IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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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,

RESPONDENT.

FROM THE CIRCUIT COURT OF

FAYETTE COUNTY, WEST VIRGINIA

(Civil Action No. 19-C-129)

PETITIONERS' REPLY BRIEF

Erwin L. Conrad, (WVSB 805)
CONRAD & CONRAD, PLLC
P. O. Drawer 958
Fayetteville, West Virginia 25840
PH: 304-574-2800
Fax: 304-574-2460
E-Mail: erwin@conradlaw.wv.com
Counsel for Petitioners

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ASSIGNMENTS OF ERROR

Requiring Discussion due to Respondent's Failure to Fully, Correctly Address

1. Respondent's failures to properly and fully address Assignments of Error 1, 3, 5 and 9 concerning the fact that everything subject to this proceeding occurred during a **MEDIATION** which required that any Settlement Agreement be written and signed by the Parties, which, clearly, did not occur.
2. The Court below committed obvious errors in allowing Respondent to fashion an Agreement when none had been reached as reported to the Court by the certified Mediator on April 20,2023 that "the Parties failed to settle the case in Mediation".
3. The Court below erred by ignoring the requirements for a mediated Settlement Agreement.
4. Without receiving Testimony or presentation of evidence, the Court erred by allowing Respondent, Allstate, to feign devotion to reporting to the State Fire Marshal concerning an arson fire when Allstate, throughout the litigation, steadfastly refused to report the arson fire to the State Fire Marshal and repeatedly lied to the Court concerning their failures and refusals and attributed false actions (never conducted) to the State Fire Marshal and then, in desperation, attempted to say that the State Fire Marshal had delegated investigation to a Deputy Sheriff Willis who steadfastly denied that he had been delegated any investigative responsibility and had not investigated the fire.

5. The Court below adopted Allstate's misrepresentation of Counsel for Petitioners by adopting the expansion by Allstate of Petitioners Counsel's response to the Mediator and to Allstate's Counsel which indicated only that Petitioners agree to the Settlement *"as outlined in Charlie's EM,"* (A.R. 56); see, also (A.R. 53), which made it clear that there was never an Agreement as to rejection of Charlie Piccirillo's Agreement by Allstate and never an Agreement to Allstate's attempts to further amend.
6. The Court below ignored Allstate's recognition that there had never been an actual Agreement by the continuing exchanges between Counsel and the Mediator on April 4 (A.R. 66 & 67), April 7 (A.R. 68), and as late as April 13, 2023, all of which made clear that no Agreement had been fashioned and certainly none had been reduced to a final written and signed version (see, A.R. 10).

ARGUMENT

RESPONDENT'S FLAWED POSITION

1. The "Agreement" which Allstate promotes did not result from and was not fashioned in Mediation;
2. The problems created were as a result of "Petitioner's rejection of Allstate's 'righteous and nearly holy desire to adhere to all reporting requirements' ";
3. It was perfectly permissible for the Court below to sweep aside the lack of a written and executed Agreement and ignore the Certified Mediator's Report and impose a Settlement based upon disputed E-Mail exchanges only.

Inasmuch as the **Standard of Review** was correctly stated in Petitioner's Brief on Page 7 and has never been an issue in this matter, it need not be revisited.

I

Allstate's Claim that Trial Ct. Rules 25.1, 25.14 & 25.10 are inapplicable because the Settlement was not achieved in Mediation *per se,* is one of its many false claims.

The Report to the Lower Court from the Certified Mediator, Charles S. Piccirillo on April 20, 2023 was:

> "I served as the Mediator for an extended Mediation conducted in the above captioned matter pending before you in the Circuit Court of Fayette County, West Virginia which commenced with a "live" Mediation Session on March 2, 2023, and has continued remotely since that time. All the Partys' and their appropriate Representatives appeared at the live Mediation Session and substantial progress toward a potential settlement was made throughout the remote negotiations, I regret to advise that we were not able to get the case settled. I have advised Counsel that I remain available if additional Mediation Settlement efforts are desired." A.R. 7.

It is therefore clear that Mediation commenced on March 2, 2023 and ended on April 20, 2023. An attempted Mediation Agreement was, in fact, fashioned by the Mediator and is set forth verbatim on Appendix Record 53.

All exchanges between Counsel included a copy to the Mediator and many are directed to the Mediator with Counsel being copied.

Allstate, desperate to avoid the requirements of enforceability of a *Mediated* Settlement Agreement, desires to turn to non-mediated Agreement and the requirements therefor.

Contract Formation, Meeting of Minds

A meeting of the minds of the Parties is a *sine qua non* of all contracts. Since a compromise and settlement is contractual in nature, a definite meeting of the minds of the Parties is essential to a valid compromise since a Settlement cannot be predicated on equivocal actions of the Parties. 15A C.J.S., Compromise and Settlement, Section 7(1), see, also, *O'Connor v. GCC Beverages, Inc.,* 391 S.E. 2d 379 (W. Va. 1990).

In this case, the Court abused its discretion to find that there had been a meeting of the minds when, clearly, none had occurred. Allstate's strained efforts to find an Agreement fail and then their failure is then restated repeatedly. First, the only concession, albeit limited, was to the Charlie Piccirillo Mediator's Settlement Agreement. (A. R. 53) which was precisely the only thing agreed to by Petitioner's Counsel in stating "my Clients do agree to the Settlement as outlined in Charlie's EM" (emphasis and underlining, mine), A.R. 56. That Agreement contained a Standard Confidentiality provision. There was no agreement to Allstate's Counsel's *disagreement* of the proposal of Mediator Piccirillo and their attempted expansion. It is equally clear that Allstate was not in agreement and there had never been a Settlement Agreement as Allstate continued to demand changes in the third proposed paragraph as proposed by the Mediator after the Mediator's earlier attempts to fashion a Settlement Agreement (A.R.10).

The Mediator continued his services and his April 13 recommendations followed an exchange of letters and E-Mails between Counsel for the Parties on April 7th and 12, 2023 which set forth, as to Plaintiffs, numerous concerns that statements in and after completion of the live Mediation Session indicated Allstate's efforts to continue matters involving subjects peripherally related to the litigation, while not the basis of

Allstate's denial of coverage, after conclusion of the litigation. All of this highlighted the lack of the meeting of the minds as the same related to Plaintiff's refusal to endorse a statement which allowed efforts to continue to harass Petitioners in an ancillary matter in spite of the proceeding being dismissed with prejudice as to all claims.

It is clear from those exchanges that there was never anything akin to a meeting of the minds with regard to the conclusion of all matters related to the litigation. This was noted by the Mediator and the subject of his April 13,2023 suggestions which were refused by Allstate. Allstate was reminded that a Standard Confidentiality Agreement with clarity for "no claw-back or liquidated damages" is what was agreed. If nothing else has or is by Allstate instigated, then, the standard language certainly protects Allstate and, in fact, all the Parties. At 10:45 A.M. on March 31, 2023, it was clear that there was no Agreement, not even as to Standard Confidentiality language as Counsel for Allstate, responding to Counsel for Petitioners (with a Copy to the Mediator) stated "Toad, that is not what has been agreed, the additional language is required..." (A.R.13)

It is, therefore, abundantly clear that there had never been a meeting of the minds for any Agreement, much less a Mediated Settlement Agreement. The Lower Court abused its discretion in finding such a meeting of the minds while ignoring the Standard required for a Mediated Settlement Agreement's enforceability. Allstate's own exhibits illustrate that they were continuing disagreements as Petitioner's Counsel, in response to Allstate's demanded additional language to the Standard Confidentiality Agreement, clearly disagreed, stating "beyond Standard Confidentiality provisions...I will not agree. March 31, 2023 (A.R. 58).

II and III

Enforceability of Mediated Settlement Agreement

The lower Court committed plain error by determining that a Settlement Agreement arose by E-Mail exchanges without a written, signed Mediation Agreement and without an evidentiary hearing. West Virginia Trial Court Rule 25.14 provides if... "Parties reach a settlement, resolution and execute a *written* Agreement, the Agreement is enforceable."

That, of course, did not occur in this case. As we know, 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.

When the Lower Court, attempting to *create* a Settlement, asked from each side an appropriate Settlement Amount, the Plaintiff's provided the same amount included in the Mediator's Proposal which the Court below summarily rejected to adopt Allstate's Proposal which was less than one-third of the Mediator's Proposal.

IV

Allstate's Obsession with Additional Language in the Standard Confidentiality Agreement

Allstate's problems relate to Allstate's so-called "righteous and nearly holy" desire to adhere to all Notice requirements - - Please!

Allstate's refusal to permit Standard Confidentiality Language supposedly related to

their "desire to comply with Statutory Requirements for Insurance Companies". Oddly, Allstate has apparently seen the holy light very, very, very late! The provisions cited by Allstate are part of the same which Allstate refused to comply with and lied about – repeatedly.

In Plaintiff's Complaint, Paragraph 30, Page 12, Plaintiff alleged that Defendants (Allstate, et al) violated W. Va Code 29-3-12(a)(b) by failing to "notify the Fire Marshal, if it has reason to believe, based upon its investigation of a Fire Loss to real or personal property that the Fire was caused by other than accidental means. The Company shall furnish the State Fire Marshal with pertinent information required during its investigation and *cooperate*"... Identical to W. Va. Code 15A-10-6(b) now cited by Allstate. But, - - did Allstate notify or cooperate when required – NO!!

Instead, Allstate issued a denial to Plaintiff's allegation (Pg. 6 – Allstate Answer). Then, in response to Request for Production (RFP 19) which requested any notification given by the Defendants to the West Virginia State Fire Marshal in connection with the Fire Loss...as required by W. Va. Code 29-3-12, *Allstate objected* and mentioned reservations for Supplemental Response. None was forthcoming. Subsequent Requests for Admissions were conducted with Responses that "the Fire Marshal's Office" conducted an "Investigation". *McDowell v. Allstate, 21-06-03, (A.R. 173) (A.R. 13).* That was proven false by sworn filing of the Deputy Fire Marshal which included the statement that "Our Agency was not contacted...and "no fire scene investigation was conducted". *McDowell v. Allstate, 21-06-03 A.R. 395, 734 (herein, A.R. 13).* Being trapped, Allstate, again lied, by saying the Fire Marshal delegated the

investigation to Deputy Willis. However, Deputy Willis, under oath, denied being asked to conduct an investigation and denied conducting an investigation. *McDowell v. Allstate, 21-06-03 A.R. 604 & 605 (herein A.R. 14).*

Now, after steadfastly refusing to comply with W. Va. Code 29-3-12(a)(b) for four (4) years, Allstate's seeks special language in a Settlement and Release Document to allow Post Settlement "cooperation" which it refused while the matter was pending.

The Party who lies repeatedly about importance of and compliance with reporting requirements creates a distinct suspicion of their motivation in demanding expansion in Standard Confidentiality terms in a Settlement Agreement.

V

That suspicion was set forth in Plaintiff's lack of agreement by Counsel for Plaintiff in an E-Mail forwarded April 7, 2023 to the Mediator and Counsel for Allstate which outlines in some detail cause for Plaintiff's suspicions of Allstate wanting expansive language (A.R. 14 & 15).

Allstate's Lack of Disagreement of the Mediator's Report – Allstate's Delays:

If Allstate disagreed with the Mediator and his Report filed with the Court and copied to the Parties bearing date of April 20, 2023, Allstate should have filed Objections and Exceptions of the Mediator's Report on April 20, 2023 or shortly thereafter.

Instead, Allstate was silent for nearly two (2) months before its June 16, 2023 filing seeking a crammed down version of its Settlement Agreement.

VI

The Lower Court Abused its Discretion by Creating a Settlement Agreement when the Parties were not in Agreement

In *Riner v. Newbraugh, 563 SE 2d 802, 211 W. Va. 137,* (similar to this case) the Court noted that delays by their opponents revived animus that had animated previous relationship of the Parties, causing the Property Owners to no longer to be willing to receive the Developers offered amount. In *Riner*, our Court recognized 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 Section 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 an 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 v. Chrysler Motors Corp*, 184 W. Va. 30, 399 SE 2d 60, the Appellate Court came to the conclusion that the Parties did not achieve Settlement where, as here, timeliness and ultimately the prior conduct of Allstate and the amount

of the offer were at issue, among several other issues. It should be noted, that in *Humphreys,* when the initial settlement did not occur, Plaintiffs informed their Attorney that they no longer wanted to settle.

Allstate's Position that an Evidentiary Hearing is Unnecessary.

Allstate's references to *Levine v. Rockwool Int'l A/S/, 21-1015, filed June 14, 2023* are opposite to its actual holdings. Allstate cites *Levine* for the proposition that the decision indicated that Settlement could be upheld without the necessity of evidentiary Hearings based solely on a series of E-Mails exchanged. Clearly, that case did not involve Mediation or any Agreement growing out of Mediation. However, even in that case, Allstate's reference is totally wrong. *In Levine,* the Court found that under the facts and circumstances, the Circuit Court erred in concluding that the Parties entered into an enforceable Settlement where the evidence required factual development as to mutual assent. The Court found that the Parties disagreed over the existence of an Agreement and its purported terms. The Court REVERSED and REMANDED the final Order of the Circuit of Jefferson County for further proceedings. In *Levine*, the Court also found that "when the Parties take steps in reliance on an Agreement, those steps can be evidence as to the existence of the Agreement. See, *Donahue, 246 W. Va. at 405, 874 SE 2d at 8* finding a Settlement Agreement when the evidence included that the Party paid funds to repair the Water Damage in reliance on the Agreement.

In this instance, in its additional bite of the apple, Allstate says that it was ready to perform; although, it paid no settlement payment which was due April 14,2023 and did not pay the cost of Mediation. In fact, Plaintiff/Petitioners paid their

Share of the Mediation Costs. Allstate's complaint is that it did not get W-9's. Of course, no W-9's are necessary for Allstate to pay the cost of Mediation as they say they had agreed to in the Agreement if they truly believed an Agreement existed.

Clearly, Plaintiffs/Petitioners provided no W-9's because they were certain there was no Agreement for which to provide a W-9. Accordingly, the conduct of the Parties indicates that there was never a Settlement Agreement achieved.

CONCLUSION

The Parties agree on one thing. There is no necessity of a further hearing on the issue of whether there was a Settlement Agreement. Clearly, there was not. The Court below abused its discretion and its decision violated the requirements of W. Va. Trial Court Rules 25.1, 25.10 and 25.14. Setting aside the fact that this was an alleged *mediated* Settlement, the lower Court clearly violated the established precedent of our Supreme Court (*Levine v. Rockwool)* and, to a larger degree, the 4th Circuit in *Hensley v. Alcon 77 F. 3d 135 (4th Circuit).*

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

Erwin L. Conrad (WVSB 805)
CONRAD & CONRAD, PLLC
P. O. Drawer 958
Fayetteville, West Virginia 25840
PH: 304-574-2800
Fax: 304-574-2800
E-Mail: erwin@conradlawwv.com

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CERTIFICATE OF SERVICE

I, Erwin L. Conrad, counsel for Damon McDowell, Mary McDowell, and Deeanna Lawson, does hereby certify that on the 1st day of February, 2024, service of the foregoing **"Petitioners Reply Brief"** has been made upon Counsel of record by depositing a true copy thereof in the regular United States mail, first-class postage prepaid and Via Fax No. 304-345-5265, addressed as follows:

Brent K. Kesner, Esq., WVSB 2022
Kesner & Kesner, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Counsel for Respondents

Erwin L. Conrad (WVSB 805)
Conrad & Conrad, PLLC
P. O. Drawer 958
Fayetteville, WV 25840
PH: 304-574-2800
Fax: 304-574-2460
E-Mail: erwin@conradlawwv.com
Counsel for Petitioners