**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.

# PETITIONER'S REPLY BRIEF

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## Table of Contents


| | | |
|---|---|---|
| I. | Table of Authorities | 3 |
| II. | Assignment of Error(s) | 3 |
| III. | Statement of the Case | 4 |
| IV. | Summary of Argument | 6 |
| V. | Statement Regarding Oral Argument and Decision | 6 |
| VI. | Petitioner's Argument in Reply to Respondent's Response | 6 |
| VII. | Conclusion | 15 |

## I. Table of Authorities

Cases

*Ashland Oil v. Donahue*, 159 W. Va. 463 (1976).

*Donahue v. Mammoth Restoration & Cleaning*, No. 20-0343, 2022 W. Va. LEXIS 145 (Feb. 18, 2022).

*O'Connor v. GCC Beverages*, 182 W. Va. 689(1990).

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

*Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573 (2004)

Persuasive Authority

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

Rules

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

Reference

Merriam-Webster Dictionary, Merriam-Webster.com <https://www.merriam-webster.com/dictionary/will?src=search-dict-boxeaning> (May 23, 2022).

Websites

Dana Brownlee, Forbes.com, 3 Times When You Really Shouldn't Email < https://www.forbes.com/sites/danabrownlee/2019/03/13/3-times-when-you-really-shouldnt-email/?sh=38dad0881405> (March 13, 2019).

Indeed, Indeed.com, 12 Pros and Cons of Using Email for Business Communication < https://www.indeed.com/career-advice/career-development/email-business-communication> (April 15, 2021).

## 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

Petitioner incorporates the *Summary of Argument* filed in the Petitioner's Brief with this Reply and has further divided the argument by topical headings.

## V. Statement Regarding Oral Argument and Decision

As stated in the Petitioner's Brief, and pursuant to Rule 18(a) (4) *W. Va. Rules Appellate Procedure,* oral argument is unnecessary.

## VI. Petitioner's Argument in Reply to Respondent's Response

A. The Settlement Between the Parties lacked Mutual Assent

The Petitioner has previously argued in his brief that 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. The Petitioner incorporates those arguments in this reply. 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. As the Petitioner argued in

his own Brief, the settlement agreement enforced by the trial court lacked specific terms constituting a binding agreement and failed to give sufficient detail as to terms meaning or set out a framework as to what the parties are to abide by in future. It is also clear that the Petitioner, the Respondents and other interested parties contemplated that the settlement agreement would be in writing.

The Respondents argue that there was mutual assent and a meeting of the minds and that a written settlement agreement was not required, however; the Respondents fail to view the whole of the correspondence between the parties. The Respondents rely heavily on the case of *Donahue v. Mammoth Restoration and Cleaning.* In that case, Donahue appealed a Circuit Court decision that enforced a settlement agreement between himself and Allstate Company ("Allstate"), relating to a payment for water damage to real property owned by Donahue. The Court found that

> petitioner's own words firmly established that, in consideration for Allstate paying the debt petitioner owed to Mammoth for the mitigation services performed on the subject property, petitioner would release Allstate not only from the third-party complaint involving the debt to Mammoth, *but also "any suit against Allstate involving that claim on the home and the lost property," including "any bad faith."*

Donahue v. Mammoth Restoration & Cleaning, No. 20-0343, 2022 W. Va. LEXIS 145, at *15 (Feb. 18, 2022). The Court went on to find that "... at no time did counsel for petitioner suggest that the reason for the delay in executing the agreement was because petitioner believed that it did not reflect the terms and conditions to which he had assented." Donahue v. Mammoth Restoration & Cleaning, No. 20-0343, 2022 W. Va. LEXIS 145, at *17 (Feb. 18, 2022).

The underlying issue in the *Donahue* case was a dispute with his insurance company Allstate and the payment of services to remediate water damage that his real property suffered.

In other words, the underlying action was a contract dispute between Donahue and Allstate. The parties in Donahue already had an existing contractual relationship that set out the rights and responsibilities of the parties. Donahue claims arose from what the plaintiff perceived where a failure of Allstate to honor those contractual terms. Donahue had previously indicated that the action was ripe for dismissal when he agreed to have the order dismissing the action circulated among the parties. Id at *5. Attempts to resolve the action stretched over many months before Allstate filed its motion to enforce settlement. Id at *9. The trial court found that a settlement had been reached and this Court agreed. However, the facts differ significantly in the case now before this Court.

In this case, the Petitioner's claims arise out of the tort of defamation. The parties had no prior agreement or relationship before the alleged tort occurred. Although the parties spoke in broad strokes as to the terms and conditions of a possible settlement agreement, the agreement approved by the trial court lacks the sufficient detail to give these terms meaning or set out a framework as to how the parties are to conform their actions in future. For example, the e-mail correspondence does not define the parties understanding of a mutual non-disparagement agreement and lacks sufficient detail overall. The Respondent argues that including the phrase "extent allowed by WV law" resolves the terms of the non-disparagement agreement. (J.A.R. 65). However, the full sentence reads that "[t]he terms of the settlement will include mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by WV law." *Id.* The full sentence that the Respondent cites is at best unclear and appears to refer to the independent clause of confidentiality being to the extent allowed by WV law, and not to the non-disparagement portion of the sentence. The non-disparagement agreement is never defined, clarified or explained. As the Petitioners' cause of action is defamation, the terms of a non-

disparagement agreement would be paramount to the Petitioner and the Petitioner would and indeed wanted this provision well-defined to avoid any future problems. This lack of sufficient detail is evidence that the parties never reached the clear and unequivocal acceptance of the agreement or a meeting of the minds.

Additionally, unlike *Donahue* case, a written settlement agreement (the "Written Settlement Agreement") was an essential component of the parties' resolution. On August 31, 2021, at 11:28 am, counsel for Casto[1] 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. 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.

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[1] The he 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*

(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 Respondents and other interested parties were able to review the Written Settlement Agreement and make any proposed amendments to that agreement; the Written Settlement Agreement was sent to the Petitioner for review. In that same correspondence the Respondents requested "proposed revisions" (J.A.R. 63). The Petitioner had no hand in the drafting the Written Settlement Agreement prior to its receipt. Unlike *Donahue*, there was not base line contractual agreement for the parties to understand their rights and obligations, instead a Written Settlement Agreement was contemplated and required by parties. The Respondents argue that the e-mail correspondence is sufficient to enforce settlement, but the Respondents' primary focus is on the e-mail correspondence on August 31, 2021, is incomplete. (J.A.R. 37, 38). First, the Respondents' do not acknowledge that the Petitioner stated that the settlement ***would*** include the Respondents, not that the settlement included the Respondents. The use of the word "would," the past tense of will; evidences plan of intention for a future event. In this case, a Written Settlement Agreement to be drafted and approved by all parties was essential.

Secondly and as previously argued by the Petitioner, the Respondents must take all the e-mail correspondence into consideration and not just the correspondence that favors their argument. E-mail communication itself is often times problematic and unclear. There are two (2) specific instances before this Court where the e-mail correspondence evidences a written agreement being an essential term of any settlement between the parties. This would include the aforementioned e-mail correspondence with Casto's Counsel that contemplated a global draft settlement agreement. (J.A.R. 60) and 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). The word "will" is important. Merriam-Webster defines will as "auxiliary verb, used to express futurity" or a time to come in the future. Merriam-Webster Dictionary, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/will?src=search-dict-boxeaning> (May 23, 2022). It is clear from the Respondents own e-mail correspondence that a written agreement was contemplated in the future. The Respondents must incorporate together all the e-mail correspondence that occurred between the Petitioner, Respondents, and interested parties; not just the e-mail correspondence that fits their narrative. It is clear that settlement negotiations included a "global draft settlement agreement," that the Respondents were aware of that conditions and that such agreement would have to be approved by all the parties.

The Respondents also 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 "... conditioned 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, the parties in this case contemplated a Written Settlement Agreement 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 and other interested parties were able to review the Written Settlement Agreement, make any proposed amendments to the Written Settlement Agreement, the Written Settlement Agreement was sent to the Petitioner for review for the first-time. In that same correspondence the Respondents requested "proposed revisions" to the Written Settlement Agreement. (J.A.R. 64) It is apparent that there were clearly issues that need to be negotiated and finalized. 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). This e-mail correspondence evidences the necessity of both a written agreement and an agreement that has the consent of all parties

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. Instead, within days after receiving the Respondents' proposed agreement, the Petitioner stated that the agreement unacceptable and suggested the possibility of early mediation to resolves the disputes between the parties. (J.A.R. 49).

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. The parties spoke in broad strokes as to the terms and conditions of the settlement agreement, but the parties never reached the clear and unequivocal acceptance of the agreement or a meeting of the minds. The essential terms, like the non-disparagement agreement; are never clearly defined. It is also clear that the Petitioner, the Respondents and other interested parties contemplated that the settlement agreement would be in writing. Without this meeting of minds, the Trial Court should not have granted the Respondents' Motion to Enforce Settlement.

B. 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. The Respondents argues that the e-mail correspondence alone was sufficient to reach an agreement and Written Settlement Agreement was not contemplated.

In support of the Respondents' claim, the Respondents point to the e-mail correspondence that was exchanged between the Respondent's Counsel and Counsel for the Petitioner. (J.A.R. 37, 38). However, sole reliance on e-mail correspondence alone is problematic and e-mail correspondence in general has inherent problems. For example, Dana Brownlee of Forbes.com has stated that "[w]hile email is easy and efficient, it's not a terribly effective medium for clarifying complex information. Particularly when an issue is being discussed for the first time, some initial back and forth questions/clarifications are often necessary to get everyone on the same page." Dana Brownlee, Forbes.com, 3 Times When You Really Shouldn't Email

<https://www.forbes.com/sites/danabrownlee/2019/03/13/3-times-when-you-really-shouldnt-email/?sh=38dad0881405> (March 13, 2019). Or as Indeed.com reported "...misunderstandings happen when an email isn't clear and there isn't always an opportunity to ensure the recipients' processed or understood the information correctly." Indeed, Indeed.com, 12 Pros and Cons of Using Email for Business Communication <https://www.indeed.com/career-advice/career-development/email-business-communication> (April 15, 2021). These types of communication problems have been recognized by this Court and are not unique to e-mail correspondence. This Court has recognized that when it comes to multiple writings, that the writings 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)). Therefore, a Court must look at all the correspondence between the parties to ascertain the meaning behind them.

In this case and as previously argued by the Petitioner, the Respondents must take all the correspondence into consideration and not just the correspondence that favors their argument. This would include the initial e-mail correspondence with Casto's Counsel that contemplated a global draft settlement agreement that memorialized the previous telephone conversation. (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 from the beginning. The Respondents must construe together all the e-mail correspondence that occurred between the Petitioner, Respondents, and other interested parties, not just the e-mail correspondence that fits their narrative. This includes 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). 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 and the Trial Court should not have found an agreement between the parties without it.

## 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. The cases of *Donahue* and *Russell* cited by the Respondents are distinguishable from the facts of the case before this Court. Instead, the facts of this case are more consistent with the cases of *Triad Energy Corp. of W. Va., Inc. v. Renner* and *O'Connor v. GCC Beverages* previously cited in the Petitioners' Brief where this Court found that settlement agreement did not exist because of lack of sufficient detail or that the settlement was conditioned upon a written agreement. *Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573 (2004) and *O'Connor v. GCC Beverages*, 182 W. Va. 689 (1990).

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. There is simply not mutual assent or meeting of the minds. 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 that the case was 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**
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Respondents.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing: "***PETITIONER'S REPLY BRIEF,***" and Certificate of Service was served upon counsel of record by First Class mail, postage pre-paid on May 25th, 2022, upon the following:

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