

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

G. THOMAS BARTLETT, III,  
Plaintiff Below, Petitioner

vs.) No. 14-0278

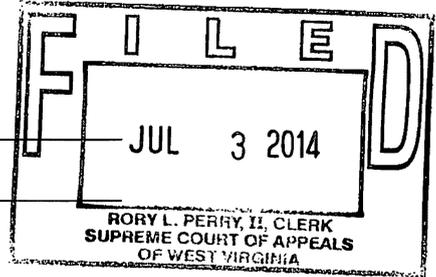
Appeal from a final order of the Circuit Court  
of Taylor County (12-C-27)

MARY LOUISE LIPSCOMB  
Defendant Below, Respondent

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN DETERMINING THAT DURING COURT-ORDERED MEDIATION THE STATUTE OF FRAUDS DOES NOT APPLY TO ORAL SETTLEMENT AGREEMENTS THAT INVOLVE THE TRANSFER OF REAL PROPERTY
  
- B. THE CIRCUIT COURT ERRED IN RULING THAT THE PARTIES REACHED A SETTLEMENT AGREEMENT AT MEDIATION BECAUSE THE RULING IS INCONSISTENT WITH *RINER V. NEWBRAUGH* AND WEST VIRGINIA CASE LAW

## STATEMENT OF THE CASE

Mildred B. Tucker died in 2002 and left assets, including mineral interests located in Taylor County, both to the Petitioner, G. Thomas Bartlett, III, her nephew, and the Respondent, Mary Lipscomb, no relation. (A.R. 27, 33). After the funeral, the Petitioner, the Respondent, and other family heirs arrived at an agreement on the distribution of assets, which included the mineral interests. (A.R. 33). Further, the Respondent signed an Acknowledgment of Distribution Agreement on March 5, 2011. (A.R. 32-35). The Acknowledgment of Distribution Agreement memorialized the agreement between the parties. (A.R. 32-35). The Petitioner and Respondent are now in a dispute concerning the ownership of the mineral interests. (A.R. 29). The Petitioner filed a complaint on April 2, 2012, in Taylor County for declaratory relief to declare that the Respondent transferred ownership of her mineral interests to the Petitioner and for other relief. (A.R. 27-41).

The Circuit Court ordered the parties to go to mediation on June 6, 2013. (A.R. 22-24). The parties dispute whether an oral settlement agreement was reached at mediation. (A.R. 22).

In the Respondent's *Memorandum in Support of Defendant's Opposition to the Motion of the Plaintiff to File First Amended Complaint*, filed on November 13, 2013, the Respondent raised *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (W. Va. 2002), as an exception to Rule 25.14 of the West Virginia Trial Court Rules<sup>1</sup>. (A.R. 52). On February 10, 2014, the Circuit Court held a hearing to determine, *inter alia*, whether an oral settlement agreement was reached at mediation.<sup>2</sup> (A.R. 22).

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<sup>1</sup> "If the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract." W. Va. T.C.R., Rule 25.14.

<sup>2</sup> The entire transcript from this hearing is included in the Appendix. One of the assignments of error concerns whether the hearing fulfilled the requirements in *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (W. Va. 2002), and so the entire transcript has been included so that this Honorable Court can consider it in full.

In addition to the parties and their counsel, the Petitioner's counsel during the mediation, Attorney James Christie, was also present.<sup>3</sup> (A.R. 2). The mediator, James Wilson, was not present, but the Honorable Judge Moats read into the record a letter the mediator had mailed to the judge in lieu of his appearance. (A.R. 3).

Respondent's counsel, Attorney Charles Johnson proffered to the court that the parties had a three-hour mediation, during which the Respondent made an offer and the Petitioner accepted the offer. (A.R. 4). Attorney Charles Johnson elaborated on the agreement stating the following: "It [the alleged agreement] was requiring three deeds from Mrs. Lipscomb. The basic settlement was that she would retain some royalty interest. Mr. Bartlett would have the right - - he would have all of the fee title except for the royalty. He would have the right to lease it. His leases in place would be good because he would have the whole thing. Mrs. Bartlett (sic) only retained a royalty interest in two pieces of property." (A.R. 5). Attorney Charles Johnson then said that no written agreement was signed by the parties memorializing this alleged agreement. (A.R. 5). Attorney Charles Johnson stated that about two months before the February 10<sup>th</sup> hearing, he contacted Petitioner's former counsel, Attorney James Christie, and requested all the drafts of the deeds, which Attorney James Christie sent to Attorney Charles Johnson. (A.R. 6).

Attorney James Christie made proffers to the court. (A.R. 7). He stated that at the mediation a couple of proposals were exchanged over the course of three hours. (A.R. 7). Attorney James Christie stated that the Respondent made the following proposal that he believed the Petitioner had accepted:

Ultimately [the Respondent] came back with a proposal that for one tract, which is twelve acres, a little over twelve acres, that Mrs. Lipscomb would give up all of her interest with no royalty

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<sup>3</sup> The Petitioner had previously relieved Attorney James Christie as counsel and retained the law firm of Mullens & Mullens, PLLC, in August of 2013, and the Circuit Court entered an order on August 23, 2013, granting Petitioner's motion for substitution of counsel. (A.R. 46-47).

override. There was a 125 acre tract which Mr. Bartlett owns one-half interest in. And that tract she would reserve a one-eighth interest. And then there was a - - excuse me, a one-fourth interest. And then there was a 41.6 acre tract, somewhere in that area, that she would retain a one-fourth.

(A.R. 7).

Attorney James Christie discussed that the Petitioner (age 78) had commented to him during the mediation that he was suffering from low sugar. (A.R. 8). During the mediation, the Petitioner and Attorney James Christie went to a kitchen located in Steptoe & Johnson's office where the Petitioner ate some fruit and cookies. (A.R. 8).

Attorney James Christie concluded his proffers to the Circuit Court by describing that after returning from the kitchen, the mediator informed them of the above-mentioned proposal. Attorney James Christie stated that the Petitioner agreed to it. Then all the parties met together, the mediator went over the proposed terms, and both parties agreed on the terms. (A.R. 8).

The Circuit Court then showed Attorney James Christie the documents that Attorney Charles Johnson had submitted and asked if he had prepared the documents and whether they accurately reflect the agreement. (A.R. 9). Attorney James Christie responded that he did prepare those documents and that they accurately reflected the agreement. (A.R. 9).

Petitioner's counsel, Hunter Mullens, then made proffers to the court. (A.R. 10). Attorney Hunter Mullens presented a letter that Attorney James Christie (attorney for the Petitioner at that time) sent the Petitioner after the mediation and read the following portion of the letter into the record: "I do not believe they will accept my draft agreement. Mr. Johnson and I do have a disagreement over your right to control future leases and sales." (A.R. 10).

Attorney Hunter Mullens further addressed the mediator's letter and the parties' meeting of the minds: "my understanding from Mr. Wilson's letter is that there was an agreement to

resolve it, not an agreement that day. It says an agreement to resolve. Mr. Bartlett, Col. Bartlett's understanding was he was not feeling well, and it was his understanding he would have a chance to review the terms and sign." (A.R. 11). The Circuit Court then responded that the mediator, James Wilson, had called his office and said an agreement was reached and that the parties would not be meeting again to try to resolve anything. (A.R. 11). Attorney Hunter Mullens responded that the Circuit Court should consider whether the Petitioner and the Respondent had a meeting of the minds. (A.R. 12).

Attorney Hunter Mullens then raised issues contained in Petitioner's brief to the Circuit Court concerning the requirements in *Riner v. Newbraugh* and the Statute of Frauds requirements. (A.R. 13). Concerning the Statute of Frauds, the Circuit Court stated the following:

But this was a mediated settlement that's pursuant to a court action. It's not something that was not envisioned. I mean this was pursuant to a court action, not by the representative of the parties. I don't think the Statute of Frauds would have any application. How would it any more than if the parties came in and said Judge, we've just reached an agreement in the back room and here's the agreement and put it on the record? How would the Statute of Frauds not apply then if it applies in a mediated settlement?

(A.R. 13, 14).

Attorney Hunter Mullens responded that case law requires that mediation agreements are to be construed like any other contract and the Statute of Frauds would apply. (A.R. 14).

At no time during the hearing did the Respondent's counsel present, or request to present, any sworn testimony or evidence to the Circuit Court that an agreement had been reached at mediation.

Based upon the representations from Attorney James Wilson, Attorney Charles Johnson, and Attorney James Christie, the Circuit Court held that an agreement was reached between the parties at mediation. (A.R. 15). The Circuit Court ordered the Petitioner to sign deeds transferring some of the disputed mineral interests to the Respondent. (A.R. 23). The Petitioner appeals from this order, entered March 6, 2014.<sup>4</sup> (A.R. 22-24).

### SUMMARY OF ARGUMENT

This Honorable Court should reverse the Circuit Court of Taylor County's decision that the Respondent met its burden under the four-part *Riner* test for enforcing the alleged settlement agreement or hold that the alleged settlement agreement is unenforceable because it violates the Statute of Frauds.

First, without even discussing whether an oral settlement was reached, the alleged agreement is unenforceable because it violates the Statute of Frauds, codified in West Virginia Code § 36-1-3. Contract law applies to settlement agreements. The alleged oral settlement agreement involves the transfer of real property. The Statute of Frauds requires transfers of real property to be in writing and signed by the person to whom the contract is being enforced against. The Petitioner has not signed any such document. The Circuit Court held that the Statute of Frauds does not apply because the alleged oral settlement agreement was reached at court-ordered mediation. Because all contract law, which includes the Statute of Frauds, applies to settlement agreements, this Honorable Court should reverse the Circuit Court's ruling.

Second, the Respondent has alleged that the parties reached an oral settlement agreement at mediation and requested the Circuit Court to enforce the oral settlement agreement pursuant to *Riner v. Newbraugh*. The Court in *Riner v. Newbraugh* established a four-part test that a party

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<sup>4</sup> The order was stayed by a subsequent order pending the outcome of this appeal.

must meet to enforce a settlement agreement at mediation when the agreement is not in writing. Syl. Pt. 3, *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (W. Va. 2002). First, the parties must reach an agreement. Second, the mediator must prepare a memorandum documenting that agreement. Third, the Circuit Court must find after a hearing that an agreement was reached free of coercion, mistake, or other unlawful conduct. Fourth, the Circuit Court must make findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement. Applying the *Riner* test, the Respondent did not prove an agreement was formed; the mediator did not submit a memorandum documenting that alleged agreement; the Respondent produced insufficient evidence and testimony at the hearing to enable the Circuit Court to find an agreement was reached free of coercion, mistake, or other unlawful conduct; and the order finding a settlement agreement lacks sufficient findings of fact to enable appellate review of whether an agreement was reached. For these reasons, this Honorable Court should reverse the Circuit Court's order finding an oral settlement agreement was reached at mediation because the Respondent did not meet its burden under the four-part *Riner* test.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument would be beneficial to this Honorable Court in reaching a decision under Rule 19 of the Revised Rules of Appellate Procedure because this appeal involves a narrow issue of law, assignments of error in the application of settled law, and an unsustainable exercise of discretion and the law governing that discretion is settled. The Statute of Frauds is a narrow issue of law in this case, and the Circuit Court abused its discretion by not considering the Statute of Frauds in reaching its final order. Further, the *Riner* test, from *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (W. Va. 2002), has not been further developed to help the

Circuit Courts distinguish between factual situations that would meet the test and factual situations that would not meet the test. Oral argument would help develop whether the facts in this case would or would not pass the *Riner* test. Oral Argument should be set for a Rule 19 argument. The Petitioner believes a memorandum decision is not appropriate because the Petitioner is requesting this Honorable Court to reverse the Circuit Court's order and, pursuant to Rule 21 of the Revised Rules of Appellate Procedure, a memorandum decision reversing the decision of a circuit court should only be issued in limited circumstances.

## ARGUMENT

### **A. THE CIRCUIT COURT ERRED IN DETERMINING THAT DURING COURT-ORDERED MEDIATION THE STATUTE OF FRAUDS DOES NOT APPLY TO ORAL SETTLEMENT AGREEMENTS THAT INVOLVE THE TRANSFER OF REAL PROPERTY**

A *de novo* standard of review applies to issues concerning questions of law or statutory interpretation. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (W.Va. 1995). Under a *de novo* standard of review, the appellate court affords no deference to the lower court's ruling. *See Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (W. Va. 1997) (citations omitted).

Settlement agreements are to be construed as any other contract under West Virginia law. *See Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 452, 590 S.E.2d 641, 645 (W. Va. 2003) (*per curiam*) citing *Floyd v. Watson*, 163 W. Va. 65, 68, 254 S.E.2d 687, 690 (W. Va. 1979).

West Virginia Code § 36-1-3 codifies a portion of the Statute of Frauds and requires contracts for the sale of land to be in writing:

No contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent. But the consideration need not be set forth or expressed in the writing, and it may be proved by other evidence.

West Virginia Code § 36-1-3.

The Statute of Frauds requires a signed, written contract for transfers of real property. *See* Syl. Pt. 4, *Kennedy v. Burns*, 84 W. Va. 701, 709, 101 S.E. 156, 159 (W.Va. 1919). The Statute of Frauds should not be ignored or circumvented for disputes involving the sale or transfer of real property:

The dangerous consequences which would follow the relaxation of the requirements of these wise and salutary statutes to permit the creation and the transfer of various interests and estates in land by parol would inevitably produce intolerable confusion and destructive instability in the law of real property. To sanction the substitution of verbal declarations for written instruments in the creation or the transfer of certain interests and estates in land is to reject the wholesome experience of the past for uncertain memory and unrecorded expression and, in so doing, to adopt a course which is necessarily fraught with danger.

*Cottrell v. Nurnberger*, 131 W. Va. 391, 411, 47 S.E.2d 454, 463-464 (W.Va. 1948).

The Petitioner never signed a document evidencing the alleged oral settlement. The Respondent is attempting to enforce an alleged oral settlement agreement for the transfer of real property. Because the Statute of Frauds is a basic principle of contract law that has been codified and contract law applies to mediation agreements, the Statute of Frauds prohibits enforcing oral contracts formed at mediation for the transfer or sale of real property. Therefore, even presuming, *arguendo*, an oral agreement was formed, it is unenforceable.

At the hearing, the Circuit Court stated that the Statute of Frauds does not apply to court-ordered mediation. (A.R. 13, 14). After the Petitioner raised the Statute of Frauds as a defense to enforcing the alleged agreement, the Circuit Court denied the Petitioner's objection based on the following reasoning:

But this was a mediated settlement that's pursuant to a court action. It's not something that was not envisioned. I mean this was pursuant to a court action, not by the representative of the parties. I don't think the Statute of Frauds would have any application. How would it any more than if the parties came in and said Judge, we've just reached an agreement in the back room and here's the agreement and put it on the record? How would the Statute of Frauds not apply then if it applies in a mediated settlement?

(A.R. 13, 14).

As set forth above, contract law applies to settlement agreements and the Statute of Frauds requires a signed, written contract for transferring interests in real property. Therefore, this Honorable Court should reverse the Circuit Court's ruling enforcing the alleged oral settlement agreement and reaffirm that contract law applies to mediation agreements—including the Statute of Frauds.

**B. THE CIRCUIT COURT ERRED IN RULING THAT THE PARTIES REACHED A SETTLEMENT AGREEMENT AT MEDIATION BECAUSE THE RULING IS INCONSISTENT WITH *RINER V. NEWBRAUGH* AND WEST VIRGINIA CASE LAW**

An abuse of discretion standard of review applies when reviewing a Circuit Court's order enforcing a settlement agreement reached as a result of court-ordered mediation. Syl. Pt. 1, *Riner*, 211 W. Va. 137, 563 S.E.2d 802; *see also Devane v. Kennedy*, 205 W.Va. 519, 527, 519 S.E.2d 622, 630 (W.Va. 1999) (citations omitted).

In *Riner*, this Court held that a signed agreement is not required to enforce a settlement agreement so long as the party seeking to enforce the settlement agreement can meet all the elements of a four-part test. *See* Syl. Pt. 3, *Riner*, 211 W. Va. 137, 563 S.E.2d 802. First, the party seeking to enforce an agreement must prove the parties reached an agreement. *Id.* To meet this burden, all the elements of a valid contract must be met, and if the settlement agreement was not signed by the parties, the unsigned agreement will only be enforced if “the parties produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms of the agreement.” *Riner*, 211 W. Va. at 141, 563 S.E.2d at 806. Second, the mediator must prepare a memorandum documenting that agreement. *Id.* at Syl. Pt. 3. Third, the Circuit Court must find after a hearing that an agreement was reached free of coercion, mistake, or other unlawful conduct. *Id.* Fourth, the Circuit Court must make findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement. *Id.*

In *Riner*, the parties in a business-related dispute were ordered to participate in mediation. *Riner*, 211 W. Va. at 139, 563 S.E.2d at 804. An agreement was eventually reached, and the mediator reduced the agreement to a written, two-page “Mediation Settlement Agreement.”<sup>5</sup> *Id.* One party signed the agreement, while the other party refused to sign and prepared a lengthier agreement with additional terms and conditions. *Riner*, 211 W. Va. at 139-140, 563 S.E.2d at 804-805. Over the course of two hearings, the circuit court heard testimony

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<sup>5</sup> the circuit court later summarized the two-page agreement into a four-paragraph summary:

“Mediation Settlement Agreement

1. The Defendants [Appellees] convey to the Plaintiffs [Riners] all interests in an account held by the Court through the Successor Trustee . . . with full rights for the Plaintiff to pursue an accounting of said fund, with the understanding the Plaintiffs will indemnify the Defendants from any liability or loss arising from said accounting.
2. The Defendants shall pay the Plaintiffs the further sum of \$ 79,000.00.
3. The Defendants shall pay all costs of mediation and copying expenses.
4. Plaintiff's [sic] counsel shall prepare the court Orders necessary to carry out the terms of the agreement . . . while counsel for the Defendants shall prepare all necessary releases for the benefit of their respective clients.” *Riner*, 211 W. Va. at 141-142; 563 S.E.2d 806-807.

from the parties and counsel and ruled that the lengthier agreement was acceptable because the parties did not have a substantive disagreement or misunderstanding concerning the agreement. *Riner*, 211 W. Va. at 140, 563 S.E.2d at 805.

On appeal, the Court found that the parties may have reached a meeting of the minds at mediation as to the terms reflected in the two-page Mediation Settlement Agreement. *Riner*, 211 W. Va. at 144, 563 S.E.2d at 809. And as required by the second part of the *Riner* test, the mediator had prepared a written agreement documenting the oral agreement. *Id.* In reversing the lower court's decision, the Court found that the parties did not reach a meeting of the minds at mediation for the additional terms and conditions that were contained in the lengthier agreement but absent from the mediator's two-page agreement. *Id.* The Court did not specifically address parts three and four of the *Riner* test, but remanded for further proceedings. *Riner*, 211 W. Va. at 145, 563 S.E.2d at 810.

The Respondent failed to meet the four-part *Riner* test, and the Circuit Court abused its discretion in enforcing the alleged settlement agreement. Under the first part of the *Riner* test, the Respondent did not present evidence or testimony to prove the parties had a meeting of the minds to reach a settlement agreement or address whether a written settlement agreement was a condition precedent to an agreement after the Petitioner raised this defense. The second part of the *Riner* test is not met because the mediator did not prepare a memorandum documenting the alleged agreement. The third part of the *Riner* test is not met because the Respondent produced insufficient evidence and testimony at the hearing to enable the Circuit Court to find an agreement was reached free of coercion, mistake, or other unlawful conduct. In conjunction with the third part of the test, the fourth part of the *Riner* test is not met because the Circuit Court's order lacks sufficient findings of fact to enable appellate review of whether an agreement was

reached between the parties. Therefore, because the Respondent failed to prove the four-part *Riner* test, the Circuit Court abused its discretion in finding a settlement agreement was reached at mediation.

- 1. The first part of the *Riner* test is not met because the Respondent failed to present evidence or testimony that the parties had a meeting of the minds to reach a settlement agreement or address whether a written settlement agreement was a condition precedent to an agreement after the Petitioner raised this defense**
  - a. The Respondent failed to present evidence or testimony that the parties had a meeting of the minds to reach a settlement agreement**

Settlement agreements are to be construed as any other contract under West Virginia law. *Burdette*, 214 W. Va. at 452, 590 S.E.2d at 645 (citations omitted). A meeting of the minds is the “*sine qua non*” for all contracts. Syl. Pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (W. Va. 1932). The “meeting of the minds” requirement is essential for settlement agreements. *See Riner*, 211 W. Va. at 144, 563 S.E.2d at 809 (citations omitted).

The Respondent failed to meet its burden that a meeting of minds occurred between the parties. The Respondent produced no evidence or testimony by the parties that a meeting of the minds occurred and only made proffers to the Circuit Court. (A.R. 15). At the hearing, neither party testified that a meeting of the minds occurred. The letter from the mediator was the only physical evidence produced at the hearing that indicates that a meeting of the minds occurred. (A.R. 26). On December 5, 2013, after a hearing had been scheduled to address the alleged agreement, the mediator sent the Honorable Judge Moats a letter stating that the parties agreed to resolve the case: “Both parties actively engaged in the mediation and, after three hours, reached an agreement to resolve the case.” (A.R. 26). Compared with *Riner* where the mediator prepared a two-page agreement, this letter lacks any detail of the alleged agreement other than an agreement to resolve the case, which is no agreement. (A.R. 26); *See Riner*, 211 W. Va. at 139-

140, 563 S.E.2d at 804-805. In addition, the delay in time from mediation (June 6, 2013) and the letter being sent (December 5, 2013) defeats the reliability of the mediator to accurately document the terms of the alleged agreement. Further, even if, *arguendo*, counsel at the mediation and the mediator believe that a settlement was reached at the mediation, the subsequent dispute between the parties concerning the royalty terms, as evidenced in Attorney James Christie's letter to the Petitioner, shows that the parties could not have had a true meeting of the minds. *See* (A.R. 25); *see also O'Connor v. GCC Beverages*, 182 W. Va. 689, 691-692, 391 S.E.2d 379, 381-382 (W. Va. 1990) (*per curiam*) (finding that even though both parties believed a settlement had been reached, no agreement was memorialized and subsequent disputes over the terms of the contract was evidence that no true meeting of the minds had occurred). Therefore, the Respondent did not prove that a meeting of the minds occurred, and the Circuit Court abused its discretion by finding an agreement was reached based on proffers alone.

Furthermore, the Petitioner produced ample evidence at the hearing directly challenging the Respondent's proffers that the parties arrived at a meeting of the minds during the mediation on June 6, 2013. Eight weeks after the mediation on July 26, 2013, Attorney James Christie, then attorney for the Petitioner, sent the Petitioner a letter. (A.R. 25). In that letter, Attorney James Christie wrote to the Petitioner that he has prepared a draft agreement but he does not believe the Respondent will accept the draft because of a disagreement over the Petitioner's right to control future leases and sales: "As I mentioned to you during our last meeting, I do not believe they will accept my draft agreement. Mr. Johnson and I do have a disagreement over your right to control future leases and sales." (A.R. 25). This letter shows that the parties did not agree on all of the terms required to reach an agreement.<sup>6</sup> Therefore, the Respondent did not

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<sup>6</sup> Petitioner's counsel also raised the issue at the hearing that the Petitioner (age 78) has a medical condition whereby his blood sugar can drop to a consequential level hindering his mental capacity. (A.R. 8, 11). During the three-hour

present evidence or testimony that the parties had a meeting of the minds. As a result, the Circuit Court abused its discretion by not requiring the Respondent to prove a meeting of the minds occurred.

**b. The Respondent failed to present evidence or testimony that a signed settlement agreement was a condition precedent for the parties prior to reaching a settlement agreement after the Petitioner raised this defense**

When all the evidence and circumstances are considered, if the parties intended as a condition precedent to an agreement becoming binding that it be reduced to writing and signed by the parties, an oral agreement that covers all the terms of the proposed agreement is not binding on the parties, until it is in writing and signed by all the parties. *See* Syl. Pt. 1, *Blair v. Dickinson*, 133 W. Va. 38, 54 S.E.2d 828 (W. Va. 1949). In *Blair*, the Court cited a Sixth Circuit case that highlighted six common situations in which the parties intended for an agreement to be in writing:

whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

*Blair*, 133 W. Va. at 69, 54 S.E.2d at 844, *citing Elkhorn-Hazard Coal Co. et al. v. Kentucky River Coal Corporation*, 20 F.2d 67, 70 (6th Cir. 1927).

In consideration of the six factors cited in *Blair*, the evidence shows the parties intended to inspect and review a written document prior to reaching an agreement. First, the parties are in

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mediation session, the Petitioner's blood sugar was low, and he was having trouble comprehending the mediation. (A.R. 8). During the mediation, the Petitioner made his concerns known to Attorney James Christie, and they both ate some food near the end of the mediation. (A.R. 8).

dispute over oil and gas rights, which are transferred by a written document. (A.R. 27-29).

Second, real property is universally transferred by a signed, written document, not only because the sale and transfer of land must be in writing as required by West Virginia Code § 36-1-3, but for many other practical purposes—such as the recording and notice requirements. Third, because the dispute involves the transfer of oil and gas rights, royalties, and interests, any settlement in this dispute will contain many terms and conditions that an oral agreement would not address in adequate detail. Fourth, oil and gas rights are valuable assets in the market today and roughly two hundred and twenty (220) acres are involved in this dispute. (A.R. 27-29).

Fifth, a contract to transfer oil and gas rights is not unusual, but it certainly is unusual for the parties to attempt to orally transfer part of over two hundred acres of oil and gas rights. Sixth, without a signed, written document clearly indicating the final conclusive offer and acceptance, the actual terms of the settlement are mere speculation after three hours of mediation. This alleged agreement is further called into question by Attorney James Christie’s letter to the Petitioner stating “I do not believe they will accept my draft agreement. Mr. Johnson and I do have a disagreement over your right to control future leases and sales.” (A.R. 10). For these reasons, the parties intended that any agreement would be in writing to comply with normal standards and customs for transferring real property and to allow for each party to review the definite terms and conditions of a possible settlement agreement prior to accepting and signing. Consequently, the Circuit Court abused its discretion by not requiring the Respondent to prove that a signed writing was not a precondition to the agreement.

**2. The second part of the *Riner* test is not met because the mediator did not prepare a memorandum of the alleged agreement**

The second part of the *Riner* test requires the mediator to prepare a memorandum documenting the agreement. Without a satisfactory memorandum from the mediator, the Circuit

Court will lack the opinion of a neutral third-party evidencing specific terms and conditions. Without the memorandum, the Court will have to rely solely on oral statements to determine whether an agreement was actually reached, which the *Riner* test does not permit.

The Respondent did not meet the second part of the *Riner* test because the mediator, Attorney James Wilson, did not prepare a memorandum documenting the alleged agreement.<sup>7</sup> In *Riner*, the mediator prepared a two-page agreement and sent the agreement to the parties to sign. *Riner*, 211 W. Va. at 139, 563 S.E.2d at 804. In contrast, the mediator did not prepare an agreement or any form of a memorandum documenting the terms of the agreement. He only sent a letter to the Circuit Court on December 5, 2013. (A.R. 26). Compared with memorandum outlining the terms of the agreement in *Riner*, this letter did not produce clarity or help the Circuit Court determine the terms of the agreement. In fact, the letter only states that the parties “reached an agreement to resolve the case,” meaning that the parties agreed to agree, which is no agreement. (A.R. 26). Thus, the Respondent did not meet the second part of the *Riner* test.

**3. The third part of the *Riner* test is not met because the Circuit Court abused its discretion that an agreement was reached free of coercion, mistake, or other unlawful conduct without requiring the Respondent to present sufficient evidence or testimony at the hearing**

The third part of the *Riner* test requires the Circuit Court to find that an agreement was reached free of coercion, mistake, or other unlawful conduct. The Circuit Court’s order, entered March 6, 2014, makes no mention that the parties reached an agreement free of coercion, mistake, or other unlawful conduct. In fact, without the parties testifying, questions of coercion,

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<sup>7</sup> Petitioner’s counsel does not intend to imply that the mediator is at a fault or failed in his duties as a mediator. Currently mediators do not have the duty to prepare an agreement or memorandum documenting the oral agreement. Rather, if the parties do not sign a written agreement at mediation, then the party attempting to enforce the oral agreement has the burden to meet the all four parts of the *Riner* test. However, other courts, such as the United States District Court for the Southern District of West Virginia, have decided to impose duties on the mediator. *See* S.D.W. Va. LR Civ P 16.6.8 (requiring a signed settlement agreements at mediation: “If all or part of the case was settled, the parties shall, at the mediation, place in writing the terms of the settlement, and all participants shall sign the terms of the settlement, with the mediator retaining the original.”).

mistake, or other contractual problems cannot be adequately addressed because these questions relate to the parties' state of mind. One specific instance, the Petitioner's state of mind was not addressed by the Circuit Court even though the Petitioner's counsel and Attorney James Christie raised the issue that the Petitioner said his blood sugar was low, and he was having trouble comprehending the mediation. (A.R. 8, 11). Therefore, the Respondent did not prove the third part of the *Riner* test, and the Circuit Court abused its discretion by finding an agreement without requiring the Respondent to call witnesses or present evidence to prove that a valid agreement was reached.

**4. The fourth part of the *Riner* test is not met because the Circuit Court's order finding a settlement agreement was reached lacks sufficient findings of fact to enable appellate review of whether an agreement was reached between the parties**

The fourth part of the *Riner* test requires the Circuit Court to make findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement. In reviewing the Circuit Court's order, the findings of fact are contained in one paragraph:

On the basis of the representations of the mediator and counsel, and for the reasons set forth on the record, the Court is of opinion that the parties settled the matters in controversy at mediation on June 6, 2013, and that the Settlement Agreement and Deeds accurately represented that settlement.

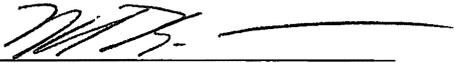
(A.R. 23).

This paragraph accurately depicts the Circuit Court's findings of fact. Because the parties' meeting of the minds is *sine qua non* in determining whether a settlement agreement was reached, the Circuit Court lacked the essential testimony in making its determination. The parties could have had very different opinions of whether an agreement was reached or the specific terms and conditions of an agreement. The testimony from the parties on whether an agreement was reached is notably absent from the order because the Respondent failed to call

witnesses or present evidence. Rather the Circuit Court relied on the representations of the mediator and counsel. These representations are insufficient to determine whether the parties actually arrived at an agreement. As a result, the Respondent failed to meet the fourth part of the *Riner* test.

## CONCLUSION

This Honorable Court should reverse the Circuit Court's order and remand this case for two reasons. First and foremost, the Circuit Court's ruling that the Statute of Frauds does not apply to oral settlement agreements reached during court-ordered mediation should be reversed because all contract law applies to settlement agreements, which includes the Statute of Frauds. Because the Petitioner did not sign a written agreement, the Statute of Frauds prohibits the Respondent from enforcing an alleged oral agreement for the transfer of real property. Second, the Circuit Court's order finding a settlement agreement was reached at mediation should be reversed because the Respondent did not meet its burden under the four-part *Riner* test. In its pre-hearing memorandum, the Respondent initially requested the alleged oral contract to be enforced pursuant to *Riner*, but then failed to prove the four-part test that was established in *Riner*. (A.R. 52). Specifically, the Respondent did not prove an agreement was formed; the mediator did not submit a memorandum documenting that alleged agreement; the Respondent produced insufficient evidence and testimony at the hearing to enable the Circuit Court to find an agreement was reached free of coercion, mistake, or other unlawful conduct; and the order finding a settlement agreement lacks sufficient findings of fact to enable appellate review of whether an agreement was reached. For either of these two reasons, this Honorable Court should reverse the Circuit Court's order, entered March 6, 2014, and remand for further proceedings.

Signed:  \_\_\_\_\_

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

G. THOMAS BARTLETT, III,  
Plaintiff Below, Petitioner

vs.) No. 14-0278

Appeal from a final order of the Circuit Court  
of Taylor County (12-C-27)

MARY LOUISE LIPSCOMB  
Defendant Below, Respondent

**CERTIFICATE OF SERVICE**

I, Hunter B. Mullens, Mullens & Mullens, PLLC, do hereby certify that on the 2<sup>nd</sup> day of July, 2014, I served the foregoing "Petitioner's Brief" upon the following counsel of record, by mailing a true and accurate copy thereof, by United States Mail, postage prepaid, to the following address:

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