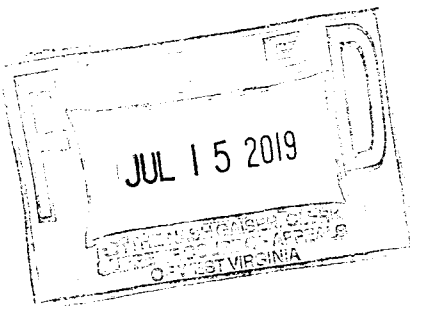
IN THE SUPREME COURT OF APPEAL OF WEST VIRGINIA
Docket Number 19-0171

HORIZON VENTURES OF WEST VIRGINIA, INC., A West Virginia Corporation,

Plaintiff Below/Petitioner,



v.

AMERICAN BITUMINOUS POWER PARTNERS, L.P.

Defendant Below/Respondent.

BRIEF OF RESPONDENT

Appeal from the Circuit Court of Marion County –
Civil Action No. CC-24-2018-C-76
Honorable Patrick N. Wilson, Judge

John F. McCuskey (WV Bar # 2431)
Roberta F. Green (WV Bar # 6598)
Shuman, McCuskey & Slicer PLLC
Street: 1411 Virginia Street East, Suite 200 (25301)
Post Office Box 3953
Charleston, WV 25339-3953
304.345.1400
Fax 304.343.1826
jmccuskey@shumanlaw.com
rgreen@shumanlaw.com

Counsel for Respondent,
American Bituminous Power Partners, LP

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The Circuit Court of Marion County appropriately relied upon clear statements of law in resolving the underlying suit on summary disposition, demonstrating that resolution as a matter of law was necessary and proper. The Marion County Court found the Consulting Agreement to be substantively unconscionable and violative of public policy, such that "the contract [must] be disbanded rather than enforced." At no time below did Horizon Ventures of West Virginia, Inc. (Horizon) raise the issue of procedural unconscionability, a fact noted by the Court, and West Virginia law expressly precludes a litigant from raising a new argument for the first time on appeal. Further, regardless of any new argument Horizon initiates here, nonetheless, the Circuit Court correctly found that the sliding scale tipped most pointedly toward substantive unconscionability and that the Consulting Agreement is inescapably one-sided, expressly interminable, incapable of meaningful revision, and thereby violative of public policy. Both Horizon and AMBIT had a full and fair opportunity to discover the legal issues prior to motions practice, with each side further deposing each other's principals. For all these reasons, the Order Granting Defendant

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III. RESPONSE TO ASSIGNMENT OF ERROR

The Circuit Court of Marion County appropriately relied upon clear statements of law in resolving the underlying suit on summary disposition, demonstrating that resolution as a matter of law was necessary and proper. The Marion County Court found the Consulting Agreement to be substantively unconscionable and violative of public policy, such that "the contract [must] be disbanded rather than enforced."[1] At no time below did Horizon Ventures of West Virginia, Inc. (Horizon) raise the issue of procedural unconscionability, a fact noted by the Court, and West Virginia law expressly precludes a litigant from raising a new argument for the first time on appeal. Further, regardless of any new argument Horizon initiates here, nonetheless, the Circuit Court correctly found that the sliding scale tipped most pointedly toward substantive unconscionability and that the Consulting Agreement is inescapably one-sided, expressly interminable, incapable of meaningful revision, and thereby violative of public policy. Both Horizon and AMBIT had a full and fair opportunity to discover the legal issues prior to motions practice, with each side further deposing each other's principals. For all these reasons, the Order Granting Defendant American Bituminous Power Partners, LP's Motion for Summary Judgment (Jan. 30, 2019) (Order) must be upheld.

IV. STATEMENT OF THE CASE.

As this Court may well remember,[2] American Bituminous Power Partners, LP (AMBIT) and Horizon Ventures of West Virginia (Horizon) are tenant-landlord

[1] 00338.

[2] *See, e.g., American Bituminous Power Partners, LP, et al v. Horizon Ventures of West Virginia, Inc.* (MemD) (Docket No. 14-0446) (May 13, 2015) (00042). *See also American Bituminous Power Partners, LP, et al v. Horizon Ventures of West Virginia, Inc.*, Docket No. 18-0584 (motion to withdraw granted Sept. 27, 2018).

respectively and have been engaged in litigation of one sort or another since at least 2013. American Bituminous Power Partners, L.P.,. (AMBIT) operates and owns the Grant Town Power Plant in Marion County, West Virginia, which Plant was constructed using $150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission.[3] The Grant Town Power Plant was built on a parcel of property owned by Horizon Ventures of West Virginia, making AMBIT and Horizon tenant and landlord to the demised premises.[4] Their real estate relationship is governed by a lease agreement not at issue here.[5] Indeed, the current litigation, judgment and appeal arise from a companion contract that the parties term the Consulting Agreement, executed on June 25, 1987.[6] Whereas Horizon references an amendment to that Agreement, no evidence exists that the amendment was ever adopted or executed.[7]

In response to Horizon's Statement of the Kind of Proceeding and Nature of the Ruling Below (Statement of Proceeding)[8] and Statement of the Facts, AMBIT identifies the following inaccuracies and omissions.

1. Whereas Horizon's Statement of Proceeding recounts this dispute beginning at Horizon's Complaint filed on May 14, 2018,[9] the dispute begins with the 1987 Consulting Agreement, which allowed AMBIT to make "reasonable requests" for

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[3] 00042
[4] 00017
[5] *But see* 00028-70 for a history of the project and the parties. *See also* Circuit Court of Marion County, Business Court Division Civil Action No. 18-C-130 (pending).
[6] 00004
[7] 00008.
[8] AMBIT has attempted to adjust its response to meet Horizon's rendition of the mandates of WV RAP Rule 10. It appears that the Statement of the Kind of Proceeding and Nature of the Ruling Below and Statement of Facts may be a bifurcated Statement of the Case. Therefore, AMBIT is addressing them collectively here.
[9] Appellant's Brief at 1; Appendix at 00001.

Horizon's assistance with lobbying, permitting or other interventions.[10] Specifically, pursuant to the Agreement (which was appended to the Complaint[11]), Horizon alleged it had and could "provide expertise and consulting services within its field."[12] In entering the Agreement, Horizon alleged that it had the necessary expertise to perform

> such public and governmental relations and liason [sic] functions as are necessary or incident to aiding and assisting First Party in locating, permitting, licensing, developing, maintaining and operating power plants in the State of West Virginia and will further aid in such other ventures as locating coal "gob" and all like coal resources when the same may be needed by First Party.

2. Horizon's Statement of Proceedings further fails to state that, by its express terms and in direct contravention of public policy and general precepts of West Virginia law of contracts,[13] the Agreement has no relief or remedy for breach, no unilateral escape clause, including no notice provisions for unilateral withdrawal. The Consulting Agreement is literally interminable unless/until the other contractual entity agrees to disband the contract (which it expressly admitted below it would *never do*)[14] or AMBIT goes out of business:

> First Party will pay unto Second Party the sum of $50,000.00, without interest, with a like payment being due without interest on the same date of each succeeding year as long as said power plant continues to produce power.. . . [The Agreement] may not be amended, terminated or otherwise changed except by a writing signed by both parties.[15]

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[10] 00005.
[11] 00004.
[12] 00004.
[13] *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 101, 799 S.E.2d 520, 532 (2017), finding that contracts must have a "fair quantum of remedy for breach." *See* further discussion below.
[14] 00354.
[15] 00005.

3. Horizon's Statement of Proceedings also omits to disclose that AMBIT complied with the terms of the Consulting Agreement contract – including paying the $50,000 consulting fee every year, as indicated -- for twenty-nine years.[16] The instant suit began when, for the first time in their shared history, AMBIT approached Horizon, requesting to be released from the Consulting Agreement pursuant to the clause cited above because AMBIT was unwilling and unable to use Horizon's services, given Horizon's repeatedly displayed abject hostility to the mission, goals, corporate ethics and very existence of the party (AMBIT) it contracted and pledged to assist in exchange for annual payment of $50,000.[17] Setting out those behaviors in detail, in particular, the most egregious events of 2017,[18] AMBIT wrote to Horizon, advising it that the relationship had been considerably strained by the five years of litigation, including the "filings in public court documents, micharacteriz[ing AMBIT's] proper business practices and claim[ing] that [AMBIT's] recordkeeping is inappropriate at best."[19] AMBIT questioned whether Horizon was "the appropriate entity to provide meaningful expertise or realistic consulting services for AMBIT, which are Horizon's obligations under the Agreement."[20] Horizon failed to disclose in its Statement of Proceedings that the 2013 litigation initiated by Horizon led AMBIT to conclude that Horizon was in material breach.[21] When AMBIT attempted to activate the escape clause for the first time, it understood, also for the first

[16] *See* AMBIT SUPPLEMENTAL00025.
[17] 00013-14.
[18] *See, e.g.*, 00028 for a discussion of that history.
[19] 00013. *See also* 00052-53.
[20] 00013.
[21] 00013.

time, that the clause was unilateral, eternal and, therefore, unconscionable and violative to West Virginia law and policy.[22] AMBIT defended Horizon's subsequent suit by seeking the protections of the Court on *inter alia* these bases.

4. Horizon's Statement of Proceedings errs in advising this Court that "[a]t the time the motion for summary judgment was filed, no discovery had been conducted[.]"[23] As demonstrated by the Docket Sheet,[24] on September 6, 2018, AMBIT noticed the deposition of Horizon's President Stanley Sears, which deposition was taken on September 13, 2018 – a date almost two months prior to the November 7, 2018, Summary Judgment motion.[25] AMBIT agrees that, on November 29, 2018, Horizon noticed the 30b(7) deposition of AMBIT by and through its corporate designee Richard J. Halloran (a 30b(7) deposition).[26] Despite the breadth of the topics identified and the short preparation time, Richard Halloran sat for deposition on Friday, November 30, 2018.[27] The Halloran transcript was submitted to the Court on December 5, 2018, as an exhibit to AMBIT's reply brief.[28] Therefore, significant discovery was completed prior to AMBIT's filing of its dispositive motion on November 7, 2018, and even more discovery was completed prior to the December 6 hearing on that dispositive motion – all of which discovery was before the

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[22] 00346-355.
[23] Brief of Appellant at 2. *But see* Order Granting Defendant American Bituminous Power Partners, L.P.'s Motion for Summary Judgment (MSJ Order) at ¶ 9 (00332), citing Horizon's participation in motions practice as "a brief and perfunctory response merely asserting that the case is in its infant stages and that further factual development is necessary[.]"
[24] 00358ff.
[25] 00122,
[26] AMBIT SUPPLEMENTAL00006.
[27] 00230.
[28] 00230.

Court by the time of oral argument.[29] Included in the materials before the Circuit Court was Stanley Sears's testimony taken in his discovery deposition, where Horizon's President Stanley Sears made the following admission against interest that demonstrated the fatal flaw with the Consulting Agreement:

Q. And the only question was you understood AMBIT wanted out of the consulting agreement and Horizon said no?
A. Of course we said no.
Q. Why do you say it like that?
A. Because it's the only reasonable answer we should have given. Why would we say -- what reason do we have to say "yes"?[30]

5. Horizon's Statement of Proceedings notes the timing of entry of the scheduling order but fails to acknowledge that discovery was ongoing even without an order in place. Additionally, at no time did Horizon request a scheduling order. Rather, the Court wrote to counsel on November 2, 2018, and *sua sponte* set a scheduling conference for December 4, 2018, which resulted in entry of a scheduling order.[31]

6. AMBIT agrees that Horizon filed discovery requests on December 3, 2018, and agrees that it (AMBIT) filed a Motion for Protective Order and Certification of Good Faith Effort to Confer on December 31, 2018.[32] AMBIT avers that its basis in so moving was that the discovery "will not change the law and facts before the Court on Summary Judgment, such that Horizon will not be prejudiced by awaiting the Court's ruling before

[29] *See, e.g.*, 00230, filed with the Court on December 5, 2018. 00229.
[30] 00165; 00337.
[31] *See* 00358ff.
[32] 00287; 00303. Of note, Horizon filed two sets of discovery requests but only *after* the motion for summary judgment was pending and noticed for hearing. *See* [00359-60].

proceeding."[33] In particular, AMBIT noted, Horizon had just asked the same questions to and/or about the same issues with Richard Halloran on November 30 and had his transcribed answers by December 5.[34] In point of fact, AMBIT cited the discovery as "redundant" but agreed to address any remaining issues once motions practice was complete. At no time did AMBIT attempt to "forestall"[35] Horizon from conducting discovery; conversely, AMBIT urged Horizon to review the materials it had to date and to await resolution of the pending legal determination.

In its motion for protective order, AMBIT did note that the Court had ordered discovery to initiate as of August 7, 2018, after which time AMBIT deposed Stanley Sears. In return, Horizon delayed in noticing AMBIT's deposition until November 29 and delayed in filing discovery on its claim until December 3, almost four months after the Court's instruction to the parties to conduct discovery. Further, Horizon's discovery arose as Horizon had just filed a motion for additional time on its proposed order on summary judgment, which motion AMBIT did not oppose. AMBIT cited these events in a footnote,[36] questioning Horizon's diligence in the process.

7. On January 30, 2019, the Circuit Court of Marion County entered an order,

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[33] 00288.

[34] 00289:

> Specifically, Plaintiff's Discovery addresses issues covered by AMBIT's 30b representative Richard Halloran in his pre-motion deposition. Specifically, Plaintiff's Discovery asks who might have knowledge of the events surrounding the execution of the Consulting Agreement (Halloran Dep. at 70-71), what other documents might remain (Halloran Dep. at 72), who from AMBIT contacted or worked with Horizon on consulting issues (Halloran Dep. at 83)[34], and what of value came of the consulting relationship (Halloran Dep. at 76), each of which has been addressed under oath by AMBIT. Plaintiff's Discovery further seeks trial information – witnesses, experts, exhibits (all of which are decisions that AMBIT has not made at this time) – and document requests (*but see* Halloran Dep at 72).

[35] Brief of Appellant at 3-4.

[36] 00288.

determining as a matter of law[37] that, based upon the law of substantive unconscionability, the public policy relative to contract seen in the context of Horizon's sworn admission against interest, the contract between the parties must fail as a matter of law given "a lack of meaningful alternatives and the existence of unfair terms in the contract."

8. As for Horizon's Statement of Facts,[38] it bears noting that the facts from the Memorandum Decision and other trial and trial court orders related to Civil Action 13-C-196 were provided to the Marion County Circuit Court to demonstrate the history of the parties and AMBIT's estimation that Horizon had breached the Consulting Agreement.[39] However, once again, in granting summary judgment as a matter of law on substantive unconscionability and public policy, the Marion County Court held that

> [i]n the instant case, while there may or may not be issues of fact were the case to survive summary judgment, the Court's decision turns wholly on a determination of law and thus, is ripe for summary judgment. The Court's decision to grant summary judgment is based on its finding that the contract between the parties is unconscionable. The remaining positions of Defendant's Motion for Summary Judgment are unnecessary and too weighted in factual determinations for the Court to consider for purposes of summary judgment. The Court's decision is made only on one narrow issue of law.[40]

9. Further, in its Brief, Horizon has included facts without appellation (Fact numbered 3 relative to the status of the bonds) that were not before the Circuit Court of Marion County and are unrelated and not germane to the Consulting Agreement.[41] Finally

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[37] 00334 ¶ 6.
[38] Brief of Appellant at 4.
[39] 000028ff.
[40] 00334.
[41] Of note, however, Horizon demonstrates yet again its lack of decorum in needlessly maligning AMBIT and its principals in public court documents. *See* Brief of Appellant at 7.

only one of the facts presented there is germane to the consulting agreement and to the summary disposition or the legal issues before this Court, that is, that AMBIT had paid the $50,000 consulting fee for decades before it ever tried to exercise what it believed to be its rights under the unilateral escape clause.[42] When AMBIT did attempt to exercise the clause after Horizon demonstrated publicly its hostility to the mission, goals, corporate ethics and very existence of the party is had pledged by written contract to aide, promote, and support (in exchange for AMBIT's faithful annual payment of $50,000), Horizon filed suit.[43]

10. Whereas Horizon now argues that the Consulting Agreement must be viewed in light of the decades of contracts between the parties, searching for sufficient consideration to support the Consulting Agreement,[44] that argument was never raised below and cannot be raised now, pursuant to West Virginia law (see below). Further, Horizon's Stanley Sears testified under oath that the Consulting Agreement is separate and apart from any other agreement between the parties.

As found by the Circuit Court, "[t]he clear and undisputed evidence is that the parties entered into a consulting agreement contract, the Defendant has requested to terminate the contract, and that Plaintiff has indicated that under no circumstance will Plaintiff agree to terminate the contract as requested by Defendant."[45] For these reasons and those set out further below, the summary disposition entered by the Circuit Court of Marion County is the necessary and proper resolution of the claim.

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[42] 00013.
[43] 00001.
[44] Brief of Appellant at 17.
[45] 00336.

V. SUMMARY OF ARGUMENT.

In direct derogation of West Virginia law, Horizon appears before this Court arguing that, "[w]ithout the finding of both procedural unconscionability and substantive unconscionability[,] a contract cannot be determined to be unconscionable."[46] In failing to raise this issue below, Horizon waived its right to raise it at any time. Although the Circuit Court of Marion County did not have the benefit of the parties' briefing and arguing any legal arguments that Horizon now improperly places for the first time before this Court, nonetheless the Circuit properly found that West Virginia law mandates the resolution reached in this matter. Regardless of Horizon's untimely and baseless allegations, the record herein demonstrates that the parties fully and fairly briefed and argued the law of the case below and that the Circuit Court of Marion County relied upon clear statements of law in resolving the underlying suit on summary disposition, demonstrating that resolution as a matter of law was necessary and proper. That is, the Marion County Court found the Consulting Agreement to be substantively unconscionable and violative of public policy, such that "the contract [must] be disbanded rather than enforced."[47] Beyond the Circuit Court's clear reasoning and legal findings, the parties further briefed and argued additional grounds, the majority of which the Court found unnecessary for its resolution. Nonetheless, those grounds remain as well, further buttressing the rulings of the Circuit Court of Marion County. Whereas Horizon now argues that too little time passed between the filing of suit and summary disposition, the file demonstrates that both Horizon and AMBIT had a full

[46] Brief of Appellant at 8.
[47] 00338.

and fair opportunity to discover the facts and legal issues between the filing of suit on May 14, 2018, and motions practice (argument on December 6), including each party's deposing the other's principal. For all of these reasons and those set out further below, it is necessary and proper to uphold the summary disposition entered by the Circuit Court on or about January 30, 2019.

VI. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Rules of Appellate Procedure Rule 19(a), this matter is suitable for oral argument in that the assignment of error arises from the application of settled law. Unconscionability and public policy remain complex concepts for litigants, such that oral argument allows for the full and fair examination that will lead to the best outcome – upholding the decision of the Circuit Court of Marion County. For these reasons, Respondent, by counsel, requests an opportunity to be heard.

VII. ARGUMENT.

A. Overview.

AMBIT moved to resolve the claim on the basis that the underlying contract is unenforceable as written on several bases -- including that it is unconscionable, violative of public policy and impossible to perform, given the frustration of its purpose and the changed circumstances between the parties, and given the evidence that no meeting of the minds could have occurred, given the contract's egregious term[48] – the Court granted summary disposition on the bases of substantive unconscionability and public policy.

[48] 00102ff.

Specifically, pursuant to the Agreement (which was appended to the Complaint[49]), Horizon alleged it had and could "provide expertise and consulting services within its field."[50] In entering the Agreement, Horizon alleged that it had the necessary expertise to perform

> such public and governmental relations and liason [sic] functions as are necessary or incident to aiding and assisting First Party in locating, permitting, licensing, developing, maintaining and operating power plants in the State of West Virginia and will further aid in such other ventures as locating coal "gob" and all like coal resources when the same may be needed by First Party.

By its express terms and in direct contravention of public policy and general precepts of West Virginia law of contracts,[51] the Agreement had no unilateral escape clause, including no notice provisions for unilateral withdrawal, literally interminable unless/until the other contractual entity agrees to disband the contract or AMBIT goes out of business:

> First Party will pay unto Second Party the sum of $50,000.00, without interest, with a like payment being due without interest on the same date of each succeeding year as long as said power plant continues to produce power.. . . [The Agreement] may not be amended, terminated or otherwise changed except by a writing signed by both parties.[52]

Appended to the Complaint was AMBIT's effort to activate the escape clause, a statement that "it is time to disband the Agreement and simplify our relationship to just landlord-tenant." In response, Horizon filed suit to enforce the Agreement.

Whereas Horizon argues on appeal that the discovery period was ongoing at the time of the dispositive motion, AMBIT and the Court both recognized that the motion

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[49] 00004.
[50] 00004.
[51] *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 101, 799 S.E.2d 520, 532 (2017), finding that contracts must have a "fair quantum of remedy for breach." *See* further discussion below.
[52] 00005.

sounded in law, relative to the contract that was appended to the Complaint. While Horizon's admission against interest (i.e., that it would never agree to release AMBIT from the consulting agreement) demonstrated that the conceptual and legal defect in the agreement was actually playing out in fact, the Circuit Court relied upon law and policy in striking down the contract. Indeed, the Court's Order Granting Defendant American Bituminous Power Partners, L.P.'s Motion for Summary Judgment (Jan. 30, 2019) (MSJ Order) is wholly of the Court's own devise and is based on neither party's proposed order.

In support of that Order, AMBIT notes that the Court relied upon settled authority in granting summary disposition. Despite Horizon's allegations to the contrary, the Court did not rely solely on substantive unconscionability, but also on public policy, finding as follows:

> 21. Public Policy. Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. See Brown 228 W. Va. 646, 724 S.E.2d 250.
>
> 22. Freedom to contract, however, is not unfettered. [The Supreme] Court has recognized that "no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void." Wellington Power Corp. v. CNA Sur. Corp., 217 W. Va. 33, 39, 614 S.E.2d 680, 686 (2005) citing State ex rel. Boone Nat. Bank v. Manns, 126 W.Va. 643, 647, 29 S.E.2d 621, 623 (1944), overruled on different grounds by State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1992).
>
> 23. Public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public. Wellington at 38, 614 S.E.2d 685.
>
> 24. In the instant action the escape terms of the contract are so one-sided and favorable to Plaintiff that the lack of a unilateral escape clause, including notice and/or consequential provisions stemming from unilateral withdrawal, and a requirement of payment into what amounts to eternity but for cessation of business, regardless the bargaining position of the parties,

> is so outrageous and oppressive that public policy mandates that the contract be disbanded rather than enforced.
>
> There is no leeway for the Court to enforce the remainder of the contract or to reform the same as the only provision(s) which creates a duty is obviated by the Court's ruling that the contract is unconscionable.[53]

West Virginia law does in the abstract require both substantive and procedural unconscionability,[54] but they operate on a sliding scale. The more of one found within the contract, the less needed of the other to find unconscionability. Judge Wilson found overwhelming substantive unconscionability that, combined with the public policy violations, obviated the need for procedural unconscionability and mandated dismissal. Pursuant to West Virginia law and policy, it is necessary and proper to uphold the summary disposition entered by the Circuit Court on or about January 30, 2019, as demonstrated below.

B. Standard of Review.

The standard for this Court's review of the grant of summary judgment is *de novo. Clark v. Shores,* 201 W. Va. 636, 638, 499 S.E.2d 858, 861 (1997).

C. Response to Assignment of Error.

The Circuit Court of Marion County appropriately relied upon clear statements of law in resolving the underlying suit on summary disposition, demonstrating that resolution as a matter of law was necessary and proper. The Marion County Court found the Consulting Agreement to be substantively unconscionable and violative of public policy,

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[53] 00337-38.

[54] *Brown ex rel. Brown v. Genesis Healthcare Corp.,* 228 W. Va. 646, 724 S.E.2d 250 (2011), *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012).

such that "the contract [must] be disbanded rather than enforced." At no time below did Horizon Ventures of West Virginia, Inc. (Horizon) raise the issue of procedural unconscionability, a fact noted by the Court, and West Virginia law expressly precludes a litigant from raising a new argument for the first time on appeal. Further, regardless of any new argument Horizon initiates here, nonetheless, the Circuit Court correctly found that the sliding scale tipped most pointedly toward substantive unconscionability and that the Consulting Agreement is inescapably one-sided, expressly interminable, incapable of meaningful revision, and thereby violative of public policy. Both Horizon and AMBIT had a full and fair opportunity to discover the legal issues prior to motions practice, with each side further deposing each other's principals. For all these reasons, the Order Granting Defendant American Bituminous Power Partners, LP's Motion for Summary Judgment (Jan. 30, 2019) (Order) must be upheld.

D. The Circuit Court of Marion County reached the proper resolution as mandated by West Virginia law and policy.

The Circuit Court of Marion County relied upon established West Virginia law in reaching the proper resolution of the claim before it, in particular, focusing on substantive unconscionability, "the lack of meaningful alternatives and the existence of unfair terms in the contract."[55] The Court defined substantive unconscionability as including

> unfairness in the contract itself—overall imbalance, one-sidedness, laesio enormis, and the evils of the resulting contract—and whether a contract term

[55] Order at ¶ 16.

> has overly harsh or one-sided results or is so one-sided as to lead to absurd results.[56]

In applying the law to the facts, the Court focused on the unilateral escape clause itself, which the Court recognized "will run in perpetuity with no end in sight absent one of two very specific occurrences."[57]

> First, the contract (and the payments flowing therefrom) will terminate in any event in which the power plant on which the contract centers ceases operations. Second, the contract may be terminated by the will of the parties but only through mutual consent of both parties, in writing.[58]

Supporting further the finding of 'lack of meaningful alternatives' and 'unfair terms in the contract,' the Court found that neither party had suggested that AMBIT was contemplating an end in operations. Perhaps most saliently, however, the Court recognized Horizon's admission against interest, which arose from its President's sworn testimony:

> The clear and undisputed evidence is that the parties entered into a consulting agreement contract, the Defendant has requested to terminate the contract, and that Plaintiff has indicated that under no circumstance will Plaintiff agree to terminate the contract as requested by Defendant. Namely, Stanley Sears' deposition testimony, when asked about the Defendant's requests to terminate that contract is that "[o]f course [Plaintiff] said no" when Defendant expressed interest in discontinuation of the consulting agreement contract. Mr. Sears further stated that refusing to agree to terminate the agreement is "the only reasonable answer we should have given. Why would we say – what reason do we have to say 'yes'?" Deposition of Stanley Sears (9 13 18) (Sears Dep.) at 171-72).[59]

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[56] Order at 12, citing *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *cert. granted, judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012).
[57] Order at 17.
[58] Order at 18.
[59] Order at 20.

Upon this admission, the Court found the contract to be substantively unconscionable and violative of public policy, recognizing the contract as "so one-sided and favorable to the Plaintiff that the public policy mandates that the contract be disbanded rather than enforced." In its review and evaluation of voluminous law and agreed-to facts, the Circuit Court of Marion County determined that West Virginia law and policy will not uphold a contract that is commercially unreasonable, patently unfair and wholly unsupportable to stand. The Court's ruling was necessary, proper and inescapable, such that affirmation is the necessary and proper outcome of this appeal.

E. West Virginia law expressly precludes a litigant from raising a new argument for the first time on appeal. At no time below did Horizon Ventures of West Virginia, Inc. (Horizon) raise the issue of procedural unconscionability, a fact noted by the Court, such that this appeal must fail.

Pursuant to West Virginia law, "'[i]n the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.'"[60] In so holding, the *Lin* Court explained that, where the Circuit Court did not have appellant's new argument, the appellant waived its right to raise the argument on appeal in all but jurisdictional or constitutional cases.[61] The issue of procedural unconscionability is neither jurisdictional nor constitutional, such that Horizon waived the argument by not raising it below. However, Horizon relies on the same authorities as did the Circuit Court of Marion County,

[60] Syl. pt. 1, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 687 S.E.2d 403 (2009), *quoting* Syl. pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971).
[61] *Lin*, 224 W. Va. at 625; 867 S.E.2d at 408.

Horizon conceding *inter alia* that a sliding scale applies, such that the more substantively unconscionable the contract, the less procedural unconscionability comes into play.[62] Horizon further concedes that "[t]he concept of unconscionability must be applied in a flexible manner taking into consideration all of the facts and circumstances of a particular case."[63] As recognized by Horizon, "[u]nconscionability is an equitable principle and the determination of whether a contract or a provision therein is unconscionable should be made by the Court."[64]

Horizon failed to raise any alleged dearth of procedural unconscionability below, only now seeking to undermine the Court's determination of the contract as void as a matter of public policy based upon substantive unconscionability due to a failure of mutuality, which West Virginia law and the Circuit Court cite as paramount.[65] It should be readily apparent to this Court that Horizon offers no alternative resolution but seeks a return to the status quo, to the Consulting Agreement that provides no unilateral exit – not with notice, not with penalty, never. As the Circuit Court clearly recognized, "[t]here is no leeway for the Court to enforce the reminder of the contract or to reform the same as the only provision(s) which creates a duty is obviated by the Court's ruling that the contract is unconscionable." Horizon seeks a return to the situation that the Circuit Court recognized as untenable:

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[62] Brief of Appellant at 11, *citing Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011); *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 736 S.E.2d 91 (2012).
[63] Brief of Appellant at 14, *citing Pingley v. Perfection Plus Turbo-Dry, LLC*, 231 W. Va. 553, 746 S.E.2d 544 (2013).
[64] Brief of Appellant at 14, *citing Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 736 S.E.2d 91 (2012).
[65] MSJ Order (00335-36) at ¶ 15, *citing Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) [citations omitted].

> The clear and undisputed evidence is that the parties entered into a consulting agreement contract, the Defendant has requested to terminate the contract, and that Plaintiff has indicated that under no circumstances will Plaintiff agree to terminate the contract as requested by Defendant. Namely Stanley Sears' deposition testimony when asked about Defendant's request to terminate that contract is that "[o]f course [Plaintiff] said no" when Defendant expressed interest in discontinuation of the consulting agreement contract. Mr. Sears further stated that refusing to agree to terminate the agreement is "the only reasonable answer we should have given. Why would we say – what reason do we have to say 'yes'?"[66]

As Horizon has recognized, the Circuit Court of Marion County did not rush to provide judgment in this matter, denying AMBIT's initial dispositive motion, based upon the contract, the prior Court orders and West Virginia law.[67] On or about August 14, 2018, the Court ordered discovery,[68] and the parties engaged in discovery up through November 30, 2018.[69] Whereas Horizon has alleged that the dispositive process came too soon and limited discovery unfairly, the Circuit Court of Marion County relied on West Virginia law in reaching its determinations, expressly stating that the decision turned on law alone.[70]

Plaintiff filed discovery late in the process, which discovery addressed issues covered by AMBIT's 30b representative Richard Halloran in his pre-motion deposition. Specifically, Plaintiff's Discovery asked who might have knowledge of the events surrounding the execution of the Consulting Agreement,[71] what other documents might remain,[72]who from AMBIT contacted or worked with Horizon on consulting issues,[73] and what of value came of the consulting

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[66] MSJ Order (00336-37) at ¶ 20, quoting Deposition of Stanley Sears (9 13 18) (Sears Dep.) at 00165.
[67] Brief of Appellant at 2.
[68] Brief of Appellant at 2, citing appendix at 00080.
[69] 00230.
[70] 00334.
[71] 00248.
[72] 00248.
[73] 00251. *See also* Sears Dep. (00133, 00159).

relationship,[74] each of which has been addressed under oath by AMBIT. Plaintiff's Discovery further sought trial information – witnesses, experts, exhibits (all of which are decisions that AMBIT has not made at this time) – and document requests.[75]

In relying upon West Virginia law alone, the Court crafted its own order rather than rely upon the proposed findings of fact and conclusions of law requested and received from the parties. The Court's Order relies upon strong legal precepts, not facts adduced in discovery, in reaching summary disposition:

> 7. Unconscionability. "Unconscionability is equitable principle, and determination of whether contract or provision therein is unconscionable should be made by court." Troy Min. Corp. v. Itmann Coal Co., 176 W. Va. 599, 346 S.E.2d 749 (1986).
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> 8. "A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract." Brown ex rel. Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 724 S.E.2d 250 (2011), cert. granted, judgment vacated sub nom.Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012).
>
> > "If a court...finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Id.
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> 10. Under West Virginia law, the court will analyze unconscionability of a contract term in terms of two component parts: procedural unconscionability and substantive unconscionability. Id.

[74] 00249.
[75] *But see* 00248.

11. "Procedural unconscionability" addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract. Id.

12. "Substantive unconscionability" involves unfairness in the contract itself—overall imbalance, one-sidedness, laesio enormis, and the evils of the resulting contract—and whether a contract term has overly harsh or one-sided results or is so one-sided as to lead to absurd results. Id.

13. When conducting substantive unconscionability analysis, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns, which can include the federal and state constitutions, public statutes, judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government is factually established.

Id.

14. To determine substantive unconscionability, courts have focused on vague matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and
similar public policy concerns. Id.

15. In assessing substantive unconscionability, the paramount consideration is mutuality. Id.

Applying these legal principles to the Consulting Agreement, the Circuit Court found that "[t]he clear and undisputed evidence is that the parties entered into a consulting agreement contract, the Defendant has requested to terminate the contract, and that Plaintiff has indicated that under no circumstance will Plaintiff agree to terminate the contract as requested by Defendant."[76] The Circuit Court then relied upon West Virginia public policy,

[76] 00336 at ¶ 20.

that "'no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void.'"[77] Found the Court, "Public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public."[78] Horizon recognizes and urges this Court to rely upon the sliding scale – the more egregious the substantive unconscionability, the less procedural unconscionability enters the determination. Here the Circuit Court found substantive unconscionability that rose to the level of a public policy violation that mandated the Court's intervention. Horizon asks this Court to return AMBIT to the unilateral, inescapable contract, to the prison of Horizon's own devise. Conversely, the Circuit Court of Marion County used its judicial power to "declare a contract void as contravening sound public policy" because it was free from doubt.[79] Regardless of any new argument Horizon initiates here, nonetheless, the Circuit Court correctly found that the sliding scale tipped most pointedly toward substantive unconscionability and that the Consulting Agreement is inescapably one-sided, expressly interminable, incapable of meaningful revision, and thereby violative of public policy. For these reasons, the Order Granting Defendant American Bituminous Power Partners, LP's Motion for Summary Judgment (Jan. 30, 2019) (Order) must be upheld.

[77] MSJ Order (00337) at ¶ 22, quoting *Wellington Power Corp. v. CNA Surety Corp.*, 217 W. Va. 33, 39, 614 S.E.2d 680, 686 (2005) [citations omitted].
[78] MSJ Order (00337) at ¶ 23, *citing Wellington* at 38, 614 S.E.2d 685.
[79] *Wellington Power Corp.* 217 W. Va. at 39, 614 S.E.2d at 686.

F. Even assuming *arguendo* that this Court would question some of the Circuit Court's law or conclusions, West Virginia law allows this Court to uphold the Marion County decision based on this Court's own findings.

Pursuant to West Virginia law, this Court on appeal may "'affirm the judgment of the lower court when it appears that such judgment is correct only legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis of the judgment.'"[80] Therefore, even assuming that the Circuit Court of Marion County's Order could be found to be deficient in any way (a finding that AMBIT denies), nonetheless, West Virginia law allows this Court to supplement or supplant its findings and holdings so as to uphold the Order for all of the reasons set forth herein.

Procedural unconscionability could be found in the argument and pleadings below in the context of failure of meeting of the minds.[81] Specifically, AMBIT argued that the Agreement is so outrageous and oppressive that the question arises as to how and why the bargain may have been struck.[82] It was AMBIT's position at summary judgment that the answer was in the evidence adduced, which demonstrated unequivocally that no meeting of the minds could have occurred. AMBIT argued as a matter of West Virginia law, an alleged contract can be so fraught with inequities, improprieties, unfairness and other inadequacies that the only explanation is that no meeting of the minds could have occurred.[83] AMBIT argued that as a matter of law, an agreement can be so unfair or

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[80] Syl. pt. 15, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).
[81] 00111. *See also* [hearing transcript at 6 – AMBIT's appendix].
[82] 00111. *See also Iafolla v. Douglas Pocahontas Coal Corp.*, 162 W. Va. 489, 497-98, 250 S.E.2d 128, 133 (1978).
[83] *Dan Ryan Builders, Inc., v. Nelson*, 230 W. Va. 281, 290, 737 S.E.2d 550, 558 (2012).

improper that no rational entity would have entered the contract had it known the true nature of the terms. Had AMBIT known Horizon's true nature or if AMBIT had known that Horizon would undercut and malign it at every turn or that Horizon would flatly refuse to exercise the termination clause, it would never had entered this relationship. No meeting of the minds occurred in the creation of this contract, and, as a result, the contract is procedurally unconscionable and void *ab initio.* In support of this argument, AMBIT attached the 30b(7) deposition, where its principal Richard Halloran testified to his expectation in entering this Consulting Agreement:

> 11 A. My expectation when I signed it was that this
> 12 was a consulting agreement wherein they would perform
> 13 duties for us as long as they were requested by us.
> 14 That was my expectation.
> 15 And the fact that any changes had to be signed
> 16 by both parties is typical, very traditional, I guess
> 17 every contract that I had ever signed said that any
> 18 changes have to be agreed to by the parties, and that
> 19 that was what was in there.
> 20 I did not imagine that anybody would ever try
> 21 and claim that we were stuck with this thing no matter
> 22 what happened.[84]

Horizon admitted that it will never release AMBIT from the Agreement because it does not have to. AMBIT's representative testified that, while signatory to the consulting agreement, he would never had signed, had he understood that the contract had no exit clause, that Horizon would never agree to release AMBIT, no matter the request or the

[84] Reply to Horizon's Opposition to Motion for Summary Judgment at 6 (00224), quoting Deposition of Richard J. Halloran (11 30 18) (attached to Reply as Exhibit 1) at 81 (00251).

circumstances. While the sliding scale clearly mitigates in favor of substantive unconscionability in the lack of mutuality at the heart of this dismissal, nonetheless, failure of meeting of the minds was raised below in the context of the contract formation.[85]

Further, the Circuit Court of Marion County found a public policy violation that was so egregious so as to void the contract between the parties. As further recognized by the Circuit Court, "[p]ublic policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public. Wellington at 38, 614 S.E.2d 685."[86] The Circuit Court has found a violation of public policy so severe, so injurious to the public good, that it struck down the Consulting Agreement on that basis. As AMBIT has argued, it is commercially unreasonable and against public policy to make an inescapable contract in an era of changing market conditions, technology and regulatory climate. Realistically, contracts need termination clauses to allow the parties to adjust to changes in their business needs and expectations, even if those clauses have uneven notice provisions, penalty payments or other limitations. As demonstrated here, the Agreement is unrealistic, unworkable and against public policy because the payments continue regardless of whether the services are necessary or acceptable or even called upon. Not even the material breach could end this contract. AMBIT would have to go out of business to stop paying Horizon for services it hasn't used in years. West Virginia law mandates that contracts provide at least a modicum

[85] *Dan Ryan Builders, Inc., v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012).
[86] 00337.

of relief for breach, in the same instance providing courts with the authority necessary to protect parties from grossly unfair, unconscionable "bargains."[87]

Therefore, for these reasons as well, summary disposition of this claim is supported by West Virginia law and policy.

VIII. CONCLUSION.

For all of the reasons set forth herein, American Bituminous Power Partners, LP, seeks recognition by this Honorable Court that the Circuit Court of Marion County relied upon clear statements of established law in resolving the underlying suit on summary disposition, such that resolution as a matter of law was necessary and proper below and must be upheld upon this appeal. AMBIT seeks the relief this Court deems just.

Counsel for Petitioners, American Bituminous Power Partners, LP

John F. McCuskey (WV Bar # 2431)
Roberta F. Green (WV Bar # 6598)
Shuman, McCuskey & Slicer PLLC
PO Box 3953
Charleston, WV 25339-3953
304.345.1400
Fax 304.343.1826
jmccuskey@shumanlaw.com
rgreen@shumanlaw.com

[87] *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 101, 199 S.E.2d 520, 532 (2017).