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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-1015

DAVID ANDREW LEVINE,
Petitioner

DO NOT REMOVE FROM FILE

vs.

ROCKWOOL INTERNATIONAL A/S,

BJØRN RICI ANDERSEN

JEFFERSON COUNTY PROSPERITY, INC.,

ROXUL USA, INC.,

DANIEL CASTO,

RAYMOND J. BRUNING,

STEVEN STOLIPHER,
Respondents.

PETITIONER'S BRIEF

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I. Table of Authorities

Cases

Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 223 S.E.2d 433 (1976).

Blair v. Dickinson, 133 W. Va. 38, 54 S.E.2d 828 (1949).

Brown v. W. M. Ry., 92 W. Va. 111, 114 S.E. 457 (1922).

Burdette v. Burdette Realty Improvement, Inc., 214 W. Va. 448, 590 S.E.2d 641 (2003).

Cadle Co. v. Citizens Nat'l Bank, 200 W. Va. 515, 490 S.E.2d 334 (1997).

Devane v. Kennedy, 205 W. Va. 519, 519 S.E.2d 622 (1999).

Floyd v. Watson, 163 W. Va. 65, 254 S.E.2d 687 (1979).

John D. Stump & Assocs. v. Cunningham Mem'l Park, 187 W. Va. 438, 419 S.E.2d 699 (1992).

Messer v. Huntington Anesthesia Grp., Inc., 222 W. Va. 410, 664 S.E.2d 751 (2008).

Riner v. Newbraugh, 211 W. Va. 137, 563 S.E.2d 802 (2002).

Russell v. Bayview Loan Servicing, LLC, No. 20-0681, 2021 W. Va. LEXIS 398 (June 23, 2021).

Sprout v. Bd. of Educ., 215 W. Va. 341, 599 S.E.2d 764, (2004).

Stark Elec. v. Huntington Hous. Auth., 180 W. Va. 140, 375 S.E.2d 772 (1988).

State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Triad Energy Corp. of W. Va., Inc. v. Renner, 215 W. Va. 573, 600 S.E.2d 285 (2004).

Tuttle v. State Farm Mut. Auto. Ins. Co., No. 14-0427, 2015 W. Va. LEXIS 520 (Apr. 10, 2015).

O'Connor v. GCC Beverages, 182 W. Va. 689, 391 S.E.2d 379 (1990).

Virginian Exp. Coal Co. v. Rowland Land Co., 100 W. Va. 559,131 S.E. 253 (1926).

Wallace v. Pack, 231 W. Va. 706, 749 S.E.2d 599 (2013).

Wheeling Downs Racing Association v. West Virginia Sportservice, 157 W.Va. 93 (1973).

Persuasive Authority

Akers v. Minn. Life Ins. Co., 35 F. Supp. 3d 772 (S.D. W. Va. 2014)

Pertee v. Goodyear Tire & Rubber Co., 861 F. Supp. 523 (S.D. W. Va. 1994)

Williams v. Rigg, No. 3:19-cv-00423, 2021 U.S. Dist. LEXIS 207362 (S.D. W. Va. 2021)

Rules

Rule 18(a)(4) *W. Va. Rules Appellate Procedure*. (2020).

II. Assignment of Error(s)

(1) Did the Trial Court erroneously find mutual assent or a meeting the minds when it held that a valid, enforceable settlement agreement existed between the Petitioner and the Respondents?

(2) Did the Trial Court erroneously find sufficient evidence of a valid, enforceable settlement agreement despite the fact that settlement was predicated on a written settlement agreement?

III. Statement of the Case

Starting August 28, 2018, the Respondents and others caused certain defaming statements to be made against the Petitioner. The defaming statements related to Petitioner's business dealings, as well as, the Petitioner individually. On August 27, 2019, the Petitioner filed his complaint, Case No. CC-19-2019-C-139; against the Respondents. (Joint Appendix Record or J.A.R. 2). The case was filed in the Circuit Court of Jefferson County, West Virginia (the "Trial Court").

Between March 26, 2020 through November 4, 2020, Jefferson County Perspective, Inc. f/k/a Jefferson County Prosperity, Inc., Daniel Casto, Mark Everhart and others (the "JCP Defendants") published at least twenty-eight (28) defamatory statements to Petitioner's business associates, Facebook, and between and among themselves and their members and constituents.

The defaming statements relate to Petitioner's business dealings, as well as, the Petitioner individually. On November 5, 2020, the Petitioner filed an action against the JCP Defendants, Case No. CC-19-2020-C-129. (J.A.R. 37).

On or about August 31, 2021, the Petitioner initiated settlement negotiations with counsel for Daniel Casto ("Casto") in a related matter, *Daniel M. Casto v. Scoby Society, Inc., a Delaware corporation; Climate Pictures, Co., Inc., a West Virginia corporation, d/b/a Scoby Foundation; and, David A. Levine, only in his capacity as a West Virginia sole proprietorship*, Case No. *CC-19-2021-C-02;* by telephone at which time the counsels for the Petitioner and Casto laid out broad elements of a possible settlement agreement. (J.A.R. 60). Written correspondence was sent by counsel for Casto confirming that they would create a global draft settlement agreement for the Petitioner's review consistent with the conversations he had with Casto's Counsel. (Id). The Petitioner advised counsel for the Respondents by written correspondence that he was contemplating a full settlement of all allegations. (J.A.R. 60). Later the JCP Defendants joined in the potential global settlement. (Id).

A confidential release and settlement agreement (the "Written Settlement Agreement") was drafted and circulated amongst the Respondents, JCP Defendants and Casto, however; the Settlement Agreement was not shared with the Petitioner until September 16, 2021. (J.A.R. 63). The Petitioner had not participated in drafting or seen any version of the Settlement Agreement prior to September 16, 2021. Three (3) days later, a reactivated Facebook page containing defamatory statements began to recirculate in Facebook feeds and became available to new members joining the page. (J.A.R. 69). Meanwhile, the Petitioner received correspondence from various counsel regarding revisions to the Written Settlement Agreement and any modifications to the document requested by the Petitioner. (J.A.R. 65- 67).

As a result of the reactivation of the Facebook page, the lack of certain important terms to the Petitioner and the unilateral insertion of material terms in the Written Settlement Agreement, the Petitioner did not move forward with Settlement. (J.A.R. 49). Petitioner did not suggest any edits or amendments and finding the Written Settlement Agreement unacceptable, suggested the possibility of early mediation to resolves the disputes between them.

On October 15, 2021, the Respondents filed their motion to enforce a settlement and the JCP Defendants and Casto filed similar motions in their cases. (J.A.R. 29-39). On November 1, 2021, the Petitioner filed his response to Respondent's *Motion to Enforce Settlement*. (J.A.R. 40-69). On November 12, 2021, the Respondents filed their reply to the Petitioners' Response. (J.A.R. 70-83). On October 18, 2021, the Trial Court granted the Respondents' requested relief in the case before this Court and directed in that same order identical relief in Case No. CC-19-2020-C-129, and Case No. CC-19-2021-C-02. (J.A.R. 23-28).

The Petitioner requests that this Court find that mutual assent to the terms and conditions did not exist among the Petitioner and Respondents. Furthermore, that any settlement was predicated on a written agreement approved by the parties to the agreement. The Petitioner requests that this case be remanded back to Trial Court for a hearing on the merits of Petitioner's claims. The Petitioner appeals these two (2) grounds.

IV. Summary of Argument

The settlement that the Respondents moved to enforce and was granted by the Trial Court is inappropriate because it does not have a meeting of the minds, an essential element in any contract. Like contracts, settlement agreements and acceptance of the terms and conditions of the agreement must be clear and unequivocal and if the terms and conditions of an agreement are not, the agreement cannot be effective. The parties must have a "meeting of the minds" or

"mutual assent" as to the terms and conditions of the agreement. In West Virginia a compromise or settlement of a civil action is viewed as a contract. As previously stated, a meeting of the minds is a key component to any agreement, including settlement agreements as the once before this Court. Therefore, a party attempting to enforce a settlement agreement must be able to show a clear and unequivocal acceptance of the agreement, along with a meeting of the minds between the parties. If there is no clear and unequivocal acceptance, there is not valid contractual agreement for the Court to enforce. The settlement that the Respondents moved to enforce and was granted by the Trial Court does not rise to the standard required to enforce the settlement agreement because there is no meeting of the minds, an essential element in any contract. The lack of certain important terms to the Petitioner and the unilateral insertion of material terms in the Written Settlement Agreement without the consent of the Petitioner and the Written Settlement Agreement approved by all parties show an obvious lack of both mutual assent and meeting of the minds.

The Trial Court should have denied the Respondents motion to enforce the settlement agreement. There was no meeting of the minds or mutual assent between the Petitioner and Respondents. A clear and unequivocal acceptance of the agreement between the parties was not present. The Petitioner requests that this Court find that that a valid, enforceable settlement agreement did not existed between the Petitioner and the Respondents and that the case should be remanded back to Circuit Court for further disposition.

In addition, the Petitioner argues that the settlement that the Respondents moved to enforce and was granted by the Trial Court is inappropriate because it was clearly contemplated by the parties that any settlement was predicated on written settlement agreement that was approved by all parties to the settlement. In situations where in the evidence and circumstances

of the case, it appears that the parties to an agreement being negotiated between them intend that, as a condition of settlement a written agreement be drafted and approved by all the parties to the action, a court should not presume that a binding settlement has been reached. In West Virginia, a strong presumption arises that there can been no agreement between the parties, if a written agreement is contemplated, but is never reduced to writing and ratified by the parties the agreement. Therefore, a court that is required to adjudicate a motion to enforce settlement, must be careful not construe preliminary negotiations of the terms and conditions of a settlement agreement as the final agreement among parties and must look at the circumstances and surroundings in each particular case to determine whether a final agreement had been reached. It was clearly contemplated in written correspondence by the Petitioner and Respondents that any settlement was predicated on written settlement agreement that was approved by all parties to the settlement.

It is also clear that the parties to this settlement agreement were contemplating and requiring both a written settlement agreement that had been approved by all parties, as well as, a signed and executed settlement agreement by all parties. The settlement that Respondents moved to enforce and was granted by the Trial Court is an agreement that the Petitioner had no hand in the drafting and has not assented to accepting. Even if this Court were to find a tentative agreement in the broad strokes of the telephone conversation and follow-up correspondence, it is also clear the parties believed it necessary to have a written and signed agreement. As a Written Settlement Agreement was never agreed to by the Petitioner and lacks the approval of all the parties, the relief requested by the Respondents should have been denied.

The Trial Court should have denied the Respondents motion to enforce settlement agreement because it was clear that settlement was predicated on written settlement agreement

that was approved by all parties. The Petitioner requests that this Court find that that a valid, enforceable settlement agreement did not existed between the Petitioner and the Respondents and that the case be remanded back to Circuit Court for further disposition.

V. Statement Regarding Oral Argument and Decision

Pursuant to *West Virginia Rules of Appellate Procedure*, the Petitioner states that oral argument is unnecessary as "...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." Rule 18(a)(4) *W. Va. Rules Appellate Procedure* (2020).

VI. Argument

A. Standard of Review

In West Virginia, appellate courts should review court orders enforcing settlement agreements under the abuse of discretion standard. This Court has previously held that "when this Court undertakes the appellate review of a circuit court's order enforcing a settlement agreement, an abuse of discretion standard of review is employed." *Devane v. Kennedy*, 205 W. Va. 519, 527 (1999). The final order and the ultimate disposition are reviewed under an abuse of discretion standard. *Cadle Co. v. Citizens Nat'l Bank*, 200 W. Va. 515, 517 (1997). However, "[a] trial court's discretion is not unbounded, and the scope of the trial court's discretion varies according to the issue before it." *State v. Guthrie*, 194 W. Va. 657, 680 (1995). This Court has stated that

> The deference accorded to a circuit court sitting as factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision.

Wallace v. Pack, 231 W. Va. 706, 709 (2013). Therefore, although an appeals court may give deference and discretion to trial court rulings, the reviewing court must look at the issues that were subject to the trial court rulings and determine if the appropriate weight was applied to the factors that led to the trial court's determination, that the relevant factors were properly considered, and whether the trial court wielded its discretion appropriately.

Petitioner argues that settlement that the Trial Court enforced does not meet the standard required to enforce a settlement agreement. The settlement agreement does not reflect a meeting of the minds, an essential element in any valid contract. Additionally, it was clearly contemplated by the Petitioner and Respondent that any settlement was predicated on written settlement agreement that was approved and signed by all parties to the settlement. For these reasons, the Petitioner argues that the Trial court did not give sufficient weight to these relevant factors when Trial Court granted the Respondents' motion to enforce settlement.

B. The Settlement Between the Parties lacked Mutual Assent

The settlement that the Respondents filed to enforce and was approved by the Trial Court is inappropriate because it does not have a meeting of the minds, an essential element in any contract. It is well settled that courts and the law generally favor compromise and settlement over litigation. Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91 (1968). Despite the obvious preference for settlements over litigation, any settlement agreement between the parties must conform to contract law. This Court has previously held that settlement agreements are to be construed "as any other contract." *Floyd v. Watson*, 163 W.Va. 65, 68 (1979). Like contracts, settlement agreements and acceptance of the terms and conditions of the agreement "... must be clear and unequivocal in order to be effective." *Tuttle v. State Farm Mut. Auto. Ins. Co.*, No. 14-0427, 2015 W. Va. LEXIS 520, at *10 (Apr. 10, 2015).

In the *Tuttle* case, the petitioner was involved in an automotive accident and sustained both property damage and physical injury. The petitioner and the respondent engaged in negotiations through written correspondence utilizing both mail and fax. In response to the petitioner's last correspondence before filing an action, the respondent mistakenly failed to write "unable to" in his response and it appeared that the respondent had accepted this final offer. The next day the respondent attempted to correct the mistake and the petitioner filed an action to enforce the settlement. The Court found 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." *Id.* The Court went on to hold that since "Mr. Cole [Respondent] did not render a clear and unequivocal acceptance of petitioner's final settlement offer..." and "...that there was no meeting of the minds between the parties in regard to petitioner's final settlement demand." *Id at 11.* Therefore, an acceptance of a settlement offer must be clear and unequivocal to evidence the meeting of the minds necessary to find an enforceable settlement agreement.

The finding in *Tuttle*, was consistent with this Court's previous determinations when this Court held that "[i]t is rather universally accepted that where an offer is made and the person accepting the offer does not do so unequivocally, but conditions his acceptance, then no binding contract arises." *Stark Elec., Inc. v. Huntington Hous. Auth.*, 180 W.Va. 140, 142 (1988). (See also *John D. Stump & Assocs. v. Cunningham Mem'l Park*, 187 W. Va. 438, 444 (1992). "We have also recognized that to be effective, an acceptance of a contractual offer must be unequivocal and unconditional and may not introduce additional terms and conditions not found in the offer.")

This Court has also held that "[i]t is well-understood that "since 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* § 7(1) (1967)." *O'Connor v. GCC Beverages*, 182 W. Va. 689, 691 (1990). (See Also Syl. pt. 4, *Riner v. Newbraugh*, 211 W.Va. 137 (2002) ("'A meeting of the minds of the parties is a sine qua non of all contracts."); syl. pt. 1, *Wheeling Downs Racing Association v. West Virginia Sportservice*, 157 W.Va. 93 (1973). ("A meeting of the minds of the parties is a sine qua non of all contracts.") The parties must have a "meeting of the minds" or "mutual assent" as to the terms and conditions of the agreement. *Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 418 (2008). The *O'Connor* case is particularly instructive. In the *O'Connor* case, an employment dispute arose between the petitioner and the respondent. During the course of the case, proposed agreements between their respective counsels were made by telephone. After a telephone conversation that appeared to outline an agreement; additional letters and settlement agreements were shared between the parties. Eventually, a dispute arose as the terms of the agreement and the respondent filed a motion to enforce the settlement agreement and the trial court granted the motion. This court upon review of the case held that no settlement agreement had been reached. The Court found that

> even though an agreement may have been tentatively reached during the telephone conversation between Ms. Wolfe and Ms. Keefer on October 23, 1986, the letters and proposed written settlement agreements that passed from one party to the other after that conversation evidence that there was no true meeting of the minds on the day in question. Furthermore, the record indicates that the parties believed that a written agreement satisfactory to each party was necessary before this matter was finally settled.

Id at 692. Despite the fact that a tentative agreement was reached by the parties and that letters and proposed written settlement agreement were shared between the parties, this Court did not find a meeting of minds. The Court built on the reasoning in *Blair* when it held that

> Where, from all the evidence and circumstances of the case, it appears that the parties to an agreement being negotiated between them intend that, as a condition precedent to its becoming binding upon them, it should be reduced to writing and signed by the parties, an oral agreement, though it covers all the terms of the proposed agreement, is not binding on the parties, until it is reduced to writing, and has been signed by all the parties thereto.

Blair v. Dickinson, 133 W. Va. 38, 39 (1949). This Court has continued to find that settlement agreements must have a meeting of the minds or mutual assent between the parties to find a valid settlement agreement in other circumstances. In *Riner,* this Court failed to fund sufficient evidence to support a settlement agreement when a settlement agreement includes "...terms that differ in substance from those set forth in the Mediation Settlement Agreement." *Riner v. Newbraugh*, 211 W. Va. 137, 145 (2002). This Court made this determination despite the fact that the parties had participated in mediation and had previously drafted a memorandum of the mediation that had been signed by the parties.

This Court has also found that a tentative settlement based on open terms and undefined clauses can evidence a lack of mutual assent in a tentative settlement agreement. In *Triad Energy Corp.* this Court held that the settlement suffered from a "...lack of sufficient detail to constitute a binding agreement" *Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573, 578 (2004). The Court found that the *written agreement* was unclear. The lack of clarity of the agreement, coupled with additional terms previously undiscussed among the parties; led to this Court to conclude that no agreement was reached and that the trial court erred in enforcing the settlement agreement.

Finally, this Court has also recognized that a motion to enforce a settlement agreement can be denied when there is evidence of "...an inability of the parties in this action to reach a true meeting of the minds has pervaded the entire settlement process from beginning to end." *Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 454 (2003). The lack of any evidence of a true meeting of the minds can signal that a settlement agreement was not present. Therefore, a party attempting to enforce a settlement agreement must be able to show a clear and unequivocal acceptance of the agreement, along with a meeting of the minds between the parties. Otherwise, there is not valid contractual agreement for the Court to enforce.

In the case before this Court, the Respondents cannot meet this standard. Although, the parties spoke in broad strokes as to the terms and conditions of a possible settlement agreement, the parties never reached the clear and unequivocal acceptance of the agreement or a meeting of the minds. On August 31, 2021, at 11:28 am, counsel for Casto and the Petitioner had a telephonic conversation regarding potential terms and conditions for settlement. Soon after, Counsel for Casto sent e-mail correspondence to Petitioner's Counsel that confirmed the "global resolution of pending cases/claims with a walk-away provision between Dan Casto and David Levine (and others.)" (J.A.R.R. 60). The correspondence also stated that the Petitioner and Casto contemplated that the parties would work "...***to put a global draft settlement agreement together*** [emphasis added] for your review." *Id.* Within less than an hour, counsel for the Respondents, sent an e-mail correspondence stating that

> the terms of this agreement are that David Levine will drop and dismiss with prejudice all claims set for the in 19-C-139 and 20-C-129 and Mr. Casto and Mr. Everhart will drop all claims they have pending against Mr. Levine , including claims in which this office does not represent Casto. The terms of the settlement ***will*** [emphasis added] include mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by WV law. Further, there will be no

> exchange of any money as a result of this settlement. All parties will execute a release. Please confirm that these settlement terms are correct and confirm that your client agrees to these terms. If there is anything missing, please let me know.

(J.A.R. 37). In response, Petitioner's counsel stated that the terms to be included in the future written settlement agreement were correct. (J.A.R. 38). On September 16, 2021, after the Respondent, JCP Defendants, and Casto were able to review the Written Settlement Agreement and make any proposed amendments to the Written Settlement Agreement; the Written Settlement Agreement was sent to the Petitioner for review. In that same correspondence the Joint Defendants requested "proposed revisions" (J.A.R. 63). The Petitioner had no hand in the drafting the Written Settlement Agreement prior to its receipt. As the West Virginia Supreme Court of Appeals stated "...a settlement cannot be predicated on equivocal actions of the parties." *Id.*

It is clear from the first e-mail correspondence that the Petitioner contemplated that the settlement agreement would be in writing as the August 31, 2021 e-mail correspondence evidences that "a global draft settlement agreement" was contemplated. The Respondent's e-mail correspondence later that day contemplates the same when he states what the settlement agreement ***will*** [emphasis added] include, clearly referencing a written agreement to be drafted in the future. (J.A.R. 37). Finally, as the Respondent contemplates that the Petitioner will have proposed revisions to the Written Settlement Agreement. The circumstances of this case are similar to the facts in the *O' Connor* case. Like *O'Connor*, the parties initial negotiations began by telephone, eventually terms and conditions were passed by written correspondence by e-mail, and like *O'Connor* of the case before this Court "the record indicates that the parties believed that a written agreement satisfactory to each party was necessary before this matter was finally

settled." *O'Connor* 182 W. Va. 692. As the parties never reached the final Written Settlement Agreement, there could not have been a meeting of the minds to necessary to create a settlement agreement, and the Trial Court should have denied the Respondent's motion to enforce settlement.

The record before this Court contains additional evidence to support the lack of settlement between the parties. Other than the e-mail correspondence from the Respondent on August 31, 2021, that confirmed in broad strokes the forthcoming terms and conditions of the proposed Written Settlement Agreement, the Respondents cannot point to any affirmation by the Petitioner that the subsequent settlement agreement was acceptable as proposed. As this Court has previously held "...an inability of the parties in this action to reach a true meeting of the minds has pervaded the entire settlement process from beginning to end." *Burdette* 214 W. Va. 454. Instead, the record before this Court is laden with correspondence that shows the opposite of mutual assent, but instead shows efforts of the parties to reach a meeting of the minds required for an enforceable settlement agreement by written correspondence on September 16, 2021, (J.A.R. 64), October 6, 2021, (J.A.R. 66), and October 11, 2021, (J.A.R. 67). The Respondent simply cannot show clear and unequivocal acceptance of any settlement agreement, much less a meeting of the minds between the parties. For this reason, the Trial Court should have denied the Respondent's motion to enforce settlement.

It is also apparent that the broad terms and conditions that were discussed between the parties "lacked sufficient detail to constitute a binding agreement." *Triad Energy Corp.*, 215 W. Va. 578. Although Respondent's e-mail correspondence references mutual non-disparagement, confidentiality, and no exchange of any money, the e-mail correspondence that the Respondent relies lacks the sufficient detail to fully comprehend these terms. For example, the e-mail

correspondence does not define what the term mutual non-disparagement means, what constitutes a breach of the non-disparagement agreement, what will be the consequences of a breach of the non-disparagement agreement, or how it will be enforced. As the basis of Petitioner's action was defamation the breadth of non-disparagement terms were both essential and material. This lack of sufficient detail was illustrated by the reactivation of the Shepherdstown Community Page, just three (3) days after the proposed Written Settlement Agreement was delivered to the Petitioner. (J.A.R. 68-69). Does the reactivation of the page, which was dormant since April 22, 2021, and which had been previously used exclusively for Defamatory Statements against the Petitioner, and began once again to recycle defamatory statements on social media constitute a violation of the non-disparagement agreement? The settlement enforced by the Trial Court cannot address this issue. The lack of detail in the settlement agreement enforced by the Trial Court leave the Petitioner and Respondent in uncertain territory, subject to additional litigation and contrary to the Court's underlying policy of favoring settlement. The Trial Court found a tentative agreement in the broad strokes of the telephone conversation and follow-up correspondence, but absence of any agreement to remove the defamatory posts from the public is an essential element to curb the damage to the Petitioner's non-disparagement agreement. The lack of sufficient detail evidence that there was no mutual assent between parties and the settlement agreement enforced by the Trial Court as it appears in the e-mail correspondence was not binding. For this reason, the Trial Court should have denied the Respondent's motion to enforce settlement.

Finally, the unilateral additions to the Written Settlement Agreement such as arbitration before the American Arbitration Association were clearly terms that lacked mutual assent. This Court has held in the *Riner* case that

> While there may have been a meeting of the minds by the parties as to the terms reflected in the four paragraphs of the Mediation Settlement Agreement, there was not a meeting of the minds with regard to the terms that are specified in paragraph numbers 5, 6, and 7 of the "Settlement [***21] Agreement and Release." Absent this critical and necessary contractual element, we cannot require the Riners to sign a document that contains terms that were not part of the original agreement. Accordingly, we find that the lower court committed error in directing the Riners to sign the "Settlement Agreement and Release" and further, in ruling that they were to be bound by the terms of such agreement.

Riner v. Newbraugh, 211 W. Va. 137, 144 (2002). The absence of critical and necessary terms and conditions, or terms and conditions that were not part of the negotiated agreement would further evidence a lack of the essential "Meeting of the Minds" to enforce a settlement agreement. Like the *Riner* case, the lack of essential terms and conditions and the unilateral addition of terms further shows a lack of mutual assent to this agreement the that the Trial Court enforced to the detriment of the Petitioner. For these reasons, the motion to enforce should have been denied.

C. Settlement was Predicated on Written Settlement Agreement

The settlement that the Respondents moved the Trial Court to enforce was in error because the parties clearly contemplated that settlement was predicated on written settlement agreement that was negotiated between the parties. This Court has previously held that

> where, from all the evidence and circumstances of the case, it appears that the parties to an agreement being negotiated between them intend that, as a condition precedent to its becoming binding upon them, it should be reduced to writing and signed by the parties, an oral agreement, though it covers all the terms of the proposed agreement, is not binding on the parties, until it is reduced to writing, and has been signed by all the parties thereto.

O'Connor 182 W. Va. 692. (See also Syl. Pt. 1, *Blair v. Dickinson*, 133 W. Va. 38 (1949)). In the *O'Connor* case, a proposed agreement settling the civil action was reached during a telephone conversation between counsels. Correspondence was exchanged and proposed written

settlement agreements were passed back and forth, but no written agreement was signed by the parties. The Court found not settlement between the parties. The Court went on to find that "...the record indicates that the parties believed that a written agreement satisfactory to each party was necessary before this matter was finally settled." *Id* at 692. This reasoning has been supported in other cases before this Court, including the *Sprout* case, where this Court warned that

> While a valid contract may be made between parties by memorandum, telegrams, and correspondence, care should be taken not to construe as an agreement that which the parties only intended to be a preliminary negotiation. The question in such cases is, Did the parties mean to contract by the memorandum of agreement, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound? Such intention must necessarily be determined from the circumstances and surroundings appearing in each particular case.

Sprout v. Bd. of Educ., 215 W. Va. 341, 345 (2004) (quoting *Virginian Export Coal Company v. Rowland Land Company*, 100 W.Va. 559, 131 S.E. 253 (1926)). In the *Sprout* case, secretary had filed two grievances for extra work that she was required to do for a school yearbook. The school board's personnel director asked how much it would take to settle her grievances at the board's direction and the secretary eventually submitted a written offer that to the board. The secretary was under the impression that any agreement must be reduced to writing. The Board later voted not to accept the settlement. This Court found that a written agreement was an essential element of the settlement and "[a]bsent this critical and necessary contractual element, we cannot find that a contract existed between Ms. Sprout and the Board." *Id* at 345. This holding was an extension of what the Court found in *Blair v. Dickinson* and *Virginian Export Coal Co. v. Rowland Land Co.*

In the *Dickinson* case, landowners and a coal mining company contracted for a lease to remove certain minerals from the landowners' holdings. The agreement broke down and the coal mining company argued that their meeting during lease negotiations resulted in an agreement and the landowners were bound by the terms that were negotiated in the meeting. This Court found that "...when it is shown that the parties intend to reduce a contract to writing this circumstance creates a presumption that no final contract has been entered into, which requires strong evidence to overcome." *Blair v. Dickinson*, 133 W. Va. 38, 70 (1949). The Court relied in part on the holding in an earlier case that held that "[w]here the parties to an agreement make its reduction to writing and signing a condition precedent to its completion, it will not be a contract until this is done, although all of the terms of the contract have been agreed upon." *Brown v. W. M. Ry.*, 92 W. Va. 111, 112 (1922).

Virginian Export Coal Co. v. Rowland Land Co. also involved the negotiations of a mineral lease. The parties negotiated and a memorandum was executed between the parties, but the lease was never finalized. The Court found that the parties did not intend to be bound by the memorandum and an enforceable lease was never signed. The Court concluded that

> "[t]he final outcome of the deal will be seen to hinge upon whether not only was a lease prepared and executed upon which all interested could agree and execute, but whether such a release might be agreed upon and executed by the parties interested in the Virginian Export lease, as would meet the views of the Rowland Land Company."

Virginian Exp. Coal Co. v. Rowland Land Co., 100 W. Va. 559, 583-84 (1926). The Court went on to conclude that

> the whole case it seems plain that the negotiations and dealings of Poston and Rowland, concerning which the Bellevue-Stratford memorandum dealt, were based on the consummation of a lease to be subsequently executed and signed by the parties, and the failure to bring about such enforceable agreement embodying the whole object of such negotiations nullified the preliminary promises.

Id. The Court cautioned that although "... a valid contract may be made by memorandum, telegrams and correspondence, but the authorities as expressly hold that care should always be taken not to construe as an agreement that which the parties only intended to be a preliminary negotiation." *Id* at 582. Therefore, when a trial court is required to adjudicate a motion to enforce settlement, must be careful not construe preliminary negotiations of the terms and conditions of a settlement agreement as the final agreement among parties and must look at the circumstances and surroundings in each particular case to determine whether a final agreement had been reached.

Other courts within this jurisdiction have had similar holdings. The United States District Court for the Southern District of West Virginia recognizes two (2) types of agreements:

> Type I agreements bind parties to their ultimate contractual objective in recognition that a contract was reached, despite the anticipation of further formalities. Type II agreements do not commit the parties to their ultimate contractual objective. Rather, they commit the parties to negotiate the open issues in good faith in an attempt to reach the contractual objective within the agreed framework.

Akers v. Minn. Life Ins. Co., 35 F. Supp. 3d 772, 786 (S.D. W. Va. 2014). In that case, the parties and facts leading to the action are complicated, somewhat confusing, and beyond the purpose of this brief. However, regarding issues as to the proposed settlement of the dispute in the case, the District Court found that no settlement existed. The Court found that "...although Preston responded to Tiffey's April 11 e-mail by stating that he agreed with Tiffey's "summary of the settlement," both knew that still other terms were meant to be included in a final writing and that

Preston did not intend to be bound by the "summary" alone." *Id* at 787. The Court found that "...[t]he settlement needed a formal writing for complete expression" *Id* at 788.

In 2021, the United States District Court of the Southern District of West Virginia had another opportunity to review an enforcement of contract in the case of *Williams v. Rigg*. In that case, the District Court found that the plaintiff

> argues that "[t]he fact that both parties agreed to a version of the written contract by affixing [their] signatures to the exact same version of the exact same contract is sufficient to create a triable issue of fact as to whether the parties reached an agreement to the essential elements of a contract." However, Williams' reliance on this fact is misguided insofar as the contract to which Williams signed his name was never sent back or communicated to Rigg, but rather, the parties continued negotiating the terms of the proposed agreement. These circumstances do not establish a "meeting of the minds" between the parties. Rather, these circumstances only establish a series of ongoing preliminary negotiations, during which neither party ever communicated to the other that they were wholly agreeable to any of the proposed contracts.

Williams v. Rigg, No. 3:19-cv-00423, 2021 U.S. Dist. LEXIS 207362, at *14 (S.D. W. Va. Oct. 27, 2021). The District Court reasoned that even though both parties has signed the exact same contract, the continued negotiations between the parties indicated that there was no meeting of the minds necessary to commit the parties to an enforceable contract.

In the case before this Court, it is clear that both the Petitioner and the Respondent anticipated a Written Settlement Agreement that had to be approved by all parties. The parties outlined the terms and conditions of a settlement, but the terms and conditions never made it to final written form and no Written Settlement Agreement was approved by the Petitioner. Instead, on August 31, 2021, at 11:28 am, counsel for Casto and the Petitioner had a telephonic conversation regarding potential terms and conditions for settlement. Soon after, Counsel for Casto sent an e-mail correspondence that confirmed the "global resolution of pending cases/claims with a walk-away provision between Dan Casto and David Levine (and others.)"

(J.A.R. 60). The correspondence also stated that the Petitioner and Casto contemplated that the parties would work "...***to put a global draft settlement agreement together for your review*** [Emphasis Added]." *Id.* Within less than an hour, counsel for the Respondents, sent an e-mail correspondence stating that

> the terms of this agreement are that David Levine will drop and dismiss with prejudice all claims set for the in 19-C-139 and 20-C-129 and Mr. Casto and Mr. Everhart will drop all claims they have pending against Mr. Levine , including claims in which this office does not represent Casto. The terms of the settlement *will* [emphasis added] include mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by WV law. Further, there will be no exchange of any money as a result of this settlement. All parties will execute a release. Please confirm that these settlement terms are correct and confirm that your client agrees to these terms. If there is anything missing, please let me know.

(J.A.R. 37). In response, Petitioner's counsel stated that the terms were correct. (J.A.R. 38). In both e-mail correspondences the parties contemplated a Written Settlement Agreement. The first e-mail correspondence that the Petitioner contemplated that the settlement agreement would be in writing as the August 31, 2021 e-mail correspondence evidences that "a global draft settlement agreement" was contemplated. (J.A.R. 60). The Respondent's e-mail correspondence later that day contemplates what the settlement agreement *will* [emphasis added] include in its final incarnation, clearly contemplating a written agreement to be drafted in the future. (J.A.R. 37). Weeks later, on September 16, 2021, after all the Respondent, JCP Defendants, and Casto were able to review the Written Settlement Agreement and make any proposed amendments to the agreement; the Written Settlement Agreement was sent to the Petitioner for review. In that same correspondence the Respondents Joint Defendants requested "proposed revisions" (J.A.R. 63). Subsequent e-mail correspondence evidences the efforts of the parties to reach a meeting of the minds required for an enforceable settlement agreement by

written correspondence on September 16, 2021, (J.A.R. 64), October 6, 2021, (J.A.R. 66), October 11, 2021, (J.A.R. 67). The parties undoubtedly saw that a written agreement was necessary.

The Respondents' heavily rely on e-mail correspondence that was exchanged between the Respondent's Counsel and Counsel for the Petitioner, but this myopic view is self-serving and incomplete. (J.A.R. 37). This Court has previously held that "[i]t is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent." *Ashland Oil v. Donahue*, 159 W. Va. 463, 469 (1976), (See also *Pertee v. Goodyear Tire & Rubber Co.*, 861 F. Supp. 523 (S.D. W. Va. 1994)). The Respondents must take all the correspondence into consideration and not just the correspondence that favors their argument. This would include the e-mail correspondence with Casto's Counsel that contemplated a global draft settlement agreement. (J.A.R. 60). It is clear that settlement negotiations included a "global draft settlement agreement" that had to be approved by all the parties. The Respondent must construed together all the e-mail correspondence that occurred between the Petitioner, Respondents, the JCP Defendants, and Casto, not just the e-mail correspondence that fits their narrative. Furthermore, as argued earlier; the Respondent's e-mail correspondence later that day contemplates a written agreement when he states what the settlement agreement ***will*** [emphasis added] include, identifying and referencing a written agreement to be drafted in the future. (J.A.R. 37). As a Written Settlement Agreement was never completed and not approved by all the parties, the Trial Court should have denied the Respondent's motion to enforce settlement.

The Respondents have previously argued that the correspondence between counsel for the Petitioner and counsel for the Respondent was sufficient to find a settlement between the parties. In support of their argument they cite this Court's memorandum opinion of *Russell v. Bayview Loan Servicing, LLC* case. *Russell v. Bayview Loan Servicing, LLC*, No. 20-0681, 2021 W. Va. LEXIS 398 (June 23, 2021). In the *Russell* case, the parties' dispute arose over the foreclosure of the plaintiff's home. On July 25, 2019, counsel for the defendant sent to plaintiff's counsel an offer in which the plaintiff responded with accepted. The defendant cancelled its defense of the case, including conducting a deposition and initiated credit repair for the plaintiff. During the month of August, the parties exchanged settlement agreements, made revisions, and the final draft of the settlement agreement was eventually signed by plaintiff's counsel and the defendant's representatives in December. As part of the agreement by the parties, the plaintiff was to pay off or vacate the home by December 2019. The plaintiff would not sign the settlement agreement, likely because the plaintiff was unable to pay the lien in full; and attempted to gain further concessions from the defendant. The Court found that the question of whether the plaintiff "did she condition her settlement on seeing a written agreement" as dispositive. *Id at 11.* The Court went on to find that "the parties demonstrated an intention to be bound upon acceptance rather than execution of a formalized settlement agreement." *Id at 12.* This was likely due to the preemptive steps that the Defendant took in contemplation of the terms the settlement agreement.

As stated previously, it was contemplated from the beginning that the parties would work "...to put a global draft settlement agreement together for your [the Petitioner's] review." (J.A.R. 60). On September 16, 2021, after all the Joint Defendants were able to review the Written Settlement Agreement, make any proposed amendments and then sent the Written

Settlement Agreement was sent to the Petitioner for review. In that same correspondence the Respondents requested "proposed revisions" to the Written Settlement Agreement. (J.A.R. 64) The Respondents and other interested parties continued to press for revisions of the Written Settlement Agreement on September 15, 2021(J.A.R. 62), September 16, 2021 (J.A.R. 63), September 16, 2021 (J.A.R. 64), September 28, 2021 (J.A.R. 65), October 6, 2021(J.A.R. 66), and October 11, 2021 (J.A.R. 67), contemplate the necessity of both a written agreement and an agreement that has the consent of all parties. The facts and circumstances of this case, is more like the facts and circumstances that this Court found in *Virginian Exp. Coal Co.* where "[t]he final outcome of the deal will be seen to hinge upon whether not only was a lease prepared and executed upon which all interested could agree and execute..." *Virginian Exp. Coal Co.*, 100 W. Va. 583. Or as the *Akers* Court where that court found a Type II agreement and that written agreement was not "...both knew that still other terms were meant to be included in a final writing and that Preston did not intend to be bound by the "summary" alone." *Akers*, 35 F. Supp. 3d 787. It is clear that the Respondents and the Petitioner knew that a written settlement agreement that was approved by the parties was required to resolve the dispute between them in this case.

Furthermore and unlike the *Russell* case cited by the Respondents, the parties did nothing to demonstrate their intention to be bound by the broad strokes mentioned in the August 31st correspondence (J.A.R. 60) and the Respondents have done nothing to effectuate their own agreement. The parties stand in the same position as before the possibility of settlement was discussed. Finally, the Petitioner did not further participate in further negotiations. Like the respondent in *Rigg*, the Petitioner did nothing to communicate "... to the other that they were

wholly agreeable to any of the proposed..." terms in the Written Settlement Agreement. *Rigg*, 2021 U.S. Dist. LEXIS 207362, at *14. For these reasons, the Trial Court should not have confirmed the settlement agreement proffered by the Respondents.

VII. Conclusion

Although a court of appeals may give deference and discretion to trial court rulings, the appellate court must look at the issues that were subject to the trial court rulings and determine if the appropriate weight was applied to the factors that led to the trial court's determination, that the relevant factors were properly considered, and whether the trial court wielded its discretion appropriately.

Petitioner argues that settlement that the Trial Court enforced does not meet the standards required to enforce a settlement agreement. The settlement agreement does not reflect a meeting of the minds, an essential element in any valid contract. Although, the parties spoke in broad strokes as to the terms and conditions of the settlement agreement, the parties never reached the clear and unequivocal acceptance of the agreement or a meeting of the minds. It is clear that the Petitioner, the Respondents and other interested parties contemplated that the settlement agreement would be in writing as the August 31, 2021 e-mail correspondence evidences that "a global draft settlement agreement" was part of any agreement. (J.A.R. 60). The Respondent's e-mail correspondence later that day contemplates what the settlement agreement ***will*** [emphasis added] include, fully contemplating and envisioning a written agreement to be drafted in the future. (J.A.R. 37). Finally, as the Respondent contemplates that the Petitioner will have proposed revisions to the Written Settlement Agreement. (J.A.R. 63). Like *O'Connor,* the parties initial negotiations began by telephone, eventually terms and conditions were passed by written

correspondence by e-mail, and like *O'Connor* of the case before this Court "the record indicates that the parties believed that a written agreement satisfactory to each party was necessary before this matter was finally settled." As the parties never reached the final Written Settlement Agreement, there could not have been a meeting of the minds to necessary to create a settlement agreement.

Additionally, the record before this Court is laden with correspondence that shows the opposite of mutual assent, but instead shows efforts of the parties to reach a meeting of the minds required for an enforceable settlement agreement by written correspondence on September 16, 2021, (J.A.R. 64); October 6, 2021, (J.A.R. 66); October 11, 2021, (J.A.R. 67). The Respondent simply cannot show clear and unequivocal acceptance of any settlement agreement, much less a meeting of the minds between the parties.

Furthermore, it is apparent that the broad terms and conditions that were discussed between the parties "lacked sufficient detail to constitute a binding agreement" *Triad Energy Corp.*, 215 W. Va. 578. Although Respondent's e-mail correspondence references mutual non-disparagement, confidentiality, no exchange of any money, the e-mail correspondence that the Respondent relies lacks the sufficient detail to give these terms meaning or set out a framework as to what the parties are to bide by in future.. The e-mail correspondence does not define the parties understanding of a mutual non-disparagement agreement and this lack of sufficient detail leaves the Petitioner and Respondent in uncertain territory, subject to additional litigation and contrary to the Court's underlying policy of favoring settlement.

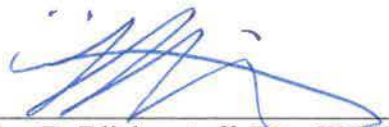
Finally, it was clearly contemplated by the Petitioner and Respondent that any settlement was predicated on written settlement agreement that was approved and signed by all parties to the settlement. A written settlement agreement was contemplated from the beginning of

negotiations. It was clear that the parties would work "...to put a global draft settlement agreement together for your [the Petitioner's] review." (J.A.R. 60). The Respondent's e-mail correspondence later that day contemplates what the settlement agreement *will* [emphasis added] include; this statement clearly contemplates a written agreement to be drafted in the future. (J.A.R. 37).The Respondents and other interested parties continued to press for revisions of the Written Settlement Agreement on September 15, 2021(J.A.R. 62), September 16, 2021 (J.A.R. 63), September 16, 2021 (J.A.R. 64), September 28, 2021 (J.A.R. 65), October 6, 2021(J.A.R. 66), and October 11, 2021 (J.A.R. 67), contemplate the necessity of both a written agreement and an agreement that has the consent of all parties before the settlement could be implemented.

The Trial Court's finding of a valid settlement agreement between the Petitioner and the Respondent is in error. The settlement agreement does not reflect a meeting of the minds, an essential element in any valid contract. Additionally, it was clearly contemplated by the Petitioner and Respondent that any settlement was predicated on written settlement agreement that was approved and signed by all parties to the settlement. This written agreement was never finalized. Instead, the Respondents moved to enforce a settlement when it became apparent that negotiations were failing and it appeared to be heading into further litigation. For these reasons, the Petitioner argues that the Trial court did not give sufficient weight to these relevant factors when Trial Court granted the Respondents' *Motion to Enforce Settlement*. The Trial Court should not have found a meeting of the minds or mutual assent in the settlement proffered by the Respondents. Furthermore, the Trial Court did not give proper weight to e-mail correspondence that occurred at the beginning of negotiations between the parties where it is plain that a written agreement was essential to any settlement. The Trial Court should not have enforced the purported settlement between the Petitioner and the Respondent.

WHEREFORE, the Petitioner requests that this Court find that that a valid, enforceable settlement agreement did not existed between the Petitioner and the Respondents and that the case be remanded back to Circuit Court for further disposition.

Respectfully Submitted
DAVID ANDREW LEVINE,
Petitioner by Counsel:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-1015

DAVID ANDREW LEVINE,
Petitioner

vs.

ROCKWOOL INTERNATIONAL A/S,

BJØRN RICI ANDERSEN

JEFFERSON COUNTY PROSPERITY, INC.,

ROXUL USA, INC.,

DANIEL CASTO,

RAYMOND J. BRUNING,

STEVEN STOLIPHER,
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing: "***PETITIONER'S BRIEF,***" "***JOINT APPENDIX RECORD***" and Certificate of Service was served upon counsel of record by First Class mail, postage pre-paid on March 21st, 2022, upon the following:

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