

**SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA**

**MULTIPLEX INC.,  
Plaintiff Below, Appellant**

**v.**

**US No. 35721**

**RALEIGH COUNTY BOARD OF EDUCATION  
AND SCHOOL BUILDING AUTHORITY OF WEST  
VIRGINIA,  
Defendants Below, Appellees**

**APPELLANT BRIEF IN SUPPORT OF ITS PETITION FOR APPEAL**

**MULTIPLEX, INC.  
BY COUNSEL**

**HEWITT & SALVATORE, *pllc***

  
**Greg A. Hewitt (*W V Bar No. 7457*)  
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Fayetteville, West Virginia 25840  
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**IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA**

**MULTIPLEX, INC.,**

**PETITIONER,**

**v.**

**CIVIL ACTION NO. 09-C-2075**

**RALEIGH COUNTY BOARD OF  
EDUCATION, et al.,**

**RESPONDENTS.**

**APPELLANT MULTIPLEX, INC.'S BRIEF IN SUPPORT OF IT'S  
PETITION FOR APPEAL**

**I. The Kind of Proceeding and Nature of Ruling of the Lower Tribunal**

This is an appeal taken from an Order dated March 24, 2010 from the Honorable Paul Zakaib, Jr., Judge for Kanawha County, West Virginia wherein the court granted the Respondent's, Raleigh County Board of Education's, Motion to Dismiss. A copy is attached as Exhibit 1. This Court granted the appeal and the Appellant submits this brief in support of it's position.

**II. Statement of Facts**

The Appellee, Raleigh County Board of Education, was and is the owner of the improvements made at Independence High School. The Appellant contracted with the Raleigh County Board of Education to provide construction services on an improvement project at Independence High School. During the Project, a dispute arose between the parties over the relocation of utility lines. As a result, the Appellant instituted a civil action in the Circuit Court of Kanawha County against the Appellees herein over the issue of relocation of the utility lines. This lawsuit was filed on August 28, 2006, Civil Action Number 06-C-1747. A Copy of the Complaint is attached as Exhibit 2.

The lawsuit filed on August 28, 2006 was ultimately settled. In this settlement, the Appellant agreed to release the Raleigh County Board of Education from all claims "arising out

of those certain alleged wrongful acts alleged in the Complaint filed in Civil Action No. 06-C17-47 . . . .” A Copy of the release is attached as Exhibit 3. The Appellant has made no further claims against the Raleigh County Board of Education regarding the relocation of utility lines in the improvement project at Independence High School.

At the time of the settlement, the Appellant was still completing work under the contract for the improvement project at Independence High School. It is not disputed that work continued after the lawsuit was resolved. Thereafter, the Appellant encountered other delays in the project, and another dispute arose between Multiplex, the Raleigh County Board of Education, and the School Building Authority of West Virginia over laying and installing tile. As a result of this new dispute that is the subject of this lawsuit, the Appellant instituted the underlying civil action against the Raleigh County Board of Education and the School Building Authority of West Virginia. A copy of the Complaint is attached as Exhibit 4. The allegations in this Complaint deal only with issues that arose after the first lawsuit was settled. Because this civil action arises from a different set of facts and circumstances than those in the previous release, the Circuit Court should not have granted the Defendant’s Motion to Dismiss.

### **III. Assignment of Error**

1. The lower court erred in granting the Appellee’s Motion to Dismiss because the facts and circumstances surrounding this civil action are different than the facts and circumstances surrounding the previous 2006 civil action. That action involved issues as to the location of utility lines in a construction project. The issues in the present manner arose after that case was resolved.

2. The lower court erred in granting the Appellee’s Motion to Dismiss because a previously signed release between the parties cannot extend to an unrelated matter involving

different facts and circumstances which occurred after the date the release was signed. In this matter, the lower Court extended the release to matters which were not contemplated by the parties as they had not yet arisen.

3. The lower Court erred in allowing matters outside the pleadings to be considered and failed to convert the Motion to Dismiss to a Motion for Summary Judgment.

#### **IV. Points of Authorities Relied Upon**

W.Va. R. Civ. P. 12(b)(6).

*Fass v. Nowasco Well Services, Ltd.*, 350 S.E.2d 562 (1986).

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

*Harrison v. Davis*, 478 S.E.2d 104 (1996).

*Chapman v. Kane Transfer Co.*, 236 S.E.2d 207 (1977).

*State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901 (1997).

*Massey v. Jim Crockett Promotions, Inc.*, 400 S.E.2d 876 (1970).

*Elliott v. Schoolcraft*, 576 S.E.2d 796 (2002).

#### **V. Discussion of the Law/Relief Prayed For**

The Appellant does not dispute that it executed a release and settlement for the issues arising under Civil Action Number 06-C-1747. Nor does the Appellant dispute that this release, settlement, and previous civil action involved a dispute that arose over the improvement project at Independence High School. Further the Appellant, is not attempting to repudiate the previous settlement or argue that it is no longer effective. To the contrary, the previous civil action and this lawsuit involve two completely different sets of facts, circumstances, and issues. The circumstances giving rise to this lawsuit occurred after the release was signed.

The Appellee argued in its Motion to Dismiss that the release previously executed by the

Appellant covers this civil action. The release in the previous civil action clearly states that it applied to “those certain alleged wrongful acts alleged in the Complaint filed in Civil Action No. 06-C17-47.” The “alleged wrongful acts” from that case dealt with the relocation of utility lines. Thus, the release and settlement from the previous civil action can only be construed to cover issues, facts, and circumstances relating to the relocation of the utility lines. The release and settlement cannot be construed to cover issues, facts, and circumstances that arose after the settlement and release were executed by the parties.

A Motion to Dismiss should be considered by reviewing the language in the Complaint to see if a valid claim exists, and a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” W.Va. R. Civ. P. 12(b)(6). A motion to dismiss for failure to state a claim is viewed with disfavor, but it should be granted if a plaintiff states no cause of action upon which relief can be granted. *Fass v. Nowsco Well Services, Ltd.*, 350 S.E.2d 562, 564 (1986). A complaint must contain sufficient factual matter to state a claim that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The purpose of a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to enable the court to weed out unfounded lawsuits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). All facts should be viewed in the light most favorable to the nonmoving party, which in this case is the Plaintiff, and a motion to dismiss should only be granted if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 236 S.E.2d 207 (W.Va. 1977). If the plaintiff can point to facts which support his claim, then the lawsuit is not unfounded, and the motion to dismiss should not be granted. *Id.*

In a motion to dismiss, the complaint is viewed in the light most favorable to the plaintiff, and its allegations should be taken as true. Complaints are to be read liberally, as required by the

notice pleading theory. *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 488 S.E.2d 901 (1997). In other words, the facts in the complaint should be taken into consideration liberally to see if they can offer support for the plaintiff's claims. If the facts support a plaintiff's claims, then the motion to dismiss should be denied.

In this civil action, the Complaint clearly states that the Appellee required a certain subcontractor to install tile, that this subcontractor failed to complete work in a timely manner, which resulted in a delay of the project for more than six months. The Complaint also states that this delay was caused by the Appellee. The Complaint seeks compensation for the tile work completed, costs, and lost profits, which Section 14.1.3 of the construction contract expressly states can be recovered. In contrast, the Complaint from the previous civil action clearly stated that it arose out of a dispute relating to the relocation of utility lines at Independence High School. These are clearly different issues, facts, and circumstances and create two separate legal matters. Further, the issue as to the tile did not exist at the time the first lawsuit was filed or settled.

The Appellant alleges that the Appellee began intentionally delaying and otherwise frustrating the completion of the improvement contract at Independence High School after the settlement was reached in the previous lawsuit. The Appellant could not have foreseen that this would occur at the time it settled and executed the release for the previous lawsuit. Further, the settlement and release can not have been construed to cover future alleged wrongful acts on the part of the Appellees, especially when those alleged wrongful acts concern different issues and occurred after the release was executed.

Clearly, the settlement and release of the Defendant in the previous lawsuit, Civil Action Number 06-C-1747, does not control this lawsuit. The two lawsuits arise out of entirely different

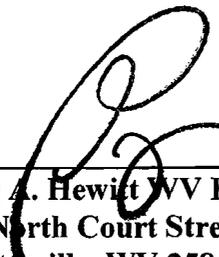
issues, facts, and circumstances. As such, the lower Court erred in granting the Appellee's Motion to Dismiss as the release can not be read to preclude the Appellant from bringing this action.

Additionally, the Appellee attached documents outside the pleadings to its Motion to Dismiss. This is improper for a motion to dismiss, and the court should then have viewed the motion, as a motion for summary judgment. *Massey v. Jim Crockett Promotions, Inc.*, 400 S.E.2d 876 (W.Va. 1970). To that end, a summary judgment motion should only be heard after full and fair discovery has been completed so that all reasonable evidence can be considered. *Elliott v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796, 800 (2002). The Appellant has not had a reasonable opportunity to discover all relevant information regarding the case, so a motion for summary judgment at this stage would be improper. Therefore, the Appellee's motion should have been considered a premature motion for summary judgment and denied.

WHEREFORE, the Appellant requests this Court to overrule the lower court's decision and allow the claim to proceed as the release cannot be extended to acts and/or omissions that occurred after it was executed.

**HEWITT & SALVATORE, pllc**  
**Respectfully Submitted**

By:



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IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

MULTIPLEX, INC.,

PETITIONER,

v.

CIVIL ACTION NO. 09-C-2075

RALEIGH COUNTY BOARD OF  
EDUCATION, et al.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Greg A. Hewitt, counsel for Petitioner, Multiplex, Inc., do hereby certify that service of the foregoing **APPELLANT MULTIPLEX, INC.'S BRIEF IN SUPPORT OF IT'S PETITION FOR APPEAL** has been made this **23<sup>rd</sup>** day of **November, 2010**, on counsel of record via United States Mail, postage prepaid, a true and exact copy thereof, addressed as follows:

Kenneth E. Webb, Jr.  
BOWLES RICE MCDAVID GRAFF & LOVE, LLP  
P.O. Box 1386  
Charleston, West Virginia 25301

  
\_\_\_\_\_  
GREG A. HEWITT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MULTIPLEX, INC.

Plaintiff,

v.

Civil Action No.: 09-C-2075

RALEIGH COUNTY BOARD OF  
EDUCATION and SCHOOL BUILDING  
AUTHORITY OF WEST VIRGINIA,

Defendants.

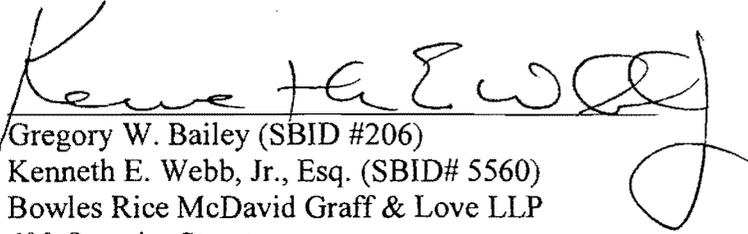
**MOTION OF RALEIGH COUNTY BOARD OF EDUCATION  
TO ENFORCE RELEASE IN FULL OF ALL CLAIMS  
AND TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant, Raleigh County Board of Education ("Raleigh County BOE"), by counsel, moves pursuant to Rules 12(b)(6) and 56 of the West Virginia Rules of Civil Procedure for this Court to enforce a Release in Full of All Claims entered into between all of the parties to this suit concerning all claims Plaintiff might have against the defendants related in any way to Plaintiff's work at the Independence High School Project. Under the facts and circumstances explained in the accompanying Memorandum of Law, Plaintiff's Complaint fails to state a claim upon which relief can be granted because Plaintiff expressly released the claims it now seeks to make. Briefly put, the instant Complaint should be dismissed because Plaintiff entered into a Release in Full of All Claims related to the Independence High School Project on April 25, 2007 that expressly includes all future claims so that the claims made in the instant Complaint should be dismissed as a matter of law. By filing the instant action, Plaintiff now seeks to repudiate the earlier settlement and release. The Raleigh County BOE incorporates herein by reference its Memorandum of Law filed simultaneously herewith.



RALEIGH COUNTY BOARD OF  
EDUCATION,

By Counsel,

A handwritten signature in black ink, appearing to read "Kenneth E. Webb, Jr.", written over a horizontal line. The signature is cursive and extends to the right of the line.

Gregory W. Bailey (SBID #206)

Kenneth E. Webb, Jr., Esq. (SBID# 5560)

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*Attorneys for Raleigh County Board of Education*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MULTIPLEX, INC.

Plaintiff,

v.

Civil Action No.: 09-C-2075

RALEIGH COUNTY BOARD OF  
EDUCATION and SCHOOL BUILDING  
AUTHORITY OF WEST VIRGINIA,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION OF RALEIGH COUNTY BOARD OF EDUCATION  
TO ENFORCE RELEASE IN FULL OF ALL CLAIMS  
AND TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant, Raleigh County Board of Education ("Raleigh County BOE"), by counsel, respectfully submits this memorandum of law in support of its motion to enforce a Release in Full of All Claims entered into between all of the parties to this suit concerning all claims Plaintiff might have against the defendants related in any way to Plaintiff's work at the Independence High School Project. Plaintiff's Complaint fails to state a claim upon which relief can be granted because Plaintiff expressly released the claims it now seeks to make. Briefly put, the instant Complaint should be dismissed because Plaintiff entered into a Release in Full of All Claims related to the Independence High School Project on April 25, 2007 that expressly includes all future claims so that the claims made in the instant Complaint should be dismissed as a matter of law. By filing the instant action, Plaintiff now seeks to repudiate the earlier settlement and release.

**I. STATEMENT OF UNDISPUTED MATERIAL FACTS.**

Defendant, Raleigh County BOE was and is the owner of the improvement made at the Independence High School Project ("the Project"). Plaintiff, Multiplex, Inc. ("Multiplex"), is a contractor who provided construction services on the Project. During Multiplex's work on

the Project, a dispute arose between Multiplex, the Raleigh County BOE and the School Building Authority of West Virginia (“SBA”). The dispute concerned Multiplex’s work on the Project. As a result of the dispute, Multiplex hired attorney Ancil Ramey to file suit against the Raleigh County BOE and SBA. On August 28, 2006, Multiplex, through attorney Ramey, instituted a civil action in the Circuit Court of Kanawha County against the Raleigh County BOE and SBA related to Multiplex’s work on the Project. A copy of the August 28, 2006 Complaint is attached hereto as Exhibit A.

Ultimately, the lawsuit filed by Miltiplex on August 28, 2006 against the Raleigh County BOE and the SBA was settled by and between Multiplex and the Raleigh County BOE. The settlement is memorialized in a written Release in Full of All Claims executed by the President of Multiplex – Mr. Art Poff – on April 25, 2007. A copy of the April 25, 2007 Release in Full of All Claims is attached hereto as Exhibit B. In exchange for the payment of One Hundred Eighty-Three Thousand Dollars and no cents (\$183,000.00), Multiplex expressly agreed to “. . . release and forever discharge the Board of Education of the County of Raleigh . . . from all claims . . . plaintiff may have, including past, present and future, both known and unknown, of whatever kind or nature, . . .” related to the conduct complained of in the Complaint. Additionally, the Release provides that:

It is expressly understood and agreed that this Release is intended to extend to any and all claims, injuries and damages sustained by Multiplex, Inc., without exception arising out of the alleged wrongful acts set forth in the aforementioned Complaint, including claims for loss of service, business opportunities, past or future expense or losses of any kind, past and future lost wages or earning capacity, punitive damages, and any and all other forms of recoverable compensation or damages, even to the extent that such injuries or damages may not be known or apparent at this time.

(See Exhibit B at pg. 2). The settlement draft was tendered to Multiplex in a check dated May 10, 2007. A copy of the May 10, 2007 check is attached hereto as Exhibit C.

In spite of entering into the Release in Full of All Claims with the Raleigh County BOE on April 25, 2007, Multiplex filed the instant lawsuit on November 4, 2009 making

allegations similar to the allegations made against the Raleigh County BOE and SBA in the earlier suit and seeking additional damages. A copy of the instant Complaint is of record in the Court's file. Because the language used in the April 25, 2007 Release in Full of All Claims expressly applies to any subsequent claims made by Multiplex against the Raleigh County BOE, the instant complaint should be dismissed with prejudice as a matter of law.

## **II. ARGUMENT.**

### **A. Standard for Granting Motion to Dismiss.**

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure allows the defending party to move for the dismissal of allegations which "fail to state a claim for which relief can be granted." Rule 12(b)(6), WVRCP. The purpose of a Rule 12(b)(6) motion is to "test" the legal sufficiency of the complaint. *See, e.g., Collia v. McJunkin*, 358 S.E.2d 242 (W.Va. 1987). To warrant dismissal under Rule 12(b)(6), it must appear beyond doubt from the allegations of the Complaint that plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See, e.g., Garrison v. Thomas Mem. Hosp. Ass'n*, 438 S.E.2d 6 (W.Va. 1993). Finally, when matters outside the pleadings are presented and considered in a Rule 12(b)(6) motion to dismiss, the motion may be converted to one for summary judgment under Rule 56 and similarly disposed of by this Court. *See, e.g., Gunn v. Hope Gas, Inc.*, 402 S.E.2d 505 (W.Va. 1991).

### **B. A Valid Settlement and Release Agreement Exists Which The Court Can and Should Enforce.**

As one Court has stated, "[t]he entire fabric of civil litigation is dependent upon the willingness of parties to settle cases. . . [and] parties and their attorneys must act in good faith in this respect . . ." *Hildick v. Hildick*, 1990 WL 1657 (Del.Fam.Ct. 1990). To be sure, contracts of compromise and settlement of lawsuits are to be construed and enforced like any other contract. *Fortuna v. Queen*, 363 S.E.2d 472 (W.Va. 1987); *Floyd v. Watson*, 254 S.E.2d 687 (W.Va. 1979). The law favors settlement contracts and has a policy upholding them if they are fairly entered into and not in conflict with any public policy. *Accord v. Chrysler Corp.*, 399 S.E.2d 860 (W.Va. 1990); *State ex rel Vapor Corp. v. Narik*, 320 S.E.2d 345 (W.Va. 1984). In

keeping with this general policy, the Court has the authority to enforce the settlement agreement entered into by the parties in this case, and to dismiss the instant Complaint based upon the settlement agreement. Such authority arises from a trial court's inherent equity power to summarily enforce a settlement agreement when the practical effect is to enter a judgment by consent. *Millner v. Norfolk & W. R.R. Co.*, 643 F.2d 1005 (4th Cir. 1981).

As the undisputed facts material to resolution of the earlier civil action indicate, Multiplex entered into a written Release in Full of All Claims with the Raleigh County BOE on April 25, 2007 that broadly released claims related to Multiplex's work on the Project. As such, a settlement between Multiplex and the Raleigh County BOE was struck as to all claims related to the project that is binding and enforceable against Multiplex. Multiplex cannot repudiate a settlement after it is made. Long held and universally recognized principals of contract law provide that: "[o]nce an offer of compromise is accepted, . . . the offeror is bound by the terms of the compromise and is powerless to withdraw his offer, and if he refuses to perform such formalities, such a refusal is ineffective as a withdrawal of his offer." 15A Am Jur 2d, Compromise and Settlement, § 9.

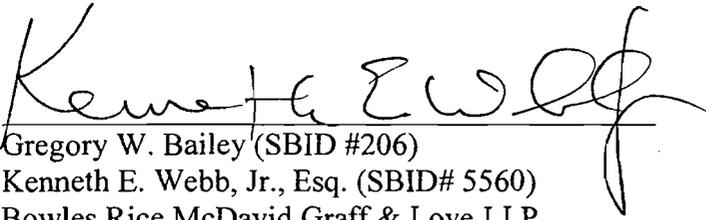
Similarly, the settlement in the present case is effective. Despite Multiplex's subsequent attempt to repudiate the settlement, a settlement of the allegations made against the Raleigh County BOE in the instant case exists. Because it is the law in West Virginia to encourage the resolution of controversies by contracts of settlement and to uphold and enforce such contracts if fair and not contrary to public policy, the settlement agreement between the parties should be enforced by the Court and the instant Complaint should be dismissed.

### **III. CONCLUSION.**

WHEREFORE, the Raleigh County BOE, by counsel, respectfully requests that the Court (i) grant its motion to enforce the Release in Full of All Claims; (ii) dismiss this case with prejudice; and (iii) grant it its costs in enforcing this settlement.

RALEIGH COUNTY BOARD OF  
EDUCATION,

By Counsel,

A handwritten signature in cursive script, appearing to read "Gregory W. Bailey". The signature is written in black ink and is positioned above a horizontal line.

Gregory W. Bailey (SBID #206)

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*Attorneys for Raleigh County Board of Education*

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**