IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioners,

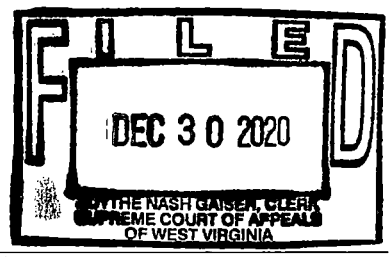
v.

HORIZON VENTURES OF WEST VIRGINIA, INC.

Respondent.

20-0759

Case No. ~~20-0762~~



PETITIONER'S BRIEF

Submitted by:

Mark A. Kepple, Esq.
W. Va. Bar Id. 7470
Benjamin P. Visnic, Esq.
W.Va. Bar Id. 12289
Bailey & Wyant, PLLC
1219 Chapline St.
Wheeling, West Virginia 26003
P: (304) 233-3100
F: (304) 233-0201
Email: mkepple@baileywyant.com

Joseph G. Nogay, Esq.
W. Va. Bar Id. 2743
Sellitti Nogay & Nogay, PLLC
P.O. Box 3095
Weirton, WV 26062

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I. ASSIGNMENTS OF ERROR

Horizon Ventures of West Virginia, Inc. ("Horizon") alleges the following assignments of error:

A. The lower court erred in granting summary judgment to American Bituminous Power Partners, L.P., a Delaware limited partnership ("AMBIT") AMBIT, as to whether particular actions are "arbitrary and capricious," which is a determined as a matter of fact, not law.

B. The lower court erred in acting as the finder of fact in granting summary judgment by explicitly weighing each party's evidence and, thereby, usurping the finder of fact's duties; and

C. The lower court erred by improperly relying on AMBIT's interpretation of its 2017 decision in dismissing Horizon's other claims, and therefore erroneously dismissed those claims for reasons unsupported by law

II. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument is necessary in this case under W. Va. R. App. P. 19 and 20. Primarily, this case involves an issue of unsettled law pursuant to W. Va. R. App. P. 20(a)(1) regarding the standard of law to be applied when resolving claims dealing with contracted-for uses of discretion, and further involves error in the application of settled law in resolving a summary judgment motion under W. Va. R. App. P. 19(a)(1).

IV. SUMMARY OF ARGUMENT

These parties have been litigating various disputes between and among themselves and other parties for more than thirty (30) years. AMBIT operates the Grant Town Power Plant, in

Marion County, West Virginia. Horizon is AMBIT's landlord. The decades of disputes between the parties have been focused, almost exclusively, on two primary issues: i) AMBIT's use of its "reasonable judgment," in using "foreign," *i.e.*, not Horizon's, fuel to power the Grant Town Power Plant, and ii) the priority order in which Horizon is to be paid by AMBIT in relation to other creditors. In the original Agreement, Horizon received three percent (3%) of AMBIT's gross revenues when "Local fuel" is used, and one percent (1%) of AMBIT's gross revenues when "Foreign fuel" is used. The parties also agreed to a series of different circumstances where the use of "Foreign fuel," for "operating reasons," would be paid at a one percent (1%) gross, but, when Foreign fuel was used for "non-operating reasons," it would trigger the higher three percent (3%) rate. Appx. 00204-00205. AMBIT has found numerous excuses, in the intervening three decades, to use Foreign fuel for improperly claimed "operating reasons."[1]

Here, Horizon appeals the lower court's grant of summary judgment to AMBIT in resolving Horizon's counterclaim in the above-captioned matter. The lower court, in finding for AMBIT, held that Horizon had failed to produce evidence which would have shown AMBIT breached its contract with Horizon when it used Foreign fuel to power the Grant Town Power Plant, in a fashion which was "arbitrary and capricious." Appx. 02076. More specifically, the lower court found, in relevant part, that "undisputed relevant evidence . . . demonstrates that AMBIT exercised its contractually granted independent discretion in using Foreign fuel for Operating Reasons at all times at issue here." This seminal, and incorrect, finding of fact by the Court was directly contrary to evidence produced by Horizon through expert testimony and other evidence.

[1] AMBIT did not question the 1% rate for Foreign fuel being used for operating reasons until June 2013. Prior to that, rent payment was determined by the terms of the 1996 Settlement Agreement and was paid by the higher agreed-to rate of 2.5%. AMBIT did not challenge the percentage rate at the higher rate of 3% from the date the power plant began selling power to Mon Power in 1993, nor the percentage rate of 2.5% in 1996. The percentage of rent owed was never an issue in any action filed by Horizon in the past.

Moreover, this specific finding by the Court reversed and contradicted its own prior ruling, which explicitly held that "reasonable minds could differ as to whether AMBIT used its contracted-for independent discretion arbitrarily and capriciously as that term is used in the law in using "Foreign fuel" for Operating Reasons from December 2012 to the present." Appx. 01148.

While, ultimately, the question before the lower court was whether summary judgment was appropriate, numerous smaller questions inform that decision. First, Petitioner believes that the "arbitrary and capricious" standard used by the lower court is not the correct standard, and second, the finding by the Court involves a question of fact not proper for summary judgment, and that the standard is not a question of law to be decided by the Court in granting summary judgment.

Further, the lower court's decisions which ultimately resulted in the issues before the lower court being narrowed to those limited questions required that the lower court improperly read findings into the final decisions of prior litigation between the parties which are not present. The lower court's original error can be traced back to AMBIT dictating its interpretation of the prior matter between the two parties, and the Court largely, and incorrectly, accepting that interpretation. Critically, this misinterpretation by the lower court of its prior opinion influenced every subsequent decision in the matter, narrowing the scope of the case in a manner which was improper and unwarranted, and which ultimately led to in the summary judgment being appealed here.

For these reasons, and other reasons set forth herein, Horizon moves this Court to overturn the summary judgment granted against it by the lower court in this matter.

V. STATEMENT OF THE CASE

A. Facts of the Case

The relevant history between these parties stretches back more than three decades, with multiple lawsuits, settlements and amended agreements being litigated, in various capacities, since 1989. This history is critical to the understanding of the appealed issues here.

On or about November 29, 1989, Horizon Ventures of West Virginia, Inc. ("Horizon") and American Bituminous Power Partners, L.P., a Delaware limited partnership ("AMBIT") entered into an Amended and Restated Lease Agreement regarding the operation of the Grant Town Power Plant ("Power Plant") in Marion County, West Virginia.[2] *See, inter alia*, 1989 Agmt., Appx. 00185-00369. More specifically, AMBIT leased parcels of real property in Marion County for "constructing, operating, and maintaining an electric generation plant on the Leased Premises for generation and sale of electricity, steam, ash, hot water, and hot air. Appx. 00017. The Power Plant was constructed using One Hundred Fifty Million Dollars ($150,000,000) in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. See, e.g., AMBIT Mot. To Dismiss, Appx. 00095. The repayment of those bonds is governed by a January 1, 1990 "Trust Indenture," which dictates and sets forth the priority of payments to be made. Appx. 00105.

The November 29, 1989 Agreement was amended by an Amended and Restated Lease Agreement on December 28, 1989, a Second Amendment to Amended and Restated Lease dated January 11, 1990, a March 31, 1993 letter of agreement, a Third Amendment to Amended and Restated Lease ("Third Amendment"), dated April 1, 1993, as well as a May 23, 1994 Settlement Agreement. Appx. 00048-00079.

Pursuant to the Amended and Restated Lease Agreement, AMBIT agreed to pay one percent (1%) of its revenue to Horizon as rent, so long as AMBIT used Local fuel. Appx. 00204-

[2] As the parties have switched designations numerous times over the course of this litigation, for simplicity's sake they will be referred to as "Horizon" and "AMBIT" exclusively, instead of, *e.g.*, Plaintiff, Petitioner, Defendant, or Respondent.

00206. The percentage remained the same if AMBIT had to use Local fuel for "non-operating reasons." *Id.* However, if AMBIT used Foreign fuel for a "operating reason," that percentage rose to three percent (3%). *Id.*

The Amended and Restated Lease Agreement set forth that "the term 'Operating Reason' means that Tenant, in its reasonable judgment, has determined that a percentage (partial or total) of Foreign fuel is required for a series of reasons, the most important of which is "due to exhaustion of the usable waste coal material on the Demised Premises." Appx. 00205. In contrast, the "Non-Operating Reasons" are merely that "such use is designed to reduce the cost of limestone usage by a Plant or . . . there is no operating reason to do so." *Id.* at 00205-00206.

In the Third Amendment, however, AMBIT agreed that for a period of eighteen (18) years, from 1993 to 2011, all use of "Foreign fuel" was for non-operating reasons, which required the three percent (3%) gross payment to Horizon for the use of Foreign fuel. Appx. 00051. Despite this agreement, Horizon was forced to institute litigation to recover past rents on April 12, 1994.[3] This litigation ultimately resulted in AMBIT paying Horizon Two Hundred One Thousand Seven Hundred Thirty-Nine Dollars and Fifty-Seven Cents ($201,739.57) in rental payments and other costs. Following AMBIT's additional and intentional failures to pay rent, Horizon was again forced to institute litigation to recover past rents on February 2, 1996, which was settled by agreement.[4] The May 28, 1996 Agreement to Resolve Pending Litigation ("Settlement Agreement") states, in relevant part:

2. Tenant's Admissions

a. Tenant acknowledges, as a fact, that since the commencement of operations by the Plant, all Foreign Fuel used in the operation of the Plant has been used for

[3] *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, Civ. A. 94-43-C (N.D. W. Va. 1994).

[4] *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, Civ. A. 96-C-32 (N.D. W. Va. 1996).

> Non-Operating Reasons, **and further acknowledges, as a fact, that so long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non-Operating Reasons.** As contemplated by the Lease, Local Fuel includes "waste coal material" (as defined in the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed and **is not dependent on the quality of the waste coal material. Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement.** Tenant further acknowledges and agrees that Tenant has no claim to recover any rents paid to Horizon prior to the date of this Agreement.
>
> Appx. 00064 (emphasis added).

Pursuant to this Settlement Agreement, AMBIT was forced to pay another Two Hundred Forty-Four Thousand Eight Hundred Eighty-Five Dollars and Eighteen Cents ($244,885.18) to Horizon. AMBIT further agreed, in written correspondence, that the then agent for the group of banks securing repayment under the Trust Indenture would "not challenge payments made in accordance" with AMBIT's agreement that "so long as Local Fuel is located at the site, it is reasonable to conclude that all Foreign Fuel is being used for non-operating reasons." Appx. 00081. In return for this concession, Horizon agreed to reduce the amount AMBIT owed from three percent (3%) to a base of two and one-half percent (2.5%) with a series of additional payments at Paragraph 5. Appx. 00065-00066. This Settlement Agreement also voided the Third Agreement in its entirety. *See, e.g.*, Appx. 00069.

From the date of the Settlement Agreement until December 2012, AMBIT paid its rent.[5] AMBIT then, without proper legal basis, stopped paying Horizon rent. On June 17, 2013, Horizon was forced to initiate additional litigation, asserting claims for declaratory judgment, breach of

[5] On November 20, 2002, AMBIT asserted that it was not to pay Horizon rent until the 7th priority in the Trust Indenture Agreements. Appx. 00084-00086.

contract, injunctive relief, and specific performance, which claims were predicated upon AMBIT's unilateral decision to stop paying rent to Horizon.[6]

Unlike the instant case, this prior dispute primarily revolved around the priority order of when Horizon was to be paid rent in the aforementioned "waterfall" of priority. Appx. 00100-00101. Horizon was initially granted summary judgment on its declaratory judgment and breach of contract claims. *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *1 (W. Va. May 13, 2015). AMBIT appealed to this Court, which reversed the lower court, finding summary judgment was inappropriate and remanded the case, with instructions that it be transferred to the Business Court Division. *Id.* at *6.

After additional protracted litigation, on August 22, 2017, the Business Court found that Horizon had breached a provision in the Lease Agreement which provides that:

> If any Senior Debt shall become or be declared to be immediately due and payable, all Subordinated Rent shall become immediately due and payable notwithstanding any inconsistent terms of this Lease. Unless and until all Senior Debt shall have been paid when due (at its stated maturity, by acceleration or otherwise) in full accordance with its terms, Landlord shall not, without the prior written consent of the holders of Senior Debt, have any right to demand payment of, or institute any proceedings to enforce, any Subordinated Rent if at such time a default in payment of any Senior Debt when due shall have occurred and be continuing.

Appx. 00109-00110. Ultimately, the Court determined that there was Senior Debt remaining, and that Horizon had not obtained written consent of the holders of Senior Debt, *i.e.*, the banks involved in the Trust Indenture. Accordingly, the Court found in AMBIT's favor.[7] The Court did, however, dismiss Horizon's claims for rent *without* prejudice. Appx. 00111-00112.

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[6] *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., et al.*, Civ. A. 13-C-196 (Ohio County, W.Va. 2013)

[7] Many of these banks intervened in the 2013 action. See, e.g., *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *1 (W. Va. May 13, 2015).

AMBIT asserts, without proper basis, that this prior decision controls far more than its actual stated scope and that assertion has improperly impacted other decisions during this matter.

Critically, the 2015 Order stated that it intended to address "four key issues":

1. Defining Senior Debt;
2. The priority of rent payment;
3. The calculation of rent; and
4. the agreement not to sue found in the Lease Agreement.

Appx. 00103. The Court found, in short, that Deutsche Bank holds senior debt; that Horizon's right to collect debt is subordinate to senior debt; that rent was to be calculated in accordance with ¶ 6 of the Lease Agreement, subject to ¶ 5 of the 1996 Agreement; and that, ultimately, Horizon could not bring an action to collect rent because it contracted its right to do so away. *See, e.g.,* Appx. 00103, 00104, 00105, 00109.

Horizon believes that those findings are not particularly relevant to this appeal. What is relevant to this appeal, however, is the 2015 Court's finding that "[i]n analyzing the 1996 (Settlement) Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement because it provides that the 1996 Agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent." Appx. 00108. AMBIT's overly-broad interpretation of this finding in arguing the instant case, and the lower Court's adoption of AMBIT's argument, is directly responsible for many, if not all, of the errors which plague this litigation, as described fully *infra*.

Ultimately, the final resolution of the 2013 suit occurred on July 2, 2018.

B. Procedural History

AMBIT filed the instant lawsuit on or around August 28, 2018, claiming, *inter alia*, that because the 2013 court found that the May 28, 1996 agreement "had no prospective effect relative to the Lease agreement," it overpaid rent and was owed recompense from Horizon for the same. Appx. 00020, ¶ 22. More specifically, AMBIT claimed that usable waste coal was, in fact, exhausted in 2003, that it had, in fact, overpaid its past rents, and that it was due reimbursement for the same from Horizon. Appx. 00020-00021, ¶¶ 27-28.[8]

Horizon counterclaimed against AMBIT, claiming, *inter alia*, that: i). AMBIT made payments as required by the Settlement Agreement from that date until December 2012; ii). that AMBIT was currently breaching its agreement by not paying the same; iii) that AMBIT admitted to constructing an electric generation plant that was not capable of utilizing a large percentage of the "Local fuel" located on the premises; iv) that AMBIT constructed a smokestack which was inadequately designed; and v) that AMBIT had intentionally concealed that fact from Horizon for decades. Horizon Counterclaim, Appx. 00032-00047. Horizon asked for declaratory relief reinforcing AMBIT's agreement to pay rent, compensatory damages, disgorgement of all sums improperly paid to third parties, and pre- and post- judgment interest. Appx. 00047. Horizon also explained that it did not seek rent, but that it requested recognition of the appropriate rent rate. Id.

AMBIT moved to dismiss Horizon's counterclaim, asserting, in relevant part, that the bonds in question have been repaid, but that AMBIT is still paying the related indebtedness to the lending group, which is prioritized higher in the aforementioned "waterfall" than Horizon, and, therefore, AMBIT could not contractually be forced to pay rent to Horizon until that debt had been paid. Appx. 00091-00098. Horizon, in turn, explained in its response to that motion that AMBIT could not file a lawsuit demanding an accounting of rent while attempting to deny Horizon the

[8] AMBIT lost their claim for overpaid rents in the lower court and has appealed the same in a separate filing, due the same day as this Brief.

ability to seek remedies based on the same facts. Appx. 00125-00130. After some delays while the case made its way to Business Court, the Business Court held, in relevant part, that:

> AMBIT initiated this action seeking a declaratory judgment from the Court finding that AMBIT has over payed its rent obligation to Horizon. Horizon is seeking similar relief in its counterclaim alleging that AMBIT has underpaid rent. Based on this reason, the Court finds that it would be inequitable and a vast waste of judicial resources and economy to prevent Horizon from going forward with its declaratory action. Allowing Horizon to go forward with its counterclaim ultimately results in a single declaratory action to calculate rent. The only tangible difference of allowing Horizon to go forward with this singular part of its counterclaim is that Horizon can present its case as a sword rather than presenting the same case as a shield in Horizon's defense of AMBIT's claim. Further, Horizon's declaratory action is limited to the calculation, not collection, of rent.

Appx. 00401. The Court dismissed the rest of Horizon's claims, explaining, *inter alia*, that Horizon was not entitled to seek payment of rent while Senior Debt is outstanding and that it had failed to name the third parties from which it was seeking disgorgement. Appx. 00401-00402. Additionally, the Business Court found that the Amended and Restated Lease Agreement prohibited Horizon from seeking rent payments before third parties had been paid. *Id.*

Importantly, Horizon, at paragraphs 20 and 21 of its counterclaim, alleged that the May 28, 1996 Agreement to Resolve Pending Litigation ("Settlement Agreement") contained an express admission by AMBIT that it had always used Foreign fuel for non-operating reasons, and that **so long as any Local fuel is located on the premises, any Foreign fuel being used in the operation of the Plant is being used for Non-Operating Reasons.** Appx. 00037-00038; the Admissions provision is quoted, *in toto, supra* at pp. 5-6. (emphasis added). AMBIT, in its Answer to paragraphs 20 and 21 of Horizon's counterclaim, claimed, in relevant part, that "AMBIT denies that the 1996 Agreement has any prospective force/effect beyond two paragraphs (per Order of this Court, entered on 8.31.17)." Appx. 00413. AMBIT then repeated this denial at paragraphs 23 and 24. *Id* at 00414.

During the course of litigation, AMBIT disclosed expert witnesses Brian F. Miller, P.E., an expert assessor of the power plant's fuel operations, Stephen D. Friend, AMBIT's power plant manager, and Herbert R. Thompson, an AMBIT administrator, as well as unidentified damages experts. *See, e.g.,* Appx. 00536-00537. AMBIT later withdrew Miller as an expert witness, instead designating him as a fact witness. Appx. 00686-00689. Horizon, in turn, submitted the parallel disclosures of Donald J. Koza, P.E., an expert mechanical engineer with vast experience in designing, constructing, and operating CFBC boiler waste coal power plants for over 35 years, as well as Stanley Sears, Horizon's president. Appx. 00690-00691.

In accordance with the Scheduling Order, both parties also filed Motions for Summary Judgment. AMBIT's Motion claimed that it was forced to use Foreign fuels, *inter alia*, because "the quality of local waste coal was significantly lower than predicted in the Comprehensive Mining Plan," and that after using up the "good" waste coal, the lesser quality coal impaired AMBIT's ability to reach optimum output at the Plant. Appx. 00728-00731. Importantly, AMBIT admitted in its Motion for Summary Judgment, that waste coal was still located on the premises, and that it had unilaterally determined, in its "reasonable judgment," that said fuel was not usable. Essentially, AMBIT claimed that it has "had no choice" but to use Foreign fuel to operate the plant since the 1990s. Appx. 00730. AMBIT maintained that it could use Foreign fuel "in its reasonable judgment," and that the "reasonable judgment" standard "allows AMBIT the discretion to use any mix of Local and/or Foreign fuel it considers is appropriate." Appx. 00740. AMBIT further claimed that Section 6 of the Lease Agreement is the only internal standard for "reasonable judgment." *Id.*

Horizon, in its Motion for Summary Judgment, correctly pointed out that in the 1996 Settlement Agreement, AMBIT admitted that:

1. **All Foreign fuel that had ever been used at the plant had been used for non-operating reasons.**

2. **As long as any Local fuel is located at the demised premises, any Foreign fuel being used in the operation of the plant is being used for non-operating purposes.**

3. **Local fuel included "waste coal material" on the Demised Premises, whether or not permitted by permits, whether or not reclaimed, and Local fuel was not dependent on the quality of the waste coal material.**

4. **That AMBIT expected and intended for Horizon to detrimentally rely on this factual admission, that such reliance is foreseeable and reasonable, and that such reliance is evidenced by the Agreement; and**

5. **AMBIT acknowledged and agreed that Tenant (AMBIT) had no claim to recover any rents paid to Horizon prior to the date of the agreement.**

Appx. 00803-00804 (emphasis added).

Horizon additionally pointed out that AMBIT had further agreed, in the 1996 Settlement Agreement, *that its right to pay its partners was subordinate to its responsibility to pay rent, and that it was obligated to get permission from the banks to do so.* Appx. 00804. AMBIT further confirmed this permission, which confirmation was contemporaneously documented by Horizon.[9] Most importantly, AMBIT admitted, in its Motion for Summary Judgment, *that Local fuel was still present on the site.* The mere presence of that Local fuel triggers the admissions in the Settlement Agreement, which, in turn, requires AMBIT to pay Horizon three percent (3%) of revenue under the Lease Agreement, because it agreed that all uses of Local fuel were non-operational in the 1996 Settlement.

[9] While not germane to this appeal, it is notable that AMBIT did not raise any of these issues regarding the quality of waste coal or of overpayment until January 2013.

AMBIT, in both its Response in Opposition to Horizon's Motion for Partial Summary Judgment, and in its Response in Opposition to Horizon's Motion for Summary Judgment, disingenuously claimed that since the 2013 Court found that only paragraphs four and five of the 1996 Settlement Agreement superseded the Lease Agreement, that Horizon's reliance on the Admissions was improper, and that *res judicata* barred Horizon's arguments. *See* Appx. 00922-00923, 00964, 00966-00967. This argument is flawed, however, because the 2013 Court decision, relied upon by AMBIT, and ultimately adopted in part by the lower court, was not as broad as AMBIT led the lower court to believe.

The lower court eventually granted partial summary judgment to Horizon on the primary case, *i.e.*, whether AMBIT could be recompensed for overpayment of rent, explaining, among other things, that its delay in asserting the claim was unreasonable.[10] Appx. 01110. Notably, the lower court explained, in ruling against AMBIT, that the Settlement Agreement contained "the express language of [AMBIT] admitting that as long as "Local fuel" remained on the "Leased Premises" the use of "Foreign fuel" was for non-operating reasons regardless of the quality of the "Local fuel." Appx. 01112, ¶ 7. However, and even more importantly, the lower court held that under the Admissions section in the 1996 Settlement Agreement, AMBIT agreed not to make claims for back rent, clearly implicating the controlling nature of the Admissions to both AMBIT and Horizon. Appx. 01113, ¶ 16.

At the Court hearing on the Motions for Summary Judgment, Horizon again argued that AMBIT admitted, in the 1996 Settlement Agreement, that AMBIT's use of Foreign fuel is for a non-operating reason. Appx. 01124-01127. AMBIT countered with the same ill-founded argument it had previously made: that somehow the Court's 2013 opinion stating that the 1996 Settlement

[10] As above, AMBIT is appealing this ruling in a separate proceeding before this Court.

Agreement does not supersede the lease also invalidates the Admissions. Appx. 01128-01129. The Court, in response to this assertion by AMBIT, explained that it was not "determining rents" in 2013. Appx. 01130-01132.

After granting summary judgment to Horizon on AMBIT's claim for allegedly overpaid rent, however, the lower court inexplicably ignored the Admissions it had just partially relied upon, and found, over Horizon's objections, that Horizon would have to show AMBIT did not use "reasonable judgment," and that Horizon would have to do so by proving AMBIT was "arbitrary and capricious" in choosing to use Foreign fuel. *See, e.g.,* Appx. 01143, 01149-01150, 01181. The Admissions contained in the Settlement Agreement were never addressed again by the lower court.

Horizon advised the lower court that its expert would testify that there was no "operating reason" for AMBIT to use Foreign fuel, and that summary judgment was improper on the matter of intent and motive, which presented a genuine issue of material fact to be determined by a jury. Appx. 01144-01145. AMBIT claimed, instead, that it was a legal question which the Court should decide. Appx. 01147. The lower court agreed with Horizon, finding that it was a question for the jury to determine. Appx. 01148. However, the lower court then incongruently found that any evidence which goes to the "nature of poor management or mismanagement or bad design, anything of that nature, is not relevant." Appx. 01150. It further prohibited Mr. Koza, Horizon's expert, from testifying about industry standards based on the ill-defined arbitrary and capricious standard at issue. Appx. 01165. Finally, when Horizon inquired of the lower court whether AMBIT's use of Foreign fuel had to be for an operating reason, the lower court confusingly found, without extrapolation, that it did not "think that's really an issue that's before us." Appx. 01182. As this is, perhaps, the seminal issue in the case, this finding is incomprehensible.

After procedural delays prior to trial, AMBIT filed a Renewed Motion for Summary Judgment ("Renewed Motion"), claiming that since the lower court would not allow Horizon to put on any evidence of negligence, poor design, industry standards, Horizon had no evidence that AMBIT acted in an arbitrary and capricious manner when selecting fuel. Appx. 01192-01195. Horizon correctly asserted in its Response to the Renewed Motion, that AMBIT had introduced no new evidence, and that AMBIT's Renewed Motion was simply requesting the Court to reconsider its prior decision. Appx. 01844-01851.

Additionally, in response, Horizon explicitly explained that Mr. Koza would testify that it was "unreasonable" for Plaintiff to assert the waste coal was unusable as fuel, among other things. Appx. 01854.

The lower court ultimately granted AMBIT's Renewed Motion. In its Order, the lower court explained that Horizon was required to prove that AMBIT acted in an "arbitrary and capricious" manner, but that Horizon could *not* make that proof by showing:

1. That the CFB boilers were poorly designed or not used as intended.

2. Waste Coal was usable, and that AMBIT's use of Foreign fuel was therefore for "nonoperating reasons,"

3. AMBIT was unwilling to modify or repair the plant to make Local fuel suitable.

4. AMBIT's claims of safety issues with Local fuel were unfounded.

5. AMBIT's assertions that Waste Coal was unusable were unreasonable; and

6. The waste coal is usable and only AMBIT's operation of the plant precludes its use.

Appx. 02075-2076, ¶¶ 36-43; *see also* Appx. 01854.

This limitation of Horizon's ability to defend its position is clear error, as the Court improperly found that none of these assertions could prove that AMBIT was "arbitrary and

capricious" in their decision to use Foreign fuel as a matter of law and granted AMBIT's motion for summary judgment on Horizon's remaining claim that rent was to be calculated at the two and one half percent (2.5%) rate set forth in the 1996 Agreement. Horizon timely appealed.

V. ARGUMENT

A. Introduction

The lower court erred in suddenly, and confusingly, disregarding the 1996 Settlement Agreement between the parties and subsequently accepting AMBIT's "arbitrary and capricious" standard in pushing this case to resolution. These findings improperly shifted the scope as to what was to be proven in this matter and improperly defined what Horizon's burden was in that regard.

The lower court's ultimate decision both failed to properly apply the facts of the case to resolve the primary issues before it, and imposed a new standard of proof on Horizon, in the middle of a motions hearing, after the close of discovery when there was no opportunity for Horizon to bring forth further evidence supporting its position. Accordingly, Horizon moves this Court to overturn the lower court's grant of summary judgment to AMBIT on Horizon's counterclaim regarding the method by which rent should be calculated.

B. The lower court erroneously relied on AMBIT's interpretation of its 2017 decision in dismissing Horizon's other claims, and therefore erroneously dismissed those claims for reasons unsupported by that decision.

Ironically, after the long factual and procedural history of this matter, the reams of technical documentation and testimony regarding BTUs, what constitutes usable coal, the methods by which AMBIT runs the Power Plant, and other relevant matters, the actual issues before this Court were surprisingly simple, and should be easily resolved in Horizon's favor.

As this Court has held, the trial court is to interpret contracts as a matter of law. *See, e.g.*, Syl. Pt. 1, *Stephens v. Bartlett,* 118 W.Va. 421, 191 S.E. 550 (1937) ("[i]t is the province of the

Court, and not of the jury, to interpret a written contract.") Further, "[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." Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.,* 147 W.Va. 484, 128 S.E.2d 626 (1962). It is similarly black-letter law that "settlement agreements are contracts and therefore, 'are to be construed as any other contract.'" *Burdette v. Burdette Realty Imp., Inc.,* 214 W.Va. 448, 452, 590 S.E.2d 641, 645 (2003) (quoting *Floyd v. Watson,* 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979)).

Here, the 1989 Lease Agreement was modified three (3) times, and a 1996 Settlement Agreement voided the third modification to the 1989 Lease Agreement. Those documents are, for all intents and purposes, intended to be read *in pari materia* with each other. *See, e.g.*, Appx. 00069, Provision 14.

The initial Lease Agreement states as follows regarding the use of Foreign fuel:

> c. During the initial fifty (50) year term of this Lease, Tenant shall pay to Landlords and when provided in Section 7 (Rent Payment), percentage rent ("Percentage Rent") for the Demised Premises, in an amount equal to the aggregate of all of the following:
>
> (i) Three percent (3%) of all gross revenues actually received by Tenant from the sale, during the initial term, of electricity and steam generated at the Plants through the use of Local Fuel or through the use for Non-Operating Reasons of Foreign Fuel, together with one percent (1%) of all gross revenues actually received by Tenant from the sale of the initial term of electricity and steam generated at the Plants through use of Foreign Fuel for Operating Reasons (it being acknowledged by the parties that Tenant has calculated that it will incur additional costs for transporting and handling Foreign Fuel which costs are approximately equal to 2% of the gross revenues attributable to the burning of the Foreign Fuel). All allocations with regard to electricity and steam generated by Local Fuel and Foreign Fuel shall be made based on the relative BTU content of such fuels.

Appx. 00207-00208; *see also* Appx. 00725. As above, the lease contract contains a determination of what constitutes "Operating Reasons" and "Non-Operating Reasons." Appx. 00204-00205, *see also* Appx. 00726-00727. Per the agreement, AMBIT must exercise "reasonable

judgment" in using Foreign fuel for "operating reasons," but "sole judgment" in using Foreign fuel for "non-operating reasons." *Id.* In cases of dispute over operating and non-operating reasons, AMBIT is also required by the lease to work with the Lenders and with Horizon to appoint an engineer to resolve the dispute; both parties are then bound by the engineer's decision. Appx. 00206.

In the 1996 Settlement Agreement, AMBIT agreed that:

> **Tenant acknowledges, as a fact, that since the commencement of operations by the Plant, all Foreign Fuel used in the operation of the Plant has been used for Non-Operating Reasons, and further acknowledges, as a fact, that so long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non-Operating Reasons.** As contemplated by the Lease, Local Fuel includes "waste coal material" (as defined in the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed and **is not dependent on the quality of the waste coal material. Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement.** Tenant further acknowledges and agrees that Tenant has no claim to recover any rents paid to Horizon prior to the date of this Agreement. (emphasis added)

Appx. 00064 (emphasis added).

This Admission by AMBIT, by its plain language, categorizes all Foreign fuel used by AMBIT before and after 1996 to be "Non-Operating, by express definition. Paragraph 5 of the 1996 decision, which the Court expressly found applicable in both 2013 and 2018, contains an agreement to reduce the amount AMBIT owes for using Foreign fuel for non-operating reasons from three percent (3%) to a base of two and one half percent (2.5%), with a series of additional payments as mitigation. Appx. 00065-00066. This solution to this alleged problem is resolved by simply matching definitions of the parties' agreements:

1. All Foreign fuel use is expressly defined as being "non-operating" fuel.

2. All non-operating fuel is expressly to be paid as rent at 2.5%.

3. Therefore, all Foreign fuel use is expressly to be paid as rent at 2.5%.

For purposes of calculating rent, that syllogism ends the analysis. There is literally no reason to participate in any other of the analyses claimed by AMBIT regarding any sort of factual analysis of a "reasonable" standard for AMBIT's decision, or a finding of "arbitrary" behavior by AMBIT officials.

The plain language of the Admissions renders them incapable of being interpreted in any other way without rendering them meaningless, a position that has been long declared untenable by this Court. *See, e.g., Benson v. ARJ, Inc.*, 215 W.Va. 324, 599 S.E.2d 747 (2004), at fn. 5, *Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 817, 219 S.E.2d 315, 321 (1975), *Coal Company, Inc. v. Little Beaver Mining Corp.*, 145 W.Va. 653, 116 S.E.2d 394 (1960), *Bischoff v. Francesa*, 133 W. Va. 474, 498, 56 S.E.2d 865, 878 (1949) (Fox, J., concurring in part and dissenting in part) (accusing the majority of "ignor[ing] every word of the quoted language, in violation of the elementary principal that, in interpreting contracts, or any written instruments, an attempt should be made to give force and meaning to all of the language employed therein.")

Horizon had explained this to the lower court numerous times. In its Motion for Summary Judgment, Horizon explained that AMBIT had made these admissions, and that AMBIT is, therefore, bound by its admissions. *See* Appx. 00803-00804. However, AMBIT has continually, and disingenuously, obfuscated this issue, claiming that the 2013 decision found that only paragraphs 4 and 5 of the 1996 Settlement Agreement were applicable to the calculation of rent, and that Horizon's reliance on AMBIT's express admission in the 1996 Settlement agreement is therefore foreclosed by the 2013 decision. *See, e.g.,* Appx. 00922-00925. Even a cursory reading of the applicable contracts renders this interpretation legally illogical and incorrect.

There are twenty-one (21) provisions in the 1996 Settlement Agreement, including Provision 14, which states, in relevant part, that "this Agreement does not supersede the lease, except only that the provision in paragraph 4 of this Agreement for the dismissal of the Pending Action and the provisions of paragraph 5 of this Agreement for the waiver of the Waived Percentage Rent and related provisions of paragraph 5 shall limit Horizon's rights under the Lease." Appx. 00069. The 2013 Court decision found that based on this provision, paragraph 5 affected the prospective calculation of rent. AMBIT asked the lower court, as well as this Court, to accept its improperly crabbed reading of this holding, claiming that "whatever is in the 1996 agreement does not supersede the lease," and that therefore Horizon could not rely on the admissions contained herein. Appx. 01128; *see also* Appx. 00922.

That argument is, however, a direct misinterpretation of the 2013 Court's ruling. In effect, AMBIT is arguing, without proper basis, that the lower court's ruling rendered the 1996 Settlement Agreement to be a meaningless document outside subparts 4, 5, and perhaps 14. The Admissions contained within that Settlement Agreement explicitly state that AMBIT "acknowledges, as a fact, that so long as any Local fuel is located at the Demised Premises, any Foreign fuel being used in the operation of the Plant is being used for Non-Operating Reasons." The phrase "so long as" is not capable of interpretation as anything other than prospective. The 2013 Court was not declaring the Admissions non-prospective any more than it was declaring the Definitions section or the Manner of Giving of Notice section invalid.

Ultimately, AMBIT asked the lower court, and this one, to interpret the 1996 Settlement Agreement as one which contains two total provisions, and renders the Admissions, which Horizon and AMBIT negotiated, to be entirely meaningless. This pedantic interpretation of a contract is unsupported by law and such an interpretation would create an "absurd result, and this Court has

held that "[g]enerally, this Court will not interpret a contract in a manner that creates an absurd result." *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W. Va. 239, 244, 624 S.E.2d 586, 591 (2005); Syl. Pt. 2, *Ashland Oil, Inc. v. Donahue,* 159 W.Va. 463, 223 S.E.2d 433 (1976).

Further complicating AMBIT's continued reliance on this sort of jurisprudence of unintended consequences relating to the 2013 Order, is that the 2013 Court Order does not say what AMBIT claims it says.[11] In the 2013 Order, the Court simply stated that:

> Paragraph five essentially requires the parties to calculate rent under the terms of the Lease Agreement, then calculate rent using the formula laid out in paragraph five. If the amount of rent calculated under the terms of the Lease Agreement are greater than the formula detailed in paragraph five, then paragraph five may waive a portion of the percentage of rent under the Lease Agreement.

Appx. 00108. The 2013 Order did not, however, address the Admissions and agreements made by the parties, including AMBIT. Moreover, the lower court disabused AMBIT of this interpretation during the Motion for Summary Judgment hearing, explaining, clearly, that in 2015, it was merely deciding which provisions of the 1996 Agreement applied *to the specific settlements of the lawsuit at issue*:

> THE COURT: Just let me make sure so the record's clear, my findings then were not based on -- I was not determining rents then. My sole issue was determining the settlement agreement of '96, is what you're speaking of, and basically what the Court found was that the lease applied except for those provisions as contained in Paragraph 14.
>
> MS. GREEN: And four and five, I think, Your Honor.
>
> THE COURT: Because those went to the specific settlements of that particular lawsuit.

[11] To the extent that AMBIT claims Horizon waived its ability to object to this nonsense interpretation by not appealing the 2013 decision, that is false. Horizon did not oppose the actual 2013 decision. Horizon does not agree with AMBIT's novel interpretation of that decision, first raised in this case. It is not obligated to prospectively appeal decisions on the off chance that other parties may interpret those decisions disingenuously.

Appx. 01132.

The Court went on to explain that it was not determining rent in its prior opinion:

> THE COURT: Okay. I find that the issues raised in this motion by the defendant under the pretext of judicial estoppel, collateral estoppel, res judicata, should be denied, as I think those matters were covered to the reverse or adverse of what position Horizon has taken in the Court's previous finding. I think there may be some merit raised by the defendant as to were those matters really binding upon the parties, because the Court was not determining rent at that time period. I mean, those were issues that the Court was weeding out about what I could proceed on pursuant to the lease and what I couldn't. We were in the process of going

Appx. 001136.

After granting Horizon summary judgment as it pertained to AMBIT's claim, the Court explained:

> THE COURT: Now, that leads us to, you know, we still have an issue of the counterclaim that is before the Court, on, I guess, from 2013 to the present. So, and I think somewhat the issues raised by AMBIT, in its motion for summary judgment would apply. Does someone disagree? Want to go forward with that? I mean, what's your intention, to go forward with your counterclaim?
>
> MR. SCHILLACE: Judge, it would be my understanding of the Court's ruling with respect to the counterclaim that this

granting of summary judgment is dispositive of those issues remaining.

THE COURT: I don't find that. I found the waiver, and they've only waived them up until they stopped paying. So, those matters as to usable fuel and the issues of rent, I think are still pending and before the Court in this litigation.

Mr. SCHILLACE: Okay. That helps me, Judge. I understand. And with respect to the admissions, do they apply or not apply, and --

THE COURT: Well, I think that's what we're about to take up with -- I mean, we'll take that up with regard to the evidentiary issues.

Appx. 01137-01138.

In other words, the lower court found that the issue of whether or not the Admissions applied **was not already decided**, and that it would do so in this matter. Unfortunately, however, the issue of the application of the Admissions was not subsequently expressly addressed by the court.

Despite AMBIT's repeated claims of *res judicata* and various claims of estoppel, the lower court agreed that the issue was never resolved by the prior litigation. Again, in 2015, this Court remanded this very issue to the lower court, explaining:

> With regard to the second issue, Horizon relies upon the Agreement to Resolve Pending Litigation to remove "usable" local fuel from the rent calculation altogether. However, this contract resolved a dispute between AMBIT and Horizon at the time it was executed and AMBIT maintains it has no prospective application, with limited exceptions not applicable here. Nevertheless, this contract is ambiguous on its face because by its express terms, it "does not supersede the Lease." And the terms of the Lease provide that rent is calculated based on whether *usable* local fuel is on the premises. Significantly, AMBIT's Plant Manager executed an affidavit stating all usable local fuel was exhausted in 2003. Accordingly, we find factual issues remain including whether the parties intended for the terms of the Agreement to Resolve Pending Litigation to operate prospectively and, if not, whether usable local fuel remains on the premises.

Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc., No. 14-0446, 2015 WL 2261649, at *6 (W. Va. May 13, 2015). As above, it was remanded to the lower court, who did not resolve it there. Judge Young presided over that litigation and this one, and he expressly stated *in this case* that the applicability of the Admissions still had to be determined – and then *did not determine them*, clear error which requires reversal of the summary judgment granted in this case.

The lower court, in its Order granting Horizon summary judgment on AMBIT's claim for previously paid rent, held that "The Third Amendment was declared void by the May 28, 1996 Agreement to Resolve Pending Litigation with the express language of the plaintiff *admitting that as long as "Local Fuel" remained on the "Leased Premises" the use of "Foreign Fuel" was for non-operating reasons regardless of the quality of the "Local Fuel."* Appx. 01112. (emphasis added).

This distinction between operating and non-operating was identified as an issue as far back as 1993, and the parties tried to resolve it then. Appx. 00051. Per the 1996 Settlement Agreement, the lower court once agreed that there was no matter of "usable fuel" and that there was not a matter of whether the fuel was used for "operating" or "non-operating" reasons. The parties plainly agreed in 1996 that *all Foreign fuel* was non-operating, as a condition of the settlement. Appx. 00064. The parties also agreed, as the 2013 Court's Order found, to reduce the percentage of rent owed when Foreign fuel was used from 3% to 2.5% with additional stipulated increases. Appx. 00065-00066. Despite AMBIT's continued obfuscation of the actual issues before the lower court, this issue was definitively resolved by the Settlement Agreement between the parties.

Ultimately, the language at provision 14 of the 1996 Settlement Agreement stating that only paragraphs 4 and 5 supersede the lease cannot, in any logical sense, be read to find that

AMBIT's Admissions are anything other than prospective and controlling. The Settlement Agreement clearly states that "so long as any Local fuel is located at the Demised Premises, any Foreign fuel being used in the operation of the Plant is being used for Non-Operating Reasons." Appx.00064. This language is necessarily prospective; the use of the phrase "so long as," as well as the continued use of "is" over "was," makes this clear. Moreover, the parties included language that states clearly that Local fuel *includes waste coal material*, and, specifically, that *the quality of the waste coal material does not matter*. *Id.*

These Admissions were clearly intended by the parties to be dispositive of the exact argument AMBIT made then, and has continued to make, regarding the use of Local and Foreign fuel, and, moreover, to resolve them in the future. This Court is obliged, therefore, to ascertain the meaning of these words in the context in which they are used. *Chevron U.S.A., Inc. v. Bonar*, No. 16-1213, 2018 WL 871567, at *3 (W. Va. Feb. 14, 2018) ("We find it important to our resolution of this matter to note that, in ascertaining the meaning of this term as intended by the parties to the contract, we are obliged to consider the context in which it is used, *i.e.*, an arbitration agreement.") *See also Benson v. AJR, Inc.*, 215 W. Va. 324, 327, 599 S.E.2d 747, 750 (2004) (per curiam) (recognizing that "any term that has significance in a given contract [ ] must be defined based on the subject matter of the contract and the intent of the document's drafters").

The intent of these Admissions are clear and unambiguous. **AMBIT admitted, in order to settle the 1996 lawsuit, to change the definition of "operating" and "non-operating," and to modify the definition of Local fuel, so that these never-ending disputes over the quality and usability of the local waste coal, as well as the endless disputes over whether each use of Foreign fuel was an "operating" or a "non-operating" reason, would stop.** AMBIT honored this agreement until 2012, and paid rent accordingly, until the Power Plant came under new

management. Based on Horizon's own words, that new management apparently decided they needed to find a way out from under these Admissions after Horizon sued them for not paying bills. Appx. 01132-01135. Now, AMBIT alleges that a clear and unambiguous Settlement Agreement that the parties abided by for almost two decades is somehow "unclear."

This exact issue was remanded by this Court in 2015 as part of the prior litigation between the parties matter. It was not resolved there, because, as Judge Young explained, "the Court was not determining rent at that time period," and that issue, therefore, bled into this litigation, where it inexplicably remains ignored and unresolved. Appx. 01138.

AMBIT's argument that the Admissions were not prospective based on the prior 2015 decision is easily disposed of by the lower court judge's own words at the January 15, 2020 hearing, *supra*, explaining that the lower court would rule on that issue at a later time. Unfortunately, the lower court did not do so, and its Order Granting Summary Judgment must be overruled and this foundational issue must be resolved clearly and specifically before the parties and the Court get bogged down unnecessarily in the minutiae of this case.

C. The lower court erroneously granted summary judgment to AMBIT, as whether particular actions are "arbitrary and capricious" is a matter of fact, not law.

After the lower court dropped the Admissions issue, it then improperly found, over Horizon's objections, that Horizon would have to show AMBIT did not use "reasonable judgment," and that Horizon would have to do so by proving AMBIT was "arbitrary and capricious" in choosing to use Foreign fuel. *See, e.g.,* Appx. 01143, 01149-01150, 01181. That standard imposed by the lower court is incorrect, and it is not an issue to be determined as a matter of law, as the lower court did here. It is a question of fact for a jury to determine.

i. The legal standard provided by AMBIT and utilized by the lower court was improperly constructed for this case and is based, largely, on incorrect factual and legal citations.

AMBIT believes, and the lower court agreed, that the term "reasonable judgment" means that AMBIT can do, effectively, whatever it likes, based on a cobbled-together legal definition of the term "reasonable judgment," and that Horizon can only overcome AMBIT's unilateral position by showing that its decision to use Foreign fuel was "arbitrary and capricious" as a matter of law. Appx. 02070-02076. This holding is incorrect.

For reference, the relevant provision of the Lease Agreement states the following:

> As used herein, the term "Operating Reason" means that Tenant, in its reasonable judgment, has determined that a percentage (partial or total) of Foreign Fuel is required for any one or more of the following reasons:
>
> Appx. 00205.

The genesis of AMBIT's claimed standard is found primarily in a footnote in the *Krypton Coal Corp. v. Golden Oak Min. Co.*, 181 W. Va. 405, 383 S.E.2d 37 (1989) decision, which states:

> Good faith between contracting parties requires that a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously. Where contractual discretion is exercised in bad faith, the contract is breached and it is incumbent on the courts to grant appropriate relief; however, bad faith is not synonymous with erroneous judgment. There can be no relief from an erroneous judgment exercised in good faith pursuant to a valid discretionary power.
>
> *Id.* at 399, S.E.2d at 40, fn. 2.

In crafting this standard, AMBIT and the lower court also bootstrapped the definition of "reasonable judgment" from a trustee case, which is distinct from this case, *Pollok v. Phillips*, 186 W. Va. 99, 411 S.E.2d 242 (1991), to it. *Pollok* states, in relevant part:

> the discretion of a trustee is not without limits. A trustee is required to act within the bounds of reasonable judgment so as to carry out the settlor's overall intent. This principle is generally recognized, and, relating to it, a leading authority on the law of trusts has stated:
>
> In determining whether the trustee is acting within the bounds of reasonable judgment the following circumstances may be relevant: (1) the extent of discretion intended to be conferred upon the trustee by the terms of the trust; (2) the existence or nonexistence, the definiteness or indefiniteness, of an internal standard by which

> the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; (5) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

Id. at 101, S.E.2d at 244; *see also* Appx. 00740.

AMBIT and the lower court posit that Syl. Pt. 1 of *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Virginia*, 186 W. Va. 613, 614, 413 S.E.2d 670 (1991), *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 228 W. Va. 125, 135, 717 S.E.2d 909, 919 (2011), and Syl. Pt. 4, *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 133, 690 S.E.2d 322, 327 (2009) stand for the principle that this Court "has recognized that the interpretation and enforcement of contracts is within the province of this Court's authority, further finding it appropriate that the Court, where indicated, uphold and enforce contract provisions as a matter of law." *Id.*; *See also* Appx. 02072, ¶ 24.

AMBIT, based on these cases, alleged that "[e]xtrapolated to the instant situation, the Lease Agreement allows AMBIT the discretion to use any mix of Local and/or Foreign Fuel it considers appropriate. According to AMBIT, the only applicable standard appears in Section 6 of the Lease Agreement, where it defines Operating Reasons within the scope of AMBIT's reasonable judgment – *without any external gauge provided or mandated.* Appx. 00740. (emphasis added). The lower court agreed, explaining in its Order dismissing Horizon's claim that "exercise of discretion is not open to any objective standard of reasonableness, not open to a comparison against an industry standard, not even subject to an assessment of 'right' or 'wrong' in its judgment." Appx. 02074, ¶ 32.

All of these claims made by AMBIT, upon which the lower court predicated its decision, are demonstrably incorrect.

a. AMBIT supplied incorrect legal positions to the lower court to develop a favorable standard.

The most basic rule of contract interpretation is that "what constitutes a contract under our relevant cases is a question of law, **the determination of whether particular circumstances fit within the legal definition of a contract under our cases is a question of fact.**" *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995) (emphasis supplied). Even assuming, *arguendo*, that the "arbitrary and capricious" standard used in this matter did apply (it does not), whether the facts of this case indicate AMBIT's decision not to use Local fuel was arbitrary and capricious is a matter for the jury to decide, not the trial court.

AMBIT, however, argued that *Art's Flower Shop, et al,* listed *supra*, required the trial court to "uphold and enforce contract provisions as a matter of law." What AMBIT neglected to tell the lower court was that AMBIT's cited cases are *arbitration* cases, dealing with contracts of adhesion and determining, as a matter of law, whether a contracted-for arbitration clause was unconscionable. These cases are inapplicable and functionally meaningless to this matter, and the lower court should not have relied upon them. Here, the dispute is over the amount of money AMBIT owes Horizon for rent. Literally no part of AMBIT's legal analysis or cited cases are applicable to the instant case. In fact, the *Williams* Court further cautioned that courts take special care when considering summary judgment in employment and discrimination cases because *state of mind, intent, and motives may be crucial elements. See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995).

As Horizon assiduously pointed out in its Response to AMBIT's Renewed Motion for Summary Judgment, the definition of "arbitrary and capricious" is as follows:

Arbitrary:

(1) Depending on individual discretion; of relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixes rules, or procedures.

(2) (of a judicial decision) found on prejudice or preference rather than on reason or fact.

Capricious:

(1) (of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways.

(2) (of a decree contrary to the evidence or established rules of law.

Black's Law Dictionary, 11th Ed. (2019); *see also* Appx. 01849. State of mind, intent, and motive are all important to the "arbitrary and capricious" analysis required by the Court, and this is clearly a matter for a jury to decide as mandated by black letter contract law. The Court can, of course, decide, pursuant to W. Va. R. Civ. P. 56, that the party with the burden of proof did not establish a genuine issue of material fact. *See, e.g.*, *Williams* at 58-59, S.E.2d at 335-336; *Gray v. Boyd*, 233 W. Va. 243, 248–49, 757 S.E.2d 773, 778–79 (2014); Syl. Pt. 5, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995).

However, AMBIT's claim that the lower court was required to decide the same as a matter of law, which the lower court appeared to incorrectly agree with in its Order Granting Summary Judgment, is without meaningful legal support.

b. AMBIT supplied incorrect factual analysis to the lower court to develop this favorable standard.

As above, AMBIT claimed that "[t]he only internal standard appears in Section 6 of the Lease Agreement, where it defines Operating Reasons within the scope of AMBIT's reasonable judgment – *without any external gauge provided or mandated.* Appx. 00740. (emphasis added). That is demonstrably untrue.

The Amended Lease Agreement explicitly states that "**any disputes between Tenant and Landlord with regard to whether the use of Foreign Fuel is for an Operating Reason or a Non-Operating Reason shall be submitted to the consulting engineer retained by the "Lenders" (as defined in Section 23 . . . or, if such consulting engineer refuses or is unable to serve in such capacity, by any qualified, competent engineer acceptable to Landlord and Tenant.**" (emphasis added). Appx. 00206.

AMBIT and Horizon expressly agreed that a consulting engineer would be selected, either by the Lenders, or by the parties themselves. This has never occurred, and AMBIT's attempts to cure its lack of compliance with the same by requesting the same from the Lenders in September 2019, well into litigation, does not solve its abject failure to comply with this provision. Per the agreement, AMBIT, as the party disputing the determination that Foreign fuel was used for non-operating reasons, was required to engage with Horizon and find a "qualified, competent engineer acceptable to" both parties, not engage in years of litigation over a topic which had a non-litigation settlement mechanism installed three decades ago. The existence of this requirement also completely undermines AMBIT's claim that there were no anticipated "external gauges" on its "reasonable judgment," as well as the lower court's determination that "exercise of discretion is not open to any objective standard of reasonableness, not open to a comparison against an industry standard, not even subject to an assessment of 'right' or 'wrong' in its judgment." Apps. 00740-00741, Appx. 2074, ¶ 32.[12]

Rather, the parties clearly anticipated that there would be a time when a "qualified, competent" engineer would need to determine whether AMBIT's reasonable judgment was, in

[12] Oddly, the Court cites only *Schroeder v. Adkins*, 149 W. Va. 400, 403, 141 S.E.2d 352, 354 (1965), a podiatry malpractice case, for the idea that 'reasonably prudent' is not synonymous with perfection. The applicability of this case or the reasoning behind it to the instant case is entirely unclear.

fact, reasonable. Presumably, too, the engineer would have to use an objective engineering standard to do so, as nothing in the Lease Agreement requires the engineer to apply any sort of "arbitrary and capricious" legal test. AMBIT's repeated claim, therefore, that it had some sort of essentially unfettered discretion to do whatever it wanted to do at all times, so long as it operated within its own "reasonable judgment," is simply untrue, and AMBIT knew it was untrue when it made that claim in its Motion for Summary Judgment.

Moreover, the existence of this provision also directly undermines AMBIT's and the lower court's, reliance on *Krypton Coal Corp. v. Golden Oak Min. Co.*, 181 W. Va. 405, 408, 383 S.E.2d 37, 40, fn. 2 (1989) in crafting this standard. The *Krypton* Court explained in that footnote that:

> Appellees argue that the contract between the parties should be interpreted as requiring an objective standard for determining when the recoverable coal has been mined. **Had the parties intended that an objective standard would apply, the contract would not call for the "sole judgment" of Golden Oak, but would state that the contract terminates when the recoverable coal has been mined.** Although the law imposes a requirement of good faith in the exercise of Golden Oak's judgment, it does not require nor allow a court to rewrite the contract to require continued mining until all recoverable coal has, in fact, been mined. The proposition is well stated in *Foster Enterprises, Inc. v. Germania Federal Savings & Loan Ass'n,* 97 Ill.App.3d 22, 52 Ill.Dec. 303, 421 N.E.2d 1375 (1981) (cited as authority by both parties):
>
> Good faith between contracting parties requires that a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously. Where contractual discretion is exercised in bad faith, the contract is breached and it is incumbent on the courts to grant appropriate relief; however, bad faith is not synonymous with erroneous judgment. There can be no relief from an erroneous judgment exercised in good faith pursuant to a valid discretionary power.

Krypton Coal Corp. v. Golden Oak Min. Co., 181 W. Va. 405, 408, 383 S.E.2d 37, 40, fn. 2 (1989) (emphasis added). Here, AMBIT does not have the wide berth of discretionary power it has continually claimed. As Horizon pointed out, the Amended Lease itself gives AMBIT "reasonable" judgment in using Foreign fuel for operating reasons, but "sole" judgment in using it for non-operating reasons. Appx. 01999-02003; See also Appx. 00204-00205. Specifically, the

former states that "[a]s used herein, the term 'operating reason' means that Tenant, in its reasonable judgment, has determined that [Foreign fuel] is required ...," but the latter states "[a]s used herein, the term "non-operating reason" means that Tenant, in its sole judgment, to partially or exclusively use Foreign fuel...". *Id.* These terms, like all terms in contracts, have meaning. "Sole judgment" is explicitly the type of "subjective" authority contemplated by *Krypton*. "Reasonable judgment," however, is the type of authority which requires a party to justify its "reasonable" judgment based on objective standards, such as the type the Lease Agreement anticipated that an engineer would employ in analyzing that judgment.

While case law on sole discretion is sparse, West Virginia case law generally requires courts to apply an objective "reasonable person" standard to all manner of claims. *See, e.g., W. Virginia Dep't of Transp., Div. of Highways v. W. Pocahontas Properties, L.P.*, 236 W. Va. 50, 67–68, 777 S.E.2d 619, 636–37 (2015) (reasonable person standard applied to determine compensation for condemned property); *W. Virginia Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 832 S.E.2d 102 (2019) (reasonable person standard applied to determination of qualified immunity), *Blanda v. Martin & Seibert, L.C.*, 242 W. Va. 552, 557, 836 S.E.2d 519, 524 (2019) (reasonable person standard applied to determine "substantial public policy,") *Mark Lynn J. v. Ballard*, No. 15-1034, 2017 WL 700852, at *12 (W. Va. Feb. 21, 2017) (objective standard of reasonableness applied to determine ineffective assistance of counsel claim); *Dunn v. Rockwell*, 225 W. Va. 43, 53, 689 S.E.2d 255, 265 (2009) (discovery rule focuses on reasonable prudent person standard).

Contract law is, similarly and generally, based on the reasonable person standard. "The objective theory of contracts . . . dictates that a contract shall have the meaning that a reasonable person would give it under the circumstances under which it was made, if he knew everything he

should plus everything [he] actually knew." W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. Cal. Interdisc. L.J. 29, 38 (1993). The Uniform Commercial Code and Restatement (Second) of Contracts are riddled with objective "reasonableness" standards. *See e.g.*, U.C.C. §§ 2-305, 2-306, 2-309, 2-609; Restatement (Second) of Contracts §§ 90, 172, 228, 265. "The imprimatur of the reasonable person can be seen throughout the Restatement and the Uniform Commercial Code." Slawson, *supra*, at 35. In West Virginia, of course, the most common contractual reasonable person standards arise in insurance contracts, where courts are routinely tasked with determining whether liability in an action is "reasonably clear" in enforcing insurance policies based on a reasonable person standard. *See, e.g.*, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 641, 600 S.E.2d 346, 353 (2004).

There appears to be no reason why the lower court should have found the "reasonable" standard in the lease here to require something *other* than an objective person standard based on the true facts of this case. The lower court's finding here, as prodded by AMBIT, that its "exercise of discretion is not open to any objective standard of reasonableness, not open to a comparison against an industry standard, not even subject to an assessment of 'right' or 'wrong' in its judgment," is not supported by *Krypton*, nor is it supported by any other relevant law or legal theory. Appx. 02074, ¶ 32.[13] AMBIT co-opted this issue in a few footnotes in its Renewed Motion. Specifically, it pointed out that "the Lease Agreement provides for a resolution that has not been fruitful to date, specifically, the selection of a consulting engineer, whose determinations bind both parties." *Id.*, fn. 64. AMBIT further claimed that it "attempted to employ" this mechanism unsuccessfully in this matter during this litigation. *Id.*, fn. 13; *see also* Appx. 00540-00545.

[13] As an aside, AMBIT's attempts to claim that it is entitled to some sort of rational basis test is beyond absurd; it is in no way "entitled to the discretion accorded courts or state agencies," as it attempts to claim in citing Syl. Pt. 1, *Gomez v. Kanawha County Comm'n*, 237 W. Va. 451, 787 S.E.2d 904 (2016) Appx. 01192, Appx. 01998.

Even if AMBIT was not required to comply with the Lease Agreement- which it was- as AMBIT claims as the only meaningful authority in this dispute, it indicates that the parties have always contemplated the use of an objective, neutral, standard, rather than the *ipse dixit* standard espoused by AMBIT and the lower Court. Accordingly, AMBIT's representations to the lower court that it had a right to act however it wished, so long as it was not arbitrary or capricious, is unsupported by the only case law upon which AMBIT relies. Rather, AMBIT's conduct is subject to an objective reasonable person standard, which can be rebutted by testimony and evidence just like any other defendant. To the extent the lower court relied on AMBIT's incorrect representations of fact and law to improperly apply this arbitrary and capricious standard, that reliance was unwarranted and without support and should serve as a basis for this Court to overturn the lower court's ruling.

ii. The Court erred in granting summary judgment on a case that it identified as being subject to binding arbitration.

When a party moves to compel arbitration, this Court has held that "the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. Pt. 2 (in part), *State ex rel. TD Ameritrade, Inc. v. Kaufman,* 225 W. Va. 250, 692 S.E.2d 293 (2010).

Here, the agreement to hire an engineer was clearly identified by the Court as "binding arbitration." Appx. 02047. The Court directly identified this issue, directly questioning Horizon's counsel and explaining that it believed the "issue of whether or not it's operating or non-operating" was ***a matter for binding arbitration,*** as it pertained to Horizon. *Id.* Horizon explained to the Court that it tried to get an agreed-upon expert, but AMBIT only chose its own experts as "suitable." Appx. 02048. Horizon then explained to the Court that it believed the correct way to

resolve the issue was to have each party submit one or two names to the Court, and have the Court select a "qualified engineer" from that list. Appx. 02048-02049. The Court then asked AMBIT's opinion on the "issue of what I'll call, it doesn't say arbitration, but it sounds a lot like arbitration in your contract?" Appx. 02050. AMBIT evaded the lower court's question entirely.[14] Appx. 02047-02050. Inexplicably, the Court never addressed the issue of binding arbitration again. Appx. 02051-02058.

Shortly after recognizing that the issue of "operating" and "non-operating" was to be determined by an engineer, as per the agreement, and despite Horizon's request to have the Court select an engineer for just that purpose, the Court usurped that role in granting summary judgment because AMBIT proved that it used foreign fuel for "operating reasons." *Compare* Appx. 02047, Appx. 02074, ¶ 35. In doing so, the lower court contradicted its finding from only weeks before that Horizon could not raise this claim **because it was to be resolved by an engineer.** Appx. 02047. This is clear error and requires reversal of summary judgment and remand to the lower court.

Horizon attempted to have the Court resolve the mandatory arbitration issue. The lower court not only tacitly declined to do so, but it also improperly resolved the arbitrable issue itself. This failure to address the arbitration issue, alone, should result in the overturning of the lower court's grant of summary judgment and mandate this case's return to the lower court and, ultimately, to an engineer deciding this issue, as required by the Lease Agreement.

D. The lower court erroneously acted as a finder of fact in granting summary judgment by explicitly weighing each party's evidence and usurping the finder of fact's duties.

[14] AMBIT's exhibits support Horizon's position; AMBIT merely attempted to interact with the "Lenders" or Horizon over a year into this litigation, in September of 2019. Once the Lenders refused, it sent Horizon one letter, explaining the rule and then offering only its three witnesses as "qualified, competent, engineers." Appx. 00540-00545. There does not appear to be any other instance of AMBIT attempting to actually comply with this agreement.

Even, assuming that the "arbitrary and capricious" standard was correctly applied to this case (it was not) the lower court's application of the same was also clearly erroneous. In its Order, the lower court went into great detail to accept, almost exclusively, AMBIT's claims that it had attempted to make Local fuel work so that they could pay Horizon additional rent monies. Appx. 02063-02069, ¶¶ 4-19. The lower court erroneously accepted AMBIT's contention that AMBIT was simply attempting to abide by the contract, instead of finding ways to reduce its costs. In fact, the lower court essentially accepted all of AMBIT's evidence, primarily expert testimony, regarding plant operation. The lower court found that AMBIT presented evidence that Foreign fuel is more efficient, that it cannot use the Local fuel to meet its power generation, and that reliance on the same is "economically unviable." Appx. 02064, ¶¶ 8-10. The majority of the evidence cited by the lower court went to economic issues, *i.e.*, the additional expense using Local fuel would inflict on AMBIT.[15] *See, e.g.*, Appx. 02064-02065 ¶¶ 10-15.[16]

After taking AMBIT's experts at their word and based on its prior holding that AMBIT's "exercise of discretion is not open to any objective standard of reasonableness, not open to a comparison against an industry standard, not even subject to an assessment of 'right' or 'wrong' in its judgment," the lower court, essentially, refused to allow Horizon to put on *any* of its evidence refuting the very testimony by which AMBIT "proved" its case. More specifically, Horizon attempted to comply with this unreasonable standard of proof, by submitting a series of evidentiary proofs of AMBIT's unreasonableness, which would have shown that (1) the CFB boilers were poorly designed or not used as intended; (2) Waste Coal was usable, and that AMBIT's use of Foreign fuel was therefore for "nonoperating reasons," (3) AMBIT was unwilling to modify or

[15] "AMBIT" in this case may be best understood as "AMBIT executives receiving bonuses." *See* Appx. 00383-00384.

[16] It is worth noting that of the six reasons which constitute "operating reasons" set forth in the Amended Lease, none of them deal with economic viability *at all*. Appx. 00205-00206.

repair the plant to make Local fuel suitable; (4) AMBIT's claims of safety issues with Local fuel were unfounded; (5) AMBIT's assertions that waste coal was unusable were unreasonable; and (6) The waste coal is usable and only AMBIT's operation of the plant precludes its use. Appx. 02001-02004; Koza Aff. at Appx. 02011-02013.

The lower court improperly ruled that Horizon could not place that evidence before a jury. Appx. 02072-02073, ¶¶ 38-43; *see also* Appx. 02018-02021. After holding that Horizon was not allowed to rebut AMBIT's experts with any of its own evidence, for unsupported or ill-defined reasons, including, but not limited to, legally unsupported findings that any evidence which goes to the "nature of poor management or mismanagement or bad design, anything of that nature, is not relevant," the lower court held that Horizon's expert could not testify about AMBIT's lack of compliance with industry standards and could not opine that AMBIT's experts were incorrect in their claim that waste fuel was unusable. The lower court incorrectly found that whether AMBIT's use of Foreign fuel had to be for an operating reason, literally AMBIT's primary contention throughout the litigation, was not "really an issue that's before us." Unsurprisingly, once the lower court essentially ignored all the evidence Horizon adduced, summary judgment was a *fait accompli*. In doing so, however, the lower court committed reversible error.

On a Motion for Summary Judgment, the trial court is required to determine whether the nonmoving party has produced enough competent evidence available at trial to enable a finding favorable to the nonmoving party. *Hoskins v. C&P Tel. Co. of W.Va.*, 169 W.Va. 397, 400, 287 S.E.2d 513, 515 (1982); *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60–61, 459 S.E.2d 329, 337–38 (1995). The circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994) (quoting *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). "[The Court] must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Id.* The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Williams* at 61, S.E.2d at 338.

Here, the lower court did not apply these standards in granting AMBIT's renewed Motion. Instead, the lower court addressed the evidence presented by AMBIT in its opinion, with detailed explanations of AMBIT's "proof," but comparatively little discussion, if any, of Horizon's opposing evidence. The lower court's ruling then improperly discounted or ignored Horizon's evidence as irrelevant. This series of rulings demonstrates that the Court was weighing evidence and making a factual inquiry which it was not authorized to make.

The lower court then improperly declared there was no justiciable issue for trial and that AMBIT had clearly shown it was not arbitrary and capricious. Horizon was, essentially, ambushed at the Motion for Summary Judgment hearing with an impossible standard of proof, and its evidence was all summarily declared irrelevant for various undeveloped reasons. There is no indication anywhere in the record as to what Horizon would have been able to introduce to show that AMBIT was arbitrary and capricious, other than expert testimony showing that their analysis was, in fact, unreasonable, and outside the "reasonable judgment" standard AMBIT itself espoused. As this Court explained in the instant case's predecessor, "[i]n complex cases, the tendency on a summary judgment motion is to rely on the facts developed through discovery as constituting all of the relevant facts in the case. This may lead to inaccurate factual assessment." *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *7 (W. Va. May 13, 2015). Even assuming the lower court applied the correct

standard, which it did not, there appears to be no discernible reason why all of Horizon's evidence and testimony should have been struck and/or ignored, and the reasons given in the record are either underdeveloped or inaccurate, as explained *supra*.

The lower court's decision to grant summary judgment to AMBIT after ignoring essentially all of Horizon's evidence clearly disregarded the significant factual issues which should have remained before the lower court, and improperly made the lower court, not the jury, the arbiter of facts. For this reason alone, the granting of summary judgment should be overturned and the case remanded for further proceedings in the lower Court.

VI. CONCLUSION

As above, the lower court committed numerous errors which led to its grant of summary judgment to AMBIT. It accepted AMBIT's interpretation of its own 2017 opinion. It accepted and applied AMBIT's hand-crafted standards of law. It accepted AMBIT's interpretation of that standard. It believed all of AMBIT's evidence. It ignored the clear fact that AMBIT agreed, in 1996, to define the terms "Operating" and "Non-Operating," without limitation. It ignored the actual standards of law and contract interpretation. It ignored all of Horizon's evidence. It claimed that Horizon was required to initiate binding arbitration to have a decision made on whether the use of fuel was operating or non-operating, then decided that same subject in AMBIT's favor. It even failed to initiate the process for arbitration after Horizon requested the same.

AMBIT's strategy in this matter is to opportunistically abuse *res judicata* to claim that a ruling in prior litigation should be unquestioningly interpreted to erase the Admissions they agreed to in settling litigation against Horizon over two decades ago. This assertion is plainly false. Horizon therefore moves this Court to overturn the lower court's grant of summary judgment to AMBIT on Horizon's counterclaim, and for any and all other relief this Court deems appropriate.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS POWER
PARTNERS, LP,

Petitioners,

v. Case No. 20-0762

HORIZON VENTURES OF
WEST VIRGINIA, INC.

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONER'S BRIEF** was mailed to counsel of record at the address shown below by United States Mail, postage prepaid this 29th day of December, 2020:

John F. McCuskey, Esq.
Roberta F. Green, Esq.
Dominick R. Pellegrin, Esq.
Shuman, McCuskey & Slicer, PLLC
1411 Virginia Street East, Suite 200
P.O. Box 3953
Charleston, WV 25301

Mark A. Kepple, Esq.
W. Va. Bar Id. 7470
Benjamin P. Visnic, Esq.
W.Va. Bar Id. 12289
Bailey & Wyant, PLLC
1219 Chapline St.
Wheeling, West Virginia 26003
P: (304) 233-3100
F: (304) 233-0201
mkepple@baileywyant.com