

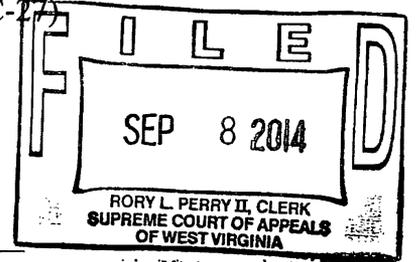
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

G. THOMAS BARTLETT, III,
Plaintiff Below, Petitioner

vs.) No. 14-0278

MARY LOUISE LIPSCOMB
Defendant Below, Respondent

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



PETITIONER'S REPLY BRIEF

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ARGUMENT

A. The Respondent is incorrect that the Statute of Frauds does not apply to settlement agreements, that the Respondent is not the party to be charged, and that the Petitioner will not be transferring an interest in real property.

1. The Respondent is incorrect that the Statute of Frauds does not apply to Settlement Agreements because all contract law applies to settlement agreements.

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). The Statute of Frauds states that no contract for the sale of land shall be enforceable unless the contract is in writing and signed by the party to be charged. 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 Respondent is attempting to enforce an alleged oral settlement agreement involving the transfer of real property against the Petitioner. Based on those facts alone, the Statute of Frauds applies, rendering the alleged settlement agreement unenforceable. Regardless of all the other issues in this appeal, the Statute of Frauds alone resolves the appeal in favor of the Petitioner.

The Respondent states that the alleged settlement agreement was not for the transfer of real property, but was a settlement agreement to settle a case. Resp. Br. at 6. This argument has no merit and would require this Honorable Court to disregard contract law for agreements involving the transfer of real property if the agreement is resolved during the pendency of a civil action. Furthermore, absent from the Respondent's argument is any case law supporting this position. Settlement agreements are held up to the same standard as all other forms of contracts,

and even in *Riner* the Court confirmed that all elements of a contract be met to enforce an oral agreement. *See Riner v. Newbraugh*, 211 W. Va. 137, 137, 141, 563 S.E.2d 802, 802, 806 (W. Va. 2002). The Petitioner requests the exact same standard in this case—specifically raising the Statute of Frauds as a defense to the enforceability of an alleged oral agreement for the transfer of real property.

2. The Respondent is incorrect that the Respondent is the party to be charged because the Respondent is the moving party to enforce the alleged settlement agreement against the Petitioner.

The Statute of Frauds requires the party to be charged by the contract, actually sign the contract. West Virginia Code § 36-1-3. The Respondent argues that the party to be charged by the settlement agreement is not the Petitioner, but the Respondent. Resp. Br. at 6. This argument is patently incorrect. Who is being charged with this settlement agreement? Not the party who is attempting to enforce the alleged agreement, but the party who disputes an agreement was reached. The Respondent is the moving party seeking to enforce the alleged settlement agreement for the transfer of real property. A. R. 48-50. By the Respondent's own motion, the Petitioner is the party to be charged by this settlement agreement. The Respondent justifies this position on the fact that the Respondent needs to sign deeds, not the Petitioner. Resp. Br. at 6. Whether deeds need to be prepared or not is irrelevant for enforcing the settlement agreement. To illustrate this point, a contract for the sale of land still requires the buyer to sign contract for it to be enforceable against the buyer even though the seller will be the only party to sign the deed. For the Respondent to be the party charged with the settlement agreement, the Petitioner would have to be attempting to enforce the settlement agreement. But the Petitioner is not attempting to enforce the alleged agreement, meaning the Petitioner is the party to be charged.

3. The Respondent incorrectly asserts the parties agree that ownership of the mineral interests is not in dispute and that the Respondent is the only party that will be transferring ownership.

In both the Statement of the Case and in the Argument, the Respondent asserts that the parties are not in dispute over the ownership of the mineral interests and that the Petitioner was transferring nothing in the alleged oral settlement agreement. Resp. Br. at 2, 6. From this assertion, the Respondent argues that the Statute of Frauds should not apply because the Petitioner will not be transferring any interest in real property. Even presuming the Statute of Frauds only applies to the transferor and not to the transferee, which is unsupported by any legal precedent, the Petitioner most certainly will be transferring mineral interests in the alleged oral settlement agreement.

The following paragraphs incorporate a portion of the Petitioner's Statement of the Facts and additional facts of record in the Circuit Court's file, though the required citations are not contained in the Appendix Record.¹ The importance of the following paragraphs emphasizes that the Petitioner will be transferring an interest in the disputed mineral rights to the Respondent in the alleged settlement agreement, and to disregard the Statute of Frauds will result in the Petitioner transferring his mineral interests to the Respondent without requiring a signed written agreement by the Petitioner.

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). The oral agreement is memorialized in documents prepared by Executrix Helen E. McKee and in the final distribution of probate assets. Attorney James C.

¹ Refer to Exhibit 1 of *Petitioner's Motion to File First Amended Complaint* contained in the Circuit Court's file.

Turner, Fiduciary Commissioner, submitted to the County Commission of Harrison County a Report and Final Settlement of the accounts of Executrix, Helen E. McKee, of record in the Office of the Clerk of the County Commission of Harrison County, West Virginia, in Appraisement Book No. 423, at page 851. In the report, the distribution of Mildred B. Tucker's assets conforms to the parties' oral agreement: the Petitioner will receive "Mineral interests-Taylor County" and Mary Louise Lipscomb will receive no mineral interests in Taylor County, but she will receive a larger portion of the liquidated estate assets.

Under West Virginia Code § 44-4-18, a fiduciary commissioner's report that has been confirmed by the county commission shall be taken to be correct, and shall be binding and conclusive upon every beneficiary of the estate who has had notice that the report has been laid before the fiduciary commissioner for settlement.

Further, the Respondent signed an Acknowledgment of Distribution Agreement on March 5, 2011, of record in the Office of the Clerk of the County Commission of Taylor County, West Virginia, in FWLD Book No. 35, at page 458. (A.R. 32-35). The Acknowledgment of Distribution Agreement not only memorialized the agreement between the parties, but itself meets all the requirements for a valid deed. (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).

From this factual development, the Petitioner became the owner of the mineral interests after the estate was probated, which incorporated the parties original agreement, and the Respondent signed an Acknowledgment of Distribution Agreement in 2011 (which in addition

has all the requirements to be a valid deed). After the possibility of leasing these mineral interests became an option, the Respondent refused to sign a standard-form deed and asserted ownership over the Petitioner's mineral interests.

The Respondent argues that the parties do not dispute the ownership of minerals and uses this assertion to conclude that only the Respondent will be the party transferring any interest in real property. The purpose of any settlement agreement would be to resolve the dispute between the ownership of the real property. A title search of the dispute property will reveal that the title is at the very least clouded. Assuming, *arguendo*, that the Respondent prepared a deed transferring any interest she owned in the property but reserving royalty rights, the title would still be clouded because a title search would reveal the final distribution of probate assets in which the Petitioner received all the mineral interests and the Respondent's signed Acknowledgment of Distribution Agreement, which acknowledges the transfer and in itself has all the elements of a valid deed. These two documents are evidence that the Respondent had no property rights to transfer and thereby her own deed reserving a royalty rights is meaningless or at most requires a declaratory judgment to resolve the dispute.

B. The Respondent failed to meet the *Riner* test and attempts to place this burden on the Petitioner.

The *Riner* test places the burden on the Respondent to meet the four-part test because the Respondent is the moving party seeking to enforce an alleged unsigned, settlement agreement. As already stated in the Petitioner's Brief but to reemphasize the Respondent's burden, in *Riner*, this Honorable 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.*

1. The Respondent did not produce evidence that a settlement agreement was reached at mediation or address whether a signed settlement agreement was a condition precedent for the parties prior to reaching 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 cites many cases enforcing settlement agreements where all the parties agree a settlement agreement was reached. But because the Petitioner disputes that an agreement was ever reached, the Respondent must prove a settlement agreement was reached. Thus, the Respondent had the burden at the hearing to prove that the parties had a meeting of the minds.

The Respondent produced no evidence and requested no testimony by the parties that a meeting of the minds occurred and relied solely on proffers by counsel. *Riner* requires that the Respondent “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.

The Petitioner and the Respondent are the only persons who could accurately testify concerning whether they had a meeting of the minds to the terms of that alleged agreement. Because the Respondent decided not to call either party as a witness to testify concerning this required element, the Respondent did not prove the first part of the *Riner* test.

The Respondent in her brief makes note that the Petitioner did not approve of the terms in the written draft once he reviewed the agreement in a formalized draft: “counsel for the Petitioner stated that the Petitioner ‘wanted to review the documents. Once he reviewed them he said this isn’t what he wanted to do.’” Resp. Br. at 12. The Respondent interprets this proffer to mean that the Petitioner made an agreement and then wanted to back out of that agreement. However, counsel for the Petitioner was actually addressing, *inter alia*, the lack of a meeting of the minds. The parties had been mediating for three hours with different offers being exchanged, and once in a written form the parties still differed on the terms of the agreement. Former counsel for the Petitioner, Attorney James Christie’s letter to the Petitioner evidences that no agreement was reached: “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). The Respondent did not refute this direct evidence that the parties had a disagreement over the terms of the agreement after mediation.

The Respondent did not address whether a signed settlement agreement was a condition precedent for the parties prior to reaching a settlement agreement. The Petitioner raised the defense that a written agreement was a condition precedent for the parties. The Respondent did not address this issue at the hearing or in her Brief, but rather dismisses it without comment. The Respondent cited in her Brief the Petitioner’s reaction to the draft agreement, and uses this

evidence to conclude that the Petitioner is attempting to back out of the alleged agreement rather than arriving at the logical conclusion that the parties wanted to review a written agreement prior to finalizing any agreement. The Respondent argues that the Petitioner cannot avoid the alleged oral settlement agreement because it later proves to be disadvantageous. Resp. Br. at 13.

Ironically, this Declaratory Judgment action was filed because the Respondent found the parties original agreement, the probate of the estate, and her Acknowledgment of Distribution Agreement disadvantageous after leasing the minerals became a possibility. The Petitioner reasserts the other reasons contained in his Brief that a written agreement was a condition precedent, which the Respondent did not refute or address at the hearing or in the Respondent's Brief. See Pet. Br. at 15, 16.

2. The second part of the *Riner* test is not met because the Respondent is incorrect that the draft settlement agreement is a memorandum.

The Respondent argues that even though the mediator did not prepare a memorandum documenting the alleged agreement, the documents Petitioner's former counsel, Attorney James Christie, prepared meets this requirement. Resp. Br. at 9. First, as already discussed, the parties had a disagreement over royalty rights, and Attorney James Christie informs the Petitioner of this disagreement. (A. R. 10). A memorandum of the alleged oral settlement agreement cannot contain disagreements over terms of the agreement, and the parties cannot have an agreement if further negotiations are required. Furthermore, the Petitioner never submitted the draft agreement to the Respondent. Approximately six months after the mediation, the Respondent's counsel contacted Attorney James Christie and requested his draft. (A.R. 6). In consideration that the parties had a disagreement over the terms of the agreement and the Respondent only received the draft after contacting Petitioner's former counsel for his draft documents six months

after the mediation, the documents obtained by the Respondent should not be considered a memorandum reflecting the alleged oral agreement. Consequently, the Respondent did not meet her burden under the second part of the *Riner* test.

3. The third part of the *Riner* test is not met because the Respondent failed to present sufficient evidence or testimony at the hearing that the agreement was reached free of coercion, mistake, or other unlawful conduct.

The third part of the *Riner* test requires the Respondent to prove that an agreement was reached free of coercion, mistake, or other unlawful conduct. The Circuit Court's order makes no mention that the parties reached an agreement free of coercion, mistake, or other unlawful conduct. The Respondent did not address these issues by calling the parties to testify concerning coercion, mistake, or any other unlawful conduct or present evidence to meet this burden. The Respondent argues that the Circuit Court did not require testimony. Resp. Br. at 10. The Respondent specifically cited *Riner* as a justification to enforce the alleged settlement agreement. (A.R. 52). The Respondent should then be held to that standard under *Riner*. The Respondent had the burden to prove an agreement was reached free of coercion, mistake, or other unlawful conduct, and if the Circuit Court did not address these requirements, then the Respondent had the obligation to put forth such evidence and testimony. Furthermore, the Respondent argues that the Petitioner did not call witnesses or produce evidence. Resp. Br. at 10. However, the Petitioner did not make the motion or request the Circuit Court to enforce the alleged oral settlement pursuant to *Riner*. The Petitioner's actions at the hearing are irrelevant if the Respondent failed to meet its burden. Because the Respondent failed to call witnesses and present evidence, the Circuit Court's order lacked the necessary requirements to meet the third part of the *Riner* test. Therefore, the Respondent did not meet the third part of the *Riner* test.

4. The fourth part of the *Riner* test is not met because the Respondent took minimal action to enable the Circuit Court to make findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the alleged agreement.

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. As discussed in Petitioner's Brief, the Circuit Court's 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).

The Respondent argues that these findings of fact are sufficient because "it is difficult to determine what else Judge Moats could have done." Resp. Br. at 10. However, the Respondent, not the Circuit Court, had the obligation and burden to develop the record to enable sufficient finding of fact. The Respondent had a plethora of options to develop the findings of fact. First and foremost, the Respondent could have called both the Respondent and Petitioner as witnesses to determine whether an agreement was reached and the specific terms and conditions of that agreement. Without the parties' testimony, the Respondent could not meet all of its burdens under the *Riner* test, specifically the meeting of the minds requirements and whether a written contract was a condition precedent to any agreement. Thus, the Circuit Court's findings of fact are inadequate to enable appellate review. The Circuit Court's findings were limited because the Respondent took minimal action to develop the findings of fact even though the Respondent knew her burden under the *Riner* test.

- C. **The Respondent is incorrect that *Smith v. Monongahela Power Co.* applies to this case, misapplies this case to shift the burden of proving a settlement agreement was reached onto the Petitioner, and requests this Honorable Court to presume a settlement agreement was reached without requiring the Respondent to meet her burden.**

The Respondent cites *Smith v. Monongahela Power Co.* as applicable legal precedent to this appeal to eliminate her burden under the *Riner* test and argue that the Petitioner prove by clear and convincing evidence that an agreement was not reached. Resp. Br. at 7, 11; *Smith v. Monongahela Power Co.* 189 W. Va. 237, 429 S.E.2d 643 (W. Va. 1993). The facts in *Smith* involved a personal injury lawsuit with multiple tortfeasors wherein one of the tortfeasors and the injured party entered into a settlement agreement for a complete release of liability. See *Smith*, 189 W. Va. at 241, 429 S.E.2d at 647. The remaining tortfeasor objected to the settlement because it believed the settlement agreement was not made in good faith. *Id.* The Court established a standard for determining whether a settlement agreement between a plaintiff and a joint tortfeasor lacks good faith:

The determination of whether a settlement has been made in good faith rests in the sound discretion of the trial court. The focus of the trial court's determination is not whether the settlement fell within a "reasonable range" of the settling tortfeasor's proportional share of comparative liability, but whether the circumstances indicate that the non-settling tortfeasor was substantially deprived of a fair trial because of corrupt behavior on the part of the plaintiff and the settling tortfeasor or tortfeasors. The determination of the trial court may be based on such evidence as it deems appropriate in the circumstances. In many (if not most) cases, a review of discovery documents and affidavits from counsel will be sufficient. The trial court may, in its discretion, conduct a hearing on the issue, but it is not required to do so.

Syl. Pt. 7, *Smith*, 189 W. Va. 237, 429 S.E.2d 643.

The Respondent heavily edited Syllabus Point Number 7 in an attempt to apply it to the facts in this case:

The determination of whether a settlement has been made in good faith rest in the sound discretion of the Trial Court . . . the determination of the Trial Court may be based on such evidence as it deems appropriate in the circumstances. In many (if not most) cases, a review of discovery documents and affidavits from counsel will be sufficient. The Trial Court may, as its discretion, conduct a hearing on the issue but it is not required to do so

Resp. Br. at 7.

In reading the full Syllabus Point, *Smith* addresses a totally different area of the law with vastly different issues. The facts in *Smith* dealt with a plaintiff and two tortfeasors wherein the plaintiff and one of the tortfeasors reach an agreement and the other tortfeasor challenged the good faith basis for that agreement because the non-settling tortfeasor is deprived of a fair trial. In *Smith* all the parties agreed that a settlement was reached, but an outside party disputed the good faith reason for the settlement agreement. In this appeal the Respondent and Petitioner are disputing whether they even entered into a settlement agreement, and no third party has raised any issue concerning whether a settlement agreement was made in good faith. *Smith* simply does not apply to this case.

The Respondent further cites Syllabus Point 5 in *Smith*, but it appears that she heavily edits it to again in an attempt to shift the Respondent's burden onto the Petitioner: "settlements are presumptively made in good faith. A Defendant (here, Petitioner) seeking to establish that a settlement . . . lacks good faith has the burden of doing so by clear and convincing evidence." Resp. Br. at 11 (quoting from Syl. Pt. 5, *Smith*, 189 W. Va. 237, 429 S.E.2d 643). The Respondent uses this heavily edited quotation to assert that the Petitioner had a clear and convincing burden: "Based on that Syllabus Point, the settlement in this case is entitled to a presumption that the settlement was made in good faith. The Petitioner had the burden of showing that it was not made in good faith, by clear and convincing evidence." Resp. Br. at 11.

The unedited Syllabus Point again shows that the Respondent is incorrect that *Smith* applies to this case:

Settlements are presumptively made in good faith. A defendant seeking to establish that a settlement made by a plaintiff and a joint tortfeasor lacks good faith has the burden of doing so by clear and convincing evidence. Because the primary consideration is whether the settlement arrangement substantially impairs the ability of remaining defendants to receive a fair trial, a settlement lacks good faith only upon a showing of corrupt intent by the settling plaintiff and joint tortfeasor, in that the settlement involved collusion, dishonesty, fraud or other tortious conduct.

Syl. Pt. 5, *Smith*, 189 W. Va. 237, 429 S.E.2d 643.

Reviewing Syllabus Point 6 from *Smith*, in which the Court discusses key factors in determining whether a settlement agreement lacks good faith, plainly shows that Syllabus Point 5 does not apply to the facts in this case:

Some factors that may be relevant to determining whether a settlement lacks good faith are: (1) the amount of the settlement in comparison to the potential liability of the settling tortfeasor at the time of settlement, in view of such considerations as (a) a recognition that a tortfeasor should pay less in settlement than after an unfavorable trial verdict, (b) the expense of litigation, (c) the probability that the plaintiff would win at trial, and (d) the insurance limits and solvency of all joint tortfeasors; (2) whether the settlement is supported by consideration; (3) whether the motivation of the settling plaintiff and settling tortfeasor was to single out a non-settling defendant or defendants for wrongful tactical gain; and (4) whether there exists a relationship, such as family ties or an employer-employee relationship, naturally conducive to collusion.

Syl. Pt. 6, *Smith*, 189 W. Va. 237, 429 S.E.2d 643.

The factors in Syllabus Point 6 to determine whether a settlement agreement was reached in good faith cannot even be analyzed with the facts in this case. Even so, the Respondent asserts that a clear and convincing standard applies to the Petitioner because Syllabus Point 5

places that burden on a joint tortfeasor. *See* Resp. Br. at 11. If either party proved by a preponderance of the evidence that a settlement agreement was reached or not reached, then that would be sufficient. The clear and convincing evidence standard set forth in *Smith* applies when a third party defendant attempts to prove that a plaintiff and a joint tortfeasor entered into a settlement agreement in bad faith thereby substantially impairing the ability of remaining defendants to receive a fair trial. Thus, *Smith* does not apply to this case, and the Respondent incorrectly uses *Smith* in an attempt to distort the Respondent's burden under the *Riner* test.

The Respondent cites additional case law that West Virginia law favors a resolution of controversies through settlement. Resp. Br. at 11. The Petitioner agrees that the law favors settlements agreements and upholds and enforces such contracts if they are fairly made and are not in contravention of some law or public policy. However, the Respondent still has the burden to prove a settlement agreement was reached. The Respondent's argument is contrary not only to *Riner*, but fundamental contract law. The Respondent does not receive any presumption in favor of the alleged settlement agreement until after the Respondent proves a settlement agreement was actually reached.

CONCLUSION

The Respondent has not raised any valid argument concerning either the Statute of Frauds or the *Riner* Test. The Statute of Frauds applies to settlement agreements, and it prohibits the Respondent from enforcing an alleged oral agreement for the transfer of real property. Pursuant to the Statute of Frauds, West Virginia law requires a signed, written contract for transferring interests in real property, and settlement agreements are construed as any other contract under West Virginia law. The Respondent has argued that she is the party being charged with the alleged agreement and the Petitioner has no interest in the disputed

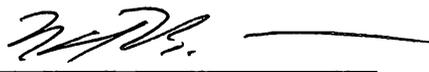
minerals. These arguments lack any merit because the Petitioner is the party to be charged because the Respondent is attempting to enforce the alleged settlement agreement against the Petitioner. Furthermore, the Petitioner reiterates that ownership of the minerals is also irrelevant because the Statute of Frauds is not limited to just the seller and transferor, but applies with equal force to the buyer and transferee. Even so, the Petitioner will establish before a trier of fact that he owns all of the disputed minerals, as evidenced by the probated estate and the Respondent's signed Acknowledgment of Distribution Agreement. Therefore, this Honorable Court should deny the enforceability of the alleged settlement agreement because it violates the Statute of Frauds. The Respondent has raised no rule of law or valid argument to contradict this simple conclusion.

The Respondent did not meet its burden under the four-part *Riner* test. The Respondent's arguments attempt to pass this burden onto the Petitioner by constantly stating that the Petitioner took minimal action at the hearing. *E.g.* Resp. Br. at 11. The Respondent raised *Riner* to enforce the alleged oral settlement agreement, and the Petitioner submitted a response to enforcing the settlement under the *Riner* test prior to the hearing.² But then at the hearing the Respondent did not testify and took minimal action to meet any of the *Riner* requirements. The Petitioner had no burden, and the Respondent is arguing that because the Petitioner did not prove the *Riner* test was not met, the Respondent met the *Riner* test.

This Honorable Court can resolve this appeal in two ways. First, the law is well-established that all contract law applies to settlement agreements. This Honorable Court needs only to specify that all contract law, including the Statute of Frauds, applies to settlement agreements. This resolution would simply clarify the existing law. Second, *Riner* established a

² See *Plaintiff's Reply Memorandum to Defendant's Response to Plaintiff's Motion to File First Amended Complaint for Declaratory Relief and Breach of Contract* contained in the Circuit Court's file.

four-part test for enforcing an unsigned settlement agreement at mediation. Since *Riner*, this Honorable Court has not published an opinion discussing a situation where a party failed to meet the *Riner* test. This case would be that opportunity, and a judicial opinion would provide guidance to the circuit courts in the future.

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 5TH day of September, 2014, I served the foregoing "Petitioner's Reply 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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