

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

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Case No. 2007-CP-10-3920

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Progressive Max Insurance Company, .....Appellant,

v.

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

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FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court erred in refusing to look to the intent of the parties in determining whether Respondent was protected in the underlying tort settlement.
  - A. Under contract principles, a court may resort to extrinsic evidence when the party seeking a benefit of the contract is a stranger to the contract or to resolve a mutual mistake.
  - B. Whether the trial court erred in construing section 15-38-50(1) to prevent admissibility of extrinsic evidence to aid in the construction of a release of covenant.
- II. Whether sufficient evidence exists to support a finding that the parties intended the Covenant to extinguish Witherpoon's claim against Respondent.
  - A. Whether the parties intended the release to discharge Silver Dollar's liability.
  - B. Whether the settlement satisfied Witherspoon's entire tort claim.
- III. Whether the Covenants provided sufficient evidence of an agreement to extinguish Respondent's liability.

## **STATEMENT OF THE CASE**

This is an appeal from an order of R. Markley Dennis, Presiding Judge of the Ninth Judicial Circuit, dated July 19, 2011, which denied Appellant's Motion for Reconsideration. Appellant Progressive Max Insurance Company brought this action for contribution against Respondent Floating Caps, Inc., d/b/a Silver Dollar Café (hereinafter "Silver Dollar") following the settlement of an underlying tort action. The Complaint was filed on September 5, 2007. Respondent moved for summary judgment on the ground that Appellant failed to comply with the requirements of the South Carolina Contribution Among Joint Tortfeasors Act (Contribution Act), S.C. Code Ann. §§ 15-38-10, et seq. (2005). Judge Dennis granted Respondent's motion for summary judgment on August 20, 2009. Appellants filed a timely Motion for Reconsideration which was heard on May 25, 2010. Judge Dennis entered his Order Denying Progressive Max Insurance Co.'s Motion to Reconsider on July 21, 2011. Appellant filed and served its Notice of Appeal on August 11, 2011.

## **STATEMENT OF THE FACTS**

Appellant's contribution action concerns liability for a fight that broke out outside the Silver Dollar Café, a bar located in Charleston, South Carolina, during the early morning hours of November 17, 2003. Ample evidence demonstrates Respondent Silver Dollar's liability in the underlying tort case. Respondent continued to sell alcohol to Ryan McGuire well after legal hours. (R. pp. 67, 99, 115-16.) Ryan McGuire was under the legal drinking age at the time. (R. pp. 66, 95, 97-98, 100.) Respondent continued to sell alcohol to Ryan McGuire despite the fact that he was intoxicated. (R. pp. 67, 97-99, 107-08.) During a brawl that ensued as McGuire and his intoxicated and underage

friends were leaving the Respondent's bar at 3:00 a.m., McGuire entered his vehicle and drove it into the crowd, striking and injuring two patrons; both of whom brought suit against McGuire. (R. pp. 67, 100-02.) This appeal concerns liability for the lawsuit brought by one of the victims, Robert M. Witherspoon.

Despite the fact that the other victim sued both McGuire and Respondent, Witherspoon opted to bring suit against only McGuire and his parents. (R. pp. 68, 62 at ¶ 8.) Witherspoon's claims against McGuire and his parents were settled for a total of \$200,000, of which Progressive paid \$180,000. (R. pp. 68, 125-29.) The settlement was reached on April 20, 2007. (R. p. 3.)<sup>1</sup>

The settlement document that the parties executed on April 20, 2007 did not specifically identify Respondent as a party being released from liability. However, Appellant presented evidence that it was the intent of the parties to the Witherspoon action that the settlement agreement extinguish all claims arising from the incident, including Witherspoon's claims against Respondent. (R. pp. 68, 62 at ¶ 12.)

The evidence Appellant presented was not merely self-serving testimony on its own behalf. Counsel for Witherspoon testified by way of affidavit that he was aware of Witherspoon's claim against Respondent, but he made the decision to focus his entire claim against McGuire in order to avoid diffusing McGuire's liability. (R. p. 62 at ¶ 7.) Counsel for Witherspoon testified that it was understood by both parties to the settlement that Appellant's payment would be in satisfaction of Witherspoon's entire claim (excepting underinsured motorist (UIM) coverage) and that Progressive would

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<sup>1</sup> The trial court noted that the statute of limitations on any claim Witherspoon may have had against Silver Dollar had expired before the settlement. This did not affect the statute of limitations for Appellant's contribution claim, which is one year from the time of the underlying settlement. See S.C. Code Ann. § 15-38-40(D) and n. 2, *infra*.

subsequently bring a subrogation action for contribution against Respondent. (Id. at ¶ 12.) When it was discovered that the settlement documents did not accurately reflect this mutual intent, counsel for Witherspoon re-executed a second Covenant Not To Execute on July 31, 2007 to clarify the intent of the parties. (R. p. 69, 62-63 at ¶ 13, 135-38.)

Respondent moved for summary judgment on the ground that the settlement documents failed to comply with the requirements of Sections 15-38-40(D) and 15-38-50(1) of the South Carolina Code. Judge Dennis granted Respondent's motion for summary judgment and denied Appellant's ensuing Motion to Reconsider. This appeal follows.

#### **STANDARD OF REVIEW**

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). In reviewing factual questions for purposes of review of a ruling on a summary judgment motion, appellate courts must apply the same standard which governs the trial court under Rule 56(c), SCRPC. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005).

“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). Moreover, summary judgment should be denied if even a scintilla of evidence supports the non-moving party's theory. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

## ARGUMENT

**I. The trial court erred in refusing to look to the intent of the parties in determining whether Respondent was protected in the underlying tort settlement.**

**II.**

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). 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. See S.C. Code Ann. § 15-38-20(E).

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)(2).<sup>2</sup> Appellant Progressive is entitled to contribution from Respondent Silver Dollar if it demonstrates an agreement that Progressive's payment on behalf of McGuire was in satisfaction of the common liability of both McGuire and Silver Dollar.

Section 15-38-50(1) of the South Carolina Code provides as follows:

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

- (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
- (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

At issue is the clause in section 15-38-50(1) providing that a Covenant Not To Execute "does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide." The trial court ruled that Appellant was not entitled to contribution because the April 20, 2007 Covenant did not specifically identify Respondent as a party protected in the settlement. Appellant submits that this was error because the trial court failed to consider the evidence of the intent of the parties to the settlement.

There are a numerous reasons why a court should look to the intent of the parties in appropriate circumstances when determining the effect of a settlement agreement on third parties. Principles of contract law allow a court to look to the intent of the parties

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<sup>2</sup> It is undisputed that section 15-38-40(D)(2) applies. (See R. p. 3.) Section 15-38-40(D)(2) provides:

If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has . . . (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.

under the circumstances of this case. Moreover, a construction allowing a court to look to the intent of the parties is consistent with case law construing the Contribution Act.

**A. Under contract principles, a court may resort to extrinsic evidence when the party seeking a benefit of the contract is a stranger to the contract or to resolve a mutual mistake.**

A release or covenant is merely a contract. Wade v. Berkeley County, 339 S.C. 495, 502, 529 S.E.2d 734, 737 (Ct. App. 1999), aff'd on reh'g, 339 S.C. 513, 529 S.E.2d 734 (Ct. App. 2000), rev'd on other grounds, 348 S.C. 224, 559 S.E.2d 586 (2002) (holding that a covenant not to sue "is nothing but a contract and should be so construed"). Accordingly, contract principles govern the construction and effect of a release or covenant. Bowers v. Dep't of Transp., 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004). Under contract law courts look beyond the four corners of the written instrument to the intent of the parties in certain circumstances.

A court may resort to extrinsic evidence to determine the intent of the parties in this case for two reasons. First, Silver Dollar may not avail itself of the parol evidence rule because it was not a party to the contract. Second, courts may look to extrinsic evidence to resolve a mutual mistake.

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, 284, 87 S.E.2d 822, 824 (1955); Baptist Found. for Christian Educ. v. Baptist College at Charleston, 282 S.C. 53, 57, 317 S.E.2d 453, 456-57 (Ct. App. 1984). Since Silver Dollar was not a party to the Covenant, it may not rely on the parol evidence rule to prevent examination of extrinsic evidence of the parties' intent.

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. The affidavit of Witherspoon's counsel further establishes that the mistake was common to both parties. This evidence of mutual mistake forms the basis for equitable reformation based on extrinsic evidence.

Respondent Silver Dollar was not a party to the covenant between Appellant and Witherspoon. Witherspoon and Appellant agree that a mutual mistake existed in the April 20, 2007 Covenant. Under contract law, Respondent may not rely solely upon the written instrument to excuse it from liability. An examination of the evidence reflects that the parties to the Covenant intended that Appellant's payment satisfy Witherspoon's claim, allowing it to seek contribution from Respondent.

**B. The trial court erred in construing section 15-38-50(1) to prevent admissibility of extrinsic evidence to aid in the construction of a release of covenant.**

The trial court construed section 15-38-50(1) to impose a bar to the admissibility of any extrinsic evidence as to whether the parties to the underlying settlement intended to provide for the protection of the party against whom contribution is sought. Appellant submits that this was error and would show that section 15-38-50(1) was intended only to clarify that the release of one tortfeasor does not automatically release all other joint tortfeasors.

Section 15-38-40(D)(2) does not expressly require that the party against whom contribution is sought be set forth in a written release or covenant. It requires only that

the party seeking contribution “agree” to discharge the common liability. Nothing in the Contribution Act requires that this “agreement” be contained in the covenant between the parties which is referenced in section 15-38-50. Moreover, the trial court’s interpretation of section 15-38-50 is inconsistent with South Carolina case law.

Under the common law, the release of one of multiple joint tortfeasors resulted in the release of all, regardless of the intent of the parties. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). Approximately 40 years ago, 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). Section 15-38-50(1) codified the common law rule as modified in Bartholomew. Bowers, 360 S.C. at 155, 600 S.E.2d at 546 (Ct. App. 2004). Importantly, section 15-38-50(1) did not overrule Bartholomew. Id. It was intended only to mirror Bartholomew. Id. Accordingly, section 15-38-50(1) should be construed in accordance with Bartholomew.

Under Bartholomew, extinguishment of the claim against another joint tortfeasor could be shown in one of two ways: (a) demonstrating that it was the intent of the parties, or (b) demonstrating that the plaintiff has, in fact, received full compensation amounting to a satisfaction. Bowers, 360 S.C. at 154, 600 S.E.2d at 545. Bartholomew does not impose a procedural mandate as to the means by which these things must be

proven. Proof of intent or satisfaction implies resorting to extrinsic evidence to determine the intent of the parties.

Statutes in derogation of common law must be strictly construed. G&P Trucking v. Parks Auto Sales Service & Salvage, 357 S.C. 82, 87, 591 S.E.2d 42, 44 (Ct. App. 2003). Since § 15-38-50(1) has been construed to mirror Bartholomew, it should not be read to impose more stringent requirements which would partially overrule Bartholomew. The purpose of the Bartholomew rule was to avoid defeating the intent of the parties and extolling technicalities. Bartholomew, 225 S.C. at 492, 179 S.E.2d at 914. This purpose is frustrated by the interpretation adopted by the trial court. Respondent's liability is clear, yet it is attempting to relieve itself from liability by hiding behind a technicality.

Courts have allowed parties to resort to extrinsic evidence, such as discovery responses and admissions of counsel, to determine the effect of a release for purposes of a contribution claim. See Loyd's Inc. v. Good, 306 S.C. 450, 454, 412 S.E.2d 441, 444 (Ct. App. 1991); Williams v. Physicians & Surgeons Cmty. Hosp., Inc., 292 S.E.2d 705 (Ga. 1983); Sims v. Honda Motor Co., Ltd., 623 A.2d 995 (Conn. 1993).

Loyd's involved facts similar to the facts in this case. In Loyd's, the owner of a pond brought a claim for siltation damage to its pond due to the construction of a K-mart store upstream. Loyd's, 306 S.C. at 451-52, 412 S.E.2d at 442. The owner of the pond, (Loyd's Inc.) brought the claim against the general contractor for the project, (McCrary Construction) and the grading and paving subcontractor (Richardson Construction). Id. at 451-52, 412 S.E.2d at 442. Richardson settled with the pond owner. Id. at 452, 412 S.E.2d at 442. The owner of the K-mart site (Pickens Partnership) and McCrary Construction refused to participate in the settlement. Id. at 452, 412 S.E.2d at 452.

Richardson paid \$21,000 to settle the claim on a covenant not to sue which did not release all claims that Loyd's had against McCrory and Pickens. Id. Additionally, Richardson took a limited assignment of all claims except those expressly reserved by Loyd's. Id. Richardson then brought an action based on the assignment of Loyd's remaining claims against Pickens and McCrory. Id.

The case was decided under Bartholomew prior to the Contribution Act. Loyd's, 306 S.C. at 454, 412 S.E.2d at 444. The court looked outside the covenant itself to discovery responses in making its determination about the effect of the covenant. Id. Despite the fact that the instrument in question was a covenant rather than a release, and that McCrory and Pickens were not protected in the covenant, the court held that the settlement by Richardson amounted to a full satisfaction of Loyd's claim. Id. at 454-55, 412 S.E.2d at 444. Thus, Richardson could not obtain contribution under the prior rule against contribution among joint tortfeasors.

Loyd's is directly on point. Like Richardson, Progressive paid the plaintiff's claim and settled on a covenant (as opposed to a full release). Since the court looked beyond the four corners of the covenant to the underlying facts of the settlement in Loyd's, the court should do the same in this case. The underlying facts in this case inevitably lead to the same conclusion the court reached in Loyd's, *i.e.*, that the settlement satisfied Witherspoon's claim as to both McGuire and Silver Dollar. However, the opposite result would follow because South Carolina now allows contribution.

The Bartholomew rule governed in both cases decided prior to the Contribution Act and cases decided under the Contribution Act. Compare Loyd's, 306 S.C. at 454,

412 S.E.2d at 444 (citing Bartholomew for the rule prior to the Contribution Act) with Bowers, 360 S.C. at 155, 600 S.E.2d at 546 (relying on Bartholomew and holding that Bartholomew was not overruled by the Contribution Act). Under Bartholomew, a court was not limited by the terms of the settlement instrument, but could examine the underlying facts and the intent of the parties to determine the effect of the settlement.

The trial court erred in construing section 15-38-50(1) so as to effectively overrule Bartholomew. The Contribution Act was not intended to overrule Bartholomew, but to codify it. Bowers, 360 S.C. at 155, 600 S.E.2d at 546. In Bowers, which was decided under the Contribution Act, the court analyzed the effect of the release at issue under Bartholomew. Bowers, 360 S.C. at 154, 55, 600 S.E.2d at 545-46. Thus, Bartholomew continues to be good law and section 15-38-50(1) should be construed in accordance with it.

The manner in which the trial court construed section 15-38-50(1) is overbroad. Clearly, section 15-38-50(1) was intended to codify Bartholomew's rejection of the ancient common law rule that the release of one joint tortfeasor automatically released all other tortfeasors who were jointly and severally liable, regardless of the intent of the parties. The trial court erred, however, in extending section 15-38-50(1) to the converse situation. The intent of the legislature can be fulfilled by a limited construction that codifies the rejection of the ancient common law rule in accordance with Bartholomew. If other defendants had remained at the time McGuire settled with Witherspoon, section 15-38-50(1) would prevent the settlement with McGuire from releasing these other defendants. This limited construction satisfies the legislative intent of codifying Bartholomew without unnecessarily overruling it.

Section 15-38-50(1) should not be read to impose a statutory parol evidence rule preventing extrinsic evidence of the parties' intent, which would be at odds with both prior law under Bartholomew and principles of contract law. Bartholomew expressly allows consideration of the parties' intent. Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914. The trial court's interpretation puts section 15-38-50(1) directly at odds with Bartholomew, thus violating Bowers.

In other jurisdictions, courts have construed statutes corresponding 15-38-50(1) to allow courts to look to extrinsic evidence to determine the intent of the parties in certain circumstances. Williams, 292 S.E.2d 705; Sims, 623 A.2d 995; Hurt v. Leatherby Ins. Co., 380 So.2d 432 (Fla. 1980). Even when the plaintiff gave a general release, courts have allowed evidence of the intent of the parties. Hurt, 380 So.2d at 434; Williams, 292 S.E.2d at 707-08. The Supreme Court of Connecticut canvassed the case law in other states and concluded that the intent approach best satisfied the purpose of a statute containing language substantially similar to section 15-38-50(1). Sims, 623 A.2d at 999 n.8, 1004.

The construction adopted by the trial court would create a trap by forcing parties to a settlement to name all potential parties which could be subject to a contribution action, including parties not yet known. This construction would violate the express purpose of the Bartholomew rule—encouragement of settlements. Defendants could be discouraged from settling until they become certain that all other potential defendants are identified and named in the covenant or release.

Finally, South Carolina courts have held that section 15-38-50(1) does not dictate procedure. Ellis v. Oliver, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999). For

these reasons, section 15-38-50(1) should not be construed to require the specific identification of a non-party to the Covenant that is being protected thereby when, as here, there is other evidence in the record demonstrating that the parties to the covenant intended for it to release the party from which contribution is ultimately sought. In congruence with Bartholomew, section 15-38-50(1) should not be construed to require that the discharge of Silver Dollar's liability occur in the covenant not to execute.

Section 15-38-40 requires only that there be an *agreement* to extinguish the common liability, it does not require that the agreement be in writing. Thus, the agreement to discharge Silver Dollar's liability is valid even if the court finds that the written covenant not to execute does not include such a term. Having extinguished the liability of Silver Dollar, Progressive's contribution action is proper and the grant of summary judgment in favor of Silver Dollar should be reversed.

**II. Sufficient evidence exists to support a finding that the parties intended the Covenant to extinguish Witherspoon's claim against Respondent.**

Respondent's motion for summary judgment was based on the argument that the Covenant executed between Witherspoon and the McGuires failed to discharge Witherspoon's claims against Respondent Silver Dollar. The motion should have been 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 trial court erred in refusing to look beyond the four corners of the original Covenant Not To Execute to the evidence of the intent of the parties in the "agreement." See S.C. Code Ann. § 15-38-40(D)(2). When this evidence is considered, it is clear that Witherspoon and Progressive both intended the settlement to extinguish Silver Dollar's liability.

As discussed above, the evidence indicates that Progressive paid more than its pro rata share of the common liability, and in fact paid the entire tort claim. Progressive presented evidence that it entered into an agreement with Witherspoon within the time required by section 15-38-40(D)(2) to discharge the common liability and to bring a contribution action against Witherspoon.

The express terms of the original Covenant are not controlling in this case for the reasons discussed above. The parol evidence rule does not apply because Silver Dollar was not a party to the Covenant. Moreover, the evidence of mutual mistake at least creates a question of fact as to the intent of the parties.<sup>3</sup> Additionally, section 15-38-50(1) must be construed in accordance with Bartholomew, which permits evidence of the intent of the parties. Therefore, it is appropriate for this Court to consider extrinsic evidence of the parties' intent, which includes the affidavit of Mr. Driggers and the re-executed Covenant. The only evidence before the trial court conclusively demonstrated that both Progressive and Witherspoon intended the settlement to extinguish Silver Dollar's liability.

The standard for reviewing extrinsic evidence to determine the effect of a settlement on third parties is set forth in Bartholomew. The court adopted the rule that release of one tortfeasor does not release all joint tortfeasors "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. A review of the evidence indicates that the settlement by Progressive and McGuire discharged Silver Dollar's liability under both prongs of Bartholomew. The parties intended the release to discharge

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<sup>3</sup> As discussed further below, the second covenant, which is actually just a restatement of the original covenant with a correction of the mutual mistake, unambiguously preserves the contribution action against Silver Dollar.

Silver Dollar's liability, and the amount paid in settlement satisfied Witherspoon's entire tort claim.

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

Progressive presented evidence that both Witherspoon and the McGuires intended the settlement in the underlying case to extinguish all tort 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 an action for contribution against Silver Dollar. (R. p. 62 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 Covenant, which was executed after it was discovered that the first Covenant 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. (R. p. 62-63 at ¶ 13.) Regardless of whether the original Covenant itself satisfied section 15-38-50,<sup>4</sup> the second Covenant provides evidence that the parol terms of the original settlement included the term that Progressive intended to bring a 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 inferences that Silver Dollar sold alcohol to minors, that Silver Dollar sold alcohol after legal hours, and that Silver Dollar sold alcohol to Ryan and Will, who were intoxicated. (R. pp. 95, 97-100, 107-08,

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<sup>4</sup> Appellant does not concede that the second Covenant was ineffective. The purpose and effect of the Second Covenant is discussed below.

115-16.) These acts of misfeasance on the part of Silver Dollar were contributing causes to the fight that resulted in Witherspoon's injuries. (R. pp. 100-02, 123.) Thus, Silver Dollar is a joint tortfeasor and could have been sued along with McGuire. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 68, 518 S.E.2d 301, 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. (R. p. 62 at ¶ 7.) This tactical decision is reflected in the fact that Witherspoon originally sued only Ryan. Although the second victim brought an action against Silver Dollar arising from the same incident, Witherspoon did not. (R. pp. 66, 79, 84.)

Driggers expressly testified in his affidavit that the parties intended the settlement to extinguish Witherspoon's claim against Silver Dollar. (R. p. 62 at ¶ 12.) He further testified that the revised Covenant reflected the parties' intention to preserve Progressive's contribution claim. (Id. at ¶ 13.)

All of the extrinsic evidence indicates that the parties' intent was to extinguish Respondent's liability in the settlement. Respondent's attempt to relieve itself of liability by relying solely on the written terms of the April 20, 2007 Covenant should be rejected.

**B. The settlement satisfied Witherspoon's entire tort claim.**

The covenant and surrounding circumstances 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. (R. p. 62 at ¶ 12.) Witherspoon

has not pursued any claim against Silver Dollar and the statute of limitations has now run on the claim.<sup>5</sup>

A satisfaction occurs when a defendant pays the amount agreed to in the settlement to satisfy the plaintiff's claim. Bowers, 360 S.C. at 155, 600 S.E.2d at 546 (explaining that "the parties will reach on 'accord' whereby one of the parties agrees to accept as 'satisfaction' of the disputed claim some performance or undertaking different from that which he considers himself entitled"). A satisfaction can occur even if the terms of the written instrument do not expressly so provide. Loyd's, 306 S.C. at 454, 412 S.E.2d at 444. In Loyd's, the court looked to extrinsic evidence to find it "clear [that] Richardson fully satisfied Loyd's claim with the expectation it could somehow recover a portion of the sum from the owners and McCrory." Id. Under Bowers and Loyd's, Witherspoon "in fact received full compensation amounting to a satisfaction" if Progressive can show that its payment was made pursuant to an agreement that the settlement fully satisfied Witherspoon's tort claim with the expectation that Progressive could pursue recovery of a portion of the sum from Silver Dollar.

The evidence indicates that Witherspoon did receive full compensation amounting to a satisfaction. The parties intended the settlement to discharge Silver Dollar's liability and to satisfy Witherspoon's entire tort claim. Under Bartholomew, the settlement extinguished Silver Dollar's liability, thus allowing a contribution action by Progressive.

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<sup>5</sup> The statute of limitations does not extinguish liability for purposes of a contribution claim. G&P Trucking, 357 S.C. at 88, 89, 591 S.E.2d at 45. However, it does bar the plaintiff from pursuing the claim absent certain exceptions such as waiver, tolling, and estoppel. Id. Moreover, the Contribution Act permits contribution claims after the running of the statute of limitations. S.C. Code Ann. § 15-38-40(D)(2). Thus, the running of the statute of limitations does not prevent Appellant's contribution claim, but it does evidence the fact that Witherspoon intended his settlement with Progressive to extinguish Respondent's liability.

**III. The Covenants provided sufficient evidence of an agreement to extinguish Respondent's liability.**

Even if this Court holds that a court may not look beyond the four corners of the settlement instruments, the Covenants provide sufficient evidence of an agreement to extinguish Respondent's liability for purposes of section 15-38-40(D)(2).

The Covenant Not To Execute dated April 20, 2007 extinguished all tort liability against McGuire and his parents, who were the only defendants in the Witherspoon action. (R. pp. 66, 68-69, 84, 87, 91, 131-33.) In fact, the settlement ended the Witherspoon action, leaving no other "persons liable in tort for the same injury." See S.C. Code Ann. § 15-38-50. Since no other defendants were named, this Covenant effectively extinguished all tort liability for the claims brought by Witherspoon.

The revised Covenant Not To Execute specifically provided for a contribution claim against Respondent. (R. pp. 69, 136.) The trial court found that the terms of the second Covenant were not material to its analysis because it was not executed either (1) while Witherspoon's action was pending or (2) before the statute of limitations expired. See S.C. Code Ann. § 15-38-40(D)(1) and (2). This is a misunderstanding of the second Covenant. The second Covenant was not a new "agreement" for purposes of section 15-38-40(D)(2), but merely a correction of the mutual mistake of failing to include the exhaustion of Silver Dollar's liability in the written instrument. Since the second Covenant was executed for only this purpose, it relates back to the date of execution of the original Covenant, thereby satisfying the requirement that the "agreement" was made during the pendency of the lawsuit. As set forth above, section 15-38-40(D)(2) does not require that the agreement be in writing and there is ample evidence that the agreement

pre-dated the settlement and subsequent dismissal of Witherspoon's underlying tort lawsuit.

The revised Covenant, on its face, evidences the intent of the parties to extinguish Respondent's liability. The trial court erred in holding that this revised Covenant was not relevant because it was not executed until after the dismissal of Witherspoon's lawsuit.

Although Appellant is aware of no South Carolina case law on point, courts have allowed equitable reformation of a release when a party against whom contribution is sought was omitted. Milford, 430 So.2d at 952. The reformation relates back to the original settlement instrument. See Commercial Union Assurance Co. v. Castile, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984) (reforming an insurance policy after the fact based on mutual mistake to cover the vehicle contemplated by the parties); George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001) (reforming an insurance policy after the fact based on mutual mistake to include \$1,000,000 in coverage instead of \$15,000); Herndon, 257 S.C. 98, 184 S.E.2d 444 (allowing an action to rescind a release based on mutual mistake). This is because the equitable doctrine of mutual mistake operates retroactively to correct a mistake in the drafting of a written instrument by which neither party got what they intended in the parol agreement. Commercial Union, 283 S.C. at 3-4, 320 S.E.2d at 490.

The re-executed Covenant correctly reflects the intent of the parties to the original Covenant. Even without the extrinsic evidence, the re-executed Covenant provides sufficient evidence of mutual mistake. Through equitable reformation, the original Covenant is reformed to include the term intended by the parties.

Moreover, section 15-38-40(D) does not require a written instrument identifying all parties whose liability is to be discharged. It requires merely an “agreement” while the underlying action is pending. The re-executed Covenant sufficiently evidences such an “agreement.” It represents the intent of both parties at the time of the original agreement. Appellant was not a party to this agreement and has not presented any evidence to the contrary. Therefore, Respondent’s motion for summary judgment should have been denied.

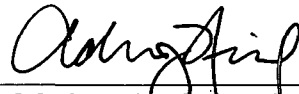
### **CONCLUSION**

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 Covenant. The failure to include the term was the result of a mere scrivener’s error. The trial court erred in construing section 15-38-50(1) to impose a procedural mandate that Silver Dollar be expressly protected in the Original Covenant. Because Silver Dollar is not a party to the original Covenant, and based on the evidence of mutual mistake, the trial court should have considered evidence of the intent of the parties in determining whether Silver Dollar’s liability was extinguished in the settlement. When this evidence is considered, it all points to the intent of both parties to the settlement that Silver Dollar’s liability be extinguished so Progressive could pursue a contribution claim against Silver Dollar. Furthermore, the Covenants themselves provide sufficient evidence of the parties’ agreement to extinguish Respondent’s liability without need for extrinsic evidence.

Accordingly, Progressive respectfully requests that this Court reverse the trial court's Order granting summary judgment for Silver Dollar and remand the case for a determination of Respondent's pro rata share of the liability to Witherspoon.

Respectfully submitted,

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February 27, 2012

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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Case No. 2007-CP-10-3920

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Progressive Max Insurance Company, .....Appellant,

v.

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

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CERTIFICATE

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I, Adam J. Neil, attorney for Appellants, certify that the Final Brief of Appellant complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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**PROOF OF SERVICE**

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I certify that I have served the Final Brief of Appellant, 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 27, 2012, addressed to their attorneys of record, Frances M. Ervin, III, Esquire, 775 St. Andrews Blvd., Charleston, South Carolina 29407



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