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December 6, 2023

Edythe Nash Gaiser
Clerk, WV Intermediate Court of Appeals
Capitol Complex, Bldg. 1, Room E301
Charleston, WV 25301

Re: McDowell, et al v. Allstate Vehicle & Property Insurance Company
No.: 23-ICA-406
Petitioners Brief and Appendix

Dear Clerk Gaiser:

Please find for filing Petitioners' Brief and original Petitioners' Appendix, a copy of which are being mailed today, December 6, 2023, to Respondent's Counsel at his office at 112 Capitol Street, Charleston, West Virginia 25301.

Thank you for your assistance.

Best regards,

Erwin L. Conrad

ELC/csk
Enclosures

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAMON MCDOWELL, ET ALS,
PLAINTIFFS BELOW,

PETITIONERS,

VS. CIVIL ACTION NO.: 23-ICA-406

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY, AN ILLINOIS CORPORATION
DEFENDANT BELOW,

RESPONDENTS.

FROM THE CIRCUIT COURT OF

FAYETTE COUNTY, WEST VIRGINIA

(Civil Action No. 19-C-129)

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Court below abused its discretion and committed ***plain error*** by its determination that a Settlement Agreement arose by E-Mails exchanged on March 30 and 31, 2023 without receiving testimony and without a written signed Agreement of the Parties and in the face of a Report to the Court by the Certified Mediator, Charles Piccirillo, on April 20, 2023 that "the Parties failed to settle the case in Mediation". (A.R.7)
2. The Lower Court erred in determining that a Settlement arose by E-Mails exchanged March 30 and 31, 2023 without receiving testimony and without a written signed Agreement of the Parties and then, in further abuse of its discretion, attempted to force verification of the alleged Agreement, (A.R. 4-6, incl.), contrary to the Report to the Court of the certified Mediator, all without taking any evidence. (A.R.7)
3. The Court below erred in finding a Mediated Settlement Agreement had been reached without a *written and signed* Agreement, and without the Parties or the Mediator informing the Court that a written, signed Settlement Agreement had been reached and executed. (A.R. 7)
4. The Court below erred by failing to find that neither Petitioners or Respondent had taken any steps in furtherance of the so-called Agreement alleged by the Respondent such as "payment of the alleged Settlement amount" by April 14, 2023, and "payment of the full charges of the Mediator" by Respondent Allstate. (A. R.20)
5. The Court below erred by failing to recognize that the alleged Settlement Agreement had complex provisions, including, non-standard settlement terms, such as Confidentiality and Non-Disparagement, yet had found the Parties had entered into an enforceable Settlement Agreement by E-Mail exchanges without any factual development. (A.R.4)

6. The Court below committed *plain error* by acknowledging that the Parties had never entered into a S*igned* Settlement Agreement but yet required the Parties to submit what the parties considered to be an *appropriate* Settlement Amount and Terms but Ordered the Petitioners to sign a version offered by Respondent, after the Court made further modifications – all without testimony or presentation of evidence. (A.R.4-6, incl.)
7. The Court below erred in violating the provisions of W. Va. Trial Ct. R. 25.1 which provides that no Party may be *compelled* by the Court Rules, the Court, or the Mediator to settle a case involuntarily or against the Party's own judgment or interest.
8. The Court below violated the requirements of Trial Ct. Rule 25.14 which provides "if the Parties reach a Settlement or Resolution and *execute* a *written* Agreement, the Agreement is enforceable".
9. The Court below, ignoring Trial Ct. Rules 25.1, 25.14, 25.10 and Rule 1.2 of the Rules Professional Conduct, Ordered a Settlement Agreement enforced on Petitioners without their consent, appearance or taking of any testimony - all based upon Counsel E-Mails exchanged with Counsel and the Mediator on March 30th and 31st of , 2023 at the time when Mediation was on-going and which said exchanges did not create in the mind of the Mediator impression of a Settlement as evidenced by his Report to the Court of April 20, 2023 that "We were not able to get the case settled". (A.R. 7)

STATEMENT OF THE CASE

Procedural History:

Petitioners, Damon McDowell and Deeanna Lawson, the owners of a .22-acre tract together with the improvements thereon situate at 219 Highland Avenue, Oak Hill, West Virginia, Fayette County, W. Va. ("Dwelling") together with Mary McDowell as Co-Owner

with Damon McDowell of personal property therein situate, suffered a fire loss of the Dwelling and Contents on June 20, 2019. After initial claim payment, Allstate denied coverage.

Petitioners filed their Complaint in the Circuit Court of Fayette County for recovery under Allstate Policy A013830 on September 18, 2019, alleging breach of contract, violation of Claims Settlement Practices Provisions of the Unfair Trade Practices Act, and regulations thereunder, seeking Judgment against Respondents under coverages A and C of the Policy, totaling $607,389.00 together with a claim for compensatory damages of $200,000.00, punitive damages and pre and post judgment costs.

Allstate removed the matter to Federal Court by Notice of Removal filed October 11, 2023. Allstate's request for Declaratory Relief failed to allege fraud or "intentional or criminal acts of or at the direction of Plaintiffs"; but, instead, sought declaration that "the Policy of Insurance was void *ab initio* due to "alleged misrepresentation regarding the condition and occupancy of the Property made ...in the application".

Petitioners filed their Motion for Remand which was granted by United States District Judge Goodwin on December 11, 2019, REMANDING to Judge Ewing's Court .

Upon recusal of Circuit Judge, Thomas Ewing, the matter was assigned to Judge Paul M. Blake, Jr.

At close of Discovery, Petitioners filed their Motion for Summary Judgment and Respondent Allstate filed its Cross-Motion for Summary Judgment.

The Lower Court granted Respondent, Allstate's Cross-Motion for Summary Judgment. Petitioners filed Petition for Appeal before the West Virginia Supreme Court of Appeals (Case 21-0603).

By Decision filed November 17, 2022, the Supreme Court REVERSED the Lower Court decision in favor of Allstate and REMANDED the matter for Trial.

The matter was set for a Scheduling Conference at which time the Lower Court noted that the matter had never been mediated and directed Mediation before the earlier appointed Mediator, Charles Piccirillo.

Mediation commenced with a "Live" Mediation Session on March 2, 2023 and continued remotely thereafter until April 13, 2023.

On or about April 20, 2023, the Mediator provided to the Court, with copies to Counsel, a Report that the Parties were "not able to get the Case settled". (A.R.7)

None of the Parties or their Counsel signaled a dispute of the Report of the Mediator to the Court. Approximately, two months passed before scheduling the renewed Scheduling Conference for Pre-Trial Matters and Trial. After the date for that conference was set by Petitioner and noticed to Allstate, Allstate filed its Motion to enforce Settlement under Seal. (A.R. 26-33,incl.)

Petitioners filed their opposition to Respondent's Allstate Motion to Enforce Settlement, together with their Memorandum in Opposition thereto. (A.R. 8-25,incl.)

The matter proceeded to a Hearing on August 14, 2023. At the commencement of which, the Court announced, without presentation of any testimony, witnesses, or presentations of Exhibits from the Parties, that it had "thoroughly reviewed the Defendant's Motion, the Plaintiffs' Response in Opposition to the Motion and Defendant's Reply...and, having done so, it was of the opinion that there was a 'meeting of the minds in the case.'" (A.R. 4)

The Lower Court went on to fashion the language it considered to be appropriately worded and accepted the monetary figure provided by Allstate rejecting the monetary

figure provided by Petitioners, which was identical to the Mediator's proposal, and granted Allstate's Motion to Enforce Settlement. The Court Below directed that Plaintiffs execute the Lower Court's Release and Settlement Agreement and deliver the same to Counsel for Allstate on August 18, 2023. (A.R. 6)

From that Order, Petitioners appeal to this Honorable Court.

Statement of Facts:

1. The alleged Settlement Agreement was allegedly a *Mediated* Settlement Agreement;
2. The alleged *Mediated* Settlement Agreement was not written by the Mediator, nor was it signed by the Parties.
3. The alleged Mediation Settlement Agreement was allegedly formed by E-Mails exchanged on March 30 and March 31, 2023. However, the representations of Respondent Allstate were disputed by Petitioners, in emails, including the last email directed to Allstate's Counsel on March 31, 2023, disputing Allstate's language. The last email from Allstate indicated it would not change its demands which had been rejected. (A.R. 13)
4. The alleged Settlement Agreement as promoted by Respondent Allstate had performance requirements which included payment by Allstate of 1) the full alleged Settlement amount by April 14, 2023 and, 2) payment of full costs of Mediation. On April 14, 2023, Respondent Allstate had not tendered the alleged Settlement payment and never paid the full cost of Mediation. Petitioners, consistent with their obligation to the Mediator, paid their ½ cost of Mediation by payment made on May 4, 2023. (A.R. 24 and 25)

SUMMARY OF ARGUMENT

Allstate first attempted to blur the distinctions between a Mediated Settlement Agreement and a Non-Mediated Settlement Agreement; then, after treating the Settlement Agreement as basically a Non-Mediated Settlement Agreement, contended, in essence, that the Settlement Agreement may be enforced even when the Parties did not come to a "meeting of the minds".

Allstate, throughout mediation, insisted on a written and signed Agreement to include Allstate's demanded language. In a complete reversal, Allstate swept aside, the mandates of preparation and execution in favor of disputed E-Mails exchanged by counsel for the Parties.

Ultimately, the Lower Court, in abuse of discretion, committed plain error in requiring the Parties to submit Proposals to the Court, and then rejecting the monetary figure of the Petitioners and adopting that of Respondent, (which is less that 1/3 of the Mediator's proposal) and thereafter fashioning its own language, while calling it enforcement of an Agreement of the Parties.

The conduct of the Court Below was in violation of W. Va. Trial Court Rule 25.1 which provides that no Party may be *compelled* by Court Rules, the Court, or the Mediator to settle a case involuntarily or against the Party's own judgment or interest.

The Lower Court failed, in adopting Allstate's position, to recognize that to achieve a *Mediated* Settlement Agreement, the Parties, and, indeed the Court, must comply with Trial Court Rules 25.1, 25.14, 25.10 and certainly Rule 1.2 of the Rules of Professional Conduct instead of enforcing on Petitioners a so-called Mediation Settlement Agreement without their consent, appearance and without taking any testimony.

The exchanges of Counsel for the Parties on the 30th and 31st of March, 2023, all copied to the Mediator when Mediation was on-going, clearly did not create in the mind of the Mediator an impression of a Settlement as evidenced by his letter to the Court on April 20, 2023 that "we were not able to get the case settled".

The Court below, by its action, *created* a settlement agreement when none existed and entered its Order to enforce its own Settlement Agreement in violation of the rights of Petitioners.

STATEMENT REGARDING ORAL ARGUMENT

PETITIONERS REQUEST ORAL ARGUMENT

ARGUMENT

Standard of Review Applicable:

The West Virginia Supreme Court applies the following standard when reviewing a Circuit Court's Order granting a Motion to enforce a settlement:

> "when there is the issue of the enforceability of a settlement agreement which requires the Lower Court to make findings of fact and to 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". Syl. Pt. 2, Triple 7 Commodities, Inc. v. High Country Mining, Inc. 245 W. Va. 63, 857 S.E. 2d 403(2021)

"The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation...." Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens 152 W. Va. 91, 159 S.E. 2d 784(1968)

Basis for any Agreement, especially a Mediated Settlement Agreement:

A contract requires "a definite meeting of the minds... since a settlement cannot be predicated on equivocal actions of the parties." Connor v. GCC Beverages, Inc. 182 W.Va. 689, 691, 391 S.E. 2d 379, 381 (1990) (per curiam), "15A C.J.S. Compromise & Settlement §7(1) (1967). However, to have a meeting of the minds, the parties must have "the same understanding of the terms of the agreement reached". Messer v. Huntington Anesthesia Group, Inc. 222 W. Va. 410, 418, 664 S.E. 2d 751, 759 (2008) (per curiam). In certain instances, our Court has found that emails and voice mails between Counsel without dispute clearly demonstrated that the parties had the same understanding of the terms of the agreement reached which would be enforced, particularly after emails between Counsel occurred after a hearing where both Petitioner and/or Counsel *testified.* Russell v. Bayview Loan Servicing, LLC, No. 20-0681, 2021 WL 2577498 & (W.Va. June 23, 2021) (emphasis, mine)

Likewise, the Court has found that where parties take steps in reliance on an agreement, those steps are evidence as to the existence of the agreement. Donahue v. Mammoth Restoration & Cleaning, 246 W.Va. 398, 405, 474 S.E. 2d 1, 8 (2022) (finding a settlement had been reached when evidence included that a party paid funds for water damage in reliance on the agreement). (See also *Russell* where the parties informed the Court of a settlement and the Respondent cancelled the Petitioner's deposition, and performed credit repair in reliance on the agreement).

Despite other issues of a meeting of the minds, the evidence and circumstances may show that the parties intended that an additional condition of the agreement was that it be signed and in writing. Syl. O'Connor, 182 W.Va. 689 391 S.E. 2d 379.

Our Court has held that if 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 become binding upon them, it should be reduced to writing and signed by the parties, and 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. Clearly, Allstate, as a condition, demanded a written, signed settlement agreement and demanded its language therein.

WAS MEETING OF THE MINDS DEMONSTRATED?

....."contract requires "a definite meeting of the minds" ..... since the settlement cannot be predicated on equivocal actions of the parties." O'Connor v. GCC Beverages, Inc. 182 W.Va. 689, 691, 391 S.E. 2d 379, 381 (1990) Also 15A C.J.S. Compromise & Settlement §7(1) (1967)

Here, although the parties have differing understandings and differing requirements for certain sections of matters being disputed, Allstate, contending for enforcement, believed that the Court should bludgeon the other party to accept their terms and their amounts.

The email exchanges (even those offered by Allstate) reveal that there was a continuing disagreement as to language and, ultimately, dollars.

The continuing disagreements were clearly expressed in Exhibit D to Allstate's Reply Memorandum (A.R. 58) where, in response to Allstate's demanded additional language in a Standard Confidentiality Agreement, Petitioner's Counsel clearly disagreed, stating "beyond Standard Confidentiality Provisions...I will not agree" (March 31, 2023 9:28 A.M. E-Mail).

The Lower Court ignored Allstate's attempted clarification of the Mediator's suggested language in the Mediator's March 30, 2023 3:36 P.M. E-Mail (to which Plaintiff's Counsel provided the March 31, 2023 9:09 A.M. Response). However, Allstate's

Counsel disagreed with the Mediator and attempted to insert clarification language, to which Plaintiff's Counsel emphatically disagreed by the 9:28 A.M. E-Mail. Reply Memorandum, Exhibit D (A.R. 58).

Thereafter, Petitioner's Counsel, by April 4, 2023 letter (Reply – Exhibit F) (A.R. 66, 67), pointed out obvious mistakes in the Allstate drafted document and offered language as the Parties were clearly in dispute. In response to the suggestions of Plaintiff's Counsel, Allstate, in confirmation that the Parties were not in agreement, stated in Allstate's April 7, 2023 10:54 A.M. E-Mail ... "Allstate cannot agree to Toad's Proposed Language" (Exhibit G) (A.R. 68).

The Lower Court swept all those disagreements and disputes aside to cram down its own Agreement. (A.R. 4 & 5)

Type of Settlement Agreement:

We are not dealing with any alleged settlement agreement but a MEDIATED settlement agreement.

Enforceability of Mediated Settlement Agreement:

Lower Court's PLAIN ERROR of determining Settlement Agreement arose by email exchanges without a written, signed Mediation Agreement and without an evidentiary hearing. West Virginia Trial Court Rule 25.14 provides when "parties reach a settlement, resolution and execute a *written* agreement, the agreement is enforceable." Unfortunately, that did not occur in this case. At one point, the Mediator prepared a Mediator's proposal to be signed by the parties and their Counsel and neither side accepted the Mediator's proposal. It can be noted, however, that when the Lower Court, attempting to *create* a settlement, asked for each side for an appropriate settlement amount, the Plaintiffs provided the same amount included in the Mediator's proposal. The

Lower Court summarily rejected the certified Mediator's proposal to adopt Allstate's proposal which was less than 1/3 of the Mediator's proposal.

Lower Court erred by finding a Mediated Settlement Agreement without a written agreement, signed by the Parties. Allstate, without expressly saying the same, contends that the matter can be *mediated* and settled by an attorney alone. West Virginia Trial Court Rule 25.10 requires that "the following persons.... If furnished reasonable notice, are required to appear in a mediation session (1) each party (2) each party's Counsel of record (3) insurance carrier.....Party.... fails to appear at a mediation session without good cause...., Court..... may impose sanction". If the matter could be mediated by attorneys alone, that provision would become a nullity. Further, under Rules of Professional Conduct of West Virginia, a lawyer should abide by a client's decision whether to accept an offer of settlement of a matter. Rules of Professional Conduct, Rule 1.2. The Petitioners gave an emphatic answer to the low-ball offer of Allstate which was adopted without question by the Lower Court ($100,000.00 dollars), by saying, "NO, so low it disrespects".

Court Below erred in finding a complicated, non-standard Mediated Settlement Agreement had been reached based on email exchanges without an evidentiary hearing for factual development. The Mediator, who had been conducting mediation, commencing with a "live" mediation session on March 2, 2023, after receiving the emphatic response of Petitioners to the final position of Allstate, reported to the Court on April 20, 2023 that "we were not able to get the case settled".

If Allstate disagreed with the Mediator, Allstate should have filed Objections and Exceptions to the Mediator's report of April 20, 2023. Instead, Allstate was silent for nearly 2 months before its June 16, 2023 filing seeking leave to file its Motion for Enforcement

Under Seal. Allstate's position departed from the applicable Trial Court Rules and Rules of Professional Conduct and asked the Court to ignore 1) the mediator's report of Charles Piccirillo after both live and remote negotiations leading to a report the fact that "we were not able to get the case settled", and 2) the fact that there was never a written settlement agreement signed by the parties as required by Trial Court Rule 25.14.

Generally, decisions as to whether to bring suit, dismiss suit or settle are not, by implication, one's that the attorney is authorized to make. Auvil v. Grafton Homes, 92 F. 3d 226, 230-231 (4th Cir. 1996) Schafer v. Barrier Island Station, Inc. 946 F. 2d 1075 (4th Cir. 1991) each citing Humphreys v. Chrysler Motors Corp., 184 W.Va 30, 399 S.E 2d 60. In *Humphreys*, when initial settlement did not occur, Plaintiffs informed their attorney that they no longer wanted to settle.

The Lower Court created a Settlement when the parties had not Agreed:

In Riner v. Newbraugh, 563 S.E. 2d 802, 211 W.Va. 137 delays by their opponents revived animus that had animated the previous relationship of the Plaintiffs and the Defendants causing the property owners to no longer be willing to receive the developers offered amount. In *Riner*, our Court recognized that the language of Trial Court Rule 25.14 requires that when a Settlement Agreement is reached and reduced to writing, it is enforceable.

The Court also recognized exceptions such as when the Settlement Agreement is made in open Court. See 15 Am. Jur. 2d Compromise and Settlement §16.

However, in instances where the settlement is not made in open Court, the possibility of enforcement without a written and signed agreement requires a determination that 1) the *parties* to the mediation reached an agreement; 2) a memorandum of that agreement was prepared by the mediator or at his direction, incident

to the agreement; 3) the Court finds that, after a properly noticed hearing, that the agreement was reached by the parties, free of coercion, mistake, or other unlawful conduct; and 4) the Circuit Court makes Findings of Fact and Conclusions of Law sufficient to enable the Appellate Court to review the Order of enforcement. In *Humphreys,* the Appellate Court came to the conclusion that the parties did not achieve settlement where, as here, timeliness and, ultimately, the amount of the offer were at issue, among several other issues.

Allstate's cited precedents render little support to force a settlement on Plaintiffs. The ancient case of Dorr v. Chesapeake, 78 W.Va. 150, 88 S.E. 666 (1916) involves an attempt to enforce an ORAL agreement in a land condemnation proceeding involving interests in land and by use of a "pass" prohibited by an act of Congress.

Fairmont Tool Inc. v. Davis, 246 W. Va 258, 868 S.E. 2d 737 (2021) involved an employer's attempt to circumvent the Wage Payment and Collection Act and enforce unauthorized wage assignment.

Young v. Young involved attempted use of an option to circumvent the widow's elected share which tactic is deemed violative of public policies and principles of statutory elective share.

Mediated Settlement Agreement Did Not Exist:

Here, we are not dealing with any alleged settlement agreement, but a Mediated Settlement Agreement offered contrary to applicable Trial Court Rules.

It is clear that no true agreement was reached as is evidenced by the 10:45 A.M. March 31, 2023 email exchanges, the April 4, 2023 and April 7, 2023 exchanges, and by the out-right refusal of Plaintiffs/Petitioners to settle as noted by their April 13, 2023

notification to the Mediator that the sum offered was so small that they believed they were being disrespected.

No Action Taken in Reliance On An Alleged Agreement:

The West Virginia Supreme Court has found that when the parties take steps in reliance on an agreement, those steps are evidence of the existence of the agreement. Donahue v. Mammoth Restoration & Cleaning 246 W.Va. 398 405, 874 S.E. 2d 1 (8) (2022). In that case, the Court found that the Settlement Agreement had been reached when evidence included that a party paid funds to repair water damage in reliance on the agreement.

However, in this case, the conduct of Allstate clearly indicated that they believed that there had never been a settlement achieved. According to Allstate's version of the settlement, Allstate was to make the "Settlement Payment" by April 14, 2023 "the particular time" (Allstate Motion, Paragraph 2)(A.R. 26) and "pay the cost of mediation". If Allstate, indeed, believed that there was an Agreement, they would have done both. They did neither.

Things considered monumental and thus mandatory in the mind of one Party can be insignificant, a threat or repugnant in the mind of the other Party, which can mean but one (1) thing – there has not been a "meeting of the minds" necessary to the formation of any agreement – certainly not a *Mediated* Agreement.

CONCLUSION

By its decision, the Lower Court violated the requirements of W. Va. Trial Court Rules 25.1, 25.10 and 25.14. Even if this case did not involve an alleged *Mediated* Settlement Agreement, the Lower Court's decision clearly violated established precedent of our Supreme Court and, to a greater degree, the 4th Circuit in *Hensley v.*

Alcon Lab'ys 77 Fed 3rd 135 (4th Circuit) and *Levine v. Rockwool International, et als,* WL 21-1015 (June 14, 2023).

Accordingly, the Lower Court Decision should be REVERSED and REMANDED for Trial, in accordance with the earlier decision of the West Virginia Supreme Court in this matter.

Respectfully Submitted,

DAMON MCDOWELL, MARY MCDOWELL
AND DEEANNA LAWSON, Petitioners
By Counsel

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