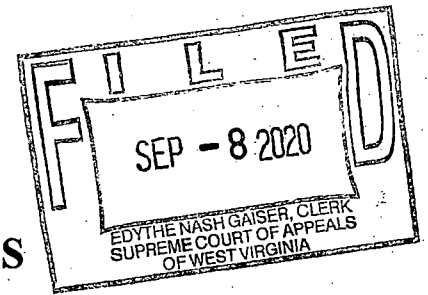


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**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Docket No. 20-0343

**DO NOT REMOVE
FROM FILE**

**ON APPEAL FROM THE
CIRCUIT COURT OF CABELL COUNTY**

REX DONAHUE,
Defendant and Third-Party Plaintiff Below, Petitioner

v.

MAMMOTH RESTORATION AND CLEANING
Plaintiff Below, Respondent,

and

ALLSTATE INSURANCE COMPANY,
Third-Party Defendant Below, Respondent.

**SUMMARY RESPONSE BY
RESPONDENT ALLSTATE INSURANCE COMPANY**

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September 8, 2020

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

Allstate Insurance Company (“Respondent” or “Allstate”), by counsel, respectfully submits its *Summary Response* in opposition to Rex Donahue’s (“Petitioner” or “Donahue”) *Petition for Appeal*, which challenges the Circuit Court of Cabell County’s February 25, 2020 *Order Granting Motion to Enforce Settlement and Denying Motion to Amend Complaint or Allow a New Complaint*. In support, Allstate respectfully states as follows:

I. STATEMENT OF THE CASE

For the convenience of the Court, a summary of the facts contained in the Circuit Court record is reproduced with citations to the Appendix, as follows:

1. The underlying civil action commenced on July 24, 2018 with the filing of a Civil Complaint form in the Magistrate Court of Cabell County by Respondent and Plaintiff below, Mammoth Restoration and Cleaning (“Mammoth”). Mammoth sought payment for \$6,301.11 for water mitigation services performed at Petitioner’s rental property after several water pipes in the residence froze and then burst. Appendix. p. 1.

2. On May 10, 2019, in the underlying matter filed by Mammoth, Petitioner filed a Third-Party Complaint against Allstate in this case, alleging that Allstate had a “good faith basis” to cover the payment of the mitigation services performed by Mammoth, and seeking attorneys’ fees and costs.¹ *Id* at 5.

3. Upon the authority of West Virginia Code §50-4-8, Allstate removed the underlying matter to the Circuit Court of Cabell County and filed its Answer there. *See*, W. Va.

¹ On or around January 3, 2018, Petitioner had made a claim on a Landlord’s Policy with Allstate for damages to his rental property caused by the burst/frozen pipes. The rental property had been unoccupied. Allstate denied the claim due to an exclusion in the policy for property damages caused by a failure to maintain adequate heat in the residence premises. As stated in Allstate’s *Response in Opposition to Third-Party Plaintiff’s Motion to Amend Complaint or in the Alternative to Allow New Complaint*, “this is the central factual premise underlying the allegations” against Allstate in this matter. Appendix, p. 44.

Code §50-4-8 (“...At any time before trial *in a civil action involving \$5,000 or more*, any party may, upon payment of the circuit court filing fee, cause such action to be removed to the circuit court...” (emphasis supplied)).

4. Not long after the matter was removed to Circuit Court, the parties negotiated a three-way settlement agreement. The terms of the three-way settlement were memorialized by counsel for Allstate, by email dated June 28, 2019, as follows:

1. Rex Donahue will release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545. Rex Donahue will dismiss all claims against Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County.

2. In return, Allstate will satisfy the claim of Plaintiff Mammoth Construction Company against Rex Donahue, by paying Mammoth Construction the sum of \$5,000.00.

3. This will resolve all claims of the parties to the civil litigation referenced above. A jointly endorsed order of dismissal with prejudice of all claims will be submitted to the Court.

Please confirm.

Id. at 14.

5. Counsel for Petitioner Donahue responded to the June 28, 2019 email, and, on behalf of his client, confirmed the terms of the settlement agreement with the following statement: “Confirmed. Please circulate the Order and I will get my client’s signature on the same (Rex Donahue.)” *Id.* at 12-13.

6. In addition to providing his express consent to the terms of the agreement as expressed in the June 28, 2019 email from counsel for Allstate, counsel for Petitioner also expressed his client’s consent in an email dated June 27, 2019:

Mr. Kime,

I spoke with my client about All-State[sic] paying the Monmouth [sic] Restoration (and whatever reduced settlement amount) and Rex Donahue would release All-State [sic] from the 3rd party complaint and bad faith claim surrounding this lawsuit and AGREED TO THE SAME. I would request the release or other document as soon as possible so that I can get Rex Donahue to sign the same so we can resolve this issue. It is my understanding that Rex Donahue will be paying \$0.00 to Monmouth [sic] under the existing suit and will be dismissed in light of All-State's [sic] payment of the same.

Thanks,

Steven T. Cook

Id. at 42.

7. Moreover, counsel for Petitioner also expressed his assent and understanding of the terms of the settlement agreement by voicemail left on the office telephone of counsel for Allstate on June 27, 2019:

This is attorney Steve Cook, I spoke with Rex Donahue and he agreed with that to get Mon Mouth [Mammoth] out of that if you, if Allstate's paying the claim and will dismiss and drop any suit against Allstate involving that claim on the home and the lost property. If you can get that out or get that worked out we're a 100% in on Rex will pay zero. Allstate will pay it we'll drop our Third-Party claim and any bad faith. If you want to get that over to us, I will get Rex to sign it and we can go from there. Um, thanks Evan, I appreciate it.

Id. at 43.

8. Allstate circulated two Settlement Agreements on July 25, 2019. By one Settlement Agreement, Respondent and Plaintiff below Mammoth would release all claims and drop its suit against Petitioner Donahue in exchange for a payment from Allstate. By the other, Donahue would release all claims and drop his suit against Allstate in exchange for Allstate's payment to Mammoth. *Id.* at 11. Pursuant to the agreed upon terms of the settlement, Allstate

paid Mammoth the sum of \$5,000.00 on July 26, 2019. *Id.* at 15. Further, on August 20, 2019, Mammoth executed a settlement agreement and release that released and compromised its claims against Petitioner Donahue and his agents and assigns. *Id.* at 16.

9. For several months, counsel for Allstate and counsel for Mammoth made continuous and repeated requests to counsel for Donahue for the promised executed settlement agreement, consideration for which was provided on July 26, 2019 and August 20, 2019. *Id.* at 17-19.

10. On September 25, 2019, counsel for Third-Party Plaintiff Donahue provided his only response to these multiple efforts, which was to state that he had “provided the same to Mr. Donahue a while ago by hand delivery and have *requested the same back from him with appropriate signatures. I have requested an office visit by him asap regarding the same.*” *Id.* at 19. (emphasis supplied). Counsel for Petitioner Donahue further explained that his client had other more pressing matters, namely a “very complicated Federal case,” but that he would carry out his settlement obligations as soon as possible. *Id.*

11. On November 22, 2019, Allstate filed its *Motion to Enforce Settlement*. In its Motion, Allstate attached the correspondence described above that set forth the terms of the settlement agreement and argued to the Circuit Court of Cabell County that the parties had formed an enforceable contract, and that undue delay was preventing Allstate from receiving the benefit of its bargain, namely the release of all claim and dismissal of the case. *Id.* at 6-20.

12. Four days later, on November 26, 2019, counsel for Petitioner Donahue, Steven T. Cook, Esq., filed a *Motion to Withdraw* as counsel for Donahue. In support of his Motion, attorney Cook cited to “a total break-down in communication between counsel and client in this matter.” *Id.* at 21.

13. One month after counsel moved to withdraw, on December 26, 2019, Petitioner Donahue, by counsel Steven T. Cook, filed a *Response to Motion to Enforce Settlement* and a *Motion to Amend Complaint or in the Alternative to Allow a New Complaint*. By these two motions, Donahue opposed enforcement of the agreed upon settlement and the dismissal of his case against Allstate, and moved instead that he should be permitted to amend his Complaint to restate the claims against Allstate related to the water loss claim made in January 2018 on his landlord's insurance policy with Allstate, and for insurance "bad faith." See *Id.* at 25-37.

14. In support of his opposition to the *Motion to Enforce Settlement*, Donahue argued that "settlement he agreed to was in relation to the original complaint filed by Mammoth.... This suit was filed in Magistrate Court." *Id.* at 34. Donahue argued to the Court that he "agreed orally through his attorney to the settlement that permitted All-State to [sic] Mammoth the \$5,000.00 in exchange for Mammoth waiving their claim against Mr. Donahue or All-State[sic]." *Id.* Thus, Donahue informed the Circuit Court that he only gave his assent to a one-sided agreement, whereby Allstate would receive no release of claims, no dismissal of Donahue's lawsuit, or any other consideration for its payments to Mammoth on Donahue's behalf. As to Donahue's return promise to "release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545" and "dismiss all claims against Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County" and endorse a dismissal with prejudice, Donahue informed the Circuit Court that he was concerned that the agreement he struck would "impair his ability to collect" disputed insurance proceeds that he alleged Allstate owed him on his water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545. *Id.* at 33-35.

15. Attached to the Motion to Amend Complaint or in the Alternative to Allow a New Complaint, was a proposed “*Amended Complaint or In the Alternative New Complaint and All-State Insurance Company*.” This new proposed pleading expressly stated claims against Allstate Insurance Company arising out of the subject water loss claim made in January 2018 on the Landlord’s Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545, and a corresponding claim for insurance “bad faith.” These are precisely the claims that Donahue had agreed to compromise and settle by emails and voicemails from his counsel six months earlier on June 27 and 28, 2019. *See* ¶¶ 4-7, above; Appendix, pp. 28-32.

16. On February 7, 2020, the Circuit Court of Cabell County heard oral argument on Allstate’s Motion to Enforce Settlement. In opposing the Motion to Enforce Settlement, counsel for Donahue argued that there was no meeting of the minds or agreement that Donahue would give up his claims against Allstate. Counsel for Donahue argued that “Rex never intended to release them [Allstate] from \$54,000 in claims and a bad faith claim. And it wouldn’t have even been possible in magistrate court.” *Id.* at 77 (Hearing Transcript, p. 12). Counsel also argued that the agreement was “unconscionable” because “[t]his is a big lawsuit that couldn’t even have been brought in magistrate court. I mean, there’s a lot of damages here.” *Id.* at 78 (Hearing Transcript, p. 13). In response, counsel for Allstate reiterated the arguments stated in the written *Motion to Enforce Settlement*, and took exception to the inclusion of disputed facts about the value and nature of the underlying breach of contract claim that Donahue agreed to settle with Allstate.²

² For the record, the transcript of the February 7, 2020 hearing contains an unintentional misstatement with respect to undersigned counsel for Allstate’s understanding of the facts of the underlying insurance claim. On page 15 of the hearing transcript, counsel is quoted as saying “[n]ow [counsel for Donahue] put a lot of facts into the record here about the underlying claim, not many of which I completely disagree with.” To be accurate, the record should reflect that undersigned counsel does not agree with most of Donahue’s counsel’s recitation of the underlying facts, as follows: “[n]ow [counsel for Donahue] put a lot of facts into the record here about the underlying claim, many of which I completely disagree with.”

17. On February 25, 2020, the Circuit Court entered its *Order Granting Motion to Enforce Settlement and Denying Motion to Amend Complaint or Allow a New Complaint* which is the subject of this appeal. The Circuit Court held that the agreement expressed in the emails and messages exchanged between the parties, set forth above at ¶¶ 4-7, created an enforceable contract. Appendix, pp. 53-55. The Circuit Court noted that “[a]ttorney for Donahue was competent to enter into an agreement with attorney for Allstate in this case, and he unequivocally gave his consent, on behalf of his client, to the terms of the agreement proposed by Allstate on June 28, 2019.” *Id.* at 54. The Circuit Court then held that that Petitioner Donahue must honor the terms of the settlement agreement set forth in Allstate’s counsel’s June 28, 2019 email, which counsel for Donahue had expressly “confirmed.” *Id.* at 54-55.

II. ARGUMENT IN RESPONSE TO ASSIGNMENTS OF ERROR

A. *The Circuit Court Properly Held That a Valid and Enforceable Contract Existed*

A circuit court’s order enforcing a settlement agreement is reviewed under an abuse of discretion standard. *Triad Energy Corp. of W. Virginia v. Renner*, 215 W. Va. 573, 576, 600 S.E.2d 285, 288 (2004)(“[T]his Court employs an abuse of discretion standard when reviewing a circuit court order enforcing a settlement agreement.”); *Riner v. Newbraugh*, 211 W. Va. 137, 140, 563 S.E.2d 802, 805 (2002).

The Circuit Court of Cabell County did not abuse its discretion when it properly found that a valid and enforceable contract was created when counsel for Donahue confirmed by email the terms of the settlement agreement reached between the parties. The Court correctly held that the agreement was between competent parties, both represented by experienced counsel, regarding legal subject matter. The Circuit Court correctly held that the agreement was also the

product of valuable payment made by Allstate to Mammoth on Donahue's behalf. In fact, in the hearing on this matter, Donahue's counsel told the Circuit Court:

What's going on in the background that made this so difficult on my client ... he is in the middle of, at that time, six major renegotiations of big loans on major businesses that he is guarantor on for -- he has Rex, Inc., but was guarantor -- guarantee on. ***And so a judgment -- or this lawsuit had the potential to cause tremendous harm to my client. More so than the normal you're being sued for \$6,000.***

Appendix, p. 73 (Hearing Transcript, p. 8). The payment by Allstate to Mammoth eliminated that "potential to cause tremendous harm" and clearly amounted to valuable consideration to Donahue.

Contrary to Petitioner's arguments to this Court, the Circuit Court also properly held that the agreement between the parties was the product of mutual assent, or a "meeting of the minds." Based on incontrovertible evidence, the Circuit Court found that counsel for Donahue had confirmed the terms of the agreement reached, and then applied settled West Virginia law to hold that "[a]ttorney for Third-Party Plaintiff Donahue had clear authority to bind his client to the terms of a settlement. *See, Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 419, 664 S E.2d 751, 760 (2008)(holding that is a "strong presumption of authority" of an attorney to bind a party to litigation to the terms of a negotiated settlement)." *Id.* at 53 (citing *Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 664 S E.2d 751 (2008)). Thus, the Circuit Court held that the agreement struck between Allstate and Donahue on June 28, 2019 regarding settlement of claims and dismissal of the civil action below contained all the "fundamentals of a legal contract...competent parties, legal subject-matter, valuable consideration and mutual assent." *Id.* at 53 (citing *EurEnergy Res. Corp. v. S & A Prop. Research, LLC*, 720 S.E.2d 163, 168 (W. Va. 2011). The Circuit Court's Order goes no further than to enforce the terms of the

agreement as stated in Allstate's counsel's June 28, 2019 email, as confirmed and agreed to by counsel for Petitioner. *See* Circuit Court Order, Conclusion of Law No. 7, Appendix, p. 55 (“Accordingly, Third-Party Plaintiff Rex Donahue is ORDERED to immediately execute and notarize a written Settlement Agreement containing the terms set forth above and provide it to counsel for Allstate.”)

B. *The Circuit Court Did Not Err in Finding That A Meeting of the Minds Occurred (Petitioner's Assignment of Error No. 1)*

Petitioner's argument to this Court is that there was no meeting of the minds because (1) the case was originally filed in Magistrate Court, and (2) and “the settlement agreement had not been reduced to writing prior to any alleged ‘agreement of the parties.’” Petitioners' Brief, p. 7. First, the question of whether a dispute results in a civil action filed in magistrate court, circuit court, or any court, has no bearing on whether the matter can be settled by an agreement of the parties. Further, this is an appeal from Circuit Court, not Magistrate Court. It was Respondent Mammoth, not Petitioner Donahue, that filed the underlying case in magistrate court; however, it was Petitioner Donahue that added the bad faith claims that raised the stakes of the litigation and caused Allstate to remove the civil action to Circuit Court. Petitioner's argument about the jurisdictional limits of the Magistrate Courts in West Virginia simply has no bearing on the question of whether a valid settlement agreement was reached in this matter.

Second, contrary to Petitioner's arguments, a “meeting of the minds” occurred when counsel for Petitioner replied “confirmed” to the June 28, 2019 email from counsel for Allstate, laying out the terms of the settlement agreement. *Infra*, ¶4-5. Unsurprisingly, the term that Petitioner claims he did not agree to concerns his consideration for Allstate's payment to Respondent Mammoth:

1. Rex Donahue will *release all claims against Allstate arising out of the subject water loss claim made in January 2018* on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545. Rex Donahue will *dismiss all claims against Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County*.

2. In return, Allstate will satisfy the claim of Plaintiff Mammoth Construction Company against Rex Donahue, by paying Mammoth Construction the sum of \$5,000.00.

3. This will resolve all claims of the parties to the civil litigation referenced above. A jointly endorsed order of dismissal with prejudice of all claims will be submitted to the Court.

Please confirm.

Id. at 14 (emphasis supplied).

However, those terms had also already been confirmed by counsel for Donahue the day prior, on June 27, 2019, when Donahue's counsel stated that, in exchange for Allstate's payment to Mammoth, Donahue would "release All-State [sic] from the 3rd party complaint and bad faith claim surrounding this lawsuit." *Infra*, ¶ 6. The Circuit Court was presented with more evidence of mutual assent in the form of the transcription of a voicemail message from counsel for Donahue to counsel for Allstate that confirmed that Donahue "...will dismiss and drop any suit against Allstate involving that claim on the home and the lost property...[and]...drop our Third-Party claim and any bad faith. If you want to get that over to us I will get Rex to sign it and we can go from there." *Infra*, ¶ 7. There is simply no basis for Petitioner's current claim that his counsel's assent to these terms was not the product of a meeting of the minds.

C. *The Settlement Agreement Between Petitioner and Respondent Allstate Was Not Unconscionable (Petitioner's Assignment of Error No. 2)*

Petitioner's second assignment error is that the agreement between Petitioner and Respondent Allstate was unconscionable "on its face" "for the same reasons set forth in the

argument for assignment of error I [one] above”; namely, that (1) the case was originally filed in Magistrate Court, and (2) and “the settlement agreement had not been reduced to writing prior to any alleged ‘agreement of the parties.’” Petitioners’ Brief, p. 8. These arguments fail for the same reasons set forth above, in Respondent’s argument in response to Petitioners’ first assignment of error. The Circuit Court correctly held that Petitioner, by his counsel, agreed to settle his claims against Allstate, including his claim for “bad faith.” Moreover, Petitioner’s statements regarding the value of his claims against Allstate is pure conjecture, unsupported by any evidence in the record, and is in dispute.³ There is nothing inherently “unconscionable” about Petitioners’ agreement to release his claims and dismiss his case against Allstate in exchange for Allstate’s return promise to discharge Petitioner’s debts to Respondent Mammoth. This Court should reject Petitioner’s assignment of error related to unconscionability of the agreement he struck with Allstate.

D. *The Settlement Agreement Between Petitioner and Respondent Allstate Does Not Result in “Unjust Enrichment” (Petitioner’s Assignment of Error No. 3)*

Petitioner’s third assignment error is that the agreement between Petitioner and Respondent Allstate would result in “unjust enrichment.” Petitioner’s argument for his third assignment of error consists of nothing more than baseless factual allegations against Allstate related to the claims that Petitioner agreed, in writing, to release and settle. The legal principle of “unjust enrichment,” or restitution, is an extra-contractual remedy based upon the idea that “it would be unjust to allow a person to retain money on which he had no valid claim.” *Prudential Ins. Co. of America v. Couch*, 180 W.Va. 210, 214 376 S.E.2d 104, 108 (1988). The remedy of “unjust enrichment” has no bearing on the question of whether Plaintiff, by his counsel, agreed

³ As explained above, the central factual issue in Petitioner’s claims against Allstate involves the question of whether Allstate properly applied a policy exclusion for water damage caused by a failure to maintain adequate heat, to a claim where many copper water pipes simultaneously froze and burst in an unoccupied rental property during cold temperature days in early January 2018.

to settle all claims against Allstate and dismiss this matter with prejudice. Finally, Petitioner did not raise the “unjust enrichment” argument below. Petitioner’s unjust enrichment argument should be rejected as baseless.

D. *The Court Did Not Err in Holding That Petitioner Should Not be Granted Leave to Amend the Complaint, or File a New Complaint, in the Civil Action He Agreed to Dismiss with Prejudice (Petitioner’s Assignments of Error Nos. 4 and 5)*

As the Circuit Court correctly cited binding precedent from this Court explaining that “the liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures.’ *Pyles v. Mason Cty. Fair, Inc.*, 806 S.E.2d 806, 813 (W. Va. 2017) (internal quotes and alterations omitted). Thus, ‘leave to amend a complaint is futile when the complaint as amended would still be properly dismissed’ Palmer, Louis J., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 480 (5th ed. 2017).” Appendix, p. 54, ¶ 5. Petitioner entered into a binding agreement to dismiss his Complaint against Allstate, not to Amend the Complaint. If that settlement is enforced, as it should be, the Petitioner’s motion to amend, or file a new Complaint based on the same set of operative facts, would clearly be futile. The Circuit Court committed no error in denying Petitioner’s motion to amend and continue his lawsuit against Allstate.

III. CONCLUSION

In conclusion, the Circuit Court correctly applied settled law to unambiguous factual evidence regarding Petitioner’s contractual promise to “release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545,” including any claim for bad faith, and to “dismiss all claims against Allstate in the civil action between the parties now pending in the

Circuit Court of Cabell County.” The Circuit Court did not abuse its discretion in this regard, and its decision should not be disturbed.

Respectfully Submitted,

ALLSTATE INSURANCE COMPANY,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Defendant and Third-Party Plaintiff Below, Petitioner

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MAMMOTH RESTORATION AND CLEANING
Plaintiff Below, Respondent,

and

ALLSTATE INSURANCE COMPANY,
Third-Party Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Evan R. Kime, counsel for Respondent, Allstate Insurance Company do hereby certify that I have served the foregoing *Summary Response by Respondent Allstate Insurance Company* on all parties by depositing a true and exact copy thereof, in the United States Mail, postage paid, addressed to counsel of record at the addresses listed below on this the 8th day of September, 2020:

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