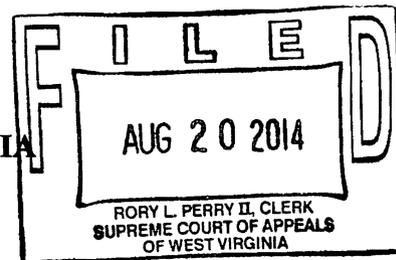


**BRIEF FILED  
WITH MOTION**

**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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**RESPONDENT'S BRIEF**

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**IN THE CIRCUIT COURT OF TAYLOR COUNTY, WEST VIRGINIA**

**G. THOMAS BARTLETT, III,  
an individual,**

**Petitioner,**

**v.**

**Civil Action No: 12-C-27  
(Judge Alan D. Moats)**

**MARY LOUISE LIPSCOMB  
an individual,**

**Respondent.**

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**RESPONDENT'S BRIEF**

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**STATEMENT OF THE CASE**

The Petitioner's statement of the case is essentially correct. Mildred B. Tucker devised and bequeathed her entire estate not only to the Petitioner and the Respondent, but also to another nephew, John Bartlett and a niece, Sally Jo Bartlett. The Respondent was a caregiver for Mildred Tucker. The Estate of Mildred Tucker included undivided interests in oil and gas in Taylor County, West Virginia. Upon the death of Mildred Tucker and the probate of her Will, title to the oil and gas interests were vested in the Petitioner, the Respondent, John Bartlett and Sally Jo Bartlett. This ownership continued for several years until Petitioner attempted to lease the oil and gas and discovered that he owned only an undivided one fourth (1/4) interest. He acquired deeds for a one half (1/2) interest from his siblings but Respondent has never executed a deed and thus, continues to be an owner of an undivided one fourth (1/4) interest in any minerals owned by Mildred Tucker.

The Statement of the Case by the Petitioner indicates that “Petitioner and Respondent are now in dispute concerning the ownership of the mineral interests.” This is not accurate. There is no dispute concerning the ownership of the interests. The dispute deals with matters arising after the death of Mildred Tucker. The Statement of the Case also indicates that a declaratory judgment should be entered, declaring that the Respondent had transferred ownership of her mineral interest to the Petitioner. Although this is the prayer of the declaratory judgment action, the Respondent’s interest in those minerals has never been transferred.

The Petitioner filed a Motion for Summary Judgment which was denied by the Circuit Court. It appears that the transcript of that hearing is not available but, at the time the Court denied the Motion for Summary Judgment, the parties were Ordered to mediate their dispute. Mediation occurred on June 6, 2013, at which time an agreement was reached to resolve the issues between the parties. At the direction of the Mediator, counsel for the Petitioner was to prepare a Settlement Agreement and deeds necessary to vest title to the oil and gas interests in the Petitioner, retaining for the Respondent some overriding royalty rights.

The only action the Petitioner took after mediation was, several months later, to fire his attorney. At no time between the mediation conclusion and his discharge of his attorney did the Petitioner ever communicate any issues regarding the settlement. In fact, by letter dated July 26, 2013 (A.R. 25), then counsel for the Petitioner, asked the Petitioner to approve documents. Nothing in that letter indicates any prior contact. In fact, the letter indicated that counsel had “left many messages over the past three or four weeks.” The letter also referred to the Petitioner as ignoring the calls. By Order entered August 23, 2013 (A.R. 46) a substitution of counsel occurred, two and one half (2 ½) months after the conclusion of mediation.

Some issues contained in the transcript are not mentioned by the Petitioner. On page 12 of that transcript (A.R. 12) is a comment by the current counsel for the Petitioner that after Petitioner received documents from Mr. Christie, he reviewed them and said “this isn’t what he wanted to do.” This is not a denial that there was a settlement, it is simply a true statement that the Petitioner, after the mediation, changed his mind and decided he did not want to do that which he agreed to do.

Another issue from the transcript which is not mentioned by the Petitioner is on the draft agreement, apparently current counsel for the Petitioner had been told that his former counsel had noted that the agreement was actually a one eighth (1/8) royalty on all parcels. This was not the agreement at the mediation and, apparently, the implication was that Mr. Christie, Petitioner’s prior counsel, had proposed changes.

When shown the agreement, Mr. Christie stated on page 18 (A.R. 18) “the yellow sticker on the front of this document that says one eighth (1/8) one eighth (1/8) is not my writing. I’m not sure whose writing it is.” Current counsel again asked Mr. Christie if other handwritten notes were his. Mr. Christie stated “it appears to be copies of drafts of the documents I prepared. There are notes on a number of pages, but that is not my handwriting. I’m not sure who made those notes.”

There is some discussion in the transcript concerning the letter from the mediator, James M. Wilson, to the Court. That letter is a one page letter being (A.R.26). Mr. Wilson stated “both parties actively engaged in the mediation and, after three (3) hours, reached an agreement to resolve the case. Because the settlement required the exchange of deeds, rather than prepare a document memorializing the settlement, the parties indicated Mr. Christie would promptly prepare the necessary documents and deliver them to Mr. Johnson.” The Petitioner now seems to be trying

to argue that the wording “reached an agreement to resolve the case” somehow means reached an agreement to agree to resolve the case. The letter basically speaks for itself.

The Petitioner in his Statement of Facts alleges “at no time during the hearing did the Respondent’s counsel present or request to present any sworn testimony to the Circuit Court that an agreement had been reached at mediation.” The Court accepted representations of counsel and, at the conclusion of the hearing, counsel for the Respondent offered to have Respondent execute the deed and agreements. The Petitioner refused to accept that. One omission is that at no time during the hearing did the Petitioner even offer to testify concerning his understanding of the mediation. A reading of the transcript indicates only that his attorney, who was not involved in the mediation, made various representations. His attorney never even requested that his client be permitted to testify. It would have been a simple matter to have the Petitioner sworn and provide the Court with his understanding of the mediation. There was never an attempt to do this.

### **SUMMARY OF ARGUMENT**

This Court should not reverse the Circuit Court of Taylor County’s decision, which is the subject of this appeal. The basis for this appeal is twofold. The Petitioner seems to believe that the Statute of Frauds in some fashion applies. The Circuit Court dealt with this argument. The Statute of Frauds does not apply since the agreement was not an agreement to sell or transfer an interest in real estate but was an agreement to settle a case. The documents prepared by counsel for the Petitioner would have transferred the interest.

The second argument is that the Court erroneously determined that an agreement had been reached. The case cited by Petitioner in the summary argument, *Riner v. Newbraugh*, 211 W.Va. 137, 563 S.E.2d 802 (2002) deals with an unwritten settlement agreement which the Court

held could be enforced if 1), the parties to mediation reached an agreement, 2), a memorandum of that agreement was prepared by the mediator, *or at his direction*, incident to the agreement, 3) the Circuit Court finds after a properly noticed hearing that the agreement was reached by the parties free of coercion, mistake or other unlawful conduct and 4) the Circuit Court makes findings of fact and conclusions of law sufficient to enable appellate review of its Order enforcing the agreement. As will be discussed later in the argument section of this brief, all those tests were met. The Petitioner cites the second requirement as “the Mediator must prepare a memorandum documenting that agreement.” The second step actually provides that a memorandum of the agreement was to be prepared by the Mediator *or at his direction*, incident to the agreement. Mr. Christie stated (A.R. 8) “I was directed to prepare a Settlement Agreement and the accompanying deeds that would go with the Settlement Agreement, which I did.” The letter from Mediator Wilson (A.R. 26) recognized that, rather than prepare a document, Mr. Christie would promptly prepare the documents and deliver them.

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

The Respondent does not believe this case rises to the level of requiring oral argument. The matters should be disposed of summarily and the decision of the Circuit Court of Taylor County should be affirmed. Judge Moats took all the action he should have taken, Petitioner failed to do anything to support his position and thus, there is no reason for oral argument. This case has been resolved.

## **ARGUMENT**

### **A. FIRST ASSIGNMENT OF ERROR**

The gist of this assignment appears to be that because this case involved real estate, the Statute of Frauds (West Virginia Code Chapter 36, Article 1, Section 3) would apply. The Petitioner has set out that particular Section which begins “no contract for the sale of land . . . 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.” In this case the “contract” was not for the sale of land, but was an agreement to settle a case pursuant to mediation. Judge Moats fully discussed this in the transcript included in the Appendix. The person to be charged by the memorandum in this case would have not been the Petitioner, but the Respondent. The Petitioner was giving up nothing but the Respondent was to sign deeds. The agreement was never tendered to the Respondent for her signature. The Petitioner seems to be arguing that because he refused to sign the contract and did not give the Respondent a chance to sign it, he can use his actions to invoke the Statute of Frauds.

The Statute of Frauds does not require that the Petitioner sign the contract, even assuming that it applies to a negotiated settlement of a civil action and not to a contract to sell property. Since the Petitioner did not need to sign any agreement and the Respondent would have signed had it been tendered to her, it is difficult to understand the position of the Petitioner who now argues that because the Respondent was never given a chance to sign the agreement he can benefit from his inaction. In fact, the brief of the Petitioner states “the Petitioner never signed a document evidencing the alleged oral settlement.” The Statute of Frauds does not require that everyone involved in a contract sign it, but only the party charged by it. The Petitioner misreads the purpose of the agreement, which was a settlement, and further misapplies the Statute of Frauds.

## B. SECOND ASSIGNMENT OF ERROR

The Petitioner apparently believes that the second error is the most important based on the length of the brief. That error essentially deals with the requirement of Rule 25.14 of the West Virginia Trial Court Rules that if the parties reach a settlement or a resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written contract. Although that Rule seems to require some written agreement, this Court addressed an instance in which no written contract existed in *Riner v Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (W. Va. 2002).

Initially, the Respondent agrees that an abuse of discretion standard applies to the Circuit Court's ruling. This Court in *Devane v Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999) involved a settlement agreement which was in writing. The determination of the fairness of the agreement rested in the sound discretion of the trial Court.

The Petitioner failed to cite another relevant case, *Smith v Monongahela Power Co.*, 189 W.Va. 237, 429 S.E.2d 643 (1993). Syllabus Point 7 of that case provides in part:

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, at its discretion, conduct a hearing on the issue but it is not required to do so

Applying this Syllabus Point to the case now before the Court, Judge Moats followed that case. Under these circumstances, there was no abuse of discretion since, as Justice Neely pointed out, in most cases a review of discovery and affidavits of counsel will be sufficient. Here, Judge Moats did not rely on affidavits, but upon the representations of three (3) attorneys.

Judge Moats, at the beginning of the hearing, on page 4 of the transcript (A.R.4) in response to a question by counsel stated “That’s what I’m asking you for is to tell me as an officer of the court what happened. That’s what I always ask attorneys. I don’t put attorneys on the witness stand unless there’s something extraordinary.” After that, Judge Moats heard representations from two (2) attorneys and received and read into the record the letter from the mediator.

At the outset of the discussion concerning the application of *Riner*, the Court was attempting to determine if a meeting of the minds occurred. The contention of the Petitioner seems to be that there was no meeting of the minds. The Court in *Riner* determined that there was no meeting of minds, mainly because additional terms and conditions were contained in a second agreement which were absent from the mediator’s agreement. Also, in that case the Court conducted two (2) hearings and received testimony not only from the parties, but their counsel.

Totally missing from this entire discussion, is the silence of the Petitioner. The Petitioner complains that there was no meeting of minds and thus no agreement. Three (3) attorneys disputed that. The Petitioner, as shown in the transcript, was present in person at the February 10, 2014 hearing, but spoke not one word. In addition, the transcript reveals that counsel for the Petitioner never asked that the Petitioner be permitted to testify. There is nothing to have prevented the Petitioner from taking the witness stand, being sworn and testifying. Now the Petitioner is complaining that the Court relied on the representations of three (3) attorneys. Since the Petitioner voluntarily chose to offer no evidence, there was nothing else on which the Court could have relied.

As pointed out above, in *Riner*, an agreement that was different in substance from the agreement reached as a result of mediation existed. That does not exist in this case since the agreement, as represented by counsel, accurately set out the settlement.

The Court in *Riner* also established a four-part test to determine if a non-written settlement agreement should be approved. The first test was that the parties to the mediation reached an agreement. On this part, there is no question that the parties reached an agreement. The three (3) attorneys present at the mediation all affirmed this. The only party who could have testified to the contrary was the Petitioner and he chose not to do so.

The second part is that a memorandum of the agreement be prepared by the mediator or at his direction incident to the agreement. Although counsel for Petitioner quotes a portion of the second requirement, the portion dealing with the agreement being prepared at the direction of the mediator is omitted.

As was stated above, in the transcript at page 8 (A.R. 8), counsel for the Petitioner, after reciting the conversations between the mediator and the parties to ascertain that both Respondent and Petitioner agreed to the terms, stated “I was directed to prepare a settlement agreement and the accompanying deeds that would go with the settlement agreement, which I did.” It is apparent that the second part of the *Riner* test was met. The mediator directed that the agreement be prepared.

This is further supported by the letter to the Court from the mediator (being A.R. 26). The mediator stated that both parties had engaged in mediation and reached an agreement to resolve the case. The mediator continued “because the settlement required the exchange of deeds, rather than prepare a document memorializing the settlement, the parties indicated Mr. Christie would promptly prepare the necessary documents and deliver them to Mr. Johnson.” This totally complies with, not only the wording of the second test, but also the spirit of it.

The third part of the *Riner* test is that the Circuit Court finds, after a properly noticed hearing, that an agreement was reached by the parties free of coercion, mistake or other unlawful

conduct. As Mr. Christie said in the above quotation, after everything was finished and both parties were in the room, Mr. Wilson went through the proposal carefully and ask both the Petitioner and the Respondent if they agreed. Both of them responded in the affirmative. At no time did the Petitioner express any concerns involving coercion, mistake or unlawful conduct.

On page 13 of his Memorandum, the Petitioner stated that the Respondent had produced no evidence or testimony about a meeting of the minds but only made proffers to the Circuit Court. This is exactly the procedure the Circuit Court requested. The argument continued that “neither party testified that a meeting of the minds” occurred.” Obviously the Respondent did not need to testify since representations made by the three (3) attorneys completely addressed all the issues. It is still difficult to understand the Petitioner’s stating that “neither party testified” since he made no attempt to testify and at no point even requested to testify. He is now contending that his voluntary decision not to testify should be interpreted to mean that there was no meeting of the minds. This argument might have some validity had the Petitioner actually testified and denied that a meeting of the minds occurred. The only indication of this is an allegation that a meeting of the minds did not occur. Again, one must wonder about the Petitioner’s not offering any testimony and then asking the Court to ignore the representations of three (3) attorneys and determine that a meeting of the minds did not occur.

The fourth test of *Riner* is that the Circuit Court makes findings of fact and conclusions of law sufficient to enable appellate review. The brief of the Petitioner alleges that the fourth part was not met because “the Circuit Court’s Order lacks sufficient findings of fact to enable appellate review whether agreement was reached between the parties.” Reading the transcript, it is difficult to determine what else Judge Moats could have done.

On this particular issue, the Court in *Smith v Monongahela Power Co.*, supra Syllabus Point 5 held in part “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.” 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. Since the Petitioner showed absolutely nothing, that burden was not met.

In *Riner*, the Supreme Court cited several West Virginia cases which basically held that the law favors a resolution of controversies. *Sanders v Roselawn Memorial Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968); *Horace Mann Insurance Co. v Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004); *Woodrum v Johnson*, 210 W. Va. 762, 559 S.E.2d 908 (2001); *Certain Underwriters v Pinnoake Resources, LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008); 1

The United States District Court for the Northern District of West Virginia addressed a case similar to the one now before the Court. In *United States ex. rel. McDermitt v Centex-Simpson Construction Co.*, 34 F.Supp 2d 397(N.D.W.V. 1999) a similar instance arose. The Court in the facts section (34 F.Supp 2d 397, 398) regarding a status conference stated that “significantly, counsel for both parties and this Court all agreed on the record that a valid settlement agreement was entered on May 15, 1998.” This is the scenario which Judge Moats used as an analogy in his reasoning that a settlement agreed to in open Court was enforceable. The case also discussed the “strong policy of the Fourth Circuit” regarding settlements to conserve scarce judicial resources. Judge Broadwater stated that “once a settlement agreement is reached, a District Court Judge

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1 See also – *Schoolhouse, LLC v Creekside Owners Association*, Case # 13-0812 Supreme Court of Appeals Memorandum Decision filed May 8, 2014.) (Footnote 10).

possesses the inherent authority to enforce a settlement agreement and to enter judgment based on agreement without a plenary hearing”. Also, in order not to be enforced, the agreement would need to be substantially unfair. In this case, that simply did not exist and judicial economy becomes a factor.

Interestingly, Judge Broadwater cited on page 399 an Eighth Circuit case (*Worthy v McKesson Corp.*, 756 F.2d 1370 (8<sup>th</sup> Cir. 1985) holding that the parties to a voluntary settlement agreement cannot avoid the agreement simply because the agreement later proves to be disadvantageous and cited another Federal case, *Mungin v Calmar Steamship Corp.*, 342 F. Supp. 484 (D.MD 1972) holding “a settlement agreement enjoys great favor with the Courts. Consequently, it is only in the most extraordinary circumstances that such a pact will be vacated.” The case is squarely on point. The only difference was the settlement agreement was reached in Court with no writing as opposed to here, in which a writing was to be signed. It is difficult to determine if the Federal standard applies to West Virginia Courts. That decision contains an excellent discussion.

The pertinent part about that decision is that an agreement cannot be avoided simply because it is disadvantageous. This is exactly the situation now facing this Court. On page A.R. 12 of the transcript of the February hearing, 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.” The representation wasn’t that there was no agreement reached, but only that the Petitioner simply did not want to do that which was set out in the documents.

This is further clarified by the attempt of the Petitioner to introduce a document with supposed notes by Mr. Christie. The notes indicated a one eighth (1/8) interest on three parcels. This is not the agreement which was reached by the parties and it certainly was not a note made by

Mr. Christie. However, the one eighth (1/8) royalty would be more beneficial to the Petitioner and it is obvious that the Petitioner was simply attempting to better his position. In the Federal case above, this accurately demonstrates an instance in which a party is trying to avoid an agreement because it may be disadvantageous. The obvious attempt by the Petitioner to change the percentages clearly demonstrates that the agreement was, in fact, reached but, as counsel for the Petitioner stated, this was not something the Petitioner “wanted to do”.

Another case cited in *Riner* is *Few v Hammack Enterprises, Inc.*, 132 N.C. App 291 511 S.E.2d 665. (1999). In that case, the mediator reported that all issues in the case had been settled and a mediation settlement was issued for signature. It was signed by the Plaintiff. The Defendant refused to sign. The Defendant offered no reason for refusing to sign and the Court determined that “refusal to sign said document was unwarranted and constituted a willful and grossly negligent failure to comply with Rule 4c . . . resulting in substantial interference with the business of the Court.” 511 S.E.2d, at 668. The gist of that decision was the information a mediator could supply. That issue does not exist here since the mediator did not reveal anything about the mediation, but only the settlement. The Court also cited several North Carolina cases and concluded “Indeed, it is well settled that parties may orally enter a binding agreement to settle a case.” 511 S.E.2d at 671.

If *Few* is applied here, only as persuasive authority, again the Petitioner has offered no reason for his refusal to sign the settlement agreement. At the risk of belaboring the point, Petitioner had an opportunity to explain his refusal but chose not to do so. He should not be rewarded for this.

## CONCLUSION

Reviewing all this, it is apparent that pursuant to Court ordered mediation, a settlement agreement between the parties was reached. The Petitioner, because the documents did not set out “what he *wanted*” to do, simply refused to sign. It is illogical for the Petitioner to insist

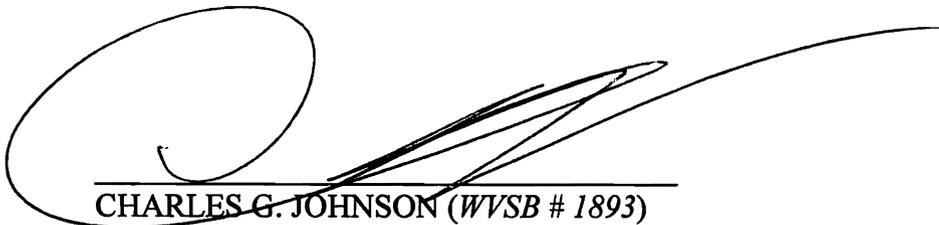
on a signed document when the Statute of Frauds does not require that he sign anything and the lack of a signature by Respondent and Petitioner is his own doing.

Along this same line, the *Riner* case was followed by Judge Moats. Had the Petitioner wished to express his opinion about the proceedings at the mediation he could have done so, but chose the opposite. Again, it is difficult to understand that he can now complain about Judge Moat's handling of this situation and benefit by his failure to take even minimal action.

For all of the above reasons, the decision of the Circuit Court of Taylor County set out in the Order entered on March 6, 2014 should be affirmed.

Respectfully submitted,  
MARY LOUISE LIPSCOMB

By Counsel,

A large, stylized handwritten signature in black ink, starting with a large loop on the left and extending across the page to the right.

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

**G. THOMAS BARTLETT, III,  
Plaintiff Below, Petitioner**

**Vs.) No. 14-0278**

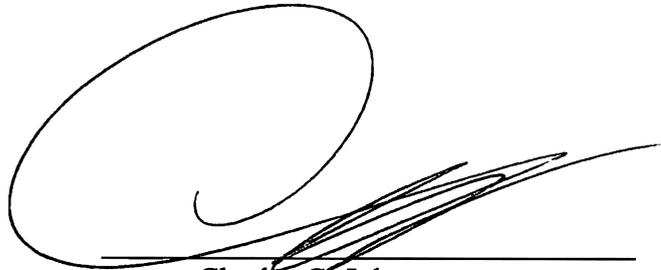
**Appeal from a final order of the Circuit  
Court of Taylor County (12-C-27)**

**MARY LOUISE LIPSCOMB  
Defendant Below, Respondent.**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19 day of August, 2014, I served the foregoing  
“*Respondent’s Brief*” upon the following by depositing a true copy thereof in the United States Mail,  
postage prepaid, in an envelope addressed as follows:

Hunter B. Mullens, Esq.  
Mullens & Mullens, PLLC  
PO Box 95  
Philippi WV 26416

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by several horizontal strokes, positioned above a solid horizontal line.

**Charles G. Johnson**