Case No. 23–ICA-406

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAMON McDOWELL, MARY McDOWELL, and DEEANNA RAE LAWSON,

Plaintiffs Below, Petitioners,

v.

ALLSTATE VEHICLE & PROPERTY INSURANCE COMPANY,

Respondent.

FROM THE CIRCUIT COURT OF FAYETTE COUNTY,
WEST VIRGINIA
Civil Action No. CC-1—2019-C-129

BRIEF OF RESPONDENT ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY

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STATEMENT OF THE CASE

In the present appeal, the Petitioners, Damon McDowell, Mary McDowell and Deeanna Rae Lawson are appealing the Circuit Court of Fayette County's determination that the parties reached a final and enforceable settlement of the Petitioners' claims arising from a June 20, 2019 arson fire loss at a property located at 219 Highland Avenue, Oak Hill, Fayette County, West Virginia. In particular, the Petitioners assert that the Circuit Court below erred when it concluded that a meeting of minds with respect to the settlement had occurred through a series of e-mails exchanged between counsel for the parties and Mediator Charles Piccirillo on March 30 and March 31, 2023. Petitioners assert that no meeting of minds with respect to settlement had occurred because the mediation was on-going and counsel for Respondent, Allstate Vehicle And Property Insurance Company ("Allstate"), was unwilling to agree to certain subsequent terms proposed by Petitioners' Counsel. Because the Petitioners fail to recognize that a meeting of minds had occurred before the Petitioners' proposed modification and ignore the fact that their proposed modification would have required Allstate to violate its legal duties under West Virginia law, Allstate now responds and asks that the Court deny the Petitioners' appeal and affirm the ruling of the Circuit Court.

Procedural History

The Petitioners filed this action on December 16, 2019. In their *Complaint*, the Petitioners alleged that Allstate had breached its insurance contract, acted in bad faith, and violated certain provisions of West Virginia's Unfair Trade Practices Act (*W.Va. Code §33-11-4(9)*) in connection with its handling of Petitioners' fire loss claim. Following discovery, the Circuit Court granted summary judgment to Allstate on July 6, 2021. In its *Order Denying Plaintiffs' Motions For*

Summary Judgment And Granting Defendant Allstate Vehicle And Property Insurance Company's Cross-Motion For Summary Judgment, the Circuit Court found that there were no genuine questions of fact with respect to whether the Petitioners had made material misrepresentations in their application for their Allstate Policy and concluded that because the Policy was void *ab initio,* Allstate was entitled to judgment as a matter of law. The Petitioners appealed that ruling to the West Virginia State Supreme Court of Appeals.

On November 17, 2022, the Supreme Court reversed the Circuit Court's decision and remanded the case for trial. (Appeal No. 21-0603). Following remand, the Circuit Court entered a new *Scheduling Order* and required the parties to engage in mediation. The mediation was scheduled for March 2, 2023.

The Settlement Discussions

While the initial mediation which proceeded on March 2, 2023 was not successful, the parties continued to have discussions regarding settlement with the mediator, Charles S. Piccirillo. Those discussions eventually resulted in a proposed settlement and, on March 30, 2023, at 3:36 p.m., the mediator, sent an e-mail to Petitioners' Counsel and Counsel for Allstate which indicated as follows:

> I believe we have achieved a full and final settlement of all claims in connection with the above civil action pending in the Circuit Ct. of Fayette Co. WV, upon the following terms:
>
> 1. The settlement will be without admission of any liability by Defendant, Allstate Vehicle and Property Insurance Company ("Defendant" or "Allstate"), which expressly denies liability;
>
> 2. The Defendant will pay to the Plaintiffs the sum of $100,000.00;
>
> 3. The above captioned civil action will be dismissed, with prejudice, and with each party paying his, her or its own costs and attorney fees;

4. Plaintiffs will execute and deliver a full and final broad form release of all claims, contractual or extra-contractual against Allstate, its agents and employees;

5. Definitive settlement documents in a form satisfactory to counsel will be prepared and entered into; **provided, however, the settlement agreement and release ("SAR") will include a confidentiality provision with customary exceptions for accountants, tax advisors, insurers, reinsurers, regulators, disclosures required by law, subpoenas and Court Orders, but will not include "claw-back" or liquidated damage provisions;**

6. The defendant will pay the costs of mediation;

7. The settlement will be concluded by 4/14/23, meaning SAR executed and returned, final order of dismissal approved by counsel and submitted to the Court for entry and settlement proceeds paid over by 4/14/23.

If you agree that this represents the basic material terms of the settlement achieved in this matter, I would ask that you so indicate on behalf of your respective clients and yourselves by "replying to all" with an affirmative statement that you and your clients agree. This email and your responses will form our mediation settlement agreement. If you believe I have misstated the settlement or omitted material terms, please weigh in as soon as possible.

(*See* JA 53, the March 30, 2023 e-mail.) (Emphasis added.) Shortly thereafter, at 4:01 p.m., Allstate's Counsel sent the following response:

A couple points for clarification. I will not be able to request the settlement check until I have a W-9 and instructions from attorney Conrad on how the check is to be issued (that is, to whom-whose names are to appear as payees). I may not be able to get the check by 4/14 if there is a delay in my receipt of the W-9 and check information.

Also, the Confidentiality Agreement of the Release will necessarily need to address the fact that Allstate and its representatives are not limited in their ability to cooperate and communicate with State and Federal officials and authorities who are or may be involved in the investigation of the claim giving rise to the present litigation. Such cooperation is required by law in any event, and Allstate does not want there to be any misunderstanding, or argument, that the Confidentiality Agreement limits or is relevant to this obligation or

> **such communications.** The Release I prepare will make this clear as related to the Confidentiality Agreement, as Allstate cannot enter into a confidentiality agreement that is inconsistent with its legal duties and obligations.

(*See* JA 55, the March 30, 2023 e-mail from Allstate's Counsel.) (Emphasis added.) The next morning, at 9:09 a.m., the Petitioners' Counsel sent a response specifically indicating he had reviewed both e-mails and stating as follows:

> I received the 3:36 and 4:01 Ems this morning. My client do agrees to the settlement as outlined IN Charlie's em.
>
> Brent, the check will be to Damon McDowell, Mary McDowell, Deeanna Lawson and Conrad & Conrad, PLLC, their attorneys. The check will be deposited in Conrad & Conrad Trust Account and distributions made therefrom. I will forward a W9 from our firm today and trust that that will be sufficient. Charlie, thank you for your skill, care, and patience.
> Best regards to all, Erwin

(*See* JA 56, Petitioners' Counsel's 9:09 a.m. e-mail.) Therefore, as of 9:09 a.m. on March 31, 2023, the parties had reached a settlement pursuant to mutually agreed upon terms which expressly included the Petitioners signing a release with a confidentiality agreement with customary exceptions which would not restrict Allstate's ability to co-operate with investigating authorities as required by law. Such a provision was necessary because it was undisputed that the subject fire had been caused by arson and *W. Va. Code §15A-10-6* provides as follows:

> **(a) The State Fire Marshal or any deputy or assistant fire marshals under the authority of the fire marshal may request any insurance company investigating a fire loss of real or personal property to release any information in its possession relative to that loss. The company shall release the information and cooperate with any official authorized to request such information pursuant to this section**. The information shall include, but not be limited to:
>
> (1) Any policy in force;
> (2) Any application for a policy;
> (3) Premium payment records;

(4) History of previous claims; and
(5) Material relating to the investigation of the loss, including statements of any person, proof of loss, and any other relevant evidence.

(b) Any insurance company shall notify the State Fire Marshal if it has reason to believe, based on 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 acquired during its investigation and cooperate with the courts and administrative agencies of the state, and any official mentioned, or referred to, in subsection (a) of this section.**

(c) In the absence of fraud, no insurance company or person who furnishes information on its behalf, shall be liable for any oral or written statement or any other action necessary to supply information required pursuant to this section.

(d) Any information furnished pursuant to this section shall be held in confidence, and is exempt from the provisions of § 29B-1-1 et seq. of this code, until such time as its release may be required pursuant to a criminal proceeding.

(e) Any official mentioned, or referred to, in subsection (a) of this section may be required to testify as to any information in his or her possession regarding the fire loss of real or personal property in any civil action in which any person seeks recovery under a policy against an insurance company for the fire loss.

Unfortunately, the Petitioners and their Counsel soon reconsidered their acceptance of the agreed upon terms of the settlement.

At 9:28 a.m. on March 31, 2023, Petitioners' Counsel sent a subsequent e-mail communication regarding the confidentiality provisions of the settlement agreement, indicating the Petitioners' sought to add language to the standard confidentiality provision that would limit or preclude Allstate's ability and duty to cooperate with investigating agencies and authorities related to the fire which gave rise to the Petitioners' claims. The e-mail indicated:

> On rereading Brent's points of clarification, I have a problem with Brent's desire to put additional language in a standard confidentiality agreement. Because the sworn statements that were recorded of Mr. & Mrs. Wallace in the unrelated matter that led to a nolo contendere disposition somehow involved questions unrelated to the auto accident but turning to the "fire" and personal property matters and when the answers were not satisfactory the questioning abruptly ended which led me to see another hand in the mix. I am not, by implication or otherwise, going to countenance further harassment of my client. Therefore, standard confidentiality provisions are fine. Beyond that I will not agree. Erwin

(*See* JA 58). Therefore, it was apparent that the Petitioners wished to modify the previously agreed upon terms of the settlement to include a new term which would preclude Allstate from cooperating with any investigation of the subject fire being conducted by law enforcement despite Allstate's specific obligation to do so under West Virginia law.

On April 4, 2023, Allstate's Counsel submitted a "Confidential Release And Settlement Agreement" which included the following language with respect to the confidentiality of the agreement:

> Nothing contained within this Agreement shall limit or preclude Allstate from complying with its duty to cooperate with and/or provide information to any governmental authorities related to the Claimants' claim or allegations.

(*See* JA 60-65.) The Petitioners' Counsel responded by proposing that the subject language in the "Confidential Release And Settlement Agreement" should be replaced with the following language:

> While Allstate, as other Insurers, has a duty to cooperate with the governmental authority concerning on-going claims, the Parties recognize and agree that all controversies concerning McDowell, et als v. Allstate Vehicle and Property Insurance Company, et al., CA 19-C-129 (Fayette County, West Virginia Circuit Court) have been resolved and there are no controversies, claims or investigations related thereto which are not closed and dismissed by this agreement, the payment made pursuant thereto, and the Order dismissing the Proceeding with prejudice which will be entered in this matter".

(*See* JA 66-67, Plaintiffs' Counsel's letter of April 4, 2023.) Because Allstate could not agree to include a term which would require it to violate its legal duties under West Virginia law to co-operate with investigating authorities regardless of whether a particular claim was ongoing, Allstate's Counsel sent an April 7, 2023 e-mail to both the mediator and Petitioners' Counsel which indicated:

> As for the apparent primary issue of concern is the simple fact that the Claimants apparently want to use the tentative settlement agreement as a shield (to prohibit Allstate's required cooperation with investigating agencies and authorities) and as a sword (to potentially threaten Allstate with further action if Allstate complies with its duty to cooperate with investigating agencies and authorities). At least in part, it seems that Toad believe that the tentative settlement of the Claimants' claim(s) eliminates Allstate's duty and obligation to cooperate with such investigating agencies and authorities. That is, of course, incorrect. There is noting in the law that makes cooperation dependent on a pending claim, as opposed to one that has been denied, settled, or otherwise concluded. In fact, it is the more common circumstance that such investigations proceed long after a claim has been concluded in some fashion.
>
> As such, Allstate cannot agree to Toad's proposed language. I can agree to modify the language of the next to last paragraph on page 3 to say, "Nothing contained within this Agreement shall limit or preclude the Claimants or Allstate from complying with their duty to cooperate with and/or provide information to any governmental authorities related to the Claimants' claim or allegations." It was not my intention to suggest that the Claimants were limited in any way in providing information to such agencies or authorities based on any provision in the Settlement Agreement.
>
> If this is satisfactory, Toad can advise accordingly, and I will make the change. If he can also provide me with the information related to the represented completion and payment by the Claimants' for the debris removal at the subject property, I can make the additional referenced change to the Paragraph on Page 2.

(*See* JA 68.) While Allstate remained ready, willing and able to proceed with the settlement under the agreed upon terms, the Petitioners did not provide the necessary tax information (a W-9 form for Petitioners' Counsel and payment instructions) or otherwise indicate that they would proceed with the negotiated settlement.

The Motion To Enforce Settlement

The Petitioners' refusal to provide the necessary W-9 and check information to complete the settlement lead Allstate to file its Motion to Enforce Settlement (JA 26-32) in its *Motion*, Allstate pointed out that the parties had clearly reached a meeting of minds with respect to settlement on March 31, 2023, and that the only impediment that subsequently arose to completing it was the Petitioners' insistence upon adding an additional term which would require Allstate to refuse to cooperate with investigating authorities despite its legal obligation to do so. The Petitioners responded on July 27, 2023 (See JA 8-25) and Allstate submitted its *Reply* on August 3, 2023, (JA 39-68). The Circuit Court held a hearing on Allstate's *Motion* on August 14, 2023. Shortly after the hearing, the Circuit Court entered its August 14, 2023 *Order Following Hearing On Defendant Allstate Vehicle And Property Insurance Company's Motion To Enforce Settlement* which is the subject of this appeal. (See JA 4-6.)

In its *Order*, the Circuit Court found as follows:

1. There was a meeting of the minds of the parties settling an matters in contention between the parties at the conclusion of remote mediation with certified mediator, Charles S. Piccirillo, as reflected in the mediator's March 30, 2023, 3:36 P.M. email to counsel, and Plaintiffs' counsel's March 31, 2023, 9:09 A.M, email response confirming receipt and acceptance as reflected in Exhibit C, of the *Motion;* and

2. Subsequently, in the preparation of documents, a dispute arose between the parties with regard to the language to be used in the release regarding any settled or pending claims; and

3. Each counsel has tendered to the Court submissions reflecting what each believes to be the proper and appropriate language to be used in the release; and

4. The *Confidential Release And Settlement Agreement* tendered to the Court by the Plaintiff, with those changes stated upon the record, appears to be the more appropriately worded release that reflects that Allstate's duty and obligation to

cooperate with authorities, comply with the law and/or any federal or state court order is not otherwise altered or impeded; and

5. Language within a provision of the release that would otherwise require Allstate to violate its obligation and duty to comply with any law or state or federal court order would be unenforceable;

(*See* JA 5.) Based upon these findings, the Circuit Court granted Allstate's *Motion* and directed the Petitioners to complete the settlement. Rather than do so, the Petitioners filed their *Notice of Appeal* on September 11, 2023.

On December 6, 2023, the Petitioners filed their *Brief* in this appeal and asked the Court to reverse the Circuit Court's decision and remand this action for trial. While the Petitioners assign a number of different alleged errors, all are centered upon the Petitioners' assertion that no meeting of minds occurred, and no enforceable settlement was ever reached. Because the Circuit Court decided the issue correctly and the Petitioners' arguments in support of reversal are without merit, Allstate submits its *Response Brief* and asks that the Court affirm the Circuit Court's August 14, 2023 *Order* and enforce the parties' settlement agreement as detailed by the mediators email of the terms of the parties' agreement on March 30, 2023, at 3:36 p.m., and the affirmations of the terms of the settlement terms by Respondent's counsel on March 30, 2023, and Petitioners' counsel on March 31, 2023.

SUMMARY OF ARGUMENT

In this case, the Circuit Court below correctly found that there was a "meeting of minds" with respect to the settlement of the Petitioners' claims against Allstate. In that regard, applicable West Virginia law requires that the existence of a "meeting of the minds" depends upon all parties having the same understanding of what the terms of a settlement would be and then agreeing to enter into it. Furthermore, West Virginia law also recognizes that such an agreement can be

reached through a series of communications between counsel even if no final signed agreement is in place.

In this case, the mediator's e-mail of March 30, 2023 setting forth the terms of the parties' settlement, the follow-up e-mail sent by Allstate's counsel later that afternoon and the March 31, 2023, e-mail from Petitioners' counsel expressly indicated in his March 31, 2023 e-mail that, after having received both of those earlier communications, his clients agreed "to the settlement as outlined IN Charlie's em." Petitioners' counsel went on to indicate that he would forward the W-9 form as requested, a step that would not have been necessary if he did not contemplate that a settlement had not been reached. Therefore, the Circuit Court was presented with clear written evidence that all of the parties had the same understanding with respect to the terms of the settlement which had not been reached and had confirmed that the terms were those set forth in the mediator's March 30, 2023 e-mail.

West Virginia law also recognizes that a party merely having second thoughts about the wisdom of the terms of a settlement they had previously accepted does not constitute good cause for setting it aside. In this case, Petitioners' Counsel specifically indicated in his 9:28 a.m. communication on March 31, 2023 that he had subsequently had second thoughts about the confidentiality agreement containing an exception for Allstate's duty to provide information to the authorities as required by law. While the Petitioners may now want a "do-over" with regard to their agreement to the settlement, the agreed-upon terms were clear.

The Petitioners' suggestion that the Circuit Court erred by deciding the issues without taking testimony and by deciding that a settlement had occurred even though there was no "written signed Agreement of the Parties" is also without merit. Specifically, West Virginia law

does not require that settlement agreements be signed to be enforceable and no testimony was necessary where the Petitioners did not challenge the authenticity of the subject e-mails in either their written response or at the August 14, 2023 hearing. The Petitioners do not explain what that testimony would have proven or how it would have contradicted their counsel's plain and unambiguous statement in the March 31, 2023 e-mail, "My client do agrees [sic] to the settlement as outlined IN Charlie's em." Nor do they seek to refute their counsel's indication in the same e-mail that he would be forwarding his W-9 form, a step which would only be necessary if a settlement had been reached. Likewise, the mediator's characterization of the status of the dispute in his April 20, 2023 Report was not binding upon the Circuit Court.

Next, it should be noted that the Petitioners suggestion that because this settlement was reached through mediation, some different rules would apply is without merit. In fact, the involvement of the mediator was irrelevant to either the need for a signed agreement or the need for testimony. Under the *West Virginia Trial Court Rules* applicable to mediation, the parties could reach a valid and enforceable settlement agreement through a series of unsigned communications and, if such an agreement was reached, the parties could be compelled to proceed with it.

Finally, the Petitioners' arguments ignore the fact that they had not provided the information necessary for Allstate to proceed with the settlement and were, instead, insisting upon the inclusion of an illegal provision in the settlement agreement. In that regard, Allstate could not proceed with payment of the settlement until it received the necessary W-9 and check information from Petitioners' counsel. Likewise, Petitioners' insistence upon Allstate agreeing to refuse to

cooperate with investigating authorities was an illegal term which could not form the basis for their subsequent refusal to proceed with the settlement agreement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In their *Brief*, the Petitioners request oral argument without explaining why such argument is necessary under the criteria set forth in *Rule 18(a)* of the *West Virginia Rules of Appellate Procedure*. The Respondent opposes the Petitioners' oral argument request because the Petitioners' *Brief* presents no new issues of law and the facts and legal arguments are adequately presented in the briefs and record on appeal such that further argument is not necessary.

ARGUMENT

I. Standard of Review.

In this case, the Petitioners are appealing the Circuit Court's August 14, 2023 *Order* granting Allstate's *Motion To Enforce Settlement*. In the case of *Triple 7 Commodities, Inc. v. High Country Mining, Inc.*, 245 W. Va. 63, 857 S.E.2d 403 (2021), the West Virginia State Supreme Court of Appeals explained the standard of review for orders enforcing a settlement as follows:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.
>
> See Messer v. Huntington Anesthesia Grp., Inc., 222 W. Va. 410, 417, 664 S.E.2d 751, 758 (2008) (rejecting simple abuse of discretion standard for review of settlement enforceability and applying multi-pronged standard of review); Certain Underwriters At Lloyd's, London, Subscribing To Policy No. B0711 v. Pinnoak Res., LLC, 223 W. Va. 336, 341-42, 674 S.E.2d 197, 202-03 (2008) (utilizing

> multi-pronged standard of review where settlement agreement enforceability invoked application of contract principles).
>
> **Therefore, we now hold that 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.** The Court is further 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 are not in contravention of some law or public policy." Syl. Pt. 1, Sanders v. Roselawn Mem'l Gardens, 152 W. Va. 91, 159 S.E.2d 784 (1968).

Triple 7 Commodities, Inc. v. High Country Mining, Inc., at 73, 413. (Emphasis added.) Therefore, the Court will review the Circuit Court's factual finding that a meeting of minds had occurred in this case under a clearly erroneous standard and will apply an abuse of discretion standard to the Circuit Court's ruling in favor of Allstate on the enforceability of the settlement.

II. The Circuit Court below correctly found that there was a meeting of minds with respect to the settlement of the Petitioners' claims against Allstate.

In their first and second and fifth and sixth assignments of error, the Petitioners assert that the Circuit Court committed "plain error" when it determined that an enforceable settlement agreement had arisen through the e-mails exchanged between the parties' counsel and the mediator on March 30 and March 31, 2023 without sufficient factual development or evidence. In effect, the Petitioners are arguing that the Circuit Court's factual determination that there was a "meeting of minds" with respect to the terms of the proposed settlement was incorrect. In that regard, the West Virginia State Supreme Court has noted:

> Our law concerning the enforcement of settlement agreements is well established. As a guiding principle, we have explained that "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than litigation[.]" Syl. Pt. 1, in part, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W.Va.

> 91, 159 S.E.2d 784 (1968). Nonetheless, settlement agreements are contracts and therefore, "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)).
>
> In that regard, "[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). A " '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.P. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932).

Donahue v. Mammoth Restoration & Cleaning, 246 W. Va. 398, 404, 874 S.E.2d 1, 7 (2022).

Thus, the existence of a "meeting of the minds" depends upon all parties having the same understanding of what the terms of a settlement would be and then agreeing to enter into it. For example, in *Messer v. Huntington Anesthesia Grp., Inc.,* 222 W. Va. 410, 664 S.E.2d 751 (2008), the Court explained:

> 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. *See* 17 C.J.S. *Contracts* § 35 (1999). In the instant case, the substantive terms of the settlement agreement drawn by Mr. Dellinger closely parallel those in the handwritten agreement developed at mediation. These terms included the gross payment of $225,000 by the defendants no later than June 30, 2006, in return for the general release from liability and dismissal of all claims with prejudice by the plaintiff.

Messer, at 418, 759.

Likewise, in *Levine v. Rockwool Int'l A/S*, 248 W. Va. 403, 888 S.E.2d 903 (2023), the Court explained:

> **We have recognized that a settlement agreement can be reached via communications between counsel, even when a party does not sign a written settlement agreement**. See Donahue v. Mammoth Restoration & Cleaning, 246 W.

> Va. 398, 405, 874 S.E.2d 1, 8 (2022) (finding that **the evidence of emails and voicemail between counsel "clearly demonstrate[d] that the parties had 'the same understanding of the terms of the agreement reached**.' " (quoting Messer, 222 W. Va. at 418, 664 S.E.2d at 759)). See also Russell v. Bayview Loan Servicing, LLC, No. 20-0681, 2021 WL 2577498, at *4 (W. Va. June 23, 2021) (memorandum decision) (affirming a circuit court's determination that a settlement agreement arose from emails between counsel after a hearing where both petitioner and her counsel testified). We also have found that when the parties take steps in reliance on an agreement, those steps are evidence as to the existence of the agreement. See Donahue, 246 W. Va. at 405, 874 S.E.2d at 8 (finding a settlement agreement had been reached when evidence included that a party paid funds to repair water damage in reliance on agreement). See also Russell, No. 20-0681, 2021 WL 2577498, at *4 (enforcing settlement agreement where the parties informed the circuit court that a settlement agreement had been reached and that respondent canceled petitioner's deposition and performed credit repair in reliance on the agreement).

Levine at 407–08, 907–08 (Emphasis added.)

In this case, the mediator's e-mail of March 30, 2023 (JA 53) and the follow-up e-mail sent by Allstate's counsel later that afternoon (JA 54) set forth all of the relevant terms of the proposed settlement, in writing, and Petitioners' counsel expressly indicated in his March 31, 2023 e-mail that, after having received both of those earlier communications, his clients agreed "to the settlement as outlined IN Charlie's em." (*See* JA 56.) He went on to indicate that he would forward a W-9 form as requested, a step that would not have been necessary if he did not contemplate that a settlement had been reached. (*See* JA 56.) Therefore, the Circuit Court below was presented with clear written evidence that all of the parties had the same understanding with respect to the terms of the settlement which had been reached and had confirmed that the terms were those set forth in the mediator's e-mail of March 30, 2023. (*See* JA 53-56). Rather than a failure to have a meeting of the minds, the evidence in this case presented a clear example of a party having second thoughts about the wisdom of the settlement terms they had previously accepted.

In the case of *Moreland v. Suttmiller*, 183 W. Va. 621, 397 S.E.2d 910 (1990), the West Virginia State Supreme Court of Appeals noted:

> Once a competent party makes a settlement and acts affirmatively to enter into such settlement, his second thoughts at a later time as to the wisdom of the settlement does not constitute good cause for setting it aside.

Moreland v. Suttmiller, at 625, 914. In this case, Petitioners' counsel clearly indicated and confirmed the Petitioners' agreement to the terms set forth in the mediator's e-mail on March 31, 2023 and, thus, confirmed the existence of a settlement. (JA 56.) However, in his later communication at 9:28 a.m. on March 31, 2023 (JA 58), he specifically indicated that he had subsequently had second thoughts about the confidentiality agreement containing an exception for Allstate's duty to provide information to the authorities as required by law. He noted:

> **On rereading** Brent's points of clarification, I have a problem with Brent's desire to put additional language in a standard confidentiality agreement.

(*See* JA 58.) (Emphasis added.) While the Petitioners now assert that there was no "meeting of the minds," the evidence makes it clear that what actually occurred was a meeting of minds followed by "buyer's remorse" on the part of the Petitioners and/or their counsel. The Petitioners simply want a "do-over" because their counsel subsequently had second thoughts about the wisdom of accepting the settlement under the agreed-upon terms.

As part of their first and second and fifth and sixth assignments of error, the Petitioners also suggest that the Circuit Court erred by deciding the issues without taking testimony and by deciding that a settlement had occurred even though there was no "written signed Agreement of the Parties." (*See* Petitioners' *Brief* at pg. 1.) These arguments ignore the fact that the Petitioners did not challenge the authenticity of the subject e-mails in either their written response (JA 8-25) or at the August 14, 2023 hearing. While the Petitioners now suggest that testimony was somehow

necessary, they do not explain what that testimony would have proven or how it would have contradicted their counsel's plain and unambiguous statement in the March 31, 2023 e-mail that "My client do agrees [sic] to the settlement as outlined IN Charlie's em." (*See* JA 56.) Nor do they seek to refute their counsel's indication in the same e-mail that he would be forwarding his W-9 form, a step which would only be necessary if a settlement had been reached. (*See* JA 56.) In *Levine v. Rockwool Int'l A/S*, supra., unlike the present case, the Court was confronted with a series of e-mails which left doubt as to the terms of the parties' agreement. While the Court found that an evidentiary hearing was necessary under those particular circumstances, it noted:

> As the Fourth Circuit Court of Appeals has explained, "[b]ecause exercise of the authority to enforce settlement agreements depends on the parties' agreement to a complete settlement, the court cannot enforce a settlement until it concludes that a complete agreement has been reached and determines the terms and conditions of that agreement." Hensley v. Alcon Lab'ys, Inc., 277 F.3d 535, 540 (4th Cir. 2002). **While we do not agree with the Fourth Circuit that a court must always conduct a hearing to evaluate factual disputes surrounding the existence of a settlement agreement**, see id. at 541, **the paucity of the record before the circuit court required it to conduct an evidentiary hearing to determine whether there was a meeting of the minds regarding the terms of the settlement agreement**.

Levine at 408–09, 908–09 (Emphasis added.) In this case, the Circuit Court had before it a specific written indication by the Petitioners' counsel that he had read both of the earlier e-mails and was agreeing to their terms. (*See* JA 56.) No further testimony to clarify the meaning of the e-mail was offered by the Petitioners or required by the Circuit Court.

Finally, it should be noted that while the mediator continued to seek a compromise between Allstate (which was prepared to move forward on the parties' agreement) and the Petitioners (who were not), the mediator's characterization of the status of the dispute in his April 20, 2023 Report (JA 7) was not binding upon the Circuit Court. Regardless of whether the mediator felt that he could report a settlement when the Petitioners were refusing to proceed, it was the Circuit Court's

role to determine if a compromise had actually been reached. Likewise, while the subject e-mail was not formally "signed" by the Petitioners or their counsel, the Petitioners do not dispute its authenticity or that their counsel had sent it. In fact, under the principles recognized in *Levine*, supra., no "signed" agreement was necessary and a series of emails was sufficient to prove the existence of the agreement. *See Levine v. Rockwool Int'l A/S*, at 407–08, 907–08. Therefore, the Circuit Court correctly concluded that there was more than sufficient written evidence to establish that a meeting of the minds with respect to the settlement had occurred between the parties.

After being served with the *Motion To Enforce Settlement*, it was incumbent upon the Petitioners to present any further evidence or proffered testimony which would disprove the existence of such a settlement agreement. They failed to do so and the Circuit Court correctly concluded that the later e-mail communication in which Petitioners' counsel expressed having second thoughts about the settlement did not nullify the existence of the parties' settlement agreement as expressed in their original e-mails. Therefore, the Circuit Court's factual findings with respect to the existence of a meeting of minds was based upon specific and un-controverted written evidence and could not constitute clear error.

III. The fact that a mediator was involved in the agreed-upon settlement is irrelevant.

In their third, seventh, eighth and ninth assignments of error, the Petitioners appear to argue that the Circuit Court erred by ignoring the fact that the case was being mediated at the time a settlement was reached and by somehow failing to apply the *West Virginia Trial Court Rules* applicable to mediation. (*See* the Petitioners' *Brief* at pgs. 1-2.) In particular, they suggest that under the *Trial Court Rules*, no party may be compelled to settle and that under the *Rules*, only signed written settlement agreements are enforceable. Neither argument has merit.

To begin, it should be noted that *W. Va. Trial Ct. R., 25.11* does provide that no party should be "compelled" to settle at mediation. However, the full text of the *Rule* provides:

> No party may be compelled by these rules, the court, or the mediator to settle a case involuntarily or against the party's judgment. All parties involved in mediation, however, and their respective representatives, counsel, and insurance carriers shall participate fully, openly and knowledgeably in a mutual effort to examine and resolve issues. "Bad faith," as used in insurance litigation as a legal term of art, is not applicable to the mediation process.

W. Va. Trial Ct. R., 25.11 At no point do the *Rules* provide that a party who voluntarily agrees to settle cannot later be compelled to honor that agreement. In fact, *W. Va. Trial Ct. R., 25.14*, expressly provides:

> If the parties reach a settlement or resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

W. Va. Trial Ct. R., 25.14. Such a requirement merely reflects the principle that "settlement agreements are contracts and, therefore, "are to be construed 'as any other contract" as noted in *Donahue v. Mammoth Restoration & Cleaning*, at 404, 7. While the Petitioners appear to argue that this language in the *Rule* means that agreements reached through mediation which are not signed are not enforceable, such an interpretation would ignore the Court's discussion of the fact that binding and enforceable settlement agreements can be proven through a series of communications between counsel in *Levine*. *See Levine v. Rockwool Int'l A/S*, at 407–08, 907–08.

At pg. 11 of their *Brief*, the Petitioners further suggest that a case cannot be mediated "by attorneys alone" and thereby appear to suggest that, under *W. Va. Trial Ct. R., 25.10*, their counsel did not have authority to settle their claims on the terms set forth in the mediator's e-mail of March 30, 2023. However, the *Rule* actually provides:

> The following persons, if furnished reasonable notice, are required to appear at the mediation session: (1) each party or the party's representative having full decision-

> making discretion to examine and resolve issues; (2) each party's counsel of record; and (3) a representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions. Any party or representative may be excused by the court or by agreement of the parties and the mediator. If a party or its representative, counsel, or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court sua sponte or upon motion may impose sanctions, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

W. Va. Trial Ct. R., 25.10. Therefore, when read in its entirety, it is readily apparent that this *Rule* is only referring to formal mediation sessions as ordered by the Circuit Court and does not require that an attorney's clients be sitting beside him each time he sends an e-mail discussing settlement. Likewise, in addressing the argument that an attorney does not have apparent authority to enter into binding settlements, the West Virginia State Supreme Court of Appeals noted in the *Messer* decision, supra, that an attorney is presumed to have such authority and explained:

> This Court addressed the concept of apparent authority in *General Electric Credit Corporation v. Fields,* 148 W.Va. 176, 133 S.E.2d 780 (1963), observing that authority to do a particular act may be inferred. *Id.* at 181, 133 S.E.2d at 783. Furthermore, we held in this case that:
>
> > **[o]ne who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship**.
>
> *Id.* at Syl. Pt. 1, 133 S.E.2d 780. Evidence supporting the existence of apparent authority includes "'statements, conduct, lack of ordinary care, or other manifestations of the principal's consent.'" *Clint Hurt & Assoc., v. Rare Earth Energy,* 198 W.Va. 320, 327, 480 S.E.2d 529, 536 (1996).
>
> **When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed**. Syl. Pt. 1, *Miranosky v. Parson,* 152 W.Va. 241, 161 S.E.2d 665 (1968). We addressed the significance of this presumption of apparent authority with regard to settlement agreements in *Sanson v. Brandywine Homes, Inc.,* 215 W.Va. 307, 599 S.E.2d 730 (2004). The *Sanson* plaintiffs alleged on appeal that their attorney had reached the settlement with the corporate defendant

> without their authorization. Although accepting the position of the plaintiffs, the decision to enforce the settlement agreement was upheld based upon the following reasoning:
>
> While this Court has recognized that "[t]he mere relation of attorney and client does not clothe the attorney with implied authority to compromise a claim of the client," Syllabus Point 5, *Dwight v. Hazlett,* 107 W.Va. 192, 147 S.E. 877 (1929), we have also held that "**[w]hen 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."** Syllabus Point 1, *Miranosky v. Parson,* 152 W.Va. 241, 161 S.E.2d 665 (1968).
>
> 215 W.Va. at 312, 599 S.E.2d at 735.

Messer, at 418–19, 759–60 (Emphasis added.) Similarly, in *Miranosky v. Parson*, 152 W. Va. 241, 161 S.E.2d 665 (1968), the Court found that a party seeking to rebut the presumption that an attorney had authority to represent them must offer some proof in support of that position, noting:

> 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**. 7 Am.Jur.2d, Attorneys at Law, s 116; Teter v. Irwin, 69 W.Va. 200, 71 S.E. 115; County Court, etc. v. Duty, 77 W.Va. 17, 87 S.E. 256; Lawrence v. Montgomery Gas Company, 88 W.Va. 352, 106 S.E. 890. **In any event, the question of the attorney's want of authority to represent clients must be raised immediately by a motion or petition accompanied by affidavits**. 7 Am.Jur.2d, Attorneys at Law, s 114; City of Charleston v. Littlepage, 73 W.Va. 156, 80 S.E. 131, 51 L.R.A., N.S., 353.

Id. at 667. Thus, any argument by the Petitioners that their counsel did not have authority to enter into the settlement was waived when they offered no proof at all to the Circuit Court below to rebut the presumption that their Counsel did, in fact, have such authority when he sent the subject e-mail.

IV. The Petitioners ignore the fact that they had not provided the information necessary for Allstate to proceed with the settlement and were instead insisting upon the inclusion of an illegal provision in the settlement agreement.

In their fourth assignment of error, the Petitioners contend that the settlement in this case cannot be enforced because Allstate did not tender payment of the settlement proceeds or pay the

cost of the mediator. (*See* the Petitioners' *Brief* at pg. 1.) Once again, this argument ignores the facts of this case. Here, it is undisputed that the Petitioners' counsel never provided his W-9 tax form and the payment instructions to Allstate (despite his earlier promise to do so), and never indicated that his clients were ready to sign the required release. For obvious reasons, Allstate could not deliver the settlement draft until the Petitioners provided the required W-9 and payment instructions. Instead, Petitioners' counsel steadfastly refused to proceed and left Allstate with no choice but to seek to enforce the settlement agreement through the Circuit Court.

Finally, it should be noted that Petitioners make no effort in their *Brief* to address the fact that their refusal to move forward was based upon the fact that Allstate was unwilling to add an illegal term to the parties' settlement agreement. Specifically, they do not explain what right they had to subsequently insist that the parties' settlement agreement be amended to preclude Allstate from complying with its statutory duty to provide information to the State Fire Marshall or other authorities upon request. The reason for this failure is obvious. Such a provision would be illegal on its face and would clearly violate the public policy behind *W. Va. Code §15A-10-6.* In that regard, the West Virginia State Supreme Court in *Dorr v. Chesapeake & O. Ry. Co.*, 78 W. Va. 150, 88 S.E. 666 (1916) noted:

> Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

Dorr, at 668. Likewise, in *Young v. Young*, 240 W. Va. 169, 808 S.E.2d 631 (2017), the Court refused to enforce a contract which would divest a surviving spouse of her share of marital property in contravention of the elective share statutes and noted:

> Thus, to allow a contract void of consideration to divest a surviving spouse of her distributive share of marital property at the death of her spouse would provide a

> court-sanctioned means of hiding or diverting assets and would thereby emasculate the elective share statutes and undermine our equitable distribution laws. **Accordingly, although we do not take the freedom to contract lightly, the Option Agreement, as written, is unenforceable because it "contravenes legislative intent in a way that is clearly injurious to the public good" in violation of public policy.**

Id., at 179, 641 (Emphasis added.) While the Petitioners suggest at pg. 13 of their *Brief* that these decisions "render little support" to Allstate's position and seek to distinguish these cases as being factually dissimilar, the differences upon which they rely are unimportant. The principle that one cannot insist upon an illegal contract term is clearly applicable here and Petitioners have offered no authority to the contrary. Therefore, it is apparent that the only settlement term upon which Allstate and the Petitioners disagreed was Petitioners' post-settlement insistence that Allstate be prevented from complying with West Virginia law in connection with requests for information. Because such a provision would be null and void on its face, Allstate's unwillingness to add it could not form a valid basis for Petitioners' refusal to proceed with the parties' agreed upon settlement. This is particularly clear where the Petitioners had unequivocally confirmed their agreement to the parties' settlement as outlined in the mediator's communication of March 30, 2023, including their agreement that the settlement would be memorialized by settlement documents including a confidentiality provision that excepted, among other things, "disclosures required by law." (See JA 53.)

Conclusion

For all of the foregoing reasons, the Petitioners' appeal should be denied and the Circuit Court's August 14, 2023 *Order Following Hearing On Defendant Allstate Vehicle And Property Insurance Company's Motion To Enforce Settlement* should be affirmed.

Respectfully submitted,

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY

By counsel

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Case No. 23–ICA-406

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAMON McDOWELL, MARY McDOWELL, and DEEANNA RAE LAWSON,

Plaintiffs Below, Petitioners,

v.

ALLSTATE VEHICLE & PROPERTY INSURANCE COMPANY,

Respondent.

FROM THE CIRCUIT COURT OF FAYETTE COUNTY,
WEST VIRGINIA
Civil Action No. CC-1—2019-C-129

BRIEF OF RESPONDENT ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I, Brent K. Kesner, as counsel for Allstate Vehicle and Property Insurance Company, do hereby certify that on the **18th day of January, 2024**, I served the foregoing **BRIEF OF RESPONDENT ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY** was electronically filed with the Clerk of the Court via File and ServeXpress which will provide a copy of the filing to the active parties in this action.

/s/ Brent K. Kesner
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