IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0762

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

Plaintiff/Counterclaim Defendant Below, Petitioner,

vs.

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

Defendant/Counterclaim Plaintiff Below, Respondent.

BRIEF OF PETITIONER

Appeal from the Circuit Court of Marion County –
Business Court Division
Civil Action No. 18-C-130

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.IV. STATEMENT OF THE CASE

American Bituminous Power Partners, L.P. (AMBIT) owns and operates the Grant Town Power Plant in Marion County, West Virginia, which Plant was constructed using $150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. The contractual relationship between Horizon Ventures of West Virginia, Inc. (Horizon), and AMBIT began on or about November 29, 1989, when Horizon leased certain parcels of land to AMBIT for the construction of the Grant Town Power Plant, which parcels included waste coal and waste

coal fines, referenced in the lease as "Local Fuel."[1] Pursuant to the Amended and Restated Lease Agreement ("Lease" or "Lease Agreement"), the amount of the monthly lease payment is a percentage of gross revenue received *inter alia* from power generation, with that percentage varying with whether AMBIT used Local or Foreign Fuel to generate the power and with the reasoning behind the fuel selection. Specifically, when AMBIT uses Foreign Fuel for Operating Reasons (as defined in the Lease), it pays a lower percentage of gross revenue as rent in recognition of the costs incurred in purchasing, transportation and handling. Relative to fuel selection, the Lease expressly gives AMBIT a contractual grant of discretion, such that the determinant is AMBIT's reasonable judgment.[2] Specifically, if AMBIT **in its reasonable judgment** decides to use Foreign Fuel for any one of six Operating Reasons, then the rent rate of 1 percent is applied to gross revenues arising from power generated using that Foreign Fuel. The higher percent rent rate applies to power generated using Foreign Fuel only when AMBIT uses Foreign Fuel arbitrarily and capriciously for Non-Operating Reasons as defined in the Lease Agreement.

Because the Court ruled that AMBIT did not act arbitrarily nor capriciously in its fuel selection, AMBIT's use of Foreign Fuel was for Operating Reasons from 2003 to 2013, and thus it should have been paying 1 percent of the gross revenues received from power production from December 2003 (the date of exhaustion of usable waste coal -- Local Fuel) until 2013. However, due to mutual confusion as to the scope of a settlement agreement entered by these parties in 1996, AMBIT paid a higher rate of rent of 2.5%, and Horizon accepted the higher rate of rent for ten years until Horizon filed an unrelated suit to recoup what has been termed 'subordinated

[1] APP000231.

[2] APP000975, relying *inter alia* on Syl. pt. 1, *Art's Flower Shop v. Chesapeake & Potomac Tel. Co.,* 186 W. Va.

rent.' In a nutshell, in mutual error, AMBIT believed it was paying the correct amount of rent and Horizon believed it was accepting the correct amount of rent for ten years. Then in 2013, Horizon filed an unrelated lawsuit that led AMBIT and its legal representatives to review anew the documents related to rent calculation. The procedural history of these litigations demonstrates that, upon recognizing the parties' mutual mistake, AMBIT acted immediately. That is, on June 17, 2013, Horizon brought suit against AMBIT for subordinated rent, which suit was Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196. On July 29, 2013, AMBIT initiated its counterclaim to recoup the rent it had overpaid from 2003 to 2013. The majority of Horizon's claims against AMBIT in Ohio County were resolved in AMBIT's favor by summary judgment entered by Honorable James H. Young, Jr., on or about August 31, 2017, which order Horizon never appealed. Of note, in that order, the Court found that the 1996 Agreement had no prospective force or effect beyond a couple of provisions that are not at issue here.[3] Finally, at that time, the Court dismissed without prejudice *inter alia* AMBIT's claim for the return of overpaid rent.[4]

Whereas allegations of prejudicial delay have arisen during motions practice only (as opposed to during discovery as demonstrated expressly by Horizon's motion and exhibits),[5] AMBIT did not delay in filing its initial counterclaim as soon as it realized the mutual error of payments made/received. AMBIT vigorously pursued its counterclaim until it was dismissed without prejudice by the Business Court on August 31, 2017. The Ohio County civil action was resolved by final order entered on May 29, 2018. Then, within the year as provided by the

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613, 413 S.E.2d 870 (1991). *See also* APP000089, 96; APP001654.

[3] APP000096.

[4] APP000101.

[5] APP000855, notable for failure to cite to evidence and notable for exhibits, none of which arose through discovery

savings statute, West Virginia Code Section 55-2-21, AMBIT re-filed its overpaid rent claim, as Marion County Circuit Court Civil Action 18-C-130. Upon motion to this Court, the Marion County matter was transferred to Business Court, where the parties appeared before Honorable James H. Young, Jr., who has knowledge of the parties' dealings, their 185-page lease, and their litigation history. In sum, after its dismissal without prejudice on August 31, 2017, AMBIT timely re-filed the overpaid rent claim in 2018,[6] all within the statutory period provided by West Virginia Code Section 55-2-6 for contracts in writing, under seal (ten years) and the saving statute, addressing fuel issues solely, expressly from 2003 to 2013.

DATE	EVENT
May 28, 1996	Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, LP, and Horizon Ventures of West Virginia, Inc. (a settlement agreement addressed in Civil Action No. 13-C-196 and largely resolved by the August 31, 2017, Order). (APP000049)
2003	Usable waste coal (Local Fuel) exhausted on the demised premises.[7]
June 17, 2013	Horizon files suit against AMBIT relative to subordinated rent. Ohio County Civil Action No. 13-C-196.
July 29, 2013	AMBIT files its crossclaim against Horizon, seeking repayment of overpaid rent.
August 31, 2017	Court rules that the Amended and Restated Lease controls rate of rent, not the 1996 Agreement. (APP000096)
August 31, 2017	Court dismisses AMBIT's overpaid rent claim without prejudice (APP000101)
May 29, 2018	Court enters final judgment order in Ohio County Civil Action No. 13-C-196.
August 27, 2018	AMBIT refiles its overpaid rent claim as Marion County Circuit Court, Business Court Division, Civil Action No. 18-C-130 (APP000001)
December 2, 2019	Pursuant to Court's scheduling order, the parties file cross motions for summary judgment (APP000756, APP000838)

in this matter nor from the time period at issue: 2003-2013.

[6] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 went to final order on May 29, 2018: Order Denying AMBIT's Motion to Alter, Amend, Vacate.

[7] APP000830.

At the close of discovery, the parties filed cross motions for summary judgment on December 2, 2019. In its dispositive motion, AMBIT presented evidence that, pursuant to the Lease provisions that govern rate of rent, it had used its contractual grant of discretion reasonably (non-arbitrarily, non-capriciously) in using Foreign Fuel for Operating Reasons from 2003 to 2013, including maintaining safe operations, reaching rated output, following manufacturers' specifications, and remaining operational in a cost-effective manner.[8] Because AMBIT had used Foreign Fuel in its reasonable judgment but had paid the higher rate of rent discussed in the 1996 Agreement (which Horizon accepted in mutual error), AMBIT overpaid rent from 2003-2013.

Conversely, in its dispositive motion, Horizon argued *inter alia* both waiver and laches.[9] Horizon argued in part that AMBIT had waived the right to bring suit for overpaid rent through its course of performance, that is, by paying rent at the wrong rate for ten years as set out in the 1996 Agreement. Horizon argued waiver in that AMBIT, by its course of conduct, demonstrated a willingness to be bound by the terms of the 1996 Agreement, such that it allegedly waived any contractual right it had to seek return of overpayment.[10] Horizon provided no evidence, documentary or other, in its dispositive motion nor its exhibits in support of waiver beyond AMBIT's paying and Horizon's accepting, the wrong rate of rent.[11]

Further, in support of its claim of laches, Horizon alleged that AMBIT unreasonably delayed in raising its overpaid rent claim, yet Horizon failed to allege or identify prejudice in its brief. Conversely, at the January 15, 2020, hearing, when prompted to do so by the Court,

[8] APP000566, APP000763 at notes.
[9] APP000855ff.
[10] APP000858, APP000875.
[11] APP000855, notable for failure to cite to case evidence and notable for exhibits, none of which arose through

Horizon alleged as its prejudice for laches the undecipherable "continuing to have this issue."[12]

Finally, in its dispositive motion, Horizon argued that AMBIT was precluded from asserting that it had been paying the wrong rate of rent because it entered the 1996 Agreement that included alleged admissions against interest relative to the rate of rent and its determination. In so arguing, Horizon failed to concede that the issue of whether rate of rent is set per the Lease or the 1996 Agreement had been resolved fully and finally by the Court's August 31, 2017, Order.

AMBIT responded in opposition to Horizon's motion with three arguments. First, AMBIT began by restating and renewing its own dispositive motion and reminding the Court of the history of these claims. Because Horizon failed to acknowledge the prior litigation and the prior motions practice in its dispositive motion, AMBIT reminded the Court that the issue of rate of rent is set by the Lease Agreement per order of the Ohio County Court, Business Court Division, in its unchallenged August 31, 2017, Order. It is imperative to note that Horizon failed to select any of the appropriate options available to it for challenging the Circuit Court's August 2017 Order.[13] That is, AMBIT noted in motions practice that Horizon had failed to challenge the Circuit Court's rulings in Civil Action 13-C-196 relative to the 1996 Agreement, whether by relevant motion to the Circuit Court or by placing the Order (8.31.17) before this Court, the West Virginia Supreme Court of Appeals, for review.

AMBIT also noted that, no doubt as a result of those failures, Horizon had attempted to bring many of the same issues into the Marion County litigation through its Counterclaim, which

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discovery in this matter nor from the time period at issue: 2003-2013.

[12] APP001200-1201.

[13] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

initiative was dismissed in pertinent part by the Circuit Court's Order (3.15.19).[14] AMBIT asserted that Horizon was attempting to re-litigate historical grievances, while the true issue (overpayment of rent) went without much comment or analysis in Horizon's dispositive motion.

Second, AMBIT analyzed *res judicata* and its bar to Horizon's continued reliance on the 1996 Agreement.[15] AMBIT argued that the issue of the 1996 Agreement had been addressed and resolved in the last litigation, such that *res judicata* precluded its discussion here. AMBIT argued that the 1996 Agreement states expressly that "[t]his Agreement does not supersede the Lease."[16] As a result and as found by Judge Young fully and finally in the prior litigation (which finding, once again, was never challenged by Horizon upon motion or appeal[17]), rate of rent is governed solely by Section 6a of the Lease Agreement and has been at all times (given paragraph 14 of the 1996 Agreement). In its response to Horizon's dispositive motion, AMBIT advised the Court that Horizon filed the same, virtually verbatim dispositive motion here in Marion County (18-C-130) as it had in the prior litigation in Ohio County (13-C-196), all of which had been struck down by the Court's August 31, 2017, Order.

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[14] APP000427.

[15] APP000049, APP000096, APP001007.

[16] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). APP000049, APP000096, APP001178.

[17] West Virginia law on this point is clear: Horizon, "having failed to appeal the final judgment of the circuit court [in Civil Action 13-C-196] has launched a collateral attack on a final judgment in a civil action through the institution of a declaratory judgment action. [West Virginia's Supreme Court has] conclude[d] that such a collateral attack is prohibited." *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996).

> Failure to appeal the circuit court's final . . . order to this Court necessarily results in "[a] final judgment on the merits of an action [and] precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*(citing *Commissioner v. Sunnen, 333 U.S. 591, 597, 92 L. Ed. 898, 68 S. Ct. 715 (1948)* and *Cromwell v. County of Sac, 94 U.S. 351, 352-53, 24 L. Ed. 195 (1876))*. Further, "the res judicata consequences of a *final*, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong. . . ." *Moitie, 452 U.S. at 398* (citing Angel v. Bullington, 330 U.S. 183, 187, 91 L. Ed. 832, 67 S. Ct. 657 (1947); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317 (1940); *Wilson's Executor v. Deen,* 121 U.S. 525, 534, 30 L. Ed. 980, 7 S. Ct. 1004 (1887)).

Third, AMBIT argued that it filed its overpaid rent claim within the ten-year statute of limitations and was inherently timely, such that no statutory lapse, untoward delay (such as laches) or waiver could apply. Specifically, AMBIT cited *Maynard v. Board of Education,* 178, W. Va. 53, 60, 357 S.E.2d 246, 253 (1987) and *Hoffman v. Wheeling Savings & Loan, Assoc.,* 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950), in support of its position that laches applies to equitable claims; where the statute of limitations applies to actions at law. West Virginia law provides that laches has no role in providing remedies at law. AMBIT argued that judicial estoppel, waiver, and collateral estoppel were equally inapplicable and unavailable to Horizon in this matter as factually and legally inapposite to the facts and law of the case. Horizon's reliance on judicial estoppel was unfounded because AMBIT's position in both litigations has been identical.[18] In response to Horizon's allegations of collateral estoppel (issue preclusion),[19] AMBIT argued that it was Horizon, not AMBIT, who was attempting to relitigate the issues in the 13-C-196 litigation. AMBIT asserted and demonstrated that its claim for overpaid rent was fairly filed, timely filed, and not precluded by any prior Order of the Circuit Court. Indeed, AMBIT noted that its claim for overpaid rent was recognized and *preserved* by Order of the Circuit Court in 2017. AMBIT asserted that the matter was ripe for resolution at that time.

At the January 15, 2020, dispositive motions hearing, the Court began by addressing Horizon's dispositive motion, with the Court walking Horizon through, in particular, laches and waiver.[20] At the hearing and in response to Horizon's allegations of waiver, AMBIT argued that for ten years it had paid too much rent in error, and for ten years Horizon accepted too much rent

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[18] Syl. pt. 2, *West Virginia Department of Transportation, Division of Highways v. Robertson,* 217 W.Va. 497, 618 S.E.2d 506 (2005).
[19] *Beahm v. 7-Eleven,* 223 W. Va. 269, 272, 672 S.E.2d 598, 601 (2008).
[20] APP001179..

in error, constituting mutual error.[21] AMBIT argued that both AMBIT and Horizon acted in error from 2003 until 2013, as proven by the terms of the August 31, 2017, Order. Specifically, the August 31, 2017, Order found unequivocally that *both parties' reliance upon the 1996 Agreement relative to rate of rent from 1996 to 2013 was in error*. The Court's Order found as a matter of law that the 1996 Agreement did not drive rate of rent. Instead, pursuant to paragraph 14 of the 1996 Agreement, rate of rent had always been and should always be governed by the Lease Agreement. Therefore, any rent calculations and payment/receipt thereof that occurred outside the provisions of the Lease Agreement, by logical necessity, would be in error. Waiver cannot operate without a knowing relinquishment. Given that neither party had knowledge of even a potential misreading of the 1996 Agreement and the Lease until 2013 and given that AMBIT acted immediately upon recognizing the mutual errors, the ten-year statute of limitations must control the determination of timeliness, not waiver.

The Court below found that, in Civil Action No. 13-C-196, it had addressed rate of rent such that any consideration of it was precluded by *res judicata.* However, the Court found that it had not previously addressed whether AMBIT had waived or impermissibly delayed in seeking overpaid rent and whether AMBIT had prejudiced Horizon thereby. That is, at the January 15, 2020, dispositive motions hearing, the Court found that it had not previously addressed whether AMBIT had waived its right to raise its 2003-2013 overpaid rent claim and/or had delayed to Horizon's detriment and prejudice pursuant to laches.[22] Therefore, even absent discovery on these issues and with only a silent record available to him, the Court found waiver and laches so

[21] APP001132, APP001183.
[22] APP001179ff.

as to preclude AMBIT's overpaid rent claim.[23]

The Court granted Horizon's dispositive motion and dismissed AMBIT's claim for overpaid rent, finding that AMBIT had *inter alia* delayed to its detriment in raising its claim.[24] On February 3, 2020, prior to entry of any judgment order, AMBIT moved the Court to re-open the issues that were raised for the first time at the motions hearing, asking the Court to alter, amend its rulings from the bench, and seeking leave to file a surresponse to address the numerous issues raised for the first time at the motions hearing, including the express dearth of "clear and convincing evidence" of AMBIT's intention to waive its claim.[25] Within three days, the Court denied leave to file the surresponse and, on the same day, issued an order finding that AMBIT had prejudicially delayed in bringing its claim (laches) and that AMBIT's paying the wrong rate of rent from 2003 to 2013 and Horizon's accepting same constituted waiver, not mutual error.[26] Also on February 6, 2020, the Court entered the judgment order, granting Horizon's motion for summary judgment on the issue of overpaid rent and ending AMBIT's claim for the return of overpaid rent from 2003 to 2013. (APP001162) On February 6, 2020, the Court both denied AMBIT's motion for leave and entered Horizon's Order Granting, in Part, Motion for Summary Judgment of the Defendant, Horizon Ventures of West Virginia, Inc. (MSJ Order).[27]

The August 31, 2017, Order remains unchallenged, a matter of law that pursuant to West Virginia law cannot be undone by Horizon's untimely collateral challenge in a separate suit, where the issues themselves were no longer available. Expressly, Horizon's failure to appeal the

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[23] APP001179ff.
[24] APP001160.
[25] APP001124.
[26] APP001158.

circuit court's orders entered in Civil Action No. 13-C-196 necessarily results in "'[a] final judgment on the merits of an action [and] precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*(citing *Commissioner v. Sunnen, 333 U.S. 591, 597, 92 L. Ed. 898, 68 S. Ct. 715 (1948)* and *Cromwell v. County of Sac, 94 U.S. 351, 352-53, 24 L. Ed. 195 (1876))*."[28]

The Circuit Court found that there was no mutual mistake because Horizon "assumedly presumed that AMBIT was paying the correct amount of rent."[29] AMBIT challenges that finding on the basis that regardless of whether Horizon believed it was accepting the correct amount of rent, the Court's August 2017 Order proved any such belief to be incorrect. Regardless of whether AMBIT believed it was paying the correct amount of rent, the Court's 2017 Order confirmed the mutual error. Both parties' beliefs from 2003 to 2013 relative to rent payments were proven to be mutual error when the Court's 2017 Order found that the payments between the parties from 2003 to 2013 were indeed made and received on the wrong basis. The parties were both in error from 2003 until 2013, as proven by the Court's August 2017 analysis of the 1996 Agreement. The fact that AMBIT 'woke up' earlier than Horizon and filed its 2013 counterclaim to recoup that rent explains the procedural history of this claim. The Court's findings pursuant to *Bruce McDonald Holding Co. v. Addington, Inc.,* 241 W. Va. 451, 825 S.E.2d 779 (2019), quoting Syl. pt. 2, *Parsons v. Halliburton Energy Serv., Inc.,* 237 W. Va. 138, 785 S.E.2d 844 (2016), were factually inapposite here and work to damage to the statutory right to bring contact claims within ten years.

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[27] APP001162.

[28] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996).

AMBIT appears before this Honorable Court in support of *inter alia* the ten-year statute of limitations on claims sounding in written contracts with seals and to challenge both laches and waiver in a timely filed contract claim, absent evidence of prejudice, knowledge or relinquishment.

VI. SUMMARY OF ARGUMENT.

The Circuit Court of Marion County, Business Court Division, impermissibly expanded West Virginia law on laches and waiver, rendering the statute of limitations for written contracts under seal meaningless. Contrary to West Virginia law and without legal basis, the Circuit Court extended laches beyond matters in equity and directly into matters sounding in law, thereby undercutting the statutory limitations that govern contract. The Circuit Court extended laches beyond any finding of true prejudice, failing to demand evidence of changed circumstances and failing to strictly confine its inquiries to the evidence adduced in discovery. The Circuit Court extended the common law defense of waiver to include an unknowing, unintended relinquishment of an unknown right, even though West Virginia law finds waiver only in the intentional relinquishment of a known right. The Circuit Court further erred by finding waiver based on a silent record, as Horizon had conducted no discovery into AMBIT's knowledge or intention over the 2003-2013 decade. Whereas the Circuit Court found that AMBIT had failed to raise genuine issues of material fact,[30] more pointedly, the Court failed to discern that there were no facts to raise, genuine or otherwise, given Horizon's complete failure to conduct any discovery whatsoever on the issues related to knowledge, relinquishment, prejudice – a completely silent record. The Circuit Court focused *sua sponte* on a pattern of rent paid and

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[29] APP001160.
[30] APP001161.

received over a decade and found waiver based on nothing further than compliance with what the Circuit Court itself found in August 2017 was an improper measure. The Court found waiver without underlying evidence of any sort.

The Court found not only laches, but also the prejudice for laches, although the evidence before the Court was that the cause of action was timely filed and that Horizon was without even a suggestion of unreasonable, unexplained delay or evidence of prejudice: no loss or destruction of evidence, no death of a party, no obligations assumed in reliance.

As a result, the Circuit Court has not only impermissibly altered the rights and remedies these parties should have under West Virginia law and pursuant to contract, but also has nullified West Virginia's ten-year statute of limitations for contract claims through these extensions of laches and waiver. Through its reliance on *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 825 S.E.2d 779 (2019), the Circuit Court found that having knowledge and intent during the statutory period, and not having knowledge and intent during the same statutory period results in the same outcome. As such, the Court below left no permissible, practical use of the ten-year statute. The Circuit Court overly simplified the tests for laches and waiver, applying them beyond their legitimate authority under West Virginia law. AMBIT appears before this Honorable Court seeking *inter alia* the return of laches, waiver and statutes of limitation to their proper roles pursuant to West Virginia law. In support of this Appeal, AMBIT provides as follows.

VI. STATEMENT REGARDING ORAL ARGUMENT.

Pursuant to West Virginia Appellate Rule 19(a), this matter is suitable for oral argument in that the assignments of error arise from the Court's extension and potential disruption of

settled law. The Court's extension of settled law beyond the rubrics established by this Court is unsustainable because it obviates otherwise known rights. This appeal addresses narrow issues of law: the use of laches on a legal issue in the absence of prejudice, judgment based upon an unintentional waiver of an unknown right, the abandonment of the statutory ten-year limitation for written contracts under seal, and a finding of all of these legal results on the basis of a silent factual record. The Circuit Court's rulings as considered by this Court will have durable repercussions for contract claims going forward. For these reasons, AMBIT requests an opportunity to be heard.

VII. ARGUMENT.

A. Introduction.

West Virginia law limits the applicability of laches beyond suits in equity, where an express statute of limitations applies. Specifically, "'if [the statute of limitations] does not bar the right to the land, laches can not [sic] bar such right.'" Syl. pt. 1, *Miller v. Diversified Loan Serv. Co.*, 181 W. Va. 320, 382 S.E.2d 514 (1989), quoting Syl. pt. 2, *Condry v. Pope,* 152 W. Va. 714, 166 S.E.2d 167 (1969). Laches mandates a finding of prejudice, which West Virginia law defines as a material change in circumstances, such as the death of a party, the loss of evidence, an additional obligation assumed.[31] The delay must be unreasonable but, even more, unexplained.[32] By example, "[p]rejudice here is strictly confined to the issue of evidence: Has the length of the delay caused critical or dispositive evidence to be lost, destroyed, or otherwise made unavailable?"[33] Here, where AMBIT did not raise a suit in equity and where it complied

[31] Syl. pt. 2, *McMullen v. Matheny,* 104 W. Va. 317, 140 S.E. 10 (1927), also generally finding a requisite minimum of twelve years for a finding of 'delay.'
[32] *Banker v. Banker,* 196 W. Va. 535, 474 S.E.2d 465 (1996).
[33] *Id.*

with its statutory mandate, laches cannot bar its right to pursue its claim. Further, laches, where it applies, offers equitable remedies (e.g., specific performance) but does not supplant the applicable statutory limitation nor drive dismissal, such that laches had no role at summary disposition of this contract claim, where no equitable remedies were sought.[34]

Further,'[t]he common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought and requires that party to have intentionally relinquished a known right. [While] waiver may be express or may be inferred from actions or conduct, [finally] all of the attendant facts, taken together, must amount to an intentional relinquishment of a known right. There is no requirement of prejudice or detrimental reliance by the party asserting waiver.'"[35] Pursuant to West Virginia law, "[t]here must be first, the existence of the right; second, knowledge of the existence of such right; and third, voluntary intention to relinquish. The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and **is never presumed**. *Hamilton* v. *Republic Casualty Co.*, 102 W. Va. 32, 135 S.E. 259."[36]

Here, where no facts were adduced in discovery relative to AMBIT's knowledge in the decade prior to suit and where AMBIT's conduct during that decade was consistent with ignorance of the existence of any right, it was the province of the Circuit Court to uphold and support the clear meaning and intent of the parties as expressed in unambiguous language in the written contract, rather than create new facts, new outcome and for them.[37] The Circuit Court of Marion County, Business Court Division, impermissibly found waiver in a record silent on the

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[34] Syl. pt. 2, *Malone v. Schaffer,* 178 W. Va. 637, 363 S.E.2d 523 (1987); *Brand v. Lowther,* 168 WW. Va. 726, 731, 285 S.E.2d 474, 478 (1981); *Clark v. Gordon,* 35 W. Va. 735, 752, 14 S.E. 255, 261 (1891).
[35] Syl. pt. 3, *Bruce McDonald Holding Co. v. Addington, Inc.,* 241 W. Va. 451, 825 S.E.2d 779 (2019), quoting Syl. pt. 2, *Parsons v. Halliburton Energy Serv., Inc.,* 237 W. Va. 138, 785 S.E.2d 844 (2016).
[36] *Hoffman v. Wheeling Sav. & Loan Assoc.,* 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) (emphasis added).
[37] Syl. pt. 7, *Bruce,* quoting Syl. pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.,* 147 W. Va. 484, 128 S.E.2d 626 (1962).

requisite facts and in the instance of a suit timely filed pursuant to statutory limitations. The instant parties litigated *inter alia* the overpaid rent issue for five years as a counterclaim in Ohio County Civil Action No. 13-C-196, prior to dismissal without prejudice. Thereafter, the parties litigated the overpaid rent issue for just over two years in Marion County Civil Action No. 18-C-130. Through the course of both litigations, Horizon never conducted discovery on waiver or intent in its defense against AMBIT's initiatives to recoup overpayment.

In support of its challenge to the summary disposition of its claim below, AMBIT presents as follows.

B. Standard of Review.

The standard for this Court's review of a circuit court's entry of summary judgment is *de novo.* Syl. pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994).

C. **Assignment of Error Number 1:** The Circuit Court of Marion County, Business Court Division, has interpreted statutes of limitation relative to contract in such a manner that West Virginia Code Section 55-2-6, the ten-year statute of limitations on contracts, no longer exists.

The Circuit Court of Marion County, Business Court Division, relied on laches and waiver to undercut AMBIT's compliance with its statutory right to bring its contract claim within the ten years provided for written contracts under seal. W. Va. Code Section 55-2-6. Without a proper finding of prejudice for laches (strictly confined to the issue of evidence) and without the knowledge and relinquishment necessary for waiver, the Circuit Court granted judgment as a matter of law to Horizon on its dispositive motion.[38] The Court found that the requisites for waiver under West Virginia law are (1) the existence of a right, advantage, or benefit at the time of the waiver; (2) actual or constructive knowledge of the existence of the right, advantage, or

benefit; and (3) intentional relinquishment of such right, advantage, or benefit. *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 460, 825 S.E.2d 779, 788 (2019)."[39] Despite a dearth of evidence of intent to waive, the Court further held that "AMBIT cannot sit on its hands and make rent payments for nearly a decade and then try and collect an alleged overpayment of rent sixteen (16) years later." The Court further cited the following in support:

> "In *Bruce McDonald Holding Co.*, the Plaintiff entered into a contract which contained a stipulation that the Defendant would 'diligently' mine coal. *Id.* Nonetheless, for a period of twenty-eight (28) years Defendants did not mine coal but instead paid royalties of $500,000 per year. *Id.* In upholding the Circuit Court's ruling finding that the Plaintiff had waived its right to demand that the coal be diligently mined, the Court instructed that '[c]onduct inconsistent with demanding strict compliance with the contract [ ] results in a waiver of the ... contract provisions.' *Id.* at 789."[40]

The Court's finding of waiver also falls outside the law and facts of this case. The facts in *Bruce*[41] are as follows. Landlord and tenant entered a contract in 1978 by which tenant mined landlord's property and agreed to pay royalties each year, starting in year five with an increasing minimum due even if tenant were not mining. In 1984, tenant sought to terminate the lease. Litigation ensued, and tenant sought termination and a declaration that the coal was neither merchantable nor mineable. By order entered in 1988, the Circuit Court of Logan County construed the lease and assessed royalties against the tenant. The Court did not find an obligation to actually mine coal, just to pay royalties.[42] After entry of the final order in the first litigation (and a failed appeal attempt by landlord), tenant continued to pay the minimum royalty per contract rather than mine coal. Finally, in 2016, landlord filed suit to force tenant to mine coal

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[38] APP001158.
[39] APP001159-60.
[40] APP001160.
[41] *Bruce,* 241 W. Va. 451, 825 S.E.2d 779 (2019).
[42] *Bruce,* 241 W. Va. at 459, 825 S.E.2d at 787.

(and thereby increase landlord's income from that property). The Circuit Court of Logan County (Young, J.) found that the landlord had waived its right to raise the claim by accepting the minimum payments for twenty-eight years. Because landlord/tenant had litigated this precise issue to judgment issued in 1988, landlord's "failure to file an action during that 28-year period, to enforce their right to have the [tenant] diligently mine coal, was intentional."[43] Specifically, the Circuit Court (Judge Young) found that because the landlord demonstrated ongoing knowledge that the tenant's performance each month failed to meet contractual mandates but still did nothing, then landlord signaled to tenant that landlord was waiving its right to pursue full compliance with the contract. The landlord demonstrated knowledge and did nothing – tenant and the Court translated that into waiver.

In *Bruce,* the landlord had litigated that precise dissatisfaction and thereafter did nothing with its residual dissatisfaction for 28 years, all the while accepting the minimal payments. Landlord had appealed that precise dissatisfaction unsuccessfully and, thereafter, did nothing but accept the minimal payments. Conversely, in the instant matter, the tenant unknowingly overpaid rent in error for ten years. AMBIT and Horizon had not litigated the rate of rent from 2003 until 2013 until 2013. Contrary to the facts in *Bruce* where the landlord had litigated and lost this precise issue, neither the Court nor Horizon cited any affirmative act by AMBIT nor external event (like the first litigation in *Bruce)* whereby AMBIT signaled that it knew of a cause of action available to it and delayed. The 'evidence' – that AMBIT paid the wrong rate of rent – is more consistent with mutual mistake than with waiver, given the complex relationship and intense litigation history between the companies.[44] The 'evidence' that AMBIT paid the wrong

[43] *Bruce,* 241 W. Va. at 460, 825 S.E.2d at 188.
[44] *See, e.g.,* APP000049, APP000089. *See also* APP000006.

rate of rent is at least equally consistent with mutual error as with waiver, and, absent more, such as even an email, a letter, an alleged conversation demonstrating knowledge of a right left unexplored (none of which is even alleged here), this silence demonstrates mutual error.

The procedural history of this claim demonstrates that AMBIT did not occasion, create or otherwise participate in a sixteen-year delay.[45] Specifically, AMBIT's cause of action became ripe with the exhaustion of useable waste coal (Local Fuel) on the demised premises in 2003. However, AMBIT had not uncovered and learned the significance of paragraph 14 of the 1996 Agreement until such time as Horizon filed suit on June 17, 2013. On that date, Horizon brought suit against AMBIT for subordinated rent. Barely a month later, on July 29, 2013, AMBIT, upon further analysis of the 1996 Agreement, initiated its counterclaim to recoup the rent it had overpaid from 2003 to 2013.[46] Everything that has transpired since that date has been the result of the vagaries of civil litigation and not any delay by AMBIT. In or about June 2013, AMBIT learned of the mutual mistake of determining rent pursuant to the 1996 Agreement; in July 2013, AMBIT brought suit. Beyond the truth of that statement, Horizon has conducted no discovery whatsoever into the timing of suit nor into AMBIT's actions that could undercut any finding of mutual error. The record is silent. Indeed, the Complaint recounts the history of this claim, and Horizon has adduced no evidence to undercut those assertions.[47]

Regardless of the findings of the Circuit Court of Marion County, Business Court Division, to the contrary, the record supports AMBIT's assertion that it spent the ten-year statute without even constructive knowledge that it was paying the wrong rate of rent. Certainly, Horizon accepted the rent without knowledge that it was getting overpaid, for what would its

[45] APP001160, APP000101.
[46] APP000101.

rationale be for maintaining those moneys other than in error, given the unequivocal fact that the payments were indeed incorrect. When AMBIT learned that it had overpaid and Horizon had accepted the same in error, AMBIT filed a claim immediately, in 2013. The delay from 2013 to present is the result of a dismissal without prejudice by the Business Court in 2017 and the operation of law by which the claim was re-filed timely in 2018. In *Bruce,* the plaintiff demonstrated knowledge of the potential cause of action but waited to file. In *AMBIT,* the plaintiff did not know of the potential cause of action but filed immediately upon learning of it, ten years after the practice began. Despite those key differences, the Circuit Court found that both plaintiffs had lapsed statutes of limitations and had failed to file timely.[48] The Court dismissed their claims accordingly. By these rulings, the Circuit Court has eliminated the ten-year statute of limitations relative to contract.

The ten-year statute of limitations is indeed a protected period and, absent clear and convincing evidence of an intentional relinquishment of 'such right, advantage or benefit,' it is a legal right that must be protected under the law. If West Virginia law finds waiver regardless of knowledge and intent, the ten-year statute has become meaningless. Whether for express or implied waiver, West Virginia law mandates **clear and convincing evidence** of the party's intent to relinquish a known right, that is, "proof so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted."[49] AMBIT respectfully asserts that the Circuit Court of Marion County, Business Court Division, incorrectly interpreted and applied waiver in light of West Virginia Code Section 55-2-6 so as to render the

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[47] APP000001ff.
[48] APP001160-61.
[49] APP001138 (*Branch Banking & Trust v. Sayer Bros.*, 2015 U.S. Dist. LEXIS 144678).

ten-year statute of limitations for contract claims meaningless and, therefore, abrogated impermissibly the commensurate rights by Court action.

The Circuit Court further deviated from the 'evidence' before it and relied upon laches in obviating AMBIT's statutory rights. Laches, where it applies, offers equitable remedies (e.g., specific performance) but does not supplant the applicable statutory limitation nor drive dismissal.[50] Here, where West Virginia Code Section 55-2-6 controls the timing of contract claims and where AMBIT expressly did not raise equitable claims nor seek equitable relief, laches has no role.[51] Once again, a finding of laches mandates a requisite finding of prejudice, which West Virginia law defines as a material change in circumstances, such as a death of a party, the loss of evidence, an additional obligation assumed.[52] The delay must be unreasonable but, even more, unexplained.[53] "Prejudice here is strictly confined to the issue of evidence: Has the length of the delay caused critical or dispositive evidence to be lost, destroyed, or otherwise made unavailable?"[54] Here, where AMBIT did not raise a suit in equity, where it complied with its statutory mandate, and where Horizon can cite no legal prejudice, laches cannot bar its rights to pursue its claim. Further, laches, where it applies, offers equitable remedies (e.g., specific performance) but does not supplant the applicable statutory limitation nor drive dismissal, such that laches had no role at summary disposition of this contract claim, where no equitable remedies were sought.[55]

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[50] Syl. pt. 2, *Malone v. Schaffer,* 178 W. Va. 637, 363 S.E.2d 523 (1987); *Brand v. Lowther,* 168 WW. Va. 726, 731, 285 S.E.2d 474, 478 (1981); *Clark v. Gordon,* 35 W. Va. 735, 752, 14 S.E. 255, 261 (1891).

[51] Syl. pt. 3, *Province v. Province,* 196 W. Va. 473, 473 S.E.2d 894 (1996); *Moundsville v. Ohio River R.R.,* 37 W. Va. 92, 96, 16 S.E. 514, 16 (1892).

[52] Syl. pt. 2, *McMullen v. Matheny,* 104 W. Va. 317, 140 S.E. 10 (1927), also generally finding a requisite minimum of twelve years for a finding of 'delay.'

[53] *Banker v. Banker,* 196 W. Va. 535, 474 S.E.2d 465 (1996).

[54] *Id.*

[55] Syl. pt. 2, *Malone v. Schaffer,* 178 W. Va. 637, 363 S.E.2d 523 (1987); *Brand v. Lowther,* 168 WW. Va. 726, 731,

For these reasons, AMBIT seeks enforcement of its statutory limitation for its contract claim, which it did not waive, which it did not lose through unreasonable, unexplained delay, and with which it complied when it filed timely and prosecuted diligently.

D. **Assignment of Error Number 2**: The Circuit Court of Marion County, Business Court Division, erred in finding that a plaintiff may waive a cause of action during its statute of limitations period even absent clear and convincing evidence of a knowing and voluntary intent to waive a known right. In filing for overpaid rent, AMBIT filed in 2013 for rent payments made back to 2003, thereby falling within the ten-year statute.

With the waiver and laches rulings, the Circuit Court effectively nullified the ten-year statute of limitations on contract in West Virginia. That is, by example, in *Bruce,* landlord had clear prior knowledge of the issues due to the prior litigation but waited 28 years to seek recovery. In the instant action, AMBIT believed it was lawfully complying and, upon learning otherwise (in 2013), filed suit right away (within a month) to recoup the prior ten years of loss. In both instances, the same Circuit Court found waiver. By natural extension of his rulings, the statute of limitations for contract claims in West Virginia has become that a plaintiff must file immediately upon knowledge or upon any act that could be construed or conceived as knowledge or alleged to be prejudicial, including maintaining one's course – even the wrong course – or face dismissal for laches, waiver, untimely filing. The statutory limitations for written contracts under seal has to have some meaning, which it cannot if even compliance with contract terms until discovery of a breach results in a finding of waiver or laches.

In filing for overpaid rent, AMBIT filed in 2013 for rent payments made back to 2003, thereby falling within the ten-year statute. Upon summary judgment, Horizon (landlord) alleged laches, asserting that AMBIT was "precluded by the equitable doctrine of laches from asserting the claim in the complaint. Laches applies where there is a delay in the assertion of a known

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285 S.E.2d 474, 478 (1981); *Clark v. Gordon,* 35 W. Va. 735, 752, 14 S.E. 255, 261 (1891).

right which works to the disadvantage of another or that the delay has been such that it warrants the presumption that the other party has waived any right. *Warner v. Kittle,* 167 W. Va. 719, 280 S.E.2d 276 (1981)."[56] Whereas Horizon admits that the defense of laches is fact dependent and yet has no facts, it was error for the Circuit Court to find that AMBIT waived its right to collect overpaid rent during the ten-year statutory period. While Horizon had no explanation, AMBIT provided an explanation on the record of the sentinel moment, when Horizon brought suit against it. In 2013, AMBIT worked with legal representatives on the defense, who uncovered paragraph 14 of the 1996 Agreement. AMBIT filed its counterclaim in Civil Action No 13-C-196 immediately thereafter. West Virginia law does not support a finding that mutual mistake constitutes 'knowing and voluntary intent to waive a known right.' AMBIT respectfully asserts that the Circuit Court of Marion County, Business Court Division, ruled inconsistently in finding previously on August 31, 2017, that the ten years of overpayments resulted from mutual mistake yet also found conversely on February 6, 2020, that AMBIT sat on its hands and waived its right to collect overpayments. AMBIT seeks relief from the Court's ruling that falls outside the law and facts of the case.

Specifically, between the Court's rulings on laches and waiver; its finding of knowledge, delay, prejudice with no discovery;[57] and its inapposite reliance on *Bruce*, nothing remains of the statutory ten-year limitation for contract claims. Further, even assuming *arguendo* that the instant claim did not sound in contract and did not have a statutory limitation, Horizon would need to demonstrate some prejudice arising from the delay, beyond the delay itself, such as a change in

[56] APP000859.

[57] Whereas the Court alleges that AMBIT failed to raise genuine issues of material fact (APP001161), more pointedly, AMBIT raised Horizon's complete failure to conduct any discovery whatsoever on that issue – a completely silent record.

circumstances.[58] Here, Horizon identified only that it "continue[s] to face this issue."[59] Contrary to the mandates of West Virginia law, Horizon cited no loss of evidence, no expenditures made, no obligations assumed, no change in circumstances. West Virginia law expressly and strictly confines 'prejudice' for laches to the issue of evidence, and Horizon had conducted no discovery, could cite nothing in its brief and only the annoyance of litigation at the dispositive motions hearing (and that at the Court's prompting). Horizon has failed to demonstrate the requisite prejudice for laches.

Once again, while Horizon did no discovery on the intervening facts, AMBIT has asserted that, in defending against Horizon's 2013 litigation, AMBIT and its representatives re-discovered paragraph 14 of the 1996 Agreement; AMBIT filed the counterclaim immediately following that discovery.[60] Thereafter, it is incontrovertible that the correct rate of rent was **not known as a matter of law** until the August 31, 2017, Order entered by the Circuit Court of Ohio County, Business Court Division, at which time the Court expressly held that the 1996 Agreement does not supersede the Lease.[61] The parties were both in error until that time, when the Circuit Court clarified the true meaning of the 1996 Agreement and the Lease Agreement. The Court's rulings in this subsequent suit should be commensurate with its initial findings in the Ohio County cause of action.

The payments made from 2003 until 2013 were consistent with AMBIT's assertion that AMBIT and Horizon believed in error that AMBIT was paying the correct amount. Indeed, landlord Horizon accepted the overpayment each month for ten years. As of August 31, 2017,

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[58] Syl. pts. 3-5, *Kinsinger v. Pethel,* 234 W. Va. 463, 766 S.E.2d 410 (2014); syl. pt. 5, *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.,* 123 W. Va. 53, 14 S.E.2d 922 (1941).
[59] APP001184.
[60] APP001182ff.

that acceptance was found to be in error or, if Horizon knew that AMBIT was paying the wrong amount, then an unlawful taking. The record below supports that landlord and tenant never discussed or corresponded about that rate of rent, not even when AMBIT's management and leadership changed over time, until 2013, when landlord filed suit against the tenant on other grounds, and the parties focused for the first time on the rate of rent issue. Thereafter, AMBIT's counterclaim was filed, dismissed without prejudice, and re-filed as the instant action in 2018. After dispositive motions practice, the Circuit Court of Marion County, Business Court Division, ruled that the tenant slept on its rights in that each overpayment constituted an implied waiver (even though the tenant never expressed knowledge).

For these reasons and those set out elsewhere herein, AMBIT seeks relief from this Honorable Court from the Circuit Court's January 15, 2020, rulings and from the improper and incorrect MSJ Order prepared by Horizon in response.[62]

E. **Assignment of Error Number 3:** The Circuit Court of Marion County, Business Court Division, erred in proceeding with a fact-based summary judgment motion when defendant conducted no discovery to support the defense and instead relied upon documents previously struck down by the Circuit Court as inapplicable to this issue.

As demonstrated by Horizon's Motion for Summary Judgment of the Defendant Horizon Ventures of West Virginia, Inc. (12.2.19),[63] Horizon presented evidence that AMBIT's rent payments over time were consistent with the terms of the May 28, 1996, Agreement to Resolve Pending Litigation (1996 Agreement), a settlement agreement entered between the parties and/or their apparent agents to resolve pending litigation.[64] However, the 1996 Agreement was at issue in the prior (2013) litigation between the parties, with one of the key issues being whether the

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[61] APP000096ff.
[62] APP001162. *But see* APP001186.
[63] AAPP000838.

1996 Agreement was the controlling determinant of rate of rent after 1996, even though its terms are inconsistent with the terms of the Amended and Restated Lease Agreement. By its Order in the prior litigation, the Circuit Court of Ohio County, Business Court Division, found that one paragraph in the 1996 Agreement "is clear in limiting the applicability of the agreement as it provides that the 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[,]"[65] neither of which is at issue here. The Circuit Court of Marion County, Business Court Division, erred in granting Horizon's fact-based motion on the basis of the parties' performance under the 1996 Agreement, which Agreement was nullified for purposes of rent through prior litigation. In sum, the parties had previously litigated *inter alia* the terms of the 1996 Agreement and overpaid rent as part of the Ohio County civil action. Portions of that litigation were dismissed without prejudice and were refiled in Marion County as the instant claim. However, the Court's Order (8.31.17) holding that the 1996 Agreement was inapplicable to rent calculations precludes Horizon's efforts to re-litigate the same issues in the same provisions of that Agreement in subsequent civil actions.[66] As the Court found, the parties had knowingly entered the 1996 Agreement, but they did so as a settlement agreement, not as knowing and voluntary intent to waive a known right to pay rent according to the Amended and Restated Lease Agreement.[67] However, because that issue was previously litigated, *res judicata* must preclude that inquiry.[68] As is evident from its Motion, Horizon conducted no discovery relative to what AMBIT and its employees or agents were thinking, knowing, intending, when

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[64] APP000049, APP000096, APP000231, APP001158.
[65] APP000096ff.
[66] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996).
[67] APP000089; APP001182.

they paid rent consistent with the 1996 Agreement and what change occurred in their thinking, knowledge or intent in recognizing the mutual error of payment/receipt and filing suit in 2013 to recoup the moneys. As expressly recognized in the MSJ Order,[69] the only bases Horizon raised in support of its fact-based motion are the 1996 Agreement and the parties mutual error in complying with its terms. Horizon's motion stops short of conceding the outcome of the prior litigation that determined that the 1996 Agreement had no force or effect to change rate of rent at any time. Whereas this issue had been resolved by the same Court's order and whereas the prior litigation and the Court's order were addressed at length in AMBIT's Response in Opposition to Horizon's Motion for Summary Judgment,[70] nonetheless the Court erred in granting Horizon's motion on the basis of clear and convincing evidence of intentional relinquishment of such right, advantage, or benefit – all of which exceeded the factual development in the claim. AMBIT respectfully asserts that the Circuit Court of Marion County, Business Court Division, erred in granting a fact-based motion without evidence of supporting facts, which motion further relied solely on the document struck down by the Circuit Court of Ohio County, Business Court Division, in litigation involving the same parties, same counsel, same Court.[71]

West Virginia law provides that "'unsupported speculation is not sufficient to defeat a summary judgment motion.'" *Williams v. Precision Coil*,194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995), quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987). Similarly, it must also be true that unsupported speculation, whether by the moving party or the Court, cannot provide the necessary basis to support a summary judgment motion, in particular as

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[68] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).
[69] APP001166.
[70] APP001162.
[71] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

relates to fact-based defenses such as laches, waiver or lapsed statute of limitations. AMBIT seeks this Court's protection from the unsupported rulings below that undercut AMBIT's timely exercise of its known and protected rights.

F. **Assignment of Error Number 4:** The Circuit Court of Marion County, Business Court Division, erred in precluding AMBIT from filing its surresponse, given that the argument at the pretrial exceeded the scope of discovery and motions practice prior to that time.

Given Horizon's failure to conduct discovery relative to knowing and voluntary intent to waive a known right, the Court's questioning at the motions hearing (held in conjunction with the pretrial) exceeded the scope of motions practice and discovery.[72] Whereas the Court alleges that AMBIT failed to raise genuine issues of material fact (APP001161), once again, more pointedly, AMBIT raised Horizon's complete failure to conduct any discovery whatsoever on that issue – a completely silent record. Thereafter, AMBIT sought leave of Court to address the Court's issues raised for the first time at the motions hearing;[73] however, the Court denied said motion for leave and issued the order citing the *Bruce* decision (see First Assignment of Error, above).[74] AMBIT seeks this Honorable Court's review of issues raised below and of legal conclusions raised below that AMBIT attempted to address in the normal course of the litigation process, without relief.

In seeking this relief from the Circuit Court, AMBIT asserted that the circumstances justified additional motions practice in order to illuminate and clarify the historical development of this case and to address new points of argument and law of first impression asserted before the Court at motions practice, all to the objective of a clean and complete

[72] APP001161.
[73] APP001124.
[74] APP001158.

record. AMBIT admitted that it is axiomatic that the Circuit Court has the discretion and authority to require, request or allow briefing as it deems necessary and appropriate for the adjudication of any claim, defense or issue presented.[75] Further, AMBIT noted by analogy that West Virginia law includes several provisions, notably, West Virginia Rules of Civil Procedure 59 and 60, that emphasize that reaching the correct ruling under the law and the just ruling under the facts are worthy endeavors and necessary to the fair administration of justice, regardless of the time at which they arise. AMBIT asserted that the specific circumstances present the very situation in which the Court should allow additional briefing, by granting AMBIT leave to file its surresponse and, if indicated, a surreply from Horizon. AMBIT sought leave to address these issues further before any order would be entered relative to the proceedings on January 15, 2020, given some factors at issue that could be clarified and/or corrected prior to entry of an order. For instance, AMBIT advised the Court that West Virginia law mandates **clear and convincing evidence** of the party's express intent to relinquish a known right, that is, "proof so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted."[76] To the extent that no evidence relative to waiver was adduced in discovery and that only the payments themselves and the passage of time were before the Court on motions practice, it has been AMBIT's position and remains so now that West Virginia law as currently crafted does not extend

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[75] APP001178ff.

[76] APP001134; *Potesta v. US. Fidelity & Guar. Co.*, 202 W. Va. 308, _,504 S.E.2d 135, 142 (1998), quoting *Hoffman v. Wheeling Savings & Loan,* 133 W. Va. 694, 57 S.E.2d 725 (1950). *See also O'Dell v. Stegall,* 226 W. Va. 590, 608 n.11, 703 S.E.2d 561, 579 n.11 (2010), citing in part *Maxwell v. Carl Bierbaum, Inc.*, 48 Ark. App. 159,161,893 S.W.2d 346,348 (1995) ("Clear and convincing evidence has been defined as proof so clear, direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the matter asserted; it is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to

to a finding of waiver in this matter.

Without addressing the failure of discovery and assertions of fact, prejudice, intention, knowledge with no record whatsoever, the Circuit Court denied AMBIT's motion for leave to explore these issues further.[77] Potentially as a result, the parties find themselves seeking review with the potential outcome of having to revisit these issues, these motions, once again before the Circuit Court. AMBIT believes the Court's failure to consider further below the failures surrounding the dispositive motion process has prejudiced AMBIT, such that the Court's order dismissing its claim for overpaid rent must be reversed.

E. **Assignment of Error Number 5:** The Circuit Court of Marion County, Business Court Division, erred in denying AMBIT's motion for summary judgment, based upon the express terms of the Amended and Restated Lease Agreement and the evidence adduced in discovery.

On the dispositive motion deadline, AMBIT filed a dispositive motion in support of its use of Foreign Fuel for Operating Reasons, as set out expressly in the Amended and Restated Lease Agreement.[78] Pursuant to Order (8.31.17) entered by the Circuit Court of Ohio County, Business Court Division (Young, J.), Section 6 of the Amended and Restated Lease Agreement provides the correct determinants for rate of rent calculations.[79] Through the course of discovery, AMBIT and its experts developed support for the finding that AMBIT in its reasonable judgment has used Foreign Fuel for Operating Reasons, such that the lower rate of rent (1 percent) should have been charged at a minimum from December 2003 to present. AMBIT presented direct and largely uncontroverted evidence that the use of Foreign Fuel was necessary to reach rated output, to operate safely, to remain operational, and because usable Local Fuel has been unavailable

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be established.")

[77] APP001158.

[78] APP000756; APP001237; APP000566.

since 2003. Whereas Horizon identified an expert on some of these issues (who remained outside deposition reach of AMBIT), the Court did not address these issues at the motions hearing, focusing instead on the issue of waiver tied to the 1996 Agreement. AMBIT respectfully asserts that the Circuit Court of Marion County, Business Court Division, erred in failing to address the substantive issues identified in the Amended and Restated Lease Agreement, which structure and inform the fuel selection process. In particular, given the resolution of Horizon's counterclaim by order of the Circuit Court pursuant to Horizon's contractual grant of discretion to AMBIT and the Circuit Court's finding that AMBIT did not use that discretion arbitrarily or capriciously,[80] the same outcome should have been available, would have been available, to AMBIT on its initial motion for summary judgment on overpaid rent from 2003 to 2013, absent the oddities and factual and legal missteps of the January 15, 2020, dispositive motions hearing. As demonstrated by the pleadings and argument relative to AMBIT's renewed motion,[81] judgment as a matter of law has been and remains the necessary and proper resolution. The roadmap for their resolution arises from the August 31, 2017, Order that tied rate of rent to the Lease Agreement. AMBIT seeks judgment as a matter of law relative to its proper use of fuel as mandated by paragraph 6 of the Amended and Restated Lease Agreement.

Conclusion.

American Bituminous Power Partners, LP, seek relief from the Order Granting in part Horizon Ventures of West Virginia, Inc.'s Motion for Summary Judgment (2.6.20) on the basis that it resulted from a misapplication of West Virginia law, arose from a silent record on fact-based determinations and

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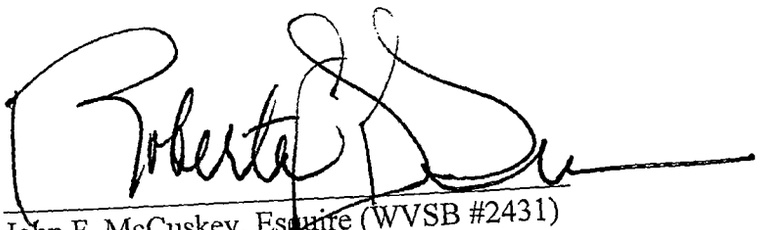
[79] APP00096.
[80] APP001189, APP001237, APP001628, APP001654.
[81] APP001189, APP001237, APP001628, APP001654.

impermissibly undercuts West Virginia's statutory limitations for contract claims. AMBIT seeks the relief this Court deems just.

Respectfully submitted,

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,

By counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0762

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,
Plaintiff/Counterclaim Defendant Below, Petitioner,

vs.

HORIZON VENTURES OF WEST VIRGINIA, INC.,
A West Virginia corporation,
Defendant/Counterclaim Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, John F. McCuskey/Roberta F. Green, counsel for Petitioner/Plaintiff/Counterclaim Defendant, do hereby certify that we served a true and exact copy of the foregoing **"BRIEF OF PETITIONER"** on counsel of record via the United States Postal Service (with electronic copy served via Marion County electronic service) by placing the same in a stamped envelope addressed as follows:

Mark A. Kepple, Esq.
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this 30th day of December, 2020.

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