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.

REPLY BRIEF OF PETITIONER

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

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III. RENEWED ASSIGNMENTS OF ERROR

A. **Renewed Assignment of Error Number 1: Respondent's selective recitation of events does not change the fact that the Circuit Court erred in granting summary judgment, given the unresolved issues of fact that remain, but rather demonstrates the error.**

B. **Renewed Assignment of Error Number 2: Respondent Does Not Refute that the Circuit Court's orders fail to reflect the arguments and proceedings below and, as such, create an obvious injustice.**

.IV. RENEWED STATEMENT OF THE CASE

It is no doubt emblematic of the genuine issues of fact that remain that the parties' Statements of Fact upon appeal are voluminous and consistently inconsistent. Horizon attests that the parties agree upon certain facts, and, if anything could be true,[1] it would be that the parties agree about almost nothing. Respondent's Brief continues to misstate the fundamentals of the contract itself, declines to address or admit the status of trial, and provides a less than forthcoming rendition of motions practice, each of which is at issue here.

Most fundamentally, it is imperative to note that, even now, Horizon misquotes and mischaracterizes its duty under the consulting agreement, leaving out the conditions precedent that reference 'expertise,' which anchors this contract for AMBIT.[2] Decidedly, Horizon's failure to focus on the precise terms demonstrates the saliency of the remaining issues of fact, including the intention of the parties in entering this agreement, their expectations of each other, the duties undertaken, the First Breach.

It remains undisputed that Horizon raised seminal questions at motions hearing that should have signaled the impropriety of summary disposition. That is, by example, Horizon

[1] Respondent's Brief at 5.
[2] AgreedApp000006 (emphasis added).

expressly questioned at motions hearing *inter alia* whose expertise was referenced in the contract, whether Mr. Sears's remote work history in the coal industry constitutes expertise, whether any of the issues before the Court were appropriate for expert testimony, whether Horizon can delegate its expertise.[3] Nonetheless, even with both parties and the Court raising, arguing, inquiring into at least three distinct sets of facts and related law/issues at motions practice, with questions and issues going back to 1987[4] or at least 2013,[5] the matter was resolved by the Court's selecting among the parties' factual arguments on the failure to pay an invoice in 2018. The factual issues were ripe for the jury alone,[6] and the jury was in the box – the answer was at hand: the factfinders needed to consider these issues.[7]

Horizon fails to address or explain the status of trial.[8] Horizon does not admit that the jurors were selected at Horizon's request, upon Horizon's motion. On May 31, 2022, Horizon moved the case onto the trial docket by filing Motion to Call Case for Trial.[9] The parties conducted *voir dire* and selected jurors on June 23, 2022, the day before the hearing showcased

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[3] AgreedApp000569, 571-649. *See also* AgreedApp000595ff. Syl. pt. 1, *Poling v. Condon-Lane Boom & Lumber Co.,* 58 W. Va. 529, 47 S.E. 279 (1904).

[4] AgreedApp000001;

[5] AgreedApp000133ff.

[6] 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. 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.*

[7] *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.

[8] Further, Horizon manages to mischaracterize both the Circuit Court and the Supreme Court in its recitation of the grounds for reversal, remand. DisputedApp000194, -200. Circuit Court Order Granting American Bituminous Power Partners, LP's Motion for Summary Judgment (1.30.19). DisputedApp000133.

[9] AgreedApp000184.

in Respondent's Brief[10] AMBIT filed pretrial motions, upon which the Court ruled and entered an order.[11] At the time of motions hearing on June 24, then, this litigations was headed decidedly in at least two directions. When motions practice confirmed three versions of the facts and allegations, it was clear that the Court and the parties were headed toward the wrong direction with summary disposition.

Theories of the case were evolving even at the motions practice, with the first clear statement of the three competing theories coming to light for the first time at that motions hearing. In Respondent's Brief, Horizon coins the term 'refocus'[12] for the Court's raising its own theory of the case – also for the first time at motions practice. Within days of that refocus and the genesis of the three competing theories, AMBIT advised the Court that genuine issues of material fact remain, as mandated by what the West Virginia's Supreme Court recently termed "'put up or shut up' time."[13] In timely fashion,[14] AMBIT put up the factual issues that had been adduced for the first time during motions practice, also critiquing the parties' proposed orders, demonstrating the factual disputes, and including citations to the record – most pointedly, including citations to the sworn testimony of the parties themselves.[15] As part of that process, AMBIT critiqued Horizon's proposed order; Horizon conversely filed a motion to strike.[16]

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[10] Respondent's Brief at 12.
[11] AgreedApp000634.
[12] Respondent's Brief at 12.
[13] *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022) at 20-21.
[14] AgreedApp000641.
[15] AgreedApp000591.
[16] Respondent's Brief at 16. Some portions of Horizon's Statement of Fact are pure fiction. Whereas Horizon alleges that the parties each critiqued the other's proposed orders (Respondent's Brief at 16), Horizon filed no critique. Conversely, Horizon filed a motion to strike AMBIT's critique of Horizon's order, which critique identified the now three different versions of facts and commensurate theories running through case. AgreedApp000673.

Where Horizon alleges that the 'put up or shut up' moment came too late in the process,[17] the Supreme Court provides that the appropriate 'put up or shut up' moment is while the Court is considering summary disposition of a case.[18] AMBIT's analysis of remaining factual issues and competing theories of the case fell well within that window.[19]

Also emblematic of the genuine issues of fact that reman is that Horizon still does not understand that the proffer at the June 24, 2022, hearing is actually a close recitation of AMBIT's 30(b) testimony as elicited by Horizon on November 30, 2019.[20] That disconnect demonstrates in a nutshell that, factually, the parties remain at odds, speaking at cross purposes, raising wildly divergent facts and history.[21] From the timing of the last request under the

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[17] Respondent's Brief at 12.

[18] *Butner v. Highlawn Memorial Park Co.,* ___ W. Va. ___, ___ S.E.2d ___ (No. 21-0387) (Nov. 17, 2022) at 20-21.

[19] AgreedApp000641, -659, -673, -679.

[20] AgreedApp000117. Where Horizon urges this Court to 'review the transcript of this hearing at AgreedApp000547-000590' (Respondent's Brief at n.6), AMBIT would add to that to be sure to read the relevant portions of the 30(b) deposition it tracks (AgreedApp000117) and AMBIT's proposed order tracking same. AgreedApp593, 596. Horizon fails to recognize AMBIT's 30(b) testimony that is part of the record below, the evidence in this case. AgreedApp000117, -596. Horizon cannot understand what happened in 2017 that confirmed AMBIT's assertions in 2013 despite the express testimony on that breach. Respondent's Brief at 8, 11, 17. *See also* AgreedApp000091. -133. AMBIT's uncontradicted evidence is that it made a request in 2013 that Horizon refused. AgreedApp000133ff. It remains undisputed testimony that the 2013 consulting breach, arguably the first of three breaches per the Court's 'refocus,' was confirmed by Court order in 2017. AgreedApp000134. It followed from that First Breach that the consulting behaviors fell below the standard (AgreedApp000134) and continue even now to undercut AMBIT's and Horizon's standing in industry circles. AgreedApp000377. The relationship was irretrievably broken by the First Breach and Horizon's resultant behaviors. For that reason, AMBIT did not pay in 2018.

[21] AgreedApp000133ff, -595ff; Respondent's Brief at 5, 27. This First Breach led to and *as a matter of law* excused the non-payment of the consulting fee in 2018. *Triple 7 & Commodities, Inc., v. High Country Mining,* 245 W. Va. 63, 74, 857 S.E.2d 403, 414 (2021). 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.These factual issues were never addressed or resolved by motions practice or the Court.

agreement,[22]to whether any disagreement is fatal to the consulting relationship,[23] whether the adduced consulting standard can or should apply to this relationship, and, indeed, whether the consulting agreement is based in expertise,[24] genuine issues of fundamental and material fact remain even now, rendering this matter unripe for resolution by summary judgment. Upon the initial appeal, the Supreme Court detected these ambiguities:

> 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.").[25]

By motions practice, it was clear that genuine issues of material fact remain to be tried, such that resolution upon summary disposition was, while expedient, finally premature.

By the time of the final order in this matter, three versions of the facts were circulating, such that this matter was ripe for the factfinders alone, who were waiting in the box. It is well settled under West Virginia law that where, at summary judgment, the parties (and the court) have factual disputes, summary judgment must be unavailable.[26] In the instant matter, the record demonstrates that the Circuit Court tried issues of fact, selected among competing facts, and

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[22] Respondent's Brief at 1, 27; AgreedApp000117ff.
[23] Respondent's Brief at 6, citing DisputedApp000064. *See also* AgreedApp000134.
[24] AgreedApp000174.
[25] *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.
[26] *Gentry v. Mangum,* 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995):

> On a motion for summary judgment, however, a circuit court cannot try issues of fact; it can only determine whether there are issues to be tried. *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995); *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). In general, summary judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law. *See* W. Va. R. Civ. P. 56(c); *National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 735 (1st Cir.), *cert denied.,* ___ U.S.___, 115 S. Ct. 2247, 132 L. Ed. 2d 255 (1995).

added its own facts by 'refocusing' the case using facts/law of its own devise. The parties' heavy reliance on disputed facts even now on appeal demonstrates that "the parties here have unresolved underlying questions of fact material to resolving the ambiguity and relationships . . . that permeate both AMBIT's and Horizon's claims . . ., 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."[27] "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). AMBIT seeks the right to present its view of the case to the jury upon proper instruction.

In the alternative, AMBIT seeks a final order that demonstrates its case and the Circuit Court's consideration of same. Nothing in Respondent's Brief disputes that 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. Respondent's Brief cannot change that the Final Order includes no references to the 2013 litigation and other behaviors that AMBIT's 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] AMBIT seeks a Final Order that reflects the trial court's thoughtful review of the evidence presented, *CMC Enter., Inc., v. Ken Lowe Mgmt. Co.,* 206 W. Va. 4141, 418, 525 S.E.2d 295, 299 (1999), which must by necessity address and resolve the complexities here.

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[27] *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. RENEWED SUMMARY OF ARGUMENT.

Summary judgment is not the default but rather an express finding by the circuit court that no genuine issues of material fact remain.[28] 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,[29] an express determination by the trial court that judgment as a matter of law is the necessary and proper resolution. 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 – and remain even now. Indeed, while the parties, to be precise, cited the same authorities, 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 – all as set out below and upon appeal.

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. 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

[28] *See, e.g., Goodwin v. Shaffer,*873 S.E.2d 885 (2022 Lexis 281) (April 15, 2022). Respondent's Brief at 25. Syl.pt., *Wilcher v. Riverton Coal,* 156 W. Va. 501, 194 S.E.2d 660 (1973).

[29] 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).

in the case itself.[30] Courts do justice when they "support, protect, defend and enforce . . . the rule of law, as difficult as that may sometimes be."[31]

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. "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). AMBIT seeks the right to present its view of the case to the jury upon proper instruction.

VI. STATEMENT REGARDING ORAL ARGUMENT.

AMBIT renews its Statement that this matter is suitable for oral argument pursuant to West Virginia Appellate Rule 19(a). AMBIT, by counsel, requests an opportunity to be heard.

VII. RENEWED ARGUMENT IN REPLY.

A. Introduction.

Emblematic in the voluminous recitations of facts by the parties upon appeal and emblematic in Horizon's concession that the Court 'refocused' the case after close of discovery is the fact that genuine issues of material fact remain even now. The factual issues as to the parties' intentions in entering the contract, their expectations of each other under the contract, the alleged deviations from 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. Before the Circuit Court of Marion County, Horizon and AMBIT each argued that the other breached the consulting agreement, with the Court adding a third suggested theory of the case. The parties cited the same

[30] Syl. pt. 2, *Mey v. Pep Boys – Manny Moe & Jack,* 228 W. Va. 48, 717 S.E.2d 235 (2011).
[31] *State v. Findley,* 219 W. Va. 747, 758, 639 S.E.2d 839, 850 (2006) (Concurrence, Benjamin, J.).

law relative to the issues before the Court,[32] but the parties raised conflicting facts as to the first breach (as did the Court), whether the alleged breaches were material, and whether either was amenable to cure. 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' disputed facts. Because the two parties alleged then and now widely divergent facts (as did the Court) and raised heretofore unaddressed facts and issues, the inescapable conclusion is that the matter was not ripe for summary disposition. Under West 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."[33] "[W]hether a breach is material is a question of fact."[34]

The findings of fact and conclusions of law as prepared by Horizon and entered by the Court 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.[35] 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.

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[32] While Horizon disputes even this (Response Brief at 23), the briefs themselves demonstrate that the law is the same, but, even there, the facts vary widely. AgreedApp000187, -231, citing *inter alia 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).

[33] *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.

[34] 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).

[35] AgreedApp000641.

B. Standard of Review.

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

Renewed Assignment of Error Number 1: Respondent's selective recitation of events does not change the fact that the Circuit Court erred in granting summary judgment, given the unresolved issues of fact that remain.

As demonstrated unequivocally by the parties' briefs before this Court and the pleadings below, the parties expressly have relevant, unresolved issues of fact remaining.[36] AMBIT has asserted that the breach in 2013 and forward was material and that it could not use Horizon's services as defined by the consulting standard,[37] which demonstrates under West Virginia law that AMBIT did not have a duty to pay the fee in January 2018.[38] Horizon alleged that AMBIT's failure to pay the consulting fee for the first time ever in January 2018 was the first and only

[36] Respondent's Brief at 18.
[37] AgreedApp000134, -257, 325-26, -355, -366.
[38] *Triple 7 Commodities, Inc. v. High Country Mining, Inc.,* 245 W. Va. 63, 73-74 857 S.E.2d 403, 413-14 (2021).

breach.[39] The parties' cross allegations of breach, one against the other, raised factual questions that evaded consideration and/or meaningful resolution and/or that the Court took upon itself at summary judgment, 'refocusing' the case as it did so. AMBIT did indeed 'put up' at the appropriate 'put up or shut up' moment, and it is undeniably true that each of the parties – and the Court – believed that they had law and facts that supported their claim – unfortunately, they were all various and in conflict. *Id.* As the Supreme Court has clarified, the materiality of a breach is a key determination and a factual determination to be made by a jury:[40]

Even now, Horizon's arguments raise factual disputes. Horizon argues that AMBIT's reliance on disloyal and unprofessional behaviors are an *ex post facto* rationale,[41] yet AMBIT's 30(b) witness testified in 2018 to those precise failures in 2013,[42] and AMBIT's expert witness echoed the same expectations and failures on an industry basis.[43] Even now, Horizon alleges that the contract between the parties does not require "loyalty, professional behavior or support of AMBIT's business initiatives."[44] Yet both AMBIT's 30(b) witness and its expert spoke of AMBIT's expectations, the industry expectations – indeed, the contract itself mandates ***expertise*** that even now Horizon will not acknowledge or address.[45] These are factual disputes – the intention of the parties, the scope of the agreement, the behaviors expected, allowed, exhibited – and their appearance even now is emblematic of why this matter must go before the factfinders for resolution. Where the parties are dug in, where Horizon has relied upon denial, misconstruction and bullying, both in its duties under the contract and in litigation, when AMBIT

[39] AgreedApp000005, -521.
[40] Farnsworth on Contracts, Sec. 8.16 (1990).
[41] Response Brief at 19.
[42] AgreedApp000133.
[43] AgreedApp000174.
[44] Respondent's Brief at 19ff.
[45] AgreedApp000133ff, -174. Respondent's Brief at 4.

has demonstrated the services for which it contracted[46] and how and why these are not they,[47] it is not the province of the Circuit Court to sort that out. At Horizon's request, the jury was impaneled and in the box – this matter needed to be diverted for their factfinding. Anything else is an insufficient, improper palliative that does not resolve the issues that remain.

Even now, Horizon questions the First Breach[48] but has no response whatsoever for AMBIT's Rule 30(b) witness, who testified 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] For Horizon's theory of the case to work, the missed payment in 2018 has to happen in a vacuum, the ***why*** question never gets answered – and nothing in life or law, especially with these companies, is ever that simple. Also emblematic of the failures below, Horizon argued that AMBIT provided no legal support, yet the parties both cited *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).[49] 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 should prevail 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.[50] Emblematic in the exchange before the Court that resulted in the Final Order is that Horizon disputed that any

[46] AgreedApp000138.
[47] AgreedApp000134.
[48] Respondent's Brief at 19.
[49] AgreedApp000248, -377; Respondent's Brief at 24.
[50] AgreedApp000196.

breach occurred prior to AMBIT's refusal to pay the consulting fee after faithfully doing so for thirty years.[51] 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. Even by Horizon's facts, 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. It is undisputed that Horizon cannot do the work, does not have the remaining knowledge or expertise, and the offer to hire others to do the work[52] does not resolve the breach of this personal services contract.[53] Horizon asserts that 'breach' requires a breach of a term,[54] even as Horizon fails to acknowledge, cite or address the ***expertise*** written into the contract,[55] reflected in Horizon's Complaint[56] and demonstrated in its admissions against interest that, finally, none remains. Horizon asserts that the parties' expectations in entering the contract is nothing more than a 'tertiary argument,'[57] even as Horizon argues to what the contract itself does not require (while overlooking that the contract expressly cites ***expertise***).[58] After all, Horizon by its original counsel in this matter listed ***expertise*** in the Complaint. Expertise is expressly stated in the contract. Only after admitting the unprofessional behaviors and lapsed skills does Horizon allege that the parties' expectations mean nothing.[59] Horizon alleges that AMBIT's evidence constitutes

[51] AgreedApp000194.
[52] AgreedApp000569-70, 694.
[53] AgreedApp000648, quoting Syl. pt. 1, *Poling v. Condon-Lane Boom & Lumber Co.,* 58 W. Va. 529, 47 S.E. 279 (1904).
[54] Respondent's Brief at 20.
[55] AgreedApp000006.
[56] AgreedApp000003.
[57] Respondent's Brief at 21.
[58] Respondent's Brief at 19.
[59] Respondent's Brief at 21.

'false flag' arguments[60] – but that is an argument to be made to a jury. Where Horizon argues that expertise is not defined in the contract,[61] the scope of that definition, the parties' expectations either are a jury question – or demonstrate a failure of the meeting of the minds *ab initio*. Horizon's arguments to AMBIT's facts, including whether they are true and what significance they have to the parties' contract and relationship, constitute genuine issues of material fact. The parties have two very different stories to tell about the relationship and behaviors – that is the terrain of the jury, not summary disposition. Horizon alleges that AMBIT's evidence does not matter because it is different than Horizon's. Horizon wants to focus on an unpaid invoice; AMBIT wants to focus on ***why.***

Further, it bears noting that, if the parties had no meeting of the minds at the time the contract was entered, if Horizon believed that loyalty, professional behavior and support of AMBIT's initiatives were not required, then arguably the contract does not exist. Found the Supreme Court, '"[a] meeting of the minds of the parties is the *sine qua non* of all contracts.'" Syl. pt. 2, T*riple 7*, 245 W. Va. 63, 74, 857 S.E.2d 403, quoting Syl. pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932). Further, if even now the parties disagree about the scope of the contract, the duties of each, the standards by which performance is judged, then how can the parties determine or the Court determine whether any breach has occurred.[62] As demonstrated here, they and it cannot.

This appellate process has amplified and clarified that the fundamental issues such as the scope of the contract, the expectations of the parties, any meeting of the minds are all extant. Where the parties and the Court fumbled in finding breach, it is no doubt a result of a failure to

[60] Respondent's Brief at 22.
[61] Respondent's Brief at 25.
[62] Respondent's Brief at 27.

determine the contract. This matter was not ripe for summary disposition – the factfinders must resolve these factual disputes and thereafter apply what law might apply. AMBIT moves this Court to reverse and remand this matter for further appropriate proceedings.

Renewed Assignment of Error Number 2: Respondent Does Not Refute that the Circuit Court's orders fail to reflect the arguments and proceedings below and, as such, create an obvious injustice.

In Respondent's Brief, Horizon cites nonsensically to portions of *State ex rel. Vanderra Res., LLC, v. Hummel,* including citing that (per *Vanderra* in qualified immunity), "the court must identify those material facts which are disputed by competent evidence and must provide a description of the competing evidence or inferences therefrom given rise to the disputed which preclude summary disposition." Horizon argues that *Vanderra* applies only to qualified immunity.[63] However, recently and repeatedly, the Supreme Court has relied upon *Vanderra* as support for strong orders, either at summary judgment or prior to petition for writ.[64] Horizon's harangue [65] in Respondent's Brief does not and cannot undercut AMBIT's position that the Final Order fails to reflect 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). Horizon seems to concede that AMBIT's evidence is not reflected, arguing rather whether it should be preserved by final order. [66] This appeal process has demonstrated unequivocally that the parties' motives and expectations in entering the consulting agreement remain disputed, as are the parties' duties

[63] Respondent's Brief at 29.
[64] *SER Chafin v. Tucker,* 2022 W. Va. Lexis 282 (April 15, 2022; *SER Navient Sols, LLC, v. Wilson,* 2020 W. Va. Lexis 328, *11.
[65] Respondent's Brief at 30.
[66] Respondent's Brief at 30.

under the contract, the consulting standard set by AMBIT's designated expert,[67] the First Breach, yet the Final Order fails to address, consider, acknowledge these fundamental disputes. AMBIT requested a different order below, one that would preserve its case[68] – and yet Horizon's order was entered without amendment. Horizon does not dispute AMBIT's assertions that the Final Order misstates AMBIT's case and mischaracterizes and/or fails to reflect the fundamental factual disputes that remain. Horizon does not dispute that the Final Order fails to reflect Horizon's contractual duty as set out in the agreement and in Horizon's Complaint (further failing to reflect AMBIT's evidence on the status of that expertise).[69] Horizon does not dispel the *ad hominem* attacks (which would be difficult to find as within the Court's purview).[70] AMBIT stands firm in its position that the Final Order also includes clear errors in mischaracterizing AMBIT's evidence and argument to the extent that it attempts to do so. 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 – the Court's refocus. AMBIT renews the request it made to the Circuit Court and in its initial Brief – AMBIT seeks an order that accurately reflects its arguments and the reality between the parties.

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

[68] AgreedApp000591, citing 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).

[69] *See. e.g.,* AgreedApp000134-35, -174, -683, -684-85.

[70] AgreedApp000133ff, -359

Conclusion.

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 matter be remanded for determination by the factfinders or, at a minimum that the Final Order accurately reflect 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 8th day of February, 2022, a true copy of the foregoing *"*Reply Brief of Petitioner*"* was served on counsel by electronic service:

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