IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-1015

DAVID ANDREW LEVINE

Plaintiff Below, Petitioner,

v.

ROCKWOOL INTERNATIONAL A/S, BJORN RICI ANDERSEN, JEFFERSON COUNTY PROSPERITY, INC., ROXUL USA, INC., DANIEL CASTO, RAYMOND BRUNING, AND STEVEN STOLIPHER,

Defendants Below, Respondents.

(On Appeal From the Circuit Court of Jefferson County, West Virginia CC-19-2019-C-139)

JEFFERSON COUNTY PROSPERITY RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Petitioner, David A. Levine ("Levine"), initiated this civil action in the Circuit Court of Jefferson County by filing a complaint on August 27, 2019. [JA 2.] Levine amended his complaint on September 20, 2019, adding additional defendants to the pending civil action. The amended complaint named as defendants ROCKWOOL International A/S, Bjorn Rici Andersen, Roxul USA, Inc. (collectively referred to as "ROCKWOOL"), Jefferson County Prosperity, Inc., Daniel Casto, Raymond Bruning, and Steven Stolipher (collectively referred to as "JCP"). [JA 2.] Levine amended his complaint for a second time on March 23, 2020. [JA 11.] Levine's claims center around purported defamatory statements allegedly made by certain defendants in the underlying civil action. [JA 45.]

On August 31, 2021, Levine, ROCKWOOL, and JCP entered into a global settlement agreement. The settlement agreement related to the action before this Court and to two additional civil actions pending in the Circuit Court of Jefferson County.[1] The terms of the settlement agreement were initially agreed to by counsel via telephone communication. [JA 47.] The settlement agreement was memorialized by the parties via e-mail correspondence. [JA 37.] Counsel for JCP sent counsel for Levine the following e-mail 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

[1] The two additional civil actions referenced in the parties' written settlement agreement include Case No. 20-C-129, filed by Levine against certain JCP defendants and Case No. 21-C-2, filed by Casto against Levine.

> 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.

[JA 37.] Within twenty-five minutes of counsel for JCP sending the e-mail memorializing the terms of the settlement agreement, and seeking confirmation of the same, counsel for Levine responded and confirmed the terms of the settlement agreement: "[y]ou are correct at [sic] to the terms of the agreement." [JA 38.] In a follow-up e-mail communication, on September 9, 2021, counsel for JCP wrote counsel for Levine to "confirm that this settlement is to include [ROCKWOOL] consistent with dismissal of all claims set forth in 19-C-139." [JA 39.] Counsel for JCP indicated to counsel for Levine that a release would be forthcoming. [JA 39.] On September 13, 2021, counsel for Levine responded and confirmed that "the settlement would include" ROCKWOOL. [JA 39.]

Levine, despite a written agreement to settle all claims in the pending civil actions, refused to honor the terms of the settlement agreement when he refused to execute a release and direct his counsel to execute a stipulation of dismissal. [JA 24, 31.] Counsel for JCP sent Levine's counsel a copy of the proposed release and stipulation of dismissal, but neither were returned. [JA. 24, 31.] Thereafter, counsel for ROCKWOOL and counsel for JCP made multiple attempts to secure a signed release and executed stipulation of dismissal. [JA 24, 65-67.] Additionally, counsel for JCP called and left voice messages for counsel for Levine with no response until October 13, 2021, when counsel for Levine informed counsel for JCP that Levine saw old Facebook posts, and

counsel for Levine was unable to get Levine to sign the release.[2] [JA 24.] Thereafter, counsel for ROCKWOOL and counsel for JCP filed a motion to enforce the settlement agreement.

Levine argued to the circuit court that the settlement agreement was predicated on the parties later reducing the terms of the settlement to a writing via a subsequent settlement agreement. [JA 25.] Counsel for Levine further contended that there was not a meeting of the minds between the parties. [JA 25.] The circuit court rejected these arguments because on August 31, 2021, Levine had the ability to clarify this position, yet remained silent. [JA 25.] Levine further argued that "the parties were only speaking in broad strokes as to the terms" of the settlement, and the parties "never reached the clear and unequivocal acceptance of the agreement . . . ." [JA 26.] Levine contended that the parties planned to complete a global settlement agreement in writing, and there were several terms the parties left unresolved. [JA 26.] The circuit court rejected these arguments and noted that in the August 31, 2021, written settlement agreement there was no reference to conditioning acceptance of the terms in the e-mail upon the execution of a subsequent writing. [JA 27.] Thus, the circuit court concluded that the back-and-forth communications between the parties served as an offer, acceptance, and mutual assent. [JA 26.] Accordingly, the circuit court ruled that the parties had entered into a written settlement agreement, granted JCP's motion to enforce the settlement agreement, and held that the terms of the agreement outlined in the August 31, 2021, email, included the following:

> (1) 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.
>
> (2) The parties shall commit to mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by West Virginia law.

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[2] The Facebook posts that Levine complained about were posted prior to any settlement of the issues in dispute between the parties. [JA 24.]

(3) There shall be no exchange of money.

(4) All parties shall execute a release.

[JA 27-28.] In addition to entering its order enforcing the settlement agreement in Civil Action No. 19-C-139, the circuit court entered identical orders in Civil Action Nos. 20-C-129 and 21-C-2, which Levine did not appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because the dispositive issue in this case has been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. *See* Rule 19(a), W. Va. R. App. P.

SUMMARY OF ARGUMENT

This Court should affirm the circuit court's order to enforce the terms of the settlement agreement reached between Levine and JCP on August 31, 2021, because the circuit court properly determined that there was mutual assent by the parties, and a valid, enforceable settlement agreement existed. Despite providing written confirmation of the settlement terms, Levine now contends that the circuit court erred in enforcing the settlement agreement because: (1) there was not mutual assent as to the terms of the settlement; and (2) the settlement was conditioned upon the execution of a subsequent written settlement agreement.

Mutual assent requires that the parties, through offer and acceptance, have the same understanding of the terms of an agreement reached. In this case, mutual assent of the parties is demonstrated via the August 31, 2021, email exchange between counsel for JCP and counsel for Levine. In the e-mail, counsel for JCP outlined the settlement terms previously discussed by counsel in an earlier telephone conversation. The terms included dismissal of several pending

claims, mutual non-disparagement and confidentiality to the extent allowed by West Virginia law, no exchange of money, and all parties executing a release. [JA 37.] Counsel for JCP concluded the e-mail stating the settlement terms with a request to counsel for Levine to confirm the terms and to state whether any terms were missing from the agreement. [JA 37.] Counsel for Levine did not respond disputing the terms, but instead wrote, "[y]ou are correct at [sic] to the terms of the agreement." [JA 38.] This Court has consistently held that when an offer is clear and acceptance of the offer is unconditional, there is mutual assent between the parties. Here, Levine's counsel's assent to the settlement terms was an unconditional acceptance of the settlement offer presented in the e-mail from counsel for JCP.

Levine's contention that the parties' settlement was conditional upon a subsequent written agreement is not supported by the August 31, 2021, written settlement agreement between the parties. The August 31, 2021, settlement agreement required only that the parties execute a release. [JA 37.] It did not require the parties to execute any further documents as Levine now contends. Indeed, counsel for JCP went as far as to tell counsel for Levine in the August 31, 2021, email, "[i]f there is anything missing, please let me know." [JA 37.] In his response confirming the settlement agreement, counsel for Levine did not mention the need for the parties to execute a subsequent settlement agreement. His only response was to confirm that the terms of the settlement agreement were correct. [JA 38.]

The August 31, 2021, e-mail communication between counsel for Levine and counsel for JCP created a binding settlement agreement between the parties. The terms outlined in the e-mail did not require the parties to execute a subsequent settlement agreement. Therefore, the circuit court did not commit error when it ordered Levine to honor the settlement agreement, and this Court should affirm the circuit court's decision.

ARGUMENT

A. STANDARD

In reviewing a circuit court's order granting a motion to enforce a settlement, this Court applies the following standard:

> 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.

Donahue v. Mammoth Restoration & Cleaning, 2022 W. Va. LEXIS 145, *12 (Feb. 18, 2022) (citing Syl. Pt. 2, *Triple 7 Commodities, Inc. v. High Country Mining, Inc.*, 245 W. Va. 63, 857 S.E.2d 403 (2021)).

B. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE PARTIES MUTUALLY ASSENTED TO THE TERMS OF THE SETTLEMENT AGREEMENT.

This Court's jurisprudence regarding enforcement of settlement agreements is well-established. As a "guiding principle," this Court has explained that "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than litigation[.]" *Donahue*, 2022 W. Va. LEXIS, at *13-14 (citing Syl. Pt. 1, in part, *Sanders v. Roselawn Mem'l Gardens*, Inc., 152 W.Va. 91, 159 S.E.2d 784 (1968)). Further, "it is the policy of the law to uphold and enforce [settlement agreements] if they are fairly made and are not in contravention of some law or public policy." *Id.* Nevertheless, settlement agreements are contracts and "are to be construed 'as any other contract.'" *Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 452, 590 S.E.2d 641, 645 (2003) (quoting *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979)). Therefore, "[i]t is well-understood that '[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties.' 15A

C.J.S. *Compromise & Settlement* § 7(1) (1967)." *O'Connor v. GCC Beverages, Inc.*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990). *See also Triad Energy Corp. of West Virginia, Inc. v. Renner*, 215 W.Va. 573, 576, 600 S.E.2d 285, 288 (2004). "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, 418, 664 S.E.2d 751, 759 (2008) (citing 17 *C.J.S. Contracts* § 35 (1999)). "A meeting of the minds of the parties is a sine qua non of all contracts." Syl. Pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932).

Mutual assent exists when there is "a proposal or 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, 140, 437 S.E.2d 448, 450 (1993). "Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied." *Id.* at 140-41, 437 S.E.2d at 450-51. An offer is the "manifestation of wiliness to enter into a bargain, so as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Verizon W. Va., Inc. v. W. Va. Bureau of Empl. Programs*, 214 W. Va. 95, 130, 586 S.E.2d 170, 205, n.11 (2003) (Davis, J., dissenting) (citing *Restatement (Second) of Contracts*, § 24). "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Restatement (Second) of Contracts*, § 50).

On August 31, 2021, counsel for JCP sent an e-mail to counsel for Levine and memorialized the terms of a settlement agreement reached by the parties in a phone conversation between counsel that morning. [JA 37.] The terms of the agreement included: (1) Levine

dismissing, with prejudice, claims set forth in multiple civil actions and some of the individual JCP defendants dismissing claims which were pending against Levine; (2) a mutual non-disparagement agreement and confidentiality of the terms of the settlement to the extent allowed by law; (3) no exchange of money; and (4) all parties to sign releases. [JA 27-28, 37.] Counsel for JCP concluded the e-mail memorializing the terms of the settlement agreement by requesting that counsel for Levine confirm the terms of the settlement or inform counsel for JCP if there were any terms of the settlement missing in the written e-mail correspondence. [JA 37.] A few minutes after receiving the e-mail from counsel for JCP, counsel for Levine responded and told counsel for JCP that he was **"correct a[s] to the terms of the agreement."** [JA 38.] (Emphasis added.) A couple of weeks later, on September 13, 2021, counsel for Levine again confirmed the terms of the agreement. [JA 39.] At no point did counsel for Levine refute any of the terms in the August 31, 2021, email, add any terms to the agreement, or otherwise indicate that the agreement was conditioned on anything not stated in the August 31, 2021, e-mail correspondence. [JA 38.]

The August 31, 2021, e-mail sent by counsel for JCP was a clear manifestation of a willingness to enter into a bargain. In the e-mail, counsel for JCP clearly outlines the terms of the verbal agreement reached earlier that morning. In his response to that e-mail, counsel for Levine does not protest any of the terms. Instead, counsel for Levine confirms that the terms of the agreement are correct. In other words, Levine, through counsel,[3] manifested an assent to the terms of the offer in the manner invited by the offer. At the moment Levine, through counsel, responded

[3] Levine does not argue that his counsel lacked authority to enter into a settlement on his behalf. *See Syl. Pt. 1, Miranosky v. Parson*, 152 W. Va. 241, 161 S.E.2d 665 (1968) ("When an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority.").

to the August 31, 2021, email, the parties had a "meeting of the minds" and a contract was formed. *See Bailey*, 190 W. Va. at 140, 437 S.E.2d at 450.

Levine now attempts to walk back the written communications between the parties by telling this Court that his counsel's August 31, 2018, e-mail, confirming the terms of the settlement agreement, simply communicated that counsel for JCP "stated that the terms to be included in the future written agreement were correct." [Pet. Br., 15.] Levine claims that the parties did not have a meeting of the minds because the parties intended to sign a future settlement agreement. Levine argues that the August 21, 2021, e-mail does not serve as the written agreement between the parties. But, this Court has, on several occasions, enforced settlement agreements where the terms of the agreement were set forth in e-mails between the parties, and the parties contemplated signing additional documents in the future.[4]

Recently, in *Donahue v. Mammoth Restoration & Cleaning*, 2022 W. Va. LEXIS 145 (Feb. 18, 2022), this Court affirmed a circuit court's decision to grant a motion to enforce a settlement agreement despite the fact that a written settlement agreement was circulated after the parties agreed to a settlement. In *Donahue*, like here, counsel for the respondent, after settlement discussions with counsel for the petitioner, circulated an e-mail memorializing the terms of the settlement. *Id.*, at **5-6. Just like this case, counsel for the respondent concluded the e-mail by requesting that counsel for the petitioner confirm the agreement. *Id.*, at *6. Counsel for the petitioner, just like counsel for Levine, responded to the e-mail and confirmed the terms of the agreement. *Id.* A month later, counsel for the respondent forwarded two settlement agreements to

[4] Per the August 31, 2021, e-mail correspondence between counsel for JCP and counsel for Levine, the only documents the parties intended to sign in the future were releases. The circuit court's order, if upheld by this Court, would require the parties to execute full releases as contemplated in the August 31, 2021, e-mail. The circuit court's order does not require the parties to execute any additional written settlement agreement.

the parties. *Id.*, at **7-8. The petitioner did not execute and return the settlement agreement. *Id.* at *8. After initial communication between counsel for the petitioner and counsel for the respondent, subsequent inquires regarding the status of the signed written agreement went unanswered prompting counsel for the respondent to file a motion to enforce the settlement. *Id.*, at *9. The circuit court, finding that there was a meeting of the minds between the parties, granted the motion to enforce the settlement agreement, and the petitioner appealed to this Court. *Id.*, at **10-11. On appeal, the petitioner argued that "the circuit court erred by enforcing the settlement agreement because the evidence failed to establish a meeting of the minds as to petitioner's assent to release [the respondent] from all claims" arising out of the loss. *Id.*, at *13. This court rejected the petitioner's argument and affirmed the circuit court's decision because, as demonstrated by the written correspondence between the parties, the "petitioner's assent to the[ ] terms was unequivocal . . .." *Id.*, at *18.

Similarly, in *Russell v. Bayview Loan Servicing, LLC*, 2021 W. Va. LEXIS 398 (June 23, 2021) (memorandum decision), counsel for the respondent prepared an e-mail correspondence to counsel for the petitioner outlining the terms of a settlement agreement. The terms included, among other things, that the petitioner would sign and execute a full release. *Id.*, at **2-3. Like this case, on the same day that counsel for the respondent sent the e-mail memorializing the terms of the settlement, counsel for the petitioner responded by e-mail, "Accepted." *Id.*, at *3. The petitioner then refused to sign a formalized settlement agreement, and the respondent filed a motion to enforce the settlement agreement, which was granted by the circuit court. *Id.*, at **4, 9. Like Levine here, the petitioner argued to this Court that the circuit court erred in enforcing the settlement agreement because there was no meeting of the minds. *Id.*, at *10. The petitioner claimed that there were differences between the e-mail communications between the parties and the formalized

settlement agreement. *Id.* Upon its review of the record in that case, this Court found that the circuit court did not abuse its discretion in granting the respondent's motion to enforce the settlement agreement. Specifically, this Court recognized that the [p]etitioner's refusal to sign the formalized settlement agreement . . . does not nullify the parties' settlement." *Id.*, at *11. In distinguishing the cases cited by the petitioner, the *Russell* Court observed:

> In advancing this argument, petitioner relies on *IMI Norgren, Inc. v. D & D Tooling Manufacturing, Inc.*, 306 F.Supp.2d 796 (2004), but in that case "counsel clearly stated in his e[-]mail that there would be no binding [settlement] agreement until the terms were committed to writing and signed." *Id.* at 803. Because a final settlement was expressly conditioned on execution of a written settlement agreement, the *IMI Norgren* Court found that no settlement agreement was reached. *Id.* at 802. Here, there was no such condition.

Id., at **11-12. Thus, this Court affirmed the circuit court's order granting the respondent's motion to enforce.

Like the petitioners in *Donahue* and *Russell*, Levine was presented with a written e-mail correspondence memorializing the terms of the settlement reached by counsel during settlement negotiations. Like the petitioners in *Donahue* and *Russell*, Levine, through his counsel, responded to the written e-mail memorializing the settlement terms and confirmed the agreement. Like the petitioners in *Donahue* and *Russell*, Levine did not receive a settlement offer conditioned upon executing a future written agreement and Levine, in responding to the e-mail, did not insist that the settlement was contingent upon execution of a future written agreement. Yet, despite Levine's unequivocal assent to the terms of the settlement agreement, he tries to convince this Court that there was not a meeting of the minds because the terms stated and accepted in the August 31, 2021, email were "terms to be included in the future written settlement agreement . . .." [Pet. Br., 15.] In support of his argument, Levine cites a series of opinions from this Court, none of which are applicable to the facts in this case.

First, Levine cites to *Tuttle v. State Farm Mut. Auto. Ins. Co.*, 2015 W. Va. LEXIS 520 (April 10, 2015) (memorandum decision), to argue that Levine's acceptance was conditional, and, therefore, there was not a binding contract between the parties. [Pet. Br., 11.] In *Tuttle*, the petitioner's counsel made a "final demand" of $40,500. *Id.*, at *2. A representative of the respondent replied to the "final demand" by facsimile with the following: "Please be advised[,] based on the current info, I am meet your $40[,]500 counter demand. Please contact me at 304-368-3830 to discuss." *Id.*, at *3. In determining that there was not a meeting of the minds, this Court held that, the unilateral mistake in the facsimile response notwithstanding, the respondent's representative did not render a "clear and unequivocal acceptance of petitioner's final settlement offer . . . ." *Id.*, at *11. The takeaway point in *Tuttle* is that an acceptance must be clear and unequivocable. *See id. See also Stark Elec., Inc. v. Huntington Hous. Auth.*, 180 W.Va. 140, 142, 375 S.E.2d 772, 774 (1988) ("It 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."). This case is not like *Tuttle* because when Levine's counsel was presented with terms of a settlement in the August 31, 2021, e-mail, he responded with an unequivocal acceptance: "You are correct at [*sic*] to the terms of the agreement." [JA 38.]

Next, Levine claims that *O'Connor v. GCC Beverages, Inc.*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990), is "particularly instructive" for this Court in deciding the case at bar. [Pet. Br., 12.] Although *O'Connor* does not aid Levine in his arguments before this Court, it is instructive in that it is illustrative of a factual scenario where the parties do not have a meeting of the minds; however, the facts of the *O'Connor* case are not in accord with the facts of the case at bar. In *O'Connor*, the lawyers involved discussed a potential settlement, verbally, seemingly reaching a verbal agreement before committing the agreement to writing via written letters. *Id.* at

690, 391 S.E.2d at 380. On the day counsel believed they reached a verbal settlement agreement, counsel for the respondent wrote a letter to counsel for the petitioner summarizing what counsel for the respondent believed to be the terms of the settlement agreement. *Id.* Much like counsel for JCP did in this case, counsel for the respondent requested that counsel for the petitioner contact counsel for the respondent "if the letter was defective in its portrayal of the representation of their proposed agreement." *Id.* Unlike counsel for Levine in this case, counsel for the petitioner in *O'Connor* wrote counsel for the respondent and included a settlement agreement that included two provisions that were not contained in the initial letter sent by counsel for the respondent. The parties went back and forth over the terms of the proposed agreement for the next several months. This Court found that, although the parties may have reached a tentative agreement, verbally, the letters and settlement agreements exchanged after the verbal communication demonstrated that there was not an actual meeting of the minds between the parties. *Id.* at 691-92, S.E.2d at 381-82. In contrast to *O'Connor*, the parties in this case were able to reduce their verbal agreement to writing on the same day the verbal agreement was reached. Levine's counsel acknowledged and confirmed the agreement on multiple occasions. [JA 37-39.] Counsel for JCP outlined the proposed settlement agreement in the initial e-mail on August 31, 2021, and counsel for Levine accepted the proposed terms in the response email on August 31, 2021. *Bailey*, 190 W. Va. at 140, 437 S.E.2d at 450 (1993). There was a meeting of the minds.

Next, Levine attempts to rely upon this Court's decision in *Triad Energy Corp. of West Virginia, Inc. v. Renner*, 215 W.Va. 573, 600 S.E.2d 285 (2004), to argue that an agreement was not reached between the parties. In that case, the parties seemingly reached a verbal agreement which the parties recited for the circuit court on the record. *Id.* at 575, 600 S.E.2d at 287. Thereafter, a written settlement agreement prepared by the respondent was submitted to the

petitioner for signature. *Id.* The petitioner refused to sign the written agreement because it contained terms not part of the agreement put on the record by the parties. The respondent filed a motion to enforce the settlement agreement, which the circuit court granted. In reversing the circuit court, this Court determined there was no meeting of the minds concerning the written settlement agreement, which went beyond the settlement terms placed on the record by the parties. *Id.* at 577, 600 S.E.2d at 289. Significantly, in that case, this court held that, "upon remand, the parties would be warranted in seeking a determination from the Circuit Court concerning the sufficiency of the settlement terms set for during" the hearing. *Id.* 578, 600 S.E.2d at 289. This Court's instruction in that case is exactly what the circuit court did in this case. In its order, the circuit court did not enforce any written settlement agreement presented to Levine's counsel after the August 31, 2021, e-mail exchange; rather, the circuit court enforced the specific terms to which counsel for the parties agreed to during the August 31, 2021, email communication. [JA 27-28.]

Finally, Levine attempts to rely upon this Court's decision in *Riner v. Newbraugh*, 211 W. Va. 137, 563 S.E.2d 802 (2002), to convince this Court that there was not a meeting of the minds. Like *Tuttle*, *O'Connor*, and *Renner*, the facts in the *Riner* case are inapplicable to the case at bar. *Riner* involved an agreement reached via telephone communication on August 31, 2000. *Id.* at 139, 563 S.E.2d at 804. A mediator reduced the agreement to writing and both the mediator and the petitioners signed a mediation settlement agreement on September 5, 2000. The two-page agreement was immediately transferred to the respondents, but the respondents chose not to sign the document. The counsel for the respondents prepared a document that restated certain provisions from the mediation settlement agreement, included additional provisions, and provided for a mutual release of the parties. *Id.* The petitioners refused to sign the agreement prepared by counsel for the respondent, which prompted counsel for the respondent to file a motion to enforce

the settlement agreement, which was granted by the circuit court. In reversing the circuit court's decision, this Court held that

> [w]hile 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 Agreement and Release." Absent this critical and necessary contractual element, we cannot require the [petitioners] 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 [petitioners]to sign the "Settlement Agreement and Release" and further, in ruling that they were to be bound by the terms of such agreement.

Id. at 144, 563 S.E.2d at 809. Here, the circuit court did not require Levine to sign an agreement containing terms that were not included in the August 31, 2021, e-mail that Levine approved. Although JCP prepared a settlement agreement for Levine's review, JCP did not seek execution of that agreement in their motion to enforce the settlement, and the circuit court did not order Levine to execute the agreement. In fact, the settlement agreement Levine references in his briefing to this Court was never entered into evidence by any party in the proceedings in the circuit court and is not part of the record before this Court. Rather, the circuit court enforced the terms that the parties' agreed to in the email, which included:

(1) 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.
(2) The parties shall commit to mutual non-disparagement and confidentiality of the terms of the settlement to the extent allowed by West Virginia law.
(3) There shall be no exchange of money.
(4) All parties shall execute a release.

[JA 27-28.]

The August 31, 2021, emails between counsel for Levine and counsel for JCP clearly establish mutual assent or a meeting of the minds. The initial e-mail sent by counsel for JCP establishes the terms of the settlement and demonstrates JCP's willingness to enter into the

agreement. Levine's counsel's response, that JCP's counsel was "correct" as to "the terms of the settlement," was not predicated on any future condition and is an unequivocal manifestation of assent to the terms presented by JCP's counsel. In other words, a clear offer was presented and unambiguously accepted, without condition. As such, based upon the evidence in the record before this Court, the circuit court was correct in determining that there was mutual assent by the parties, and the settlement agreement should be enforced. This Court should affirm that order.

C. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE SETTLEMENT WAS NOT CONDITIONED UPON A SUBSEQUENT WRITTEN AGREEMENT.

Levine contends that the settlement was predicated upon the execution of a future written settlement agreement, and the lack of such written settlement agreement invalidates the written settlement that the parties entered into on August 31, 2021. Levine again relies upon *O'Connor*, 182 W. Va. 689, 391 S.E.2d 379, to argue that the parties, in this case, did not reach a settlement because a final written agreement was necessary. [Pet. Br., 18-19.]

As previously discussed, in *O'Connor* this Court held that a ***telephonic*** settlement agreement had not been entered into where the parties had verbally agreed to a settlement, later exchanged ***differing versions*** of a formal written agreement, and never signed a formalized agreement. 182 W.Va. at 692, 391 S.E.2d at 382. The *O'Connor* Court determined that the settlement agreement was not complete because a letter from the petitioner's attorney containing alterations to the writing "reflect[ed] that the lawyers essentially embarked on a renegotiation." *Id.* at 691, 391 S.E.2d at 381. There is no such renegotiation here. The initial terms of the settlement in this case were agreed to in writing via e-mail. [JA 37-38.] Levine never submitted an opposing draft settlement agreement and never suggested that the settlement was predicated upon the execution of a future written agreement. To the contrary, the record before this Court confirms that all parties agreed about the basic terms: i.e., all would walk away, bear their own fees, not

disparage, not exchange money, and hold the terms of the agreement in confidence. [JA 37-38.] At no point did Levine ever request any different terms and instead remained silent until counsel for Levine advised that Levine refused to complete the terms of the settlement.

West Virginia case law provides that a written settlement agreement is required

> [w]here, 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.

Syl. Pt. 5, *Sprout v. Bd. of Educ.*, 215 W. Va. 341, 599 S.E.2d 764 (2004) (citing to Syl. Pt. 1, *Blair v. Dickinson*, 133 W. Va. 38, 54 S.E.2d 828 (1949)); Syl. Pt. 1, *O'Connor*. Here, unlike *O'Connor*, writings exist. The initial agreement here was not made telephonically, but via e-mail correspondence. This Court has previously held that a valid contract can be made via "memorandum, telegrams, and correspondence." *Sprout*, 215 W. Va. at 345, 599 S.E.2d at 768 (internal citations omitted). Moreover, and also contrary to *O'Connor*, this Court has found that no settlement agreement had been reached telephonically because both parties expressed on the record that they "believed that a written agreement satisfactory to each party was necessary before this matter was finally settled." *O'Connor*, 182 W. Va. at 692.

Here, the parties' correspondence and actions did not indicate the settlement agreement was contingent upon execution of a future agreement. Unlike *O'Connor*, there was not back and forth between the parties regarding the terms of the settlement – the parties agreed to the terms set forth, and there was no exchange of differing terms between the parties. [JA 37-39.] Although the record contains correspondence between the parties showing the efforts of ROCKWOOL and JCP to get Levine to sign a written agreement, there is no indication that Levine was displeased with the already agreed-to terms or that a writing was required to uphold the already agreed-to terms.

Levine made no indication that he wished to reopen negotiations of the agreed-upon terms. Accordingly, there is no basis for invalidating the written agreement entered into by the parties on August 31, 2021.

The record does not demonstrate that the parties conditioned their agreement upon the execution of a future agreement. Although Levine points to emails that discuss a written agreement, none of those emails condition the settlement upon execution of any such agreement. Unlike *Sprout* and *O'Connor*, there is no indication in the record that any party involved in the settlement insisted that a future formal written agreement was a condition precedent to the settlement. As such, based upon the evidence in the record before this Court, the circuit court was correct in determining that the settlement between the parties was not conditioned upon the execution of a subsequent written agreement. This Court should affirm that decision.

CONCLUSION

For the reasons articulated herein, this Court should affirm the Circuit Court of Jefferson County's order enforcing the settlement agreement reached by the parties.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.: 21-1015

DAVID ANDREW LEVINE

Plaintiff Below, Petitioner,

v.

ROCKWOOL INTERNATIONAL A/S, BJOEN RICI ANDERSEN, JEFFERSON COUNTY PROSPERITY, INC., ROXUL USA, INC., DANIEL CASTO, RAYMOND BRUNING, AND STEVEN STOLIPHER,

Defendants Below, Respondents.

(On Appeal From the Circuit Court of Jefferson County, West Virginia CC-19-2019-C-139)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May 2022, I served the foregoing ***"Jefferson County Prosperity Respondents' Brief"*** on the following counsel of record via email, and via United States mail, in an envelope addressed as follows:

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