpus (530) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| ☐ Other (599) | ☐ Transcript Judgment (740) | ☐ Forfeiture (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Other (899) | ☐ SCDOT (950) |
| | ☐ Other (799) | | ☐ Worker's Comp (960) |
| | | | ☐ Zoning Board (970) |
| | | | ☐ Administrative Law Judge (980) |
| | | | ☐ Public Service Commission (990) |
| | | | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |
| Special/Complex/Other | | | |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) | | |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) | | |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) | | |
| ☐ Other (699) | | | |

Submitting Party Signature:



Date: August 30, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO:

Progressive Max Insurance Company,

Plaintiff,

vs.

Steven Shur d/b/a The Silver Dollar,

Defendant.

SUMMONS

BY

JULIE J. HARRIS, RONG
CLERK OF COURT

2007 SEP -5 PM 2:54

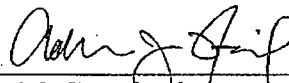
FILED

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 4406-B Forest Drive, Post Office Box 6648, Columbia, South Carolina 29260 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, Plaintiff(s) will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

This the 31 day of August, 2007, in Columbia, South Carolina.

MURPHY & GRANTLAND, P.A.



John M. Grantland, Esquire
Adam J. Neil, Esquire
4406-B Forest Drive (29206)
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**

** Contact Respective County Clerk of Court for modified ADR Program Rules

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO:

Progressive Max Insurance Company,

Plaintiff,

vs.

Steven Shur d/b/a The Silver Dollar,

Defendant.

COMPLAINT

JULIE A. AMOS, FROM
CLERK OF COURT

2007 SEP -5 PM 2:56

FILED

The Plaintiff, Progressive Max Insurance Company complaining of the Defendant herein, would respectfully allege and show to the court the following:

JURISDICTION

1) Plaintiff Progressive Max Insurance Company (hereinafter "Progressive") is an insurance company organized and existing pursuant to the laws of the State of Ohio, which conducts business and writes insurance policies in the State of South Carolina.

2) Upon information and belief, the Defendant, Steven Shur is a citizen and resident of Charleston County, South Carolina. Mr. Shur owns and operates The Silver Dollar, a business operating in Charleston County, South Carolina as a bar. The Silver Dollar is organized and existing pursuant to the laws of South Carolina. The Defendant is hereinafter referred to as "The Silver Dollar."

3) At all times relevant hereto, Progressive provided an automobile liability insurance policy to Kevin McGuire and his wife Betty McGuire, which also provided automobile liability coverage to their son Ryan McGuire.

4) This is a contribution action brought pursuant to the South Carolina Contribution Act,

S.C. Code Ann. § 15-38-10 through 15-38-70.

FACTS

5) On or about November 17, 2003, Ryan McGuire, while driving the vehicle owned by his parents Kevin and Betty McGuire, struck a pedestrian, Robert M Witherspoon, IV, on King Street in Charleston, South Carolina outside of The Silver Dollar bar. Mr. Witherspoon was injured as a result of the incident.

6) Prior to the time that Mr. Witherspoon was struck by the vehicle being driven by Ryan McGuire, Ryan McGuire had been a patron at The Silver Dollar.

7) At all times relevant to this suit, Ryan McGuire had not yet reached twenty-one (21) years of age, the legal age for consuming alcohol in the State of South Carolina.

8) While patronizing The Silver Dollar, Ryan McGuire consumed several alcoholic beverages.

9) Ryan was sold these alcoholic beverages and was allowed to consume them by employees and managers of The Silver Dollar both during regular business hours and after the bar closed. Ryan McGuire was allowed to consume alcoholic beverages to the point that he became intoxicated.

10) The employees and managers of The Silver Dollar, were, at all times relevant to this suit, acting as agents, servants, or employees of The Silver Dollar and were acting within the course and scope of their agency, service, or employment to make The Silver Dollar liable for their actual admissions under the theory of respondeat superior.

11) Following this incident, Mr. Witherspoon brought an action against Ryan McGuire,

Kevin McGuire, and Betty McGuire. In the United States District Court for the District of South Carolina, Charleston Division, case number 2:06-1089-DCN (the "underlying lawsuit").

12) Generally, in the underlying suit, Mr. Witherspoon set forth a negligence cause of action against Ryan McGuire and a negligent entrustment cause of action against Kevin McGuire and Betty McGuire.

13) Ryan McGuire, Kevin McGuire, and Betty McGuire, answered, denied liability, and actively engaged in defense in the action. At the time of the incident involving Mr. McGuire, there was in effect a policy of insurance ("policy"), issued by Progressive to Kevin McGuire and Betty McGuire as named insured. Progressive's policy also provided insurance coverage to Ryan McGuire pursuant to the terms of the insurance contract.

14) Progressive agreed to defend and indemnify the McGuires pursuant to the terms of this policy.

15) During the course of the underlying lawsuit, settlement negotiations were undertaken. Eventually Progressive agreed to pay \$180,000.00 to settle the case on behalf of all potential liable parties, including, but not limited to the defendant named herein.

16) Under the terms of the Settlement Agreement, Mr. Witherspoon released the McGuires and The Silver Dollar. However, The Silver Dollar did not contribute to the settlement of the claim.

17) As part of the settlement, Progressive reserved the right to pursue The Silver Dollar for contribution on account of the fact that it did not contribute its pro-rata share to the settlement of this claim.

18) The Silver Dollar is a joint tort feisor on account of its negligence in providing

excessive amounts of alcoholic beverages to an under aged Ryan McGuire. Specifically, the Defendant, by and through the acts and/or omissions of its agents or employees, with its negligence, carelessness, recklessness, grossly negligence, willful, and wanting in the following particulars:

- A) Failing to properly train and supervise its employees;
- B) Allowing persons not of legal age to consume alcohol on its premises;
- C) In aiding and embedding the illegal sale of alcohol to Ryan McGuire;
- D) In allowing a vehicle to be operated by an individual that it knew, or should have known that the operator was under the influence of alcohol at the time;
- E) Allowing an intoxicated minor driver to drive away from its premises;
- F) In failing to take measures to ensure that only those of the legal age consume alcohol at its premises;
- G) In failing to exercise degree of care and caution when a reasonable business establishment would have exercised under the same in similar circumstances; and
- H) Such other and further particulars of the evidence at trial may show.

All of which combined contributed as a direct and proximate cause of the injuries and damages suffered by Mr. Witherspoon, set acts being in violation of the laws of the State of South Carolina.

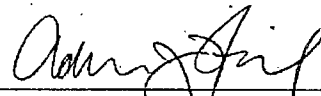
19) Progressive is informed and believes that it has a right of contribution provided for by South Carolina code § 15-38-10, et seq., in that this Defendant had a common liability to Mr. Witherspoon, in addition to the liability of Ryan McGuire, Kevin McGuire, and Betty McGuire.

20) Thus Progressive is informed and believes that the settlement in this case of

\$180,000.00 and obtaining full release and favor of all parties, including the Defendant herein, Progressive has paid a disproportionate share of the common liability to the Plaintiff in the underlying lawsuit. Progressive is, therefore, entitled to pursue this contribution claim against the Defendant. Progressive is further informed and believes that it is entitled to a Judgment against this Defendant for its pro-rata share of this settlement, together with interest thereon at the legal rate from the time Progressive paid its disproportionate share of the liability to Mr. Witherspoon until such time as a verdict is satisfied according to South Carolina code § 15-38-20, § 15-38-30, and § 15-38-40.

WHEREFORE, Progressive prays for a Judgment against this Defendant in the amount of its pro-rata share of the settlement paid to Mr. Witherspoon, together with interest thereon from the date of the settlement payment until such time that this judgment is paid and satisfied together with the cost of this action and for such other and further relief if the court may be unjust and proper.

MURPHY & GRANTLAND, P.A.



John M. Grantland, Esquire
Adam J. Neil, Esquire
4406-B Forest Drive (29206)
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
August 30, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO.: 07-CP-10-3920
Progressive Max Insurance Company,	)	
	)	ANSWER TO AMENDED
Plaintiff,	)	COMPLAINT
vs.	)	(Jury Trial Demanded)
Floating Caps, Inc. d/b/a Silver Dollar	)	
Cafe,	)	
	)	
Defendant.	)	

The defendant, above-named, answering the Amended Complaint of the above-named plaintiff, alleges and says as follows:

1. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 1 of the Amended Complaint and therefore denies the same.
2. That the defendant admits the allegations contained in paragraph 2 of the Amended Complaint.
3. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 3 of the Amended Complaint and therefore denies the same.
4. In response to paragraph 4 of the Amended Complaint, said paragraph contains no allegations, and therefore no response is required to same.
5. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 5 of the Amended Complaint and therefore denies the same.
6. That the defendant admits so much of the allegations of paragraph 6 of the Amended Complaint as alleges that on the night in question, Ryer McGuire had been inside The Silver Dollar, but denies all other allegations contained in said paragraph.

7. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 7 of the Amended Complaint and therefore denies the same.
8. That the defendant denies the allegations contained in paragraph 8 of the Amended Complaint.
9. That the defendant denies the allegations contained in paragraph 9 of the Amended Complaint.
10. That the allegations of paragraph 10 are conclusions of law, and the defendant is not required to answer the same.
11. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 11 of the Amended Complaint and therefore denies the same.
12. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 12 of the Amended Complaint and therefore denies the same.
13. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 13 of the Amended Complaint and therefore denies the same.
14. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 14 of the Amended Complaint and therefore denies the same.
15. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 15 of the Amended Complaint and therefore denies the same.
16. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 16 of the Amended Complaint and therefore denies the same.
17. That the defendant lacks sufficient information to form a belief as to the allegations of paragraph 17 of the Amended Complaint and therefore denies the same.

18. That the defendant denies the allegations contained in paragraph 18 of the Amended Complaint.
19. That the defendant denies the allegations contained in paragraph 19 of the Amended Complaint.
20. That the defendant denies the allegations contained in paragraph 20 of the Amended Complaint.

FURTHER ANSWERING THE AMENDED COMPLAINT

AND AS AN AFFIRMATIVE DEFENSE THERETO,

THE DEFENDANT ALLEGES AND SAYS:

(Violation of Constitutional Guarantees)

21. That the plaintiff, to the extent that he/she seeks punitive or exemplary damages, if any, is in violation of the rights of the defendant under the United States Constitution and the Constitution of the State of South Carolina and, therefore, fails to state a cause of action upon which either punitive or exemplary damages may be awarded.

WHEREFORE, having fully answered the Amended Complaint of the plaintiff, this defendant prays for a trial by jury and that the plaintiff's Complaint be dismissed, together

with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

CLAWSON & STAUBES, LLC



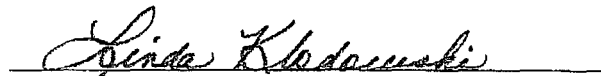
John L. McDonald, Jr.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for Defendant(s)

Charleston, South Carolina
October 5, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **ANSWER** has been served upon counsel of record by mailing a copy properly addressed with the sufficient postage affixed thereto this 10th day of October, 2007.



STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Progressive Max Insurance Company)	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 07-CP-10-3920
	)	
Floating Caps, Inc d/b/a Silver	)	
Dollar Café,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned action was held on May 25, 2010, before The Honorable R. Markl y Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Adam J. Neil, Esq.
MURPHY & GRANTLAND
P O Box 6648
Columbia, SC 29260
Appearing for Plaintiff

Francis Ervin, Esq.
PRATT-THOMAS WALKER
P O Drawer 2247
Charleston, SC 29413
Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 THE COURT: All right, I will be
2 happy to hear from you. Mr. Neil, I believe
3 that it is your Motion.

4 MR. NEIL: Yes, Your Honor. It is
5 a Motion to reconsider the summary judgment in
6 favor of the Defendant Floating Caps, Inc.
7 d/b/a Silver Dollar Café in the event that this
8 needs to be appealed.

9 Not to offend Your Honor but by way of
10 just refreshing your memory, ---

11 THE COURT: You're not offending me.

12 MR. NEIL: Thank you, Your Honor.
13 This is a contribution action.

14 THE COURT: I remember it.

15 MR. NEIL: Yes, sir. One of the
16 original plaintiffs was a Mr. Witherspoon and
17 one of the original plaintiffs was Ray McGuire
18 and his parents. The case stemmed from the
19 parties being at the Silver Dollar Café, on King
20 Street, where they -- they were underaged,
21 become intoxicated.

22 Originally the plaintiff was
23 represented by Johnny Driggers, and his
24 affidavit is in the record. Mr. Driggers has
25 testified that it was always contemplated by

1 the parties and agreed upon as to the liability
2 of the bar, Silver Dollar -- prior to the
3 action being dismissed.

4 Subsequent to the dismissal of the
5 tort action, when Progressive was preparing to
6 bring the tort action it was addressed that
7 they did not address the liability of the bar,
8 and an amendment, amended covenant, was done.

9 THE COURT: At this point the bar
10 was not ---

11 MR. NEIL: Right, because the first
12 covenant did not include Silver Dollar. The
13 amended covenant was done after 15-38-40(d) had
14 been ---

15 THE COURT: I understand and I
16 recall that was because at that time there was
17 no action pending.

18 MR. NEIL: That's correct. For
19 full disclosure, because the full statute of
20 limitations had run the action was barred.

21 At the time of the Hearing before you
22 in August last year, two things were argued.
23 One, that it was a mutual mistake between
24 Witherspoon and McGuire that ---

25 THE COURT: And let me state for the

1 record that I have your -- I usually do this
2 and if I didn't but I typically do it for the
3 very reason that I am about to state. That is
4 in the brief, your position, and it is
5 protected. The briefs are fully incorporated
6 for the purposes of review.

7 By my ruling, I didn't agree with
8 that. But I want to create a record that gives
9 both sides a fair opportunity to truly have the
10 court address the issues. I remember the case.
11 I remember my ruling.

12 Mr. Ervin, maybe you need to argue the
13 -- I recall the trigger date when this case was
14 over. When it is over, it's over.

15 Maybe it is not a good analogy, but I
16 had to do that with my father's estate. Once
17 everything is done, the estate is closed, then
18 somebody finds something that should have been
19 done. We know that they would have had to file
20 any claim before the estate was closed. I was
21 the Personal Representative, I was discharged.
22 There was a stock certificate that they wanted
23 me to transfer as the Personal Representative.
24 I could have backdated it, said, 'sorry, here
25 it is' but would not have been in keeping with

1 the law and the statute -- I'm sorry, but that
2 is in essence what you're trying to do.

3 You also said -- and I was reversed,
4 years ago, on a case because you have to do
5 everything that you have it do within the
6 timeframe.

7 MR. NEIL: With all due respect,
8 Your Honor, I disagree. The State says that
9 you can agree to reform.---

10 THE COURT: Well, -- I respect your
11 opinion but we will just stay where we are. I
12 comfortable with my decision. That reminds of
13 something, Tim Scott, -- well, no connection.
14 No comment.

15 I am comfortable with my decision.
16 Thank you.

17 (HEARING CONCLUDED)

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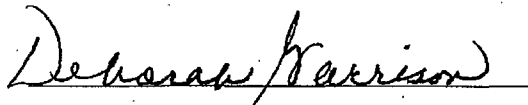
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25

CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on May 25, 2010;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

September 25, 2011

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Progressive Max Insurance Company)	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 07-CP-10-3920
	)	
Floating Caps, Inc d/b/a Silver	)	
Dollar Café,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned action was held on August 3, 2009, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Adam J. Neil, Esq.
MURPHY & GRANTLAND
P O Box 6648
Columbia, SC 29260
Appearing for Plaintiff

Francis Ervin, Esq.
PRATT-THOMAS WALKER
P O Drawer 2247
Charleston, SC 29413
Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

1 THE COURT: Motion for summary
2 judgment?

3 MR. ERVIN: Yes, Your Honor.

4 THE COURT: I will be glad to hear
5 from you, Mr. Ervin. If you will, identify
6 yourself and the party that you are
7 representing.

8 MR. ERVIN: Yes, Your Honor. My name
9 is Francis Ervin. I represent the Defendant
10 Floating Caps, doing business as Silver Dollar
11 Café.

12 THE COURT: Very well.

13 MR. ERVIN: Your Honor, just by way
14 of a brief background, this is a contribution
15 action brought by Progressive as insurer for a
16 tortfeasor in an underlying case by the name of
17 Brian McGuire.

18 Just by way of background, this case
19 arises out of a November 17th ---

20 THE COURT: I think that I have -- I
21 think that Progressive is -- my agent uses
22 Progressive, I think. Northern but they call it
23 Progressive, I think. So I have that
24 insurance. Do you have any problem with my
25 hearing this? Is it Progressive Northern?

1 COUNSEL: Progressive Max, Your
2 Honor.

3 THE COURT: That is probably not the
4 same thing.

5 MR. ERVIN: Your Honor, this case --
6 really the underlying case rises out of a
7 November 17th, 2003 incident that happened at the
8 Silver Dollar, King Street.

9 As a brief way of background, that
10 evening Mr. McGuire, the defendant in the
11 underlying case, he and his friends were at the
12 bar and it is alleged that the bar, who I
13 represent, served them; that they were underage
14 at the time, and they became intoxicated.

15 The claimant in the underlying case, a
16 Mr. Witherspoon, uh, a fight broke out, it
17 spills onto King Street and Mr. Witherspoon is
18 out there on the street with one of Mr.
19 McGuire's friends. Mr. McGuire goes and gets
20 his vehicle and comes back to pick up his friend
21 who was in the fight and in the melee he
22 inadvertently, whether intentional or not, runs
23 over a couple of pedestrians who are outside on
24 the street, including Mr. Witherspoon. Uh,
25 sustained serious injuries.

1 Mr. Witherspoon then brings suit
2 against Mr. McGuire and against Mr. McGuire's
3 parents, who are the owner of the vehicle. This
4 was all filed within the statute of limitations,
5 by November 2006.

6 By April, April the 20th of 2007, the
7 parties enter into a covenant not to execute.
8 Progressive/McGuire, they sign off with
9 Witherspoon. Witherspoon reserves his right to
10 pursue underinsured motorist coverage, which he
11 does have, and he doesn't pursue.

12 If you look at Exhibit A -- Your Honor,
13 did you get a copy of my memorandum that I filed
14 last week?

15 THE COURT: It's not in the file, but
16 I am sure if it's filed. The memoranda are
17 incorporated fully for the purposes of review.

18 MR. ERVIN: Exhibit A to the
19 memorandum that I filed last week, Your Honor,
20 is the April 20th Covenant Not to Execute that
21 was signed in settlement of the underlying case.

22 As I indicated earlier, this is a
23 contribution action. So under the Contribution
24 Act, in order for Progressive to preserve their
25 right of contribution against the Silver Dollar,

1 they remain a party. It was alleged that they
2 were a joint tort feisor. If they do it by way
3 of settlement, they must extinguish the
4 liability of the Silver Dollar. That is under
5 15-38-20(d).

6 Now, the case does not go to judgment,
7 which I think opposing counsel would concede is
8 the case, they haven't said anything about going
9 to judgment, under 15-38-40(d), (1) and (2) sets
10 forth really the criteria to preserve their
11 right to contribution. Under 15-38-40(d)(1),
12 the settling tort feisor, Progressive/McGuire
13 would need to settle and pay, basically
14 extinguishing that common liability within the
15 statute of limitations. I think opposing
16 counsel concedes that they did not meet that
17 section one, because the filing was outside the
18 statute.

19 So we go down to 15-38-40(d)(2) which
20 states that while the action is still pending
21 that Progressive can discharge that liability of
22 the Silver Dollar, preserving their right to
23 proceed.

24 Under 15-38-50, it says that if there
25 is a release, a covenant not to execute, it will

1 not release any potential joint tort feisor
2 unless the terms expressly states it, must abide
3 by the release.

4 Your Honor, we would submit to you
5 that, Exhibit A, the April 20th, 2007 Covenant
6 Not to Execute, did not extinguish or discharge
7 any liability of the Silver Dollar. As a matter
8 of fact, if you look at it, the Silver Dollar is
9 not mentioned expressly whatsoever within the
10 four corners of the document. We will submit to
11 you, Your Honor, that under our case law that
12 this Release, same principles of contract law,
13 that you need to look to the terms to see if
14 there is any ambiguity there to find out what
15 the intent of the parties were. We would submit
16 it's a clear, unambiguous document that does
17 not, expressly or otherwise, discharge any
18 liability of the Silver Dollar.

19 In fact, paragraph three of Exhibit A,
20 they expressly state that this company "does not
21 release, nor shall be construed as a release, of
22 any party, person, firm or corporation.

23 So we say that even if they argue that
24 there was an intent to discharge the Silver
25 Dollar, by its express terms, it doesn't release

1 anyone. It allows Witherspoon to proceed for
2 UIM coverage, which he does.

3 So by May 8th, 2007, after Witherspoon
4 has proceeded again UIM and has collected,
5 Exhibit B is the Order of Dismissal, signed by
6 Judge Norton, filed in the District Court.
7 So on May 8th, 2007, the case is dismissed.

8 Subsequent to the dismissal, Exhibit C
9 comes around. Progressive realizes that they
10 made a mistake, they did preserve their right of
11 contribution. In an attempt to do so, they sign
12 another Covenant Not to Execute on July 31st,
13 2007, after the case has already been dismissed.
14 We would submit, Your Honor, that as July 31st,
15 which is Exhibit C, it was -- not timely, for
16 one. If this court were to somehow entertain
17 the idea that it was timely executed,
18 potentially preserving their rights, we would
19 submit, Your Honor, that by its own terms they
20 do not preserve their right to discharge -- they
21 do not discharge any liability of Silver Dollar.

22 They actually expressly stated, in
23 paragraph three, that the parties "were desirous
24 of pursuing a contribution claim." That is the
25 terms that they used. They don't say that is

1 extinguishes or discharges any liability of the
2 Silver Dollar. Then in the subsequent paragraph
3 after three, paragraph four of that same
4 Covenant, there is same exact language as the
5 first Covenant; that this is not to be construed
6 as a release of any party.

7 So, Your Honor, we would submit to the
8 Court that Progressive has failed to preserve
9 their right of contribution under the statute.
10 We think the statute is clear. We think that
11 this court must give this practical meaning,
12 interpretation of what the Legislature meant by
13 "extinguishing" or "discharging" that liability.
14 They have not met the letter of the statute and,
15 Your Honor, we think that it is untimely, that
16 the contribution plan cannot stand because they
17 did not preserve it. I think that we are
18 entitled to summary judgment.

19 THE COURT: Okay.

20 MR. ERVIN: Thank you, Your Honor.

21 MR. NEIL: May it please the Court,
22 Your Honor. I am Adam Neil, here on behalf of
23 the Plaintiff, Progressive Max, in this matter.

24 Mr. Ervin's recitation of what has
25 transpired in this case is generally accurate,

1 Your Honor, but we believe that Progressive
2 still is entitled to pursuant contribution
3 against the Silver Dollar Café on the basis of
4 the Covenant, the second covenant that was
5 entered into.

6 Your Honor, ---

7 THE COURT: But that was after the
8 case had been dismissed?

9 MR. NEIL: That is true, Your Honor.
10 There is case law in South Carolina however
11 that, as Mr. Ervin alluded to, that says
12 settlement agreements are to be treated as
13 contracts under South Carolina law. There is
14 law in South Carolina -- handing up this case,
15 Your Honor, *Ward v West Oil Company* ---

16 THE COURT: I don't need you to do
17 that.

18 MR. NEIL: The citation is 379 SC
19 225. Your Honor, in that case what the court
20 said is -- just for purposes of clarity, Judge,
21 that is a very recent case out of the Court of
22 Appeals. Cert has been awarded or granted by
23 the Supreme Court. We don't cite the case as a
24 whole, we cite the case for the law that's in
25 there, which I think is generally undisputed.

1 That settlement agreements are to be
2 treated like contracts. And contracts, when
3 there are two documents that relate to the same
4 topics, they are to be treated as one document
5 or one contract when they relate to the exact
6 same terms and the exact same factual scenario.
7 Clearly that's what happened here.

8 The evidence in the record here --
9 first of all, I don't think that there is any
10 question, and Mr. Ervin hasn't disputed it, that
11 there is a factual question as to whether the
12 Silver Dollar Café is a joint tort feisor.
13 There are allegations and there is evidence in
14 the record that they served minors, that they
15 served them afterhours, that they became
16 intoxicated. So under the dram shot statute,
17 there is a joint tort feisor status.

18 So then we go to whether the document
19 that we have extinguished their liability. The
20 first covenant was executed within the period of
21 time when the case was pending.

22 As I just set out, Your Honor, the
23 second document, we believe, is simply a
24 correction of a mutual mistake.

25 THE COURT: How do we -- the problem

1 that I have is that the parties that existed and
2 the capacity of the parties that existed, in the
3 second contract, are not true. That's a fraud.
4 Isn't it?

5 MR. NEIL: Your Honor, ---

6 THE COURT: Because you are
7 representing something that exists, that these
8 parties have an action. They don't have an
9 action. It's over.

10 MR. NEIL: It's true, Your Honor,
11 that at the time that the second document was
12 executed that they didn't have the action, that
13 the case had been dismissed. However, that
14 document should relate back to the execution of
15 the original document that ---

16 THE COURT: The capacity -- my point
17 is that they are the same people, but they can't
18 contract settlement because there is nothing to
19 settle, the case is over.

20 MR. NEIL: Correct, Your Honor.
21 They weren't settling a new claim.

22 THE COURT: I understand. The
23 covenant -- I mean, how do you come in -- to me,
24 I will tell you what it sounds like. It sounds
25 like an Oops! contract, that 'I see I didn't

1 cover my bases.' I don't fault you for trying,

2 I just don't know how you do that.

3 MR. NEIL: Well, Your Honor, if you
4 look at the affidavit of Mr. Driggers, and that
5 is in the record, -- Johnny Driggers represented
6 the plaintiff in the underlying case. Mr.

7 Driggers has testified by way of his affidavit,

8 and it is clearly evidence in the second

9 covenant, that it was always the intent of the

10 parties to allow Progressive to pursue a

11 contribution action. That term was

12 inadvertently left out of the original ---

13 THE COURT: We don't need to argue.

14 I don't think that there is any question that --

15 I mean, I -- you don't have to convince me that

16 the Silver Dollar could be a tortfeasor. Okay?

17 A joint tortfeasor. That's not -- that's not a

18 real obstacle.

19 Nor do you have to convince me that

20 Progressive wanted to pursue a contribution.

21 I don't have any problem with that.

22 The problem that I have is that this is

23 where a contract -- I don't think that you can

24 modify the terms of the statute and you have to

25 comply with the statute. How do you comply with

1 the statute in this situation?

2 MR. NEIL: Your Honor, assuming that
3 the first covenant had included the terms that
4 the second covenant ---

5 THE COURT: But it didn't. It didn't
6 have it, so we can't assume that.

7 MR. NEIL: I understand but -- I
8 think that if it had that we would not be here,
9 because everybody would agree that ---

10 THE COURT: Maybe not. I don't know.

11 MR. NEIL: --- the first covenant
12 would have preserved the right. The second
13 covenant is simply an effort to conform the
14 first on account of a mutual mistake.

15 THE COURT: The problem is, would you
16 agree with me that the second covenant, the time
17 has run ---

18 MR. NEIL: Yes, Your Honor.

19 THE COURT: --- according to the
20 statute, at the time it was executed?

21 MR. NEIL: Yes, Your Honor.

22 THE COURT: Time has expired?

23 MR. NEIL: Yes. So the question is
24 whether that covenant relates back to the first
25 covenant, which was done in time. And, Your

1 Honor, the position that we taken and the point
2 is that it was always the intent of the parties,
3 under the original one to do it that way.

4 THE COURT: I appreciate the intent
5 but the intent can't change the law. The law
6 says that you've got to do certain things.
7 That's the problem. It's like if I have a
8 lawsuit and I really intend to file it before
9 the statute of limitations runs and everybody
10 knows, I mean, I've been talking to the
11 insurance adjuster, 'I am going to sue you,
12 here my Complaint, here is everything.' Then
13 for whatever reason, I don't file it timely and
14 serve it timely, everybody knows what my intent
15 is. You're telling me that 'everybody knows
16 the intent, now I am just complying with the
17 intent that everybody knew about..'

18 MR. NEIL: Well, Your Honor, is
19 that context you certainly -- the statute of
20 limitations could have been waived by the other
21 party.

22 THE COURT: But it wasn't.

23 MR. NEIL: Sure.

24 THE COURT: Do you understand?

25 MR. NEIL: (Affirmative nod) I

1 understand what you're saying. I believe that
2 this case is a little bit different, Your
3 Honor, because general contract law in South
4 Carolina says if there is a mutual mistake that
5 contract can be reformed.

6 THE COURT: I don't have any problem
7 with you'all saying, 'Wait a minute, we need to
8 correct something.' I don't have any problem
9 with any of that.

10 The problem is that you can't change
11 the law. You can't change what existed at the
12 time that you went and did this. You had to
13 comply with the statute. You simply -- that
14 covenant can't relate back, jump back in time.
15 There's no way.

16 MR. NEIL: Well, I think it does,
17 Your Honor, and that's our ---

18 THE COURT: I appreciate it. Based
19 on what? What statutory scheme?

20 MR. NEIL: Your Honor, you can look
21 at -- I don't think it deals with the statute,
22 Your Honor. I think that it deals with
23 contract interpretation.

24 THE COURT: I appreciate that. That
25 is where you and I have to part ways. I will

1 tell you why -- to me, it's kinda of what --
2 it's a -- maybe it is a poor analogy, maybe I
3 ought not to even say it. But I was reversed
4 on 40J, uh, wanted to try to restore a case
5 after the expiration of -- because the statute
6 of limitations had run. A similar situation.
7 The parties were -- there was an argument -- we
8 knew that it was going to be restored, it was
9 intended to be restored. I said 'no, can't
10 have it.' Well, the Court said, 'No, no, you
11 can agree to waive these rules because they are
12 not basically matters of law, but you can't
13 waive the statute. You can agree to file the
14 action but you can't do anything with this
15 thing that is sitting over here.' That sitting
16 over here is the statute.

17 I understand what you wanted to do.
18 If you had done it before the case had been
19 dismissed, maybe you've got an argument there
20 because now there's an existing action, the
21 statute -- the statute even acknowledged that,
22 the covenant, because you said in the second
23 one, as I understand it, 'Wait a minute, we
24 want to pursue this', which is precisely what
25 they should have said in the first one. We all

1 know that, but it didn't.

2 So -- I'm sorry. I mean, I -- I
3 appreciate your argument. Maybe -- you know,
4 when I get reversed on things like these,
5 that's okay. At least I will be clear -- clear
6 it up for the next one. I just don't see how
7 you -- I don't have any problem with anything
8 that you're saying. I think the parties are
9 correct, they are -- what that document didn't
10 provide. I don't think that there is any
11 question as to what they intended. The problem
12 is that we have someone who wasn't a party. We
13 all agree with that. They have certain rights
14 that flow from that statute. Therein lies the
15 problem. We can correct your situation but we
16 can't give you -- we can't open the door.

17 That is my -- I've probably
18 articulated too much. I appreciate your
19 position but I must respectfully differ with
20 you. I grant summary judgment. Do we need a
21 formal Order?

22 MR. NEIL: Yes, Your Honor, I
23 believe that I would like one.

24 THE COURT: Mr. Ervin, if you would,
25 -- and I understand that. If you would, just

1 state the position -- I think that I have
2 articulated basically what -- I think the
3 timing, that it is lost because it didn't occur
4 before it was dismissed. That is the key
5 factor.

6 MR. ERVIN: Yes, sir.

7 THE COURT: Thank you, sir.

8 (HEARING CONCLUDED)

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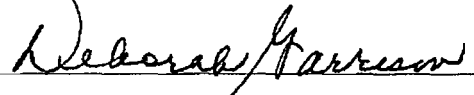
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25

CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on August 3, 2009;

I further certify that I am neither kin
nor counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

September 25, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
PROGRESSIVE MAX INSURANCE COMPANY,
☐ Plaintiff(s)

vs.

FLOATING CAPS, INC. D/B/A SILVER DOLLAR CAFE,
☒ Defendant(s)

IN THE COURT OF COMMON PLEAS

CASE NO. 07-CP-10-3920

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Plaintiff's Attorney: John M. Grantland
Bar No:
Address: Murphy & Grantland, P.A.
4406-B Forest Drive
P.O. Box 6648
Columbia, SC 29260

Phone: (803) 782-4100 Fax: (803) 782-4140
email: Other:

Defendant's Attorney: John L. McDonald, Jr.
Bar No: 12019
Address: CLAWSON & STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144

Phone: (843) 577-2026 Fax: (843) 722-2867
email: @clawsonandstaubes.com Other:

- ☒ MOTION HEARING REQUESTED (Attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: **MOTION FOR SUMMARY JUDGMENT**

Estimated Time Needed: 15 Min.

Court Reporter Needed: ☐ YES ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 21, 2008
Date Submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

- ☐ EXEMPT: (Check Reason)
- ☐ Rule to Show Cause in Child or Spousal Support
 - ☐ Domestic Abuse or Abuse and Neglect
 - ☐ Indigent Status ☐ State Agency v. Indigent Party
 - ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
 - ☐ Motion for Stay in Bankruptcy
 - ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
 - ☐ Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
 - ☐ Other

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____
(Print Name)

DATE FILED: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Progressive Max Insurance Company,
Plaintiff,
vs.
Floating Caps, Inc. d/b/a Silver Dollar
Cafe,
Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO.: 07-CP-10-3920 ✓

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**

FILED
2008 MAR 28 AM 10:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY DA

PLEASE TAKE NOTICE that the Defendant, by and through its undersigned attorney, shall, and hereby does, move this Honorable Court for an Order granting summary judgment in favor of the Defendant in the above-captioned matter upon the grounds that there exists no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law in its favor.

This Motion is based upon the pleadings in the within action, memorandum in support of this motion and attachments thereto, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be appropriate. The grounds for this motion are that the Covenant Not to Execute that is the subject of this suit (Exhibit A) fails to discharge Defendant Floating Caps, Inc. Pursuant to SC Code 15-38-50.

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

RULE 11 CERTIFICATION

I certify that consultation with opposing counsel on the subject of the within Motion would serve no useful purpose.

CLAWSON & STAUBES, LLC

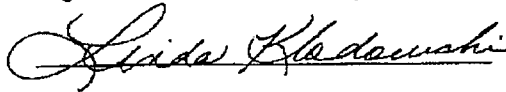


John L. McDonald, Jr.
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorney for Defendant

March 26, 2008

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true copy of the foregoing pleading **Notice of Motion and Motion to Dismiss** has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 26th Day of March, 2008.



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) COVENANT NOT TO EXECUTE

This COVENANT made this 20 day of APRIL, 2007, by and between Robert M. Witherspoon, IV, hereinafter referred to as "Covenantor" and Kevin McGuire, Betty McGuire, Ryan McGuire, The Cincinnati Insurance Companies and Progressive Max Insurance Company hereinafter referred to as "Covenantees".

WHEREAS, on November 17, 2003, in Charleston County, South Carolina, the Covenantor, Robert M. Witherspoon, IV, was injured when struck by the vehicle driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire; and

WHEREAS, the automobile being driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire was insured by Progressive Max Insurance Company and The Cincinnati Insurance Company; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of November 17, 2003, may exceed the liability limits of the insurance policy of Covenantees, and the Covenantor is desirous of protecting his right to proceed to suit against the Covenantees for purposes of collecting underinsured benefits or any other insurance benefits which may apply;

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars by the Covenantees-One Hundred Eighty Thousand and no/100 (\$180,000.00) paid by Progressive Max Insurance Company and Twenty Thousand and no/100 (\$20,000.00) paid by The Cincinnati Insurance Companies, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of their claim with any underinsured carrier or any other carriers which may have liability insurance applicable to the accident of November 17, 2003, the Covenantor shall have the right to bring suit against the Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars, Covenantor, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for their or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in any lawsuit arising out of the November 17, 2003, accident except as herein stated. Further, that upon

reduction to Judgment of the aforementioned lawsuit that Covenantor, their subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, that this agreement or copy hereof shall be considered a satisfaction of any Judgment in any case presented by Covenantor against Covenantees for the accident dated May 22, 2005, and can be recorded as such should Covenantor, their subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. ~~4.1.1.1.~~ Covenantor will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys with the exception of underinsured motorist coverage.

5. In executing this agreement, Covenantor represent and warrant that it has relied on their investigation and have not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agree that if there exists any subrogation, assignment, lien, or interest; whether created by contract, statute or otherwise, that they will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement the Covenantees does not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits or any other insurance coverage which may apply and the Covenantor expressly acknowledge this disclaimer.

8. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Progressive Northern Insurance Company abreast of developments in their attempt to collect underinsured motorist benefits or other insurance coverage which may apply, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage or other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

9. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

10. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company and The Cincinnati Insurance Companies from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

11. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

12. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

13. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

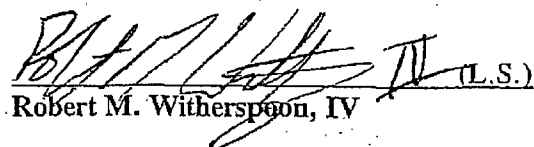
14. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

15. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

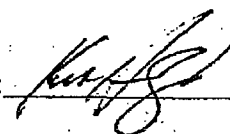
AS TO COVENANTOR:



 (L.S.)
Robert M. Witherspoon, IV

AS TO COVENANTEE:

Progressive Max Insurance Company

BY:  (L.S.)

other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

10. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

11. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

12. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

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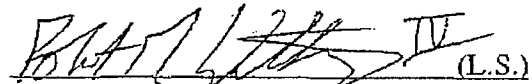
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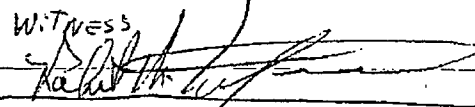
15. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

16. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:


Robert M. Witherspoon, IV (L.S.)

WITNESS

3 Robert M. Witherspoon III

AS TO COVENANTEE:

AS TO COVENANTEES:

The Cincinnati Insurance Companies

BY *John H. King* (L.S.)

(L.S.)
Kevin McGuire

(L.S.)
Betty McGuire

(L.S.)
Ryan McGuire

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 07-CP-10-3920

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

**AFFIDAVIT OF
JOHNNY F. DRIGGERS, ESQUIRE**

FILED
JUN 26 AM 11:44
CLERK OF COURT
BY J. ARMSTRONG

PERSONALLY APPEARED BEFORE ME, the undersigned Johnny F. Driggers,

Esquire, who after being duly sworn, deposes and says:

1. My name is Johnny F. Driggers, Esquire.
2. I am above 18 years of age.
3. I make this affidavit based on my knowledge and observations.
4. I represented Robert M. Witherspoon, IV, the Plaintiff in the underlying tort action from which contribution is sought by Progressive Max Insurance Company in this declaratory judgment action.
5. The underlying tort action arose from an alleged incident that occurred on November 17, 2003, in which my client, a pedestrian, was struck by a vehicle operated by Ryan McGuire and owned by Ryan's parents.
6. I brought separate tort actions on behalf of my client against Ryan McGuire and his parents which were consolidated. The consolidated tort action was styled Robert M. Witherspoon, IV, v. Ryan McGuire, Civil Action No. 2:06-1089-DCN.

7. Although my client also had potential tort claims against Floating Caps, Inc. d/b/a Silver Dollar Café (Silver Dollar) for, among other things, selling alcohol to a minor and selling alcohol to an intoxicated person, I made a tactical decision to assert all claims arising from the incident against Ryan McGuire. I also withdrew Plaintiff's claims of negligent entrustment and family purpose doctrine against Ryan McGuire's parents. My strategy was not to diffuse any liability against Ryan McGuire for his actions.

8. I did not bring a separate action on behalf of my client against Silver Dollar, nor has any claim been brought on behalf of my client against Silver Dollar arising from the above-named incident.

9. Witherspoon's claim against the McGuires was settled for \$200,000.00 on April 7, 2007.

10. I then pursued underinsured motorist coverage on behalf of my client. Once the UIM case was settled, Witherspoon's action against the McGuires was dismissed on May 8, 2007.

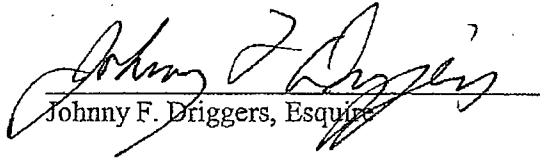
11. In settling the tort action brought by Witherspoon, the parties entered into a Covenant Not To Execute which was dated April 20, 2007.

12. The settlement was entered into with the understanding that the McGuire's auto insurance carrier, Progressive, would bring a subrogation action for contribution against Silver Dollar. It was the intent of the parties that the Covenant Not To Execute was in satisfaction of all claims arising from the incident, including Witherspoon's potential claims against Silver Dollar.

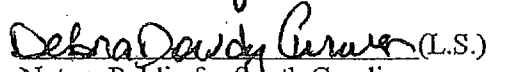
13. The revised Covenant Not To Execute, which the parties executed on July 31, 2007 and which contains an express recital protecting Progressive's claim against Silver Dollar,

is evidence of the parties' intent that the settlement extinguish any claim Witherspoon had against Silver Dollar.

FURTHER AFFLIANT SAYETH NOT


Johnny F. Driggers, Esquire

SWORN to and subscribed before me
this 22 day of June, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 07/08/09

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 07-CP-10-3920

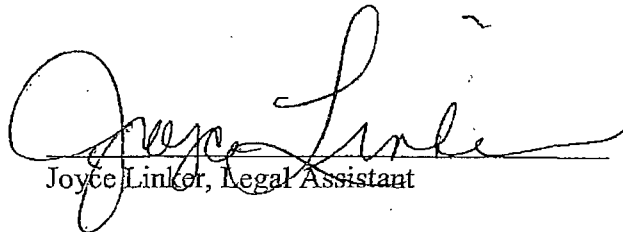
CERTIFICATE OF SERVICE

2009 JUN 26 AM 11:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FILED

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Progressive Max Insurance Company, do hereby certify that I have served a copy of the foregoing, Affidavit of Johnny Driggers, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Frances M. Ervin, III, Esquire
Pratt-Thomas, Pearce, Epting & Walker, PA
16 Charlotte St.
P.O. Drawer 22247
Charleston, SC 29413-2247


Joyce Linker, Legal Assistant

Columbia, South Carolina
November 8, 2007

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 07-CP-10-3920

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

**MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

**TO: JOHN L. MCDONALD, JR., ESQUIRE, AND JONATHAN S. ALTMAN,
ESQUIRE, ATTORNEYS FOR DEFENDANT AND TO THE DEFENDANT
NAMED ABOVE:**

Plaintiff Progressive Max Insurance Company ("Progressive") submits this Memorandum of Law in opposition to Defendant Floating Caps, Inc. d/b/a Silver Dollar Café's ("Silver Dollar") motion for summary judgment.

BACKGROUND

This is an action for contribution brought pursuant to the South Carolina Contribution Among Tortfeasors Act (Contribution Act), S.C. Code Ann. §§ 15-38-10, et seq. (2005 and Supp. 2007). Silver Dollar has moved for summary judgment on the basis that Progressive is not entitled to contribution because the release in the tort action did not discharge Silver Dollar's liability. However, genuine issues of material fact exist as to whether the parties intended to discharge Silver Dollar's liability which make summary judgment inappropriate at this time.

The underlying tort action arose from a fight that broke out outside the Silver Dollar Café, a bar located in Charleston, South Carolina, during the early morning hours on November 17, 2003. Well after legal hours, Silver Dollar continued selling alcohol to Ryan McGuire, who was underage and intoxicated. During a drunken brawl, McGuire struck two other patrons of the

bar with his vehicle as they were leaving the Silver Dollar Café. The vehicle McGuire was driving was owned by his parents, Kevin and Betty McGuire. The vehicle was insured under a liability policy issued by Progressive and an umbrella policy issued by another carrier.

Separate tort actions were brought against Ryan McGuire and his parents by Ernest Grant Cook and Robert M. Witherspoon, IV. (Complaint, Ernest Grant Cook v. Ryan McGuire, et al., Case No. 06-CP-10-4521, attached as Exhibit A; Complaint, Robert M. Witherspoon, IV v. Ryan McGuire, Civil Action No. 2:06-1089-DCN, attached as Exhibit B.) Silver Dollar was named as a defendant in the Cook action. (Exhibit A.) However, Witherspoon opted to sue only Ryan McGuire. (Exhibit B.) Witherspoon later amended his Complaint to add Ryan's parents as parties. (Complaint, Robert M. Witherspoon, IV v. Kevin M. McGuire and Betty E. McGuire, Civil Action No. 2:06-3197-DCN, attached as Exhibit C.) Witherspoon's actions against Ryan and his parents were consolidated. (Consent Order to Consolidate, attached as Exhibit D.)

The Cook Complaint alleged that, among other things, the Silver Dollar bar sold alcohol to a minor, sold alcohol after the legal hours, and sold alcohol to an intoxicated person. (Exhibit A, ¶ 4.) These facts were evident in the Witherspoon case also and are undisputed at this time.

Ryan McGuire testified in his deposition in the Witherspoon action that he was born on November 4, 1983, which establishes that Ryan had just turned 20 and was therefore under the legal age for drinking alcohol on the night of the incident. (Ryan McGuire dep., p. 5, 35, excerpts attached as Exhibit E.) McGuire testified that he was a regular at the Silver Dollar since his freshman year in college and his identification was never checked. (Id. at 34-37, 45.) McGuire's identification was never checked at the Silver Dollar because he knew the bartender or bouncer, Calhoun. (Id. at 34-35, 45.)

McGuire testified that on the night the incident occurred, he arrived at the Silver Dollar with some friends around 1:00 a.m. (McGuire dep., p. 39.) McGuire was served alcohol on the premises that night – he drank beer or bourbon and Coke. (Id. at 36.) McGuire had at least two to three beers at the Silver Dollar that night. (Id. at 42.) McGuire’s girlfriend was also underage and was also drinking. (Id. at 38, 40.)

McGuire testified that another of his friends, Will Irvin, was drinking kamikaze shots and beer at the Silver Dollar and “getting pretty smashed.” (McGuire dep., pp. 42-44.) Will himself admitted in his deposition that he became intoxicated at the Silver Dollar. (William Sean Irvin, Jr. dep., pp. 19, 24-25, excerpts attached as Exhibit F.) Will testified he could only vaguely recall the events of that night, in part because he was intoxicated at the time. (Id. at 18-19.) Will’s date of birth is May 6, 1984, making him only 19 at the time of the incident. (Irvin dep., p. 5.)

McGuire testified that he and his friends were allowed to stay at the Silver Dollar after it was required to close at 2:00 a.m. (McGuire dep., pp. 42-43.) Witherspoon testified in his deposition that he and his friends were also allowed to stay in the Silver Dollar until well after 2:00. (Robert M. Witherspoon IV dep., pp. 32-33, excerpts attached as Exhibit G.) Another witness, Blain Stout, also testified that he and his friends “shouldn’t have been in there” because it was after legal hours. (Blain Stout dep., p. 17, excerpts attached as Exhibit H.)

Around 3:00 or 3:30 a.m., Calhoun told Will to leave the Silver Dollar. (McGuire dep., p. 46; Stout dep., p. 17.) Will, Ryan, their girlfriends, and the others all left at the same time. (McGuire dep., p. 48.) The reason Will was told to leave is because he was not tipping extra since they had been allowed to stay in the Silver Dollar after legal hours. (Id. at 46; Irvin dep., p. 26.) Will and Calhoun got into a shouting match, and Will went after Calhoun with a baseball

bat he took from the vehicle. (McGuire dep., p. 46-53.) Ryan testified that Will's aggression was uncharacteristic and he believed it was due to alcohol. (Id. at 50-51.) Ryan got into the vehicle and went back to get Will as the others were beating Will up. (Id. at 55-56.) As the fight continued, Ryan struck several people with the Jeep, including Witherspoon. (McGuire dep., p. 56-57; Witherspoon dep., pp. 38-40.)

Witherspoon's claims against McGuire were eventually settled for a total of \$200,000.00, of which Progressive paid \$180,000.00 and \$20,000.00 was contributed by the umbrella policy carrier. (Covenant Not to Execute dated April 20, 2007, attached as Exhibit I.) Witherspoon then pursued underinsured motorist (UIM) coverage. (Affidavit of Johnny F. Driggers, Esquire ¶ 10, attached as Exhibit J.) Once the UIM case settled, Witherspoon's action against the McGuires was dismissed. (Id.)

Silver Dollar's liability is clear because it sold alcohol to a minor, sold alcohol after the legal hours, and sold alcohol to an intoxicated person. Although Witherspoon had potential tort claims against Silver Dollar, Witherspoon never sued Silver Dollar. (Id. at ¶ 8.) Instead, counsel for Witherspoon made a tactical decision to assert all claims arising from the incident against Ryan McGuire. (Id. at ¶ 7.) Witherspoon also withdrew his claims of negligent entrustment and family purpose doctrine against Ryan's parents. (Id.) Witherspoon's strategy was to avoid diffusing any liability against Ryan McGuire for his actions. (Id.)

In settling the tort action brought by Witherspoon, the parties entered into a Covenant Not To Execute which was dated April 20, 2007. (Affidavit of Driggers, ¶ 11.) The settlement was entered into with the understanding that Progressive would bring a subrogation action for contribution against Silver Dollar. (Id. at ¶ 12.) It was the intent of the parties at the time of the settlement that the Covenant Not To Execute was in satisfaction of all claims arising from the

incident, including Witherspoon's potential claims against Silver Dollar. (*Id.*) The Covenant was signed by the parties and dated April 20, 2007. (Exhibit J.)

Shortly thereafter, both parties recognized that the signed document did not reflect the intent of the parties at the time of the settlement. Based on the mutual recognition that Progressive intended to bring a contribution action against Silver Dollar, a revised Covenant was again signed which contained a term reflecting the parties' true intent. (Revised Covenant Not To Execute, attached as Exhibit K.) The revised Covenant Not To Execute, which the parties executed on July 31, 2007 and which contains an express recital protecting Progressive's claim against Silver Dollar, is evidence of the parties' intent that the settlement extinguish any claim Witherspoon had against Silver Dollar. (Affidavit of Driggers, ¶ 13.)

Progressive then initiated this subrogation action pursuant to section 15-38-20(E) of the South Carolina code against Silver Dollar for contribution. Silver Dollar filed its motion for summary judgment on March 28, 2008.

ARGUMENT

I. Summary Judgment standard.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Id.* Since summary judgment is a drastic remedy, it should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. Connor v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002). Summary judgment is not appropriate

where further inquiry into the facts of the case is desirable to clarify the application of the law.

Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

II. Defendant's motion for summary judgment must be denied because evidence exists that the parties intended the Covenant to extinguish Witherpoon's claim against Silver Dollar.

Where two or more persons become jointly or severally liable in tort for the same injury, a right of contribution arises by operation of law in favor of the tortfeasor who has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(A) and (B). Contribution may be enforced in a separate action whether or not judgment has been entered in an action against two or more tortfeasors. S.C. Code Ann. § 15-38-40(A). If there is no judgment against the tortfeasor seeking contribution he may preserve his right to contribution by agreeing while the action against him is pending to discharge the common liability and by paying the liability and commencing an action for contribution within one year of the agreement. S.C. Code Ann. § 15-38-40(D).

Under the common law, the release of one of multiple joint tortfeasors resulted in the release of all. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). The South Carolina Court mitigated the harsh effects of this rule by holding that the release of one tort defendant does not release all:

Being untrammelled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Bartholomew v. McCartha, 255 S.C. 489, 492, 179 S.E.2d 912, 914 (1971). This doctrine has been codified in the Contribution Act. S.C. Code Ann. § 15-38-50 (providing that a release or covenant not to execute given in good faith by one tort defendant does not release other tort

defendants unless the terms of the release or covenant so provide). Section 15-38-50 does not dictate procedure, but simply explains the ultimate effect of a release or covenant. Ellis v. Oliver, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999).

The Defendant's motion for summary judgment is based on the argument that the covenant executed between Witherspoon and the McGuires failed to discharge Witherspoon's claims against Silver Dollar. The motion should be denied because it is clear from the evidence that the parties intended to discharge the claims against Silver Dollar when they entered into the settlement.

The fact that Silver Dollar was not named as a defendant in the original action is not conclusive, in and of itself, that the settlement in the McGuire action did not discharge Witherspoon's claims against Silver Dollar. Bowers v. Dep't of Transp., 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004). In Bowers, Byson was injured in an auto accident that was Jones' fault. Id. at 151, 600 S.E.2d at 544. Byson sued Jones and the parties settled for \$9,000. Id. Byson signed a release in favor of Jones and her liability carrier. Id. Jones also signed a release after accepting payments for the property damage and personal injuries. Id. at 152, 600 S.E.2d at 544. Byson and Jones then brought actions against SCDOT for negligent highway maintenance. Id. The court held that the releases evidenced intent to release all tortfeasors for claims arising out of the accident, and that the claims of both Byson and Jones were satisfied in the prior action. Id. at 156, 600 S.E.2d at 546. The court granted summary judgment in favor of SCDOT. Id.

Under Bowers, a release can operate to discharge the liability of non-parties to the action. The standard for determining which parties are discharged by a release is found in Bartholomew, 255 S.C. 489, 179 S.E.2d 912. In Bartholomew the court rejected the ancient rule that release of one tortfeasor automatically released them all. Instead, the court adopted the rule that release of

one tortfeasor does not release them all “unless this was the intention of the parties, or unless the plaintiff has, in fact, received full compensation amounting to a satisfaction.” Id. at 492, 179 S.E.2d at 914. This rule has been codified in the Contribution Among Joint Tortfeasors Act. S.C. Code Ann. s 15-38-50.

In Bowers, the court held that SCDOT’s liability was discharged because the release satisfied both prongs of Bartholomew. Bowers, 360 S.C. at 154, 600 S.E.2d at 545. The terms of the release were not limited to the parties to the release, but extended to claims against all other persons arising out of the accident. Id. Additionally, it was clear that the payments made in the prior settlement had satisfied all claims Byson and Jones had. Id. at 156, 600 S.E.2d at 546. Although Bowers was decided solely based on the terms of the release, courts are not limited to the terms of a release in construing it. Instead, courts have looked to extrinsic evidence, such as discovery responses and admission of counsel in determining the effect of a release. Loyd’s Inc. v. Good, 306 S.C. 450, 454, 412 S.E.2d 44, 444 (Ct. App. 1991).

The release in this case discharged Silver Dollar’s liability because both prongs Bartholomew are satisfied. The parties intended the release to discharge Silver Dollar’s liability, and the amount paid in settlement satisfied Witherspoon’s entire claim.

A. The parties intended the release to discharge Silver Dollar’s liability.

In this case it is clear that both Witherspoon and the McGuires intended the settlement in the underlying case to extinguish all claims Witherspoon had with regard to the incident. The affidavit of Witherspoon’s counsel, Johnny Driggers, establishes that the settlement was entered into with the understanding that Progressive would bring a subrogation action for contribution against Silver Dollar. (Affidavit of Driggers at ¶ 12.) It was the intent of the parties at the time of the settlement that the Covenant Not To Execute was in satisfaction of all claims arising from

the incident, including Witherspoon's potential claims against Silver Dollar. (*Id.*) The second release, which was executed after it was discovered that the first release did not accurately reflect the intent of the parties, includes a term recognizing Witherspoon's claim against Silver Dollar and Progressive's intent to bring a contribution action against Silver Dollar. (Affidavit of Driggers, ¶ 13.)

B. The settlement satisfied Witherspoon's entire claim.

The release and surrounding circumstances clearly establish that the McGuire settlement satisfied Witherspoon's claim. Counsel for Driggers testified by way of affidavit that it was the intent of the parties at the time of the settlement that the Covenant Not To Execute was in satisfaction of all claims arising from the incident, including Witherspoon's potential claims against Silver Dollar. (*Id.*) Witherspoon has not pursued any claim against Silver Dollar since the settlement of the McGuire action and the statute of limitations has now run on the claim.

The parties intended the settlement to discharge Silver Dollar's liability and satisfied Witherspoon's entire claim. Under Bartholomew, the settlement released Silver Dollar, thus allowing a contribution action by Progressive.

II. The extinguishment of Witherspoon's claims against Silver Dollar resulted from the settlement.

Contribution claims are based on discharge of common liability by one tort defendant. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999). The extinguishment of the plaintiff's claims against the other defendants must have resulted directly from the settlement itself. G&P Trucking v. Parks Auto Sales Service & Salvage, 357 S.C. 82, 88, 591 S.E.2d 42, 45 (Ct. App. 2003). However, this does not require that the extinguishment result from the written instrument alone. A court may canvass the record for evidence that a release or covenant was intended to discharge the liability of a third party. *Id.* at

89 n.13, 591 S.E.2d at 45 n.13 (finding no evidence of a release and reviewing the testimony of an adjuster who admitted that the claimants could potentially make additional claims).

Contract principles govern construction of releases. Bowers v. Dep't of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). The general rule is that where the terms of a release are unambiguous, a court may not resort to extrinsic evidence to determine intent of the parties. Bowers, 360 S.C. at 153-54, 600 S.E.2d at 545; Ecclesiastes, 374 S.C. at 498-99, 549 S.E.2d at 501. However, neither Bowers nor Ecclesiastes were decided under the Contribution Act. Additionally, the exceptions to the parol evidence rule under the law of contracts were not argued in either case. Therefore, these cases are not controlling in determining the parties' intent with regard to the settlement. Courts have resorted to extrinsic evidence to ascertain the intent of the parties to a release. Loyd's, 306 S.C. at 454, 412 S.E.2d at 444.

In this case, numerous reasons exist to admit extrinsic evidence to determine the parties' intent with regard to the Covenant. First of all, an ambiguity exists due to the fact that the parties re-executed the release when they discovered that the original instrument did not comport with their intent. South Carolina courts have long held that when the terms of a settlement agreement are ambiguous, the court must ascertain the intent of the parties by admitting extrinsic evidence. Smith v. S.C. Dep't of Highways & Pub. Transp., 296 S.C. 11, 370 S.E.2d 101 (Ct. App. 1988). In Smith, the court held that the release was ambiguous because by its terms the original defendant and "all other persons" were released. Id. Since the Department is not a jural "person," the court found an ambiguity existed and allowed extrinsic evidence as to whether the Smiths intended to release the Department. Id. Under Smith, this Court should look behind the four corners of the original Covenant because an ambiguity exists in order to ascertain the parties' intent.

Moreover, under South Carolina law, the parol evidence rule does not apply when the controversy is between a party to the instrument in question and a third party. City of Orangeburg v. Buford, 227 S.C. 280, ___, 87 S.E.2d 822, 824 (1955); Baptist Found. for Christian Educ. v. Baptist College at Charleston, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984). Since Silver Dollar was not a party to the Covenant, it may not resort to the parol evidence rule to prevent examination of extrinsic evidence of the parties' intent. Other jurisdictions have held that in contribution actions brought under the Uniform Contribution Act, extrinsic evidence is generally admissible to ascertain the intent of the parties to the release. Williams v. Physicians & Surgeons Comty. Hosp., Inc., 292 S.E.2d 705 (Ga. 1983); Sims v. Honda Motor Co., Ltd., 623 A.2d 995 (Conn. 1993).

Furthermore, courts have allowed both rescission and reformation of releases based on mutual mistake. Herndon v. Wright, 257 S.C. 98, 184 S.E.2d 444 (1971), Milford v. Metro. Dade County, 430 So.2d 951 (Fla. Dist. Ct. App. 1983). In this case it is clear that a mutual mistake existed because the parties re-executed the Covenant to bring it in line with the intent of the parties. This evidence of mutual mistake creates an ambiguity which calls for admission of extrinsic evidence.

The express terms of the original Covenant are not controlling in this case. An ambiguity exists due to the re-execution of the Covenant. Moreover, the parol evidence rule does not apply because Silver Dollar was not a party to the Covenant. Thirdly, the evidence of mutual mistake creates a question of fact as to the intent of the parties. Therefore, it is appropriate for this Court to consider extrinsic evidence of the parties intent.

The evidence of the parties' intent in this case establishes that both Witherspoon and the McGuires intended the settlement in the underlying case to extinguish all claims Witherspoon

had with regard to the incident. The parties re-executed a settlement agreement to reflect their intent that Progressive be allowed to pursue its contribution claim against Silver Dollar.

Moreover, there is clear evidence of liability against Silver Dollar. Ample testimony exists in the underlying tort case to support the inference that Silver Dollar sold alcohol to under age persons, that Silver Dollar sold alcohol after legal hours, and that Silver Dollar sold alcohol to Will, who was intoxicated. These acts of misfeasance on the part of Silver Dollar were contributing causes to the fight that resulted in Witherspoon's injuries. Thus, Silver Dollar is a joint tortfeasor and could have been sued along with McGuire. Vermeer, 336 S.C. at 68, 518 S.E.2d at 309 (holding that common liability is the basis for contribution).

However, the affidavit of Witherspoon's counsel, Johnny Driggers, establishes that Witherspoon made a tactical decision to focus all claims on Ryan McGuire. (Affidavit of Driggers, ¶ 7.) This tactical decision is reflected in the fact that Witherspoon originally sued only Ryan. He later amended his Complaint to assert claims based on negligent entrustment and the family purpose doctrine but these claims were withdrawn. (Id.) Although Cook brought an action against Silver Dollar arising from the same incident, Witherspoon did not.

The fact that Witherspoon allowed the statute of limitations to run on his claim against Silver Dollar provides further evidence that he intended all liability to be extinguished by the claim against McGuire. The mere running of the statute did not extinguish the claim for purposes of contribution. G&P Trucking, 357 S.C. at 89, 591 S.E.2d at 45. Thus, the only way the claim against Silver Dollar could be brought is by way of contribution. Silver Dollar should not be able to escape liability merely by pointing to a mistake in the written embodiment of an agreement to which it was not a party.

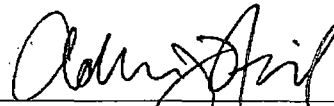
Finally, Driggers expressly testified in his affidavit that the parties intended the settlement to extinguish Witherspoon's claim against Silver Dollar. (Affidavit of Driggers, ¶ 12.) He further testified that the revised Covenant was intended to be evidence of the parties' intention to preserve Progressive's contribution claim. (Id. at 13.)

All the evidence of the parties' intent in this case points to the conclusion that the parties intended to comply with the requirements for contribution and simply inadvertently left the term out of the original release. The failure to include the term was the result of a mere scrivener's error. Accordingly, Progressive respectfully requests that this Court either allow the extrinsic evidence of intent or reform the written instrument to comport with the intent of the parties. Progressive further requests that the Court review the evidence and find that sufficient evidence exists that the parties to the underlying tort case intended to extinguish Witherspoon's claim and therefore Progressive's contribution claim should be allowed. Consequently, summary judgment for Silver Dollar is not appropriate.

CONCLUSION

For the foregoing reasons, Progressive respectfully requests that Silver Dollar's motion for summary judgment be denied.

MURPHY & GRANTLAND, P.A.



John M. Grantland, Esquire

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Attorneys for Defendant

Columbia, South Carolina
June 16, 2009

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 06-CP-10- 4521

Ernest Grant Cook.

Plaintiff,

vs.

Ryan McGuire, Kevin M. McGuire,
Betty E. McGuire and Silver Dollar Café,

Defendants.

COMPLAINT
JURY TRIAL DEMANDED

2006 NOV 16 AM 11:38
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The Plaintiff above named, complaining of the Defendants herein, would respectfully show unto this Honorable Court:

1. That the Plaintiff is a resident of the County of Charleston, State of South Carolina, and at the time of the occurrence herein mentioned, was a pedestrian; that on information and belief, the Defendants are citizens and residents of the State of Kentucky, and at the time of the hereinafter mentioned occurrence, the Defendant, Ryan McGuire, was operating a 2001 Jeep Cherokee vehicle, with the permission of its owners, Defendant Kevin M. McGuire and Defendant, Betty E. McGuire. The vehicle was regularly furnished to Defendant, Ryan McGuire for his use and convenience within the Family Purpose Doctrine of the State of South Carolina and the Defendant, Ryan McGuire, was a non-resident operating a vehicle within the State of South Carolina and is subject to the jurisdiction of this court. The Silver Dollar Café' is a business and/or corporation organized and existing under the laws of the State of South Carolina doing business at 478 King Street, in the City and County of Charleston, State of South Carolina.

2. That on or about the 17th day of November, 2003, at approximately 3:00 a.m., the Plaintiff was a pedestrian walking down the sidewalk along King Street, in the County of Charleston, State of South Carolina, when the Defendant, Ryan McGuire, operating the 2001 Jeep Cherokee crashed into Plaintiff.

3. That as a result, the Plaintiff suffered great physical harm and permanent injury from being struck by the vehicle, all of which has and will in the future cause him to undergo much physical pain and suffering, has and will in the future cause him to have to spend money for medical services, and to lose money in the nature of wages and earnings.

4. That the Defendant, Ryan McGuire, was negligent, wilful wanton, careless and grossly negligent at the time and place above mentioned in the following particulars:

- a) In operating a vehicle while under the influence of alcohol and/or drugs;
- b) In failing to maintain a proper look-out;
- c) In failing to keep his vehicle under proper control;
- d) In driving too fast for conditions;
- e) In failing to apply his brakes;
- f) In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the Statute laws of the State of South Carolina.

That the Defendants, Kevin McGuire and Betty E. McGuire are responsible under the Family Purpose Doctrine for the Plaintiff's injuries and were negligent, wilful wanton, careless and grossly negligent at the time and place above mentioned in the following particulars

- a) In entrusting their vehicle with an immature and careless individual;

- b) In failing to properly train, teach, caution and instruct the Defendant, Ryan McGuire, relative to the above mentioned acts of negligence.
- c) In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the Statute laws of the State of South Carolina.

That the Defendant, Silver Dollar Café, was negligent, wilful wanton, careless and grossly negligent at the time and place above mentioned in the following particulars:

- a) In selling alcohol to a minor;
- b) In selling alcohol illegally;
- c) In selling alcohol to an intoxicated person;
- d) In selling alcohol after legal hours;
- e) In providing alcohol to an irresponsible person when it was foreseeable that the said act could result in the injuries and damages above described.
- f) In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the Statute laws of the State of South Carolina.

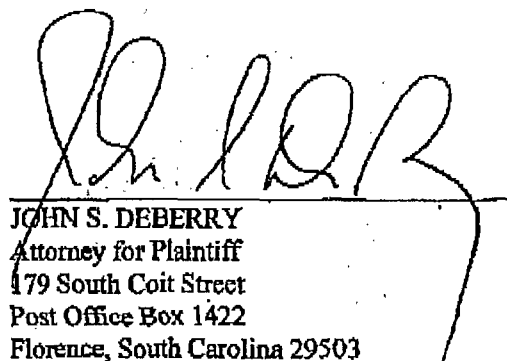
5. That Plaintiff is informed and believes that he is entitled to judgment against the Defendant in the sum of One Million Seven Hundred Fifty Thousand and No/100 (\$1,750,000.00) Dollars, actual damages, and for punitive damages in an appropriate amount.

WHEREFORE, Plaintiff prays for judgment against the Defendant in the sum of One Million Seven Hundred Fifty Thousand and No/100 (\$1,750,000.00) Dollars, actual damages,

together with punitive damages in an appropriate amount, and for the costs of this action.

Florence, South Carolina

Date: November 15, 2006



JOHN S. DEBERRY
Attorney for Plaintiff
179 South Coit Street
Post Office Box 1422
Florence, South Carolina 29503
(843) 662-0435

Exhibit B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

ROBERT M. WITHERSPOON, IV.,)

CIVIL ACTION NO.:

Plaintiff,)

-versus-)

COMPLAINT

RYAN MCGUIRE,)

Defendant.)

TO THE DEFENDANT ABOVE NAMED:

1. Plaintiff is a citizen and resident of Charleston County, South Carolina. Upon information and belief, Defendant is citizen and resident of the state of Kentucky. The Court has jurisdiction pursuant to 28 USCA 1332.

2. On November 17, 2003, Plaintiff was walking down the sidewalk on King Street in Charleston, South Carolina. Defendant, operating a motor vehicle, slammed into Plaintiff, causing serious and permanent injuries

3. Defendant was negligent and reckless in one or more of the following ways:

- a) operating his vehicle while under the influence of alcohol and/or drugs;
- b) failing to keep his vehicle under proper control;
- c) failing to yield the right of way;
- d) failing to keep his vehicle on the paved portion of the street;

e) failing to exercise the degree of caution that a reasonably careful person would have exercise under the same or similar circumstances;

4. As a direct result of Defendant's negligence and recklessness, Plaintiff has sustained the following damages:

- a) medical bills, including hospital, physician, and prescription charges;
- b) lost wages;
- c) Impairment of earning capacity;
- d) permanent impairment;
- e) physical and mental pain and suffering

WHEREFORE, Plaintiff demands judgment against Defendant for such amount of actual and punitive damages as the trier of facts shall determine, for the costs of this action, and for such further relief as the Court deems proper.

North Charleston, South Carolina
April 17, 2006.

/s/ JOHNNY F. DRIGGERS, ESQUIRE
2850 Ashley Phosphate Road
Post Office Box 60506
Charleston, SC 29419
FEDERAL ID #606
(843) 572-5000
ATTORNEY FOR PLAINTIFF

Exhibit C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

ROBERT M. WITHERSPOON, IV,	)	CIVIL ACTION NO.:
	)	
Plaintiff,	)	
	)	
-versus-	)	COMPLAINT
	)	
KEVIN M. MCGUIRE AND BETTY	)	
E. MCGUIRE,	)	
	)	
Defendants.	)	
	)	

TO THE DEFENDANTS ABOVE NAMED:

Plaintiff alleges:

1. Plaintiff is a citizen and resident of Charleston County, South Carolina. Upon information and belief, Defendants are citizens and residents of the state of Kentucky. The Court has jurisdiction pursuant to 28 USCA 1332.
2. On November 17, 2003, Plaintiff was walking down the sidewalk on King Street in Charleston, South Carolina. Ryan McGuire, Defendants' son, operating a motor vehicle, slammed into Plaintiff, causing serious and permanent injuries.
3. Ryan McGuire was negligent and reckless in one or more of the following ways:

- a) operating his vehicle while under the influence of alcohol and/or drugs;
- b) failing to keep his vehicle under proper control;
- c) failing to yield the right of way;
- d) failing to keep his vehicle on the paved portion of the street;
- e) failing to exercise the degree of caution that a reasonably careful person would have exercise under the same or similar circumstances;

4. As a direct result of Ryan McGuire's negligence and recklessness, Plaintiff has sustained the following damages:

- a) medical bills, including hospital, physician, and prescription charges;
- b) lost wages;
- c) impairment of earning capacity;
- d) permanent impairment;
- e) physical and mental pain and suffering.

5. Upon information and belief, at all times mentioned herein, Ryan McGuire was a member of the family and resident of the household of Defendants Kevin M. McGuire and Betty E. McGuire and that the 2001 Jeep Cherokee automobile, titled in the name of Defendants Kevin M. McGuire and/or Betty E. McGuire, was regularly furnished to Ryan McGuire for his use and convenience within the Family Purpose Doctrine of the

State of South Carolina.

6. Defendants Kevin M. McGuire and Betty E. McGuire, therefore, are responsible under the Family Purpose Doctrine for Plaintiff's Injuries.

WHEREFORE, Plaintiff demands judgment against Defendants for such amount of actual and punitive damages as the trier of facts shall determine, for the costs of this action, and for such further relief as the Court deems proper.

/S/ JOHNNY F. DRIGGERS, ESQUIRE
108 Central Avenue, Suite 7
P. O. Box 757
Goose Creek, SC 29445
FEDERAL I.D. NO. 606
ATTORNEY FOR THE PLAINTIFF

Goose Creek, South Carolina

November 10, 2006

Exhibit D

1115
1150-0763**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

2006 NOV 28 A 10:47

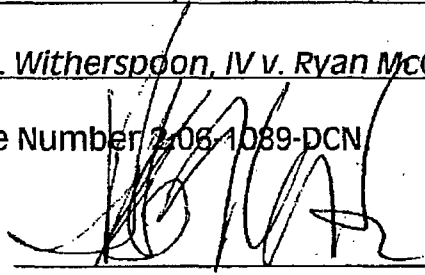
ROBERT M. WITHERSPOON, IV.,)**CIVIL ACTION NO.: 2:06-1089-DCN****Plaintiff,)****-versus-)****CONSENT ORDER
TO CONSOLIDATE****RYAN MCGUIRE,)****Defendant.)****ROBERT M. WITHERSPOON, IV.,)****CIVIL ACTION NO.: 2:06-3197-DCN****Plaintiff,)****-versus-)****CONSENT ORDER
TO CONSOLIDATE****KEVIN M. MCGUIRE and
BETTY E. MCGUIRE,)****Defendant.)**

IT APPEARING to the Court that consolidation of the within cases which have common questions of law and fact in both cases, would promote judicial goals of economy, convenience, and fairness; and

IT FURTHER APPEARING to the Court that the parties have consented to consolidate these cases; and

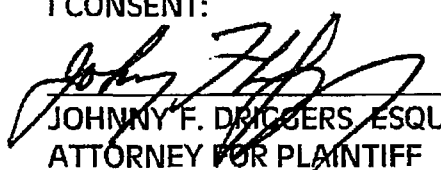
IT IS THEREFORE ORDERED that the within cases be consolidated, Robert M. Witherspoon, IV v. Kevin M. McGuire and Betty E. McGuire, Case

Number 2:06-3197 DCN and Robert M. Witherspoon, IV v. Ryan McGuire, Case
Number 2:06-1089-DCN as Robert M. Witherspoon, IV v. Ryan McGuire, Kevin M.
McGuire and Betty E. McGuire, Case Number 2:06-1089-DCN

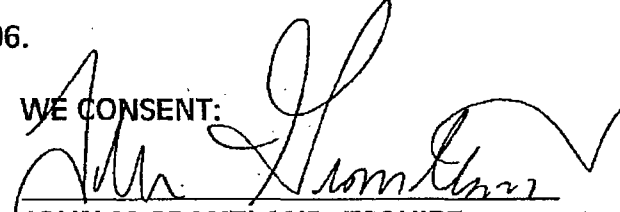

PRESIDING JUDGE


_____, South Carolina
27th Day of November, 2006.

I CONSENT:


JOHNNY F. DRIGGERS, ESQUIRE
ATTORNEY FOR PLAINTIFF

WE CONSENT:


JOHN M. GRANTLAND, ESQUIRE
ATTORNEY FOR DEFENDANTS

11/20/06

Exhibit E

DEPOSITION OF: RYAN McGUIRE

SHEET 1: PAGE 1

PAGE 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CIVIL ACTION NO.: 2:06-1089-DCN

ROBERT M. WITHERSPOON, IV,

Plaintiff,

vs.

RYAN McGUIRE,

Defendant.

WITNESS: RYAN McGUIRE

The deposition of Ryan McGuire was taken before Janine N. Leroux, Court Reporter and Notary Public in and for the State of Kentucky at Large, at the offices of Jackson Kelly, LLC, located at 175 East Main Street, Suite 500, Lexington, Kentucky on Friday, September 29th, 2006, commencing at the approximate hour of 10:05 a.m. Said deposition was taken pursuant to Notice.

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WITNESS: RYAN McGUIRE PAGE

DIRECT EXAMINATION
By Mr. Driggers..... 4

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EXHIBITS
(NO EXHIBITS WERE MARKED DURING THIS DEPOSITION.)

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PAGE 4

APPEARANCES:
JOHNNY F. DRIGGERS, ESQUIRE
108 Central Avenue, Suite 7
P.O. Box 757
Goose Creek, South Carolina 29445
ATTORNEY FOR THE PLAINTIFF,
ROBERT M. WITHERSPOON, IV.

REFORD COLEMAN, ESQUIRE,
126 7 Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
ATTORNEY FOR USAA,
WILLIAM H. PARTIN, JR., ESQUIRE
CLARK & WARD
The World Trade Center, Suite 1100
333 West Vine Street
Lexington, Kentucky 40507
ATTORNEY FOR THE DEFENDANT,
RYAN McGUIRE.

THEREUPON:

RYAN McGUIRE

the witness, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DRIGGERS:

Q Good morning, Mr. McGuire. My name is Johnny Driggers. Let me start off by asking you have you ever given a deposition before?

A No, sir.

Q Okay. A deposition, as probably was explained to you, is basically just an interview. I'm here to find out what information you have relative to this case.

It's not any kind of a trick session or anything. I'm going to ask you as simple questions as I can. If you don't understand a question, let me know and I'll be glad to rephrase it.

If you answer a question, I'm going to assume that you understood it. Is that fair with you?

A Yes, sir.

Q Well, let's start off with some real simple ones. How about giving me your full name?

A Ryan Patrick McGuire.

Q Okay. Are you a little nervous, Ryan?

DEPOSITION OF: RYAN McGUIRE

SHEET 2 PAGE 5

5

1 A A little bit.
2 Q Okay. Well, I'm not trying to be
3 intimidating so just relax. I promise this won't
4 take long, and it's generally fairly painless.
5 Where do you presently reside, Ryan?
6 A In Richmond, Kentucky.
7 Q What's got you in Richmond, Kentucky?
8 A I'm attending Eastern Kentucky University.
9 Q What year are you in?
10 A I'm a junior.
11 Q A little bit of background, where were you
12 born and raised?
13 A Lexington, Kentucky.
14 Q Where did you go to high school?
15 A Lafayette. I ended up graduating from
16 Danville High School.
17 Q Are those private or public schools?
18 A Public schools.
19 Q Okay. What is your birth date, Ryan?
20 A November 4th, 1983.
21 Q And when would you have graduated high
22 school?
23 A 2002.
24 Q Did you work during high school either after
25 school or during the summers?

PAGE 6

6

1 A During the summers I worked a little bit.
2 Q Okay. What kind of work did you do?
3 A I worked on a horse farm.
4 Q There's horse farms up here?
5 A A couple. I worked at my dad's law firm as a
6 runner.
7 Q Okay. What kind of work would you have done
8 on a horse farm, strong back?
9 A A lot of mucking stalls, fixing fences.
10 Q A lot of what?
11 A Mucking stalls.
12 Q Is that cleaning stalls out?
13 A Yes, it is.
14 Q Okay.
15 A And mowing a lot of grass.
16 Q I learned a new word. I didn't know what
17 mucking stalls was.
18 MR. DRIGGERS: Off the record.
19 (Thereupon, there was an off-the-record
20 discussion.)
21 BY MR. DRIGGERS:
22 Q And just different horse farms?
23 A I worked for Buck Ferguson. It was Ferguson
24 Farms.
25 Q And you also worked at your father's firm,

PAGE 7

7

1 which is where we are now, as a runner?
2 A Yes, sir.
3 Q Okay. And the summer after you graduated
4 high school, what kind of work did you do?
5 A I was working for the law firm.
6 Q Okay. And after you graduated in 2002, I
7 assume the Spring of 2002?
8 A Yes, sir.
9 Q What did you do that next Fall?
10 A That Fall I moved to Charleston and attended
11 a college in Charleston there.
12 Q Now, did you actually move there, or did you
13 just go there to attend school? Did you actually
14 stay there after school was over with?
15 A I moved to the dorms there.
16 Q Okay.
17 A I came home over winter vacation and ended up
18 staying that summer and subleasing my apartment.
19 That's about it.
20 Q Where did you stay in Charleston?
21 A At the dorms my first year, and then I stayed
22 in West Ashley, Ashley Knowles (phonetic)
23 apartments.
24 Q And who did you stay with that summer?
25 A Brandon Harris.

PAGE 8

8

1 Q Brandon Harris?
2 A Yes, a kid from Louisville.
3 Q Did you hook up with him at school?
4 A Yes.
5 Q Did you know him before that?
6 A No, I didn't.
7 Q Did you work at all during your freshman
8 year?
9 A I guess it was the summer after the end of my
10 freshman year, I started working at a restaurant
11 called the Trawler in Mount Pleasant.
12 Q I grew up in Mount Pleasant so I am familiar
13 with the Trawler.
14 A You can pull your boat right up to it.
15 MR. DRIGGERS: Let's go off the record.
16 (Thereupon, Mr. Coleman entered the room at
17 10:10 a.m., and there was an off-the-record
18 discussion.)
19 MR. DRIGGERS: Let's go back on the record.
20 BY MR. DRIGGERS:
21 Q We were at the Trawler and this would be the
22 summer of 2003?
23 A Yes, sir.
24 Q You did not work during school?
25 A No.

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DEPOSITION OF: RYAN McGUIRE

SHEET 8 PAGE 29

29

1 A Uh-huh, (affirmative response).
 2 Q That's a yes?
 3 A Yes, sir.
 4 Q We are working on that.
 5 A At that point I moved out of the house on
 6 Ashley Avenue and was living with Will Irvin on
 7 Charlotte Road, Charlotte Street.
 8 Q Which side of King Street would you have been
 9 on, the Colonial Lakes side or the East Bay side?
 10 A The East Bay side.
 11 Q Okay. Was it walking distance to school,
 12 classes and all?
 13 A Yes, sir.
 14 Q And when did you move in with Will Irvin?
 15 A I want to say mid September, around that
 16 time.
 17 Q And how did you hook up with Will Irvin?
 18 A My roommates in the dorm they were both from
 19 Clemson. They were good buddies in high school. I
 20 had met Will my freshman year, and we became good
 21 friends.
 22 Q And was he also attending college in
 23 Charleston?
 24 A No, he wasn't. He was getting his real
 25 estate license.

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30

1 Q About what period of time did you run into
 2 Will?
 3 A When I first moved down to Charleston my
 4 freshman year.
 5 Q And what was he doing?
 6 A At the time he was at Trident Technical.
 7 Q How did you meet Will?
 8 A He was my roommate at the dorm, and I went to
 9 the same high school as Will.
 10 Q And did you pretty much keep contact with him
 11 your entire freshman year?
 12 A Uh-huh, (affirmative response).
 13 Q That's a yes?
 14 A Yes, sir.
 15 Q And during that time what was Will doing your
 16 freshman year?
 17 A As far as I know, going to Trident Technical.
 18 Q Did you all keep in touch during that summer
 19 that you were working at the Trawler?
 20 A Yes.
 21 Q What did he do during that summer?
 22 A I'm not sure. I kind of remember him working
 23 for a catering service.
 24 Q And in the Fall of your sophomore year while
 25 you all were roommates, what was he doing while you

PAGE 31

31

1 were going to school?
 2 A Getting his real estate license.
 3 Q Is Will a little bit older than you or the
 4 same age?
 5 A I'm not sure. The same age.
 6 Q Okay. When you say he was getting his real
 7 estate license, was he going to like a tech school
 8 or something?
 9 A I don't know what he was getting it through.
 10 He was studying.
 11 Q Do you know where Will is today?
 12 A I believe he lives in Mount Pleasant.
 13 Q Do you know if he's a licensed agent yet?
 14 A He is.
 15 Q Do you know what company he works for?
 16 A Exit.
 17 Q Exit?
 18 A Yes.
 19 Q Exit Realty?
 20 A Exit Realty.
 21 Q About when is the last time you talked to
 22 Will?
 23 A Midsummer when I was down there for I guess
 24 the restitution hearing.
 25 Q Okay. What happened at that hearing?

PAGE 32

32

1 A We never even actually entered the courtroom.
 2 My attorney went back I believe in chambers with
 3 the judge.
 4 Q Lofton?
 5 A No.
 6 Q Which one?
 7 A The guy in South Carolina.
 8 Q Richter?
 9 A It wasn't Richter. It wasn't Lofton. He
 10 said he wasn't involved after the criminal case was
 11 over.
 12 MR. PARTIN: John Grantland.
 13 BY MR. DRIGGERS:
 14 Q John Grantland, does that sound right?
 15 A Yes. I think it might have been one of John
 16 Grantland's partners actually.
 17 Q Bill Connor?
 18 A That's who it was.
 19 Q All right. Going back to November 16th, 2003
 20 about somewhere around 5:00 or 6:00 Amanda and Beth
 21 came over?
 22 A Amanda and Megan.
 23 Q Amanda and Megan came over and was Will
 24 already there?
 25 A Yes.

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DEPOSITION OF: RYAN McGUIRE

SHEET 9 PAGE 33

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1 Q What did you all start doing when they came
2 over?
3 A I believe we cooked dinner and watched a
4 movie.
5 Q Who cooks?
6 A I think me and Will cooked that night.
7 Q Do you remember what you watched?
8 A I don't. I know we sat around for a while,
9 and we weren't planning on going out anywhere. I
10 guess it was around midnight we decided we all were
11 going to go out. It was a little bit late to be
12 going out.
13 Q Before you all went out, had anybody in the
14 the group consumed any alcohol?
15 A I think Will had. I don't think any of the
16 rest of us had.
17 Q Had anybody consumed any drugs either legal
18 or illegal?
19 A No.
20 Q At that point or at any time during this
21 evening?
22 A No.
23 Q Okay. Do you know what Will had to drink?
24 A I believe a few beers while we were still at
25 the apartment.

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1 Q How about Megan and Amanda, they had nothing?
2 A I don't think so.
3 Q And you had nothing at the apartment?
4 A No.
5 Q Where did you all go out to when you left at
6 midnight?
7 A We went to the Silver Dollar. It might have
8 been after midnight. It might have been 1:00 a.m.
9 It just felt really late to be going out. All
10 night we said we weren't going to go out. We were
11 just going to stay in, and we ended up going out.
12 Q Okay. Had you been to the Silver Dollar
13 before?
14 A Uh-huh, (affirmative response).
15 Q That's a yes?
16 A Yes, sir.
17 Q Did you know any of the people that worked at
18 the Silver Dollar?
19 A I had begun to semi know a guy named Calhoun.
20 Q What does Calhoun look like?
21 A Big guy, 6'2", maybe 260, 270 pounds, short
22 hair.
23 Q That's big.
24 A Real big guy.
25 Q About when would have been the first time

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35

1 that you would have gone to the Silver Dollar?
2 A My freshman year, the first couple weeks in
3 Charleston.
4 Q How did you find out about the Silver Dollar?
5 A A buddy took me there.
6 Q College hang out?
7 A Yes.
8 Q Okay. And from the first time you went
9 there, is there an age requirement to be admitted
10 into the bar?
11 A There is.
12 Q And what is the requirement?
13 A 21.
14 Q Do they check the ID's when you get in there?
15 A I never got checked. I went with a couple
16 guys my first couple of times. And then from then
17 on out, I guess I was always good there.
18 Q All right. Now, the first couple of buddies
19 that you went there with, what would be their
20 names?
21 A I believe Brandon Harris was one of their
22 names.
23 Q Brandon Harris?
24 A Yes.
25 Q Do you know if he was still going to college?

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1 A He was older than me. I believe he had
2 already graduated.
3 Q Okay. And who else?
4 A There were his buddies Ben and TJ. I don't
5 remember their last names. I think it was Ben
6 Metter.
7 Q Okay. And when you went there your freshman
8 year, did you consume any alcohol on the premises?
9 A I did.
10 Q What would be your normal beverage?
11 A Beer or bourbon and coke.
12 Q Okay. And now after kind of coming in
13 regularly, you didn't need to go with them to be
14 able to order, would that be fair?
15 A No.
16 Q Would that be fair?
17 A Uh-huh, (affirmative response).
18 Q Yes?
19 A Yes, sir.
20 Q All right. So from your freshman year up
21 until this incident, can you tell me how regular of
22 a patron you would have been at the Silver Dollar?
23 A Two or three times a month.
24 Q Okay. Would it normally be weekends
25 sometimes during week?

DEPOSITION OF: RYAN McGUIRE

SHEET 10 PAGE 37

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1 A Just the weekends.
2 Q Okay. Was it a fairly popular college
3 hangout?
4 A Semi.
5 Q Okay.
6 A There were I guess bigger ones that people
7 had to have ID's to get into. We went to the
8 Silver Dollar a lot because they didn't ID us.
9 Q Okay. And when you went to the Silver
10 Dollar, who would be some of the people you would
11 go there with? Was there a regular crowd you ran
12 with? Sometimes would you just go by yourself?
13 A Either Will or Brandon a kid named Jamie.
14 London from Clemson as well. A number of kids from
15 my dorm, Keith Maxwell, Yuval, a couple different
16 girls.
17 Q Okay. And on this particular night that you
18 all went there, is this pretty much walking
19 distance for you guys?
20 A Uh-huh, (affirmative response).
21 Q That was yes?
22 A Yes.
23 Q Did you walk or drive there?
24 A I drove that evening.
25 Q And who rode with you?

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1 A Amanda, Megan and Will.
2 Q Which one of these girls were you dating?
3 A Megan.
4 Q And how old was Megan at the time?
5 A She was a year older than me. I don't think
6 she was 21 yet, but she graduated a year before me.
7 Q Where did you know her from, school?
8 A I met her in astronomy class.
9 Q Okay. And how long had you and she been
10 going out before this incident?
11 A A month, two months.
12 Q Okay. How about Amanda and Will, how long
13 had they been dating?
14 A They met through me and Megan knowing each
15 other.
16 Q Okay.
17 A They were roommates in the dorm.
18 Q All right. So was the Silver Dollar the
19 first place that you all went to that evening?
20 A Yes.
21 Q And you drove there. Where did you park?
22 A Across the street from the Silver Dollar,
23 maybe four or five buildings up.
24 Q Okay. All right. If I were to walk out of
25 the Silver Dollar, would it be to the left or to

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1 the right?
2 A If you were with your back to the Silver
3 Dollar?
4 Q That's correct.
5 A To the left.
6 Q Okay. If I walked right out the front door
7 of the Silver Dollar, it would be across the other
8 side of King Street down to the left?
9 A Yes.
10 Q And if I went perpendicular across, how far
11 down would the car be?
12 A Four or five buildings.
13 Q Okay. Is that pretty much the closest
14 parking place that you could get?
15 A At the time, yes.
16 Q Were you parked with the traffic or against
17 the traffic?
18 A I was parked on the right side of the road
19 facing away from the Silver Dollar.
20 Q Okay. And you all got there somewhere around
21 1:00, is that correct?
22 A Yes, sir.
23 Q Okay. Now, as I understand the Silver
24 Dollar, you walk in. There's a couple pool tables
25 in the back?

PAGE 40

40

1 A Uh-huh, (affirmative response).
2 Q And the bar is on the left side?
3 A I believe the right.
4 Q The right. And the tables are on the left?
5 A Uh-huh, (affirmative response).
6 Q Is that a yes?
7 A Yes, sir.
8 Q Okay. When you all walked in, what did you
9 all do? Kind of walk me through it. You all went
10 in?
11 A Walked in. Immediately went straight up to
12 the bar, sat down there.
13 Q Okay. At the bar?
14 A I think me and Will might have played a game
15 of pool or two.
16 Q Okay. And where were the girls?
17 A They were sitting at the bar.
18 Q Did you all order any alcohol?
19 A Yes.
20 Q All right. What did you all have?
21 A I had a beer. I'm not sure about the rest of
22 them. I think Megan was drinking beers that night,
23 too.
24 Q Okay. And was there any other employees of
25 the Silver Dollar other than Calhoun there?

DEPOSITION OF: RYAN McGUIRE

SHEET 11 PAGE 41

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1 A I'm not really sure. He was usually bouncing
2 at the front door, and there were a couple other
3 guys but I wasn't sure if they were bouncers, but
4 they were kind of hanging out by the door.
5 Q Once you get into the bar, you are not
6 checked for; ID is that correct?
7 A No.
8 Q So once you make it past that point, you
9 don't have to show your ID and you just go ahead
10 and order?
11 A Right.
12 Q Was anybody at the door checking ID's do you
13 recall?
14 A I don't think so.
15 Q All right. Can you tell me, other than the
16 four of you, about how many other people may have
17 been there?
18 A When we first got there, ten, fifteen people
19 other than us.
20 Q Okay.
21 A I guess we stayed until -- We were there
22 after the bar closed.
23 Q Okay. And what time was the bar to close?
24 A I believe 2:00.
25 Q Did it close at 2:00?

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1 A We were allowed to stay after.
2 Q Okay. And was anybody else allowed to stay?
3 A There were other people, maybe five or six
4 others.
5 Q Okay. Was the five or six other people, did
6 they appear to be in one group together or were
7 there different groups?
8 A They appeared to be together.
9 Q Okay. And where were they sitting?
10 A I remember a couple of them sitting by the
11 door and a couple of them playing pool.
12 Q Okay. When you all got in there, were they
13 already there?
14 A They were already there.
15 Q Did you know any of them?
16 A I did not.
17 Q Okay. And from the time you were there until
18 the time that you left, can you give me an
19 approximation of how much alcohol had you may have
20 consumed during that time?
21 A Two or three beers at the most.
22 Q Okay. And how about the rest of your group?
23 A Amanda and Megan were both drinking a little
24 bit, about the same as me, not much at all. Will
25 was getting pretty smashed. He was drinking shots.

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1 Q What kind of shots was he doing?
2 A I can't remember, kamikazes.
3 Q How many of those did he have?
4 A I don't know.
5 Q Nobody was doing Yeager Bombs?
6 MR. DRIGGERS: Off the record.
7 (Thereupon, there was an off-the-record
8 discussion.)
9 MR. DRIGGERS: Let's go back on.
10 BY MR. DRIGGERS:
11 Q All right. He was doing kamikaze. It has
12 been a while for me. What is a kamikaze?
13 A I believe just vodka, lemon juice, triple
14 sec. I'm not really sure.
15 Q Okay. Any idea about how many of those he
16 might have had?
17 A I'm not sure.
18 A A couple I know. I don't know if it was a
19 bunch. I saw him take a couple shots.
20 Q Did you do any shots?
21 A No.
22 Q Did Amanda and Megan?
23 A I'm not sure. I don't think Megan did.
24 Q All right. And what was he drinking? Other
25 than that, was he drinking beer as well?

PAGE 44

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1 A I think beer.
2 Q Was he drinking like draft beer or tap?
3 A Bottled beer.
4 Q Okay. Did you, during the time that you were
5 in there, make any kind of observations of this
6 other group, i.e., whether they appeared that they
7 were also, you know, partying hard, were slammed or
8 anything like that?
9 A Not really. I didn't notice anything.
10 Q You all basically were doing your own little
11 thing?
12 A Uh-huh, (affirmative response).
13 Q Yes?
14 A Yes, sir.
15 Q From the time you all got there, did you all
16 pretty much just stay at the bar or did you have to
17 get a table?
18 A Will and I played pool. But other than that,
19 we basically stayed at the bar.
20 Q Did you all play any of these other guys in a
21 game of pool or was it just you and Will?
22 A No, just Will and I.
23 Q I believe the bar was supposed to close at
24 that time at 2:00; is that correct?
25 A Yes.

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DEPOSITION OF: RYAN McGUIRE

SHEET 12 PAGE 45

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1 Q Did Calhoun actually get up and go over and
2 lock the door, pull the shades down or anything
3 like that to keep other people from coming in?
4 A They might have shut the door. I'm not
5 really sure.
6 Q Okay. After 2:00 was anybody else let into
7 the bar?
8 A No.
9 Q Had you ever been in there before after
10 regular closing hours?
11 A Yes.
12 Q About how many times did you stay after
13 hours?
14 A Two or three.
15 Q And was all this Calhoun?
16 A Usually Calhoun wasn't bartending. He was
17 usually bouncing.
18 Q But on those times would Calhoun be there?
19 A Yes, he would be the one that let us stay.
20 Q Had you ever been there on any other
21 occasions where Calhoun had said, okay, you all can
22 stay and some other employee said, no, we need to
23 run these people out of here?
24 A Un-huh, (negative response).
25 Q That's a no?

1 Q Where is Calhoun during this period of time?
2 A Standing behind the bar.
3 Q Where is this other group?
4 A There's two or three guys standing right by
5 the door as we were walking out giving Will hell
6 just talking back and forth with him.
7 Q Do you know what they said to him?
8 A Something to the point if you have got a
9 problem with Calhoun, you've got a problem with us,
10 something like that.
11 Q Okay. And again, at this time were you able
12 to make any kind of observations about that group,
13 those two to three guys sitting there?
14 A They were pretty big. I'm a tall guy. They
15 were intimidating.
16 Q Were they tall or were they big?
17 A Both.
18 Q Both. Okay. And you could tell that when
19 they were sitting down that they were already
20 bigger?
21 A They were standing out the door.
22 Q Okay. They were standing up. Okay. And so
23 the bar is on the right side. As they are walking
24 out, they are right there where Will walks right by
25 them?

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1 A No, sir.
2 Q And do you recall what time that you actually
3 went to leave?
4 A I'm not exactly sure what time it was. It
5 was around 3:00, 3:30, I believe.
6 Q Okay. And what prompted you all to leave?
7 A We were sitting at the bar. Will ordered a
8 beer for him and Amanda. He tipped Calhoun a
9 dollar or two. Calhoun looked at Will and said
10 something real smart to him. Like you are in here
11 after hours. You shouldn't be here. It's like you
12 better starting tipping me more.
13 Q Okay. And what did Will say?
14 A Will just kind of laughed. I think Will
15 might have ordered a shot right after that or
16 ordered another drink right after that, bought it
17 and paid for it and didn't tip the guy at all.
18 Q Is Will bigger than Calhoun?
19 A No, Will is a short guy, stocky guy.
20 Q Living dangerously, okay.
21 A Calhoun jerks Will's drink back from him and
22 tells him you need to get the F out of the bar.
23 We were all walking out of the way. And when
24 Will gets to the door, he decides he's going to
25 talk back and he starts yelling, F Calhoun.

1 A We walked right by them. Will might have
2 actually been shoved out the door.
3 Q Okay. But that's what prompted it was the
4 tipping?
5 A Exactly.
6 Q And so right after that I guess trying to be
7 a smartass, and he just didn't tip him at all?
8 A Didn't tip him at all.
9 Q Okay. All right. Now, were you ordered out
10 or did you all leave because Will was thrown out?
11 A Because of Will.
12 Q Did pretty much Amanda and Megan and all of
13 you all leave at the same time?
14 A We all left.
15 Q Did you all leave your drinks there?
16 A Uh-huh, (affirmative response).
17 Q That's a yes?
18 A Yes, sir.
19 Q All right. Besides the F Calhoun and stuff,
20 did Calhoun saying anything back to him?
21 A Not that I can remember.
22 Q But basically you all were leaving because
23 Will was thrown out?
24 A Yes, sir.
25 Q I understand this was a little over three

DEPOSITION OF: RYAN McGUIRE

SHEET 13 PAGE 49

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1 years ago. Can you recall what type of jawing
2 would have been going back and forth before you
3 were outside the door between Will and this other
4 group?
5 A I remember one of the guys kind of grabbing
6 Will and saying, you've got a problem with Calhoun
7 and Will pointed to the fact that he had just been
8 thrown out by Calhoun. And he yelled back in there
9 F Calhoun again, and he pretty much tossed him out
10 the door:
11 Q One of his group?
12 A Yes.
13 Q And then what happened? When Will you got
14 tossed out, were you all already outside or were
15 you all right behind Will?
16 A Right behind Will. Will was jawing back and
17 forth to the group of guys.
18 Q Through the door? Is the door still open?
19 A We are all on the sidewalk now.
20 Q Are the other guys inside or outside?
21 A They are coming out the door.
22 Q Were they thrown out or were they following
23 you all out the door?
24 A They were following us.
25 Q Okay. As best you can recall in that group

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1 there were about three of them?
2 A At first it was three. By the time I guess I
3 had turned around in the car and came back, there
4 were five or six of them holding Will down on the
5 ground.
6 Q Okay. All right. So you all are leaving,
7 and you are outside, then what happens?
8 A Will is yelling at these guys.
9 Q Can you recall what he's saying? Is the F
10 word flying right and left?
11 A They are both cussing back and forth.
12 Q Was it like F you, F you, dah, dah, dah?
13 A (The witness nods head in the affirmative.)
14 Q Is anybody threatening to kick anybody's butt
15 at this point?
16 A Not Will. Those guys were saying stuff like
17 you need to get out of here or you are going to get
18 your ass kicked. I just remember Will yelling,
19 bring it, just egging it on definitely and not
20 leaving the scene like he should have done. Me and
21 the girls kind of like had to drag Will away.
22 Q Would this be what they call liquid courage
23 at work on Will?
24 A Yes.
25 Q Okay. Now, from the time that you had known

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1 Will, have you ever had a prior evening such as
2 this where Will was trying to mix it up or
3 something with a group?
4 A No.
5 Q Was this uncharacteristic for Will?
6 A Yes.
7 Q Did it seem to be alcohol fueled?
8 A Yes.
9 Q Normally he's not the kind of guy, you know,
10 that just likes to go around picking fights?
11 A No.
12 Q Okay. But on this particular evening, he's
13 outside the door. These guys were egging him on;
14 is that correct?
15 A Yes.
16 Q And when you all get outside, are you all
17 walking or are you all standing still?
18 A We are walking back to the car and I'm kind
19 of pulling Will along with me trying to get him to
20 keep his mouth shut. He's still yelling back and
21 forth to these guys.
22 Q Are they now outside the bar?
23 A They are.
24 Q Okay. And are they following you all?
25 A They are. They are not chasing us. They are

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1 not running after us, but they are definitely
2 coming away from the bar towards the way we were
3 walking.
4 Q Well, as you are dragging Will, does he kind
5 of like keep turning around to jaw at them?
6 A Yes.
7 Q Okay. And so how close are they to you all
8 as they are following you?
9 A A store or two away, you know, staying a
10 little distance.
11 Q And again, I'm trying to get as best I can
12 the play by play. What kind of jawing back and
13 forth are we into now?
14 A The same stuff.
15 Q Are they still telling Will that he needs to
16 just get going?
17 A They are calling him short, this and that,
18 cussing at him. The only person that ever told him
19 that he needed to go was Calhoun. After that it
20 was more than just being real aggressive, cussing
21 him out.
22 Q And Will is giving it right back?
23 A Yes.
24 Q Okay. Where do you all walk now? 101
25 A To the car.

DEPOSITION OF: RYAN MCGUIRE

SHEET 14 PAGE 53

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1 Q Okay. Did you cross the street to get to
2 your car?
3 A Yes.
4 Q Okay. And did you walk down King and then go
5 straight across to your car, or did you all cross
6 King and then go down to your car?
7 A We went down King and crossed straight to my
8 car.
9 Q Did these guys follow you the whole way?
10 A No, they did not.
11 Q Okay. What happened?
12 A When we started crossing the street, they
13 stopped about maybe where we had the crossed
14 street, maybe a little bit before.
15 Q Okay. And then what happened?
16 A Will grabbed a baseball bat out of my car and
17 took off after the guys.
18 Q Did he give you any advance warning like, you
19 know, I'm going to get the bat and go kick those
20 guys ass or anything like that?
21 A When I lived on Ashley, we lived right next
22 to a baseball park. We always played home run
23 derby there. Me and Will had gone out there the
24 day before with a couple guys.
25 Q Who usually won?

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1 A I won a couple times. There was a big guy
2 that won when he could get ahold of the ball.
3 Q Between you and Will, who won?
4 A I did.
5 Q Would he give me the same answer?
6 A Probably. He's not a baseball player. He's
7 a soccer player.
8 Q So you walked across the street. Do the
9 girls get in the car?
10 A Megan got in the car with me. Amanda went
11 chasing back after Will.
12 Q Did she ever get in the car?
13 A I don't think so.
14 Q Okay. And whose bat is this?
15 A It's my bat.
16 Q Okay. And how did Will know it was back
17 there? Did you all --
18 A We actually played the day before.
19 Q Okay. So he knew it was back there?
20 A Uh-huh, (affirmative response).
21 Q Yes?
22 A Yes, sir.
23 Q Did he say anything when he grabbed the bat?
24 A Not at all.
25 Q Okay.

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1 A He actually opened my trunk, grabbed the bat
2 and took off.
3 Q Now, do you recall what he said to these guys
4 if he said anything?
5 A I didn't hear him say anything. I was
6 getting in my car. Actually I kind of thought it
7 was one of the guys opening up my trunk. I turned
8 around and looked and saw it was Will. Before I
9 could even stop him, he had the bat, and he was
10 like on a dead sprint toward these guys.
11 Q What did you do?
12 A Stayed in the car.
13 Q From the time that you got into the car, did
14 you ever get out and go after Will?
15 A No, I didn't.
16 Q Did Megan get out of the car?
17 A No.
18 Q All right. Did Amanda ever get in the car
19 and then got out when Will left?
20 A I don't think she got in the car and got out
21 but she could have. She wasn't in the car once we
22 got started.
23 Q Okay. And you obviously at some point left
24 in the car, is that correct?
25 A Yes, sir.

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1 Q As best you can approximate, from the time
2 that Will got the bat and took off, what time
3 period was it between the time you cranked the car
4 up and put it in drive?
5 A A minute later, real quick.
6 Q Okay. What happened during that minute?
7 A Just me and Megan were sitting in the car. I
8 was kind of looking back behind me to see what all
9 was going on.
10 Q Did you ever see what was going on?
11 A I saw Will and a bunch of guys. I didn't see
12 like any swings or anything going on.
13 Q And what did you do?
14 A I turned on the car and did a U-turn on King
15 Street and came back to where the group was
16 standing. They were all on the sidewalk. I pulled
17 up next to them.
18 I rolled down the passenger window on Megan's
19 side and yelled. I was like, put him in the car.
20 Put Will in the car, you know, over and over again.
21 There were five or six guys holding him down.
22 He was obviously beat to a pulp. There was blood
23 coming out of his head.
24 I can remember Calhoun and another guy
25 holding him down, and it was like four other guys

DEPOSITION OF: RYAN MCGUIRE

SHEET 15 PAGE 57

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1 started approaching my car. Megan ducked, I
2 remember, down. They were yelling stuff in the
3 window.
4 And then the next thing I knew, somebody
5 slammed the bat down on the hood of my car. As
6 soon as the bat hit my car, I just took off.
7 Q Okay. Anything else?
8 A That was about it.
9 Q Okay. Which direction were you headed when
10 you took off?
11 A Towards the Citadel on King Street away from,
12 I guess, town.
13 Q If we walked out of the Silver Dollar, the
14 front of your car would have been pointing left; is
15 that correct?
16 A If your back is to the Silver Dollar?
17 Q That's correct.
18 A My car is pointing towards the right.
19 Q When you parked it?
20 A Oh, when I parked it?
21 Q When you parked it.
22 A Do we have a picture of that?
23 MR. DRIGGERS: Do you have a picture? Maybe
24 that will help us.
25 THE WITNESS: Of the street?

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1 MR. PARTIN: Yes.
2 THE WITNESS: I was parked on the other side
3 of King Street four or five buildings down about
4 here (indicating). I did a U-turn, and there were
5 no cars in these parking spots. The group was
6 right here (indicating) on the sidewalk, and I
7 pulled up next to him in the street --
8 Q Okay.
9 A -- facing away from campus and everything.
10 Q Okay.
11 MR. COLEMAN: Were you facing back toward the
12 Silver Dollar?
13 THE WITNESS: I was where this car is in the
14 street facing that way (indicating), the same
15 direction as these cars (indicating).
16 MR. PARTIN: For the record, you were parked
17 down the street and the car was facing left. And
18 after you made your U-turn and came back, you were
19 heading towards the Silver Dollar?
20 THE WITNESS: Right.
21 BY MR. DRIGGERS:
22 Q Calhoun Street would be down here somewhere
23 (indicating); is that right?
24 A Calhoun is down here (indicating).
25 Q Because we are getting different versions,

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1 you did not go past this group and then turn around
2 and come back this way (indicating)?
3 A No.
4 Q Okay.
5 A I was down here (indicating). I immediately
6 did a U-turn out of the parking spot and came back
7 towards the Silver Dollar.
8 Q And you came to a complete stop?
9 A Yes, sir.
10 Q Okay. Can you see in that photograph where
11 they would have been holding Will down?
12 A Basically where this pole is between the
13 Silver Dollar and the other building right about
14 here on the sidewalk (indicating).
15 Q Okay. Did you see anybody hitting Will?
16 A Not at that time I didn't.
17 Q Okay. At any time did you see anybody
18 hitting Will?
19 A Yes.
20 Q When did you see them hitting Will?
21 A When I was still parked before I had done the
22 U-turn kind of looking over my shoulder.
23 Q And who was hitting Will?
24 A I couldn't exactly tell. It was somebody I
25 didn't know.

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1 Q But it was one of this group?
2 A Yes.
3 Q Was it one of the first group of guys of the
4 ones that stood up and walked out with you all?
5 A Uh-huh, (affirmative response).
6 Q That's a yes?
7 A Yes, sir.
8 Q Was there more than one person hitting Will?
9 A Yes, sir.
10 Q Was Will standing up or was he already down?
11 A When I saw him being hit, he was standing up.
12 Q Okay.
13 A By the time I had gotten back, he was on the
14 ground.
15 Q And were they continuing to hit Will?
16 A I didn't see him at that point.
17 Q Okay. I mean, it's not like they were all
18 holding him down and everybody was taking punches
19 at him?
20 A No, no, not when I was there. It might have
21 happened before.
22 Q Okay. Did you see anybody with the bat?
23 A No.
24 Q Okay. You mentioned something about the bat
25 on your car. Did you see anybody hit your car with

Exhibit F

CONDENSED

Page 1

ROBERT M. WITHERSPOON, IV,) CIVIL ACTION NO.:
) 2:06-1089-DCN
Plaintiff,)
)
vs.)
)
RYAN MCGUIRE,)
)
Defendant.)

* * * * *

DEPOSITION OF: WILLIAM SEAN IRVIN, JR.
DATE TAKEN: Monday, November 20, 2006
TIME: 3:00 p.m.
PLACE: 108 Central Avenue, Suite 7
Goose Creek, SC
REPORTED BY: TERI L. SAMPSON,
Registered Professional
Reporter and Notary Public

* * * * *

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Page 2

1 APPEARANCES
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 23
 24
 25

Page 4

1 GOOSE CREEK, SOUTH CAROLINA, MONDAY, NOVEMBER 20, 2006
 2 3:00 P.M.
 3 PROCEEDINGS
 4 -----
 5 WHEREUPON,
 6 WILLIAM SEAN IRVIN, JR.
 7 being first duly sworn, testified as follows:
 8 EXAMINATION
 9 BY MR. DRIGGERS:
 10 Q Mr. Irvin, we have previously met. I'm
 11 Johnny Driggers, and you know that I represent the
 12 plaintiff in this case in a lawsuit against
 13 Mr. McGuire.
 14 I am here to take your deposition, which is
 15 just a question and answer session, not here to trick
 16 you. I just want to find out what information you have
 17 about this incident that we're here to talk about.
 18 If you don't understand my question, let me
 19 know and I'll be glad to rephrase it. Is that fair
 20 with you?
 21 A Fair to me.
 22 Q And to start off with, easy questions, what
 23 is your full name?
 24 A William Sean Irvin, Jr. Sean is spelled
 25 S-E-A-N.

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1 INDEX
 2
 3 WITNESS: WILLIAM SEAN IRVIN, JR.
 4
 5 Examination Page
 6 BY MR. DRIGGERS..... 4, 51, 63
 7 BY MR. CONNOR..... 38, 58
 8 BY MR. NICKELS..... 42
 9
 10 REPORTER'S CERTIFICATE..... 66
 11
 12 EXHIBITS:
 13 Plaintiff's
 14 Exhibit Description Page
 15 1 Photograph 30
 16 2 Photograph 52
 17 3 Photograph 53
 18
 19 STIPULATIONS
 20 It is hereby stipulated and agreed by and
 21 between the parties hereto, through their respective
 22 counsel, that the reading and signing of the
 23 transcript is expressly waived by the Deponent.
 24
 25

Page 5

1 Q And what's your Social Security number?
 2 A [REDACTED]
 3 Q Do you have any objections to me calling you
 4 Will throughout the deposition?
 5 A I would prefer it.
 6 Q Okay. How about a date of birth, Will?
 7 A 5-6 of '84.
 8 Q Where do you currently live?
 9 A [REDACTED] Mt. Pleasant, South
 10 Carolina.
 11 Q What is that?
 12 A It's a house.
 13 Q Are you buying it?
 14 A I own it.
 15 Q Okay. Along with a mortgage company, I
 16 presume?
 17 A Right.
 18 Q Okay.
 19 MR. NICKELS: What neighborhood is that?
 20 THE WITNESS: Glenn Lake.
 21 BY MR. DRIGGERS:
 22 Q Give me a little background, Will. Where
 23 were you born and raised?
 24 A Clemson, South Carolina. That's where I was
 25 raised, born in North Carolina, Monroe, North Carolina.

2 (Pages 2106 to 5)

Page 18

1 A Yes, just kind of part-time.
 2 Q Where were you working at that time?
 3 A Exit Lowcountry Realty, another Exit
 4 franchise.
 5 Q That was another franchise?
 6 A Right.
 7 Q Okay. And you were working as an agent at
 8 that time?
 9 A Right.
 10 Q And is that the franchise that you bought and
 11 then renamed, or is there another -- you opened up a
 12 competing franchise?
 13 A Right.
 14 Q Okay. How long did you and Ryan live
 15 together?
 16 A Six months, maybe, at the most.
 17 Q Okay. Was it just you and he?
 18 A Yes.
 19 Q Okay. What was this, like a big house that
 20 had been cut up into apartments kind of thing, one of
 21 those big old houses?
 22 A No, just a duplex.
 23 Q Okay. Do you remember the instance where
 24 you-all went to Silver Dollar, left, and a fight broke
 25 out?

Page 19

1 A Vaguely.
 2 Q Okay. And why do you say "vaguely"?
 3 A Well, because it's been, what, three years
 4 now or two years now, and we were intoxicated at the
 5 time.
 6 Q Okay. When you say "we," who is we?
 7 A Ryan, me, and the two girls we were with.
 8 Q Do these two girls have a name?
 9 A I'm trying to think. Amanda was one, and I
 10 think Megan was the other. I don't know their last
 11 names.
 12 Q Amanda Dillard and Megan Kincaid?
 13 A If that's what you have.
 14 (Whereupon, a discussion ensued off the record.)
 15 BY MR. DRIGGERS:
 16 Q Okay. Do you remember --
 17 (Whereupon, there was a brief recess.)
 18 BY MR. DRIGGERS:
 19 Q Okay. Now, do you have any kind of feel for
 20 whether this incident was in 2002, 2003, where at in
 21 that time period or anything like that?
 22 A The incident?
 23 Q Yes.
 24 A I could look at the dates on the court.
 25 Q So, if I told that you everything I've looked

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1 at says November 17th, 2003, does that sound about
 2 right to you?
 3 A I would believe you.
 4 Q Okay. Now, let's back up a little bit, and
 5 again, if you don't remember, that's fine. Do you
 6 recall what you and he or you and any of the other
 7 girls would have done that day before this incident
 8 happened?
 9 A I believe we got together, had a few drinks
 10 at the house before going up to the Silver Dollar.
 11 Q Now, when we say "we," I just want to be real
 12 clear, that's -- you and Amanda were dating at that
 13 time, right?
 14 MR. CONNOR: Object to form.
 15 A (Continuing) Yes.
 16 Q Okay. Were you and Amanda dating at that
 17 time?
 18 A Yes.
 19 Q And was Will -- I mean, was Ryan and Megan
 20 dating at that time?
 21 A I don't know.
 22 Q Okay. Do you know where you-all met at,
 23 where you-all came together at, your apartment,
 24 somebody else's apartment?
 25 A At the house.

Page 21

1 Q And whose place was this?
 2 A Ryan and I's.
 3 Q You-all were still -- this was still at
 4 [REDACTED]
 5 A Correct.
 6 Q Okay. Did you-all have dinner, go out
 7 somewhere, what happened?
 8 A I think we just had a few drinks and...
 9 Q Okay. When you say "we," would it be all
 10 four of you?
 11 A Yes, from the best of my knowledge.
 12 Q Was anybody else over there that evening?
 13 A I don't believe so.
 14 Q Sorry, but I have to ask this, were any drugs
 15 of any sort being consumed?
 16 A I don't believe so.
 17 Q Okay. And can you tell me what type of
 18 drinks you-all were having? Was it beer, alcohol,
 19 wine?
 20 A I've got no idea.
 21 Q Okay. But just a few drinks?
 22 A Right.
 23 Q Okay. And do you know at what time during
 24 the evening you-all would have left to go somewhere?
 25 A No idea. I really don't know.

Page 22

1 Q Do you know whose ideas it was to leave the
2 place and go somewhere?
3 A No.
4 Q Can you tell me where you-all went to?
5 A Obviously, the Silver Dollar.
6 Q Can you tell me where the first place would
7 have been?
8 A I believe it was just the Silver Dollar.
9 Q Okay. That was the only place you went to?
10 A Yeah, I'm guessing.
11 Q All right. When you got to the Silver
12 Dollar, can you remember whether there was a lot of
13 people there, a little bit of people?
14 A I don't remember.
15 Q Any particular -- any idea what time it was?
16 A Late.
17 Q When you say "late," would this be after
18 midnight?
19 A I believe so. Again, I would have to go back
20 to that statement that I submitted after, when it was
21 all kind of fresh and current.
22 Q Okay. Do you recall how you got there,
23 transportation-wise?
24 A We rode with Ryan.
25 Q Okay. And who drove?

Page 23

1 A I guess Ryan or I. I'm not sure.
2 Q Whose vehicle?
3 A His vehicle.
4 Q Okay. And this is the -- is this the same
5 vehicle you had always known Ryan to have?
6 A Yes.
7 Q Okay. So, you get to Silver Dollar, and what
8 do you-all do?
9 A I guess we drank, maybe played a game of
10 pool.
11 Q Okay. Well, do you remember if you played a
12 game of pool?
13 A No. I mean, I just know pool is there, so I
14 imagine we may have done that.
15 Q Okay. Do you know how much you-all would
16 have drank while you were there?
17 A No. I don't know exactly how much we drank.
18 Q Okay. Do you recall about how long you were
19 there?
20 A No, I don't.
21 Q Do you remember approximately what time you
22 would have left there?
23 A No, but going back to that court report, it
24 was probably like 3:00, 4:00 in the morning. I'm not
25 sure.

Page 24

1 Q Okay. Do you recall sitting at the bar
2 ordering drinks and shots?
3 A Ordering drinks. I'm not sure, I'm not
4 really a shot taker, so I'm not sure if we were taking
5 shots.
6 Q Do you remember -- do you know who Calhoun
7 is?
8 A Again, I know of him. I don't know who he
9 is.
10 Q Okay. Do you remember having any
11 conversations with him that night?
12 A No, other than he -- I believe he said we
13 weren't tipping well enough.
14 Q Okay. Then what happened after that?
15 A The incident we're dealing with today.
16 Q Okay. Backing up a little bit, when you say
17 "we had some drinks," would all four of you have been
18 consuming alcohol at the Silver Dollar?
19 A I know I was. I don't really know if anybody
20 else was.
21 Q All right. When you left, what would you
22 describe your condition, were you a little drunk?
23 A A little.
24 Q Okay. How about Ryan?
25 A Don't know his condition.

Page 25

1 Q How about Megan?
2 A Don't know their condition, either.
3 Q How about Amanda?
4 A I don't know hers.
5 Q Okay. And do you not know or you just not
6 remember their condition?
7 A I just don't remember.
8 Q Okay. And -- but you do remember your
9 condition?
10 A Well, obviously, yes.
11 Q Okay. Why do you say "obviously"?
12 A Well, because I did things I wouldn't
13 normally do.
14 Q Okay. All right. Well, do you recall any
15 discussions, run-in, anything like that you had from
16 inside the Silver Dollar until you went to leave out
17 the front door of the Silver Dollar?
18 A No. I just remember being, you know, kind of
19 trampled by three or four guys, and that was
20 essentially it until after Ryan came to pick me up.
21 And there was -- and then I just -- we heard the bam
22 from the bat hitting the car, from one of the guys that
23 was on top of me or -- with whatever hitting the car.
24 I mean, that was pretty much it, and then the police
25 were on the scene. That's the last thing I remember.

Page 26

1 Q All right. Well, let's back up a little bit
2 and let's walk through it. Okay. At some point,
3 you're leaving the Silver Dollar, is that correct?
4 A Right.
5 Q Okay. And was -- do you recall any incident
6 inside the Silver Dollar as to why you left, or you
7 just decided to leave?
8 A The tip thing, I think, was why we were
9 leaving.
10 Q Okay. On your way out to the door, did you
11 have any kind of conversations or any type of run-in
12 with any of the other patrons there?
13 A I don't believe so, no.
14 Q Okay. All right. Then what happened? Where
15 did you go?
16 A I guess we were heading back to the car, and
17 then the altercation took place.
18 Q Okay. And where was the car?
19 A I don't know. Somewhere on King Street
20 maybe.
21 Q All right. Well, if you walk straight out
22 the Silver Dollar, was it to the left or to the right?
23 A I believe to the left.
24 Q Okay. And do you recall how far down the
25 left?

Page 27

1 A I have no idea.
2 Q All right. Then what happened after you
3 walked out the door?
4 A We got into the altercation with the guys.
5 Q Okay. Describe this altercation.
6 A I really don't remember in details what
7 happened.
8 Q Okay. Do you recall what side of the road
9 Ryan's SUV was parked on, whether it was the side of
10 the Silver Dollar, or was it across the street?
11 A I don't recall.
12 Q Okay. Do you recall any kind of conversation
13 or any kind of exchange back and forth that you would
14 have had with anyone else on the sidewalk?
15 A I don't recall any conversation or -- I think
16 there was a dispute, though.
17 Q Okay.
18 A To what extent, I don't know.
19 Q And did you get in Ryan's SUV?
20 A No.
21 Q Do you recall anybody that got in his SUV?
22 A I think he did --
23 Q Okay.
24 A -- when he came to pick me up or whatever.
25 Q Do you recall getting a bat out of the back

Page 28

1 of the SUV?
2 A I don't recall it, but I know it happened.
3 Q How do you know that happened?
4 A The -- when we were dealing with this two
5 years ago or three years ago, whenever it was.
6 Q Okay. Have you given any prior statements
7 about how this incident occurred?
8 A Yes.
9 Q Okay. And who did you give one to?
10 A I don't know. One of the attorneys. I'm not
11 sure if it was the police or who it was. I'm not sure
12 who it was.
13 Q Did you write it out, or did someone else
14 write it out?
15 A I couldn't tell you.
16 Q Okay. Well, let me ask you this: You don't
17 recall getting the bat out of the back of the back of
18 the SUV?
19 A I don't recall it, but I know it happened.
20 Q All right. Do you recall going after anyone
21 with the bat?
22 A No, because it was immediately taken from me.
23 Q Okay. And then what happened?
24 A That's when Ryan pulled up and the fellow,
25 whatever, struck the car with the bat. And then the

Page 29

1 next thing I remember, police are on the scene.
2 Q Okay. Do you recall what direction Ryan came
3 from when he asked you to -- when he came up?
4 A He would have been coming -- going away from
5 town.
6 Q Okay.
7 A Towards the Crosstown.
8 Q Okay. And can you walk me through, as best
9 you can, what exactly happened when he came up?
10 A He had a -- the -- there was just -- you
11 know, the guy hit the car with the bat, and then that
12 was, I guess, the last thing I remember.
13 Q Where were you when the -- when this
14 happened? Were you on the ground?
15 A Yeah, underneath a couple of guys.
16 Q Okay. What was happening?
17 A They were just beating me up.
18 Q Okay. What were they hitting you with?
19 A I have no idea.
20 Q Do you recall what Ryan said to you when he
21 pulled up?
22 A I think he said, "Get in the car."
23 Q Okay. And did you hear or did you see
24 somebody hit the Jeep with the bat?
25 A Heard.

Page 30

1 Q And what did you hear?

2 A Whatever noise a bat hitting a car sounds

3 like.

4 Q Okay. And what happened after that?

5 A I really don't recall. That was when --

6 Q Did Ryan take off?

7 A I don't remember what happened.

8 MR. CONNOR: Object to the form.

9 BY MR. DRIGGERS:

10 Q Do you know which direction Ryan was heading

11 towards when he left?

12 A The Crosstown.

13 Q Okay.

14 (Whereupon, there was a brief recess.)

15 (Plaintiff's Exhibit No. 1 was marked for

16 identification.)

17 BY MR. DRIGGERS:

18 Q All right, Will, I'm going to hand you what's

19 been marked as Plaintiff's Exhibit 1. And can you spot

20 the Silver Dollar Cafe on that photograph?

21 A Yes.

22 Q Where is it?

23 A (Indicating.)

24 Q Okay. Can you locate, on that photograph,

25 approximately where you were being held on the ground?

Page 31

1 A I have no idea.

2 Q Okay. Well, just so we're clear, what

3 direction was Ryan coming? Was he coming from the --

4 coming from the top of the photograph towards the

5 bottom or from the bottom of the photograph towards the

6 top?

7 A Top to the bottom, towards the Crosstown.

8 MR. CONNOR: Object to the form. Object to

9 form, because there were two times he was driving

10 up and --

11 BY MR. DRIGGERS:

12 Q Okay. When he went to pick up, when he

13 allegedly went to pick you up, which direction was he

14 driving?

15 A This, above --

16 Q Because we can't show that, that's from the

17 top of the photograph to the bottom?

18 A Right.

19 Q And do you recall if anybody was in the car

20 with him?

21 A I do not recall. I don't believe there was,

22 but I don't recall.

23 Q Okay. Did you ever see the car again after

24 that?

25 A You mean like ever again?

Page 32

1 Q The SUV that evening.

2 A No, not that evening.

3 Q Okay. All right. The -- he comes up, and

4 then you said you hear some type of bat on the car?

5 A Right.

6 Q Okay. Did you see who hit the car with the

7 bat?

8 A No.

9 Q Can you describe any of the individuals that

10 were holding you down on the ground?

11 A Nope.

12 Q After Ryan left, what's the next thing you

13 remember?

14 A Being in the back of the police car.

15 Q Okay. Were you handcuffed?

16 A I'm not sure if they handcuffed me or not. I

17 don't think they -- well, they may have. I think they

18 took them up once I got in the car.

19 Q Did you receive any medical treatment?

20 A Yes. I believe I had some x-rays on my leg.

21 Q And where did you get the medical treatment

22 at?

23 A MUSC.

24 Q Do you know if they ran any blood work on

25 you?

Page 33

1 A They did not run any blood work on me.

2 Q Okay. Did they ask you if they could?

3 A They did not ask me if they could.

4 Q Okay. They x-rayed your leg?

5 A Yes.

6 Q And what was wrong with your leg?

7 A It was sore. I don't know. I'm not sure.

8 You know, it felt hurt, whatever.

9 Q Do you know what it was from?

10 A I don't know what it was from. I would

11 assume the getting beat up was probably what it was

12 from.

13 Q Okay. Do you know if Ryan's SUV ran over

14 your leg?

15 A It did not run over my leg.

16 Q Okay. Anything other than your leg that they

17 ran x-rays of?

18 A No, I don't believe so.

19 Q Okay. Did you receive any other kind of

20 medical treatment as a result of this incident

21 afterwards?

22 A No.

23 Q Okay. Who would have been your family doctor

24 at that time?

25 A Whoever my dad directs me to. I'm not -- I

Exhibit G

**CONDENSED TRANSCRIPT
WORD INDEX**

Deposition
Of
ROBERT M. WITHERSPOON, IV

ROBERT M. WITHERSPOON, IV v. RYAN MCGUIRE
2:06-1089-DCN

10-24-2006

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ROBERT M. WITHERSPOON, IV

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
CASE NO:2:06-1089-DCN

ROBERT M. WITHERSPOON, IV,)
)
 PLAINTIFF,) DEPOSITION
)
) OF
 VS.) ROBERT M. WITHERSPOON, IV
)
 RYAN MCGUIRE,)
)
 DEFENDANT.)

DEPOSITION OF ROBERT M. WITHERSPOON, IV, TAKEN
BEFORE CHERI B. WILLIAMS, CERTIFIED COURT REPORTER AND
NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA,
SCHEDULED FOR 10:00 A.M. AND COMMENCING AT THE HOUR OF
10:13 A.M., TUESDAY, OCTOBER 24, 2006, AT THE OFFICE OF
JOHNNY F. DRIGGERS, 108 CENTRAL AVENUE, SUITE 7, GOOSE
CREEK, SOUTH CAROLINA.

REPORTED BY:
CHERI B. WILLIAMS, CVR

STIPULATIONS

IT IS STIPULATED BY AND BETWEEN COUNSEL FOR
THE RESPECTIVE PARTIES THAT ALL OBJECTIONS ARE
RESERVED UNTIL THE TIME OF TRIAL, EXCEPT AS TO
THE FORM OF THE QUESTIONS.

THIS DEPOSITION IS BEING TAKEN PURSUANT TO THE
FEDERAL RULES OF CIVIL PROCEDURE.

THE READING AND SIGNING OF THIS DEPOSITION IS
WAIVED BY THE DEPONENT AND COUNSEL FOR THE
RESPECTIVE PARTIES.

WHEREUPON,

ROBERT M. WITHERSPOON, IV, BEING DULY SWORN
AND CAUTIONED TO SPEAK THE TRUTH, THE WHOLE
TRUTH, AND NOTHING BUT THE TRUTH, TESTIFIED
AND DEPOSED AS FOLLOWS:

EXAMINATION

BY MR. GRANTLAND:

Q MR. WITHERSPOON, GOOD MORNING.

A GOOD MORNING.

Q MY NAME IS JOHN GRANTLAND. I WAS HIRED BY
PROGRESSIVE TO REPRESENT MR. MCGUIRE IN THIS
LAWSUIT. I'VE ASKED YOU TO BE HERE TODAY IN YOUR
LAWYER'S OFFICE TO TAKE YOUR DEPOSITION, AND WHAT
THIS IS, IT'S MY ONE OPPORTUNITY TO MEET YOU, FIND

APPEARANCES

FOR THE PLAINTIFF: JOHNNY F. DRIGGERS, ESQ.
108 CENTRAL AVENUE, SUITE 7
GOOSE CREEK, SC 29445

FOR THE DEFENDANT: JOHN F. GRANTLAND, ESQ.
WILLIAM M. CONNOR, V, ESQ.
MURPHY & GRANTLAND, P.A.
4406-B FOREST DRIVE
POST OFFICE BOX 6648
COLUMBIA, SC 29260

FOR THE UNDERINSURED
CARRIER: MICHAEL B. MCCALL, ESQ.
CLAWSON & STAUBES, LLC
126 SEVEN FARMS DRIVE, SUITE
200
CHARLESTON, SC 29492

ALSO PRESENT: KEITH HOLYROD

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DEFENDANT'S EXHIBIT NO. 1, HAND-DRAWN DIAGRAM; ONE PAGE.

OUT SOME INFORMATION ABOUT YOU, BUT MAINLY TO FIND
OUT ABOUT THE FACTS AND CIRCUMSTANCES OF THE
INCIDENT YOU HAD WITH MR. MCGUIRE AND ANY INJURIES
YOU HAD AS A RESULT. I NEED TO SAY A FEW
PRELIMINARY THINGS BEFORE I START ASKING QUESTIONS.
FIRST, OUR COURT REPORTER, CHERI, IS RECORDING
EVERYTHING YOU SAY SO IT'LL BE VERY IMPORTANT THAT
YOU SPEAK CLEARLY AND THAT YOU RESPOND VERBALLY TO
MY QUESTIONS. I CAN UNDERSTAND YOU IF YOU SAY UH-
HUH, UH-UH, BUT YOU NEED TO SAY YES AND NO WHEN
APPROPRIATE. AND I CAN UNDERSTAND YOU IF YOU NOD
YOUR HEAD, BUT YOU NEED TO SPEAK SO THE MICROPHONE
PICKS UP EVERYTHING WE SAY. SECOND, ALTHOUGH
YOU'RE UNDER OATH AND THIS IS FORMAL IN THAT
REGARD, THIS IS ALSO SUPPOSED TO BE VERY INFORMAL.
SO AT ANY TIME YOU NEED TO TAKE A BREAK, ANY TIME
YOU WANT TO TALK TO YOUR LAWYER, MY TIME IS YOUR
TIME. I DON'T EXPECT THIS TO TAKE ALL DAY, BUT I
DO WANT YOU TO BE AS COMFORTABLE AND RELAXED AS
POSSIBLE. FINALLY, IF I ASK YOU A QUESTION YOU
DON'T UNDERSTAND, PLEASE TELL ME AND I'LL DO MY
BEST TO REPHRASE THE QUESTION. MY JOB IS TO GET
INFORMATION FROM YOU, NOT TO TRICK YOU OR MISLEAD
YOU. SO IF I SAY SOMETHING THAT DOESN'T MAKE
SENSE, TELL ME AND I'LL DO MY BEST TO CLARIFY.

ROBERT M. WITHERSPOON, IV

25 1 CELEBRATE OR TO SEE YOU BEFORE YOU WENT ON ACTIVE 2 DUTY? 3 A RIGHT. THAT'S CORRECT. 4 Q BEFORE THE INCIDENT WITH MR. MCGUIRE, DID YOU EVER 5 HAVE ANY ALCOHOL TO DRINK? 6 A BEFORE THE INCIDENT? 7 Q YES. 8 A YES. 9 Q WHEN DID YOU START DRINKING THAT DAY? 10 A PROBABLY ABOUT APPROXIMATELY ABOUT IN-BETWEEN EIGHT 11 O'CLOCK AND NINE. 12 Q WHILE YOU WERE AT KENDALL'S HOUSE? 13 A UH-HUH. 14 Q WHAT DID YOU DRINK AT KENDALL'S HOUSE? 15 A PROBABLY A COUPLE BEERS. 16 Q AND YOU STAYED AT KENDALL'S HOUSE UNTIL HOW LONG? 17 A MAYBE TEN P.M., SOMEWHERE AROUND THERE, GIVE OR 18 TAKE HALF AN HOUR. 19 Q AND YOU LEFT KENDALL'S HOUSE. YOU SAID YOU WENT TO 20 ANOTHER FRIEND'S HOUSE? 21 A WE WENT TO ANOTHER HOUSE.. IT WASN'T A FRIEND OF 22 MINE, BUT IT WAS CLOSER TO THE -- WHERE THE KING 23 STREET WAS WHERE WE WERE GOING. I BELIEVE IT WAS 24 ON VANDERHORST, IF I CAN RECALL CORRECTLY. 25 Q I KNOW WHERE THAT IS. SO YOU DON'T REMEMBER THIS	27 1 WAS IT YOU AND TIM AND BLAINE AND GRANT AND RYAN? 2 A SHOULD HAVE BEEN ALL TOGETHER. 3 Q WAS THERE ANYONE ELSE WITH YOU? 4 A I MEAN, AT THAT TIME IT WOULD HAVE BEEN KENDALL, 5 HIS ROOMMATES, AND SEVERAL OTHER PEOPLE. WE 6 STARTED OFF WITH RATHER A LARGE GROUP OF FRIENDS. 7 Q RIGHT. ALL GUYS? 8 A GUYS AND GIRLS. 9 Q SO YOU STAYED AT PORTSIDE CAFE FOR HOW LONG? 10 A APPROXIMATELY AN HOUR. 11 Q WHAT DID YOU DRINK AT PORTSIDE? 12 A PROBABLY HAD LIKE A SHOT THERE AND A BEER. 13 Q THEN YOU LEFT PORTSIDE. WHERE DID YOU GO? 14 A IT WAS EITHER ONE OF THE TWO. IT WAS EITHER 15 PORTSIDE OR CHARLESTON BEER WORKS, AND I WAS TRYING 16 TO THINK IF BEER WORKS WAS OPEN THEN. I THINK IT 17 WAS. I'M SURE IT WAS. I'M SURE WE WENT THERE, IF 18 IT WAS. I'M SORRY. IT'S JUST SO LONG AGO I'M 19 HAVING A LITTLE TROUBLE TRYING TO REMEMBER WHAT 20 EXACTLY WE DID. 21 Q SURE. I UNDERSTAND. ARE THEY SIDE BY SIDE OR 22 SOMETHING LIKE THAT? 23 A RIGHT. THAT'S CORRECT. THEY ARE SIDE BY SIDE. 24 Q SO YOU WOULD HAVE GONE TO BEER WORKS AROUND 25 MIDNIGHT?
26 1 PERSON'S -- THE OWNER OR THE TENANT OF THE HOUSE? 2 A NO, I DO NOT, SIR.. 3 Q WHAT DID YOU DO AT THIS HOUSE ON VANDERHORST? 4 A SAME THING. MOSTLY MEET AND GREET. SEE WHO'S 5 GOING WHERE, YOU KNOW. TRY TO FIND OUT WHAT WE 6 WANT TO DO. JUST MAKE PLANS FOR THE NIGHT, YOU 7 KNOW, AS FAR AS WHERE WE WANT TO GO SO ... 8 Q HOW LONG DID YOU STAY AT THIS HOUSE ON VANDERHORST? 9 A PROBABLY FOR ABOUT AN HOUR. 10 Q DID YOU DRINK WHILE YOU WERE AT THIS HOUSE ON 11 VANDERHORST? 12 A YEAH. I HAD A BEER WHILE I WAS THERE. 13 Q AND THEN YOU ALL LEFT THE HOUSE ON VANDERHORST AND 14 WHERE DID YOU GO? 15 A I BELIEVE WE WENT TO EITHER PORTSIDE OR -- I'M NOT 16 EVEN SURE IF CHARLESTON BEER WORKS WAS EVEN THERE. 17 I DON'T THINK IT WAS. I BELIEVE WE WENT TO 18 PORTSIDE FOR A BEER. 19 Q IT THAT A BAR? 20 A YEAH. IT WAS PORTSIDE CAFE. IT USED TO BE A BAR 21 OUT THERE ON KING STREET. 22 Q AND SO YOU WOULD HAVE GONE TO PORTSIDE AT 23 APPROXIMATELY 11 OR SO? 24 A YEAH. DIDN'T STAY LONG. 25 Q AND WHILE AT PORTSIDE IT WOULD HAVE BEEN YOU AND --	28 1 A OR PORTSIDE. 2 Q YOU WOULD HAVE GONE TO ONE OR THE OTHER. YOU WENT 3 TO BOTH, YOU THINK, AND YOU WOULD HAVE GONE TO ONE 4 AT 11 AND THE OTHER AT MIDNIGHT? 5 A RIGHT. 6 Q DOES THAT SOUND RIGHT? 7 A CORRECT. 8 Q AND THE SECOND -- AND AT MIDNIGHT, WHETHER IT WAS 9 PORTSIDE OR BEER WORKS, HOW LONG DID YOU STAY AT 10 THIS BAR? 11 A AGAIN PROBABLY AN HOUR. 12 Q DO YOU REMEMBER WHAT YOU DRANK AT BEER WORKS? 13 A I DON'T REMEMBER, BUT, I MEAN, I CAN APPROXIMATE. 14 I PROBABLY TOOK A SHOT AND HAD A BEER. 15 Q AND YOU STAYED THERE FOR AN HOUR, YOU THINK? 16 A I WOULD THINK SO BEFORE WE MOVED OVER TO THE SILVER 17 DOLLAR. 18 Q SO BY THE TIME YOU WENT TO THE SILVER DOLLAR IT 19 WOULD HAVE BEEN ABOUT ONE A.M.? 20 A THAT'S PROBABLY A PRETTY GOOD ESTIMATE. 21 Q AND BY THE TIME YOU GOT TO THE SILVER DOLLAR IT 22 WOULD HAVE STILL BEEN GRANT AND BLAINE AND RYAN AND 23 TIM AND MAYBE EVEN KENDALL AND HIS ROOMMATE? 24 A YEAH. KENDALL AND HIS ROOMMATES ENDED UP LEAVING 25 THE SILVER DOLLAR RATHER EARLY. I MEAN, I'D SAY

ROBERT M. WITHERSPOON, IV

29

1 PROBABLY MAYBE 30 OR 45 MINUTES AFTER WE GOT THERE.

2 Q TELL ME ABOUT THE SILVER DOLLAR. IT'S JUST ANOTHER

3 BAR?

4 A IT'S A HOLE IN THE WALL. LIKE I'VE NEVER BEEN A

5 REAL FAN OF IT, BUT, YOU KNOW, IT WAS PRETTY

6 POPULAR AND PEOPLE DEFINITELY LIKED GOING THERE.

7 BUT IT HAD A COUPLE POOL TABLES IN THE BACK. WE

8 ALL LIKED PLAYING POOL. HAD A BAR OFF TO THE RIGHT

9 AND THEY USUALLY HAD A BAND PLAYING UP FRONT ON

10 STAGE, SO IT WAS PRETTY TIGHT QUARTERS IN THERE.

11 Q RIGHT. SO BY THE TIME YOU WERE AT THE SILVER

12 DOLLAR DO YOU HAVE ANY IDEA HOW MUCH ALCOHOL YOU

13 HAD HAD TO DRINK THAT EVENING?

14 A FROM THE HOUSE TO THE OTHER HOUSE TO THE BAR I

15 DON'T REALLY HAVE ANY IDEA. I MEAN, I CAN ONLY

16 APPROXIMATE, BUT, YOU KNOW, HOW GOOD THAT WOULD BE

17 FOR YOU I DON'T KNOW.

18 Q WELL, WHAT'S YOUR BEST APPROXIMATION OF HOW MUCH

19 ALCOHOL YOU HAD HAD TO DRINK BY THE TIME YOU GOT TO

20 THE SILVER DOLLAR?

21 A I PROBABLY HAD ABOUT SIX BEERS.

22 Q AND A COUPLE SHOTS?

23 A COUPLE SHOTS.

24 Q NOW, DID YOU ALL JUST PARK ON KING STREET AND JUST

25 KIND OF WALK TO THESE PLACES? I MEAN, IS SILVER

30

1 DOLLAR WALKING DISTANCE FROM PORTSIDE?

2 A RIGHT. WE ACTUALLY PARKED -- I PARKED MY JEEP

3 GOING THIS WAY, GOING SOUTH ON KING, AND WE HAD TO

4 WALK ACROSS THE STREET TO WHERE THE BARS WERE.

5 Q SO YOU DIDN'T HAVE TO DRIVE FROM BAR TO BAR?

6 A NO.

7 Q YOU COULD JUST WALK?

8 A NO. THEY WERE ALL -- THAT WAS A GOOD THING ABOUT

9 IT.

10 Q THEY WERE ALL CLOSE TOGETHER?

11 A RIGHT. AND, YOU KNOW, IT WAS KIND OF MORE OF A

12 SAFETY ISSUE THAN ANYTHING. KEEPING US ALL, YOU

13 KNOW, IN ONE PLACE. YOU KNOW, NOT SPREADING OUT

14 AND HAVING TO DRIVE AND WHATNOT.

15 Q NOW, YOU MAY NOT KNOW THIS, BUT YOUR OTHER FRIENDS,

16 WERE THEY DRINKING ALONG WITH YOU? I MEAN, WAS ONE

17 PERSON COMPLETELY SOBER, OR WAS EVERYONE KIND OF

18 HAVING A BEER HERE AND A BEER THERE?

19 A I THINK EVERYONE WAS KIND OF HAVING A BEER HERE AND

20 A BEER THERE ENJOYING THEMSELVES. YOU KNOW,

21 LAUGHING, TELLING JOKES, OLD STORIES. YOU KNOW, I

22 HAD HIGH SCHOOL BUDDIES THERE THAT I DIDN'T SEE.

23 Q ALL FROM IRMO, YEAH.

24 A RIGHT. I DON'T SEE ON A REGULAR BASIS, SO, I MEAN,

25 IT WAS MORE OF A REUNION/GOODBYE, YOU KNOW.

31

1 Q RIGHT. WAS ANY ONE PERSON MORE INTOXICATED THAN

2 THE OTHER OR WAS EVERYONE PRETTY MUCH THE SAME?

3 A NOT THAT I CAN RECALL, SIR. I MEAN, I WASN'T -- I

4 DON'T KNOW. I COULDN'T -- I COULDN'T TELL YOU AT

5 WHAT POINT ONE PERSON GOT INTOXICATED AS OPPOSED TO

6 ANOTHER PERSON.

7 Q RIGHT. WELL, BY THE TIME YOU GOT TO THE SILVER

8 DOLLAR AT APPROXIMATELY ONE A.M. OR THEREABOUT, HOW

9 WERE YOU FEELING? WERE YOU SOBER OR WERE YOU

10 INTOXICATED?

11 A I FELT FINE. I MEAN, I'D HAD -- I HAD HAD A FEW

12 DRINKS AND -- BUT I DIDN'T OVERDO IT, YOU KNOW, AND

13 I WALKED INTO THERE FEELING FINE. SAW A WHOLE --

14 YOU KNOW, WHOLE OTHER GROUP OF PEOPLE AND, YOU

15 KNOW, IT WAS ...

16 Q DID YOU KNOW ANY OF THE EMPLOYEES AT THE BAR? DID

17 YOU KNOW THIS CALHOUN FELLOW?

18 A I KNOW WHO HE IS.

19 Q RIGHT. WAS THIS A BAR YOU FREQUENTED?

20 A I HAD BEEN THERE BEFORE. BUT RYAN BASS IS A

21 BOUNCER. HE WAS A BOUNCER AT BEER WORKS. HE

22 WORKED AT SILVER DOLLAR SOME NIGHTS.

23 Q SO HE WAS FAMILIAR WITH EVERYBODY?

24 A YEAH. EXACTLY. AND SO I KNEW SOME OF THOSE GUYS

25 THROUGH HIM, BUT DIDN'T REALLY KNOW THEM.

32

1 Q I GOT YOU. SO YOU GOT TO SILVER DOLLAR

2 APPROXIMATELY ONE A.M. APPROXIMATELY WHAT TIME DID

3 THE ACCIDENT HAPPEN?

4 A APPROXIMATELY SOMEWHERE IN-BETWEEN THREE AND 3:30,

5 3:45, SOMETHING LIKE THAT.

6 Q SO WHAT DID YOU DO BETWEEN ONE AND THREE?

7 A SHOT POOL, HUNG OUT WITH FRIENDS.

8 Q DID YOU DRINK ANY -- DID YOU HAVE ANY MORE BEERS OR

9 SHOTS WHILE YOU WERE AT SILVER DOLLAR?

10 A OH, YES, SIR.

11 Q HOW MUCH DID YOU DRINK WHILE YOU WERE AT THE SILVER

12 DOLLAR?

13 A BY THAT TIME I PROBABLY WAS JUST DRINKING BEER

14 BECAUSE I DON'T LIKE A LOT OF SHOTS AND I REALLY

15 DON'T LIKE ANY FORM OF LIQUOR. BUT I PROBABLY HAD,

16 YOU KNOW, TWO OR THREE MORE BEERS WHILE I WAS

17 THERE.

18 Q AND I ASSUME -- AND BY THREE A.M. I GUESS IT WAS

19 JUST PRETTY MUCH YOUR GROUP OF FRIENDS?

20 A THERE WAS ACTUALLY A GOOD BIT OF PEOPLE IN THERE

21 STILL.

22 Q OH, REALLY?

23 A I MEAN, IT WASN'T JAM PACKED, BUT THERE WAS PEOPLE

24 STILL SITTING AT THE BAR.

25 Q WHAT TIME DOES THE BAR CLOSE?

ROBERT M. WITHERSPOON, IV

33

1 A IT'S SUPPOSED TO CLOSE AT TWO, SIR.
2 Q RIGHT. BUT IT WAS STILL OPEN AT THREE?
3 A CORRECT.
4 Q AND YOU SHOT POOL AND HUNG OUT WITH YOUR FRIENDS,
5 AND I CAN VISUAL THAT. AT WHAT POINT DID YOU HAVE
6 ANY CONTACT WITH MR. MCGUIRE OR HIS FRIEND, MR.
7 IRVIN, DO YOU KNOW?
8 A NEVER DID.
9 Q YOU NEVER HAD ANY CONTACT WITH THEM?
10 A NEVER DID.
11 Q SO WOULD YOU RECOGNIZE HIM IF YOU SAW HIM?
12 A I SAW HIM ONCE SINCE THE INCIDENT HAPPENED AND THAT
13 WAS --
14 Q IN COURT?
15 A -- FEBRUARY, I THINK, IN COURT A YEAR OR TWO AGO.
16 Q RIGHT.
17 A AND HE STOOD UP AND I STOOD UP AND, YOU KNOW, I
18 MADE A MOTION TO THE JUDGE ON HAND, YOU KNOW,
19 BECAUSE HE ASKED ME IF I HAD ANYTHING TO SAY DURING
20 HIS SENTENCING, I GUESS, AND I STOOD UP AND HAD A
21 FEW THINGS TO SAY.
22 Q I'LL GET TO THAT.
23 A SURE.
24 Q BUT BEFORE -- THAT NIGHT OR BEFORE THE ACCIDENT OR
25 AFTER THE ACCIDENT YOU NEVER LAID EYES ON MCGUIRE?

34

1 A THAT COURT DATE WAS THE FIRST DATE I HAD SEEN HIM.
2 AND I'M NOT SAYING I DIDN'T SEE THE BACK OF HIS
3 HEAD SOMEWHERE THAT NIGHT, BUT AS FAR AS
4 RECOGNIZING HIM THAT I'VE SEEN, NO.
5 Q BUT YOU ALL DIDN'T TALK TO EACH OTHER?
6 A NO.
7 Q CUSS AT EACH OTHER?
8 A NO.
9 Q TOUCH EACH OTHER OR ANYTHING THAT NIGHT?
10 A NO, SIR.
11 Q HOW ABOUT YOU WOULDN'T KNOW IF HE HAD -- I GUESS
12 YOU DON'T KNOW WHO HIS COMPANIONS WERE THAT NIGHT?
13 A NO, SIR.
14 Q DO YOU KNOW IF THEY WERE -- YOU MAY HAVE HEARD
15 SOMETHING FROM YOUR OTHER FRIENDS SO I'M ASKING YOU
16 WHAT YOU'VE HEARD. DO YOU KNOW IF THEY WERE
17 BOTHERING THE BARTENDER OR IF THEY WERE BOTHERING
18 ANYONE INSIDE THE BAR?
19 A THE ONLY THING THAT I'VE HEARD AND IT'S COMPLETELY
20 SECONDHAND, BUT IS THAT SOME KIND OF ARGUMENT OVER
21 A BAR TAB. I DON'T KNOW HOW TRUE THAT IS. BUT
22 THEY GOT IN AN ARGUMENT WITH THE BARTENDER AND THE
23 BARTENDER HAD ASKED THEM TO LEAVE OR SOMETHING.
24 Q AND YOU WEREN'T A PARTY TO THAT AT ALL?
25 A NO.

35

1 Q NOW, BY THREE A.M., GIVE OR TAKE -- OR WHEN WAS IT
2 THAT YOU LEFT SILVER DOLLAR?
3 A I GUESS AFTER WE WERE HIT --
4 Q WELL, BEFORE YOU WERE HIT. I MEAN, HOW DID YOU
5 MAKE IT OUTSIDE, I GUESS?
6 A WELL, WE WERE INSIDE AND PEOPLE STARTED -- THAT
7 WERE INSIDE THE BAR WERE HANGING OUT THE DOOR, YOU
8 KNOW, YELLING ABOUT COMMOTION ABOUT A FIGHT THAT'S
9 GOING ON. AND SO I GOT UP, AND I BELIEVE THAT
10 GRANT COOK, IF HE WASN'T WITH ME HE WAS RIGHT AHEAD
11 OF ME GOING OUT THE DOOR TRYING TO SEE WHAT WAS
12 GOING ON. AND I LOOKED OUT THERE AND I SAW, YOU
13 KNOW, ALL THE COMMOTION. A BAT.
14 Q LET ME BACK YOU UP. SO YOU'RE INSIDE. AND I'LL
15 JUST LET YOU TELL ME WHAT YOU RECALL. YOU'RE
16 INSIDE WITH YOUR FRIENDS APPROXIMATELY THREE A.M.
17 WHAT DO YOU REMEMBER HAPPENING?
18 A I REMEMBER THAT WE WERE NOT LEAVING BUT WE WERE
19 GETTING CLOSE TO THE POINT WE WERE ABOUT TO LEAVE,
20 OKAY?
21 Q OKAY.
22 A AND I WAS GIVING --
23 Q I GUESS YOU ALL WERE GOING TO LEAVE WHEN THEY
24 KICKED YOU OUT, I GUESS?
25 A RIGHT. RIGHT. AND SO I WAS HUGGING PEOPLE AND

36

1 THEN THAT'S WHEN I HEARD GUYS AT THE DOOR. YOU
2 KNOW, THESE GUYS ARE GETTING INTO IT, WHATEVER WAS
3 SAID. SO I STOPPED AND SAID ALL RIGHT. LOOKED
4 AROUND, OKAY, AND NONE OF THE GUYS I'M WITH ARE
5 HERE BESIDES MR. COOK. ALL RIGHT.
6 Q SO YOU AND GRANT WERE THERE INSIDE THE BAR
7 BASICALLY?
8 A RIGHT.
9 Q WHERE WAS TIM AND RYAN AND BLAINE?
10 A THEY WERE OUTSIDE, I RECKON, JAW-JACKING WITH THESE
11 OTHER GUYS. I'M NOT SURE HOW ALL THAT TOOK PLACE.
12 Q YOU WEREN'T INVOLVED IN ANY OF THAT?
13 A NO, I WAS NOT.
14 Q OKAY. SO YOU LOOK AROUND AND YOU'RE WITH GRANT AND
15 YOU HEAR SOME COMMOTION OUT -- YOU HEAR THERE'S A
16 FIGHT OR SOMETHING OUTSIDE?
17 A GUYS JUST CROWDING THE DOORWAY OF THE BAR, YOU
18 KNOW, LOOKING OUT. PEOPLE -- YOU CAN -- IT'S A BIG
19 WINDOW. YOU CAN SEE PEOPLE LOOKING OUT DOWN THE
20 STREET.
21 Q DID YOU KNOW ANYONE AT THE DOORWAY?
22 A NO, NOT THAT I CAN RECALL, SIR.
23 Q SO YOU AND GRANT GET UP AND YOU ALL GO. TELL ME
24 WHAT YOU DO.
25 A WELL, I'LL SAY THIS. WHETHER GRANT WAS RIGHT

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ROBERT M. WITHERSPOON, IV

37

1 BESIDE ME OR HE WAS AT THE DOORWAY, HE WAS
2 SOMEWHERE IN-BETWEEN THE AREA BECAUSE WE BOTH KIND
3 OF MOTIONED DOWN THERE AT THE SAME TIME.
4 Q WHAT WERE YOU DOING? WERE YOU LOOKING FOR YOUR
5 OTHER FRIENDS?
6 A YEAH. I WANTED TO KNOW WHAT WAS GOING ON, OF
7 COURSE, YOU KNOW.
8 Q SO TELL ME WHAT HAPPENS.
9 A GOT OUTSIDE, SAW THE -- ALL I SAW WAS ONE GUY WITH
10 THE BAT AND BLAINE STRUGGLING WITH HIM ON THE BAT
11 AND THEN THEY WENT DOWN. AND SO THAT'S WHEN I WENT
12 OVER TO WHERE THEY WERE.
13 Q SO YOU SAW -- DO YOU KNOW WHO THE GUY WITH THE BAT
14 WAS?
15 A NO.
16 Q DO YOU EVEN KNOW WHAT HE LOOKS LIKE NOW?
17 A NO.
18 Q AND THEN YOU SAW BLAINE.
19 A RIGHT.
20 Q BLAINE'S A BIG GUY, ISN'T HE?
21 A LANKY.
22 Q OH, OKAY.
23 A HE'S SKINNY.
24 Q OKAY. HE'S SKINNY. WAS HE BIGGER THAN THE GUY
25 WITH THE BAT, DO YOU REMEMBER?

38

1 A POUND FOR POUND, PROBABLY NOT.
2 Q SO ARE THEY STANDING STRUGGLING FOR A BAT?
3 A RIGHT.
4 Q WERE THEY ON THE SIDEWALK OR IN THE ROAD, OR WHERE
5 WERE THEY?
6 A THEY WERE KIND OF IN-BETWEEN. I GUESS THE BEST WAY
7 TO SAY IT IS, YOU KNOW, YOU GOT PARALLEL PARKED
8 CARS ALL THE WAY DOWN THE ROAD.
9 Q RIGHT.
10 A AND THERE WAS ABOUT A BIG SPACE LIKE THIS
11 (INDICATING) AND IT WAS KIND OF RIGHT BEFORE THE
12 ALLEYWAY THAT SEPARATES PORTSIDE AND CHARLESTON
13 BEER WORKS AND THE SILVER DOLLAR. AND SO THEY WERE
14 ALMOST IN WHAT SHOULD HAVE BEEN A CAR SPOT,
15 PARALLEL CAR SPOT. RIGHT THERE. PROBABLY
16 VENTURING ON THE EDGE --
17 Q SO THEY WERE OFF THE SIDEWALK?
18 A YEAH. THEY WERE OFF THE SIDEWALK VENTURING IN THE
19 EDGE OF WHAT WOULD BE CONSIDERED BEING ON THE FAR
20 PART OF THAT ROAD STRUGGLING BACK AND FORTH.
21 Q WERE THERE CARS ON EITHER SIDE OF THEM THAT WERE
22 STILL PARKED THERE?
23 A SIR, I CAN'T REMEMBER.
24 Q THAT'S ALL RIGHT. SO YOU SAW BLAINE AND THE GUY
25 YOU DON'T KNOW STRUGGLING OVER A BAT?

39

1 A CORRECT.
2 Q WHAT HAPPENED BEFORE THEN, YOU HAVE NO IDEA?
3 A I WAS IN THE BAR.
4 Q SO YOU SEE THAT AND WHAT DO YOU DO? YOU SEE BLAINE
5 AND THIS GUY WITH A BAT. WHAT DO YOU DO?
6 A WELL, I WALKED OUT BEHIND WHERE THEY WERE. I
7 DIDN'T WANT TO GET HIT WITH ANYTHING. AND, YOU
8 KNOW, STARTED ASKING QUESTIONS. WHAT'S GOING ON.
9 YOU KNOW, HOW DID THIS START, ALL THAT GOOD STUFF.
10 Q WHO WERE YOU TALKING TO, DO YOU REMEMBER?
11 A I HAVE NO IDEA, SIR.
12 Q SO YOU'RE ASKING WHAT'S GOING ON, AND WHAT HAPPENS
13 NEXT?
14 A BAM.
15 Q DO YOU EVER SEE BLAINE AND THIS GUY ON THE GROUND
16 FIGHTING OR STRUGGLING OVER THE BAT?
17 A YEAH. THEY MADE IT TO THE GROUND BEFORE WE WERE
18 HIT.
19 Q WHEN YOU SAID YOU WERE BEHIND THEM, WERE YOU ON THE
20 SIDEWALK OR WERE YOU KIND OF ON THE FAR SIDE OF THE
21 ROAD?
22 A I WAS IN THE FAR SIDE OF THE ROAD LIKE WHERE THAT -
23 - WHERE I WAS TALKING ABOUT WHERE A CAR WOULD BE
24 PARKED.
25 Q WHERE A CAR WOULD BE --

40

1 A RIGHT BEHIND THEM. IF THIS WAS ME, THEN HERE ARE
2 THE TWO OF THEM AND THEN GUYS SCATTERED ABOUT AND
3 THAT'S WHERE THE CAR CAME FROM.
4 Q SO YOU'RE ON THE -- I GUESS YOU'RE ON THE FAR SIDE
5 OF THE ROAD WHERE A CAR WOULD BE AND THEY WERE A
6 LITTLE BIT FURTHER OUT INTO THE ROAD, I GUESS?
7 A POSSIBLY.
8 Q OKAY.
9 A ALL I KNOW IS THAT THEY WERE IN THE AREA OF WHERE A
10 PARKED CAR SHOULD BE. WHETHER THEY WERE GETTING
11 OUT INTO A SECTION WHERE A CAR DRIVING THIS WAY
12 COULD HIT THEM, I COULDN'T TELL YOU.
13 Q SO YOU SAW THEM MAKE IT TO THE GROUND. YOU ASKED
14 WHAT'S GOING ON. THEN WHAT'S THE NEXT THING THAT
15 HAPPENS?
16 A AND THEN WE WERE HIT BY THE CAR. JEEP.
17 Q LET ME JUST MAKE SURE I'M -- I'M GOING TO ASK YOU
18 SOME SPECIFIC QUESTIONS YOU MAY OR MAY NOT BE ABLE
19 TO ANSWER, MITCH.
20 A SURE.
21 Q BY THE TIME YOU GOT OUTSIDE HOW WERE YOU FEELING?
22 WERE YOU STILL FEELING FINE OR BY THEN WERE YOU A
23 LITTLE INTOXICATED OR LITTLE BUZZED?
24 A I WAS FEELING FINE, BUT IT WOULD BE NAIVE FOR ME TO
25 SAY THAT I WASN'T -- YOU KNOW, I HADN'T HAD A

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ROBERT M. WITHERSPOON, IV

41

1 LITTLE TOO MUCH TO DRINK. BUT AS FAR AS I WAS
2 CONCERNED I WAS FINE, BUT I'M NOT GOING TO DENY THE
3 FACT THAT I HAD BEEN DRINKING.
4 Q WERE YOU SOBER ENOUGH TO DRIVE SAFELY?
5 A NO. I WOULD HAVE NEVER GOTTEN IN AND DRIVEN MY
6 CAR.
7 Q THAT WASN'T YOUR PLAN?
8 A RIGHT. NO, OBVIOUSLY NOT. THAT'S NOT SOMETHING
9 YOU WANT TO DO WHEN YOU'RE ABOUT TO LEAVE.
10 Q RIGHT. THE NIGHT BEFORE YOU GO ON ACTIVE DUTY,
11 RIGHT. SO HAD YOU MADE ARRANGEMENTS FOR SOMEONE TO
12 TAKE YOUR HOME?
13 A A CAB OR KENDALL'S HOUSE WAS TWO BLOCKS AWAY.
14 Q HE'S NOT ON VANDERHORST, IS HE, BUT HE'S AROUND
15 THERE?
16 A HE'S NOT ON VANDERHORST, NO. I SAID SMITH STREET
17 EARLIER. IT MIGHT BE ANOTHER STREET.
18 Q SOMEWHERE IN THAT AREA. SO YOU WEREN'T PLANNING TO
19 DRIVE. YOU NEVER -- I GUESS YOU NEVER SAW -- I
20 ASSUME YOU NEVER -- YOU WEREN'T INVOLVED IN THIS
21 ALTERCATION AT ALL? YOU ASKED WHAT'S GOING ON AND
22 THAT'S REALLY --
23 A THAT'S CORRECT.
24 Q NO ONE MADE ANY THREATENING COMMENTS TO YOU?
25 A NO.

42

1 Q IS THAT NO?
2 A NO.
3 Q NO ONE HIT YOU?
4 A NO.
5 Q NO ONE PUNCHED YOU OR HIT YOU AND YOU DIDN'T HIT
6 ANYONE?
7 A NO.
8 Q AS FAR AS YOU KNOW -- CORRECT ME IF I'M WRONG --
9 THE ONLY PEOPLE INVOLVED IN AN ACTUAL PHYSICAL
10 CONFRONTATION WAS BLAINE AND THIS OTHER GUY WITH
11 THE BAT?
12 A CORRECT.
13 Q IS THAT RIGHT?
14 A AS FAR AS I KNOW, SIR.
15 Q DID YOU SEE ANYONE ELSE PUSHING OR SHOVING OR
16 ANYTHING LIKE THAT?
17 A THERE WAS A LOT OF TALKING GOING ON, BUT NOT SO
18 MUCH ACTION, YOU KNOW, AS FAR AS PEOPLE FIGHTING.
19 THAT WAS KIND OF THE ONLY THING THAT I SAW WAS THE
20 STRUGGLE BETWEEN BLAINE AND THE OTHER GUY WITH THE
21 BAT.
22 Q HOW SOON AFTER YOU SAW THEM STRUGGLING WERE YOU HIT
23 BY THE JEEP?
24 A MATTER OF SECONDS.
25 Q AND CORRECT ME IF I'M WRONG, YOU SAW THEM GO DOWN

43

1 AND THEN YOU WERE HIT?
2 A RIGHT.
3 Q HOW DID THEY AVOID GETTING HIT BY THE JEEP?
4 A BLAINE DIDN'T.
5 Q BLAINE GOT HIT?
6 A HE GOT -- HIS FOOT WAS RUN OVER BY THE JEEP.
7 Q DO YOU KNOW IF THE OTHER GUY ON THE GROUND, IF HE
8 WAS --
9 A I'M NOT SURE. I HEARD THAT THE OTHER GUY HAD GONE
10 TO THE HOSPITAL. I HAVE NO IDEA WHAT KIND OF
11 INJURIES.
12 Q SO BLAINE DEFINITELY GOT HIT BY THE JEEP?
13 A CORRECT.
14 Q ONE OF HIS FEET WERE RUN OVER. AND YOU DIDN'T SEE
15 THE JEEP COMING?
16 A NO. I SAW -- I HEARD THE ROAR OF THE ENGINE AND
17 THEN I TURNED LEFT AND I SAW HEADLIGHTS AND THE
18 JEEP EMBLEM ON THE FRONT, AND THAT'S THE LAST THING
19 I REMEMBER.
20 Q I'M JUST GOING THROUGH MY LIST. DO YOU KNOW WHO
21 WAS DRIVING THE JEEP? I ASSUME YOU KNOW IT'S
22 MCGUIRE, BUT YOU HAD NOT --
23 A COULD I IDENTIFY HIM?
24 Q RIGHT.
25 A IS THAT WHAT YOU'RE GETTING AT?

44

1 Q RIGHT. WELL, DID YOU EVER SEE HIM GET IN THE JEEP?
2 A NO.
3 Q DID YOU EVER SEE HIM DRIVE UP TO WHERE YOU ALL --
4 DO YOU KNOW WHERE HE CAME FROM?
5 A I KNOW WHERE HE CAME FROM.
6 Q WHERE DID HE COME FROM?
7 A HE CAME FROM THE NORTH SIDE OF KING COMING DOWN AND
8 HE HAD TO CROSS OVER A LANE OF TRAFFIC I KNOW TO
9 HIT ME AND TO HIT EVERYBODY ELSE. SO HE CAME FROM
10 THE NORTH SIDE.
11 Q CAN YOU DIAGRAM THAT?
12 A I CAN DIAGRAM IT. NO PROBLEM, SIR.
13 Q THAT WAY YOU CAN JUST KIND OF MAYBE SHOW ME WHERE
14 YOU WERE. AND I KNOW IT'S NOT TO SCALE, BUT THAT
15 MIGHT BE BETTER THAN SHOWING A FINGER ON THE TABLE.
16 A SURE. I'LL DO THE BEST I CAN FOR YOU.
17 Q YES, SIR. TAKE YOUR TIME.
18 A (COMPLIES.)
19 MR. GRANTLAND: WE CAN GO OFF THE RECORD.
20 (OFF THE RECORD FROM 11:02 A.M. TO 11:06 A.M.)
21 EXAMINATION CONTINUES
22 BY MR. GRANTLAND:
23 Q WE'LL MARK THIS AS AN EXHIBIT, AND THEN YOU CAN
24 EXPLAIN IT, IF THAT'S ALL RIGHT.
25 DEFENDANT'S EXHIBIT NO. 1, HAND-DRAWN DIAGRAM;

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Exhibit H

CONDENSED TRANSCRIPT WORD INDEX

Deposition
Of
BLAINE STOUT

9/22/2006

WILLIAMS REPORTING
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CASE NO: 2:06-1089-DCN

ROBERT M. WITHERSPOON, IV)

PLAINTIFF,)

VS.)

RYAN MCGUIRE,)

DEFENDANT.)

DEPOSITION

OF

BLAINE STOUT

DEPOSITION OF BLAINE STOUT, TAKEN BEFORE ELLYN W.
LEARN, NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH
CAROLINA, SCHEDULED FOR 11:00 A.M., AND COMMENCING AT
THE HOUR OF 12:18 P.M., FRIDAY, SEPTEMBER 22, 2006, AT
THE OFFICE OF MURPHY AND GRANTLAND, P.A., 4406-B FOREST
DRIVE, COLUMBIA, SOUTH CAROLINA.

REPORTED BY:
ELLYN W. LEARN

APPEARANCES

FOR THE PLAINTIFF: JOHNNY F. DRIGGERS, ESQ.
108 CENTRAL AVENUE, SUITE 7
GOOSE CREEK, SC 29445

FOR THE DEFENDANT: WILLIAM M. CONNOR, JR., ESQ.
MURPHY & GRANTLAND, P.A.
4406-B FOREST DRIVE
POST OFFICE BOX 6648
COLUMBIA, SC 29260

FOR ERNEST COOK: JOHN S. DEBERRY, ESQ.
179 S. COIT STREET
POST OFFICE BOX 1422
FLORENCE, SC 29503

FOR UNDERINSURED
CARRIER: CHRISTOPHER W. NICKELS, ESQ.
CLAWSON & STAUBES, L.L.C.
126 SEVEN FARMS DRIVE, STE 200
CHARLESTON, SC 29492

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1 Q THE ONLY THING I WILL SAY THAT WAS NOT MENTIONED
2 ALREADY IS THAT AS SHE'S TAKING THIS SHE'S ACTUALLY
3 TAKING IT WORD FOR WORD. SO WHEN I ASK YOU A
4 QUESTION, PLEASE ANSWER VERBALLY AS OPPOSED TO A
5 HEAD NOD OR SOMETHING OF THAT NATURE BECAUSE IT
6 CAN'T GET PICKED UP FOR THE TRANSCRIPTS. AND
7 YOU'VE BEEN SWORN IN. THANK YOU. OKAY. FIRST
8 THING, WHAT'S YOUR FULL NAME?
9 A BLAINE HENDRICK STOUT.
10 Q DID YOU SAY HENDRIX?
11 A HENDRICK.
12 Q HENDRICK. COULD YOU SPELL HENDRICK, PLEASE?
13 A H-E-N-D-R-I-C-K.
14 Q DO YOU HAVE ANY NICKNAMES?
15 A NO.
16 Q ARE YOU MARRIED?
17 A NO.
18 Q WHERE DO YOU LIVE CURRENTLY?
19 A [REDACTED]
20 Q AND IS THAT IN COLUMBIA?
21 A YES.
22 Q WHAT'S THE ZIP?
23 A 29212.
24 Q HOW LONG HAVE YOU LIVED THERE?
25 A IT'S WHERE I GREW UP. I'VE ONLY BEEN LIVING THERE

1 STIPULATIONS
2 IT IS STIPULATED BY AND BETWEEN COUNSEL FOR
3 THE RESPECTIVE PARTIES THAT ALL OBJECTIONS ARE
4 RESERVED UNTIL THE TIME OF TRIAL, EXCEPT AS TO
5 THE FORM OF THE QUESTIONS.
6 THIS DEPOSITION IS BEING TAKEN PURSUANT TO THE
7 FEDERAL RULES OF CIVIL PROCEDURE.

8
9 THE READING AND SIGNING OF THIS DEPOSITION IS
10 WAIVED BY THE DEPONENT AND COUNSEL FOR THE
11 RESPECTIVE PARTIES.

12 WHEREUPON,
13 BLAINE STOUT, BEING DULY SWORN AND CAUTIONED
14 TO SPEAK THE TRUTH, THE WHOLE TRUTH, AND
15 NOTHING BUT THE TRUTH, TESTIFIED AND DEPOSED
16 AS FOLLOWS:

17 EXAMINATION

18 BY MR. CONNOR:

19 Q HI. IS IT - GO BY BLAINE?

20 A YES, SIR.

21 Q MY NAME IS BILL CONNOR. AND I'M A DEFENSE ATTORNEY

22 FOR RYAN MCGUIRE. AND YOU'VE GONE THROUGH A COUPLE

23 OF THE INSTRUCTIONS ABOUT DEPOSITIONS. FOR THE

24 RECORD, THIS IS YOUR FIRST DEPOSITION, CORRECT?

25 A CORRECT.

1 FOR ABOUT SIX MONTHS AS OF NOW, THOUGH.

2 Q AND WHERE DID YOU LIVE BEFORE THAT?

3 A IN CHARLESTON.

4 Q AND WHERE DID YOU LIVE IN CHARLESTON?

5 A PITT AND WENTWORTH.

6 Q AND HOW LONG DID YOU LIVE THERE?

7 A SIX MONTHS.

8 Q WHERE DID YOU LIVE BEFORE THAT?

9 A PRESIDENT PLACE.

10 Q AND WHY WERE YOU IN CHARLESTON?

11 A JUST LIVING AND WORKING.

12 Q DID YOU GO TO THE COLLEGE OF CHARLESTON?

13 A I DID NOT.

14 Q HOW LONG DID YOU LIVE IN CHARLESTON?

15 A I THINK IT WAS TWO AND A HALF YEARS.

16 Q WERE YOU LIVING IN CHARLESTON AT THE TIME OF THIS
17 ALLEGED INCIDENT?

18 A YES.

19 Q AND WHERE WERE YOU BEFORE THAT?

20 A LIVING?

21 Q YES.

22 A HERE, COLUMBIA.

23 Q IS THIS WHERE YOU'RE FROM?

24 A YES.

25 Q DID YOU GRADUATE HIGH SCHOOL HERE? 122

1 A NOT THAT I RECALL.
 2 Q DID YOU OR OTHERS IN YOUR GROUP CONSUME ALCOHOLIC
 3 BEVERAGES IN THE APARTMENT BEFORE YOU LEFT?
 4 A YES.
 5 Q ABOUT HOW MANY DID YOU CONSUME?
 6 A I'D SAY SIX.
 7 Q WAS THAT ABOUT THE SAME AMOUNT AS THE OTHER PEOPLE
 8 IN YOUR PARTY?
 9 A YES.
 10 Q WHICH INCLUDES MR. WITHERSPOON?
 11 A YES.
 12 Q ONCE HE PARKED HIS CAR, DID YOU GUYS WALK STRAIGHT
 13 INTO THE SILVER DOLLAR?
 14 A YES.
 15 Q WHEN YOU WALKED IN, PLEASE DESCRIBE THE SILVER
 16 DOLLAR.
 17 A THERE'S A STAGE ON THE RIGHT. THERE IS A -- AN L-
 18 SHAPED BAR TO THE -- ON THE RIGHT SIDE. THERE'S
 19 COCKTAIL TABLES ON THE LEFT AND TWO POOL TABLES IN
 20 THE BACK.
 21 Q HOW WAS THE LIGHTING INSIDE?
 22 A DARK.
 23 Q DO YOU KNOW SOMEONE BY THE NAME OF CALHOUN?
 24 A I DO.
 25 Q HOW DO YOU KNOW HIM?

1 A HE'S THE BARTENDER AT SILVER DOLLAR.
 2 Q IS THAT THE ONLY WAY YOU KNOW HIM?
 3 A YEAH.
 4 Q WERE YOU FRIENDS WITH HIM?
 5 A I WOULDN'T CALL US THAT. ACQUAINTANCES.
 6 Q ABOUT HOW MANY TIMES HAD YOU BEEN AT THE SILVER
 7 DOLLAR BEFORE?
 8 A TWENTY.
 9 Q DO YOU KNOW IF CALHOUN WAS THE BARTENDER OR
 10 SECURITY MAN?
 11 A BOTH.
 12 Q WAS HE ACTING AS BOTH THAT NIGHT?
 13 A YES.
 14 Q WHERE DID YOU SEE HIM WHEN YOU WALKED IN?
 15 A BEHIND THE BAR.
 16 Q WAS THERE ANYBODY WATCHING THE DOOR?
 17 A WHEN WE WALKED IN I'M SURE THERE WAS.
 18 Q DID YOU SAY ANYTHING TO CALHOUN WHEN YOU WALKED IN?
 19 A HELLO.
 20 Q WHAT ELSE DID YOU SEE IN THE RESTAURANT AT THAT
 21 TIME IN THE WAY OF OTHER PEOPLE WHEN YOU WALKED IN?
 22 A THERE WAS A LOT OF PEOPLE WHEN WE GOT THERE.
 23 Q YOU SAY A LOT. ROUGH NUMBERS, MORE THAN 20?
 24 A YES.
 25 Q WHAT TIME DO YOU THINK IT WAS WHEN YOU GOT THERE?

1 A MIDNIGHT.
 2 Q WHERE DID YOUR GROUP GO? AND WHEN I SAY GROUP, I'M
 3 TALKING ABOUT THE GROUP OF PEOPLE WHO WERE IN THE
 4 CAR WITH MR. WITHERSPOON. WHERE DID YOUR GROUP GO
 5 ONCE YOU GOT IN THE BAR?
 6 A TO THE BACK.
 7 Q WAS THAT THE LOCATION OF THE POOL TABLES?
 8 A YES.
 9 Q AND WHAT DID YOU DO?
 10 A SHOT POOL AND TALKED.
 11 Q DID YOU ORDER DRINKS?
 12 A YES.
 13 Q ABOUT HOW MANY?
 14 A FOUR.
 15 Q SO THE PEOPLE IN THE GROUP ALL HAD ABOUT FOUR; IS
 16 THAT CORRECT?
 17 A I COULDN'T TELL YOU.
 18 Q BUT YOU HAD ABOUT FOUR?
 19 A YES.
 20 Q AND THE OTHERS DRANK WITH YOU AND THAT KIND OF
 21 THING?
 22 A YES.
 23 Q WHILE YOU WERE PLAYING POOL, DID YOU SEE ANOTHER
 24 GROUP IN THE BAR THAT WAS IN SOME KIND OF VERBAL
 25 ALTERCATION WITH CALHOUN?

1 A NO.
 2 Q DID YOU SEE ANY VERBAL ALTERCATIONS BEYOND REGULAR
 3 TALKING IN THE BAR THAT NIGHT?
 4 A NOT THAT I RECALL.
 5 Q WHAT TIME DID YOUR GROUP DECIDE TO LEAVE?
 6 A I THINK IT WAS AROUND THREE.
 7 Q AND WHY DID YOU LEAVE?
 8 A CALHOUN MADE US.
 9 Q DO YOU KNOW WHY HE MADE YOU ALL LEAVE?
 10 A BECAUSE WE SHOULDN'T HAVE BEEN IN THERE AT THAT
 11 POINT ANYWAY.
 12 Q HAD THE BAR OFFICIALLY CLOSED DOWN BEFORE THAT
 13 TIME?
 14 A YES.
 15 Q WHAT TIME DID IT OFFICIALLY CLOSE DOWN?
 16 A TWO.
 17 Q WHEN HE TOLD YOU GUYS TO LEAVE, DID YOU GUYS WALK
 18 OUT RIGHT AT THAT POINT?
 19 A YES.
 20 Q WERE OTHERS LEAVING THE SAME TIME?
 21 A YES.
 22 Q WERE THERE ANY OTHER GROUPS LEAVING AT THE SAME
 23 TIME?
 24 A ONE OTHER.
 25 Q AND HOW MANY PEOPLE WERE IN THAT GROUP?

Exhibit I

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

)
) COVENANT NOT TO EXECUTE
)

This COVENANT made this 20 day of APRIL, 2007, by and between Robert M. Witherspoon, IV, hereinafter referred to as "Covenantor" and Kevin McGuire, Betty McGuire, Ryan McGuire, The Cincinnati Insurance Companies and Progressive Max Insurance Company hereinafter referred to as "Covenantees".

WHEREAS, on November 17, 2003, in Charleston County, South Carolina, the Covenantor, Robert M. Witherspoon, IV, was injured when struck by the vehicle driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire; and

WHEREAS, the automobile being driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire was insured by Progressive Max Insurance Company and The Cincinnati Insurance Company; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of November 17, 2003, may exceed the liability limits of the insurance policy of Covenantees, and the Covenantor is desirous of protecting his right to proceed to suit against the Covenantees for purposes of collecting underinsured benefits or any other insurance benefits which may apply;

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars by the Covenantees-One Hundred Eighty Thousand and no/100 (\$180,000.00) paid by Progressive Max Insurance Company and Twenty Thousand and no/100 (\$20,000.00) paid by The Cincinnati Insurance Companies, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of their claim with any underinsured carrier or any other carriers which may have liability insurance applicable to the accident of November 17, 2003, the Covenantor shall have the right to bring suit against the Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars, Covenantor, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for their or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in any lawsuit arising out of the November 17, 2003, accident except as herein stated. Further, that upon

reduction to Judgment of the aforementioned lawsuit that Covenantor, their subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, that this agreement or copy hereof shall be considered a satisfaction of any Judgment in any case presented by Covenantor against Covenantees for the accident dated May 22, 2005, and can be recorded as such should Covenantor, their subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. ~~Covenantor~~ Covenantor will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys with the exception of underinsured motorist coverage.

5. In executing this agreement, Covenantor represent and warrant that it has relied on their investigation and have not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agree that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that they will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement the Covenantees does not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits or any other insurance coverage which may apply and the Covenantor expressly acknowledge this disclaimer.

8. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Progressive Northern Insurance Company abreast of developments in their attempt to collect underinsured motorist benefits or other insurance coverage which may apply, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage or other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

9. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

10. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company and The Cincinnati Insurance Companies from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

11. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

12. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

13. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

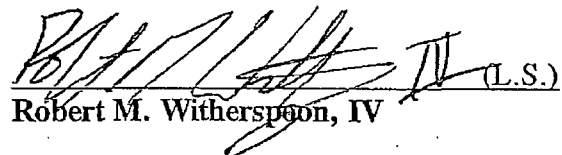
14. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

15. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:



 (L.S.)
Robert M. Witherspoon, IV

AS TO COVENANTEE:

Progressive Max Insurance Company

BY:  (L.S.)

127

AS TO COVENANTEE:

AS TO COVENANTEES:

The Cincinnati Insurance Companies

BY *Kevin McGuire* (L.S.)

Kevin McGuire (L.S.)

Betty McGuire (L.S.)

Ryan McGuire (L.S.)

other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

10. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

11. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

12. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

13. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

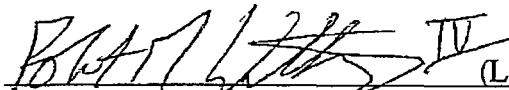
14. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

15. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

16. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:


Robert M. Witherspoon, IV (L.S.)

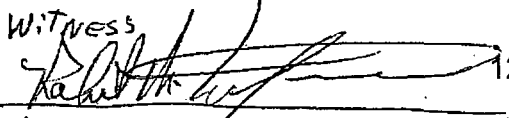
WITNESS

3 Robert M. Witherspoon III 129

Exhibit J

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 07-CP-10-3920

Progressive Max Insurance Company,

Plaintiff,

vs.

**AFFIDAVIT OF
JOHNNY F. DRIGGERS, ESQUIRE**

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

PERSONALLY APPEARED BEFORE ME, the undersigned Johnny F.

Driggers, Esquire, who after being duly sworn, deposes and says:

1. My name is Johnny F. Driggers, Esquire.
2. I am above 18 years of age.
3. I make this affidavit based on my knowledge and observations.
4. I represented Robert M. Witherspoon, IV, the Plaintiff in the underlying tort action from which contribution is sought by Progressive Max Insurance Company in this declaratory judgment action.
5. The underlying tort action arose from an alleged incident that occurred on November 17, 2003, in which my client, a pedestrian, was struck by a vehicle operated by Ryan McGuire and owned by Ryan's parents.
6. I brought separate tort actions on behalf of my client against Ryan McGuire and his parents which were consolidated. The consolidated tort action was styled Robert M. Witherspoon, IV, v. Ryan McGuire, Civil Action No. 2:06-1089-DCN.
7. Although my client also had potential tort claims against Floating Caps,

Inc. d/b/a Silver Dollar Café (Silver Dollar) for, among other things, selling alcohol to a minor and selling alcohol to an intoxicated person, I made a tactical decision to assert all claims arising from the incident against Ryan McGuire. I also withdrew Plaintiff's claims of negligent entrustment and family purpose doctrine against Ryan McGuire's parents. My strategy was not to diffuse any liability against Ryan McGuire for his actions.

8. I did not bring a separate action on behalf of my client against Silver Dollar, nor has any claim been brought on behalf of my client against Silver Dollar arising from the above-named incident.

9. Witherspoon's claim against the McGuires was settled for \$200,000.00 on April 7, 2007.

10. I then pursued underinsured motorist coverage on behalf of my client. Once the UIM case was settled, Witherspoon's action against the McGuires was dismissed on May 8, 2007.

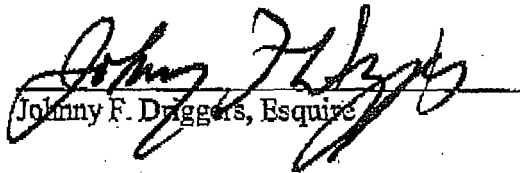
11. In settling the tort action brought by Witherspoon, the parties entered into a Covenant Not To Execute which was dated April 20, 2007.

12. The settlement was entered into with the understanding that the McGuire's auto insurance carrier, Progressive, would bring a subrogation action for contribution against Silver Dollar. It was the intent of the parties that the Covenant Not To Execute was in satisfaction of all claims arising from the incident, including Witherspoon's potential claims against Silver Dollar.

13. The revised Covenant Not To Execute, which the parties executed on July 31, 2007 and which contains an express recital protecting Progressive's claim against Silver Dollar, is evidence of the parties' intent that the settlement extinguish any claim

Witherspoon had against Silver Dollar.

FURTHER AFFIANT SAYETH NOT


Johnny F. Driggers, Esquire

SWORN to and subscribed before me
this 15 day of APRIL, 2008.


(L.S.)
Notary Public for South Carolina
My Commission Expires: 11-17-2016

Exhibit K

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COVENANT NOT TO EXECUTE

This COVENANT made this 31 day of July, 2007, by and between Robert M. Witherspoon, IV, hereinafter referred to as "Covenantor" and Kevin McGuire, Betty McGuire, Ryan McGuire, and Progressive Max Insurance Company hereinafter referred to as "Covenantees".

WHEREAS, on November 17, 2003, in Charleston County, South Carolina, the Covenantor, Robert M. Witherspoon, IV, was injured when struck by the vehicle driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire; and

WHEREAS, the automobile being driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire was insured by Progressive Max Insurance Company; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of November 17, 2003, may exceed the liability limits of the insurance policy of Covenantees, and the Covenantor is desirous of protecting his right to proceed to suit against the Covenantees for purposes of collecting underinsured benefits or any other insurance benefits which may apply;

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of One Hundred, Eighty Thousand and no/100 (\$180,000.00) Dollars by the Covenantees, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of their claim with any underinsured carrier or any other carriers which may have liability insurance applicable to the accident of November 17, 2003, the Covenantor shall have the right to bring suit against the Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of One Hundred, Eighty Thousand and no/100 (\$180,000.00) Dollars, Covenantor, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for their or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in any lawsuit arising out of the November 17, 2003, accident except as herein stated. Further, that upon reduction to Judgment of the aforementioned lawsuit that Covenantor, their subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, that this agreement or copy hereof shall be considered a satisfaction of any

Judgment in any case presented by Covenantor against Covenantees for the accident dated November 17, 2003, and can be recorded as such should Covenantor, their subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. The Covenantor acknowledges that he has a cause of action against the owner(s), manager(s), employee(s), or agents(s) of The Silver Dollar, (hereinafter collectively, "The Silver Dollar") an establishment located at 478 King Street, Charleston, South Carolina. The Covenantor further acknowledges that the Covenantees are desirous of pursuing a claim for contribution against The Silver Dollar, pursuant to the Uniform Contribution among Torfeasors Act, S.C. Code Ann. § 15-38-10, et seq.

4. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

5. Covenantor will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys with the exception of underinsured motorist coverage.

6. In executing this agreement, Covenantor represent and warrant that it has relied on their investigation and have not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

8. The Covenantor agree that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that they will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement the Covenantees does not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits or any other insurance coverage which may apply and the Covenantor expressly acknowledge this disclaimer.

9. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Progressive Northern Insurance Company abreast of developments in their attempt to collect underinsured motorist benefits or other insurance coverage which may apply, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage or other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

10. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

11. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

12. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

13. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

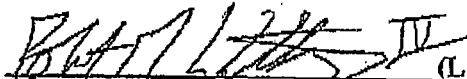
14. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

15. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

16. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:


Robert M. Witherspoon, IV (L.S.)

WITNESS


Robert M. Witherspoon III

AS TO COVENANTEE:

Progressive Max Insurance Company

BY: _____ (L.S.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C/A No.: 2007-CP-10-3920
	)	
Progressive Max Insurance Company,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANT'S MEMORANDUM IN
	)	SUPPORT OF ITS MOTION FOR
Floating Caps, Inc., d/b/a Silver Dollar	)	SUMMARY JUDGMENT
Cafe,	)	
	)	
Defendant.	)	

Defendant Floating Caps, Inc., d/b/a Silver Dollar Café ("Silver Dollar") submits this memorandum in support of its motion for summary judgment pursuant to SCRCP 56. Plaintiff Progressive Max Insurance Company ("Progressive") has filed a contribution claim against Silver Dollar, pursuant to S.C. Code § 15-38-10 et seq. (South Carolina Contribution Among Tortfeasors Act), alleging Silver Dollar is jointly liable for the damages caused in the underlying case of Robert M. Witherspoon, IV v. Ryan, Kevin and Betty McGuire, Civil Action No. 2:06-1089-DCN. Silver Dollar asserts that Progressive has failed to preserve its right to seek contribution against Silver Dollar, as the Covenant Not to Execute exchanged by it on April 20, 2007 in settlement of the Witherspoon case failed to comport with S.C. Code § 15-38-40 (D)(1)-(2) and S.C. Code § 15-38-50(1).

Silver Dollar further asserts that Progressive's subsequent attempt to preserve its right to seek contribution against Silver Dollar by executing a second Covenant Not to Execute on July 31, 2007 also failed. Said covenant was executed *after* the Witherspoon case was dismissed and, therefore, does not comport with S.C. Code §

15-38-40 (D)(2), nor does said covenant expressly discharge Silver Dollar from any liability pursuant to S.C. Code § 15-38-50(1).

Statement of Facts

This case arises out of an incident that occurred outside the Silver Dollar in downtown Charleston, South Carolina on the night of November 17, 2003. In its contribution action, Progressive has asserted that the Silver Dollar sold alcohol to a minor, Defendant Ryan McGuire, who, with some other under-aged friends, became intoxicated at the bar. It is further alleged that one of McGuire's friends started a fight with a Silver Dollar bartender, and the fight spilled out onto King Street. McGuire went to get his car with the intention of coming back to pick up the friend who had started the fight. Whether intentionally or not, the car McGuire was driving struck several people standing outside the bar, including Plaintiff Witherspoon.

Witherspoon filed suit against McGuire in U.S. District Court – Charleston Division on May 9, 2006, Civil Action No. 2:06-1089-DCN. Witherspoon subsequently filed suit against McGuire's parents, Kevin M. and Betty E. McGuire, on November 10, 2006, Civil Action No. 2:06-3197-DCN, as the owners of the vehicle McGuire was driving on the night of the incident. Witherspoon did not file suit against Silver Dollar. Both suits were consolidated by consent order on November 27, 2006 under Civil Action No. 2:06-1089-DCN.

On April 20, 2007, approximately five months after the statute of limitations had run on Witherspoon's claims, the parties in the Witherspoon case entered into a Covenant Not to Execute. Progressive, which insured the McGuire vehicle, and another umbrella policy carrier of the McGuires settled the case for \$200,000.00. The April 20,

2007 covenant did not release or discharge Silver Dollar from any liability against Witherspoon or McGuire. In fact, by its clear and unambiguous language, the April 20, 2007 covenant expressly stated that the covenant was "not a release, nor shall it be construed as a release of any party, person, firm or corporation". (See **Exhibit A** – copy of April 20, 2007 Covenant Not to Execute at ¶ 3). Furthermore, the April 20, 2007 covenant allowed Witherspoon to pursue underinsured motorist coverage from his carrier, which he subsequently did and was able to collect.

On May 8, 2007, the Witherspoon case was dismissed from the U.S. District Court – Charleston Division. (See **Exhibit B** – copy of May 8, 2007 Order of Dismissal signed by Judge David C. Norton). Realizing that it had not preserved its right to seek contribution against the Silver Dollar under the April 20, 2007 covenant, Progressive sought to execute a second covenant in an attempt to do so. The second covenant was executed on July 31, 2007, over two months after Judge Norton had dismissed the Witherspoon case. (See **Exhibit C** – copy of July 31, 2007 Covenant Not to Execute). Furthermore, as was the case with the first covenant, the second covenant neither released nor discharged any liability of Silver Dollar to Witherspoon or McGuire. As is evident at Paragraph 3 of the second covenant, McGuire/Progressive stated that they were "desirous of pursuing a claim for contribution against The Silver Dollar," but the parties did not expressly state that they were discharging any liability against Silver Dollar. (Id.). In fact, as with the first covenant, Paragraph 4 of the second covenant expressly stated that said covenant was "not a release, nor shall it be construed as a release of any party, person, firm or corporation." (Id. at ¶ 4).

On or about September 25, 2007, Progressive brought the current action for contribution against Silver Dollar. On or about October 10, 2007, Silver Dollar filed its answer to Progressive's complaint. On March 28, 2008, through its predecessor counsel, Jay McDonald at Clawson & Staubes, LLC, Silver Dollar filed this motion for summary judgment. Due to an inadvertent mistake, the summary judgment motion was denied by Order of the Court on July 28, 2008 for failure to prosecute. However, upon showing of good cause, the Court rescinded its July Order on August 18, 2008 and reopened the motion for summary judgment.

On December 18, 2008, Attorney McDonald was relieved as counsel for Silver Dollar, and the undersigned was substituted as counsel for Silver Dollar in this action.

Statement of Law

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). However, when the "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001).

Argument

I. Progressive Has Failed to Meet the Requirements of S.C. Code § 15-38-20 et seq. of the South Carolina Contribution Among Tortfeasors Act and As Such, May Not Maintain This Action Against Silver Dollar.

Progressive filed the instant action against Silver Dollar, seeking contribution for an alleged pro rata share of monies paid by Progressive to settle the underlying Witherspoon case. Progressive's claims against Silver Dollar are controlled by the South Carolina Contribution Among Tortfeasors Act, S.C. Code § 15-38-20 et seq.

Where two or more persons become jointly or severally liable in tort for the same injury to person or property, there is a right of contribution among them, even though judgment has not been recovered against all or any of them. S.C. Code § 15-38-20(A). This right of contribution only exists in favor of a tortfeasor which has paid more than its pro rata share. S.C. Code § 15-38-20(B). A tortfeasor which enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor "*whose liability for the injury or wrongful death is not extinguished by the settlement.*" S.C. Code § 15-38-20(D)(emphasis added). One entitled to contribution may seek same against another tortfeasor by separate action, whether or not a judgment has been entered in an action against two or more tortfeasors. S.C. Code § 15-38-40(A).

If no judgment has been entered against the tortfeasor seeking contribution, his right is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for

contribution. S.C. Code § 15-38-40(D)(1)-(2). When a release or covenant not to sue and/or not to enforce a judgment is given to one of two or more persons liable in tort for the same injury, said covenant "*does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.*" S.C. Code § 15-38-50(1) (emphasis added).

The April 20, 2007 Covenant Not to Execute between Progressive and Witherspoon did not extinguish or discharge the alleged liability of Silver Dollar, and as such, Progressive may not maintain its action for contribution against Silver Dollar. (See Exhibit A).

II. The April 20, 2007 Covenant Not to Execute Entered into by Progressive to Settle the Underlying Witherspoon Case Did Not, by its Express, Clear and Unambiguous Terms, Discharge Any Alleged Liability of Silver Dollar to Witherspoon.

Under South Carolina case law, the "release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries *unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.*" Bartholomew v. McCartha, 255 S.C. 489, 491, 179 S.E.2d 912, 913 (1971) (emphasis added). Releases are contracts, and principles of law applicable to contracts generally are also applicable to releases. 18 S.C. Jur. Release § 2 (2003). In construing the terms of a release, like terms of a contract, South Carolina Courts "must look to the language of the contract to determine the intentions of the parties." C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Financial Commission, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). If a release unambiguously sets forth the intention of the parties, South Carolina Courts are bound "by that clearly expressed intent without resort to extrinsic evidence." Bowers v. South Carolina Department of

Transportation , 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct.App.2004). Extrinsic evidence giving the "[release]" a different meaning from that indicated by its plain terms is inadmissible." Id., 360 S.C. at 153-154, 600 S.E.2d at 545.

Based on the undisputed fact that Progressive entered the April 20, 2007 covenant approximately five months after the statute of limitations ran on Witherspoon's claims against McGuire, S.C. Code § 15-38-40(D)(1) does not apply to this case. Therefore, Progressive may only maintain its contribution action against Silver Dollar if it has met the requirements set forth under S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1). Progressive has failed to meet said requirements.

The April 20, 2007 covenant sets forth the clear and unambiguous intention of the parties thereto, and as such, this Court should not refer to any extrinsic evidence (deposition transcripts or affidavits) to alter the intent of the parties. Contrary to Progressive's assertions in its Memorandum in Opposition to Silver Dollar's motion, the April 20, 2007 covenant did not discharge and extinguish the liability of Silver Dollar. In fact, by its express terms, the parties clearly stated that said covenant was "not a release, nor shall it be construed as a release of any party, person, firm or corporation." (See Exhibit A –at ¶ 3).

Furthermore, contrary to the requirements of S.C. Code § 15-38-50(1), the April 20, 2007 covenant did not provide any express terms to discharge the liability of Silver Dollar. A review of said covenant establishes that Silver Dollar is neither mentioned nor referenced in any respect throughout the four corners of the document. The terms of the April 20, 2007 covenant do not evince intent to limit its scope to any specifically identifiable party, let alone Silver Dollar. Had the parties intended to discharge the

liability of Silver Dollar, the terms of the covenant could have been so tailored. By executing the April 20, 2007 covenant, Progressive failed to meet the statutory requirements to preserve its right to seek contribution against Silver Dollar.

Finally, contrary to Progressive's assertions, the two-pronged test set forth under Bartholomew, supra, has not been met. The April 20, 2007 covenant did not express the parties' intention to discharge the liability of Silver Dollar, as indicated by the clear and unambiguous terms of said covenant. Furthermore, said covenant did not fully compensate Witherspoon for his injuries. As the covenant clearly contemplated, Witherspoon preserved his right to pursue additional compensation against his underinsured motorist carrier. (See **Exhibit A** —at page 1, fourth unnumbered paragraph).

III. Progressive's Attempt to Execute Another Covenant Not To Execute on July 31, 2007 After the Witherspoon Case Had Already Been Dismissed Failed As a Matter of Law to Preserve Progressive's Right to Seek Contribution Against Silver Dollar.

Pursuant to S.C. Code § 15-38-40(D)(2), a joint tortfeasor's right to seek contribution is barred unless he has agreed "*while the action is pending against him*" to discharge the common liability of another tortfeasor. (Emphasis added). It is undisputed that the underlying Witherspoon case was dismissed on May 8, 2007 by an Order of Dismissal signed by Judge David C. Norton. (See **Exhibit B**). Progressive's subsequent execution of the July 31, 2007 covenant, more than two months after Witherspoon was dismissed, is a complete bar to its right to seek contribution against Silver Dollar. (See **Exhibit C**).

As our Courts have held, where "the terms of the statute are clear, the court must apply those terms according to their literal meaning". Ellis v. Oliver, 335 S.C. 106, 110,

515 S.E.2d 268, 270 (Ct.App.1999), quoting Paschal v. State Election Commission, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). The legislative intent of S.C. Code § 15-38-40(D)(2) is clearly that Progressive must agree to discharge the alleged common liability of Silver Dollar "while the action is pending". Progressive's execution of the July 31, 2007 covenant was not accomplished during the pendency of the Witherspoon case, and, therefore, its contribution claim against Silver Dollar must fail as a matter of law.

Should this Court consider the July 31, 2007 covenant to be timely executed, which Silver Dollar asserts it was not, said covenant still failed to expressly discharge the liability of Silver Dollar. As is evident in Paragraph 3 of the July 31, 2007 covenant, McGuire/Progressive stated that they were "desirous of pursuing a claim for contribution against The Silver Dollar", but the parties did not expressly state that they were discharging any liability against the Silver Dollar. (See **Exhibit C**). In fact, as with the first covenant, Paragraph 4 expressly stated that said covenant was "not a release, nor shall it be construed as a release of any party, person, firm or corporation." (Id. at ¶ 4).

In enacting the South Carolina Contribution Among Tortfeasors Act, the legislature was very clear on what a settling joint tortfeasor must do in order to preserve its right to seek contribution against another alleged joint tortfeasor. In three different sections of the Act, the legislature expressly stated that there is no right to contribution against another whose liability is not "extinguished by the settlement" (§ 15-38-20(D)); whose common liability is not "discharged" while the action is pending (§ 15-38-40(D)(2)); and finally, no release or covenant will "discharge" the liability of the alleged joint tortfeasor "unless its terms so provide (§ 15-38-50(1)). Silver Dollar asserts that the July 31, 2007 covenant is not only untimely in its execution, but also that the terms

used in Paragraph 3 do not discharge or extinguish any alleged liability it may have had for Witherspoon's injuries. Therefore, Progressive's right to bring this action for contribution is not preserved by the July 31, 2007 covenant.

Conclusion

For the foregoing reasons, Defendant Floating Caps, Inc., d/b/a Silver Dollar Café, pursuant to SCRCP 56, respectfully requests that this Court grant its Motion for Summary Judgment.

PRATT-THOMAS WALKER, P.A.



Francis M. Ervin, II (SC Bar #70900)

P.O. Drawer 22247

Charleston, SC 29413-2247

(843) 727-2246

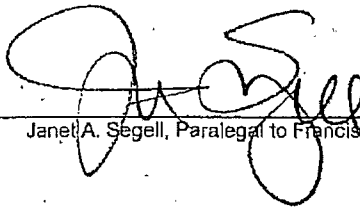
Attorney for Defendant Floating Caps, Inc.,
d/b/a Silver Dollar Café

Charleston, South Carolina
July 29, 2009

I hereby certify that I have served a true copy of the foregoing document by delivering a copy to the below-listed counsel/parties on July 29, 2009, via e-mail and first class mail, postage prepaid and properly addressed, to said counsel/party(ies):

John M. Grantland, Esq.
Murphy & Grantland
P.O. Box 6648
Columbia, SC 29260

By: _____



Janet A. Segell, Paralegal to Francis M. Ervin, II

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COVENANT NOT TO EXECUTE

This COVENANT made this 20 day of APRIL, 2007, by and between Robert M. Witherspoon, IV, hereinafter referred to as "Covenantor" and Kevin McGuire, Betty McGuire, Ryan McGuire, The Cincinnati Insurance Companies and Progressive Max Insurance Company hereinafter referred to as "Covenantees".

WHEREAS, on November 17, 2003, in Charleston County, South Carolina, the Covenantor, Robert M. Witherspoon, IV, was injured when struck by the vehicle driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire; and

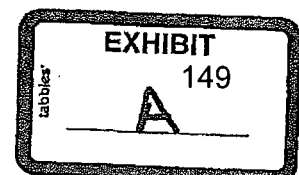
WHEREAS, the automobile being driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire was insured by Progressive Max Insurance Company and The Cincinnati Insurance Company; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of November 17, 2003, may exceed the liability limits of the insurance policy of Covenantees, and the Covenantor is desirous of protecting his right to proceed to suit against the Covenantees for purposes of collecting underinsured benefits or any other insurance benefits which may apply;

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars by the Covenantees-One Hundred Eighty Thousand and no/100 (\$180,000.00) paid by Progressive Max Insurance Company and Twenty Thousand and no/100 (\$20,000.00) paid by The Cincinnati Insurance Companies, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of their claim with any underinsured carrier or any other carriers which may have liability insurance applicable to the accident of November 17, 2003, the Covenantor shall have the right to bring suit against the Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of Two Hundred Thousand and no/100 (\$200,000.00) Dollars, Covenantor, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for their or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in any lawsuit arising out of the November 17, 2003, accident except as herein stated. Further, that upon



reduction to Judgment of the aforementioned lawsuit that Covenantor, their subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, that this agreement or copy hereof shall be considered a satisfaction of any Judgment in any case presented by Covenantor against Covenantees for the accident dated May 22, 2005, and can be recorded as such should Covenantor, their subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. Covenantor will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys with the exception of underinsured motorist coverage.

5. In executing this agreement, Covenantor represent and warrant that it has relied on their investigation and have not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantor agree that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that they will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement the Covenantees does not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits or any other insurance coverage which may apply and the Covenantor expressly acknowledge this disclaimer.

8. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Progressive Northern Insurance Company abreast of developments in their attempt to collect underinsured motorist benefits or other insurance coverage which may apply, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage or other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

9. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

10. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company and The Cincinnati Insurance Companies from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

11. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

12. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

13. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

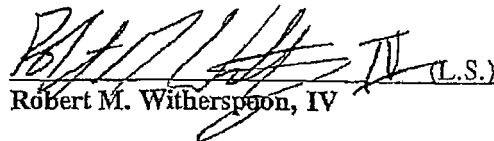
14. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

15. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

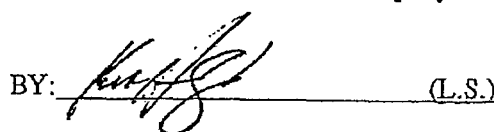
AS TO COVENANTOR:



 (L.S.)
Robert M. Witherspoon, IV

AS TO COVENANTEE:

Progressive Max Insurance Company

BY:  (L.S.)

AS TO COVENANTEE:

AS TO COVENANTEES:

The Cincinnati Insurance Companies

BY *Kevin McGuire* (L.S.)

Kevin McGuire (L.S.)

Betty McGuire (L.S.)

Ryan McGuire (L.S.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Robert M. Witherspoon, IV,

Plaintiff,

-VS-

Ryan McGuire,

Defendant.

.) Civil Action No. 2:06-1089 DCN

ORDER OF DISMISSAL

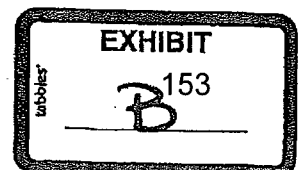
The court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated within sixty (60) days, either party may petition the Court to reopen this action and restore it to the calendar. Rule 60(b)(6), F.R.Civ.P. In the alternative, to the extent permitted by law, either party may within sixty (60) days petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir. 1978).

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

Charleston, South Carolina
May 8, 2007



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COVENANT NOT TO EXECUTE

This COVENANT made this 31 day of July, 2007, by and between Robert M. Witherspoon, IV, hereinafter referred to as "Covenantor" and Kevin McGuire, Betty McGuire, Ryan McGuire, and Progressive Max Insurance Company hereinafter referred to as "Covenantees".

WHEREAS, on November 17, 2003, in Charleston County, South Carolina, the Covenantor, Robert M. Witherspoon, IV, was injured when struck by the vehicle driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire; and

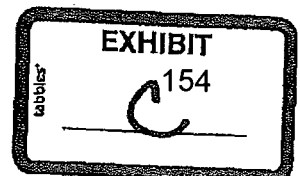
WHEREAS, the automobile being driven by Ryan McGuire and owned by Kevin McGuire and Betty McGuire was insured by Progressive Max Insurance Company; and

WHEREAS, the damages sustained by the Covenantor, in the automobile accident of November 17, 2003, may exceed the liability limits of the insurance policy of Covenantees, and the Covenantor is desirous of protecting his right to proceed to suit against the Covenantees for purposes of collecting underinsured benefits or any other insurance benefits which may apply;

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantor of the sum of One Hundred, Eighty Thousand and no/100 (\$180,000.00) Dollars by the Covenantees, the sufficiency and receipt of which is hereby acknowledged, the Covenantor and Covenantees agree as follows:

1. That in the event the Covenantor is unable to resolve by agreement and settlement of their claim with any underinsured carrier or any other carriers which may have liability insurance applicable to the accident of November 17, 2003, the Covenantor shall have the right to bring suit against the Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that the Covenantees, their respective heirs and assigns, shall never at any time, be liable to the Covenantor, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantor of the sum of One Hundred, Eighty Thousand and no/100 (\$180,000.00) Dollars, Covenantor, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for their or in their behalf, enforce against the Covenantees, by execution or otherwise, any judgment that may be rendered in any lawsuit arising out of the November 17, 2003, accident except as herein stated. Further, that upon reduction to Judgment of the aforementioned lawsuit that Covenantor, their subrogees, heirs, or assigns will provide Covenantees with an executed satisfaction of said Judgment forthwith. Moreover, that this agreement or copy hereof shall be considered a satisfaction of any



Judgment in any case presented by Covenantor against Covenantees for the accident dated November 17, 2003, and can be recorded as such should Covenantor, their subrogees, heirs, or assigns fail to execute a Satisfaction of Judgment.

3. The Covenantor acknowledges that he has a cause of action against the owner(s), manager(s), employee(s), or agents(s) of The Silver Dollar, (hereinafter collectively, "The Silver Dollar") an establishment located at 478 King Street, Charleston, South Carolina. The Covenantor further acknowledges that the Covenantees are desirous of pursuing a claim for contribution against The Silver Dollar, pursuant to the Uniform Contribution among Tortfeasors Act, S.C. Code Ann. § 15-38-10, et seq.

4. Covenantor and Covenantees expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

5. Covenantor will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against the Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys with the exception of underinsured motorist coverage.

6. In executing this agreement, Covenantor represent and warrant that it has relied on their investigation and have not relied on any statement, representation, or commitment of any kind made by Covenantees, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

8. The Covenantor agree that if there exists any subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that they will obtain a release from the person or entity holding such interest and that the Covenantor will protect, save, defend, hold harmless, and indemnify the Covenantees from any such subrogation, assignment, claims, or interests. By entering this agreement the Covenantees does not make any representation as to the effect of this agreement on the Covenantor's claim for underinsured motorist benefits or any other insurance coverage which may apply and the Covenantor expressly acknowledge this disclaimer.

9. The Covenantor and the Covenantor's attorney, if represented, expressly agree to keep Progressive Northern Insurance Company abreast of developments in their attempt to collect underinsured motorist benefits or other insurance coverage which may apply, including specific notice as to the date of trial, the amount of verdict, status of underinsured motorist coverage or other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

other insurance coverage and whether a settlement of underinsured motorist benefits and/or other insurance coverage has been obtained.

10. Should any damages be incurred by Covenantees due to the failure to immediately satisfy any judgment hereafter rendered, Covenantor agrees to save, defend, hold harmless and indemnify Covenantees from any and all liability therefor.

11. Covenantees, Kevin McGuire, Betty McGuire and Ryan McGuire, hereby agree to release Progressive Max Insurance Company from any duty to defend any lawsuit upon execution of this covenant and payment of the limits of liability coverage applicable hereto.

12. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a doubtful and disputed claim, that the Covenantees deny any liability to the Covenantor and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability.

13. All parties agree that this Covenant is a product of negotiation and agreement among the parties.

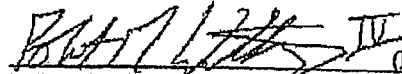
14. The provisions and stipulations hereof shall inure to the benefit of, and shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

15. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina law.

16. The Covenantor acknowledges that he has been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantor acknowledges that Covenantees have made no representations on the availability of underinsured motorist coverage or any other insurance coverage should this Covenant be executed.

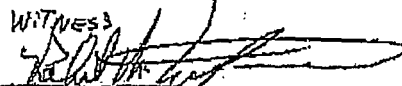
IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.

AS TO COVENANTOR:


Robert M. Witherspoon, IV (L.S.)

WITNESSES

3


Robert M. Witherspoon, III

AS TO COVENANTEE:

Progressive Max Insurance Company

BY: _____ (L.S.)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company

☒ Plaintiff

v.

Floating Caps, Inc. d/b/a Silver Dollar Cafe

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2007-CP-10-3920

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Timothy J. Newton, Bar No. 71640
Address:
P.O. Box 6648
Columbia, SC 29260
phone: (803) 454-1242 fax: (803) 782-4140
e-mail: tnewton@murphygrantland.com other:

Defendant's Attorney:
Erances M. Ervin, III, Bar No.
Address:
P.O. Drawer 22247
Charleston, SC 29413-2247
phone: (843) 727-2200 fax: (843) 727-2239
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

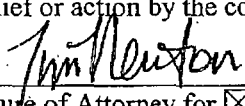
Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 1, 2009

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

158

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CIVIL ACTION NO: 07-CP-10-3920

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

MOTION FOR RECONSIDERATION

FILED
2009 SEP 2 PM 2:33
JULIE M. TROTT
CLERK OF COURT

TO: FRANCIS M. ERVIN, II, ESQUIRE, ATTORNEY FOR DEFENDANT AND TO THE DEFENDANT NAMED ABOVE:

Plaintiff Progressive Max Insurance Company ("Progressive") submits this motion for reconsideration of this Court's Order granting Defendant's motion for summary judgment.

BACKGROUND

Progressive brought this subrogation action seeking contribution from Defendant Floating Caps, Inc. d/b/a Silver Dollar Café. Silver Dollar's liability in the underlying tort case was clear because it sold alcohol to a minor, sold alcohol after the legal hours, and sold alcohol to an intoxicated person. However, Robert M. Witherspoon, IV, the plaintiff in the underlying tort case, sued only Ryan McGuire (the driver of the vehicle which struck him) and his parents. Counsel for Witherspoon provided testimony by way of affidavit that he made a tactical decision to avoid diffusing any liability against Ryan McGuire for his actions.

When Witherspoon settled with the McGuires, the statute of limitations had already run on Witherspoon's claims against Silver Dollar. By affidavit, Witherspoon's counsel testified that the settlement was entered into with the understanding that Progressive would bring a subrogation action for contribution against Silver Dollar. Following the settlement, Witherspoon

attempt to assert a claim against Silver Dollar. However, the Covenant Not To Execute dated April 20, 2007 did not specifically mention Silver Dollar.

After the court approved the settlement, the parties to the Witherspoon matter realized that the signed document did not reflect the intent of the parties. The re-executed document, dated July 31, 2007, recited that the parties understood Progressive intended to bring a contribution claim against Silver Dollar.

Silver Dollar moved for summary judgment on the ground that Progressive failed to comply with the requirements of the South Carolina Contribution Among Tortfeasors Act (Contribution Act), S.C. Code Ann. §§ 15-38-10, et seq. (2005 and Supp. 2007). Progressive moves for reconsideration of this Court's Order granting Silver Dollar's motion because: (a) the Court misapplied section 15-38-40, and (b) the Court misconstrued section 15-38-50.

ARGUMENT

I. Application of section 15-38-40.

The Court's Order relies on section 15-38-40(D) in granting Defendant's motion for summary judgment. Section 15-38-40(D) is not applicable to this case. Section 15-38-40(D) only applies "[i]f there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution." A judgment has been entered against the tortfeasor seeking contribution, Ryan McGuire. The judgment was for \$200,000.00, of which Progressive paid \$180,000.00. Progressive brought McGuire's contribution claim by way of subrogation pursuant to section 15-38-20(E) of the South Carolina Code. Thus, section 15-38-40 does not apply because there has been a judgment against McGuire which has been satisfied in part through Progressive's payment.

The proper standard is found in section 15-38-40(C), which provides: “If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.” Progressive satisfied this requirement by bringing this action within one year of the settlement as required by section 15-38-40(C). Thus, no basis exists for granting summary judgment for Defendant based on section 15-38-40.

II. Construction of section 15-38-50.

The Court’s Order construes section 15-38-50 as a hard-line procedural rule which must be complied with to allow Plaintiff to be entitled to contribution. This construction is not consistent with South Carolina law. Section 15-38-20(A) creates a right of contribution, as a matter of law, whenever joint and several liability exists. The right of contribution exists when a defendant has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20(B). “No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.” Id.

In this case, McGuire paid more than his pro rata share of the common liability—he paid the entire claim. Thus, Progressive (through McGuire) has a right of contribution, as a matter of law, to the extent the amount it paid exceeds its pro rata share of the liability. The only other requirement is that McGuire’s payment extinguished Silver Dollar’s liability. The Contribution Act does not specify how this must be proved.

Section 15-38-50 was intended to codify recent case law rejecting the ancient rule that the release of one defendant released all defendants. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). Section 15-38-50 does

not dictate procedure, but simply explains the ultimate effect of a release or covenant. Ellis v. Oliver, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999). The right of contribution does not arise from section 15-38-50, but instead arises automatically under section 15-38-20. Although Ellis dealt with a set-off, the same principles apply here.

In Ellis, the plaintiff was injured in a car accident and subsequently died due to negligent treatment by an anesthesiologist at Richland Memorial Hospital. The plaintiff settled with Richland Memorial for \$140,000 and then pursued her claim against the anesthesiologist. The jury awarded a total of \$700,000 for the wrongful death and survival actions. Id. at 108, 515 S.E.2d at 269. The trial court reduced the verdict by \$140,000 because of the amount Richland Memorial Hospital had already paid. Id. at 109, 515 S.E.2d at 270. The issue on appeal was whether the anesthesiologist had to jump through any particular hoops to assert the set-off. The court held that since the set-off was statutorily mandated, the right rose automatically by operation of law and no motion was required to apply the credit. Id. at 112, 515 S.E.2d at 271. Since the right to a set-off arises automatically from the statute, the right to contribution must also arise automatically, because the set-off is simply another way of accomplishing contribution.

In this case, McGuire paid the entire claim. His right to contribution arose automatically from the payment of the judgment by his liability carriers. The only further requirement is that McGuire's payment must have extinguished Silver Dollar's liability.

Silver Dollar's argument that McGuire did not pay the entire claim because Witherspoon reserved his right to pursue an underinsured motorist (UIM) claim is a red herring. An UIM claim has nothing to do with liability—it is brought solely for the purpose of establishing the

amount of damages for purposes of a plaintiff's first-party insurance claim with his auto insurer. See Broome v. Watts, 319 S.C. 337, 340-41, 461 S.E.2d 46, 48 (1995).

The evidence is clear that the settlement between McGuire and Witherspoon was intended to extinguish all liability arising from Witherspoon's injuries, including Silver Dollar's. The fact that the Covenant Not To Execute did not specifically mention Silver Dollar should not be determinative. Witherspoon never sued Silver Dollar, and the statute of limitations had run on Witherspoon's claim by the time the parties entered into the settlement. Thus, there was no reason to include Silver Dollar in the settlement. Courts generally presume that a statute is not intended to require the doing of a futile act. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008). The immediate concern of the parties was to preserve Witherspoon's UIM claim, and this prevented the use of a full release.

Counsel for the plaintiff in the tort case presented undisputed testimony that it was the parties' intention that the settlement with McGuire would extinguish all liability. Silver Dollar was not a party to this agreement and, as such, cannot argue that the written document was the entire agreement between Witherspoon and McGuire. Regardless of whether the Covenant itself satisfied section 15-38-50, the parol terms of the settlement included the term that Progressive intended to bring a subrogation claim against Silver Dollar, and the re-executed Covenant provides evidence of this fact. Section 15-38-50 should not be construed to mandate inclusion of non-parties to the contract and to prohibit all external evidence as to the intent of the parties.

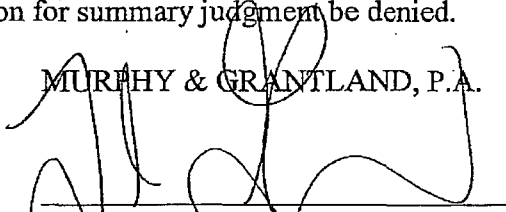
Because Progressive's right of contribution arose automatically from section 15-38-20 when it paid the entire claim, Progressive respectfully submits that this Court erred in holding that section 15-38-50 bars its claim. All that is required is proof that the parties to the tort case intended the settlement to extinguish Silver Dollar's liability. Bartholomew v. McCartha, 255

S.C. 489, 492, 179 S.E.2d 912, 914 (1971). The evidence that the terms of the Covenant were not consistent with the oral agreement between the parties should at least create a question of fact which would survive summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-331, 673 S.E.2d 801, 803 (2009) (holding that a mere scintilla of evidence is sufficient to withstand a motion for summary judgment).

CONCLUSION

For the foregoing reasons, Progressive respectfully requests that this Court reconsider its ruling and order that Silver Dollar's motion for summary judgment be denied.

MURPHY & GRANTLAND, P.A.



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Attorneys for Defendant

Columbia, South Carolina
August 31, 2009

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Progressive Max Insurance Company,

Plaintiff,

vs.

Floating Caps, Inc. d/b/a Silver Dollar Cafe,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 07-CP-10-3920

CERTIFICATE OF SERVICE

2009 SEP 2 PM 2:34
JULIE J. HARRIS
CLERK OF COURT

FILED

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for Plaintiff, do hereby certify that on September 1, 2009, I have served a copy of the foregoing Motion for Reconsideration in connection with the above-referenced case placing same in the U.S. mail, postage paid to:

Frances M. Ervin, III, Esquire
Pratt-Thomas, Pearce, Epting & Walker, PA
16 Charlotte St.
P.O. Drawer 22247
Charleston, SC 29413-2247

Mallory Wiltshire
Mallory Wiltshire, Legal Assistant

Columbia, South Carolina

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2007-CP-10-3920

Progressive Max Insurance Company, ...Appellant,

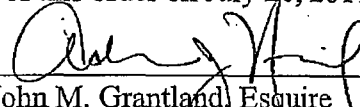
v.

Floating Caps, Inc. d/b/a Silver Dollar Café, ... Respondents.

NOTICE OF APPEAL

Progressive Max Insurance Company, appeals the Order of the Honorable R. Markley Dennis, dated July 19, 2011 and filed July 21, 2011, which denied Appellant's Rule 59(e) motion seeking reconsideration of the Order granting Respondent's motion for summary judgment. Appellant received written notice of entry of this order on July 26, 2011.

August 11, 2011


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Other Counsel of Record:
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Attorneys for Respondents

RECEIVED

AUG 11 2011

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2007-CP-10-3920

Progressive Max Insurance Company, ...Appellant,

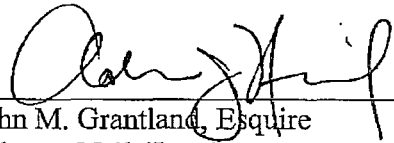
v.

Floating Caps, Inc. d/b/a Silver Dollar Café, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Floating Caps, Inc. d/b/a Silver Dollar Café, by depositing a copy of it in the United States Mail, postage prepaid, on August 11, 2011, addressed to their attorneys of record, Frances M. Ervin, III, Esquire, P.O. Drawer 22247, Charleston, South Carolina 29413-2247.

August 11, 2011



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Adam J. Neil, Esquire

Murphy & Grantland, P.A.

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Attorney for Appellant, Progressive
Max Insurance Company

RECEIVED

AUG 11 2011

SC Court of Appeals

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	C/A No.: 2007-CP-10-3920
Progressive Max Insurance Company,	)	
	)	
Plaintiff,	)	
	)	ORDER DENYING PROGRESSIVE
	)	MAX INSURANCE CO.'S MOTION TO
	)	RECONSIDER
v.	)	
	)	
Floating Caps, Inc., d/b/a Silver Dollar Cafe,	)	
	)	
Defendant.	)	

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JULIE ARMSTRONG
CLERK OF COURT

This matter originally came before me upon motion of the Defendant Floating Caps, Inc., d/b/a Silver Dollar Café's ("Silver Dollar") for summary judgment pursuant to SCRCP 56. That motion was granted and Plaintiff filed a motion to reconsider. For the reasons set forth below, the Court denies the motion to reconsider. Therefore, the Order granting summary judgment in favor of the Defendant stands.

Plaintiff Progressive Max Insurance Company ("Progressive") has filed a contribution claim against Silver Dollar, pursuant to the South Carolina Contribution Among Tortfeasors Act, S.C. Code § 15-38-10 et seq., alleging Defendant is jointly liable for the damages caused to the plaintiff Robert Witherspoon in the underlying case of Robert M. Witherspoon, IV v. Ryan, Kevin and Betty McGuire, Civil Action No. 2:06-1089-DCN. Arguments for and against the motion were heard on May 25, 2010. The Plaintiff was represented by Adam J. Neil. The Defendant was represented by Francis M. Ervin, II.

The Court finds that the Motion to Reconsider was properly made pursuant to Rule 59(e), SCRCP. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue

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for appellate review.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Progressive raised the issue of the timing, including the “relation back”, of the second covenant not to execute in its filings and at the oral argument of the motion for summary judgment. However, the Court’s order granting the Defendant’s motion for summary judgment did not specifically address Progressive’s argument that the fact that the second covenant corrected a mutual mistake in the first, it “relates back” to the first covenant such that the covenant was executed in a timely fashion according to the requirements of the statute.

At issue in this case is whether the agreement to settle all claims in the underlying case properly complied with the statute and preserved the contribution action even though the original Covenant Not to Execute signed by the parties in the underlying case on April 20, 2007, did not specifically reference any potential liability of Silver Dollar. A second covenant not to execute that Progressive argues did discharge the liability of Silver Dollar was executed by the parties to the underlying suit on July 31, 2007.

In this case, S.C. Code Ann. § 15-38-40(D) applies because a settlement was reached prior to the entry of any judgment. When no judgment has been entered against the tortfeasor seeking contribution (in this case Progressive as subrogee McGuire), its right is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant’s right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution. S.C. Code § 15-38-40(D). When a release or covenant not to sue and/or not to enforce a judgment is given to one of two or more persons liable in tort

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for the same injury, said covenant "does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide." S.C. Code § 15-38-50(1).

It is undisputed that Progressive entered the first covenant on April 20, 2007, approximately five months after the statute of limitations ran on Witherspoon's personal injury claims. Therefore, Progressive may maintain its contribution action against Silver Dollar only if it has met the requirements set forth under S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1).

Progressive argues that it has complied with both statutory requirements. Progressive points to the affidavit of attorney Johnny Driggers which recites that the parties in the underlying suit agreed to discharge the liability of Silver Dollar as part of the settlement. Thus, Progressive argues, it had an agreement to discharge the liability of Silver Dollar while the Witherspoon action was pending as is required by §15-38-40(D)(2)¹.

Moreover, Progressive argues, that it has complied with § 15-38-50 because the second covenant not to execute included a term that expressly discharged the liability Silver Dollar. Progressive argues that §15-38-50 has no timing requirement and, therefore, the fact that the liability of Silver Dollar was formally discharged, in writing, after the suit was dismissed and after the statute of limitations had run was of no effect. The Court rejects this argument.

Progressive also argues that the second covenant is merely a correction of the mutual mistake of failing to preserve the contribution claim in the first covenant. Therefore, it should be deemed executed as of the date of the first covenant – April 20, 2007. A party seeking to reform a release or covenant on the basis of a mutual mistake must demonstrate that "the mistake is common to both parties and, by reason of it, each has done what neither intended." Chet Adams

¹ There is no dispute about the fact that this contribution action was brought within the one year period mandated by the statute.

Co. v. James F. Perersen Co., 308 S.C. 410, 413, 418 S.E. 2d 337, 339 (Ct. App. 1992). In this case, Progressive contends that the evidence demonstrates at least a question of fact regarding whether both parties to the agreement mistakenly failed to include a discharge of Silver Dollar's liability. The Court agrees that such evidence is in the record.

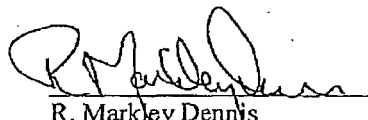
Progressive then argues that the Court should treat the second covenant not to execute as a reformed version of the original covenant not to execute. Accordingly, Progressive argues, the reformation should relate back to the date of the original covenant. See Lawrence v. Clark, 115 S.C. 67, 104 S.E. 330 (1920). The Court disagrees. I am not persuaded by this argument and find that the second covenant not to execute did not satisfy the statutory requirements for preserving a contribution claim.

S.C. Code § 15-38-40(D)(2) expressly states that a party's right to contribution will not be preserved unless the joint tortfeasors liability has been discharged by agreement "while the action is pending." Once the underlying Witherspoon case was dismissed on May 8, 2007, Progressive's subsequent execution of the July 31, 2007 covenant could not preserve any right to contribution against the Defendant. Therefore, I find that any right of contribution that Progressive may have had against Silver Dollar was barred once the Witherspoon case was dismissed on May 8, 2007.

Having determined that the original motion for summary judgment was properly granted, the Plaintiff's motion to reconsider is **DENIED**.

IT IS SO ORDERED.

Dated: July 19, 2011
Charleston, South Carolina


R. Markley Dennis
Presiding Judge Ninth Judicial Circuit

RMBH

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2007-CP-10-3920

Progressive Max Insurance Company, ...Appellant,

v.

Floating Caps, Inc. d/b/a Silver Dollar Café, ... Respondents.

CERTIFICATE

I, Adam J. Neil, attorney for Appellants, certify that the Record on Appeal complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 210(g) of the South Carolina Court Rules.

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February 9, 2012

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2007-CP-10-3920

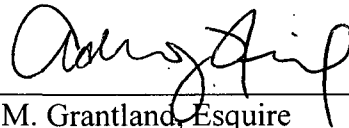
Progressive Max Insurance Company, ...Appellant,

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Floating Caps, Inc. d/b/a Silver Dollar Café, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal, on Floating Caps, Inc. d/b/a Silver Dollar Café, by depositing a copy of it in the United States Mail, postage prepaid, on February 9, 2012, addressed to their attorneys of record, Frances M. Ervin, III, Esquire, 775 St. Andres Blvd., Charleston, South Carolina 29407.



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