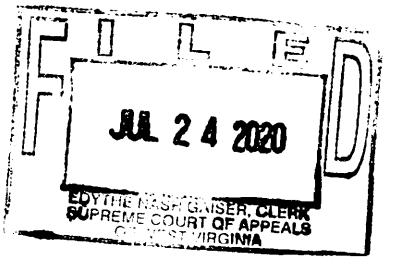
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



REX DONAHUE
DEFENDANT BELOW, AND
THIRD PARTY PLAINTIFF BELOW,
PETITIONER,

CASE NO. 20-0343
(LOWER COURT CASE NO. 19-289)

MAMMOTH RESTORATION AND CLEANING,
PLAINTIFF BELOW, RESPONDENT,

AND

ALL STATE INSURANCE COMPANY
THIRD-PARTY DEFENDANT BELOW,
RESPONDENT,

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. Whether the lower court erred in granting the motion to enforce settlement because there was no meeting of the minds?

II. Whether the lower court erred in granting the motion to enforce settlement when the agreement was unconscionable?

III. Whether the lower court erred in granting the motion to enforce settlement when the agreement would result in the unjust enrichment of the bad faith party?

IV. Whether the lower court erred in failing to permit the Amended Complaint?

V. Whether the lower court erred in failing to permit the Petitioner to file a new unrelated claim against AllState Insurance?

STATEMENT OF THE CASE

This case began with a civil complaint in magistrate court filed by Mammoth Restoration and Cleaning (hereinafter: Mammoth) versus Rex Donahue for $6,000.00 in contract payments owed from December of 2017. See APP. P. 1 and 2. Initially, AllState Insurance had selected and contracted for Mammoth to perform a clean up of water damage on property owned by Rex Donahue. During the clean up Mammoth had a member of Rex Donahue's family sign a form that indicated that AllState was responsible for the clean up cost; however if they failed to pay Rex Donahue was to pay the same. No documentation by Mammoth was ever signed by Rex Donahue and AllState

was the initial party contracted with Mammoth Restoration. In fact, Rex Donahue would have preferred to use Servpro instead of Mammoth. Rex Donahue filed a third party complaint in magistrate court (where there is a $10,000.00 limit of damages) to bring AllState in to pay Mammoth which AllState had previously agreed to do. See App. P. 4. Essentially, to pay the claim as originally required of AllState.

Negotiations were had between the parties and later AllState agreed to pay $5,000.00 to Mammoth and then the case would be dismissed. During the negotiation period and prior to a hearing in Magistrate Court, AllState transferred the case to Circuit Court. See App. P. 57 Ultimately, a settlement was reached wherein AllState would pay $5,000.00 to Mammoth and the $6,000.00 claim and all parties would be dismissed and the same was agreed by phone call. Certain emails were exchanged between counsel confirming a settlement (all of these prior to fling of any new complaint, any expiration of statute of limitation, and prior to the filing of the Amended Complaint in Circuit Court for unrelated damages and bad faith). See App. P. 25 Later, All State prepared a settlement agreement which purported to do the above, but also included language that could be interpreted to exclude nearly $54,000.00 in water damages that were never paid on a claim made by Rex Donahue and any bad faith claims Rex Donahue may have for the lack of payment of the claim from water damage in December of 2017. Rex Donahue then refused to sign the written settlement agreement which included different language then agreed by the parties. Allstate

then filed a motion to enforce settlement. See App. P. 6 Defendant filed a response objecting to said motion to enforce and a motion to amend complaint or allow a new complaint against AllState. See App. P. 33. Following a hearing in circuit court, the lower court entered the an Order Enforcing Settlement. See App. Volume II and See also App. Volume I pages 48- 56

SUMMARY ARGUMENT

I. Whether the lower court erred in granting the motion to enforce settlement because there was no meeting of the minds?

Petitioner asserts there was no meeting of the minds . "As this Court has held, "[a] meeting of the minds of the parties is a sine qua non of all contracts." Syl. Pt. 4 (quoting Syl. Pt. 1, *Wheeling Downs Racing Ass'n v. W.Va. Sportservice, Inc.*, 157 W.Va. 93, 199 S.E.2d 308 (1973). Further, [t]he meeting of the minds requirement has been recognized by this Court as specifically applicable to settlement agreements. See, *Riner*, . . . 211 W.Va. at 144, 563 S.E.2d at 809; *State ex rel. Evans v. Robinson*, 197 W.Va. 482, 475 S.E.2d 858 (1996), cert. denied, 519 U.S. 1121 (1997), "a court may only enforce a settlement when there has been a definite meeting of the minds." 197 W.Va. at 485, 475 S.E.2d at 861. *In O'Connor v. GCC Beverages*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990). In this case, Petitioner argues this case was filed in Magistrate Court with a limit of $10,000.00 Therefore, there could be no agreement on an amended complaint involving $54,000.00.

II. Whether the lower court erred in granting the motion to enforce settlement when the agreement was unconscionable?

For the same reasons set forth in the argument for assignment of error I above the purported written and unsigned agreement on its face would be unconscionable. In a case where the limit of liability would be $10,000.00, no reasonable person would agree to settle $54,000.00 dollars of claims in addition to a $6,000 lawsuit.

III. Whether the lower court erred in granting the motion to enforce settlement when the agreement would result in the unjust enrichment of the bad faith party?

Petitioner contends that Allstate originally contracted for the service of Mammoth and then failed to pay the same. The same resulted in Mammoth directly suing only Petitioner and not Allstate through no fault of Petitioner. To have a third party bring a civil complaint for judgment for an "alleged unpaid contract" was devastating for Petitioner. Allstate's failure to pay their debt placed Petitioner in grave danger. Further, their conduct since the initial water leak in December of 2017 and their failure to pay the $54,000.00 in water damages coupled with their failure to pay the $6,000.00 in clean up costs that Allstate contracted Mammoth for constitutes *per se* bad faith.

IV. Whether the lower court erred in failing to permit the Amended Complaint?

The Petitioner argues leave to amend a complaint should be freely given

pursuant to Rule 15 of the Rules of Civil Procedure when good cause is shown. For the reasons set forth in the arguments above and for the fact that the claim had never been filed previously and the same was within the statute of limitations the claim should have been allowed.

V. Whether the lower court erred in failing to permit the Petitioner to file a new unrelated claim against AllState Insurance?

The Petitioner asserts that he should have been permitted to file new complaint since the same was within the statute of limitations and was related to water damage and other misconduct by AllState Insurance that was not the subject of the claim by Mammoth in Magistrate where the limit of liability was $10,000.00.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case was reviewed under the following standard:

Criteria for oral argument. Oral argument is unnecessary when:

all of the parties have waived oral argument; or

the appeal is frivolous; or the dispositive issue or issues have been authoritatively decided; or the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

Petitioner waive Rules 19 oral argument, the appeal is clearly not

frivolous and the Petitioners believe relief is necessary, there are multiple dispositive issues and there is significant case law in certain areas, however the facts and legal arguments should be adequately presented in the briefs and record for appeal.

Therefore, pursuant to Rule 18(a), counsel for the Petitioner believes the case can be resolved through memorandum decision in light of the strength of Petioners appeal; however Petitioner's counsel will argue said case on oral motion if requested, or if the Court has specific questions as necessary. Petitioner acknowledges that based upon the completeness of the record and the completeness of the brief that oral argument may not be required.

Counsel does waive and indicate Rule 20 oral argument is unnecessary, unless the Court or opposing counsel would desire the same.

ARGUMENT

I. Whether the lower court erred in granting the motion to enforce settlement because there was no meeting of the minds?

Petitioner asserts there was no meeting of the minds . "As this Court has held, "[a] meeting of the minds of the parties is a sine qua non of all contracts." Id. at 139, 563 S.E.2d at 804, Syl. Pt. 4 (quoting Syl. Pt. 1, *Wheeling Downs Racing Ass'n v. W.Va. Sportservice, Inc.*, 157 W.Va. 93, 199 S.E.2d 308 (1973)). Further, [t]he meeting of the minds requirement has been recognized by this Court as

specifically applicable to settlement agreements. See, *Riner*, . . . 211 W.Va. at 144, 563 S.E.2d at 809; *State ex rel. Evans v. Robinson*, 197 W.Va. 482, 475 S.E.2d 858 (1996), cert. denied, 519 U.S. 1121 (1997), "a court may only enforce a settlement when there has been a definite meeting of the minds." 197 W.Va. at 485, 475 S.E.2d at 861. *In O'Connor v. GCC Beverages*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990), this Court stated: "It is well understood that '[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties.' 15A C.J.S. Compromise & Settlement, sec. 7(1)(1967)[.]" *McGee v. Amedisys* W. Va., LLC (W. Va. 2018). In this case, Petitioner argues this case was filed in Magistrate Court with a limit of $10,000.00 West Virginia Code § 50-2-1 provides as follows, " Civil jurisdiction Except as limited herein and in addition to jurisdiction granted elsewhere to magistrate courts, such courts shall have jurisdiction of all civil actions wherein the value or amount in controversy or the value of property sought, exclusive of interest and cost, is not more than $10,000." Therefore, there could be no agreement on an amended complaint involving $54,000.00 Further, the Petitioner argues that the settlement agreement had not been reduced to writing prior to any alleged "agreement of the parties." Petitioner was fully entitled to refuse to sign a proposed written agreement which exceeds the meeting of the minds of the parties in regards to settlement.

II. Whether the lower court erred in granting the motion to enforce settlement when the agreement was unconscionable?

For the same reasons set forth in the argument for assignment of error I above the purported written and unsigned agreement on its face would be unconscionable. In a case where the limit of liability would be $10,000.00, no reasonable person would agree to settle $54,000.00 dollars of claims in addition to a $6,000 lawsuit along with potentially millions of dollars in bad faith claim for literally zero ($0.00) dollars being awarded to Petitioner and waiver of debt, (totaling a maximum of $6,000.00) that wasn't even legally attributable to the Petitioner under the facts and defenses in the case. The court opined in App. Vol. II P. 14, " What's the limit now, ten thousand – ten thousand in magistrate court.

III. Whether the lower court erred in granting the motion to enforce settlement when the agreement would result in the unjust enrichment of the bad faith party?

Petitioner contends that Allstate originally contracted for the service of Mammoth and then failed to pay the same. The same resulted in Mammoth directly suing only Petitioner and not Allstate through no fault of Petitioner. See App. P. 2. Allstate's failure to perform their agreement could not have occurred at a worse time for Petitioner when he was in the middle of a Federal lawsuit involving more than millions of dollars worth of mortgages that were in the process of being refinanced, which was ultimately settled. To have a third party bring a civil complaint for judgment for an "alleged unpaid contract" was

devastating for Petitioner. Allstate's failure to pay their debt placed Petitioner in grave danger. Further, their conduct since the initial water leak in December of 2017 and their failure to pay the $54,000.00 in water damages coupled with their failure to pay the $6,000.00 in clean up costs that Allstate contracted Mammoth for constitutes *per se* bad faith. In addition, their attempt to use "smoke and mirrors" to extrapolate the $5,000.00 settlement agreement to reduce the initial $6,000.00 claim to somehow prevent Petitioner from recovering on unrelated water damage claims and bad faith conduct constitutes unjust enrichment of the at fault party.

IV. Whether the lower court erred in failing to permit the Amended Complaint?

The Petitioner argues leave to amend a complaint should be freely given pursuant to Rule 15 of the Rules of Civil Procedure when good cause is shown. For the reasons set forth in the arguments above and for the fact that the claim had never been filed previously and the same was within the statute of limitations the claim should have been allowed. The purpose of the words, and leave [to amend] shall be freely given when justice so requires" in Rule 15(a) W.Va. Civ.P. is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore motions to amend should always be granted under Rule 15 when (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment;

(3) the adverse party can be given ample opportunity to meet the issue." *McDowell County Bd. Of Educ. V. Stephens*, 191 W.Va. 711, 447 Se.E.2d 912 (W.Va. 1994). In this case all 3 issues above apply. AllState has known about this since January of 2017, the amendment was filed with the 2 year statute of limitations, the matter couldn't have been filed until the matter was in circuit court because of the jurisdictional limit of the magistrate court. Petitioner was prejudiced by AllState's failure to pay Mammoth. Mammoth suing the Petitioner further prejudiced Petitioner. The initially $6,000.00 lawsuit should have been against AllState, who selected Mammoth.

V. Whether the lower court erred in failing to permit the Petitioner to file a new unrelated claim against AllState Insurance?

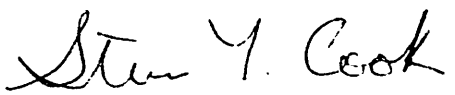
The Petitioner asserts that he should have been permitted to file new complaint since the same was within the statute of limitations and was related to water damage and other misconduct by AllState Insurance that was not the subject of the claim by Mammoth in magistrate court where the limit of liability was $10,000.00. The same arguments in the Argument IV apply herein.

CONCLUSION

Respondent prays the enforcement of settlement be limited to the $6,000.00 claim by Mammoth only (as this is within the $10,000.00 statutory limit in magistrate court), and to give credit to All State for the payment of the same and permit Rex Donahue to proceed either on a new filing against AllState or direct the lower

court to grant the Amended Complaint filed on December 26th, 2019. (See App. P. 57). The judge even opined in App. Vol. II P. 14, " What's the limit now, ten thousand – ten thousand in magistrate court. Clearly, everyone knew what the limits were and that this case involved around $6,000.00 in regards to the settlement for $5,000.00 It clearly did not include the $54,000.00 in water damage that AllState has tried to do an end around on paying or compensating their insured for.

Respectfully Submitted,



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ALL STATE INSURANCE COMPANY
THIRD-PARTY DEFENDANT BELOW,
RESPONDENT,

CERTIFICATE OF SERVICE

By Signing below counsel swears he served a true copy of the Petitioner's Brief upon Evin R. Kime, of Jackson and Kelly, 500 Lee Street East, Suite 1600, po Box 553, Charleston, WV 25322 and Oscar R. Molina, Esq. of Jenkins and Fenstermaker, PLLC, PO Box 2688, Huntington, WV 25726.

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