INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

American Bituminous Power Partners, LP,
Defendant Below, Petitioner

vs. No. 22-ICA34

Horizon Ventures of West Virginia, Inc.
Plaintiff Below, Respondent

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This matter arises from a breach of contract claim between the parties, Horizon Ventures of West Virginia Inc. ("Horizon") and American Bituminous Power Partners, LP ("AMBIT"), arising largely from AMBIT's recent refusal to honor that contract. The facts of this case are simple-AMBIT entered into a contract in 1987 to pay Horizon fifty thousand dollars ($50,000.00) per year. In return for AMBIT's payments, Horizon would be available to perform specific consulting roles, if requested.

AMBIT paid their contractually obligated amount for approximately thirty (30) years. The parties agreed that AMBIT had not requested Horizon to perform a task under the agreement since at least 2006. In 2017, AMBIT announced it would no longer pay the amounts owed, despite its contractual obligation to do so. AMBIT then refused to pay the amount owed on the contract. In response, Horizon sued AMBIT for breach of contract.

This case was before the Supreme Court on a prior occasion, after AMBIT moved the lower court judge to grant summary judgment in its favor on the grounds that the contract at issue was unconscionable, *without* a finding of procedural unconscionability. That decision was reversed and found to be incorrect as a matter of law. After the reversal, AMBIT, again, moved for summary judgment, claiming that the Court should find the contract invalid because it was either impossible to fulfill, its purposes had been frustrated, or circumstances had changed. AMBIT's motion, however, was merely offering the Court different legal labels for AMBIT's new argument – that because AMBIT and Horizon were adverse to each other in a prior action, Horizon had breached *this* contract, and that it must be voided.[1]

[1] As discussed *infra*, none of the actual legal requirements of any of these contractual claims were met by AMBIT's claim.

Discovery closed, and both parties moved for summary judgment pursuant to W. Va. R. Civ. P. 56. On June 24, 2022, the Court held a hearing on the parties' respective summary judgment motions, at which the court asked AMBIT to explain why it should void a contract for Horizon's alleged breach when Horizon was not asked to perform under the contract. AMBIT did not respond substantively to the inquiry. Instead, AMBIT offered new legally and factually incorrect theories, including, but not limited to, the idea that because AMBIT asked Horizon to *not* demand rent in 2013, such a request qualified as asking Horizon to perform duties under the contract. Importantly, AMBIT did not, at any juncture in its oral argument on the summary judgment motion or at the hearing, claim that questions of fact still existed for a jury. At the end of that hearing, the Court explained that it believed both parties' positions to be that that the issues before the Court were those which it should decide as a matter of law, and that a jury trial was "probably not going to happen." Both parties had an opportunity to assert that factual questions existed despite the cross-motions for summary judgment. However, neither party did so.

The Court ultimately granted summary judgment to Horizon, and, in its Order, explained why the facts AMBIT presented did not satisfy the applicable legal standards it was asserting. AMBIT then moved the Court to reconsider its decision because despite AMBIT having filed three summary judgment motions claiming this case was resolvable at the summary judgment stage, it now believed that the Court had committed reversible error by *granting summary judgment to any party.* The Court denied AMBIT's Motion to Reconsider.

AMBIT and Horizon's agreement provided that Horizon would remain on retainer and provide certain services upon request, and that AMBIT would pay Horizon fifty thousand dollars ($50,000.00) per year for this service. AMBIT quit paying the contract in 2017. Horizon sued AMBIT for breach. The Supreme Court found that the agreement was not unconscionable. The

Circuit Court found that AMBIT did not ask Horizon to perform under the agreement, and that AMBIT's failure to pay was unjustified. There are no remaining "factual questions" which require resolution. As such, AMBIT's assignments of error are incorrect as a matter of law.

Nothing remains of AMBIT's defenses, nor does AMBIT currently present a legally viable defense for its breach. It has already offered, *inter alia*, an unsuccessful unconscionability defense, an unsuccessful frustration of purpose defense, and an unsuccessful impracticability defense. AMBIT claimed that summary judgment on these topics was appropriate. However, after AMBIT *lost* summary judgment on all those issues, it now claims the court committed legal error by *granting summary judgment at all*. This argument is without merit and was never argued to the lower court until AMBIT's motions were denied, as it noted in its Order denying AMBIT's Motion to Reconsider.

AMBIT's current claims - that the lower Court should have sent this case to a jury to resolve, issues such as, "the parties' intention in entering the contract," or "the parties' motive in resolving or refusing to resolve same," or whether there was a "first breach"- are meritless and contrary to AMBIT's position or "legal arguments" set forth in its Motion for Summary Judgment.

AMBIT's second appellate "argument," that the Circuit Court's Order does not find what AMBIT apparently wishes it had found - is not an appealable argument at all. Instead, it appears to exist solely as a repository for AMBIT to reiterate prior arguments or to address issues irrelevant to this, or any, legal appeal. To the extent that section does contain any appealable argument, that argument is without merit.

A. Factual History

On June 25, 1987, Horizon Ventures of West Virginia, Inc. entered into a contract ("Consulting Contract") with American Bituminous Power Partners, L.P. AgreedApp000006 –

0000007.[2] The contract obligated AMBIT to pay Horizon fifty thousand dollars ($50,000.00) per year, and in exchange, Horizon was obligated to perform the following tasks, *upon request*:

> 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.

AMBIT paid this amount, whether it used these services or not, for approximately thirty (30) years. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 4–5, 857 S.E.2d 33, 36–37 (2021). Horizon sent AMBIT the annual invoice for this payment on December 26, 2017. AgreedApp000014. AMBIT refused to pay the invoice, instead sending Horizon a letter explaining why it was not paying the bill ("letter"). AgreedApp000015.

The Supreme Court summarized the letter as follows:

> By letter dated January 27, 2018, AMBIT's executive director responded to Horizon noting that their relationship had become "considerably strained over the past several years due primarily to the ongoing litigation." Additionally, AMBIT stated that it ha[s] been engaged before the [Public Service Commission] in a battle for [its] very existence, and part of that process has mandated that [it] review every invoice with an eye to value for services rendered. With that in mind, we have taken a frank and full look at the relationship between us and at the Consulting Agreement. Given the realities of both, we believe the Consulting Agreement has

[2] The reason the Appendix is inefficiently split into an Agreed and Disputed section is emblematic of AMBIT's approach to litigation and also one of the more bizarre processes with which Horizon's counsel has ever been involved. AMBIT initially proposed the appendix contain docket sheet items 1, 9, 15, 17, 21, 23, 30, 62, 74, 75, 77, 81, 82, 84 – 87, 91, 94 – 101, and 104 – 106. Noting that these adds included substantially all of AMBIT's Motions and Responses, but left out substantially all of Horizon's Responses and Replies to the same, Horizon asked AMBIT to include docket sheet items 12, 13, 29, 39, 42, 49, and 88. AMBIT, in response, then claimed that these items were now "outside the Rules of Appellate Procedure," that documents which were not "before the Court on remand" should not be included in any appeal appendix, and ultimately tried to negotiate an agreement where AMBIT would drop items 9, 15, 17, 23, and 30 and Horizon would drop items 12, 13, 29, 39, 42, and 49. Horizon refused. Even now, AMBIT's Motion to Dismiss is part of the "Agreed Appendix," while Horizon's Response is "disputed." *Cf.* Agreed Appx. Tab. of Cont., No. 2, Disputed Appx. Tab. of Cont., Nos. 1 – 2. And that is the story of why this Court now has to wade through an "Agreed Appendix" and "Disputed Appendix" to understand the procedural history of this case.

Additionally, the Disputed Appendix, at pages 000001 – 000061, erroneously contains a second copy of AMBIT's initial Motion to Dismiss. Horizon did not ask to include a second copy of AMBIT's Motion to Dismiss. The actual requested items begin at DisputedApp000062. Accordingly, to properly use the Table of Contents to the Disputed Appendix, one must add 61 to the listed page number to locate the correct document.

> no value to [AMBIT] and that it is time to disband the Agreement and simplify our relationship to just landlord-tenant.

Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 245 W. Va. 1, 5, 857 S.E.2d 33, 37.[3] Critically, AMBIT had not asked Horizon to perform under the contract since 2006, nor does AMBIT's letter accuse Horizon of breaching the agreement.

Because AMBIT had not paid its bill and had instead, sent a letter refusing to pay it, Horizon filed suit for breach of contract on or around May 14, 2018, about five (5) months after AMBIT's initial refusal to pay. AgreedApp000003. The parties agree upon these facts. Pet'r's. Brief, p. 1, ¶ 1.

B. Procedural History

i. Pre-Appeal Litigation

AMBIT moved to dismiss Horizon's aforementioned claim or, in the alternative, be granted summary judgment, on the same. AgreedApp000021. AMBIT's argument, at that time, was that "the underlying contract is unenforceable as written, given that it is unconscionable, violative of public policy and impossible to perform, given the frustration of its purpose and the changed circumstances between the parties." *Id.*, p. 1, ¶ 1. AMBIT further incorrectly claimed that Horizon "materially breached" the contract in question. *Id.*

AMBIT's ostensible position, at the time, was that the contract *lacked* a unilateral escape clause, rendering it "unconscionable." *Id.* AMBIT also incorrectly claimed that "the Court may refuse to enforce the agreement based solely on the substantive unfairness of the agreement between the parties." AgreedApp000028; *see also Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 857 S.E.2d 33, 41 (criticizing AMBIT for

[3] AMBIT incorrectly characterizes this letter as claiming that Horizon breached the agreement in 2013 by filing an unrelated lawsuit against AMBIT. Pet. Brief., p. 1, ¶ 1 ("In so refusing …"). Notably, AMBIT does not cite the letter itself, because the letter does not actually accuse anyone of breaching anything. Instead, AMBIT refers this Court to motions it filed in this litigation, which are not "evidence" in any sense. *Id.*

misstating the law to the circuit court.) AMBIT further claimed that the parties' relationship changed, that the contract purposes were frustrated, and that Horizon breached its duty of good faith and fair dealing. *See* AgreedApp000027 – 000033.

Horizon, in response, filed an affidavit from Mr. Stanley Sears, Horizon's President, stating that "Horizon stands ready, able and willing to perform in good faith any and all services required by it to be performed pursuant to said Contract," that the "goals of the parties to the Contract are similar and that it believes" that keeping the power plant profitable benefits all parties. DisputedApp000063. Importantly, Mr. Sears also explained that "any disagreements between [Horizon and AMBIT] are unrelated to the consulting services contract and that any such disagreements do not and will not prevent [Horizon] from performing in good faith its consulting services to [AMBIT]." DisputedApp000064. Horizon also filed a Reply Memorandum in Opposition to Defendant's Motion to Dismiss, in which it explained, that "[t]he Defendant merely baldly points to unrelated litigation and disputes between the parties as grounds to justify their failure to perform under the aforesaid Contract." DisputedApp000070. The Court ultimately denied AMBIT's Motion to Dismiss on August 14, 2018 and took the summary judgment motion under advisement until discovery had been conducted. DisputedApp000073.

Less than three months later, AMBIT filed a Motion for Summary Judgment, again claiming that the contract was substantively unconscionable because it lacked a unilateral exit clause. DisputedApp000080 – 000082. AMBIT also alleged that Horizon had "materially breached" the agreement because, *inter alia*, that Horizon "has become … partisan and adverse to AMBIT," and because AMBIT "is dissatisfied with Horizon's disloyal, disruptive and amateurish behaviors." DisputedApp000080 – 000081. AMBIT also claimed that Horizon had breached the agreement by "failing to support AMBIT's regulatory and business decisions in operating its

plant." DisputedApp000081. AMBIT spent the rest of its brief explaining how, *during depositions*, it claimed that Mr. Sears was allegedly not knowledgeable enough for AMBIT's liking. DisputedApp000095-000096.

As discussed *infra*, none of these issues would, or could, constitute breach of this contract, and are not meaningful to any legal analysis of this contract. Horizon filed a short reply, explaining that discovery had just begun, only two depositions had been taken, and that the motion was premature. DisputedApp00191 – 000192. AMBIT filed a brief reply, claiming, *inter alia*, that the contract was somehow "commercially unreasonable," and that Horizon engaged in "treachery and disloyalty," among other epithets. AgreedApp000105 – 000170. Nevertheless, on January 19, 2019, the lower Court granted the motion, finding specifically that the contract was procedurally compliant, but substantially unconscionable, and that the contract violated public policy. DisputedApp000201 – 000202. Horizon appealed.

ii. Appeal Arguments

The Supreme Court found that the lower court failed to find procedural unconscionability, but also specified that there *was no* procedural unconscionability, eliminating unconscionability as a defense going forward. *Horizon Ventures of W. Virginia, Inc. v. American Bituminous Power Partners, L.P.*, 245 W. Va. 1, 11, 857 S.E.2d 33, 43 (2021). The Supreme Court further found that the consulting agreement did not violate public policy, and that AMBIT cited inapplicable New York law in support of their claim that public policy was, in fact, violated. *Id.* at 1-2, S.E.2d at 44.

The Court further explained that:

> [Y]ou are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of

> justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.

State v. Memorial Gardens Development Corp., 143 W. Va. 182, 191, 101 S.E.2d 425, 430 (1957) (*quoting Baltimore & Ohio Southwestern Railway Co. v. Voigt*, 176 U.S. 498, 20 S. Ct. 385, 387, 44 L. Ed. 560 (1900)). The Supreme Court elaborated, explaining that "[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *Horizon* at 11 – 12, S.E.2d at 43 – 44.

Justice Hutchinson, in his concurrence, explained:

> But the equitable doctrine of unconscionability "permits courts to protect parties from grossly unfair, unconscionable bargains; it does not permit courts to protect commercial litigants from stupid or inefficient bargains willingly and deliberately entered into." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 497, 729 S.E.2d 808, 819 (2012). I have no idea whether any mendacity was afoot in 1987 when AMBIT agreed to pay Horizon an annual chunk of change for "consulting," but the existing record points to this contract fitting the definition of a "stupid or inefficient bargain willingly entered into."

Horizon at 13, S.E.2d at 45. The Supreme Court therefore addressed, and specifically eliminated, AMBIT's unconscionability and public policy arguments and remanded for further proceedings consistent with its opinion. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 12, 857 S.E.2d 33, 44 (2021).

iii. Post-Appeal Arguments

Upon remand, the parties appeared at a status hearing on September 28, 2021. AMBIT claimed that "the breach came in 2017." Specifically, that "[e]verything [AMBIT] filed before this Court demonstrates that we believe the breach came in 2017 when Judge Young ruled that the suit Horizon filed against AMBIT was baseless and that ruling came on August 31, 2017."

AgreedApp000217, 4:18 – 4:23.[4] AMBIT also offered, *inter alia*, that it continued to intend to defend the case, apparently by whatever means necessary, to avoid having to pay Horizon the money AMBIT owed it:

> It would be our position that the thing we have to do now, is we believe that the contract, as the Court is aware, is a bad contract and whether that's under changed circumstances, impossibility, you know, their breach, whatever it is, we intend to continue fighting the consulting agreement, and we would fight the providing them any money at this time.

AgreedApp000218, 5:6 – 5:12.

Notably, at the September 28, 2021, hearing, AMBIT incorrectly claimed that the Supreme Court "did not find that we were wrong, just found that the allegations we were raising relative to change of circumstances, impossibility of breach were all fact-based and that the Court didn't have to reach those yet, and that's because there was a legal defense." AgreedApp000219, 6:5 – 6:16. It also claimed that the Supreme Court found that AMBIT had just *failed to argue* procedural unconscionability and threatened to bring up the issue again. AgreedApp000219, 6:16 – 6:19.

Both these statements are demonstrably false. The Supreme Court found, specifically, that **"the consulting agreement was not procedurally unconscionable**." *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 11, 857 S.E.2d 33, 43 (2021) (emphasis added). Further, the opinion does not contain any language indicating that the Court believed AMBIT's allegations regarding change of circumstances and impossibility of breach were all fact-based and should be further examined – the Supreme Court only examined the

[4] Defendant is referring to a ruling in Civ. A. 13-C-196, a lawsuit between the two parties unrelated to this one.

unconscionability and public policy issues since those were the only issues upon appeal, and specifically identified impossibility, frustration of purpose, and changed circumstances as not relevant to the appeal. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 5, 857 S.E.2d 33, 37 (2021). The lower Court accordingly determined that AMBIT's other defenses remained before the Court, and that the parties would proceed with discovery. AgreedApp000224 – 000225, 11:10 – 12:15.

The parties took additional depositions, filed witness lists, and even participated in mediation. *See* Dkt. Nos. 66 – 78. All parties further agreed that dispositive motions would be filed on or before June 3, 2022. The parties timely filed respective summary judgment motions.

Horizon argued that the contract in question is not unconscionable, not violative of public policy, and further explained that there is no evidence to legally support AMBIT's positions that the contract was somehow impossible to perform, the purpose was frustrated, or the circumstances have changed in a legally cognizable manner. *See* AgreedApp000195 – 000200 (legal argument discussed further *infra*.) Out of an abundance of caution, Horizon also went through AMBIT's Answer and responded to each affirmative defense that AMBIT alleged. AgreedApp000201 – 000207.

AMBIT's position, in its Motion for Summary Judgment, was that the contract was either "impossible," or "frustrated," or suffered from "changed circumstances" because AMBIT deposed Horizon representatives in 2021 and 2022 and they failed to answer political trivia questions, which AMBIT offers as "undisputed evidence" that Horizon did not have the "expertise" necessary to fulfill the contract at the time of its breach in 2017. AgreedApp000232, p. 1, ¶ 2. [5] Of course, a company representative's inability to name a particular senator at a deposition taken in 2022 has

[5] Throughout this litigation, Horizon believes that AMBIT has used the terms "impossibility," "frustration of purpose," and "changed circumstances" interchangeably because it supports them all with the same "facts."

no legal bearing on whether that company failed to provide services under a contract breached by another company in 2017, and is evidence of nothing at all.

AMBIT also reiterated its claim that Horizon somehow breached the consulting agreement by filing an unrelated lawsuit in 2017, by being contrary to AMBIT in public, and because, based on *deposition testimony*, Horizon's officers were no longer qualified to provide the "expertise" in question. AgreedApp000233, p. 2, ¶¶ 1-2.

AMBIT's *post hoc* unilateral determination that Horizon was now incapable of performing its tasks under the contract, determined *five years* after AMBIT first breached the contract, is not evidence of anything at all. Horizon's position, in its Response, was, in short, that "AMBIT entered into a contract with Horizon in which it paid Horizon a retainer to consult on specific matters when asked," and that it never took advantage of those services. AgreedApp000522 – 523. No factual predicate for a breach, *i.e.*, AMBIT asking Horizon to perform a duty listed in the contract, took place. Horizon cannot breach an agreement under which it was never actually asked to perform. As Horizon explained:

> AMBIT's primary argument, which takes up pages 2-18 of AMBIT's 19-page brief, kludges together multiple issues in an attempt to mislead this Court as to the standards which need to be applied, if any, to each of these arguments. In reality, this "argument" exists as a sort of decorative backdrop by which AMBIT can peddle its *actual* near-incoherent theory of law which can best be summarized as:
>
> 1. AMBIT deposed some Horizon principals during the pendency of this case;
> 2. AMBIT claims Horizon's representatives would not have given good advice if asked; and
> 3. This Court should *ex post facto* ratify AMBIT's failure to satisfy its obligations under the contract because AMBIT does not like the things Horizon's representatives said, and because Horizon sued AMBIT.
>
> None of this has anything to do with the legal terms "frustration of purpose" and "impracticability," and it especially has nothing to do with "changed circumstances," which is not even a functional legal rule in West Virginia. *See* Horizon's Mot. for Sum. Judg., pp. 8-14.

AgreedApp000523. Horizon also pointed out that the letter informing Horizon of AMBIT's intent to breach its agreement does not make anything "evident." The letter contains no words accusing Horizon of breaching its agreement. Rather, it "question[s]whether Horizon is the appropriate entity to provide meaningful expertise or realistic consulting services," and that the litigation between the parties is "divisive and wasteful." AgreedApp000530, p. 10, ¶ 2. The letter also claims, *inter alia*, that AMBIT cannot afford to pay Horizon's fee, and that their interests are not aligned. AgreedApp000537.

AMBIT's Reply to Horizon's Response *again* claimed that the issues in this matter should be resolved by summary judgment, and that AMBIT "seeks a judicial determination based upon the unambiguous contract, the admissions and testimony of Horizon's principals that the Agreement is unenforceable based on impossibility, frustration, breach, and commercial impracticability, and a determination as a matter of law that Horizon has failed in its duty of good faith and fair dealing." AgreedApp000542. Notably, none of AMBIT's pre-trial dispositive filings claim that questions of fact exist, or that additional discovery is necessary.

iv. Dispositive Motions hearing and final arguments

The parties attended a hearing on their respective dispositive motions on June 24, 2021. AgreedApp000547 – 000590. Horizon reiterated its assertion that AMBIT had never asked it to perform under the contract, and thus had no basis to claim that Horizon breached the agreement in any way. AgreedApp000550 -000553.

AMBIT initially appeared to argue that because Horizon did not do discovery after the case was remanded or complete errata sheets for the most recent depositions, Horizon's Motion for Summary Judgment should be denied. AgreedApp000558, 10:16 – 10:20. However, the Court refocused the case and asked AMBIT if it had ever asked Horizon to perform under the contract:

THE COURT: Has AMBIT asked anybody from the other side to perform any services for them?

MS. GREEN: They -- they have paid them every year for 30 years.

THE COURT: I know they have paid. Have they ever -- have they ever made a request for services that weren't supplied?

MS. GREEN: Uh, not since they notified them of the breach. Before that, certainly for 30 years, they did -- I think the last request was in 2006.

AgreedApp000559, 13:1 – 13:10. The Court continued:

THE COURT: And I am sorry to interrupt you, but just a couple things stand out that I want to get clear in my head.

When you say they notified them of the breach, you're talking about the letter?

AgreedApp000559, 13:11 – 13:15. AMBIT's answer regarding whether the letter Mr. Halloran sent was intended to be notification of breach. AMBIT's answer is as follows:

MS. GREEN: I am, but the letter actually -- and because they filed suit as soon as they got that letter, you know, that letter was to indicate the breach and also to try to activate the exit clause. Remember the exit clause? So you have to at least ask before you can say it's breached. So it's like, you know what, they raised -- they raised defenses in the 2013 litigation that demonstrated a fundamental lack of knowledge about waste coal and coal production, indicated an absolute fundamental misunderstanding

or lack of knowledge relative to remediation. So the allegations about the ash cap on the Joanna parcel, the allegations about the value of waste coal, demonstrated an absolute fundamental misunderstanding of AMBIT's business. So

AgreedApp000559, 13:16 – 14:4. This convoluted response to a straightforward question from the Court continued for a while.[6] Ultimately, the Court interjected and again asked AMBIT when it asked Horizon to perform under the contract:

THE COURT: And when did -- and when did you ask them to exercise their expertise?
MS. GREEN: I think in the litigation actually, Your Honor, when they heard the things coming out of the mouths of Horizon, that's what started the process, and that was, you know what -- and in fact, you don't have to --
THE COURT: But that's the --
MS. GREEN: Yes.
THE COURT: My question is, when did your client ask for them to exercise their expertise in any form or fashion, do any act, comply with their obligations in the contract, and they were not able to do it or failed to do it?

Not speculating that they might not be able to. When did they fail -- when were they asked --
MS. GREEN: Sure.
THE COURT: -- and when did they fail?
MS. GREEN: Sure. So in 2013, and not to dig too far into the weeds of the last litigation. In 2012, Senior Debt was in default. That means, so as the Court is

[6] Horizon asks that this Court carefully review the transcript of this hearing at AgreedApp000547 - 000590, as it is impossible to fully set forth AMBIT's repeated inability and/or refusal to answer simple questions from the Court without exceeding the page limitation provided.

AgreedApp000562 – 563, 16:13 – 17:7. Again, AMBIT refused to substantively answer the question, and, instead discussed Senior Debt and other lawsuits unrelated to the contract at issue in this case. The Court continued:

THE COURT: So you're telling me the filing of the lawsuit is the just -- I guess I'm hearing you tell me that that is your justification then to say that the -- that the contract should not be adhered to? I mean --

MS. GREEN: Well, I --

THE COURT: I don't hear any -- because I still haven't heard you answer my question --

MS. GREEN: Right. Well, I think --

THE COURT: -- as to when there was any request for services to be done or any inability to provide those after that request was made.

MS. GREEN: Well, as -- so after the request that, you know, we're under water on the banks, we're in default with the banks, so you know --

THE COURT: That's just asking to be patient. That's not a request for expertise.

MS. GREEN: No, no. It's a real live formal request.

THE COURT: For what?

MS. GREEN: Well, it's actually supposed to be those operations between the parties and then after that, Your Honor --

AgreedApp000564 – 000565, 18:17 – 19:14. AMBIT never offered a legitimate answer to the Court's simple question – when did AMBIT ask Horizon to perform under the contract? Or, in other words, *when and how did Horizon breach?*

At the close of summary judgment arguments, the Court explained to both parties that it understood both parties' positions to be questions of law:

> All right. Let me -- given the positions of the parties, both sides are basically indicating, as I understand the arguments, that this is a question of law for the Court to decide that's going to in effect, at least, be a decision that would be a final decision subject to any appeals of the Court's decision. So given that, I'm not so sure that a jury trial is going to happen in this case, given the position of the parties, although we picked a jury yesterday.

AgreedApp000579, 33:13 – 33:20. AMBIT did not, at any point, object to the Court's assertion, nor claim that the Court was mistaken or that there were "numerous unresolved questions of fact for a jury," as it now claims. Notably, *too, AMBIT did not identify any unresolved questions of fact anywhere in its Findings of Fact section in its Proposed Order Granting Summary Judgment*, either. *See* AgreedApp000593 – 000613.

Ultimately, after the parties filed objections to each other's proposed orders, the Court granted summary judgment to Horizon. AgreedApp000680 – 000698. AMBIT filed a Motion to Alter or Amend Judgment, claiming, for the first time, that unresolved questions of material fact existed, and that the Order somehow "mischaracterized" AMBIT's positions. AgreedApp000701 – 000708. The trial court denied that motion as well, explaining that the factual recitations in the Order were accurate. Specifically, the Court explained that "[i]t is undisputed that the contract exists and that the annual consulting fee has not been paid since 2017." AgreedApp000712. The

Court additionally noted that "[w]ithout sufficient grounds to alter or amend the judgment the Defendant now argues that the matter was not actually ripe for summary judgment consideration, entirely contradictory of its previously asserted position during the motions practice." *Id.* Finally, the lower Court explained, unequivocally, that AMBIT's continued references to other cases between the parties are "entirely unrelated to the matters at issue in this action." *Id.*

II. SUMMARY OF ARGUMENT

AMBIT's instant claim that the Court erred by granting summary judgment, *after it had moved the Court for summary judgment multiple times*, is without merit. AMBIT lost this case at the summary judgment stage because the undisputed facts of the case show that, in 2017, AMBIT stopped paying a contract to which it was bound, without legal justification. AMBIT lost because it incorrectly based its claim largely on Horizon's inability to perform its duties under the contract, even though AMBIT *never asked Horizon to perform specific tasks under the contract*. Moreover, the Circuit Court's Order specifically addresses each argument set forth in AMBIT's Motion for Summary Judgment, with more coherent analysis of the legal standards for each than AMBIT has set forth in at least three motions, let alone in this appeal.

AMBIT's second assignment of error does not address an appealable issue. However, if the Court's Order is somehow legally faulty, such an error would necessarily fall under AMBIT's first assignment of error. If it is not, then it does not appear to be in this Court's power to demand the lower court rewrite its Order, not to correct an actual wrong, but to "fix" alleged "mischaracterizations" to which AMBIT apparently disapproves.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case meets the qualifications for oral argument under W. Va. R. App. P. 19(a) because AMBIT is claiming that the lower court committed assignments of error in the application of

settled law. A memorandum decision is likely appropriate, though AMBIT did not specify its preference in its brief as required by W. Va. R. App. P. 10(c)(6).

IV. ARGUMENT

A. The Circuit Court properly granted summary judgment because there are no relevant, unresolved issues of fact remaining in this case.

The Circuit Court's Order correctly found that AMBIT breached the contract in this case when AMBIT failed "to pay the $50,000.00 due to Horizon in 2018, and by failing to pay it every additional year this case has been pending." AgreedApp0000697. The Court further found that AMBIT admitted that it had not asked Horizon to perform under the contract since 2006, and that AMBIT did not provide evidence that Horizon was either asked to *perform* a duty, or that it *breached* a duty. *Id.* Ultimately, the lower Court correctly found that AMBIT could not claim Horizon breached a contract under which it was not asked to perform. *Id.* It also found, in detail, that AMBIT did not adduce facts which would allow the Court to void the contract for impracticability, frustration of purpose, or breach of the duty of good faith and fair dealing. *Id.*; *see also* AgreedApp000688 – 000696 (analyzing the facts of the case under each successive legal rubric). At the time Horizon's Motion for Summary Judgment was granted, no party claimed that there were unresolved issues of fact, and, as the Court noted later, AMBIT represented to the Court that the matter was ripe for summary disposition. AgreedApp000712. AMBIT's arguments to the opposite are without merit.

i. AMBIT incorrectly alleges a faulty basis for breach of contract, and there is and was no need for the Court to send questions of fact regarding the alleged "materiality" of any breach to a jury.

AMBIT begins its argument section with fundamentally and materially wrong assertions about Horizon's alleged breach of contract. "A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." Syl. Pt. 1,

State ex rel. Thornhill Group, Inc. v. King, 233 W.Va. 564, 759 S.E.2d 795 (2014); *see also Wetzel County Savings & Loan Co. v. Stern Bros., Inc.*, 156 W.Va. 693, 698, 195 S.E.2d 732, 736 (1973), *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015).

AMBIT predicates its entire claim on its mistaken belief that it was allowed to breach the consulting agreement in 2017 because Horizon breached the consulting agreement in 2013 first "by and through Horizon's disloyal and unprofessional behaviors, failure to support AMBIT's business initiatives, and its demonstrated failure of expertise." Pet'r's Br., p. 15, ¶ 1. This is both an *ex post facto* rationale not evidenced by AMBIT at the time of the breach, and a demonstrably incorrect interpretation of Horizon's responsibilities under the plain language of the contract.

First, the actual letter between the parties does not mention any sort of breach by Horizon. AgreedApp0000015 – 000016. As the Supreme Court explained, the letter merely informed Horizon that AMBIT believed their relationship to be "strained," that it was "review[ing] every invoice with an eye to value for services rendered," and that it found the Consulting Agreement had "no value to [AMBIT]," so AMBIT was choosing to unilaterally disband the agreement. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 5, 857 S.E.2d 33, 37. AMBIT then refused to pay their contractually obligated bill. AMBIT did not identify any "first breach" at all until Horizon filed suit and AMBIT had to come up with something so it could continue its longstanding practice of paying endless legal fees instead of monies it owes Horizon.

Second, and perhaps, more importantly, the contract between the parties does not require Horizon to show loyalty, professional behavior, or support of AMBIT's business initiatives. The operative language in the contract is as follows:

> 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.

AgreedApp000007. The contract further states that "[t]his Contract and Agreement sets forth the *entire understanding and agreement* between the parties. It may not be amended, terminated or otherwise changed except by a writing signed by both parties." *Id.* Put simply, Horizon *had no contractual duty to do any of the things AMBIT claims it failed to do*.

Horizon *is*, however, required, upon request, to provide public and governmental relations, liaison functions necessary or incident to aiding and assisting AMBIT in "locating, permitting, licensing, developing, maintaining and operating power plants" in West Virginia, and to help locate coal resources ***upon a reasonable request by AMBIT***. AgreedApp000007. **AMBIT admits it did not make a request to Horizon under the contract *since 2006***. AgreedApp000559, 13:1 – 13:10.

AMBIT claims that Horizon breached its contract because it failed to do three tasks which are not in the contract, and one task which it was never actually asked to do. However, a breach of contract claim requires that someone *breach a term of a contract*.[7] The lower court correctly found that Horizon did not breach the agreement. AgreedApp000686, ¶¶ 33, 35.

AMBIT's claim that the lower Court erred by failing to have a fact-finder determine if Horizon's "breaches" were "material" is without merit. The pages AMBIT dedicates to explaining how material breach works have no bearing on this case because the Court found that *Horizon did not breach the contract.* No factfinder needs to determine if non-existent breaches are material. AMBIT's "first breach" claims, as well as any ancillary claims about the "materiality" of

[7] Failing to pay $50,000.00 which you agree unequivocally to pay is a great example.

nonexistent breaches, are without merit, and the lower Court had no responsibility to entertain them.

ii. AMBIT's tertiary arguments are similarly misguided and irrelevant.

The remainder of AMBIT's appeal argument relies upon non-issues as "questions of fact" which it incorrectly alleges require resolution. For example, AMBIT claims that "questions of fact" exist as "each of the party's expectations in entering the contract, what each party expected of each other, and whether Horizon had failed to comply with consulting standards." Pet'r's Br., p. 19, ¶ 1. None of these "disputed facts" matter. One of the most basic rules of contract law is that if the document clearly expresses the intent of the parties, no more analysis is necessary or even appropriate:

> A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.
>
> 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.

Ascent Res. - Marcellus, LLC v. Huffman, 244 W. Va. 119, 125, 851 S.E.2d 782, 788 (2020) (quoting Syl. Pts. 1 and 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962)). Here, the parties' expectations of each other are clearly set forth *in the contract*. The contract even *specifies* that the agreement "sets forth the entire understanding and agreement" between the two. AgreedApp000007. Moreover, it is not as if the parties entered into this deal lightly. As the Supreme Court explained:

> The 1987 contract was one of many deals negotiated and signed in the late 1980s as part of the construction of a $100 million power plant that the parties expected would operate for at least four decades. Lawyers, bankers, bond specialists, business folks, all sorts of sophisticated actors swirled through the project when the contract was signed. AMBIT dutifully complied with the consultation contract and,

> by my calculation, paid Horizon $1.5 million over thirty years before someone at AMBIT decided to claim the contract terms were unfair.

Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 245 W. Va. 1, 13, 857 S.E.2d 33, 45 (2021). There was no reason for the lower Court, or any court, to delve into ancillary speculative opinions about the respective expectations of each party. Doing so would have been error and in clear violation of *Cotiga* and its progeny.

AMBIT also inexplicably complains that the Order does not include, *inter alia*, any discussion about AMBIT's "designated expert" who purported to explain that Horizon *did* breach the contract and did not "comply" with consulting standards, and does not "reflect AMBIT's evidence that, as a result of Horizon's behaviors with and in the 2013 litigation," AMBIT needed to prove to its banks that it was not guilty of wrongdoing. Pet'r's Br., p. 20, ¶ 2. These are all false flag arguments that have *nothing to do* with AMBIT's failure to pay fees under the consulting contract.

AMBIT's "expert" complaint is particularly specious and evinces AMBIT's repeated attempts to push ill-founded arguments before the Court. AMBIT named Kenneth Niemann, its *own executive director*, as an "expert" on how consultants should behave. AgreedApp000175. AMBIT was *outraged* at the hearing that Horizon failed to depose him or show any interest in his opinion, and apparently is still upset that Horizon does not consider him a meaningful part of this litigation.[8] AgreedApp000558, 12:16 – 12:24.

AMBIT spent significant time throughout its Summary Judgment motion, the June 24, 2021, hearing, and the subsequent pleadings, including this one, complaining that Horizon did not depose AMBIT's "witnesses" and did not conduct enough discovery, submit errata sheets, ask

[8] Horizon's counsel felt that any alleged "need" to take Mr. Neimann's deposition was obviated by the clear evidence supporting Horizon's Motion for Summary Judgment and chose not to waste his client's money on the same.

enough questions at depositions of its own witnesses, or whatever other pettifoggery AMBIT is manufacturing outrage about at any given time. *See, e.g*; Pet'r's Br., pp. 19 – 20.

However, AMBIT's complaints fail to appreciate that all of these depositions attempting to show motive, or expectation, or whatever other manufactured legal issue AMBIT is claiming, *do not matter*. The Order did not need to reference the 2013 litigation between the parties because *it does not matter to the instant case.* The Order does not need to reference Horizon's "expert" because he *does not matter*. The language of the contract is clear and unambiguous. AMBIT did not ask Horizon to perform under the contract. AMBIT refused to pay its bills under the contract. Ergo, AMBIT breached the contract.

iii. AMBIT's assertion that it and Horizon provided the same "legal support" for their positions is incorrect.

AMBIT's brief claims that there were unresolved contractual ambiguities in the agreement which no one discovered until after its Motion for Summary Judgment was denied. This argument also oddly incorporates the case law on impracticability and other legal remedies but is devoid of actual discussion on the topic. AMBIT begins this discussion by misstating the parties' legal submissions to the Court, explaining that "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).

While both parties *cited Waddy v. Riggleman*. AgreedApp000195, 000235.[9] AMBIT is incorrect when it claims that both parties used it for "legal support." It is Horizon's understanding that "legal support" refers to a citation of a legal authority that benefits one's position. AMBIT

[9] AMBIT's citation to AgreedApp000248 and AgreedApp000377 for this point is inaccurate; those citations reference, respectively, a random page in AMBIT's Motion for Summary Judgment consisting of mostly Stanley Sears quotes, and Horizon's Petition to Intervene in a Public Service Commission hearing case. Horizon believes the above citation accurately represents AMBIT's intended targets, but perhaps not.

cites *Waddy* as a prop and does not meaningfully analyze any facts in the case under the appropriate rubric set forth by *Waddy* and the Restatements. *See* AgreedApp000236 – 000249. AMBIT instead dedicated those thirteen (13) pages in its Motion for Summary Judgment insulting Horizon's principals and explaining why *it does not believe* AMBIT could fulfill its contractual obligations. That belief is, of course, irrelevant to any determination of whether Horizon actually *failed* any contractual obligation under *Waddy*.

In contrast, Horizon and the Court, analyzed the rubrics for impracticability, frustration of purpose, and breach of the duty of good faith and fair dealing provided in *Waddy* and in the Restatements cited in that case, and therefore provided *legal support* for the position that AMBIT's defenses did not actually apply to the case. *Cf.* AgreedApp000195 – 000206, 000689 – 000697. The Court, whose Order AMBIT maligns as inaccurate, applied the standards of each law to the facts of the case. AMBIT, throughout its dispositive motion responses, motions to reconsider, and this appeal brief, has consistently failed to apply the facts of this case to the actual standards for each of its affirmative defenses, presumably because it cannot do so. The Court was correct when it found this in its initial Order, and nothing AMBIT has presented in its instant appeal undermines the Court's finding.

iv. AMBIT's claim that there are "ambiguities" in the contract is without legal or factual support.

AMBIT next claims that there are "ambiguities" in the contract because AMBIT disagreed about the duties present in the contract. Pet'r's Br., pp. 22 – 23. AMBIT also claims that a factfinder needs to determine whether Horizon is allowed to seek assistance when providing consulting, or whether Horizon is required to do the work itself. *Id.* at 23, ¶ 1. However, there is no meaningful ambiguity present in this agreement. As AMBIT itself noted, both parties agreed that there were no ambiguities in the agreement. *Id.* at 22, ¶ 2. The fact that AMBIT now believes

that there are unlisted duties in the contract related to, *inter alia*, loyalty, kindness, an ability to answer trivia questions in depositions, or whether Horizon can subcontract obligations for which it requires assistance is of no moment.[10] The contract clearly sets forth the agreement, as stated previously:

> 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.

AgreedApp000007. To the extent that AMBIT is arguing about the definition of "expertise" as set forth in the introduction to the contract, the above section defines what "expertise" Horizon is expected to use. There are no other definitions within the contract, and the contract expressly states that it is the "entire understanding and agreement between the parties." *Id.* AMBIT has no basis to assert that Horizon breached an unambiguous agreement because it failed to complete some unstated duties which are not listed in that agreement.

Moreover, it is not the Court's job to answer theoretical questions about what constitutes an ambiguity in this agreement. The Court's job is to determine whether the contract was breached. It does not matter what duties a provision conveys upon a party if the other party *never asks them to perform those duties under the contract.* The contract at issue does not have any patent or latent ambiguities. The parties' responsibilities are clearly set forth therein. No one was confused about their respective responsibilities for three decades. AMBIT was, apparently, not confused about them until it lost its Motion for Summary Judgment, at which time it "discovered" these

[10] Some examples of AMBIT's highly relevant questions posed in depositions include, but are not limited to, asking Andrew Noshagya whether he knew the current West Virginia Supreme Court justices or the current legislators from "Mariott" (presumably Marion) County, whether Michael Shaw, Jr., read the New York Times, Charleston Gazette, or Coal Age, whether he knew of "any of the current issues for coal-fired plants," or whether he knew what EEPA, PURPA, or FERC stood for. *See* AgreedApp000332, 000333, 000358, 000359.

ambiguities. *See* AgreedApp000712 – 000714. As the Court correctly found, AMBIT did not provide evidence that Horizon breached any of its stated responsibilities under the agreement. *See, e.g.*, AgreedApp000687 – 000688.[11]

Finally, AMBIT's attempt to claim that "the Court's factual inquiries exceeded the scope of either parties' motions and led to submission of additional supporting evidence" is patently incorrect. Pet'r's Br., p. 27, ¶ 3. The Court merely asked AMBIT to explain whether it had ever asked Horizon to perform under the contract. *See generally* AgreedApp000547 – 000590. This line of questioning by the Court was entirely proper and should have been expected because it was a focus of Horizon's Motion for Summary Judgment and its Response to AMBIT's Motion for Summary Judgment. *See* AgreedApp000196 – 000197, 000530 – 000531. The fact that AMBIT decided to turn answering this simple, and relevant, question into forty-three (43) transcribed pages of non-responsive argument, is no fault of the Court's. AgreedApp000547 – 000590.

AMBIT's arguments do not comport with the relevant facts and law of this case. The case is simple and straightforward, no matter how much AMBIT convolutes the issues. AMBIT admits it did not ask Horizon to perform under the contract before unilaterally breaching it and failing to pay its bills. It has since then come up with a series of *post hoc* reasons and recharacterizations of its actions which are unsupported by the plain language of the contract and of the facts immediately surrounding that contract, *i.e.*, the letter AMBIT sent Horizon declaring its intent to breach the

[11] AMBIT briefly mentions that the Supreme Court "detected" an ambiguity in the contract when it explained that there were disputed facts as to the nature of the consulting agreement. *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 12, 857 S.E.2d 33, 44, fn. 17 (2021). The court here was discussing how AMBIT failed to meet the summary judgment standard to succeed on its public policy claim because it relied only on Mr. Sears' testimony. The court even specifically explained that it was "assuming without deciding that this evidence is appropriate to construe this consulting agreement." While Mr. Sears' testimony may or may not have been relevant to determine whether the contract was somehow in violation of public policy, it certainly is not relevant to determine whether AMBIT or Horizon breached that contract.

agreement. AMBIT's attempts to add responsibilities to the contract, conjure ambiguities which were not noticed by any party, nor any Court, and blame the Court for not including AMBIT's ancillary arguments in its Order are all *non sequiturs*. AMBIT simply cannot overcome the fact that it did not ask Horizon to perform a contractual duty, before breaching the contract by failing to pay monies it was contractually obligated to pay.

AMBIT's brief sets forth these *non sequiturs* when it argues:

> 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. ***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, AMBIT countered that this is a personal services contract, entered on the basis of Horizon's expertise, which cannot be assigned. 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 of any breach. 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.

Pet'r's Br., pp. 21 – 22. However, it is AMBIT who is "missing the point." AMBIT appears incapable of understanding is that *Horizon could not have breached any consulting standard without being asked to consult*. AMBIT cannot *ever* succeed on this matter because they did not ask AMBIT to perform a duty under the contract. No matter how many of AMBIT's own executives it tries to classify as a consulting expert, no matter how many depositions it takes where a Horizon official says mean things about AMBIT or forgets a legislator's name, no matter how many false claims about surprise ambiguities or unstated duties it conjures, the *relevant* facts remain the same.

AMBIT did not notify Horizon of any alleged breach of the consulting agreement in 2013. AMBIT did not notify Horizon of any alleged breach of the consulting agreement in 2017. AMBIT admits it did not ask Horizon to perform under the agreement after 2006. AMBIT sent Horizon a letter in 2017 stating that the parties were not getting along, that it believed the consulting agreement was not working out, that it needed the money, and that it was ultimately breaching the contract because it did not feel that the contract had value. AgreedApp000015.

The Court's decision to grant summary judgment to Horizon was and is factually and legally correct.

B. The Circuit Court's Order accurately reflects the relevant arguments and proceedings in the lower Court.

The remainder of AMBIT's brief sets forth the "argument" that "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 erroneous." Pet'r's Br., p. 28, ¶ 1. However, this argument does not appear to be a relevant appealable issue – as stated above, if the trial court's Order contains legal errors, then a party can appeal those errors, as AMBIT has done here.

AMBIT's citations claiming that it is entitled to relief simply because it does not like the trial court's Order misrepresents their respective purposes. AMBIT first cites Syl. Pts. 5 and 8 of *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 829 S.E.2d 35 (2019) for the principle that "it is incumbent upon litigants to request the type of order necessary to preserve their rights." Pet'r's Br., p. 29, ¶ 1. The actual syllabus points are as follows:

> 5. "A circuit court's order denying summary judgment on qualified immunity grounds on the basis of disputed issues of material fact must contain sufficient detail to permit meaningful appellate review. In particular, 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 giving rise to the dispute which preclude summary disposition." Syllabus Point 4, *W. Va. Dep't of Health and Human Resources v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013).

> 8. "A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders." Syllabus Point 6, *State ex rel. Allstate v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998).

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 829 S.E.2d 35 (2019). There are no qualified immunity grounds present in this case, nor is a party petitioning for an extraordinary writ, rendering the value of this citation questionable at best. Similarly, *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 219, 719 S.E.2d 381 (2011) deals with "invited error," where a litigant essentially attempts to create a ground for appeal by acquiescing to a ruling it knows to be incorrect. *Id.* at 387. While Horizon does not dispute that AMBIT invited the trial court to commit error, no party has done so in the fashion discussed in *Hopkins.* AMBIT's ability to demand this Court tell the lower court to rewrite its Order because AMBIT did not like its use of footnotes, for example, is not supported by these cases. AMBIT does not offer any additional legal support for its contention that this Court can and should conduct examination of a lower court's drafting style.

AMBIT did submit a Response to Horizon's Proposed Order in which it "identified errors" in Horizon's Proposed Order including, but not limited to, the following critical issues of law and fact:

> 5. Horizon has embedded key facts in footnotes, a practice which AMBIT opposes in an order potentially subject to appeal.[19] That is, the order needs to reflect proceedings and both parties' positions relative to the allegations and defenses (which AMBIT attempted to do in its proposed order), yet Horizon continues its practice of omitting the full negotiations between the parties in the consulting agreement – embedding the WHEREAS negotiation solely into a footnote. Specifically, Horizon's Proposed Order substantively excludes AMBIT's arguments that the parties *negotiated* the agreement to include Horizon's agreement that it would provide expertise. The full set of negotiated terms needs to appear in the substantive portion of any order. In a nutshell, Horizon quotes paragraph 2 from the contract without including or addressing the initial WHEREAS that demonstrates that the key duty of expertise was negotiated between the parties.[20]

AgreedApp000647; *see also* AgreedApp000648-650 (accusing Horizon of making minor procedural errors on purpose to "malign AMBIT and undercut any confidence the Court might have in AMBIT's legal analysis.)

When AMBIT was not objecting to stylistic choices, it was claiming that the Order was *incorrect* because it did not provide a long explanation of AMBIT's incorrect theory that Horizon's filing a lawsuit against AMBIT, in 2013, in an unrelated matter, somehow *breached the consulting contract*:

> 10. In addition to *inter alia* Horizon's admissions against interest, AMBIT's deposition testimony provides facts that support AMBIT's claim that Horizon breached the contract in question, as reflected above. Whereas Horizon has discounted AMBIT's evidence on breach, ascribing it solely to good faith and fair dealing,[39] AMBIT's evidence of breach relative to the duty to aid and assist and the 2013 litigation remains uncontradicted and undisputed on the record, such that summary disposition must be provided to AMBIT. Beyond that, the inarguable result for Horizon is that its decision to eschew discovery has left it with genuine issues of material fact that it must prove (or disprove) at trial. Whereas Horizon's Proposed Order continues to assert that it is immaterial whether compliance with a contract is financially beneficial, unprofitable, lacks value or is more difficult,[40] AMBIT has never raised those issues and objects to any suggestion that it did. AMBIT raised its own evidence of how these defenses apply – none of which appears here, including by example only as follows:

AgreedApp00651; *see also* AgreedApp000652-000654. If the Court wanted to accept this argument, it would have. It was not obligated to include every claimed theory put forth by AMBIT during the course of the litigation, nor is it obligated to devote a section, as AMBIT claims, to AMBIT's "evidence" that Horizon filed a lawsuit against it or that Horizon officials "demonstrated ignorance of AMBIT's business throughout the 2013 litigation." *See* AgreedApp000651-000652.

AMBIT essentially repeats these same complaints throughout its appeal brief. It concludes the appeal brief itself by claiming that the lower Court committed reversible error because it did not include a "thoughtful review" of AMBIT's Executive Director and "expert" consulting witness, Kenneth Niemann, anywhere in the Order. Pet'r's Br., pp. 33-34. These arguments are even more irrelevant in relation to alleged Order-drafting deficiencies than they are to the case in chief, and certainly do not create grounds for this Court to order the lower court to redraft its Order to AMBIT's specifications.

AMBIT does not have any separate recourse, outside appealing the summary judgment itself, to claim that the Order somehow "does not accurately reflect the proceedings" simply

because it does not include references to all the irrelevant facts and pointless arguments AMBIT set forth in its filings. The Court's opinion found, clearly:

> 1. "If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are at issue." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 66, 459 S.E.2d 329, 343 (1995).
>
> 2. In the instant case, the contract is short, simple, and unambiguous, and may be interpreted as a matter of law.
>
> 3. The contract requires, as above, that Horizon would perform, "within its field," "upon [AMBIT's] reasonable request," "such public and governmental relations and liaison functions as are necessary or incident to aiding and assisting [AMBIT] 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 needed by AMBIT.
>
> 4. This Court finds that AMBIT did not ask Horizon to perform under the contract, and has not set forth any facts which would allow this Court to find that AMBIT *did* ask Horizon to perform, or that Horizon breached any obligation it owed to AMBIT under the agreement.

AgreedApp000687. The Court's Order clearly addresses all of AMBIT's remaining affirmative defenses, before stating its conclusion. AgreedApp000689 – 000697. Neither Horizon, nor the lower Court, was obligated to include sections on arguments like "Horizon breached its consulting contract with AMBIT by filing a lawsuit demanding AMBIT pay rent it is due," or "Questions of fact remain because Horizon did not depose AMBIT's Executive Director in his capacity as a Consulting Standards Expert" in the Order. The Order reflects the Court's findings of fact and conclusions of law. AMBIT's legal recourse is to appeal the Court's judgment, not ask this Court for rulings on footnotes.

V. CONCLUSION

AMBIT admits it did not ask Horizon to perform under the agreement after 2006. AMBIT did not notify Horizon of any alleged breach of the consulting agreement in 2013. AMBIT did not notify Horizon of any alleged breach of the consulting agreement in 2017. Rather, AMBIT sent Horizon a letter in 2017 refusing to pay any more money under the contract.

AMBIT apparently decided it was going to breach the contract for the reasons stated in the letter. The letter clearly states that its purpose is to "disband the Consulting Agreement for the reasons set out below." AgreedApp000015. The letter contains no discussion explaining that AMBIT thought Horizon breached the agreement back in 2013 because it filed a lawsuit. It does not claim that Horizon breached the agreement by giving deposition testimony in that lawsuit that AMBIT found inadequate. It contains no discussion claiming that Horizon was somehow incapable of providing expert advice. It does not even contain AMBIT's oft-repeated extralegal arguments claiming that Horizon is "traitorous" or "disloyal," as if Horizon were bound, by a two-page consulting agreement, to give up its rights vis-à-vis AMBIT in all other forums and on all other issues.

Those arguments were put forth later by lawyers apparently trying to argue their way out of a clear breach of contract case. The letter itself merely states that the parties disagree too much with each other, and that AMBIT feels as if it is not receiving any value from the agreement, and AMBIT, going forward, intends to unilaterally breach the agreement. That is not a position protected by any law. To paraphrase Justice Hutchinson, the legal system does not exist to "protect commercial litigants from stupid or inefficient bargains willingly and deliberately entered into." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 497, 729 S.E.2d 808, 819 (2012). If AMBIT signed an agreement which it now merely dislikes, or is somehow distasteful to it, that is its own fault for failing to use the resource it secured with the contract. That is not Horizon's, or

this Court's, problem. Here,"[t]his State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." Syl. Pt. 3. *Wellington Power Corp.,* 217 W. Va. 33, 614 S.E.2d 680 (2005). AMBIT has not provided any compelling reason why this contract should not be enforced.

WHEREFORE, Horizon moves this Court to deny AMBIT's appeal on all grounds, to affirm the lower Court's Order, and for any and all other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I, the undersigned counsel or the Petitioners, herby certify that I served a true copy of the foregoing **Respondent's Brief** upon the following individuals, on the 19th day of January 2023.

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