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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKET NO. 22-0434



KRISTIN L. HUNNICUTT,

Petitioner,

FILE COPY

v.

Appeal from order of the  
Circuit Court of Randolph County  
Civil Action No. 22-C-15

SUSAN H. HUNNICUTT,

Respondent.

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RESPONDENT'S BRIEF

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## **I. INTRODUCTION**

This case originates out of the Circuit Court of Randolph County, West Virginia. Respondent filed the underlying lawsuit against Petitioner, and others, regarding the unlawful removal of timber from real estate for which Respondent owns a one-quarter interest. (J.A. 5-17). Petitioner filed a motion to dismiss in the circuit court arguing that a settlement agreement entered into between Petitioner and Respondent in 2015 relating to litigation surrounding the settlement of their late father's estate precluded Respondent from bringing the underlying action. (J.A. 18-42). The circuit court heard argument on April 11, 2022, and denied the motion. (J.A. 92-93). In its denial, the circuit court expressly permitted any party to re-raise the issue with additional authority and evidence for the court's consideration. (J.A. 92-93). Nonetheless, Petitioner filed this appeal seeking review of the circuit court's order denying her motion to dismiss.

## **II. STATEMENT OF CASE**

Petitioner and Respondent are biological sisters born to James M. Hunnicutt and Mary Virginia Hull Hunnicutt. (J.A. 6-7, 19). Kristin and Susan's parents divorced in the 1960's. (J.A. 50, 73). Their mother died on January 28, 1988, and their father died on September 6, 2012. (J.A. 6, 35, 62).

Following their father's death, a dispute arose between Petitioner and Respondent regarding the settlement of their father's trust and his estate. (J.A. 35, 50-51, 73). As a result of the dispute, a lawsuit was filed and litigated in the United States District Court for the Eastern District of Virginia. (J.A. 35, 50-51). The Virginia litigation was ultimately resolved by settlement and compromise in 2015. (J.A. 35-42). In furtherance of that settlement, the Petitioner and Respondent entered into a *Release and Settlement Agreement*. (J.A. 35-39). As part of the 2015 *Release and Settlement Agreement*, Respondent received a payout of \$475,000.00 "from the assets of the

Trust....”<sup>1</sup> (J.A. 40). The parties also agreed to release any and all claims against each other and to dismiss the civil case pending before the federal court. (J.A. 35-39).

Unbeknownst to Respondent at the time of the litigation and settlement in 2015, Petitioner had, five years earlier, entered into a contract for the removal of timber, and actually removed timber, from real estate upon which Respondent owned a one-quarter interest. (J.A. 6-8, 74). More specifically, Petitioner’s and Respondent’s mother had become seised and possessed of a one-half interest in a certain tract or parcel of real estate containing 200 acres, more or less, in Randolph County, West Virginia. (J.A. 6). Following their mother’s death on January 29, 1988, Petitioner and Respondent inherited the one-half interest, leaving Petitioner and Respondent seized and possessed of a one-quarter interest, each, in the real estate. (J.A. 6-7).

On September 10, 2010, Petitioner, along with the owners of the other one-half interest of the real estate, and Larry S. Barger, a licensed Forester in the State of West Virginia, entered into a Timber Sale Agreement with Inter-State Hardwoods, Inc., for sale of the timber from the real estate. (J.A. 5, 7-8, 12-17). Sometime thereafter, the timber was harvested from the real estate and the funds were distributed. (J.A. 8, 56, 66). Petitioner took and received one-half of the total proceeds, despite Respondent’s ownership of a one-quarter interest. (J.A. 8, 56, 66).

Respondent first learned of the Timber Sale Agreement and removal of the timber in July, 2021. (J.A. 8). Shortly thereafter, Respondent acquired a copy of the Timber Sale Agreement and determined the identity of the parties to the Timber Sale Agreement. (J.A. 8, 12-17).

After determining the responsible parties, Respondent initiated the underlying action in the Circuit Court of Randolph County, West Virginia, seeking judgment against Kristin L. Hunnicutt,

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<sup>1</sup> Petitioner asserts, in her brief, that she paid Respondent \$475,000.00, which is not reflected by the *Release and Settlement Agreement*. (J.A. 36).

Larry S. Barger, and Inter-State Hardwoods, Inc., for damages Respondent suffered for not being a party to the Timber Sale Agreement. (J.A. 5-10).

Following receipt of the Complaint, Petitioner moved the circuit court to dismiss the case, arguing that the *Release and Settlement Agreement* entered into in 2015 regarding their father's estate precluded Respondent's ability to bring the underlying action. (J.A. 18-32). To address the motion, the lower court convened a hearing on April 11, 2022. (J.A. 55-91). After hearing argument, the lower court reasoned, "This is something that I think in everybody's arguments from the statute of limitations issue, to the discovery issue, to the application of the settlement agreement, are all things that can be developed, that can be subsequently addressed in other dispositive motions." (J.A. 80). With regard to the 2015 *Release and Settlement Agreement*, the lower court specifically stated, "I would like to know any authority that you might have in regard to this settlement agreement that you have, how the Supreme Court has dealt with these global resolutions, and says, um, from the beginning of time up until now, when they are litigating subject A, how that may apply to subject B, um, of the estate of dad is --is one thing. Um, the estate of mom may be another." (J.A. 81).

The lower court, wanting more information with regard to Petitioner's contention that the unrelated 2015 *Release and Settlement Agreement* precluded Respondent's claims, denied Petitioner's motion to dismiss, but noted in its order that the court's ruling "shall not be construed to preclude any party from filing a subsequent, dispositive motion as the case is more fully developed through the discovery process." (J.A. 92-93).

Petitioner now appeals the circuit court's order denying her motion. Though Petitioner's motion to dismiss contained other grounds, the only assignment of error relates to the application of the 2015 *Release and Settlement Agreement*, and therefore, Petitioner only addresses the

applicability and provisions of the 2015 *Release and Settlement Agreement* to the underlying controversy.

### III. SUMMARY OF ARGUMENT

The 2015 *Release and Settlement Agreement* does not apply to the underlying controversy, and therefore, the Respondent requests that the circuit court's order be affirmed and the matter remanded. Further, the order is interlocutory and not subject to the collateral order doctrine exception for the reasons set forth in Respondent's *Motion to Dismiss Appeal* being filed contemporaneously.

The 2015 *Release and Settlement Agreement* does not apply to the underlying controversy, as it had been entered into and contemplated for purposes of settling claims relating to Petitioner's and Respondent's father's trust and estate. And application of the 2015 *Release and Settlement Agreement* to the underlying controversy, as Petitioner suggests, would contradict long-standing contract principles regarding meeting of the minds and contemplation of the parties.

Moreover, application of the 2015 *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to perpetrate a fraud while preying upon the law of this State favoring compromise and settlement. Petitioner knew, at the time of entering the 2015 *Release and Settlement Agreement*, of her unlawful actions and did not disclose the existence of the claim. Based upon her argument before this Court, Petitioner sought, during the settlement and compromise of the 2015 litigation, to entice Respondent into entering an agreement where Petitioner would be released from liability for a claim she knew Respondent remained unaware.

Finally, application of the 2015 *Release and Settlement Agreement* to the underlying controversy would create a dangerous risk to litigants seeking to resolve and compromise claims and will serve only to squelch the law of this state favoring resolution of controversies by contracts

of compromise and settlement. For those reasons, Respondent respectfully requests that the circuit court's order be affirmed and the matter remanded.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 18, oral argument is unnecessary because the dispositive issues in this case have been authoritatively decided. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision because this case involves an assignment of error in the application of well-settled law.

#### **V. STANDARD OF REVIEW**

The standard of appellate review from an order dismissing a claim under W.Va. R. Civ. P. 12(b)(6) for failure to state a claim is *de novo*. *Liberty Mut. Ins. Co. v. Morrissey*, 236 W. Va. 615, 621, 760 S.E.2d 863, 869 (2014), citing *Sturm v. Board of Educ. of Kanawha County*, 223 W.Va. 277, 280, 672 S.E.2d 606, 609 (2008). “The controlling principle of law on appeal, as at the trial court level, is that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Id.* Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008), citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604–05, 245 S.E.2d 157, 158–59 (1978).

#### **VI. ARGUMENT**

The 2015 *Release and Settlement Agreement* entered into for purposes of settling claims surrounding their father's trust and estate does not apply to the underlying controversy because it was not contemplated as part of the settlement and its application permits Petitioner to perpetrate



a fraud. Further, and for the reasons set forth in Respondent's contemporaneously filed *Motion to Dismiss Appeal*, the matter is not ripe for appeal.

Before delving into argument, Respondent is compelled to address an issue with how Petitioner has presented this appeal and lay the framework for this response. The issue before the circuit court when addressing Petitioner's motion to dismiss was somewhat unique because it required the court to first determine whether the 2015 *Release and Settlement Agreement* applied to the underlying controversy. If the circuit court had determined that the 2015 Agreement applied, then the next issue before the circuit court would have been how the 2015 *Release and Settlement Agreement* affected the underlying controversy, i.e. whether the 2015 *Release and Settlement Agreement* required arbitration.

Most of the cases that have come before this Court have dealt with the application of a contract, and arbitration agreements within those contracts, that directly related to the controversy at hand. For instance, in *Credit Acceptance Corp.*, this Court considered the enforceability of retail installment contracts in connection with vehicle purchases, which contracts contained arbitration clauses. *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 520, 745 S.E.2d 556, 558 (2013). There was no dispute that the contracts were directly related to the controversy, as the Plaintiffs had executed the contracts when purchasing the vehicles. The only issue before the Court was the enforceability of the arbitration clauses contained in the contracts that were at the heart of the dispute.

In this case, and unlike *Credit Acceptance Corp.*, the lower court was presented with a contract unrelated to the underlying controversy. As a result, and to address the Petitioner's motion, the circuit court was faced with the initial question of whether the 2015 *Release and Settlement Agreement* applies to the underlying controversy. In its analysis, the circuit court

acknowledged to Petitioner's Counsel, "I agree with you that if there is a valid arbitration agreement the Hunnicutt sisters will have to go to arbitration but I don't know whether that valid that arbitration agreement in the release relating to dad's estate is applicable and can be enforced in dealing with mom's estate. So I would like to have some more information about that." (A.R. 82). By the circuit court's pronouncements, it is apparent that the circuit court addressed only the first question in its ruling, and kept open the possibility of revisiting that question after Petitioner provided additional authority and evidence supporting her contention.<sup>2</sup>

In her appeal, Petitioner focuses much argument on the second part of the analysis, specifically the validity of the 2015 *Release and Settlement Agreement* and its terms, including arbitration, rather than focusing on the primary issue of whether the 2015 *Release and Settlement Agreement* applies to the underlying controversy. Because Respondent views the primary issue in this case as whether a settlement agreement from an unrelated case applies to the controversy at hand, Respondent focuses her argument on that issue in response to the appeal.

The 2015 *Release and Settlement Agreement* does not apply to the underlying controversy in this case because 1) the parties, particularly Respondent, did not and could not have contemplated the existence of the underlying controversy at the time of executing the 2015 *Release and Settlement Agreement*, 2) application of the 2015 *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to carry out a fraud, and 3) permitting the release of unknown controversies, for which the opposing party is presumably aware and fails to disclose, creates dangerous risk to litigants attempting to compromise and resolve claims.

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<sup>2</sup> Because the circuit court's ruling on the first inquiry was not final, and for other reasons set forth therein, Respondent has filed her *Motion to Dismiss Appeal* for lack of an appealable order. Respondent incorporates her memorandum of law accompanying the motion for additional argument on that issue.

First, the 2015 *Release and Settlement Agreement* does not apply to the underlying controversy because it was entered into and contemplated for purposes of settling claims relating to Petitioner's and Respondent's father's trust and estate. The 2015 *Release and Settlement Agreement* is not related, in any way, to Petitioner's tortious actions in entering into the Timber Sale Agreement and reaping the benefits of the timber sale for herself.

As this Court reaffirmed in *Woodrum v. Johnson*, 210 W.Va. 762, 771, 559 S.E.2d 908, 917 (2001), the law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation. Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968). Nevertheless, settlement agreements are to be construed "as any other contract," *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979), and, as noted in syllabus point 1 of *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932): "A meeting of the minds of the parties is a sine qua non of all contracts." *Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 452, 590 S.E.2d 641, 645 (2003). "A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." *Conley v. Hill*, 115 W. Va. 175, 174 S.E. 883 (1934), overruled on other grounds by *Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 213 S.E.2d 102 (1975).

In this case, Petitioner attempts to hang her hat upon a "but not limited to" provision of the 2015 *Release and Settlement Agreement* as the basis for arguing that the 2015 *Release and Settlement Agreement* applies to the underlying controversy. The *Release and Settlement Agreement* defines "CONTROVERSIES" as:

"[A]ll claims, disputes, controversies, causes of action, and demands, including, but not limited to, in connection with, relating to, or arising from the Trust, the Trust's assets, the Decedent, the Decedent's assets, the Decedent's Last Will and Testament, Decedent's Estate and the Civil Action, including but not limited to any other claim, cause of action, controversy, dispute, property, interest, entitlement, chose in action, or any other benefit whatever, whether known or unknown, and

wherever situate and in whatever form it may exist, whether based on federal or state law, statute or common law, and whether sounding at law or in equity....” (J.A. 35).

With regard to the release language of the *Release and Settlement Agreement*, it provides a release from the following:

“[A]ll claims, controversies, suits, demands, obligations, allegations (express and implied), rights, responsibilities, duties, obligations, remedies (including for any past or future accounting, fiduciary removal, or any other equitable entitlement or expectancy whatever), causes of action (and any and all related damages, payment, property, property interest, liabilities, losses, fees, attorney's fees, interest, costs, and expenses), including, **but not limited to**, the CONTROVERSIES (as defined in this Agreement), of any kind or character, whether now known or unknown, asserted or unasserted, liquidated or unliquidated, secured or unsecured, whether sounding at law or in equity, whether arising by statute or under the common law, and whether provided for by state or federal law, which SUSAN has or may have, directly or indirectly, legally or beneficially, from the beginning of the world through the date of SUSAN's receipt of the Settlement Payment.” (emphasis added). (J.A. 36).

Petitioner, in an effort to place a square peg through a round hole, contends the underlying controversy should be governed by the 2015 *Release and Settlement Agreement* because it falls within the “but not limited to” provision of the release.

Application of the 2015 *Release and Settlement Agreement* to the underlying controversy, as Petitioner suggests, contradicts long-standing contract principles regarding meeting of the minds and contemplation of the parties. Presumably, Petitioner was aware of her tortious conduct and the removal of timber from the real estate prior to entering into the 2015 *Release and Settlement Agreement*. And under Petitioner’s argument in this case, she would be getting released from tortious liability for which Respondent was unaware. As a result, and under that argument, there could have been no meeting of the minds.

The weakness in Petitioner’s argument is further illustrated with a hypothetical. Under Petitioner’s argument, had Respondent stole Petitioner’s identity and incurred thousands of dollars

of credit card debt in Petitioner's name prior to execution of the 2015 *Release and Settlement Agreement*, Petitioner would be left without a remedy. It is difficult to fathom that Petitioner, herself, believed the 2015 *Release and Settlement Agreement* to preclude relief in such an instance.

Additionally, the settlement funds for the 2015 litigation were paid from Petitioner's and Respondent's father's trust. At the time of executing the 2015 *Release and Settlement Agreement*, Respondent could not have contemplated that she would be releasing Petitioner from unrelated tortious conduct based upon a payment from their late father's trust. And application of the 2015 *Release and Settlement Agreement* to that effect would only further Petitioner's attempt to escape liability at no cost or consequence to Petitioner. Because there could have been no meeting of the minds under the argument Petitioner seeks to advance; because Respondent, or any other reasonable person, would not have released Petitioner's tortious conduct for consideration paid from their father's trust; and because application of the 2015 *Release and Settlement Agreement* to the underlying controversy could permit Petitioner to escape liability for her tortious conduct at no cost, the 2015 *Release and Settlement Agreement* does not apply to the underlying controversy.

Second, application of the *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to perpetrate a fraud. "Where parties have made a settlement..., such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same." Syl. Pt. 7, *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999). "[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." *Smith v. Monongahela Power Co.*, 189 W. Va. 237, 246, 429 S.E.2d 643, 652 (1993).

As Petitioner concedes in her motion to dismiss filed with the circuit court, “[I]t is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” Syl. Pt. 1, *Sanders v. Roselawn Mem’l Gardens, Inc.*, 152 W. Va. 91, 91, 159 S.E.2d 784, 785 (1968). As this Court has provided, “the law favors and encourages the resolution of controversies by contracts of compromise and settlement.” *Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 382, 572 S.E.2d 900, 905 (2002).

In this case, application of the 2015 *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to perpetrate a fraud while preying upon the law favoring compromise and settlement. Petitioner knew, at the time of entering the 2015 *Release and Settlement Agreement*, of her unlawful actions in selling the timber. Petitioner did not disclose the existence of the claim to Respondent at the settling and compromising the 2015 litigation surrounding their father’s estate. Based upon Petitioner’s argument advanced in this case, Petitioner sought, during the settlement and compromise of the litigation with her father’s estate, to entice Respondent into entering an agreement where Petitioner would be released from liability for a claim she knew Respondent remained unaware. Because application of the 2015 *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to perpetrate a fraud and because application of the 2015 *Release and Settlement Agreement* would be in contradiction of the law in West Virginia, the 2015 *Release and Settlement* agreement is not applicable to the underlying controversy.

Third, and for similar reasons, application of the 2015 *Release and Settlement Agreement* to the underlying controversy would create a dangerous risk to litigants seeking to resolve and compromise claims. The circuit court, during the hearing on April 11, 2022, noted a hypothetical that if there is a global release after someone is injured in a car accident and settles with the at-



fault driver, does that preclude the at-fault driver from liability if he causes injury again. (J.A. 81). The hypothetical becomes more dangerous when applied to Petitioner's assertion that she can escape liability for her tortious actions that she had already perpetrated, for which she was presumably aware, and for which she failed to disclose. Further, permitting the release of such claims and unrelated tortious actions will serve only to squelch the law of this state favoring resolution of controversies by contracts of compromise and settlement. Because the 2015 *Release and Settlement Agreement* does not apply to the underlying controversy, because application of the 2015 *Release and Settlement Agreement* to the underlying controversy would permit Petitioner to perpetrate a fraud, and because application of the unrelated settlement agreements to other controversies creates a dangerous precedent against the law of this State favoring compromise and settlement, Respondent respectfully requests that the relief sought in this appeal be denied and the matter remanded to the circuit court.

Before concluding, Respondent is compelled to address Petitioner's argument that the 2015 *Release and Settlement Agreement* mandates that an arbiter decide whether the 2015 settlement applies to the underlying controversy. Petitioner's argument is without merit because Petitioner, again, seems to skip the first step of the analysis as to whether the 2015 *Release and Settlement Agreement* applies to the underlying controversy. If that question were answered in the affirmative, then, and only then, would the question arise whether the arbitration provision of the 2015 *Release and Settlement Agreement* mandates arbitration of the underlying controversy. And for the reasons set forth in this response, the 2015 *Release and Settlement Agreement* does not apply to the underlying controversy. Therefore, Petitioner's argument that the circuit court is divested of jurisdiction and authority to determine whether the 2015 *Release and Settlement Agreement* applies to the underlying controversy is without merit.

Petitioner further argues that the circuit court's failure to make findings of fact and conclusions of law is indicative of the court's error, which argument is also without merit. For the circuit court to make findings of fact, evidence of facts must first be presented to the court. In this case, Petitioner filed only her unverified motion to dismiss, with the 2015 *Release and Settlement Agreement* attached, and an unverified answer to the Complaint. No evidence was presented to the circuit court on April 11, 2022. The only presentation made to the circuit court was oral argument of counsel, though the circuit court welcomed and invited Petitioner to submit evidence and additional authority to support her claim. Because the circuit court was not presented with factual evidence and because the circuit court welcomed Petitioner to submit evidence and additional authority, the circuit court's failure to set forth specific findings of fact and conclusions of law is not indicative of any error.

## **VII. CONCLUSION**

In sum, this appeal is not properly before this Court for the reasons set forth in Petitioner's *Motion to Dismiss Appeal*. Regardless, the *Release and Settlement Agreement* does not apply to the underlying controversy because it governs the relationship of the parties only as it relates to the controversies surrounding the 2015 litigation over their father's estate; because Petitioner's unrelated, undisclosed, tortious actions were not contemplated at the time of the release, and if applied to this case, would permit Petitioner to perpetrate a fraud; and because application of the agreement to this controversy would create a dangerous risk to litigants seeking to compromise and settle their claims. Based thereon, Respondent respectfully requests that the relief sought by Petitioner be denied and the matter remanded to the circuit court.



Respectfully Submitted,

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Petitioner,

v.

Appeal from order of the  
Circuit Court of Randolph County  
Civil Action No. 22-C-15

SUSAN H. HUNNICUTT,

Respondent.

---

CERTIFICATE OF SERVICE

---

I, Jonathan G. Brill, a practicing attorney before the bar of this Honorable Court, certify that I served the foregoing *Respondent's Brief* upon Petitioner by mailing a true copy to her Counsel, Allison J. Farrell and Jason D. Bowles, on October 19, 2022, to the following addresses:

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