The Supreme Court of South Carolina

Progressive Max Insurance Company, Appellant,

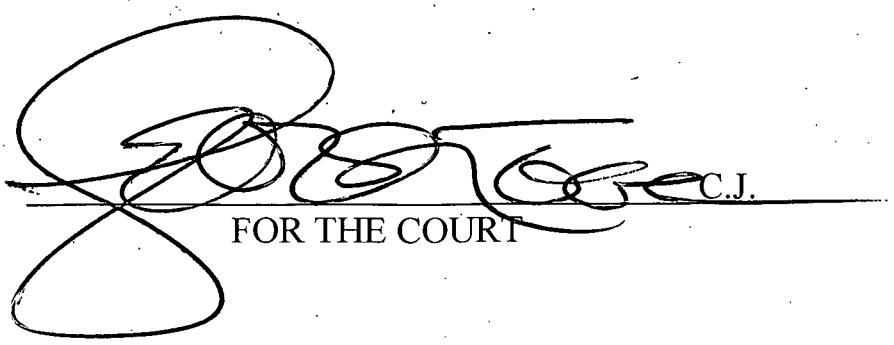
v.
Floating Caps, Inc., d/b/a Silver Dollar Cafe,
Respondent.

Appellate Case No. 2011-196906

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



C.J.

FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc:
Francis Marion Ervin, II
John Martin Grantland
Adam J. Neil
The Honorable Jenny Kitchings

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February 28, 2012

The Honorable Tanya A. Gee, Clerk
The South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

RE: Progressive Max v. Floating Caps
Case No. 2007-CP-10-3920
Tracking # 2011196906

Dear Ms. Gee:

Please find enclosed for filing the original and 15 copies of the Final Brief of Respondent, Certificate of Counsel and Proof of Service. Please return a stamped-in copy of Final Brief in the enclosed envelope.

By copy of this letter, the Final Brief of Respondent is being served upon Appellant's counsel.

Please contact me if you have any questions.

Very truly yours,

Francis M. Ervin, II

FME/pb
Enclosures

cc: John M. Grantland, Esq. (w/enc.)
Caroline Swartz, J.D., CPCU (w/enc.)

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February 27, 2012

Tanya Gee, Clerk
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café

Civil Action No.:	07-CP-10-3920
Case Tracking No.:	2011196906
Claim No.:	032061750
Date of Loss:	11-17-03
Our File No.:	1115-0763

Dear Ms. Gee:

Enclosed please find herewith for filing with the Court the original and twenty (20) copies of Appellant's Final Reply Brief, the original and twenty (20) copies of Appellant's Final Brief and the original and twenty (20) copies of Appellant's Record on Appeal in the above-referenced matter. I would appreciate your filing the originals and returning five (5) clocked copies of each document to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel.

With best regards, I remain

Very truly yours,

Adam J. Neil

AJN/kbd
Enclosure
cc: Keith Holroyd
Georgia S. Hamilton
Frances M. Ervin, III, Esquire

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 Initial 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 January 12, 2012, addressed to their attorneys of record, Frances M. Ervin, III, Esquire, P.O. Drawer 22247, Charleston, South Carolina 29413-2247.

JMG for Adam Neil

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January 12, 2012

Via Hand Delivery
Tanya Gee, Clerk
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café
Civil Action No.: 07-CP-10-3920
Claim No.: 032061750
Date of Loss: 11-17-03
Our File No.: 1115-0763

Dear Ms. Gee:

Enclosed please find herewith for filing with the Court the original and three (3) copies of the Initial Reply Brief of Appellant in the above-referenced matter. I would appreciate your filing the original and returning three (3) clocked copies to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel.

Sincerely,

Timothy J. Newton

TJN/mwt
Enclosure
cc: Keith Holroyd
Frances M. Ervin, III, Esquire

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.

INITIAL REPLY BRIEF OF APPELLANT

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January 12, 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 Aff. of Driggers, ¶¶ 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 and 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, ___, 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. (Aff. of Driggers, ¶ 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. (Aff. of Driggers 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. (Aff. of Driggers 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

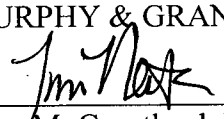
Neither the common law nor the Contribution Among Tortfeasors Act prevents consideration of extrinsic evidence to determine the parties' intent under these circumstances. When this evidence is considered, Appellant satisfied the requirements for establishment of a contribution action and its action against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

MURPHY & GRANTLAND, P.A.



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Columbia, South Carolina
January 12, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2007-CP-10-3920

Progressive Max Insurance Company .....Appellant

vs.

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

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal:

(1) Defendant's Motion for Summary Judgment, filed March 28, 2008;

(2) Defendant's Memorandum in Support of its Motion for Summary Judgment (including Exhibits A through C), filed July 29, 2009;

(3) Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (including Exhibits A through K), filed June 16, 2009;

(4) The Honorable R. Markley Dennis, Jr.'s Order Granting Defendant's Motion for Summary Judgment, filed August 20, 2009;

(5) Plaintiff's Motion for Reconsideration, filed September 2, 2009;

(6) The Honorable R. Markley Dennis, Jr.'s Order Denying Plaintiff's Motion to Reconsider, filed July 21, 2011;

(7) Transcript of Summary Judgment Hearing held on August 3, 2009; and

(8) Transcript of Reconsideration Hearing held on May 25, 2010.

I hereby certify that this Designation of Matter to be Included In the Record On Appeal contains no matter which is irrelevant to this appeal and complies with the provisions of Rule 209, SCACR.

Francis M. Ervin, II
ROGERS, TOWNSEND & THOMAS, P.C.
775 St. Andrews Blvd.
Charleston, SC 29407
843-556-5656
Attorneys for Respondent

January 3, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2007-CP-10-3920

Progressive Max Insurance Company .....Appellant

vs.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Initial Brief of Respondent complies with Rule 208(a)(2) and 208(b)(2), SCACR.

Francis M. Ervin, II
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Attorneys for Respondent

January 3, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2007-CP-10-3920

Progressive Max Insurance Company .....Appellant

vs.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellant, Progressive Max Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on January 3, 2012, addressed to its attorneys of record, John M. Grantland, Esq., Adam J. Neil, Esq., Murphy & Grantland, P.A., P.O. Box 6648, Columbia, SC 29260.

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January 3, 2012
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ATTORNEYS AT LAW

January 3, 2012

The Honorable Tanya A. Gee, Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Progressive Max v. Floating Caps
Case No. 2007-CP-10-3920
Tracking # 2011196906

Dear Ms. Gee:

Please find enclosed for filing the original and one copy of the Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service. Please return a stamped-in copy of these documents in the enclosed envelope.

By copy of this letter, the Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service are being served upon Appellant's counsel.

Please contact me if you have any questions.

Very truly yours,

Francis M. Ervin, II

FME/pb
Enclosures

cc: Steve Sher (w/enc.)
John M. Grantland, Esq . (w/enc.)
Adam J. Neil, Esq. (w/enc.)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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R. Markley Dennis, Jr., Circuit Court Judge

CASE NO. 2007-CP-10-3920

Progressive Max Insurance Company .....Appellant

vs.

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

INITIAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT APPELLANT FAILED TO PRESERVE ITS RIGHT OF CONTRIBUTION AGAINST RESPONDENT WHILE THE UNDERLYING ACTION WAS STILL PENDING AGAINST THE ALLEGED JOINT TORTFEASOR?

A. Did the April 20, 2007 Covenant Not to Execute Entered into by Progressive to Settle the Underlying Witherspoon Case Discharge the Liability of Silver Dollar?

B. Did Progressive's Attempt to Execute A Second Covenant Not To Execute on July 31, 2007 After the Witherspoon Case Had Already Been Dismissed Preserve Progressive's Right to Seek Contribution Against Silver Dollar?

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO RECONSIDER ON THE GROUNDS THAT NO NEW EVIDENCE WAS PRESENTED TO CHANGE THE UNDISPUTED FACT THAT APPELLANT FAILED TO PRESERVE ITS RIGHT OF CONTRIBUTION AGAINST RESPONDENT WHILE THE UNDERLYING CASE WAS STILL PENDING AGAINST THE ALLEGED JOINT TORTFEASOR, PURSUANT TO S.C. CODE § 15-38-40(D)(2)?

STATEMENT OF THE CASE

This case arises out of an incident that occurred outside the Respondent, Floating Caps, Inc., d/b/a Silver Dollar Café's ("Silver Dollar") bar in downtown Charleston, South Carolina on the night of November 17, 2003. (Memo. In Support of Def.'s Motion for Summ. J., p. 2). In its contribution action, Progressive Max Insurance Company ("Progressive") has asserted that Silver Dollar sold alcohol to a minor, Ryan McGuire, the Defendant in the underlying case, who, with some other under-aged friends, became intoxicated at the bar. (Id.) 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. (Id.) Whether intentionally or not, the car McGuire was driving struck several people standing outside the bar, including Robert M. Witherspoon IV, the Plaintiff in the underlying case. (Id.)

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, captioned Robert M. Witherspoon, IV v. Ryan, Kevin and Betty McGuire.

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. (Memo. In Support of Def.'s Motion for Summ. J., p. 2-3). 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." (Id. at p. 3; **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. (Id.).

On May 8, 2007, the Witherspoon case was dismissed from the U.S. District Court – Charleston Division. (Memo. In Support of Def.'s Motion for Summ. J., p. 3; **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. (Id.; **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 September 5, 2007, Progressive brought an action against Silver Dollar for contribution pursuant to S.C. Code §§ 15-38-10, *et. seq.*, the South Carolina Contribution Among Joint Tortfeasors Act (Contribution Act). On 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 its motion for summary judgment on the grounds that Progressive failed to properly preserve its right of contribution against it pursuant to S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1). 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 August 3, 2009, the Honorable R. Markley Dennis, Jr. heard Silver Dollar's motion for summary judgment, granting the same by written order dated August 20, 2009. (Order Granting Defendant's Motion for Summary Judgment). Progressive timely filed its Motion for Reconsideration, which was heard by Judge Dennis on May 25, 2010. Judge Dennis denied Progressive's Motion to Reconsider by written order dated July 21, 2011. (Order Denying Plaintiff's Motion to Reconsider). Progressive timely filed its Notice of Appeal on August 11, 2011.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS APPELLANT FAILED TO PRESERVE ITS RIGHT OF CONTRIBUTION AGAINST RESPONDENT BEFORE

THE UNDERLYING ACTION WAS DISMISSED AGAINST THE ALLEGED JOINT TORTFEASOR.

A. 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.

Progressive filed the underlying 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. 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.[1] Therefore, Progressive could only maintain its contribution action against Silver Dollar if it had met the requirements set forth under S.C. Code § 15-38-40(D)(2) and S.C. Code § 15-38-50(1). Progressive failed to meet these requirements, and Judge Dennis properly granted Silver Dollar summary judgment.

The April 20, 2007 covenant sets forth the clear and unambiguous intention of the parties thereto, and as such, contrary to Progressive's assertions, Judge Dennis properly excluded any resort to extrinsic evidence (deposition transcripts or affidavits) to alter the intent of the parties. 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." (Memo. In Support of Def.'s Motion for Summ. J.; **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. Pursuant to S.C. Code § 15-38-50(1), when a covenant not to execute is given by one party to another, "it does not discharge any of the other tortfeasors from liability for the injury or wrongful death *unless its terms so provide. . . .*" (Emphasis added). 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,

[1] Progressive acknowledges in its Initial Brief at P. 5 that § 15-38-40(D)(2) applies to this case as the statute of limitations had expired, and as of the signing of the April 20, 2007 Covenant Not to Execute, the underlying action was still pending against the alleged joint tortfeasor.

let alone Silver Dollar. Had the parties intended to discharge the liability of Silver Dollar, the terms of the covenant could have (and should 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 stated, Witherspoon preserved his right to pursue additional compensation against his underinsured motorist carrier. (Memo. In Support of Def.'s Motion for Summ. J.; **Exhibit A** –at page 1, fourth unnumbered paragraph).

B. Progressive's Attempt to Execute A Second 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. (Memo. In Support of Def.'s Motion for Summ. J.; **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. (Id.; **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 clear 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. (Memo. In Support of Def.'s Motion for Summ. J.; **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 Torfeasors 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)). The July 31, 2007 covenant was not only untimely in its execution, but failed, per the terms used in Paragraph 3, to discharge or extinguish any alleged liability Silver Dollar may have had for Witherspoon's injuries.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT DENIED THE APPELLANT'S MOTION TO RECONSIDER ON THE GROUNDS THAT NO NEW EVIDENCE WAS PRESENTED TO CHANGE THE UNDISPUTED FACT THAT APPELLANT FAILED TO PRESERVE ITS RIGHT OF CONTRIBUTION AGAINST RESPONDENT WHILE THE UNDERLYING CASE WAS STILL PENDING AGAINST THE ALLEGED JOINT TORTFEASOR, PURSUANT TO S.C. CODE § 15-38-40(D)(2)

For the reasons stated in the above Section I, A and B, Judge Dennis properly denied Progressive's Motion to Reconsider. No new evidence was presented to change the undisputed fact that the April 20, 2007 Covenant Not to Execute did not preserve Progressive's right to seek contribution against the Silver Dollar while the underlying action was still pending.[2] The July 31, 2007 Covenant Not to Execute could not preserve any rights of Progressive to seek contribution because (1) the statute of limitations had expired, and (2) the underlying case was dismissed almost two months prior to execution. The underlying case had already been settled by the time Judge Norton issued his order dismissing the case. By the time the second Covenant was executed on July 31, there was no case to settle as there was no case pending. Therefore, pursuant to S.C. Code § 15-38-40(D)(2), Progressive could not maintain an action for contribution as a matter of law because there was no pending case by July 31, 2007.

[2] Progressive acknowledges in its Initial Brief at P. 16 that the April 20, 2007 "did not accurately reflect the intent of the parties" to preserve its right of contribution against the Silver Dollar.

Progressive's argument that the July 31, 2007 Covenant Not to Execute was only correcting a mutual mistake created by the April 20, 2007 Covenant, and, therefore, should relate back to April 20 must fail as a matter of law. The intention of the parties to the Covenant cannot change the clear and unambiguous language of the Contribution Act. Where "the terms of the statute are clear, the court must apply those terms according to their literal meaning." Ellis, supra, 335 S.C. at 110, 515 S.E.2d at 270 (Ct.App.1999), quoting Paschal v. State Election Commission, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court affirm Judge Dennis' August 20, 2009 Order granting Silver Dollar Summary Judgment and his July 21, 2011 Order denying the Appellant's Motion to Reconsider.

Respectfully submitted,

Francis M. Ervin, II
ROGERS, TOWNSEND & THOMAS, P.C.
775 St. Andrews Blvd.
Charleston, SC 29407
843-556-5656
Attorneys for Respondent

January 3, 2012
Charleston, South Carolina

The South Carolina Court of Appeals

Progressive Max Insurance Company, Appellant

v.

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

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2007-CP-10-03920

ORDER

For good cause having been shown, the time for serving and filing the Respondent's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until January 4, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

FILED
12/12/11 ST.

Columbia, South Carolina
cc: John M. Grantland, Esquire
Adam J. Neil, Esquire
Francis M. Ervin, II, Esquire

PRATT-THOMAS | WALKER

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December 5, 2011

The Honorable Tonya Gee
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Appeal from Charleston County
Progressive Max Insurance Company vs. Floating Caps, Inc., d/b/a Silver Dollar Café
C.A. No.: 2007-CP-10-3920
Our File No. 5405-035

Dear Ms. Gee:

I represent Floating Caps, Inc., d/b/a Silver Dollar Café in the above-captioned appeal. The Respondent's initial brief is due on December 7, 2011.

I am writing to request a thirty-day extension for Respondent to file its initial brief. No previous extension has been requested by or granted to Respondent. Enclosed is our firm's check in the amount of $25.00 to cover the filing fee for this request. By copy of this letter Adam J. Neil, Esq., I am advising him of our request.

Your courtesies and consideration of this matter are greatly appreciated.

With regards, I am

Very truly yours,

PRATT-THOMAS WALKER, P.A.

Francis M. Ervin, II

FME/jas
cc: Adam J. Neil, Esq.

1st
12/5/11
1/4/12

PRATT-THOMAS | WALKER **ATTORNEYS AT LAW**

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KATHLEEN FOWLER MONOC

December 5, 2011

The Honorable Tonya Gee
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

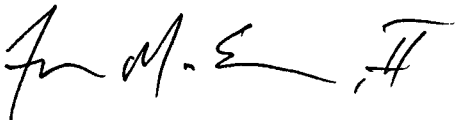
RE: Progressive Max Insurance Company v. Floating Caps, Inc. d/b/a Silver Dollar Cafe
C.A. No.: 07-CP-10-3920
Our File No.: 5405-035

Dear Ms. Gee:

I write concerning the above-referenced matter to notify the Court and all parties to the action that I have departed Pratt-Thomas Walker, P.A. and have joined the law offices of Rogers, Townsend & Thomas. This case has been transferred to me and my new firm for continued representation of the Defendant Floating Caps, Inc., d/b/a Silver Dollar Cafe, in this appeal. Please remove Pratt-Thomas Walker, P.A. from your service list for all orders, filings, pleadings, and correspondence and send the same to me at the following address: 775 St. Andrews Blvd., Charleston, SC 29407(office number : 843-556-5624; fax number: 843-556-5635). My email address will be updated, but in the meantime please use the following address: francismarionervin@gmail.com. By copy of this letter, I am notifying all counsel of record of this change and substitution of law firms for the Defendant. If you have any questions or concerns, you may reach me at (843) 509-2723.

Many thanks for your attention to this matter.

Very truly yours,



Francis M. Ervin, II

FMEii:jas
cc: John M. Grantland, Esq.
Adam Neil, Esq.

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.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant Progressive Max Insurance Company proposes the following to be included in the Record on Appeal:

1. Order Denying Progressive Max Insurance Co.'s Motion to Reconsider, filed July 21, 2011;
2. Order Granting Defendant Floating Caps, Inc. D/B/A Silver Dollar Café's Motion for Summary Judgment, filed August 20, 2009;
3. Form 4 Judgment in a Civil Case, filed August 4, 2009;
4. Summons and Amended Complaint, filed September 25, 2007;
5. Summons and Complaint, filed September 5, 2007;
6. Answer to Amended Complaint, filed October 12, 2007;
7. Transcript of Hearing held on May 25, 2010;
8. Transcript of Hearing held on August 3, 2009;
9. Motion for Summary Judgment, filed March 28, 2008;
10. Affidavit of Johnny Driggers, Esquire, filed June 26, 2009;
11. Memorandum in Opposition to Defendant's Motion for Summary Judgment (including Exhibits A through K), dated June 16, 2009;
12. Defendant's Memorandum in Support of its Motion for Summary Judgment (including Exhibits A through C), filed July 29, 2009;

13. Motion for Reconsideration, filed September 2, 2009;
14. Notice of Appeal, filed August 11, 2011.

I certify that this designation contains no matter which is irrelevant to this appeal.

John M. Grantland, Esquire
Adam J. Neil, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
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Attorney for Appellant, Progressive
Max Insurance Company

November 3, 2011

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

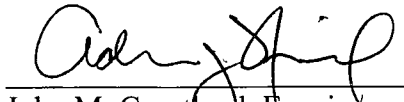
Progressive Max Insurance Company, ... Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation Of Matter To Be Included In 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 November 3, 2011, addressed to their attorneys of record, Frances M. Ervin, III, Esquire, P.O. Drawer 22247, Charleston, South Carolina 29413-2247.



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November 3, 2011

Tanya Gee, Clerk
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café
Civil Action No.: 07-CP-10-3920
Claim No.: 032061750
Date of Loss: 11-17-03
Our File No.: 1115-0763

Dear Ms. Gee:

Enclosed please find herewith for filing with the Court the original and three (3) copies of Respondent's Initial Brief and Designation of Matter in the above-referenced matter. I would appreciate your filing the original and returning three (3) clocked copies to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel.

With best regards, I remain

Very truly yours,

Adam J. Neil

AJN/kbd
Enclosure
cc: Keith Holroyd
Frances M. Ervin, III, Esquire

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.

INITIAL BRIEF OF APPELLANT

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November 3, 2011

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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. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 3; dep. of Ryan McGuire, pp. 42-43; dep. of Robert M. Witherspoon IV, pp. 32-33.) Ryan McGuire was under the legal drinking age at the time. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 2; dep. of Ryan McGuire, pp. 5, 34-37, 45.) Respondent continued to sell

alcohol to Ryan McGuire despite the fact that he was intoxicated. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 3; dep. of Ryan McGuire, pp. 36, 38-39, 40, 42-44; dep. of William Sean Irvin, Jr., pp. 18-19, 24-25.) 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 3; dep. of Ryan McGuire, pp. 46-56.) 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 4; Aff. of Johnny F. Driggers, Esquire, ¶ 8.) Witherspoon's claims against McGuire and his parents were settled for a total of $200,000, of which Progressive paid $180,000. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 4; Covenant Not to Execute dated April 20, 2007.) The settlement was reached on April 20, 2007. (Order Den. Progressive Max Insurance Co.'s Mot. to Recons., p. 3.)[1]

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,

[1] 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*.

including Witherspoon's claims against Respondent. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 4; Aff. of Driggers, ¶ 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. (Aff. of Driggers, ¶ 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 subsequently bring a subrogation action for contribution against Respondent. (Id., ¶ 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 5; Aff. of Driggers, ¶ 13; Revised Covenant Not To Execute dated July 31, 2007.)

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), SCRCP. 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.

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).[2] 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

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[2] It is undisputed that section 15-38-40(D)(2) applies. (See Order Den. Progressive Max Ins. Co.'s Mot. to Recons., 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.

(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 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 untrammeled 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 Comty. 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, (McCrory 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 McCrory 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 Witherpoon'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.[3] Additionally, section 15-38-50(1) must be construed in accordance with Bartholomew, which permits evidence of the

[3] 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.

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 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. (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 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. (Affidavit of Driggers, ¶ 13.) Regardless of whether the original Covenant itself satisfied section 15-38-50,[4] 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. (Dep. of McGuire, pp. 5, 34-45; dep. of Witherspoon, pp. 32-33; dep. of Irvin, pp. 18-19, 24-25.) These acts of misfeasance on the part of Silver Dollar were contributing causes to the fight that resulted

[4] Appellant does not concede that the second Covenant was ineffective. The purpose and effect of the Second Covenant is discussed below.

in Witherspoon's injuries. (Dep. of McGuire, pp. 46-56; dep. of Blaine Stout pp. 16-17.) 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. (Aff. of Driggers, ¶ 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., 2; Exs. A & B.)

Driggers expressly testified in his affidavit that the parties intended the settlement to extinguish Witherspoon's claim against Silver Dollar. (Aff. of Driggers, ¶ 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. (Affidavit of Driggers, ¶ 12.)

Witherspoon has not pursued any claim against Silver Dollar and the statute of limitations has now run on the claim.[5]

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.

[5] 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., pp. 2, 4-5 and Exs. B, C, D, and J.) 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. (Mem. in Opp'n to Def's. Mot. for Summ. J., p. 5 and Ex. K.) 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, section15-38-40(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.

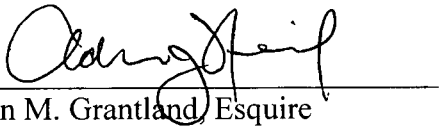
CONCLUSION

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,

MURPHY & GRANTLAND, P.A.



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(803) 782-4100
Attorneys for Appellant

Columbia, South Carolina
November 3, 2011

M&G
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Adam J. Neil
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October 5, 2011

Tanya Gee, Clerk
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café

Civil Action No.:	07-CP-10-3920
Case Tracking No.:	2011196906
Claim No.:	032061750
Date of Loss:	11-17-03
Our File No.:	1115-0763

Dear Ms. Gee:

I am writing to advise the court that the hearing transcript in the above-referenced matter was received in my office on October 5, 2011.

With best regards, I remain

Very truly yours,

Adam J. Neil

AJN/kbd
cc: Keith Holroyd
Frances M. Ervin, III, Esquire
Rosalyn W. Frierson, Court Administration

M & G
MURPHY & GRANTLAND, P.A.

Adam J. Neil
Direct dial 803-454-1232
aneil@murphygrantland.com

August 11, 2011

Deborah Garrison
Post Office Box 901
Johns Island, SC 29457

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café
Civil Action No.: 07-CP-10-3920
Claim No.: 032061750
Date of Loss: 11-17-03
Our File No.: 1115-0763

Dear Ms. Garrison:

I am writing to request a copy of the transcript of the motion hearings heard on August 3, 2009 and May 25, 2010, before Judge R. Markley Dennis in the above-referenced matter. Please let me know if you require payment in advance.

With best regards, I remain

Very truly yours,

Adam J. Neil

AJN/kbd
cc: Keith Holroyd
Frances M. Ervin, III, Esquire
The Honorable Julie J. Armstrong, Clerk
Rosalyn W. Frierson, Court Administration
Tanya Gee, Clerk

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE. (803) 734-1890
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August 15, 2011

John M. Grantland, Esquire
Adam J. Neil, Esquire
Murphy & Grantland
P.O. Box 6648
Columbia, SC 29260

Re: Progressive Max v. Floating Caps
Tracking # 2011196906 – Docket # 2007-CP-10-3920

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as

amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

1) any final judgment from the circuit court which includes a sentence of death;

2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;

3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;

4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;

5) any final judgment from the circuit court pertaining to elections and election procedure;

6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;

7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Tanya A. Gee
CLERK

VA
TAG/mpm
cc: Francis Marion Ervin, II, Esquire
The Honorable Julie J. Armstrong

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 15, 2011

John M. Grantland, Esquire
Adam J. Neil, Esquire
Murphy & Grantland
P.O. Box 6648
Columbia, SC 29260

Re: Progressive Max v. Floating Caps
Tracking # 2011196906

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm
cc: Francis Marion Ervin, II, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:2

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.

2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.

3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

PM 8/11/11
POS 8/11/11

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

John M. Grantland, Esquire
Adam J. Neil, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
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(803) 782-4100
Attorney for Appellant, Progressive Max Insurance Company

Other Counsel of Record:
Frances M. Ervin, III, Esquire
Pratt-Thomas, Pearce, Epting & Walker, PA
16 Charlotte St.
P.O. Drawer 22247
Charleston, SC 29413-2247
Attorneys for Respondents

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

John M. Grantland, Esquire
Adam J. Neil, Esquire
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Attorney for Appellant, Progressive
Max Insurance Company

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Adam J. Neil
Direct dial 803-454-1232
aneil@murphygrantland.com

August 11, 2011

Tanya Gee, Clerk
South Carolina Court of Appeals
1205 Pendleton Street
P.O. Box 11629
Columbia, SC 29211

Re: Progressive Max Insurance Company vs. Floating Caps, Inc. d/b/a Silver Dollar Café
Civil Action No.: 07-CP-10-3920
Claim No.: 032061750
Date of Loss: 11-17-03
Our File No.: 1115-0763

Dear Ms. Gee:

Enclosed please find herewith for filing with the Court the original and one (1) copy of a Notice of Appeal in the above-referenced matter. Also enclosed is a check in the amount of $100.00 to cover the costs of filing. I would appreciate your filing the original and returning a clocked copy to me by individual delivering same. By copy of this letter I am serving same on opposing counsel.

With best regards, I remain

Very truly yours,

Adam J. Neil

AJN/kbd
Enclosure
cc: Keith Holroyd
Frances M. Ervin, III, Esquire
The Honorable Julie J. Armstrong, Clerk
Rosalyn W. Frierson, Court Administration

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.	)	

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

RMDL

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

RMD2

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.

RMD3

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.

R. Markley Dennis
Presiding Judge Ninth Judicial Circuit

Dated: July 19, 2011
Charleston, South Carolina

RMD4