IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 22-ICA-34

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,

Defendant Below, Petitioner,

vs.

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

Plaintiff Below, Respondent.

BRIEF OF PETITIONER

Appeal from the Circuit Court of Marion County –
Civil Action No. 18-C-76

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A. **Assignment of Error Number 1**: The Circuit Court erred in granting summary judgment, given the unresolved issues of fact that remain.

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.IV. STATEMENT OF THE CASE

Factual Background.

On or about June 25, 1987, Horizon Ventures of West Virginia, Inc. (Horizon), and American Bituminous Power Partners, LP (AMBIT) entered the Contract and Agreement (consulting agreement) that is the subject of this civil action. As recounted by West Virginia's Supreme Court of Appeals, AMBIT paid the consulting fee of $50,000 every year from 1987 until 2018, at which time, for the first time, AMBIT refused to pay.[1] In so refusing and all times since, AMBIT has asserted that Horizon breached the consulting agreement in 2013.[2] Nonetheless, AMBIT waited, paid the fees from 2013 through 2017, when AMBIT's belief in the breach was confirmed by Court Order.[3] Upon the next payment due date after that August 31, 2017, Order (that found that Horizon had filed suit in violation of contract terms),[4] AMBIT declined to pay the consulting fee and wrote to Horizon, referencing the 2013 litigation and, more specifically, related behaviors, and explaining its dissatisfaction.[5] In that January 27, 2018, letter, AMBIT advised Horizon that they could not work together further, thus notifying Horizon

[1] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners, LP*, 245 W. Va. 1, 4, 857 S.E.2d 33, 36 (2021).
[2] AgreedApp000015, -32, -34, -83, -133, -174.
[3] AgreedApp0000034, -83.
[4] AgreedApp000073, -18.
[5] AgreedApp000015; *Horizon*, 245 W. Va. at 5, 857 S.E.2d at 37.

of the breach and seeking to activate the bilateral exit clause in the contract.[6][7] In response, Horizon filed suit based solely on AMBIT's failure to pay and has prosecuted this claim on that sole basis.[8] By and through Horizon's response to the January 2018 request and the course of this resultant litigation, AMBIT has learned that Horizon will never allow AMBIT to leave this relationship.[9] AMBIT has defended this claim on imprecisions in the contract itself and on Horizon's unprofessional behaviors and disloyal acts from 2013 to the present that constitute the first breach.[10] Simply stated, AMBIT can no longer use Horizon in the manner outlined by the agreement (material breach), and, therefore, AMBIT should be released from the annual fee.

Horizon and AMBIT have had a long, complex, and often contentious history.[11] Nonetheless, the parties agree that, at least initially, the four principals who comprise Horizon had expertise – thereto, the consulting agreement based thereon. The principals allegedly had ties to business, coal, state government, the law – so it was realistic to believe that Horizon by and through them could "provide expertise and consulting services within its field,"[12] that by and through them, Horizon could provide meaningful input on "locating, permitting, licensing, developing, maintaining and operating power plants." AMBIT asserts that Horizon's expertise was a basic assumption upon which the contract was made.[13] However, AMBIT further alleges that Horizon's positions taken relative to AMBIT in intervening litigations demonstrate, *inter alia,* Horizon's ignorance on *inter alia* fuel and other industry issues, Horizon's disregard for AMBIT (including Horizon's assertions before the PSC that AMBIT is dishonest, conniving,

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[6] AgreedApp000015; *Horizon*, 245 W. Va. at 5, 857 S.E.2d at 37.
[7] AgreedApp000015.
[8] AgreedApp000003.
[9] AgreedApp000274..
[10] AgreedApp000015, -32, -34, -83, -133, -174.
[11] *See, e.g., Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 873 S.E.2d 905 (2022 W. Va. Lexis 285) (4.18.22).
[12] AgreedApp000257.AgreedApp000006, -257. 325-26, -355, -366.
[13] *See, e.g.,* AgreedApp000137.

untrustworthy and potentially felonious) and Horizon's demonstrated failure of expertise, including its admissions against interest at deposition, make it impracticable, if not impossible, for Horizon to serve as advisor/consultant to AMBIT by the consulting (or any) standard.[14] Argues AMBIT, it is no longer possible to have Horizon speak for it in any consulting or other capacity, as Horizon's disregard and disrespect for AMBIT are now public within the industry and render Horizon ineffective to serve by any standard, including the consulting standard set in this case.[15]

In 2019, this civil action was resolved by summary disposition, when the Circuit Court found that the contract itself was substantively unconscionable and violative of public policy.[16] Horizon appealed that resolution on the basis that both substantive and procedural unconscionability are necessary under West Virginia law,[17] and AMBIT defended on *inter alia* the bases that it had raised both types and that both parties had applied as a matter of fact and law.[18] In support of AMBIT's position, it bears note that Horizon defended the initial claim on the basis that the parties were sophisticated businesspersons, such that they all knew what they

[14] AgreedApp000134, -331, -359, -377, -406.
[15] AgreedApp000134, - 174.
[16] *Horizon*, 245 W. Va. at 8-9, 857 S.E.2d at 40-41.
[17] AMBIT also placed before the Supreme Court a succession of West Virginia cases so holding from a 1902 case (*Lowther Oil v. Guffey,* 52 W. Va. 88, 92, 43 S.E.2d 101, ___ (1902), that "The manacles were forged by the lessors themselves with their eyes open, and the court cannot remove them unless fraud can be shown or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetration of fraud upon the lessors. It is claimed that this is a case of such character because the lessee by the prompt payment of the non-forfeiture sum could perpetually prevent the development of the land for oil and gas."). AMBIT further relied upon *inter alia* Syl pt. 9, *Dan Ryan Builders v. Nelson,* 230 W. Va. 281, 737 S.E.2d 550 (2012); *Iafolla v. Douglas Pocahontas Coal Corp.,* 162 W. VA. 489, 498, 250 S.E.2d 128, 134 (1978).
[18] Both below and on appeal, AMBIT argued procedural unconscionability in no meeting of the minds in reliance in pertinent part upon *Blackrock Capital Investment Corp. v. Fish,* 239 W. Va. 89, 799 S.E.2d 520 (2017), for the lack of remedy for breach in the contract and for the fact that procedural unconscionability/failure of meeting of the minds can be found where a contract is so unfavorable that no reasonable person would have entered it, and no reasonable person would try to enforce it. *See Blackrock,* citing *Hume v. United States,* 132 U.S. 406 (1889) ("It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains.").

were getting into here.[19] The Supreme Court reversed and remanded.[20] Therefore, since remand, AMBIT has defended the case upon Horizon's failures (the first breach) that frustrated the purpose of the consulting agreement, irretrievably changed the circumstances between the parties, rendered any further alliance impracticable and breached the duty of good faith and fair dealing.[21] AMBIT has traced each of these failures to Horizon's adverse actions beginning in 2013, confirmed to be adverse (and a breach of the lease) by the 2017 Court Order,[22] and its related and ancillary failures, unprofessional behaviors, and adverse acts that continue now.[23]

AMBIT has defended its refusal to pay the consulting fee starting in January 2018 based upon the first breach – that is, the reason that, after thirty years, finally, AMBIT refused to pay. In discovery on remand, AMBIT adduced evidence that demonstrated by Horizon's admissions against interest that Horizon breached its consulting duty both pursuant to the express terms of the contract and pursuant to the only consulting standard set in this case: the opinions espoused by AMBIT's designated expert.[24] Horizon prosecuted its case on the fact that AMBIT did not pay in 2018, never focusing or even addressing the 'why' of that non-payment. However, the first breach, if material, is key to the issues before this Court. West Virginia law provides that a material breach that goes to the essence of the contact obviates the need for the unoffending party to comply further[25] -- in sum, the 'why' matters. Before a court or jury can determine

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[19] https://www.youtube.com/watch?v=t8_h2MJ7ITQ&t=16307s *See* Syl. pt. 3, *Riggs v. West Virginia Univ. Hosp.,* 221 W. Va. 646, 656 S.E.2d 91 (2007). Motion for Summary Judgment (11.7.18) at 1, 10, 11. *See also Blackrock Capital Inv. Corp. v. Fish,* 239 W. Va. 89, 96, 799 S.E.2d 520, 527 (2017), finding that "New York's unconscionability jurisprudence is structured almost identically to West Virginia's." Syl pt. 7, *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 245 W. Va. 1, 11, 857 S.E.2d 33, 43 (2021).

[20] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 245 W. Va. 1, 857 S.E.2d 33 (2021).

[21] AgreedApp000083ff.

[22] AgreedApp000034.

[23] AgreedApp000134, 559ff, -641.

[24] AgreedApp000174. Syl. pt. 6, *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).

[25] Syl pt. 4, *Triple 7 & Commodities, Inc., v. High Country Mining,* 245 W. Va. 63, 857 S.E.2d 403 (2021).

whether AMBIT's nonpayment is a meaningful breach, the factfinder must first determine whether Horizon breached the agreement and, if so, whether that breach was material. In focusing on fee due and unpaid (certainly the most basic of facts), Horizon and the Circuit Court failed to ask why, after years of faithful payments whether services were received or not,[26] AMBIT refused to pay. AMBIT's undisputed evidence has been that Horizon breached the agreement in 2013 and continued the behaviors thereafter[27] (the first breach[28]). AMBIT asserts that Horizon initially breached the agreement in 2013 and that the intervening consecutive breaches of consulting standards generally are all material and go to the essence of the contract.[29]

The instant appeal arises from cross motions for summary judgment filed on June 3, 2022.[30] Prior to filing for summary disposition, Horizon moved to call case to trial,[31] and, as a result, the parties selected a jury on June 23, 2022.[32] Before the motions were argued, before any order was entered, the jury was in the box upon Horizon's motion, and this matter was first up for trial on August 24, 2022. Nonetheless, Horizon filed its Motion for Summary Judgment, arguing that AMBIT had no evidence to support its affirmative defenses.[33] AMBIT filed its Motion for Summary Judgment, citing the same law as Horizon but providing transcripts of sworn testimony and the opinions of its designated expert in support of its affirmative defenses.[34] Horizon alleged that AMBIT's affirmative defenses were baseless, without support in the record, and AMBIT alleged that its evidence was undisputed such that summary disposition in AMBIT's

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[26] AgreedApp000559, -681.
[27] AgreedApp000133ff, -174, -641, -274.
[28] *Triple 7 & Commodities, Inc., v. High Country Mining,* 245 W. Va. 63, 73, 857 S.E.2d 403, 413 (2021), quoting *Blue v. Hazel Atlas Glass Col,* 106 W. Va. 642, 650, 147 S.E. 22, 26 (1939) ("The party to a contract is guilty of the first breach who fails to do what he contractually is bound to do.").
[29] AgreedApp000133..
[30] *See, e.g.,* AgreedApp000134.
[31] AgreeApp000184.
[32] AgreedApp000544.
[33] AgreedApp000187.
[34] AgreedApp000231.

favor was the necessary and proper resolution. The parties were arguing the same issues, the same law – but different evidence.[35] At that moment, the parties had a factual dispute that the Court could not and should not have tried to resolve.[36]

Legal and factual issues and/or errors were evident in this process and were reflected and amplified in and by the Final Order. In its response to AMBIT's motion, Horizon conceded that 'factual fictions' remain – which it goes on to identify as facts with which Horizon disagrees.[37] If the parties are arguing disputed facts at summary judgment – including facts as to the scope of the duties and whether expertise is required by the contract or available from Horizon – then genuine issues of material fact remain. AMBIT noted as much in its Trial Court Rule 24.01 analysis, which addresses the factual discrepancies and remaining issues no fewer than 17 times.[38] The issue is not who is right about the facts. The issue is that the matter was not ripe for summary disposition, and AMBIT expressly advised the Court that genuine issues of fact remain that needed adjudication by a jury.[39] West Virginia's Supreme Court has recently termed this moment where the trial court is considering summary disposition as "'put up or shut up' time,"[40] and AMBIT put up the factual issues that had been adduced during motions practice, including citations to the record – most pointedly, sworn testimony of the parties themselves.[41]

Whereas in motions practice, Horizon has relied upon the Supreme Court's admonition

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[35] *Waddy v. Riggleman,* 216 W. Va. 380, 606 S.E.2d 222 (2004).
[36] *Teller v. McCoy,* 162 W. Va. 367, 392, 253 S.E.2d 114, 129 (1978). *See also* W. Va. RCP 59(d); syl. pt. 8, *Benson v. AJR, Inc.,* 226 W. Va. 165, 169, 698 S.E.2d 638, 642 (2010):

> It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. pt.3, *Cotiga Development Co. v. United Fuel,* 147 W. Va. 484 128 S.E.2d 626 (1962).

[37] Agreedapp000522. *Sadler v. Nationwide,* 2012 W. Va. Lexis 544 (2012).
[38] AgreedApp000641.
[39] AgreedApp000656, stating that "Horizon's motion must be denied on the basis that, for its case, genuine issues of material fact remain that would have needed adjudication by a jury."
[40] *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022) at 20-21.
[41] AgreedApp000651, -653, -593ff.

that "decisions on summary judgment before completion of discovery are 'precipitous,'"[42] it bears noting that, on remand, Horizon (the plaintiff) conducted no discovery whatsoever. Conversely, AMBIT deposed each of Horizon's principals on Horizon's acts and behaviors that constituted breach from 2013 to present. By and through the motions hearing – for the first time in this remanded litigation – the factual disputes between the parties became evident. As demonstrated *inter alia* by the motions hearing[43] and as reflected in Horizon's proposed order (the current Final Order Granting Horizon's Motion for Summary Judgment[44]), factual issues remained then and now that the factfinders needed to hear, consider, and resolve. The parties disagreed even about the operative provisions of the contract, the parties' motives for entering the contract, the essence of the contract, and Horizon's duty thereunder.[45] As of that motions hearing held on June 24, 2022, the matter was ripe solely for the jury's determination. Nonetheless, the Circuit Court took it under advisement and instructed the parties to prepare proposed orders. The parties submitted proposed orders that differed substantially. The Circuit Court entered Horizon's Order without substantial revision or amendment, despite AMBIT's substantial analysis of each point, including the genuine issues of material fact remaining.[46]

Equally problematic under West Virginia law, Horizon's proposed order[47] failed to reflect AMBIT's evidence or arguments – rather characterizing AMBIT's case as baseless but never reflecting the substance. In its proposed order, AMBIT identified the remaining questions of fact raised through the hearing. Because Horizon had conducted no discovery and because Horizon denied that AMBIT's evidence exists or is credible, this matter needed the factfinder's

[42]AgreedApp000189, quoting *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners, LP,* 245 W. Va. 1, 5, 857 S.E.2d 33, 37(2021).
[43] AgreedApp000558ff.
[44] AgreedApp000544.
[45] Agreedapp000134, -540.
[46] AgreedApp000641ff.
[47] *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022) at 20-21.

assistance. Horizon never challenged the authenticity of AMBIT's evidence or its expert's opinions, such that those standards remained available and appropriate for jury determination.[48] As a matter of law and through the dispositive motions practice, this matter was demonstrated as unripe for the Circuit Court's determination of summary disposition.[49]

Beyond the Court's inappropriate resolution as a matter of law while factual issues remain in dispute, AMBIT was further prejudiced by the Final Order itself, which failed fairly to reflect AMBIT's case, and failed to reflect AMBIT's rebuttal to Horizon's claims[50] Given the tenets of West Virginia law that make it incumbent on a party to request and develop an order that reflects the true proceedings and each party's case before the Court,[51] AMBIT filed its critique of Horizon's proposed order, identifying the numerous factual and legal errors in the Final Order (and that remain) and identifying Horizon's failure to reflect AMBIT's case accurately or, more pointedly, at all.[52] Indeed, in direct contravention of West Virginia law, the Final Order as drafted by Horizon and entered by the Circuit Court does not fairly demonstrate AMBIT's case, evidence, arguments.[53] Nonetheless, the Circuit Court entered the Final Order prepared by Horizon, without substantial revision or amendment. AMBIT filed its motion to alter, amend judgment, once again identifying errors of law and fact – and asking that at a minimum the Final Order reflect its evidence and arguments; the Circuit Court entered its Order Denying AMBIT's Motion to Alter, Amend Judgment on August 4, 2022.[54]

The Final Order and the proceedings below at motions practice demonstrate unresolved

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[48] Syl. pt, 6, *Butner v. Highlawn Memorial Park Co.,* __ W. Va. __, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).
[49] Syl pt. 6, *Butner v. Highlawn Memorial Park Co.,* __ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).
[50] AgreedApp000679.
[51] Syl. pt. 4, 8, *SER Vanderra Res. LLC v. Hummel,* 242 W. Va. 35, 829 S.E.2d 35 (2019); syl. pt. 2, *Hopkins v. DC Chapman Ventures,* 228 W. Va. 213, 719 S.E.2d 381 (2011), quoting syl. pt. 1, *Maples v. West Virginia Dep't of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996).
[52] AgreedApp000700.
[53] *CMC Enter., Inc., v. Ken Lowe Mgmt. Co.,* 206 W. Va. 4141, 418, 525 S.E.2d 295, 299 (1999).
[54] AgreedApp000710.

issues of fact that should have gone before the factfinders who had been selected and remained in place. Indeed, the Final Order reflects the failure to recognize *inter alia* the factual disparities, instead recounting AMBIT's evidence as nothing more than a "a long and interesting history" and further mischaracterizing the evidence and arguments before the Court.[55] At the motions hearing, the Court questioned counsel about the underlying facts, and the Court and counsel addressed for the first time in the case the scope of the duties and the parties' expectations in entering the consulting agreement.[56] Whereas AMBIT argued that expertise was key – its reason for entering the consulting agreement (and the lapse of which was breach),[57] Horizon argued that AMBIT wanted to jettison Horizon because the principals were old and offered little value.[58] These are factual issues that should have been addressed to a jury – the parties' intention in entering the contract and the parties' motive in resolving or refusing to resolve same—as they go to whether there was a first breach (as AMBIT has alleged) and whether it was material (such that AMBIT's refusal to pay is appropriate).[59]

AMBIT respectfully submits that the Circuit Court's ruling was premature and usurped the role of the jury given the genuine issues of fact remaining. AMBIT asserts that the Final Order is inaccurate as a matter of law and fact in part in its failure to reflect the evidence and argument before the Court. Indeed, while the parties continue their efforts to escape their litigation past, it is inescapably true as West Virginia's Supreme Court has found relative to these parties,

> [t]he factual disputes that necessarily arise from the interpretation of these various agreements require a jury's resolution. In such a complicated fact and litigation

[55] AgreedApp000679.
[56] AgreedApp00547ff.
[57] AgreedApp00560.
[58] AgreedApp000553.
[59] *Waddy v. Riggleman,* 216 W. Va. 250, 606 S.E.2d 222 (2004).

> pattern and given the tumultuous history of these parties who are seemingly governed by so many overlapping leases, settlement agreements, court orders, and course of performance findings, we borrow an apropos analogy from the Arkansas Court of Appeals, addressing parties' "labyrinth of claims and counterclaims" that "produced a Gordian knot of epic proportion" reaching to a similar conclusion:
>
> > It is certainly tempting to sever the stranglehold of this Gordian knot in true Alexander the Great form with a swift slash of the summary-judgment word. However, because this case presents many disputed issues of material fact, we must rely on the jury to untangle the knot, one strand at a time.
>
> In the same way, the parties here have unresolved underlying questions of fact material to resolving the ambiguity and relationships between these documents that permeate both AMBIT's and Horizon's claims presented in these appeals, and it matters how those threads are loosed. More to the point of summary judgment entered by a court, it matters by *whom* the threads are loosed. In an intricate, circular argument such as this, each decision reached causes a deviation; a tug that affects other claims in the knot. For that reason, we cannot abide summary judgment to resolve this tangle of claims without first resolving the underlying disputes on which they are premised.[60]

AMBIT initiated this appeal of the proceedings below on the basis that the Circuit Court erred in reaching summary disposition of a case mired with and by factual determinations that needed then and need now to be placed before the jury. AMBIT initiated this appeal of the proceedings below on the basis that the Circuit Court erred in entering Horizon's objectively imprecise Final Order that fails to accurately reflect the parties, the arguments, these proceedings – indeed, fails even to reflect accurately the terms of the contract, the duties of the parties, the allegations of the first breach. The failures are fundamental and enduring. The inescapable conclusion is that Circuit Court failed to appreciate the issues before it, such that the Court's rulings are inaccurate as a matter of law and fact. For these reasons and those set out further below, the Final Order must be stricken and the judgment reached in Marion County Civil Action 18-C-76 must be reversed and remanded directly for jury determination of the rights and responsibilities of these parties, all as follows.

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[60] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 873 S.E.2d 905, 917 (2022 W. Va. Lexis 285) (4.18.22).

V. SUMMARY OF ARGUMENT.

Under West Virginia law, summary judgment is an express finding by the circuit court that no genuine issues of material fact remain.[61] The circuit court's duty is not to weigh the evidence and determine the truth of the matter – but rather to determine whether genuine issues remain for trial.[62] Rather than a default result, summary judgment is an express determination by the trial court that judgment as a matter of law is the necessary and proper resolution.[63] In direct contravention of that precept, however, the Circuit Court of Marion County summarily dispensed with the subject civil matter while competing issues of fact remained. Indeed, while the parties agreed on the law of the case, even the most fundamental of facts remained outstanding, including competing understandings of the parties' rights under the contract, competing understandings of the essence of the contract (key in any determination of material breach), competing recitations of fact, cross-assignments of breach and materiality, confusion and cross-allegations of scope and nature of duties under the contract. As reflected by and within the Final Order Granting Horizon's Motion for Summary Judgment (Final Order), the parties by counsel and the Court never considered or determined the duties owed, never focused on AMBIT's allegations of the first breach, never reached consensus on the precise legal and factual determinations before the Court, never identified or understood the evidence extant and in conflict. As demonstrated in part by the fact-based arguments at motions hearing[64] (as memorialized in the Final Order[65]), fundamental factual issues remained but were overlooked or expressly excluded by the Circuit Court in reaching judgment. The Final Order arose while

[61] *See, e.g., Goodwin v. Shaffer,*873 S.E.2d 885 (2022 Lexis 281) (April 15, 2022).
[62] Syl. pt. 4, *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022), quoting Syl. pt. 3, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994).
[63] Syl.pt., *Wilcher v. Riverton Coal,* 156 W. Va. 501, 194 S.E.2d 660 (1973).
[64] AgreedApp000547.
[65] AgreedApp000679.

fundamental facts remained unresolved, such as whether AMBIT entered the contract based upon Horizon's expertise; whether Horizon's admissions against interest relative to power production and the power industry frustrate the purposes of the contract, whether Horizon's admitted subversive acts change the circumstances as a matter of law or render the contract impracticable; whether a consultant's availability absent expertise and effectiveness (by the only consulting standard in the case—which pointedly is not reflected or even mentioned in the Final Order) is legally and factually sufficient in a contract entered on that basis. Further, genuine issues of fact and law remain relative to whether Horizon can or may outsource its duties, given that AMBIT's evidence is that it entered the contract with Horizon in strict and express reliance on its represented abilities, its expertise.[66] Indeed, materiality of the first breach was never addressed or determined – a requisite to determining any continuing duty AMBIT had to pay the fee.[67]

These and other pending factual disputes and legal questions demonstrate that the matter below was not ripe for summary disposition but rather needed the assistance of the factfinder. Here, the record taken as a whole could lead a rational trier of fact to find for either party, such that summary judgment was improperly granted. *Parker v. Estate of Bealer*, 221 W. Va. 684, 687, 656 S.E.2d 129, 132 (2007) (*citing Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995)). Compounding the errors, the Final Order Horizon prepared is incomplete, incorrect, and reflects the flawed process. Whereas the Circuit Court has been pinned between

[66] Syl. pt. 1, *Poling v. Condon-Lane Boom & Lumber Co.,* 58 W. Va. 529, 47 S.E. 279 (1904). *See* AgreedApp000006, , wherein Horizon agreed it "will provide expertise and consulting services within its field," further described as "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 ventures as locating coal 'gob' and all like coal resources when the same may be needed by First Party."

[67] *Waddy v. Riggleman,* 216 W. Va. 250, 606 S.E.2d 222 (2004), generally, relying upon **Restatement (Second) of Contracts § 261, 265** (1979). *See also* Farnsworth on Contracts, Sec. 8.16 (1990).

these adversaries for four years now and whereas resolution of any sort must be a sought-after commodity, West Virginia's Supreme Court has found relative to these precise entities that

> [i]t is certainly tempting to sever the stranglehold of this Gordian knot in true Alexander the Great form with a swift slash of the summary-judgment word. However, because this case presents many disputed issues of material fact, we must rely on the jury to untangle the knot, one strand at a time.

The impropriety of the Circuit Court's rush to resolution is perhaps reflected nowhere more pointedly than in the Final Order, which fails to reflect accurately the facts and law of the case. West Virginia's Supreme Court of Appeals has found that it is a "paramount principle of jurisprudence that the Court speaks through its orders" and that a court has the right and duty to revise any order submitted by a party to ensure that it reflects the Court's statement on the case and complies with the law.[68] While the Final Order accurately reflects the chaos of motions practice, the proffering of counsel, and the irresolution of issues, the Final Order also misstates the facts and law of this case and introduces even more complexities than in the case itself.[69] Courts do justice when they "support, protect, defend and enforce . . . the rule of law, as difficult as that may sometimes be."[70]

The parties here have even now unresolved underlying questions of fact, material to resolving the ambiguity and relationships between them as relates to the consulting agreement. The Circuit Court questioned counsel on the facts, engaged the parties in oral argument beyond the record, such that, more to the point of summary judgment entered by a court, it matters by *whom* the questions are resolved. In an intricate relationship such as this, each decision reached causes a tug that affects other claims. For that reason, summary judgment should not

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[68] *Legg v. Felinton,* 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006); *Ballard v. Delgado,* 241 W. Va. 495, 514, 826 S.E.2d 620, 639 (2019).
[69] Syl. pt. 2, *Mey v. Pep Boys – Manny Moe & Jack,* 228 W. Va. 48, 717 S.E.2d 235 (2011).
[70] *State v. Findley,* 219 W. VA. 747, 758, 639 S.E.2d 839, 850 (2006) (Concurrence, Benjamin, J.).

resolve this tangle of claims because over and over, history has demonstrated that no court can resolve the tangle without first resolving the underlying factual disputes on which they are premised. For these reasons and those set out further herein, summary disposition, while expedient in the short term, was inappropriate here – as reflected by the fatally flawed Final Order that tried unsuccessfully to contain and clean up the vagaries below. AMBIT moves this Honorable Court to return these parties to their determinations before a jury and to remove the factual determinations from the province of the Court. AMBIT seeks the continuation of the factfinding process begun paradoxically for the first time at motions hearing and interrupted prematurely before the Circuit Court of Marion County. As a matter of fact and law, summary disposition arose while genuine issues of material fact remained and with no resolution of the expressed doubt as to whether those genuine issues were or could be or should be resolved for or against the movant.[71] AMBIT seeks the relief this Court deems just.

VI. STATEMENT REGARDING ORAL ARGUMENT.

Pursuant to West Virginia Appellate Rule 19(a), this matter is suitable for oral argument in that the assignments of error arise from settled West Virginia law – that is, from deviations from settled law beyond the rubrics established by West Virginia's Supreme Court, which deviations are unsustainable because they obviate an otherwise known right under West Virginia law. This appeal involves foundational areas of West Virginia law – including impropriety of summary disposition of factual disputes, when genuine issues of material fact remain. For these reasons, AMBIT, by counsel, requests an opportunity to be heard.

[71] Syl. pt. 4, *Kourt Sec. Partners, LLC v. Judy's Locksmiths, Inc.,* 239 W. Va. 757, 8806 S.E.2d 188 (2017), quoting Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

VII. Argument.

A. Introduction.

Before the Circuit Court of Marion County, Horizon and AMBIT each argued that the other breached the consulting agreement. Horizon alleged breach in AMBIT's refusal to pay the consulting fee, which all parties and the Supreme Court admit AMBIT failed to do for the first time ever in thirty years in January 2018. AMBIT alleges Horizon first breached the agreement in 2013 by and through Horizon's disloyal and unprofessional behaviors, failure to support AMBIT's business initiatives, and its demonstrated failure of expertise. In support, AMBIT deposed Horizon's principals and designated an expert on the standards for consulting expertise. Whereas the parties relied upon the same law relative to the issues before the Court, the parties raised conflicting facts as to the first breach, whether the alleged breaches were material, and whether either was amenable to cure. Whereas each party alleged at summary judgment that the contract was unambiguous, their analysis of the contract varied markedly and materially, demonstrating in motions practice that the contract's terms and meaning were indeed ambiguous after all.[72] Further, where each party alleged breach against the other, the issue of the first breach and whether the breaches were material remained without resolution. In granting summary judgment, the Circuit Court of Marion County noted the agreed-upon law but proceeded to interpret the contract, excluding key language and selecting among the parties' facts. Horizon prepared the Court's order granting summary disposition, which order reflects the errors addressed here, including reflecting the Court's questioning of counsel on the underlying facts. Because the two parties alleged widely divergent facts and raised heretofore unaddressed facts and issues, the inescapable conclusion is that the matter was not ripe for summary disposition.

[72] Syl. pt. 3, *Lee v. Lee,* 228 W. Va. 48, 721 S.E.2d 53, quoting *SER Frazier & Oxley, LC v. Cummings,* 212 W. Va. 275, 569 S.E.2d 998 (2002).

The prematurity of the case is memorialized markedly as well in AMBIT's proposed order[73] and AMBIT's analysis of Horizon's proposed order,[74] including a clear identification of the remaining factual issues, errors and improprieties in that pleading and remaining before the Court. The factual issues as to the parties' intentions in entering the contract, their expectations of each other under the contract, the alleged deviations of same all rose to prominence for the first time at summary judgment – demonstrating the full scope of what remained to be resolved by a jury.

AMBIT placed sworn testimony before the Court on its issues and arguments, and Horizon prosecuted its claim based solely upon the unpaid fee. These issues and questions of motive for entering the contract and relative to whether the breach was material were and are questions of fact. Counsel can argue the facts and issues to the Court at length (which they did), but it does not make it 'evidence.'[75] The parties' cross allegations of breach, one against the other, raised factual questions that evaded consideration and/or that the Court took upon itself at summary judgment – even given the jury selected and prepared for trial. Factfinders need to hear from the individuals who entered the contract, agreed to perform under the contract, and determined that the contract had been breached – that information can never be determined by the Court and counsel alone on the silent record here.

Here, where the parties raised cross allegations of breach, along with other contractual defenses, the determination of first breach, materiality of breach, and even the parties' expectations and intent in entering the contract – all were questions of fact that were only apparent through motions practice on cross motions for summary judgment. Under West

[73] AgreedApp000593.
[74] AgreedApp000641.
[75] *SER Miller v. Karl,* 231 W. Va. 65, 743 S.E.2d 876 (2013).

Virginia law, "where there is any controversy as to the fact of the breaches and condonation thereof, the questions of fact are generally for the jury."[76] "[W]hether a breach is material is a question of fact."[77]

The findings of fact and conclusions of law as prepared by Horizon and entered by the Court without substantial revision further complicated the proceedings, failing to reflect AMBIT's case accurately or emblematically to reflect that the Court considered or even heard AMBIT's evidence, including the first breach and AMBIT's designated expert. The Final Order fails to consider, address, reference or resolve any of the seventeen factual determinations and errors AMBIT raised relative to the proposed order and found by the Court (Horizon's order) upon the silent record.[78] For all of these reasons and those set out further below, the Final Order must be vacated and the parties returned to assert their claims before a Marion County jury.

B. Standard of Review.

The standard for this Court's review of a circuit court's entry or denial of summary judgment is *de novo.* Syl. pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). In determining the propriety and accuracy of the Final Order itself, the standard is two pronged:

> 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.

Triple 7 & Commodities, Inc., v. High Country Mining, 245 W. Va. 63, 73, 857 S.E.2d 403, 413 (2021), quoting Syllabus Point 2 of *Walker v. West Virginia Ethics Commission*, 201 W. Va.

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[76] *Gordon v. Dickinson,* 100 W. Va. 490, 130 S.E. 650 (1925), quoting *Batchelder v. Standard Plunger Elevator Co.,* 227 Pa. 201, 19 Am. Cas. 875, 75 A. 1090, note p. 879.
[77] Farnsworth on Contracts, Sec. 8.16 (1990). *See also Mountaineer Contractors v. Mountain State Mack,* 165 W. Va. 292, 297, 268 S.E.2d 886, 890 (1979); *Reiser v. Lawrence,* 96 W. Va. 82, 87, 123 S.E. 451, 457 (1924).
[78] AgreedApp000641.

108, 492 S.E.2d 167 (1997).

> **Assignment of Error Number 1**: The Circuit Court erred in granting summary judgment, given the unresolved issues of fact that remain.

In its motion for summary judgment, AMBIT alleged that Horizon had breached its consulting duty in filing the 2013 suit that was determined to be unlawful by Court order entered on August 31, 2017, and in continuing those behaviors from 2013 to the present (even during this litigation).[79] AMBIT has asserted that the breach was material and that it could not use Horizon's services as defined by the agreement further,[80] which demonstrates under West Virginia law that AMBIT did not have a duty to pay the fee in January 2018.[81] AMBIT notified Horizon that the relationship was irretrievably broken and attempted to use the bilateral termination clause.[82] Horizon declined to release AMBIT and alleged that AMBIT's failure to pay the consulting fee was a breach.[83] Further, Horizon alleged that AMBIT's failure to pay the consulting fee for the first time ever in January 2018 was the first and only breach.[84] The issues before the Circuit Court of Marion County included whether the initial breach as alleged by AMBIT was the 'first breach' and material so as to render any further performance by AMBIT unnecessary. Under West Virginia law,

> "[a]s a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party subsequently refuses to perform. In other words, a party is barred from enforcing a contract that it has materially breached." 17A Am. Jur. 2d Contracts § 589 (footnotes omitted); see also Restatement (Second) of Contracts § 237 (1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

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[79] AgreedApp000134, -377.
[80] AgreedApp000134, -257, 325-26, -355, -366.
[81] *Triple 7 Commodities, Inc. v. High Country Mining, Inc.,* 245 W. Va. 63, 73-74 857 S.E.2d 403, 413-14 (2021).
[82] AgreedApp000015.
[83] AgreedApp000001.
[84] AgreedApp000005, -521.

Triple 7 Commodities, Inc. v. High Country Mining, Inc., 245 W. Va. 63, 73-74 857 S.E.2d 403, 413-14 (2021). The parties' cross allegations of breach, one against the other, raised factual questions that evaded consideration and/or that the Court took upon itself at summary judgment "[W]hether a breach is material is a question of fact." Farnsworth on Contracts, Sec. 8.16 (1990). That is, in the instance of cross allegations of breach, the initial determination is whether one is the first breach. Then the issue becomes whether the first breach "'goes to the essence of the contract [or] only a minor part of the consideration.'" *Triple 7,* 245 W. Va. at 74, 857 S.E.2d at 414, quoting 17 Am. Jur. 2d Contracts § 589.[85] Found the Supreme Court in *Triple 7,* "only material breaches will satisfy the doctrine and permit a nonbreaching party to escape its subsequent performance requirements." *Id.* As the Supreme Court has clarified, the materiality of a breach is a key determination because it obviates the need for the other party to perform; it is a question of degree[86] and a factual determination to be made by a jury:[87]

> [M]odern courts and the Restatement Second recognize that something more than a mere default is ordinarily necessary to excuse the other party's performance in the typical situation . . . . [A]n uncured failure of performance by the former can suspend or discharge the latter's duty of performance only if the failure is material or substantial. Thus, if the prior breach of contract was slight or minor, as opposed to material or substantial, the nonbreaching party is not relieved of its duty of performance although it may recover damages for the breach.

In the instant matter, motions practice demonstrated that Horizon challenged whether the breach cited by AMBIT had even occurred and whether it was material.[88] Indeed, Horizon casually characterized AMBIT's argument to first breach and materiality as "this contract was somehow

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[85] The Court in Triple 7 further cited a "recent memorandum decision. *See Std. Oil Co. v. Consolidation Coal Co.,* No. 15-0655, 2016 W. Va. LEXIS 759, 2016 WL 6078570, at *4 (W. Va. Oct. 17, 2016) (memorandum decision) ("The gist of the doctrine of 'first breach' is that the 'party who commits the first breach of a contract is not entitled to enforce it, or to maintain an action thereon, against the other party for his subsequent failure to perform.'" (*quoting Hurley v. Bennett*, 163 Va. 241, 176 S.E. 171, 175 (Va. 1934)). 245 W. Va. at 74 n.8, 857 S.E.2d at 414 n.8.
[86] *Triple 7,* 245 W. Va. at 74 n.8, 857 S.E.2d at 414 n.8.
[87] Farnsworth on Contracts, Sec. 8.16 (1990).
[88] AgreedApp000190.

breached when AMBIT received a favorable ruling in an unrelated lawsuit filed by Horizon in 2017."[89] Horizon argued that "AMBIT is upset with Horizon due to other litigation and does not want to honor the contract."[90] However, the evidence below is that Horizon "hurt [AMBIT] badly, cost [AMBIT] a ton of money[; Horizon] made accusations that were absolutely not only false, but accusations that they had to know were false and lies."[91] That evidence was confirmed by Horizon's principals who testified under oath that they each approved the adverse actions taken.[92] Questions of fact remained at summary disposition, such that proceeding to summary judgment was inappropriate. Other issues of fact developed through motions practice include each of the party's expectations in entering the contract, what each party expected of the other, and whether Horizon had failed to comply with consulting standards, evidence of which was presented by a designated consulting expert. None of these issues was resolved. Indeed, few are preserved in the Final Order.

By example, Horizon's proposed order reflects none of AMBIT's reliance on the consulting agreement's requirement of expertise by Horizon and reflects none of the evidence in support of AMBIT's case on changed circumstances, frustration of purpose, impracticability. The Final Order includes no references to the 2013 litigation and other behaviors that AMBIT's Rule 30(b) witness testified and that AMBIT's designated expert found constituted breach; the order does not reflect AMBIT's evidence that, as a result of Horizon's behaviors with and in the 2013 litigation, AMBIT had to "satisfy [its] banks that [it] was not doing the things [it] was accused of."[36]

[89] AgreedApp000190.
[90] AgreedApp000198.
[91] AgreedApp000133, -596, -650.
[92] AgreedApp000133, -356ff, -402ff.

Also emblematic of the failures below, Horizon argued that AMBIT provided no legal support, yet the parties both relied upon the same legal support: *Waddy v. Riggleman,* 216 W. Va. 250, 256, 606 S.E.2d 222, 228 (2004), quoting **Restatement (Second) of Contracts § 265** (1979 and **Restatement (Second) of Contracts *§ 261*** (1979).[93] Notably, however, the parties presented widely divergent evidence in support of the cross motions. That is, the two parties' cases were almost completely distinct, and the determination of whose facts were accurate and compensable was for the jury alone.

Horizon argued that AMBIT had no evidence, alleging that no event had occurred, the non-occurrence of which was 'a basic assumption' of the contract, rendering the contract impracticable, frustrating its purpose, and changing its circumstances.[94] Emblematic in the exchange before the Court that resulted in the Final Order is that Horizon disputed that any breach occurred prior to AMBIT's refusal to pay the consulting fee after faithfully doing so for thirty years.[95] Horizon argued that AMBIT has not asked for services since 2006, so how would AMBIT know what Horizon can or would do – yet Horizon misses the point. AMBIT paid for services it never used from 2006 until 2018. Whatever happened to stop those payments was not a fluke, not a one-off – it was Horizon's material breach. Where Horizon argued that Horizon could hire others to do the work,[96] AMBIT countered that this is a personal services contract, entered on the basis of Horizon's expertise, which cannot be assigned.[97] Where AMBIT argued that Horizon's breach of its duty of expertise *per the consulting standard set in the case* absolved it of any further duty to perform (i.e., pay the fee), Horizon argued that AMBIT had no evidence

[93] AgreedApp000248. AgreedApp000377.
[94] AgreedApp000196.
[95] AgreedApp000194.
[96] AgreedApp000694, AgreedApp000569-70.
[97] AgreedApp000648, quoting Syl. pt. 1, *Poling v. Condon-Lane Boom & Lumber Co.,* 58 W. Va. 529, 47 S.E. 279 (1904).

of any breach.[98] Where Horizon argued that the breach was the failure to pay the fee in 2018, AMBIT argued that the fee was the second breach, justified by the first material breach – Horizon's breach of its consulting duty. After all, per West Virginia law, if AMBIT continued the contract, continued to pay the fee, it would be precluded from suspending performance later and then claiming that it had no duty to perform based on the first material breach.[99] That is, AMBIT would waive its rights under the first material breach if it paid – and so after thirty years of contract/payment, AMBIT stopped paying and pursued Horizon's material breach based upon the 2013 breach as confirmed by the Circuit Court of Ohio County, Business Court Division in its August 2017, Order.

As demonstrated here, substantial and enduring factual issues remain relative to the fundamental contractual relationship between the parties, the duties, the breach, the behaviors exhibited and expected. Where counsel and the Court worked through these issues at great length, finally, these determinations are the province of the factfinders, where this matter was slated to go but never went. A "'circuit court's function at summary judgment is not to weigh the evidence and determine the truth of the matter but is to determine whether there is genuine issue for trial.'" Syl. pt. 4, *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022), quoting Syl. pt. 3, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994); Syl. pt. 4, *Goodwin v. Shaffer,* 246 W. Va. 354, 873 S.E.2d 885 (2022).

Further, whereas AMBIT and Horizon each argued initially that the contract was unambiguous, at motions practice, the parties could not even agree as to duties under that contract. AMBIT's position is that the consulting agreement allows AMBIT to make "reasonable

[98] AgreedApp000192.
[99] *Triple 7,* 245 W. Va. at 78, 857 S.E.2d at 418., citing also Williston on Contracts § 43:15 (footnotes omitted) and *Restatement (Second) of Contracts § 246* (1981).

requests" for Horizon's assistance with lobbying, political or other interventions.[100] Specifically, Horizon agrees to "provide expertise and consulting services within its field."[101] AMBIT relies on the following as the section of the contract at issue here:

> WHEREAS, First Party and Second Party have negotiated an agreement wherein Second Party will provide expertise and consulting services within its field to First Party in its projects in West Virginia, and
>
> * * *
>
> 2. It is agreed that the Second Party will perform from time to time upon the reasonable request of the First Party, such public and governmental relations and liason [sic] functions as are necessary or incident to aid and assist the 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 those may be needed by First Party.

AMBIT further argued that the expertise is to be related *inter alia* to maintaining and operating power plants in West Virginia. AMBIT argued that no time or other limitation is placed upon this expertise, such that, to the extent the contract were to extend to the life of the lease,[102] Horizon would be required to maintain that expertise and to provide 'public and governmental relations and liaison functions' per the contract. AMBIT argued that it is a personal services contract, and that, therefore, as a matter of law, Horizon cannot fulfill its duty of expertise by outsourcing it, where (as here) AMBIT entered the contract in express reliance on that expertise. "A contract in which the *delectus personae* is material, as where a person agrees to use his personal skill and knowledge or has been contracted with by reason of the trust and confidence placed in him, cannot be assigned by such person, while the agreement remains executory, without the consent of the other contracting party."[31]

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[100] AgreedApp000006.
[101] AgreedApp000006.
[102] AMBIT and Horizon are also Tenant and Landlord relative to the Grant Town Power Plant in Marion County. *See American Bituminous Power Partners, LP, v. Horizon Ventures of West Virginia, Inc.,* 2015 W. Va. Lexis 617, *1 (14-0446) (May 13, 2015).

. Conversely, Horizon relied in motions and in the Final Order it prepared solely on a subset of Horizon's duties under the contract (relegating AMBIT's to a truncated footnote):

> It is agreed that the Second Party will perform from time to time upon the reasonable request of First Party, such public and governmental relations and liaison 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.
> Consulting Contract, ¶ 2.[2][103]

At no point in the Final Order nor in its Motion for Summary Judgment does Horizon reflect AMBIT's evidence or Horizon's admissions on the *expertise* AMBIT expected and argued it was contracted to have. Therefore, while each party was convinced it was correct about the scope of the contract and Horizon's duties thereunder,[104] their interpretations were mutually exclusive. Upon the initial appeal, the Supreme Court detected this ambiguity:

> there remain disputed facts regarding the precise nature of the consulting agreement that render summary judgment improper. *See, e.g.*, Syl. pt. 1, in part, *Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247* (holding that [ ] summary judgment should be granted "only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.").[105]

Under West Virginia law, contract language can be considered ambiguous "'where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.' *Syl. Pt. 6, State ex rel. Frazier & Oxley, L.C. v. Cummings, 212 W. Va. 275, 569 S.E.2d 796 (2002)*." Syl. pt. 6, *Triple & Commodities, Inc., v. High Country Mining,* 245 W. Va. 63, 857 S.E.2d 403 (2021). At motions practice before the Circuit Court, the parties demonstrated that the language

[103] AgreedApp000681.
[104] AgreedApp000192.
[105] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 245 W. Va. 1, 857 S.E.2d 33 (April 1, 2020) at n17.

of the contract supported differences of opinion as to the obligations undertaken. Horizon alleged all it had to do was answer the phone if AMBIT called;[106] AMBIT alleged that it had hired Horizon based upon its expertise, that AMBIT expected Horizon to maintain that expertise over time.[107] AMBIT expected Horizon's behaviors to comport with a consulting standard, as opined by a designated expert – whose role was not addressed by the Court or Horizon (but whose participation, opinions or authenticity were never challenged).[108] Therefore, as demonstrated in the record from below, significant and enduring questions of fact arose through motions practice related to the fundamentals of this relationship, even as to the scope of the consulting agreement itself and the respective duties thereunder, rendering summary judgment unavailable here.

West Virginia law advises that the first significant circumstance affecting materiality of the breach is "the extent to which the injured party will be deprived of its expected benefit under the agreement."[109] As a logical necessity, then, the expectations of the parties under the contract are key, constitute a necessary predicate to determining materiality and are a factual determination[110] that the Circuit Court cannot and should not undertake. At motions practice, the expectations of the parties remained unresolved, unexplored, limited solely to the proffers of counsel. AMBIT argued impracticability, frustration, changed circumstances relative to the breach based upon Horizon's open disloyalty, antagonism, unprofessionalism and name-calling that started in 2013, as it was confirmed in 2017, and further argued that those behaviors have made it impossible for AMBIT to use Horizon.[111] AMBIT's evidence confirmed that the Horizon principals expressly had endorsed those behaviors and then placed before the Court the

[106] AgreedApp00000000554.
[107] AgreedApp0000134.
[108] Syl pt. 6, *Butner v. Highlawn Memorial Park Co.,* __ W. Va. __, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).
[109] *Triple 7 & Commodities, Inc., v. High Country Mining,* 245 W. Va. 63, 75, 857 S.E.2d 403, 415 (2021)
[110] Farnsworth on Contracts, Sec. 8.16 (1990).
[111] AgreedApp000134, stating that "And it was those actions that would say it's impossible for this company, Horizon, to represent us in speaking to anybody."

behaviors[112] AMBIT's evidence was that it was those precise behaviors that meant AMBIT could not use Horizon to represent it in speaking to anybody.[113]

Horizon denied the evidence and, conversely, denied that the alleged breach went to the heart of the deal – which conversely Horizon argued was Plant operations.[114] The parties did not agree even on which part of the contract was at issue. Where it was an agreed fact that the fee had not been paid in January 2018, by the evidence in dispute, that fact may well be meaningless if the 2013 breach is material and goes to the essence of the contract. AMBIT asserts that is the case.

At motions practice, then, a factual dispute existed as to the expectations of the parties in entering the contract, as to when the first breach occurred, and as to whether that first breach was material. The matter should have been directly placed before the jury because the question of "whether a breach is material is a question of fact." Farnsworth on Contracts, Sec. 8.16 (1990). The jury impaneled to serve should have been allowed to weigh the parties' testimony on their expectations and understandings in entering the contract and to consider those factors relative to material breach – upon recognizing the factual mire, the correct answer in this situation was to have the factfinders determine whether *inter alia* AMBIT is deprived of the benefit for which it bargained, the likelihood of cure, the extent of any breach of good faith/fair dealing.[115] Conversely, Horizon might argue that the correct answer is that, as long as the Plant is operational, all it has to do is answer the phone if called.[116] Regardless, the answers are not the

[112] AgreedApp000238.
[113] AgreedApp000134.
[114] AgreedApp000198.
[115] *Triple 7 & Commodities, Inc. v. High Country Mining,* 245 W. Va. 63, 79, 857 S.E.2d 403, 419 (2021).
[116] AgreedApp000293ff.

Court's to provide. This is the province of the factfinder,[117] as AMBIT argued before the Court below.[118]

As West Virginia's Supreme Court has stated, exploring the intent of the contracting parties' intentions often involves extrinsic evidence.[119] Here, where it is uncovered for the first time in motions practice that Horizon believes that the heart of the contract is the Plant operations and AMBIT believes it is consulting services (which it cannot ever use again), genuine issues of material fact remain even as to the parties' intention in entering the contract. No matter how eager the Court and the parties are to cut the Gordian knot, these factual issues mandate a jury's attention. "Where conflicting theories of a case are presented by the evidence, each party is entitled to have his view of the case presented to the jury by proper instruction." *Whitmore v. Rodes,* 103 W. Va. 301, 137 S.E. 747 (1927).

The Supreme Court previously found that these exact issues required resolution by a jury;[120] however, the Circuit Court erroneously made factual determinations, invading the province of the jury, and denying AMBIT its day in court.

As demonstrated in the hearing transcript, the Court was led deeply into questioning and cross-examining counsel, who were proffering relative to the underlying facts.[121] Whereas Horizon has prepared a Final Order that has the Court state that AMBIT was raising 'new claims' at summary judgment argument, AMBIT produced the deposition transcript that was responsive to the Court's questioning; that is, the Court's factual inquiries exceeded the scope of either party's motions and led to submission of additional supporting evidence.

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[117] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners ,*873 S.E.2d 905, 917 (2022 W. Va. Lexis 285) (4.18.22).
[118] AgreedApp000641, identifying factual issues that could not be resolved by summary disposition.
[119] *SER Miller v. Karl,* 231 W. Va. 65, 743 S.E.2d 876 (2013).
[120] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 873 S.E.2d 905, 917 (2022 W. Va. Lexis 285) (4.18.22)
[121] AgreedApp000547.

The Circuit Court of Marion County undertook to sort through and resolve the parties' decades-long disagreements and litigations, attempting to resolve the claims without the assistance of the factfinder. As demonstrated here, that process needed factfinders to see and listen to the witnesses, to judge their credibility, to determine the facts of the case. Because the Circuit Court overstepped those bounds, this matter must be reversed and remanded for trial.

> **Assignment of Error Number 2**: The Circuit Court's orders fail to reflect the arguments and proceedings below and, as such, create an obvious injustice.

At motions hearing, the Circuit Court instructed both parties to prepare and submit proposed orders. Given the widely divergent recitation of facts extending even to the fundamentals and given the partisan and narrow scope of the Final Order, it is impossible to find that the Final Order reflects that the trial court thoughtfully reviewed the evidence presented and that, therefore, those findings of fact are not clearly erroneous. *CMC Enter., Inc., v. Ken Lowe Mgmt. Co.,* 206 W. Va. 4141, 418, 525 S.E.2d 295, 299 (1999). It is difficult to find that the Circuit Court considered all of the evidence,[122] given that AMBIT's standard as set by its designated expert appears nowhere in the Final Order despite the fact of the timely filed disclosure, the expert's key role in AMBIT's dispositive motion, the testimony of AMBIT's 30(b) representative, and AMBIT's arguments to same.[123] Given that the parties' motives and expectations in entering the consulting agreement remain disputed, given that the parties' duties under the contract remain disputed, given that the consulting standard set by AMBIT's designated expert appears nowhere in the order,[124] given that the first breach remains disputed, given that the Final Order fails to address, consider, acknowledge the fundamental disputes, given the other myriad shortcomings of the Final Order, it is unrealistic to believe that it

[122] *Lamphere v. Consol. Rail Corp.* 210 W. Va. 303, 307, 557 S.E.2d 357, 361 (2001).
[123] AgreedApp000118, -174, -547, -591, -649.
[124] Syl pt. 6, *Butner v. Highlawn Memorial Park Co.,* __ W. Va. __, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).

demonstrates the Circuit Court's consideration of the issues before it. However, AMBIT is not raising these issues here for the first time.

After receiving Horizon's proposed order (which became the Final Order), AMBIT provided the Court with its response to the proposed order.[125] Pursuant to West Virginia law, it is incumbent upon litigants to request the type of order necessary to preserve their rights. Syl. pts. 4, 8, *SER Vanderra Res. LLC v. Hummel,* 242 W. Va. 35, 829 S.E.2d 35 (2019). Also pursuant to West Virginia law, "'[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error" as a defense or upon appeal or arguably use it as any other defense or affirmation under the law. Syl. pt. 2, *Hopkins v. DC Chapman Ventures,* 228 W. Va. 213, 719 S.E.2d 381 (2011), quoting Syl. pt. 1, *Maples v. West Virginia Dep't of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996). In its response to the proposed order, AMBIT set out 17 areas in which the proposed final order failed to reflect the proceedings before the Court, further expressly identifying and documenting the remaining genuine issues of material fact. At 'put up or shut up time,'[126]AMBIT put up its evidence repeatedly, at length.

Among the most glaring errors is that Horizon's Final Order identifies AMBIT's case as based in unconscionability,[127] although that was not reflected in AMBIT's case on remand. Indeed, unconscionability was not referenced or mentioned in AMBIT's motion for summary judgement. Also, in preparing the Final Order, Horizon minimizes the portion of the consulting agreement that references expertise, which the express evidence demonstrated was and is the essence of the contract for AMBIT.[128] That is, then, in adopting Horizon's order, the Circuit Court imprecisely cites Horizon's duty under the consulting agreement, failing to identify it as an area of dispute (or

[125] AgreedApp000591.
[126] *Butner v. Highlawn Memorial Park Co.,* __ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022) at 20-21.
[127] AgreedApp000648. *See also* AgreedApp000231 that does not reference unconscionability anywhere in its text. *See also* AgreedApp000679 that recounts proceedings, which were not at issue here.
[128] AgreedApp000679ff.

preserving AMBIT's expectations of Horizon under the contract beyond a final footnote):

> 2. It is agreed that the Second Party will perform from time to time upon the reasonable request of the First Party, such public and governmental relations and liason [sic] functions as are necessary or incident to aid and assist the 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 those may be needed by First Party.

Conversely, for AMBIT, the essence of the consulting agreement was recounted in the WHEREAS paragraph above this in the contract, discounted by footnote in the Final Order – such that the expertise for which AMBIT entered the consulting agreement is referenced only in passing in that provision or the Final Order. In AMBIT's motions and argument, its expectation of Horizon's duty, the essence of the agreement, is as follows:

> WHEREAS, First Party and Second Party have negotiated an agreement wherein Second Party will provide expertise and consulting services within its field to First Party in its projects in West Virginia, and
>
> * * *
>
> 2. It is agreed that the Second Party will perform from time to time upon the reasonable request of the First Party, such public and governmental relations and liason [sic] functions as are necessary or incident to aid and assist the 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 those may be needed by First Party.

Additionally, AMBIT's evidence was that the expertise is to be related *inter alia* to maintaining and operating power plants in West Virginia.[129] AMBIT argued that no time or other limitation is placed upon this expertise, such that, Horizon would be required to maintain that expertise and to remain able to provide public and governmental relations and liaison functions per the contract. While the Court may make a finding as to the 'duty' under the contract, AMBIT's position is discounted, minimized, mischaracterized in the Final Order. Where this disagreement as to the scope of the duty and the expectations of the parties in entering the agreement would have been

[129] AgreedApp000134ff.

necessary determinants in materiality, it also is an area of dispute between the parties that was never resolved or even preserved – it is truncated, mischaracterized in the Final Order.

Whereas the Final Order engages in *ad hominem* attacks (which would be difficult to find as within the Court's purview),[130] Horizon has demonstrated a keen lack of expertise in power production and in providing consulting services (AMBIT's evidence), which appears nowhere in the Final Order. At deposition, Horizon's four principals have demonstrated a lack of the knowledge, interest, professionalism necessary to serve AMBIT in any way.[131] Beyond that, Horizon has demonstrated very little interest in "locating, permitting, licensing, developing, maintaining and operating power plants" and even less professionalism and loyalty, even in key industry settings. These failures are paramount to AMBIT, are identified as determinative by AMBIT's expert, and appear in the Final Order only as failure of expertise.[132]

The Final Order also includes clear errors, mischaracterizing AMBIT's evidence and argument. Where Horizon alleges that "AMBIT argued that this contract was breached when AMBIT received a favorable ruling in a lawsuit filed by Horizon in 2017 which is unrelated to the consulting agreement,"[133] AMBIT's evidence was that an Order entered by the Circuit Court of Ohio County, Business Court Division Civil Action No. 13-C-196 (Young, J.), on August 31, 2017, confirmed AMBIT's beliefs relative to Horizon's unprofessional and disloyal behaviors.[134] Further, AMBIT is unaware of any December 27, 2017, letter, referenced in the Final Order.[135]

Where Horizon alleges that the 2017 Order was unrelated to the consulting agreement, West Virginia's Supreme Court has expressly found that all matters, all documents, all issues

[130] *See. e.g.,* AgreedApp000685.
[131] AgreedApp000133ff, -359.
[132] AgreedApp000174.
[133] AgreedApp000683.
[134] AgreedApp000134-35.
[135] AgreedApp000684-85.

between these parties are interrelated, a tangled knot, "where each decision reached causes a deviation; a tug that affects other claims in the knot."[136] Additionally, AMBIT's 30(b) witness testified precisely to that Order as a sentinel and seminal event.[137]

The Final Order further has the Circuit Court "find[] that, as the Supreme Court noted, Stanley Sears . . . specifically stated in his deposition .. . . that the 'goals of the parties the [c]ontract are similar and that . . . it is in the best interest of both parties to keep the Grant Town Power Plant operated by [AMBIT] open, viable and profitable," AMBIT's evidence was that it entered the contract based on Horizon's professed expertise.[138] Further, even a cursory glance at the Supreme Court decision at issue demonstrates that the Supreme Court noted that testimony only in identifying Horizon's position at deposition,[139] rather than making any finding. AMBIT contested that position in the first litigation and the second litigation, and while Horizon may believe that is the essence of this contract, AMBIT disputes that assertion.

Where the Final Order prepared by Horizon and entered by the Circuit Court states that the last request for services was in 2006, the Final Order fails to consider or reflect AMBIT's evidence – *why* would it pay the fee for thirty years whether it used the service or not and then abruptly stop. The answer is the first breach that was never addressed. Where AMBIT tried to address the consulting standard set by its designated expert, who appears nowhere in the Final Order, by recounting the 30(b) testimony that has been part of this case from December 2018 to the present, Horizon's Final Order ridicules AMBIT's effort to respond to the Court's

[136] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners,* 873 S.E.2d 905, 917 (2022 W. Va. Lexis 285) (4.18.22).
[137] AgreedApp000134.
[138] AgreedApp000685-86, -133ff.
[139] *Horizon Ventures of West Virginia, Inc., v. American Bituminous Power Partners, LP*, 245 W. Va. 1, 5, 857 S.E.2d 33, 37 (2021).

questioning.[140] Beyond whether the tone and content are appropriate for an order of the Court, which is of little moment here, the fact remains that Horizon characterized a proffer of sworn testimony (a problem in and of itself) as "a long and interesting history of the relationship between the parties in other litigation."[141] AMBIT's express evidence is not reflected in the Final Order, and none of the key determinants identified by AMBIT -- the first breach, materiality, personal services contract – are preserved. Where a court's orders are to reflect the court's consideration of the positions of the parties, the evidence before the court, and the court's considered judgment, the Final Order is little more than the latest unprofessional and adversarial attack by Horizon of AMBIT, now roping the Circuit Court into the fray.

As for the conclusions of law, Horizon has adopted its case wholesale without reflecting AMBIT's case anywhere in the Final Order. Where Horizon wanted to focus on a 'reasonable request' that Horizon could not or would not perform (which was actually reflected in the Rule 30(b) testimony referenced at the motions hearing), AMBIT focused on the consulting standard set by a designated expert. He is a retained consultant to AMBIT – and AMBIT argued at summary judgment and motions hearing as follows:

> Based upon Mr. Niemann's education, training and experience on consultancy and engineering, his review of discovery to date, and his experiences relative to Horizon, it is expected that Mr. Niemann will testify that certain behaviors and loyalties are inherent in the consulting process and that the behaviors are more than 'good manners' but rather go directly to effectiveness. Beyond the behaviors that enable and empower the consulting process, the consultant needs to have knowledge of the field of endeavor – indeed, more knowledge and resources than the principal in order to make the relationship of any value whatsoever – and the parties must trust each other's judgment and abilities. In his education, training and experience, Mr. Niemann has both been a consultant and relied upon consultants successfully for decades,

[140] AgreedApp000685.
[141] AgreedApp000645ff, -547, -621.

> in instances other than Horizon, and so is able to identify and discuss patterns, determine causes and distinguish between successful and failed relationships and endeavors. Mr. Niemann will opine that the skills the consultant brings to the process, the professionalism with which s/he performs, the strength of the interpersonal and industry relationships are all key.[142]

> As is evident in this disclosure and the January 2018 letter, Horizon has breached its duties under the consulting agreement. Horizon has failed to demonstrate the professionalism that is inherent in being a consultant and, of more concern, has failed to demonstrate that it has knowledge in the field of endeavor – absolutely failing to demonstrate that it has more knowledge and resources than AMBIT. Horizon has failed to maintain any expertise relative to operating a power plant.[143]

Where the Court may weigh the parties' arguments and find in favor of Horizon, it is less credible to assert that the Final Order reflects the trial court's thoughtful review of the evidence presented when AMBIT's evidence is mischaracterized, discounted, overlooked there.

AMBIT's motions practice never addresses a task requested and left undone – however, at the Court's bidding, AMBIT referenced one that was addressed in testimony in November 2018. AMBIT's case is different than anything in the Final Order. AMBIT had expectations of Horizon (just as it does with all consultants), and Horizon fell short repeatedly, starting in 2013 and since. That case is nowhere evident (even if it were to be acknowledged and then discounted) in the Final Order. Where AMBIT produced voluminous evidence of the status of the principals' expertise, that evidence is reduced to passing references in the Final Order.[144] Further, arguments Horizon did not raise at summary disposition appear for the first time, ascribed to Horizon, in the Final Order.[145] Where Horizon has the Court find that AMBIT had no law or fact on the breach of good faith, fair dealing, AMBIT argued in pertinent part that

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[142] AgreedApp000175. *See* Syl pt. 6, *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022).
[143] AgreedApp000490.
[144] AgreedApp000679.
[145] AgreedApp000696.

> [w]hereas in some transactions it is an express requirement of the body of law, nonetheless, in all contracts, the parties have a duty in a commercial setting of "'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.'"[146] Horizon demonstrated its lack of regard for AMBIT by maligning it in court documents. Horizon used its position of trust with AMBIT to learn information that it placed before the public over AMBIT's objections and requests.[147]

Rather than acknowledge AMBIT's evidence and argument, Horizon has led the Circuit Court to discount it wholesale or even exclude it from reference all together. Also, as demonstrated herein, genuine issues of material fact remained at motions practice – indeed, were teased out in the process of motions practice. Those issues are not addressed in the Final Order, which is Horizon's partisan gloss of proceedings that AMBIT has alleged it to be. Whereas it would be consistent for Horizon to submit an editorialized selection of events and to exclude and preclude AMBIT's arguments entirely, it is difficult to find that the Final Order reflects the trial court's thoughtful review of the evidence presented or even a cursory consideration of all of the evidence, as much of AMBIT's affirmative evidence does not even appear in the Final Order.

Additionally, the disputed facts set out above are not set out and resolved in the Final Order. Only by eliminating AMBIT's assertions, defenses – indeed, virtually its entire case – does the case become the undisputed recitation of Horizon by Horizon that became the Circuit Court's Final Order. AMBIT understands that, finally, one party's position will prevail. However, where disputed facts are ignored and glossed over by eliminating, mischaracterizing, minimizing AMBIT's evidence and arguments, the system has failed to provide justice. A "paramount principle of jurisprudence is that the Court speaks through its orders" and a court has the right and duty to revise any order submitted by a party to ensure that it reflects the Court's

[146] *See, by analogy, Ashland Oil v. Donahue*, 159 W. Va. 463, 474, 223 S.E.2d 433, 440 (1976), citing W. Va. Code 46-2-103(1)(b) (UCC).
[147] AgreedApp000015, -249-50.

statement on the case and complies with the law.[148] While the Final Order accurately reflects the chaos of motions practice, the proffering of counsel, and the irresolution of issues, it also misstates the facts and law of this case and introduces even more complexities, inaccurate history, misstatements of law and fact than in the case itself.[149] Courts do justice when they "support, protect, defend and enforce . . . the rule of law, as difficult as that may sometimes be."[150] The order as prepared by plaintiff and accepted and adopted by the Court fails to reflect accurately the facts and law of the case, such that a motion to alter or amend provides the rare but meaningful opportunity to clarify the case and the law at this time.[151] AMBIT sought that relief, but the Court declined, relying on the parties' initial positions that the agreement was unambiguous. Where the Court asserted that it had considered AMBIT's arguments, it did not address how and why they are not reflected in the Final Order. Where the Court expressed confidence in outcome here, at no time did the Court acknowledge AMBIT's argument or ask its own question as to why, after thirty years, AMBIT would finally not pay. The Court declined to address or consider the argument of first material breach, pursuing solely Horizon's argument of what request did AMBIT make that Horizon could not perform. Clearly, that is not now nor has it ever been part of AMBIT's case before the Circuit Court. AMBIT renews the request it made to the Circuit Court – AMBIT seeks an order that accurately reflects its arguments and the reality between the parties.

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[148] *Legg v. Felinton,* 219 W. Va. 478, 483, 637 S.E.2d 576, 581 (2006); *Ballard v. Delgado,* 241 W. Va. 495, 514, 826 S.E.2d 620, 639 (2019).
[149] Syl. pt. 2, *Mey v. Pep Boys – Manny Moe & Jack,* 228 W. Va. 48, 717 S.E.2d 235 (2011).
[150] *State v. Findley,* 219 W. VA. 747, 758, 639 S.E.2d 839, 850 (2006) (Concurrence, Benjamin, J.).
[151] *Mey v. Pep Boys – Manny Moe & Jack,* 228 W. Va. 48, 56-57, 717 S.E.2d 235, 243-44 (2011), quoting *Palmer v. Champion Mortgage*, 465 F.3d 24, 29 (1st Cir.2006); *Templet v. HydroChem Inc*., 367 F.3d 473, 479 (5th Cir.2004); *Pacific Ins. Co. v. Amer. Nat. Fire Ins. Co*., 148 F.3d 396, 403 (4th Cir.1998). *See also 11 Wright et. al., Federal Practice and Procedure* § 2810.1 (3d ed.2010).

Conclusion.

On July 19, 2022, the Circuit Court of Marion County entered the Final Order Granting Horizon's Motion for Summary Judgment. That Final Order as prepared by Horizon glossed over or eliminated the genuine issues of material fact that remained and effectively eliminated any opportunity the parties had to place their factual disputes before the jury waiting in the box. West Virginia law requires the submission of factual issues to a jury and allows parties the right to an order that demonstrates the trial court's consideration of its evidence and arguments, and a clear determination of the issues based on all parties' evidence. American Bituminous Power Partners, LP, requests that the Final Order be stricken and the judgment reached in Marion County Civil Action 18-C-7 be reversed and remanded directly for jury determination of these substantial and enduring issues or, at a minimum, a Final Order that accurately reflects its case as well. American Bituminous requests the relief this Court deems just.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 22-ICA-34

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,

Defendant Below, Petitioner,

vs.

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

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Roberta F. Green/John F. McCuskey, hereby certify that on this 5th day of December, 2022, a true copy of the foregoing *"*Brief of Petitioner*"* was served on counsel by electronic service:

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