

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

---

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

v.

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

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FINAL REPLY BRIEF OF APPELLANT

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February 27, 2012

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## FACTUAL ISSUES

Appellant has previously set forth its Statement of Facts. However, Appellant would show that it disagrees with Respondent's characterization of the facts on one point. Appellant objects to the following statement of fact in Respondent's Brief: "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." (Resp't Initial Brief, p. 3.) The only evidence presented indicates that the re-executed covenant dated July 31, 2007 was not a new covenant, but a correction of the original document to bring it in line with the mutual intent of the parties. (See R. pp. 62-63 at ¶¶ 12-13.) Driggers's uncontroverted testimony by way of affidavit is that the parties' intent at the time of the April 20, 2007 settlement was that Witherspoon's liability be extinguished so Progressive could bring a contribution action. (Id. at ¶ 12.) There is no factual basis in the record to support Respondent's assertion that the re-executed instrument was a new and separate covenant between the parties.

## ARGUMENT

The case before the Court is distinguishable from all the authorities upon which Respondent relies. No case cited by Respondent deals with a situation in which the parties to the covenant not to execute agreed that the instrument did not reflect their intent and a second instrument was drafted and executed to correct it. When there is no evidence other than the settlement instrument as to the intent of the parties, it makes sense that extrinsic evidence should not be admissible to vary or clarify the intent of the parties. All of the cases cited by Respondent that construe the effect of settlement instruments fall into this category. See Bowers v. S.C. Dep't of Transp., 360 S.C. 149,

600 S.E.2d 543 (Ct. App. 2004); Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007); Scott by McClure v. Fruehauf Corp., 302 S.C. 364, 368, 396 S.E.2d 354, 356 (1990). However, these cases are not controlling because here there is evidence that the written instrument did not reflect the original agreement of the parties.

**I. Under principles of contract interpretation, consideration of extrinsic evidence to ascertain the intent of the parties is appropriate.**

Respondent argues that in the absence of an ambiguity, courts are bound by the terms of a settlement instrument without resort to extrinsic evidence. (Resp't Brief, p. 6 (citing Bowers; C.A.N. Enters. Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988).) This is a principle of contract interpretation known as the parol evidence rule. See Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280-81, 486 S.E.2d 742, 745 (1997). As Respondent acknowledges (Resp't Brief, p. 6), principles of contract construction govern interpretation of settlement instruments. Bowers, 360 S.C. at 153, 600 S.E.2d at 545. The parol evidence rule is not controlling in this case for two reasons.

**A. Third party exception**

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). This exception to the parol evidence rule for third parties to the contract was not raised in Bowers. See Bowers, 360 S.C. at 153, 600 S.E.2d at 545. In C.A.N., which is cited in Bowers, the exception for third parties did not apply because the dispute

was between the parties to the contract. See C.A.N., 296 S.C. at 374, 373 S.E.2d at 585. The general rules cited in Bowers therefore do not prevent application of exceptions found in other rules of contract interpretation.

Respondent Silver Dollar was not a party to the Witherspoon settlement. Respondent's proposed interpretation contradicts the express intent of both parties to the settlement agreement. Accordingly, Respondent has no standing to prevent extrinsic evidence from being considered to ascertain the intent of the parties to the settlement.

**B. Mutual mistake**

Secondly, parol evidence is admissible to show fraud or mistake in a written instrument. Henderson v. Rice, 160 S.C. 307, 320-21, 158 S.E. 258, 263 (1931). Because the evidence establishes that the original covenant was re-executed to correct a mutual mistake, Respondent may not rely on the parol evidence rule to avoid consideration of the extrinsic evidence of the parties' intent.

The evidence of mutual mistake is sufficient grounds for reformation. Commercial Union Assurance Co. v. Castile, 283 S.C. 1, 4, 320 S.E.2d 488, 490 (Ct. App. 1984) ("A mutual mistake is one whereby both parties intended a certain thing and by mistake in the drafting did not get what both parties intended."). In Castile, the court reformed an insurance policy to provide retroactive coverage for a 1977 Ford, rather than the 1972 Chevrolet listed in the written instrument. See id. at 2-3, 320 S.E.2d at 489-90. Due to the mutual mistake, terms which were not included in the original instrument were supplied by reformation, and these oral terms related back to the original agreement.

Under this doctrine, the re-executed covenant should be considered, not as a new agreement, but as extrinsic evidence of an oral term which was omitted from the original

covenant by mistake. The re-executed covenant is evidence, through the doctrine of mutual mistake, that Progressive agreed, while the Witherspoon action was pending, to discharge Silver Dollar's liability, satisfying section 15-38-40(D)(2).

For these reasons, the parol evidence rule is not controlling in this situation. Respondent was not a party to the Witherspoon settlement, and cannot assert the parol evidence rule as a bar to the consideration of extrinsic evidence to determine the intent of the parties to the settlement. Additionally, parol evidence is admissible to show a mutual mistake in the original instrument. The extrinsic evidence consists of Driggers' testimony and the re-executed covenant. When this evidence is considered, it is clear that the parties to the Witherspoon settlement intended to extinguish Silver Dollar's liability so that Progressive could pursue a contribution action.

**II. The evidence of an agreement to discharge Respondent's liability, even if unwritten, satisfies the statutory requirement.**

Respondent's argument that the statute itself bars consideration of extrinsic evidence fails because the Contribution Among Tortfeasors Act does not contain rules for construction of settlement instruments. The Act requires that the party seeking contribution must "agree[] while the action is pending against him to discharge the common liability" and pay the liability and bring an action within a year. S.C. Code Ann. § 15-38-40(D)(2). The statute does not define what constitutes an "agreement" and does not expressly require that the agreement be written.

Appellant satisfied the "agreement" requirement through the evidence that the parties agreed during the original settlement that the Covenant Not To Execute was to satisfy Witherspoon's claims against Respondent. (R. p. 62 at ¶ 12.) Driggers further testified that the re-executed covenant was to be construed as evidence of the original

intent of the parties. (Id. at ¶ 13.) This extrinsic evidence sufficiently demonstrates that Appellant agreed, while the Witherspoon action was pending, to discharge Respondent's liability in the settlement.

**III. The terms of the settlement included the intent to discharge Respondent's liability.**

Respondent's argument based on section 15-38-50(1) also misses the mark. Section 15-38-50 does not concern construction of a covenant, but only the effect of a covenant. Ellis v. Oliver, 335 S.C. 106, 110, 515 S.E.2d 268, 270 (Ct. App. 1999) ("The section simply explains the ultimate effect of a release, covenant not to sue, or covenant not to enforce . . . ."). Section 15-38-50(1) states that a covenant does not discharge other tortfeasors from liability "unless its terms so provide." But what are the "terms" of the covenant? As discussed above, the terms of the covenant must be ascertained by extrinsic evidence in this case because of the evidence of mutual mistake and the fact that Respondent was not a party to the agreement. Based on the uncontroverted testimony of Driggers and the evidence of the re-executed covenant, the terms of the original covenant included the agreement that Progressive's payment would discharge Respondent's liability. This satisfies section 15-38-50(1).

**IV. The settlement discharged Respondent's liability under the common law rule.**

Furthermore, even if this Court holds that Appellant failed to satisfy section 15-38-50(1), Appellant can prove it discharged Respondent's liability under the broader common law rule. This court refused to hold that the Contribution Among Tortfeasors Act overruled the common law rule. Bowers, 360 S.C. at 155, 600 S.E.2d at 546. Therefore, Appellant may prove that the settlement discharged Respondent's liability under prior case law. Under the common law rule, the effect of a settlement instrument is

determined by the intent of the parties or whether the plaintiff has, in fact, received full settlement amounting to a satisfaction. Bartholomew v. McCartha, 255 S.C. 489, 492, 179 S.E.2d 912, 914 (1971).

**A. Intent of the parties**

Bartholomew does not require that the terms of the covenant dictate entitlement to contribution. Rather, it looks to the intent of the parties. Id. Precedent exists for an examination of extrinsic evidence to determine the effect of a settlement instrument as to third parties, even when the parties to the settlement did not re-execute the settlement instrument due to a mutual mistake. See Loyd's Inc. v. Richardson Constr. Co. of Columbia, S.C., Inc., 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991). In Loyd's, the court examined a covenant not to sue together with the parties' discovery responses and determined that the covenant had the effect of fully satisfying the claim. Id. at 454, 412 S.E.2d at 444.

As discussed above, the extrinsic evidence of the intent of the parties indicates that the settlement discharged Respondent's liability in this case.

**B. Full satisfaction**

Secondly, Bartholomew inquires whether "plaintiff has, in fact, received full compensation amounting to a satisfaction." Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914. The use of the conjunction "or" in the test indicates that both prongs do not have to be satisfied. See id. However, Appellant contends that this requirement was also satisfied.

Counsel for Witherspoon testified by affidavit that he chose not to sue Respondent so he could focus on McGuire. (R. p. 62 at ¶¶ 7-8.) The original settlement

was intended to satisfy Witherspoon's entire claim, including Respondent's liability. (Id. at ¶ 12.) As Respondent acknowledges, the statute of limitations had already run on Witherspoon's claims against Respondent at the time of the settlement. (Resp't Brief, p. 2.) This had no impact on Appellant's contribution claim. See S.C. Code Ann. § 15-38-40(D) (providing a separate one-year statute of limitation for contribution causes of action); G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003) (holding that the running of the statute of limitations does not extinguish liability for purposes of a contribution claim). However, the fact that statute had run provides further support that Witherspoon in fact received full compensation amounting to a satisfaction through the settlement. Moreover, counsel for Witherspoon expressly testified that the settlement was intended to satisfy Witherspoon's entire claim, including his claim against Respondent. (R. p. 62 at ¶ 13.) This uncontroverted evidence sufficiently demonstrates that Witherspoon received full satisfaction of his claim through the settlement.

**V. The protection of the underinsured motorist claim and the use of a Covenant do not negate the fact that Witherspoon's claim was satisfied in full.**

The fact that the parties preserved Witherspoon's underinsured motorist (UIM) coverage claim in the covenant is irrelevant. A UIM claim is not a tort cause of action, but a statutory proceeding to determine first-party benefits under an auto insurance contract. See S.C. Code Ann. § 38-77-160; Broome v. Watts, 319 S.C. 337, 340-41, 461 S.E.2d 46, 48 (1995) (explaining that section 38-77-160 provides for a direct proceeding against the UIM carrier, who defends in the name of the underinsured motorist). Moreover, the nominal defendant in the UIM proceeding would have been the at-fault driver, *i.e.*, McGuire, not Silver Dollar.

In order to preserve an UIM claim, a covenant not to execute is generally used, rather than a full release. However, courts have held that a covenant discharges the liability of a joint tortfeasor, just as a release does, if the parties so intended. Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914 (finding it “unnecessary” to determine whether the instrument involved was a release or a covenant); Loyd’s, 306 S.C. at 455, 412 S.E.2d at 444 (finding that the covenant represented a full satisfaction of all claims). Therefore, Respondent’s attempt to distinguish between a covenant and a release is without merit.

Finally, the language of the re-executed covenant is not determinative because it was never intended as a standalone agreement. When all the evidence is considered, it is clear that the intent of the parties was that Respondent’s liability be extinguished in the settlement so Appellant could pursue a contribution action.

### **CONCLUSION**

Neither the common law nor the Contribution Among Tortfeasors Act prevents consideration of extrinsic evidence to determine the parties’ intent under these circumstances. When this evidence is considered, Appellant satisfied the requirements for establishment of a contribution action and its action against Respondent should be allowed to go forward.

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.

[Signature page follows]

Respectfully submitted,

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CERTIFICATE

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I, Adam J. Neil, attorney for Appellants, certify that the Final Reply 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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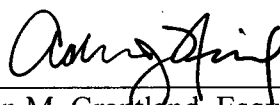
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**PROOF OF SERVICE**

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I certify that I have served the Final Reply 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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