IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-1015

DAVID ANDREW LEVINE,

Petitioner,

v.

ROCKWOOL INTERNATIONAL A/S,

BJØRN RICI ANDERSEN,

JEFFERSON COUNTY PROSPERITY, INC.,

ROXUL USA, INC.,

DANIEL CASTO,

RAYMOND J. BRUNING, and

STEVEN STOLIPHER,

Respondents.

Appeal from an Order of the Circuit Court of Jefferson County (CC-19-2019-C-139)

ROCKWOOL RESPONDENTS' BRIEF

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Bjørn Rici Andersen, and
Roxul USA, Inc.
Respondents, By Counsel

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STATEMENT OF THE CASE

Petitioner, David A. Levine (hereinafter "Levine") instituted this civil action in the Circuit Court of Jefferson County by filing a complaint for defamation and related torts on August 27, 2019, and amending it to add an additional defendant on September 20, 2019. The amended complaint named as defendants ROCKWOOL International A/S,[1] Bjørn Rici Anderson, Roxul USA, Inc. (collectively the "ROCKWOOL Respondents"), Jefferson County Prosperity, Inc., Daniel Casto, Raymond J. Bruning, and Steven Stolipher (collectively the "JCP Respondents") (the ROCKWOOL Respondents and the JCP Respondents are collectively referred to as "Respondents"). Joint Appendix ("JApp.") at 2-3. On March 23, 2020, Levine amended the complaint a second time after the Circuit Court granted Respondents' respective motions for a more definite statement. JApp. at 8-11.

On December 13, 2019, prior to filing his second amended complaint, Levine filed for Chapter 7 bankruptcy protection. After Levine filed the second amended complaint, Levine's Chapter 7 Bankruptcy Trustee intervened as a party plaintiff (JApp. at 16) and withdrew all claims asserted by Levine in the civil action up to December 13, 2019 at 4:11:53 p.m., the date and time of Levine's Chapter 7 bankruptcy filing, given the settlement of those claims in the bankruptcy proceeding. JApp. at 19.

[1] As of April 7, 2022, ROCKWOOL INTERNATIONAL A/S was renamed "ROCKWOOL A/S."

On or about August 31, 2021, Levine advised counsel for the JCP Respondents that he had authorized his counsel to enter into a global settlement with the JCP Respondents. JApp. at 37. This settlement related not only to the action before this Court, but also to two other civil actions pending in the Circuit Court of Jefferson County.[2] On August 31, 2021, counsel for the JCP Respondents sent Levine's counsel the following email seeking confirmation of the settlement terms:

> I received word this morning that your client, David Levine, has authorized you to enter into a global settlement with Jefferson County Perspective, Dan Casto, Mark Everhart, Raymond Bruning, and Steven Stolipher. **It is my understanding that the terms of this agreement are that David Levine will drop and dismiss with prejudice all claims set forth 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 Mr. Casto. The terms of the settlement will include mutual non-disparagement and confidentially 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. (emphasis added)

Id. In response to this August 31, 2021 email, Levine's counsel stated unambiguously: **"[y]ou are correct at *[sic]* to the terms of the agreement."** JApp at 38 (emphasis added). In a September 13, 2021 email, the JCP Respondents' counsel asked Levine's counsel to

[2] The first was Case No. 20-C-129, filed by Levine against some of the JCP Respondents, among others. The second was Case No. 21-C-2, filed by one of the JCP Respondents against Levine, among others. *Id.*

"confirm that this settlement is to include the Rockwool defendants consistent with dismissal of all claims set forth in 19-C-139." JApp. at 39. Levine's counsel responded in part: "I got your message and **the settlement would include the Rockwool Defendants."** *Id.* (emphasis added). Having agreed to settle all remaining claims asserted in this and the other civil actions, Petitioner then refused to sign the release and formal settlement agreement memorializing the above confirmed written terms, and his counsel refused to sign a Stipulation of Dismissal pursuant to Rule 41(a)(1)(ii) of the West Virginia Rules of Civil Procedure. JApp. at 31. Counsel for the JCP Respondents sent Levine's counsel a copy of the formal settlement agreement and release for signing, along with the stipulation of dismissal, but neither were returned. *Id.* After sending the formal settlement agreement on September 16, 2021, JApp. at 63, counsel for the respective Respondents made multiple attempts to secure a signed formal settlement agreement from Levine's counsel. Those efforts included emails sent on September 28 (JApp. at 65), October 6 (JApp. at 66), and October 11, 2021 (JApp. at 67), all of which asked when Respondents could expect the executed agreement. In addition, counsel for the JCP Respondents called and left voice messages for Levine's counsel with no response until October 13, when Levine's counsel advised that he could not get Levine to sign because Levine had seen some old Facebook posts. JApp. at 32. However, the Facebook page Levine complained of was created on August 14, 2020, and included only a single comment relating to Levine published prior to the settlement of the issues on August 31, 2021. JApp. at 68-69. Levine presented no

evidence that any Respondent was responsible either for reactivating the Facebook page or making the single comment regarding him. Levine's counsel thereafter also refused to execute a Stipulation of Dismissal. JApp. at 31.

As a result, on October 15, 2021, Respondents filed a motion to enforce the terms of the settlement as set forth in the parties' e-mails. JApp. at 19 and 31. Respondents' motion to enforce notably did not seek to enforce the subsequently drafted written settlement agreement, as the material terms of the settlement had already been agreed to in the parties' e-mail exchanges. After full briefing pursuant to the Circuit Court's Trial Court Rule 22 Scheduling Order, JApp. at 19, on November 19, 2021, the Circuit Court entered its "Order Granting Motion to Enforce Settlement Agreement," JApp. at 22-28. The Circuit Court found that Levine had "offered no evidence to dispute" the emails setting forth the terms of the agreement and that Mr. Levine's assertion that the agreement was predicated on a later written agreement was unavailing because "Mr. Levine had the ability to clarify this position yet remained silent." JApp. at 24-25. Notably, the Circuit Court did *not* require Petitioner to execute the written formal settlement agreement emailed to Levine's counsel by counsel for the JCP Respondents. In fact, no party provided that agreement to the Circuit Court, and it is not a part of the record on appeal. Rather, the Circuit Court ordered that the terms of the settlement agreement were "those terms set forth in the August 31, 2021 email…which include the following terms: 1) [Levine] will drop and dismiss with prejudice all claims set forth in 19-C-139….2) [t]he parties shall commit to mutual

non-disparagement and confidentiality of the terms of the settlement to the extent allowed by West Virginia law. 3) [t]here shall be no exchange of money. 4) [a]ll parties shall execute a release." JApp. at 27-28.

The Circuit Court's order was entered in this civil action as well as Civil Action Nos. 20-C-129 and 21-C-2. Levine timely appealed from the Circuit Court's order in this action, but did not appeal from the identical orders entered in the other civil actions.

SUMMARY OF ARGUMENT

The Circuit Court possessed the authority to enforce the terms of the settlement agreement set forth in the emails between counsel for Levine and Respondents on August 31, 2021 and September 13, 2021.

Settlement agreements are contracts and are enforceable when the fundamental elements of a legal contract exist: competent parties, legal subject matter, valuable consideration, and mutual assent. All of these elements were present here in the email exchanges between the parties' counsel.

Levine nonetheless claims in his assignments of error that: 1) there was no mutual assent as to the terms of the settlement; and 2) the parties further contemplated a subsequent formal written settlement agreement. Both assignments of error fail.

First, mutual assent requires an offer on the part of one party and an acceptance by the other. Mutual assent is shown here in respective counsels' August 31, 2021 email exchange. Specifically, the JCP Respondents' counsel sought confirmation that "these

settlement terms are correct and confirm that your client agrees to these terms":

- Levine would "drop and dismiss with prejudice all claims set forth in 19-C-139 and 20-C-129" in exchange for "Mr. Casto and Mr. Everhart [dropping] all claims they have pending against [Levine], including claims in which this office does not represent Mr. Casto";
- "mutual non-disparagement and confidentially of the terms of the settlement to the extent allowed by WV law";
- "no exchange of any money as a result of this settlement"; and
- "All parties will execute a release."

JApp. at 27-28. Levine's counsel did not respond that the terms were incorrect, but instead stated only that "**[y]ou are correct at [sic] to the terms of the agreement.**" JApp. at 38 (emphasis added). Moreover, on September 13, 2021, Petitioner's counsel confirmed that "**the settlement would include the Rockwool Defendants.**" JApp. at 39 (emphasis added).

Levine does not assert that his counsel lacked authority to bind him to the terms of this settlement. His counsel's assent to the terms expressed in these e-mails was unequivocal and reveals that the parties had the same understanding as to the terms of the settlement so reached. This Court's precedent has consistently enforced settlement agreements where the terms of the agreement were set forth in e-mails between counsel for the parties.

Second, there is no evidence that the parties contemplated a later, written settlement agreement. The original August 31, 2021 email exchange setting forth the terms of the agreement required only a single writing – that "all parties will execute a release." JApp. at 37. The JCP Respondents' further requested in that email that, "If there is anything missing, please let me know." *Id.* Contrary to Levine's current position, his counsel did not respond that a further, written settlement agreement was required, but instead stated only that "[y]ou are correct at *[sic]* to the terms of the agreement." JApp. at 38.

The subsequent emails from Respondents relied upon by Levine here reveal nothing more than attempts by Respondents to obtain Levine's signature on a written settlement agreement consistent with the already agreed upon terms. JApp. at 62-67. None of these emails state that any further terms needed to be negotiated, or even that the written settlement agreement was itself a necessity.

Accordingly, the decision of the Circuit Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Rockwool Respondents believe that oral argument is not necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure inasmuch as the facts and legal argument can be adequately presented in the parties' briefs and the record and the Court's decisional process would not be significantly aided by oral argument. However, should this Honorable Court be of the opinion that oral argument would significantly aid its decisional process, this case is appropriate for a Rule 19 argument and disposition by memorandum

decision.

ARGUMENT

A. STANDARD OF REVIEW

Levine cites *Devane v. Kennedy*, 205 W. Va. 519, 527, 519 S.E.2d 622, 630 (1999) for the proposition that an abuse of discretion standard applies to this Court's review of a circuit court order enforcing a settlement agreement. This assertion is incorrect. The Circuit Court's order on appeal contains specific findings of fact and applies both contract law and the law relating to settlement agreements to those facts. JApp. at 23-28. As such, the standard of review applicable to this appeal is as set forth in this Court's recent per curiam decision in *Donahue v. Mammoth Restoration & Cleaning*, 202 W. Va. LEXIS 145 (Feb. 18, 2022):

> Where the issue of the enforceability of a settlement agreement requires the lower court to make findings of fact and apply contractual or other legal principles, this Court will review its order and the ultimate disposition under an abuse of discretion standard, its underlying factual findings under a clearly erroneous standard, and questions of law pursuant to a de novo review.

Id. at Syl. Pt. 1 (citing Syl. Pt. 2, *Triple 7 Commodities, Inc. v. High Country Mining, Inc.*, 245 W. Va. 63, 857 S.E.2d 403 (2021)). This "three-part standard of review has consistently been applied" by this Court. *Horkulic v. Galloway*, 222 W. Va. 450, 458, 665 S.E.2d 284, 292 (2008).

Further, where the enforcement of a settlement agreement is at issue, this Court has

been "mindful that '[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy.'" Syl. Pt. 2, *Triple 7*, citing Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens*, 152 W. Va. 91, 159 S.E.2d 784 (1968).

B. THE CIRCUIT COURT PROPERLY FOUND THAT THERE WAS A MEETING OF THE MINDS BETWEEN LEVINE AND RESPONDENTS LEADING TO THE ENFORCEABILITY OF THE SETTLEMENT REACHED BETWEEN THE PARTIES

"This Court has consistently held that a circuit court has the authority to enforce a settlement agreement through a party's motion to compel enforcement." *Horculick*, 222 W. Va. at 459, 665 S.E.2d at 293. In fact, this Court has further "long recognized that settlement agreements are contracts and subject to enforcement like any other contract." *Marcus v. Staubs*, 230 W. Va. 127, 141, 736 S.E.2d 360, 374 (2012).

"The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration, and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syl. Pt. 2, *Go-Mart, Inc. v. Olson*, 198 W. Va. 559, 482 S.E.2d 176 (1996), citing Syl. Pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926); *see also Atl. Credit & Fin. Special Fin. Unit, LLC v. Stacy*, No. 17-0615, 2018 W. Va. LEXIS 654, at *14, 2018 WL 5310172, at *5 (W. Va. Oct. 26, 2018) (memorandum decision) (quoting *Virginian Export* and stating that these fundamentals are "well-established").

Levine argues that the Circuit Court erred in enforcing the settlement reached between the parties because there purportedly was no meeting of the minds as to the settlement's terms. Pet. Br. at 10. The Circuit Court found that Levine offered no evidence to dispute the email of August 31, 2021 from JCP Respondents' counsel setting forth the terms of the settlement followed by an email from Levine's counsel confirming those terms. JApp. at 24. These undisputed emails led the Circuit Court to correctly conclude that the settlement reached must be enforced because the parties had "entered into a legally binding settlement agreement," with the August 31, 2021 emails establishing the required mutual assent. JApp. at 26. Levine points to no evidence in the record on appeal to call into question the Circuit Court's factual findings, much less prove that they are clearly erroneous.

The United States District Court for the Northern District of West Virginia succinctly, but comprehensively, reviewed West Virginia law regarding mutual assent to contract in *Benson v. High Rd. Operating, LLC*, No. 5:20-cv-00229, 2022 U.S. Dist. LEXIS 15241, 2022 WL 264548 (W. Va. Jan. 27, 2022) (memorandum opinion):

> "A meeting of the minds is a *sine qua non* of all contracts." *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802, 804 (W. Va. 2002). "The contractual concept of 'meeting of the minds' or 'mutual assent' relates to the parties having the same understanding of the terms of the agreement reached." *Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 664 S.E.2d 751, 759 (W. Va. 2008) (citation omitted). For "mutual assent" to exist, "it is necessary that there be a[n] . . . offer on the part of one party and an acceptance on the part of the other." *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 437 S.E.2d 448, 450 (W. Va. 1993). "Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to

> contract." *Id.* at 450-51. Mutual assent "may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied." *Bailey*, 437 S.E.2d at 451.
>
> An offer is "'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs*, 214 W.Va. 95, 586 S.E.2d 170, 205 n. 11 (W.Va.2003) (Davis, J., dissenting); *see also* 1 Corbin on Contracts, § 11 at 23 (1963) (defining an offer as "an expression by one party of his assent to certain definite terms provided that the other party involved in the bargaining transaction will likewise express his assent to the identical same terms."). "An offer must be certain in its essential terms to create a power of acceptance." *Charbonnages de France v. Smith*, 597 F.2d 406, 417 (4th Cir.1979) (construing West Virginia law). In contrast, "a manifestation of willingness to enter into a bargain" will not constitute an offer if the person receiving the communication "knows or has reason to know" that the party manifesting a willingness to bargain "does not intend to conclude [the] bargain until he has made a further manifestation of assent." *Restatement (Second) of Contracts,* § 26 (1981). Such communications will constitute preliminary negotiations. *See id.*

Benson, 2022 U.S. Dist. LEXIS 15241, at *12-13, 2022 WL 264548, at *4-5.

The underlying facts giving rise to the Circuit Court's finding that an enforceable settlement had been reached among the parties here are very similar to those in this Court's recent decision in *Donahue*. There the petitioner, Donahue, made a claim with Allstate under a landlord's policy for water damage to his rental property that Allstate denied. Mammoth Restoration was hired to correct the damage and, when it was not paid by Donahue, it brought suit against him in magistrate court. Donahue then filed a third-party complaint against Allstate claiming Allstate had hired Mammoth and Allstate should therefore be responsible for payment to Mammoth. Allstate removed the case to Circuit Court and, shortly thereafter, negotiations commenced between respective counsel for each

of the parties. Counsel for Allstate circulated a three-way e-mail to counsel for Mammoth and Donahue which outlined the terms of a global settlement among all parties: "... Donahue will release all claims against Allstate arising out of the subject water loss claim ...[and] will dismiss all claims against Allstate in the civil action ... [i]n return, Allstate will satisfy the claim of ... Mammoth ... against ... Donahue, by paying Mammoth ... the sum of $5,000.00 ... [and] [t]his will resolve all claims of the parties to the civil litigation referenced above. A jointly endorsed order of dismissal will be submitted to the Court. Please confirm." *Id.*, 2022 W.Va. LEXIS 145, at *4-5. Thereafter, by e-mail, counsel for Mammoth replied "Confirm" to Allstate's counsel's e-mail and Donahue's counsel likewise replied "Confirmed. Please circulate the Order and I will get my client[']s signature on the same..." *Id.*, 2022 W.Va. LEXIS 145, at *5. As here, counsel for Allstate thereafter forwarded settlement agreements via e-mail to counsel for Mammoth and counsel for Donahue and advised, "Let me know if you have changes, otherwise, please execute and return the original to the appropriate Defendant's counsel." *Id.*, 2022 W.Va. LEXIS 145, at *7-8. Although Mammoth executed the settlement agreement and received its settlement funds, Donahue's counsel indicated in response to inquiries from Allstate's counsel that he had requested the return of the agreement from Donahue and had requested that Donahue meet with him. *Id.*, 2022 W.Va. LEXIS 145, at *8. After Allstate's counsel received no response from Donahue's counsel to his inquiries over a period of several months regarding execution of the settlement agreement by

Donahue, Allstate filed a motion to enforce the settlement. *Id.*, 2022 W.Va. LEXIS 145, at *9. The circuit court enforced the settlement and Donahue appealed claiming that the evidence failed to establish that there had been a meeting of the minds as to the release of Allstate for water damage on his rental property. *Id.*, 2022 W.Va. LEXIS 145, at *13. This Court affirmed, finding that the circuit court did not abuse its discretion in determining that there was a meeting of the minds as respects the settlement terms: "Petitioner's assent to these terms was unequivocal, ... and the evidence clearly demonstrates that the parties had 'the same understanding of the terms of the agreement reached.'" *Id.*, 2022 W.Va. LEXIS 145, at *18, citing *Messer*, 222 W. Va. at 418, 664 S.E.2d at 759.

As in *Donahue*, counsel for Levine here unequivocally confirmed that Levine would "drop and dismiss with prejudice all claims set forth in 19-C-139 and 20-C-129" in exchange for "Mr. Casto and Mr. Everhart [dropping] all claims they have pending against [Levine], including claims in which this office does not represent Mr. Casto." Counsel for Levine further unequivocally confirmed that "[t]he terms of the settlement will include mutual non-disparagement and confidentially 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." JApp. at 37-38. The August 31, 2021, e-mail from counsel for the JCP Respondents specifically requested that Levine's counsel "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." JApp. at 37. Levine's counsel

responded only : "You are correct at *[sic]* to the terms of the agreement." JApp. at 38. Levine's counsel did not, as asserted in his brief, state that those terms were only part of a later written settlement agreementPet. Br. at 15. Levine's counsel further confirmed that these same settlement terms applied to the Rockwool Respondents. JApp. at 39. Specifically, in a September 9, 2021, e-mail, counsel for the JCP Respondents asked Levine's counsel to "confirm that this settlement is to include the Rockwool defendants consistent with dismissal of all claims set forth in 19-C-139." JApp. at 38. On September 13, 2021, Levine's counsel replied, "I got your message and the settlement would include the Rockwool Defendants." JApp. at 39. Given this evidence, Levine cannot now argue that he did not, through his counsel, propose a settlement that Respondents reduced to a writing in the record e-mails and that his own counsel confirmed were correct. These emails reveal that the parties had "the same understanding of the terms of the agreement reached." *Messer*, 222 W. Va. at 418, 664 S.E.2d at 759.

Even prior to *Donahue*, this Court has enforced settlement agreements where the terms of the agreement were set forth in e-mails between counsel for the parties. In *Russell v. Bayview Loan Servicing, LLC*, No. 20-0681, 2021 W. Va. LEXIS 398, 2021 WL 2577498 (June 23, 2021) (memorandum decision), counsel for the respondent e-mailed a settlement offer to then-counsel for the petitioner that outlined the terms of a settlement offer, including "Full release from [petitioner]". As here, counsel for the petitioner responded on the same day via e-mail, "Accepted." *Id.*, 2021 W. Va. LEXIS at **2-3. After

the petitioner subsequently refused to sign the formalized settlement agreement, the respondent filed a motion to enforce the settlement agreement. *Id.*, 2021 W. Va. LEXIS at *2-4. The circuit court found that the parties had reached an agreement via the referenced e-mails which set out the terms of the parties' agreement and enforced the terms of the settlement agreement. *Id.*, 2021 W. Va. LEXIS at *9. The petitioner's sole assignment of error was that the circuit court had erred in enforcing the settlement agreement because there had been no meeting of the minds. This Court, however, reasoned that the petitioner's refusal to sign the formalized agreement did not nullify the settlement reached between the parties, because nothing in the terms required the petitioner's signature and her counsel had the authority to act on her behalf. *Id.* 2021 W. Va. LEXIS at **10-12. This Court therefore affirmed the lower court's order granting the respondent's motion to enforce. *Id.* 2021 W. Va. LEXIS at *13.

Levine does not argue here that his counsel lacked authority to settle on his behalf, but instead argues that because "the parties never reached the final Written Settlement Agreement, there could not have been a meeting of the minds to *[sic]* necessary to create a settlement agreement." Pet. Br. at 16. That is, he contends that "the broad terms and conditions that were discussed between the parties 'lacked sufficient detail to constitute a binding agreement.'" *Id.* Specifically, Levine claims that "[a]lthough [the August 31, 2021] e-mail correspondence references mutual non-disparagement, confidentiality, and no exchange of money, the e-mail correspondence that the Respondent relies *[sic]* lacks

the sufficient detail to fully comprehend these terms." *Id.* Despite the fact that the parties' respective counsel all agreed to non-disparagement to **the full "extent allowed by WV law,"** Levine now contends that "[a]s the basis of Petitioner's action was defamation the breadth of non-disparagement terms were *[sic]* both essential and material" and accordingly there could have been no meeting of the minds as to that term. Pt. Br. at 17. To distract the Court from the fact that it would have been impossible for Levine to obtain *more* non-disparagement protection than that agreed to in the August 31, 2021 emails, Levine complains that a "Shepherdstown Community" Facebook page was reactivated three days after the proposed Written Settlement Agreement was e-mailed to his counsel. *Id.* However, that page was created on August 14, 2020 and included only a single comment relating to Levine that was published prior to the settlement of the issues on August 31, 2021. JApp. at 68-69. Further, Levine presented no evidence that any Respondent was responsible either for reactivating the Facebook page or making the single comment regarding Levine. Levine does not and cannot cite any legal authority to support the proposition that actions taken by unknown third parties at an unknown time prior to an agreed-upon settlement can result in the repudiation of that settlement. Levine grasps at straws in his reliance on this reactivated social media page as justification for his refusal to complete a settlement to which he had previously agreed.

Levine next cites this Court's decision in *O'Connor v. GCC Beverages*, 182 W. Va. 689, 391 S.E.2d 379 (1990) (per curiam) to support his contention that there was no

meeting of the minds between the parties here. Pet. Br. at 12-13. The facts in *O'Connor* are inapposite. In *O'Connor*, counsel conducted oral discussions over at least a month, culminating in an in-person meeting between counsel, with the petitioner available on the office premises for consultation with his counsel. No agreement was reached at the end of that meeting, although the parties continued to negotiate by phone that same day. At the end of the day, petitioner's counsel telephoned respondent's counsel and "said "So, I guess you've got a deal." While petitioner's counsel did not recall saying those words, she did not dispute them. Counsel for the parties then discussed who would be responsible for drafting the settlement agreement and it was decided that petitioner's counsel would undertake that effort. On the same day, respondent's counsel wrote a letter to petitioner's counsel summarizing what she believed to be the terms of the agreement and asking petitioner's counsel to immediately contact her if the letter did not accurately summarize their proposed agreement. A week later, petitioner's counsel sent a proposed settlement agreement to respondent's counsel which contained two additional terms which were not in respondent's counsel's letter. This back-and-forth over the terms of the agreement continued for **several months**. Thereafter, petitioner's counsel advised that both she and her client were of the understanding that the agreement had to be reduced to a writing, **a proposition with which respondent's counsel agreed**. This Court found that while a tentative agreement may have been reached telephonically, the letters and settlement agreements exchanged thereafter demonstrated that there was no true meeting of the

minds. *Id.*, 182 W. Va. at 691-92, 391 S.E.2d at 381-82.

In contrast to the lengthy back and forth on terms in *O'Connor* and the parties' agreement there that a further, written settlement agreement was necessary, the parties' agreement in this case was reduced to a writing on August 31, 2021, to which Levine's counsel acknowledged his agreement. JApp. at 37-38. Unlike in *O'Connor*, the emails exchanged between counsel for the parties here evidence that a definitive agreement was reached, and the contractual requirement of mutual assent was therefore met. The fact that Respondents' counsel nonetheless sought Levine's signature on a settlement agreement does not alter the fact that agreement as to its terms had already been reached, and no further negotiation was necessary. *See Donahue*, 2022 W.Va. LEXIS 145, at *18 (affirming circuit court finding a meeting of the minds where petitioner had unequivocally assented to those terms despite later exchange of settlement agreement).

Levine's reliance on *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (2002) is similarly misplaced. In *Riner*, the parties reached a settlement after a court-ordered mediation. The mediator and the Riners signed a two-page agreement prepared by the mediator in which he reduced the agreement so reached to writing. Newbraugh did not sign the mediator-prepared agreement. Rather, Newbraugh's counsel drafted a lengthier document that included provisions not addressed at mediation. The Riners refused to sign. The circuit court granted Newbraugh's motion to enforce the settlement agreement prepared by Newbraugh's counsel. On appeal, this Court held that the circuit court

committed error "by requiring the Riners to sign an agreement that differed in substance from the agreement reached as a result of the mediation conference." *Id.*, 211 W. Va. at 139-140, 563 S.E.2d at 804-05. Here, while Respondents drafted and provided a settlement agreement to Levine's counsel, they did not seek execution of that agreement in their motion to enforce the settlement, and the Circuit Court did not so require. In fact, that subsequently drafted settlement agreement was never entered into evidence by either party in the proceedings below. Rather, the Circuit Court enforced the terms that the parties agreed to in the e-mails between counsel for the parties: "1) [Levine] will drop and dismiss with prejudice all claims set forth in 19-C-139.... 2) [t]he parties shall commit to mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by WV law." 3) [t]here shall be no exchange of money. 4) [a]ll parties shall execute a release." JApp. at 27-28.

Levine likewise asks this Court to find that the facts of this case comport with those in *Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573, 600 S.E.2d 285 (2004) (per curiam). In *Triad*, counsel for Triad placed upon the record at a December 20, 2000 hearing for injunctive relief the terms of an agreement which he represented had been agreed to by the parties. That agreement was confirmed at the hearing by all other counsel. Thereafter Triad's counsel prepared a written agreement containing additional terms not set forth on the record, including a provision for the placement of multiple pipelines on Renner's farm versus the single gas gathering line and a residential gas service line

described in open court. The Renners refused to sign this written agreement. Triad then filed a motion to enforce the written settlement agreement that the lower court granted. This Court reversed, finding that there was no meeting of the minds between the parties concerning the later written agreement. *Id.*, 215 W. Va. at 574-75, 600 S.E.2d at 286-87. In support of its holding, this Court pointed to the differences between the terms of agreement set forth in the injunctive relief hearing and the ultimate written document, including the additional pipeline language, the release of Triad from liability or damage to the Renner farm, and the right for Triad to assign the agreement. *Id.*, 215 W. Va. at 577, 600 S.E.2d at 289. There are no such material differences here. Moreover, in *Triad,* this Court further instructed that "the parties would be warranted in seeking a determination from the Circuit Court concerning the sufficiency of the settlement terms set forth during the December 20, 2000, hearing." *Id.*, 215 W. Va. at 578, 600 S.E.2d at 290. Ironically, this instruction mirrors precisely what the Circuit Court did in the instant case. It did not enforce the later written settlement agreement sent to Levine's counsel, but rather enforced the specific terms to which counsel for the parties had agreed in the relevant email exchanges.

Unlike the cases cited by Levine, the parties here reached an agreement via the record e-mails. The mere fact that Respondents later also circulated a written settlement agreement is irrelevant – Respondents never sought to enforce that later document, and the Circuit Court did not order such relief. The circulation of that document does not alter the fact that agreement already had been reached as to the terms of the settlement.

C. THE CIRCUIT COURT PROPERLY FOUND THAT A SETTLEMENT HAD BEEN REACHED BETWEEN THE PARTIES AND THAT SETTLEMENT WAS NOT PREDICATED UPON A SUBSEQUENT WRITTEN AGREEMENT

Levine's second assignment of error claims that the Circuit Court erroneously found sufficient evidence to exist of a valid, enforceable settlement agreement despite his claim that that the parties "clearly contemplated that settlement was predicated on written settlement agreement that was negotiated between the parties." Pet. Br. at 18.

The Circuit Court found that Levine's claim that a further written agreement was required had no merit given the agreement reached via emails on August 31, and September 13, 2021. Levine's counsel's decision to "remain[] silent," when he had the "ability to clarify this position," JApp. at 25 further supported the Circuit Court's conclusion: "If Mr. Levine or his counsel had a secret plan to refuse the terms on August 31, 2021, then they should have made this intent known instead of agreeing [to the settlement] without reservation," *Id.* at 27. The Circuit Court also found that the parties never expressed an expectation that a writing was a condition precedent to contract formation because "no such expectation was voiced on August 31, 2021" and there "was no reference to conditioning acceptance of the terms on a final writing" because "acceptance of the terms occurred on August 31, 2021." *Id.* Levine points to no evidence in the record to counter these findings of the Circuit Court.

In support of his contention that settlement was conditioned upon negotiation of a later written agreement, Levine again relies on *O'Connor*. As more fully set forth above,

the underlying facts of *O'Connor* are incongruent with those in the case at bar. Of particular importance, in *O'Connor* it was clear that a written agreement was contemplated by the parties and **counsel for each party acknowledged that to have been the case**. *O'Connor*, 182 W. Va. at 691-92, 391 S.E.2d at 381-82. Here, the agreement reached via e-mail between the parties' counsels set forth the terms of the agreement and the only subsequent document to have been prepared was a release.

Levine's reliance on *Sprout v. Bd. of Educ.*, 215 W. Va. 341, 599 S.E.2d 764 (2004) (per curiam) is likewise misplaced. Sprout involved grievances filed with the school board by its employee Sprout. The school board instructed its personnel director to ask Sprout what amount would be needed to settle her grievances and ultimately Sprout presented a written offer to accept $17,000 in settlement. After the school board voted to offer Sprout $17,000 along with work experience credit in exchange for dropping her grievances, the president of the board approached Sprout and made this offer. In response, Sprout asked if this offer included the employee portion of various salary withholdings in addition to the $17,000 but was advised that the employee withholdings would be coming out of the $17,000, a result that was not acceptable to Sprout. The president told Sprout that she would "get things started" and advised Sprout that she would have the papers drafted and then presented to the board for approval. Sprout testified in her deposition that, for the agreement to become effective, it had to be put in writing and voted on by the board. The Board refused to approve the settlement based upon advice from its attorney. Contrary to

the facts of this case, the fact that there was no agreement was communicated to Sprout by the board's attorney. Sprout then brought suit against the school board. The circuit court found that no agreement had been reached and granted summary judgment in favor of the school board. Sprout then appealed to this Court. *Id.*, 215 W. Va. at 343-44, 599 S.E.2d at 766-67. This Court found "that the circuit court properly granted summary judgment because the evidence shows that the parties intended that the settlement agreement would be reduced to writing and voted on by the [school board] before it became effective." *Id.*, 215 W. Va. at 344-45, 599 S.E.2d at 767-68. Given that the negotiations between the parties in *Sprout* were all oral, this Court looked to Syl. Pt. 1, *Blair v. Dickinson*, 133 W. Va. 38, 54 S.E.2d 828 (1949) for guidance:

> Where, from all of 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.

Sprout, 215 W. Va. at 345, 599 S.E.2d at 768. In the case at bar, Levine made an offer to settle, *inter alia*, the within civil action, and that offer was accepted by Respondents by the August 31, 2021, e-mail specifically outlining the terms thereof. On the same day, Levine's counsel confirmed those terms and later also confirmed that the settlement included the Rockwool Respondents. JApp. at 37-39. As such, the facts here are clearly dissimilar to those of *Sprout*—the agreement reached here was in writing and required no further approval. Further, the *Sprout* Court's reliance upon additional language cited in *Blair*, and

upon which Levine here likewise relies, is not applicable to this case:

> 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.

Id., citing *Blair*, 133 W. Va. at 68-69, 54 S.E.2d at 844, quoting *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926). Here, Levine was the one to initially make the offer of settlement of the various civil actions, which was thereafter accepted in writing via e-mail by Respondents, with those written terms then confirmed by Levine's counsel as to all Respondents. JApp. at 37-39.

Levine argues that e-mails between the parties other than those setting forth the terms of the agreement and counsel's acceptance of those terms somehow confirm that the parties had not agreed to be bound by the terms of the settlement until there was a writing signed by all of the parties. Pet. Br. at 18-26. But Levine fails to identify anything in those emails that is contrary to the terms agreed upon in the August 31 and September 13, 2021 e-mails. Since Levine does not contest his counsel's authority to enter into this settlement in the circuit court nor in this Court, this leaves no doubt that the essentials of contract formation were met.

Looking specifically at the emails cited by Levine, the August 31, 2021 e-mail to

Levine's counsel from counsel for Dan Casto in another civil action, sets forth only that Casto *accepted* Levine's offer. JApp. at 60. The remaining emails of September 13, September 15, September 16, October 6, October 7, and October 11, 2021, reveal nothing more than an attempt by Respondents to obtain Levine's signature on a written settlement agreement. JApp. at 63-67. None of these emails contain objection by either party to the agreed-upon terms of the settlement or an agreement that a further writing was required to enforce the previously agreed upon terms. Levine simply seeks to renege on a settlement to which he previously agreed, and attempts to fasten upon the fact that Respondents circulated a settlement agreement for signature to justify his change of position.

CONCLUSION

The Circuit Court properly found as fact that Levine's counsel confirmed the terms of settlement set forth in an August 31, 2021 email from the JCP Respondents, and that Levine offered no evidence to dispute those terms, much less demonstrate that the Court's findings were clearly erroneous. The Circuit Court further correctly applied the law of contracts and the law relating to settlement agreements to those facts. The Circuit Court did not abuse its discretion in so doing. The facts and the law clearly support the Circuit Court's determination that a meeting of the minds was reached between the parties and that the settlement reached in the August 31, 2021 e-mails and the September 13, 2021 e-mail created an enforceable contract between the parties. The Circuit Court also properly determined that the email agreement was not preliminary in nature and that no party voiced

an expectation that a later written agreement must be negotiated. The evidence in this matter support both conclusions by the Circuit Court. All of the essential elements of a contract between the parties existed: competent parties, legal subject matter, valuable consideration, and mutual assent. As such, the legal conclusions reached by the Circuit Court complied with the underlying law of contracts. In reaching that conclusion, the Circuit Court took into consideration the policy of law to uphold and enforce settlement contracts given the favoring and encouragement of compromise and settlement rather than litigation and did not abuse its discretion in doing so.

For these, and those reasons more fully set forth herein, the ROCKWOOL Respondents respectfully request that this Honorable Court affirm the Circuit Court's decision.

Respectfully submitted this 2nd day of May, 2022.

ROCKWOOL INTERNATIONAL A/S, BJØRN RICI ANDERSEN, AND ROXUL USA, INC.
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-1015

DAVID ANDREW LEVINE,

Petitioner,

v.

ROCKWOOL INTERNATIONAL A/S,

BJØRN RICI ANDERSEN,

JEFFERSON COUNTY PROSPERITY, INC.,

ROXUL USA, INC.,

DANIEL CASTO,

RAYMOND J. BRUNING, and

STEVEN STOLIPHER,

Respondents.

Appeal from an Order of the Circuit Court of Jefferson County (CC-19-2019-C-139)

CERTIFICATE OF SERVICE

I, Kathy M. Santa Barbara, Esq., of The Law Office of Kathy M. Santa Barbara, PLLC, local counsel for Respondents, ROCKWOOL International A/S, Bjørn Rici Anderson, Roxul USA, Inc., hereby certify that on this 22nd day of May, 2022, I served a true and correct copy of the ***ROCKWOOL RESPONDENTS' BRIEF*** upon counsel of record for Petitioner and Respondents Jefferson County Prosperity, Inc., Daniel Casto, Raymond J. Bruning, and Steven Stolipher, via U. S. Mail, postage prepaid, as follows:

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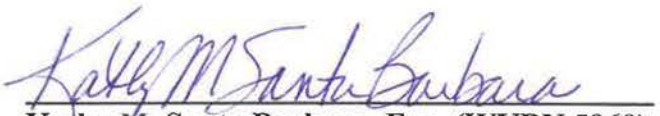

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