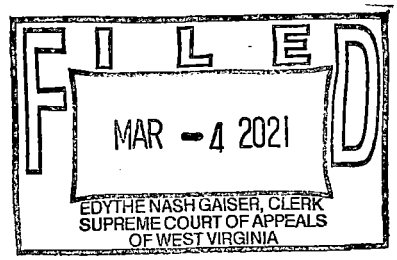
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0762



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.

REPLY OF PETITIONER INCLUDING RESPONSE TO CROSS ASSIGNMENTS OF ERROR

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

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I. TABLE OF CONTENTS

SECTION **PAGE**

II. TABLE OF AUTHORITIES

Case Law

Statutes

Other

III. REPLIES AND RESPONSES TO ASSIGNMENTS OF ERROR

A. **Reply in Support of 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.

B. **Reply in Support of 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.

C. **Reply in Support of Assignment of Error Number 3:** The Circuit Court of Marion County, Business Court Division, erred in proceeding with a fact-based summary judgment motion on bases including but not limited to laches and waiver 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..

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

E. **Reply in Support of 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.

F. **Response to Respondent's First Cross-Assignment of Error:** The Circuit Court properly determined that the parties were at stage 2 of the rent determination such that *res judicata* did not, would not and could not apply to AMBIT's claims, but certainly must apply to Horizon's arguments relative to the 1996 Agreement.

G. **Response to Respondent's Second Cross-Assignment of Error:** The Circuit Court properly determined that collateral estoppel had no role in AMBIT's claims in this civil matter, as the Court and AMBIT had transitioned to stage 2 of the rent determination (despite Horizon's insistence, regardless of the law precluding same, on revisiting stage 1).

H. **Response to Respondent's Third Cross-Assignment of Error:** The Circuit Court properly determined that judicial estoppel had no role in AMBIT's claims in this civil matter, as the Court and AMBIT had transitioned to stage 2 of the rent determination (despite Horizon's insistence, regardless of the law precluding same, on revisiting stage 1).

.IV. REPLY AND RESPONSE ON STATEMENT OF THE CASE

American Bituminous Power Partners, L.P. (AMBIT) appears before the Court, in part, in support of its appeal and, in other part, in support of the Circuit Court of Marion County, Business Court Division, in that Horizon Ventures of West Virginia, Inc. (Respondent, Horizon) has based the Respondent's Brief and Cross-Assignments of Error (Respondent's Brief) on issues, 'facts,' arguments that were never before the Court below. Additionally, despite the now five times these parties have appeared before this Court relative to these issues, the frequent changes in Horizon's legal team over time may have led to some of the confusion and errors that Horizon has placed before this Court. Therefore, AMBIT uses this opportunity in part to address and clarify the muddle that Horizon has created, raising these issues here, outside the civil action in which they were fully litigated to an unchallenged conclusion, as if its lost appeal option, the missed date, the miscommunication can be obviated by bluster, rhetoric, and unsubstantiated and false accusations. Regardless of the disappointments of missed opportunities, the record below and here is clear. In addressing these issues so as to clarify the record and support the work of the Business Court, AMBIT does not waive its position that the Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, LP, and Horizon Ventures of West Virginia, Inc. (the "1996 Agreement,"[1] does not, cannot and shall not supersede the Lease Agreement, as follows.

Since 2014, the Business Court Division has worked to sort out the rent issues between Horizon and AMBIT. Whereas Horizon even now asserts that "AMBIT then [in 2012], without any proper legal basis, stopped paying Horizon rent, in violation of the Settlement Agreement."[2]

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[1] The 1996 Agreement included dismissal of Horizon's then-pending suit (section 4e of the Agreement) and the payment of $244,885.18 to Horizon in settlement. It is a settlement agreement that by its express terms does not supersede the Lease Agreement. *See also* Respondent's Brief at 7, referencing the 1996 Agreement as tied to resolving a separate lawsuit between these entities. *See also* Respondent's Brief at 10.

[2] Respondent's Brief at 3.

Horizon has already litigated this issue to full conclusion, with this Honorable Court deciding key pieces of it as well. The indisputable and heretofore undisputed record of these litigations is that, as a matter of fact and law, AMBIT stopped paying rent in December 2012 because Senior Debt[3] was outstanding and there were insufficient funds beyond those obligations. On May 13, 2015, this Honorable Court recognized relative to an appeal of Civil Action No. 13-C-196, that "[t]he Lease Agreement provides that AMBIT's payment of rent to Horizon is subordinated to the payment of 'Senior Debt' defined as all indebtedness, obligations and liabilities of AMBIT pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees between AMBIT and any banks or other financial institutions providing a letter of credit or other form of security or credit enhancement for the tax-exempt bonds."[4] Thereafter, upon remand and after two more years of litigation, the Business Court, also in Civil Action No. 13-C-196, "conclude[d] that Horizon's right to collect rent is subordinate to Senior Debt."[5] The Business Court further found that, by initiating 13-C-196 to collect rent payments while Senior Debt was outstanding, Horizon had "committed a breach of the Lease Agreement."[6] Therefore, Horizon's assertion that AMBIT stopped paying rent 'without proper legal basis' has been tested through protracted litigation in Civil Action 13-C-196 and determined to be decidedly false.

Whereas ***now,*** too late, in the wrong litigation, in direct derogation of West Virginia law, Horizon attempts to revisit the August 2017 Order arising from Circuit Court of Ohio County, Business Court Division, Civil Action No. 13-C-196, nothing changes the fact that Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the Order other than, in

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[3] APP000094, finding that "because AMBIT's debt obligation to Deutsche bank is not a new loan or new extension of credit, the debt obligation is Senior Debt."
[4] 14-0446 at *2.
[5] APP000096.
[6] APP000096.

violation of West Virginia law, attempting to relitigate its terms here and in its own appeal.[7] 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 [which] is prohibited."[8] "'[F]ailure to appeal an order does not render it 'non-final.'"[9]

Further, Horizon has demonstrated confusion as to the status of rent litigations. However, the Business Court has been express and transparent in its plan to sort out these issues between Horizon and AMBIT. That is, as the Business Court has stated and found expressly and repeatedly, its examination is three pronged: (1) the correct basis for determining rent, (2) the correct rate of rent under that basis and (3) collection. Therefore, Civil Action 13-C-196, stage one of the rent determination process, worked to determine whether rent should be calculated as set out in the 1996 Agreement or as provided in the Lease Agreement. Once again, after at least four years of litigation, the Business Court found *as recognized by Horizon*[10] that "Rent shall be calculated in accordance with paragraph six of the Lease Agreement as limited by paragraph five of the 1996 Agreement."[11] Indeed, in the August 31, 2017, Order, the Business Court recounts Horizon's arguments just as Horizon recounts them to this Court in this appeal process. The Business Court heard and understood Horizon's arguments relative to the 1996 Agreement. It just dismissed them as untenable and incorrect. As a matter of unchallenged, unappealed law, rent payments are calculated in accordance with paragraph six of the Lease Agreement.[12] That issue and all of Horizon's arguments relative to that issue were litigated for years before this same Business Court.

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[7] Docket No. 20-0759 (pending).
[8] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13.
[9] *Bison Interests,* at *22 n.13, quoting *Smith v. CSK Auto, Inc.,* 132 P.3d 818, 820 (Alaska 2006).
[10] Respondent's Brief at 6. *See also* Respondent's Brief at 8, citing the Business Court's recounting that 13-C-196 was not about determining rent.
[11] APP000096.
[12] APP000231.

They were resolved, fully, finally, and must be left inviolate even now. In addressing this Honorable Court's attention to prior litigations between these parties, AMBIT does not acquiesce to Horizon's assertion that these issues are extant and expressly does not waive its position that West Virginia law precludes Horizon's efforts to end-run the claim/issue preclusion that places the basis for rent beyond litigation. Nothing changes the fact that Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the Order other than, in violation of West Virginia law, attempting to relitigate its terms here and in its own appeal.[13] Indeed, for all that Horizon disputes in its Respondent's Brief, it does not dispute that it never challenged or appealed the August 2017 Order. Therefore, 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 [which] is prohibited."[14] ["F]ailure to appeal an order does not render it 'non-final.'"[15]

Also, in determining that paragraph six of the Lease Agreement controls rent, the Business Court further felt tasked to answer a question this Honorable Court had directed it to address: whether the parties had intended for the 1996 Agreement to operate prospectively.[16] Found the Court, "[i]n analyzing the 1996 Agreement, the Court finds that paragraph fourteen 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."[17] Therefore, by the express terms of the August 31, 2017, Order, the Agreement does not supersede the Lease

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[13] Docket No. 20-0759 (pending).
[14] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13.
[15] *Bison Interests,* at *22 n.13, quoting *Smith v. CSK Auto, Inc.,* 132 P.3d 818, 820 (Alaska 2006).
[16] APP000092.
[17] APP000098.

Agreement (but for paragraphs 4, 5). To the extent that Horizon relies on provisions in the 1996 Agreement that reference rates of rent to be paid and the status of fuel, none of that remains, as the Lease Agreement supersedes them. The Lease Agreement controls – and that is where AMBIT's contractual grant of discretion resides: paragraph six of the Lease Agreement.

Horizon asserts that the "lower court's opinion did not eliminate the Admissions contained in the Settlement Agreement from consideration, as AMBIT claims."[18] However, by the express terms of the 1996 Agreement, in part, "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."[19] Horizon now seeks to enforce provisions of the 1996 Agreement beyond paragraphs 4, 5 – but as a matter of established law, the Lease Agreement prevails on *inter alia* the provisions Horizon now would revisit. Both the 1996 Agreement and the Lease Agreement address bases of rent and its calculation, but, as a matter of law, the Lease Agreement prevails. Addressing the particulars of Horizon's argument raised for the first time since 2017 on AMBIT's and Horizon's appeals (while reserving every objection under law and equity to Horizon's end-run of proper law and procedure),[20] Horizon argues that the higher rate of rent is appropriate (an alleged 3 percent) because, pursuant to the 1996 Agreement, AMBIT agreed that as long as any Local Fuel is located on the premises, AMBIT is using Foreign Fuel for non-operating reasons. From here, Horizon argues that local fuel is available, so the higher rate applies.[21]

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[18] Respondent's Brief at 6.
[19] APP0001162.
[20] As a matter of law, Horizon is precluded from raising non-jurisdictional issues for the first time at appeal. *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).
[21] Respondent's Brief at 10, 11.

Even assuming that the 1996 Agreement were an active issue rightfully and properly before this Court, which it is not, the Lease Agreement provides express guidance on each of these issues. That is, for instance, the determinant under the Lease Agreement is *usable* Local Fuel,[22] and it is only one of the determinants under Operating Reasons for the use of Foreign Fuel.

> 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: (a) to achieve and maintain the manufacturer's rated output of any. Plants on the Demised Premises; (b) to operate any Plants on the Demised Premises in a safe manner; (c) to operate the Initial Cogeneration Plant in compliance with the Electric Energy Purchase Agreement (the "EEPA") dated September 15, 1988 between Tenant and Monongahela Power Company ("Mon Power") or to operate any other Plants on the Demised Premises in compliance with the agreement with any utility concerning the purchase of electricity generated by such Plants; (d) to operate any Plants on the Demised Premises in compliance with any operation. and maintenance manual prepared or modified by the person who, or entity which, designs, constructs, manufactures, repairs, modifies or improves the Plants or the equipment therein and all laws or regulations applicable to such Plants: (e) due to the inability of Tenant to use Local Fuel as a result of any law, rule, regulation or order of any court or other administrative, governmental or quasi-governmental agency or authority including, without limitation, as a result of the rejection of this Lease in bankruptcy; or (f) due to exhaustion of the **usable** waste coal material on the Demised Premises. As used herein, the term "Non-Operating Reason" means that Tenant has determined, in its sole judgment, to partially or exclusively use Foreign Fuel to the extent (i) such use is designed to reduce the cost of limestone usage by a. Plant or (ii) there is no Operating Reason to do so.[23]

As demonstrated here, paragraph six of the Lease Agreement expressly conflicts with the provision of the 1996 Agreement referenced by Horizon. Whereas Horizon's preferred provision references local fuel as the determinant, the Lease Agreement references ***usable*** local fuel. Whereas Horizon's preferred provision renders rate of rate determinations a pre-determined, mandated sum, the Lease Agreement provides AMBIT with a contractual grant of discretion in its fuel selection:

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[22] APP000232.

[23] APP00231ff (emphases added). Also, whereas Horizon continues to marvel that AMBIT did not raise issues relative to local fuel and pricing at any time before January 2013, that stance is expressly undercut by the evidence adduced below. *See, e.g.,* APP00567-68.

in its reasonable judgment, in its sole judgment. In these and other features, the provision cited by Horizon is directly contradicted and overruled by paragraph six of the Lease Agreement, which Lease Agreement, as a matter of unchallenged, unappealed, settled law, controls; the 1996 Agreement cannot, shall not and does not supersede the Lease Agreement.[24]

Horizon believes that the Court's alleged failure to discuss directly in the August 2017 Order each of the alleged Admissions means that the Admissions remain unadjudicated.[25] However, the Business Court's ruling did expressly provide for each of them. To the extent that the Admissions and the Lease Agreement could both apply, the Lease Agreement prevails because as a matter of fact and law, the 1996 Agreement does not, cannot and shall not supersede the Lease. By the express terms of the Agreement itself and the Business Court's 2017 Order, the 1996 Agreement does not supersede the Lease Agreement. Rate of rent determinations, therefore, are driven by the Lease Agreement.

Horizon asserts that the Admissions were not previously decided,[26] however, the evidence before the Court on Horizon's dispositive motion was that Horizon filed the same brief in 18-C-130 as it had filed in 13-C-196.[27] Indeed, in most if not all respects, Horizon's July 2017 and December 2019 motions appear to be verbatim, which similarity was addressed to the Business Court in 18-C-130.[28] The inescapable fact and disappointment for Horizon is that it litigated the

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[24] Of note, Horizon references AMBIT's answer, in which AMBIT responded consistently with the August 31, 2017, Order, with its arguments before the Business Court, and with its arguments here. Additionally in its answer, AMBIT denied any and all allegations not expressly admitted to in its Answer. APP000457

[25] Respondent's Brief at 13.

[26] Respondent's Brief at 9.

[27] *See* Civil Action No. 13-C-196 at Motion Of The Plaintiff, Horizon Ventures Of West Virginia, Inc., For Partial Summary Judgment WithRespect To Count II Of The Amended Counterclaim; Motion For SummaryJudgment Of The Plaintiff With Respect To Count I Of The AmendedCounterclaim Of The Defendant; Common Statement Of Facts With Respect To Motions For Summary Judgment Of The Plaintiff, Horizon Ventures Of West Virginia, Inc.; And Motion For Summary Judgment With Respect To The Status Of The Intervenor Banks As Holders Of Senior Debt (7.7.17).

[28] APP001162-63.

1996 Agreement, the exact same provisions it wants to pursue improperly here, before the Business Court sitting in a different county, in a different civil action but with the same judge, unsuccessfully. That adverse ruling went without challenge, and Horizon tried again below unsuccessfully to gain purchase and now is trying to accomplish improperly, impermissibly by fiat or run-around what it failed to address properly, had it appealed the 2017 Order. That said, the terms of paragraph 14 of the 1996 Agreement are clear – nothing in the 1996 Agreement supersedes the Lease. It is unclear that any challenge at any time could have changed the Business Court's or this Court's assessment of that fact.

Therefore, where Horizon repeatedly asserts that AMBIT "asserts without proper basis, that [the August 31, 2017] prior decision controls far more than its actual stated scope[,]"[29] in actuality, AMBIT relies upon the express provisions, as does the Business Court itself *as recognized expressly by Horizon.*[30] The Business Court found that, the Lease Agreement controls because by the express provisions of the 1996 Agreement, it does not and cannot supersede the Lease. AMBIT has never argued beyond that. Of note, both the Business Court and AMBIT agree as to the Court's rulings in the August 31, 2017, Order, as reflected in Respondent's Brief.[31] Horizon's failure to question, move to alter/amend, appeal or otherwise challenge the 2017 Order does not render it non-final here. Therefore, Horizon's energy and misdirection related to enforcing provisions of the 1996 Agreement and its continued challenge to the Lease Agreement are improper, ill-founded and baseless.

Whereas Horizon argues that AMBIT's arguments against waiver and laches would fail if this Court would just weigh-in and enforce the 1996 Agreement according to Horizon's

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[29] Respondent's Brief at 5.
[30] Respondent's Brief at 7, relying upon Horizon's Appx. [sic] 001185-86 [001135-36]. Also available in AMBIT's appendix at APP001185-86 (explaining perhaps the confusion on page numbers).
[31] Respondent's Brief at 7.

[mis]reading of it, albeit an issue not before the Business Court and, therefore, not rightfully before this Court, the fact remains that, by its express terms and by the unchallenged, unappealed August 31, 2017, Business Court Order, the 1996 Agreement cannot, does not and shall not supersede the Lease Agreement. The Lease Agreement prevails, as Horizon's arguments do not arise from paragraphs 4 and 5.

Whereas Horizon argues that AMBIT wants to push any and all courts into AMBIT's interpretation of the August 31, 2017, Order, as demonstrated here, the Business Court has fully, expressly and correctly construed not only the 1996 Agreement but also its relationship to the Lease Agreement. The same parties litigated the same issue fully in 13-C-196, resulting in the August 31, 2017, Order. In sum, final adjudication on the merits between the same parties, with Horizon pursuing the same claims and arguments in Ohio County and here: r*es judicata.*[32]

The second prong of the rent determination as undertaken by the Business Court is the correct rate of rent, "the calculation, not the collection of rent."[33] The Court focused in particular on paragraph six of the Lease Agreement, which had been determined through previous litigation to be the operative basis. The Court focused in particular on the contractual grant of discretion reflected there: "As used herein, the term 'Operating Reason' means that [AMBIT], in its reasonable judgment, has determined that a percentage (partial or total) of Foreign Fuel is required for one or more of the following reasons[.]"[34] Whereas Horizon without basis or appellation asserts that "the most important [reason] is 'due to exhaustion of the usable waste coal material on the Demised Premises,'"[35] no determination has been requested nor provided as to the most

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[32] *Mueller v. Shepherd Univ. Bd. Of Gov.*, No 11-0567, 2012 WL 5990134, at *22 (W. Va. Nov. 30, 2012) (quoting Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) (overruled on other grounds)).
[33] APP000429-30.
[34] APP000231-32.
[35] Respondent's Brief at 2.

'important' basis. The Lease Agreement provides six different reasons, and AMBIT presented evidence relative to three of them as demonstrative of its non-arbitrary, non-capricious use of its contractual grant of discretion.[36] The Business Court never waivered from its prior ruling – that the calculation of rent should be performed pursuant to paragraph six of the Lease Agreement. Even in denying AMBIT's Motion for Summary Judgment (12.2.19), a ruling that AMBIT disputes here, nonetheless, throughout the instant litigation, the Court relied upon the language of paragraph six in finding that the rate of rent was tied to a contractual grant of discretion: AMBIT's "reasonable judgment."[37] Indeed, the Business Court confirmed at the end of the instant litigation that "the rate of rent over time and the practical tools for calculating rent in arears and forward were determined as matters of law."[38]

The actual calculation of rents has not been accomplished given the Agreed Order to Stay Judgments (11.4.20) nor is the issue relative to payment before any court at this time.

Horizon asserts that AMBIT erred in "attempt[ing] to file a 'Surresponse' brief, claiming *inter alia,* that West Virginia law requires clear and convincing evidence of waiver and that Horizon did not adduce clear and convincing evidence of waiver, other than the fact that AMBIT *paid the rent at issue for sixteen years"* (emphasis in original).[39] Of note, Horizon argues to clear and convincing evidence without conceding that, at the motions hearing, the record reflects no evidence adduced by Horizon – indeed, nothing more than AMBIT by counsel proffering to the Court. Horizon conducted absolutely no discovery whatsoever into intent to waive, such that the payments made were more consistent with unknowing compliance with an erroneous rate of rent than with waiver or laches given the dearth of requisite evidence. Indeed, Horizon came before the

[36] APP000765.
[37] APP001162.
[38] APP001659.
[39] Respondent's Brief at 13, citing to the transcript of the pretrial held on January 15, 2019.

Court with no evidence of AMBIT's knowing relinquishment (waiver) and no evidence of prejudice (laches), and the appropriately filed motion for leave to file a surresponse, accompanied by a proposed surresponse, was rightfully and lawfully filed. To the extent that Horizon laments that litigation just involves too much paperwork, that motions practice clogs the legal system, AMBIT responds below, where indicated.

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.'"[40] 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."[41]

Horizon ridicules the suggestion of mutual mistake.[42] However, as set out below, AMBIT was in error as to the rate of rent until Horizon filed suit against it in 2013. When legal counsel came to assist AMBIT in that defense, AMBIT, under control by new management, was advised for the first time that, by its express terms, the 1996 Agreement does not supersede the Lease, such that rate of rent is driven by the Lease. At that moment, AMBIT recognized the mutual error of overpayment and receipt of overpayments. At that moment, AMBIT initiated this claim.

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[40] 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).
[41] *Hoffman v. Wheeling Sav. & Loan Assoc.*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) (emphasis added).
[42] Respondent's Brief at 15-16.

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 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)."[43] Horizon admits that the defense of laches is fact dependent and yet has no facts; therefore, it was error for the Business 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 clarified the effect of paragraph 14 relative to the Lease Agreement and 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.

AMBIT filed the overpaid rent claim in 2013, 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

[43] APP000859.

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.[44] In response to Horizon's allegations of collateral estoppel (issue preclusion),[45] 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.

VI. SUMMARY OF REPLY AND RESPONSE ON ARGUMENT.

AMBIT renews its assertion that 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 Business Court extended laches beyond matters in equity and directly into matters sounding in law, thereby undercutting the statutory limitations that govern contract. The Business 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 Business Court extended the common law defense of waiver to include an

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

unknowing, unintended relinquishment of an unknown right, even though West Virginia law finds waiver only in the intentional relinquishment of a known right. The Business 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 and, even now, for all its rhetoric and vitriol, Horizon has demonstrated no indication of how and when AMBIT waived its right, given that paying rent is an action consistent equally (if not more so) with unknowing compliance. Whereas the Business Court found that AMBIT had failed to raise genuine issues of material fact so as undercut Horizon's assertions,[46] 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 for waiver and laches – leaving AMBIT attesting by proffer as to the events leading to AMBIT's discovery of the error in 2013. The Circuit Court focused *sua sponte* on a pattern of rent paid and received over a decade and found waiver based on nothing further than compliance with what the Business 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 Business 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

[46] APP001161.

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 Business 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 Business Court overly simplified the tests for laches and waiver, applying them beyond their legitimate authority under West Virginia law.

Most recently, Horizon has raised cross assignments of error, citing *res judicata,* collateral estoppel and judicial estoppel – all relative to the alleged Admissions in the 1996 Agreement. The issue was not before the Business Court below but was addressed fully, finally in 13-C-196, at which time the Business Court found that the 1996 Agreement cannot and does not supersede the Lease Agreement. The Business Court and AMBIT moved to the second step in the Court's rent determinations, but Horizon remains at step one, lamenting the failure to appeal the Business Court's 2017 ruling. *Res judicata* must preclude Horizon's cross assignments of error as unfounded based upon West Virginia law and the Business Court's August 31, 2017, Order. If there is claim preclusion, it runs against Horizon. And there is no judicial estoppel, as ABMTI's positions have remained consistent over time and litigations.

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. AMBIT appears before the Court in support of the Business Court's rulings in 2017 (13-C-196), which were never properly before this Court. AMBIT asserts that it is Horizon's reliance on the 1996 Agreement that falls outside *res judicata* and that the parties' and the Court's positions have been consistent from 2013 to the present. In support of this Appeal, AMBIT provides as follows.

VI. RENEWED STATEMENT REGARDING ORAL ARGUMENT.

Initially, pursuant to West Virginia Appellate Procedure Rule 19(a), AMBIT asserted that

this matter would be suitable for oral argument in that the assignments of error arise from the Court's extension and potential disruption of settled law. AMBIT asserted that the Court's extension of settled law beyond the rubrics established by this Court is unsustainable because it obviates otherwise known rights. While AMBIT believes 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), it is unclear whether issues wrongfully before the Court (the 1996 Agreement) have a place at oral argument. While the Business Court's rulings as considered by this Court will have durable repercussions for contract claims going forward, AMBIT defers to this Court as to the wisdom of inviting these parties to argue.

VII. ARGUMENT.

A. Introduction.

AMBIT renews its authorities and arguments as set forth in its Petitioner's Brief and further asserts and avers that Horizon has failed to raise a credible challenge through its Response or its Cross-Assignments. It will not have escaped this Court's attention that Horizon still has demonstrated no prejudice, still cannot locate even a scintilla of affirmative evidence of intent to waive a known right and is left citing to its own oral argument below in support of its assertions before this Court.[47] Horizon has raised new arguments here – *res judicata,* collateral estoppel, judicial estoppel – which it feels should have eliminated AMBIT's claims below. However, the limitations of the 1996 Agreement via a vis the Lease Agreement were already established law by

[47] Respondent's Brief at 19, 20, citing apparently AMBIT's appendix: [sic] Appx. 001160 (transcript of the pretrial hearing).

August 31, 2017, such that Horizon's attempts to relitigate it now run afoul of *res judicata,* collateral estoppel, judicial estoppel and must be denied at this time.

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. Reply in Support of 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.

AMBIT renews its position relative to the Business Court's determination of laches without prejudice and waiver without a demonstration of knowledge and an express relinquishment undercut, which, left as stands, vitiate West Virginia law. Here, where no facts were adduced in discovery relative to AMBIT's knowledge in the decade prior to suit, where AMBIT's conduct during that decade was consistent with ignorance of the existence of any right, and where Horizon even now, nearing the close of appellate practice, has cited no evidence whatsoever that AMBIT knowingly waived any right or that Horizon was prejudiced, it was the province of the Business Court and now is of this 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 for them.[48] The record remains silent on the requisite facts for laches or waiver. Yet the record clearly supports a suit timely filed pursuant to statutory limitations. Even now, Horizon has done nothing to challenge AMBIT's assertion that Horizon never conducted discovery on waiver or intent in its defense against AMBIT's initiatives to recoup overpayment and that Horizon never demonstrated or even plead the prejudice necessary for laches.

[48] 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).

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.[49] The delay must be unreasonable but, even more, unexplained.[50] 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?"[51]

Whereas Horizon expresses confusion as to whether AMBIT appealed the Business Court's finding of same,[52] AMBIT asserts that the term 'laches' appears 46 times in its Brief. Further, Horizon cites AMBIT's arguments on same, such that AMBIT is flummoxed as to how to convey its intent any more expressly. **AMBIT challenges as error and therefore has appealed the Business Court's reliance on waiver and laches in granting Horizon's dispositive motion.** Once again, Horizon has failed to evidence any prejudice, rather relying one more time on any assumed prejudice from the years of payment. Horizon does not address nor debunk that it failed to raise prejudice in any way until prompted to do so by the Court.[53] AMBIT did not delay. Once the relationship between the 1996 Agreement and the Lease Agreement was clarified for, by and with AMBIT, it filed suit, and that was not adjudicated fully, finally until 2017. Whereas Horizon scoffs that AMBIT could have neglected to read paragraph 14, AMBIT responds with amazement that Horizon does not comprehend the 2017 Order and that it failed to appeal it (had it desired to do so) when that opportunity was available.

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.

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[49] 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.'
[50] *Banker v. Banker,* 196 W. Va. 535, 474 S.E.2d 465 (1996).
[51] *Id.*
[52] Horizon's Response at 33.
[53] APP001168.

[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.'"[54] 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."[55]

Whereas Horizon scoffs at AMBIT's assertion of mutual mistake, Horizon has no other explanation for the 2013 counterclaim that AMBIT filed, seeking reimbursement of overpaid rents. AMBIT's explanation has been clear. Horizon's filing of the 2013 suit brought in legal advisers who reviewed documents and placed paragraph 14 in a new [legal] context for AMBIT. Additionally, supportive of AMBIT's assertion regarding changing operators over time, it bears noting that, while the 1996 Agreement was signed by all of Horizon's four officers,[56] AMBIT appears on a signature block via an individual[57] who has not appeared in any of the matters pending before West Virginia courts (a fact noted at the hearing that led to the 2017 Order), a representative of operators not in place shortly after the 1996 Agreement was signed The current operator of the Grant Town Plant came into that position at about the time the 2013 suit was filed,[58] such that the issues aligned: the 2013 suit, the review of documents, the arrival of the new controlling operator.

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[54] 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).

[55] *Hoffman v. Wheeling Sav. & Loan Assoc.*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) (emphasis added).

[56] https://apps.wv.gov/SOS/BusinessEntitySearch/Details.aspx?Id=meS0GRnSK3km5pnzhbRc0w==&Search=/Zt8ohHmrKs4//gfjE6Aha4X8dfvHqjL/z1mSxC0ncV5pRGbsfvFl/Lvv4NKY/Pk&Page=0

[57] APP000060-68.

[58] As Horizon failed to conduct discovery on this issue, *see* APP0001163. Also, Horizon cites NRG in error. Of note, the Lease Agreement also provides that the presumption is against waiver of any of its provisions. APP000272.

Conversely, even now, Horizon points to nothing but continued payments – an act as consistent with (if not more consistent with) error than waiver. Whereas Horizon now scoffs at the thought that the law would request a recognition of a right and its knowing waiver, Horizon stops far short of identifying any sentinel moment that would rival AMBIT's explanation, which is supported by the facts below. Otherwise, AMBIT's counterclaim for overpaid rent arises without predicate, a clear and unexplained break with past practices – something Horizon has yet to address.[59]

Whereas Horizon heralds that a waiver may be express or may be inferred from actions or conduct, it does so oblivious to the fact that AMBIT cites that language as well. However, the true issue is that all of the attendant facts (not assumptions, not silence, not projections) must amount to an intentional relinquishment of a known right.[60] Syl. pt. 2, *Parsons v. Halliburton Energy Servs., Inc.,* 237 W. Va.138, 785 S.E.2d 844 (2016).

Horizon asserts, first, that AMBIT relies on no case law and, then, comments on the lengths to which AMBIT relies on *Bruce McDonald.* Regardless of Horizon's vagaries, it remains true that this Court has 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).[61] 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

[59] Additionally, Horizon cites "sixteen years" more than a dozen times in its Response, without acknowledging that AMBIT limited its claim to the years after *usable* Local Fuel was unavailable on the premises.
[60] Respondent's Brief at 23.
[61] APP001159-60.

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."[62]

The Court's finding of waiver also falls outside the law and facts of this case. The facts in *Bruce*[63] 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 was 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.[64] After entry of the final order in the first litigation (and a failed appeal attempt by landlord), tenant continued to pay the minimum royalty according to contract rather than mine coal. Finally, in 2016, landlord filed suit to force tenant to mine coal (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."[65] Specifically, the

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[62] APP001160.
[63] *Bruce,* 241 W. Va. 451, 825 S.E.2d 779 (2019).
[64] *Bruce,* 241 W. Va. at 459, 825 S.E.2d at 787.
[65] *Bruce,* 241 W. Va. at 460, 825 S.E.2d at 188.

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.[66] The 'evidence' that AMBIT paid the wrong 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.[67] Specifically, once again, Horizon has neglected the fact that AMBIT's cause of action became ripe with the exhaustion of useable waste coal (Local

[66] *See, e.g.,* APP000049, APP000089. *See also* APP000006.
[67] APP001160, APP000101.

Fuel) on the demised premises in 2003. However, AMBIT had not understood fully, legally 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.[68] 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.[69]

Regardless of the findings of the Business Court and despite the voluminous Response filed by Horizon, the record still 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 rationale be for maintaining those moneys other than in error, given the unequivocal fact that the payments were indeed determined by the Court to have been 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. Here, AMBIT did not know of the potential cause of action but filed immediately upon learning of it, ten years

[68] APP000101.
[69] APP000001ff.

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.[70] The Court dismissed their claims accordingly. By these rulings, the Circuit Court has eliminated the ten-year statute of limitations relative to contract.

In its Response, Horizon misconstrues AMBIT's argument that 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. AMBIT clearly admits that waiver can occur during the statutes of limitations. However, to reiterate so as to clarify, 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."[71] 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 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.[72] Here, where West Virginia Code Section 55-2-6 controls the timing of contract claims

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[70] APP001160-61.
[71] APP001138 (*Branch Banking & Trust v. Sayer Bros.*, 2015 U.S. Dist. LEXIS 144678).
[72] 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

and where AMBIT expressly did not raise equitable claims nor seek equitable relief, laches has no role.[73] Whereas Horizon relies upon "such other relief as the Court deems just and proper" as somehow equitable, it provides no support for that proposition – and cites to no equitable relief expressly requested in the Complaint.[74] 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.[75] The delay must be unreasonable but, even more, unexplained.[76] "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?"[77] 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.[78] Whereas Horizon cites three decisions in support of its premise that reimbursement can be defended with laches, it cites only to three child support decisions, where the rights and equities at issue relative to unpaid child support are orders of magnitude different than unpaid commercial rent.[79]

(1891).

[73] 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).

[74] Respondent's Brief at 36.

[75] 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.'

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

[77] *Id.*

[78] 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).

[79] Horizon's Response at 36.

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. Reply in Support of 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.

Horizon asserts that these assignments of error are repetitive and AMBIT avers that herein, AMBIT asserts its rights to pursue its timely made claim. It is the companion to the prior assignment – not only do waiver and laches not apply, but also AMBIT's claim was timely filed. 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 (within a month) to recoup the prior ten years of loss. In both instances, the same Circuit Court found waiver. By natural extension of its 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 or mistake 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 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)."[80] Horizon admits that the defense of laches is fact dependent and yet has no facts, such that it was error for the Business 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 brought paragraph 14 of the 1996 Agreement into focus with the Lease 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 and in finding 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;[81] 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

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[80] APP000859.

[81] 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.

demonstrate some prejudice arising from the delay, beyond the delay itself, such as a change in circumstances.[82] Here, Horizon identified only that it "continue[s] to face this issue."[83] 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 (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.[84] 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.[85] 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, that

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[82] 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).
[83] APP001184.
[84] APP001182ff.
[85] APP000096ff.

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.[86]

> **E. Reply in Support of Assignment of Error Number 3:** The Circuit Court of Marion County, Business Court Division, erred in proceeding with a fact-based summary judgment motion on bases including but not limited to laches and waiver 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 reflected at great length herein, Horizon relies on the 1996 Agreement in asserting that AMBIT's mistaken rent payments were actually compliance with a known agreement.[87] Once again, as set out above and below, 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

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[86] APP001162. *But see* APP001186.
[87] Respondent's Brief at 26.

of rent[,]"[88] neither of which is at issue here. On the basis of its own rulings in 13-C-196, the Business Court erred in granting Horizon's fact-based motion on the basis of the parties' performance under the 1996 Agreement, which 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 could not and did not supersede the Lease and therefore was inapplicable to rent calculations precludes Horizon's efforts to re-litigate the same issues in subsequent civil actions.[89] As the Court found, the parties had knowingly entered the 1996 Agreement, but they did so as a settlement agreement to then pending litigation, not as knowing and voluntary intent to waive a known right to pay rent according to the Amended and Restated Lease Agreement.[90] However, because that issue was previously litigated, *res judicata* must preclude that inquiry.[91] As is evident from its Motion and its Response, Horizon conducted no discovery relative to what AMBIT and its employees or agents were thinking, knowing, intending, when 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 at the motions hearing and the resultant order,[92] 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 has come up with nothing further on Response.

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[88] APP000096ff.
[89] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996).
[90] APP000089; APP001182.
[91] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.,* 201 W. Va. 469, 498 S.E.2d 41 (1997).
[92] APP001172, APP001163.

Horizon still has not conceded the outcome of the prior (2013) litigation that determined that the rate of rent is determined by the Lease Agreement, not by the 1996 Agreement. It recounts the lengths to which it went to explain the admissions, to enforce the admissions, to resurrect its rights relative to the 1996 Agreement, yet, the Court declined to address, let alone enforce, the admissions.[93] The Court found that the parties had engaged in a pattern of payments/acceptance but expressly sidestepped enforcing the admissions because they were not properly before it and because it was part of the last litigation, fully and finally resolved.[94] It is true that the payments made in error were made pursuant to the 1996 Agreement – but that is because the 1996 Agreement was not determined fully, finally to be the wrong basis until the August 31, 2017, Order. And consistently Horizon demonstrates in its Response that it is confused at the difference in issues because 13-C-196 (how rate is determined: 1996 Agreement or Lease) versus 18-C-130 (what the correct rate is pursuant to the Lease). Because the issue of the source for determining rate of rent had been resolved by Order entered on August 31, 2017, 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.[95]

Horizon's Response does not dispute that because West Virginia law provides that "'unsupported speculation is not sufficient to defeat a summary judgment motion,'" *Williams v.*

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[93] APP001172, APP001163.
[94] APP001182.
[95] Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

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 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. Reply in Support of Assignment of Error Number 4: The Circuit Court of Marion County, Business Court Division, erred in precluding AMBIT from filing its surresponse, given that, as demonstrated in the transcript and the order, 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.[96] Even now, it is undisputed that Horizon failed to conduct any discovery whatsoever on the issues of waiver or laches – 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;[97] however, the Court denied said motion for leave and issued the order citing the *Bruce* decision (see First Assignment of Error, above).[98] AMBIT seeks this Honorable Court's review of issues raised below and of legal conclusions reached below that AMBIT attempted to address in the normal course of the litigation process, without relief. 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

[96] APP001161.
[97] APP001124.
[98] APP001158.

matter asserted."[99] It has been AMBIT's position and remains so particularly no,w after Horizon's Response that adds no additional support, that West Virginia law as currently crafted does not extend to a finding of waiver (or laches) in this matter. Had the surresponse been granted, then the Business Court could have considered expressly what evidence was missing – indeed that all evidence was missing – and could have considered the law and fact anew.

ABMIT does hear and acknowledge Horizon's fit of pique relative to motions practice. Horizon's unprofessional attacks, along with its misuse of the appeal process to advance arguments previously overlooked or neglected, demonstrates the types of litigation behaviors that AMBIT rightfully addressed to the Business Court, in motions practice, rather than participate in litigation ambushes. Name-calling, *ad hominin* arguments, and ridicule have little place in motions or appellate practice. Additionally, the Court will have noticed that several of the motions (less heralded in Respondent's Brief) were tied to accomplishing discovery with a derelict and recalcitrant Horizon, which motions resulted in a series of sanctions (including a monetary sanction that remains unpaid at this time). Horizon further seems confused by West Virginia Rules of Civil Procedure Rule 8(a), which actually prescribes not a Best Practice, not a maximum, but rather the minimum level of pleading in claims for relief only: original claim, counterclaim, cross-claim, or third-party claim (none of which are at issue here). And, finally, the Court will have noted that Horizon filed, not only the same motion for summary judgment in 13-C-196, but repeated and supplemental motions in this matter as well.

G. Reply in Support of Assignment of Error Number 5: The Circuit Court of Marion County, Business Court Division, erred in denying AMBIT's motion for summary

[99] 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 be established.")

judgment, based upon the express terms of the Amended and Restated Lease Agreement and the evidence adduced in discovery.

Horizon expresses confusion over the purpose for this assignment of error. The Business Court found that the test on a contractual grant of discretion is whether AMBIT used its discretion arbitrarily or capriciously, as those phrases are used in the law. Therefore, absent the waiver and laches that derailed the initial dispositive motions process below, AMBIT would have prevailed on its initial dispositive motion just as it had on its renewed motion. 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.[100] 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.[101] 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 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 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 issues of waiver and laches. 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

[100] APP000756; APP001237; APP000566.
[101] APP00096.

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,[102] 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,[103] judgment as a matter of law has been and remains the necessary and proper resolution. The roadmap for the 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.

H. Response to Respondent's First Cross-Assignment of Error: The Circuit Court properly determined that the parties were at stage 2 of the rent determination such that *res judicata* did not, would not and could not apply to AMBIT's claims, but certainly must apply to Horizon's arguments relative to the 1996 Agreement.

In arguing *res judicata,* Horizon relies upon the admissions in the 1996 Agreement.[104] Horizon expresses confusion over the rent determinations in each litigation. Further, Horizon has demonstrated confusion as to the status of rent litigations. However, the Business Court has been express and transparent in its plan to sort out these issues between Horizon and AMBIT. That is, as the Business Court has stated and found expressly and repeatedly, its examination is three pronged: (1) the correct basis for determining rent, (2) the correct rate of rent under that basis and (3) collection. Therefore, once again, Civil Action 13-C-196, stage one of the rent determination process, worked to determine whether rent should be calculated as set out in the 1996 Agreement or as provided in the Lease Agreement. Once again, after at least four years of litigation, the

[102] APP001189, APP001237, APP001628, APP001654.
[103] APP001189, APP001237, APP001628, APP001654.
[104] Response Brief at 36.

Business Court found *as recognized by Horizon*[105] that "Rent shall be calculated in accordance with paragraph six of the Lease Agreement as limited by paragraph five of the 1996 Agreement."[106]

Horizon asserts that the "lower court's opinion did not eliminate the Admissions contained in the Settlement Agreement from consideration, as AMBIT claims."[107] However, as of August 2017, AMBIT's payments pursuant to the 1996 Agreement were adjudged to have been in error. The 1996 Agreement does not control rent, and AMBIT's payments were in error. AMBIT here explains the Court's reasoning below and further challenges the disconnect of failing to find AMBIT paid in error but striking down the 1996 Agreement as the source of rent determinations.

Horizon has clearly read and digested AMBIT's analysis of *res judicata.*[108] Nonetheless, *res judicata* mandates final adjudication on the merits between the same parties, with Horizon pursuing the same claims and arguments below and here: r*es judicata.*[109] Because Horizon cannot and has not understood that 13-C-196 was only about the source of rent determinations (not the determinations themselves), it believes that AMBIT has litigated all rent issues and is precluded by the admissions.

The issue is not whether *res judicata* applies to settlement agreements.[110] The issue is that the 1996 Agreement ***by its express terms*** does not and cannot and shall not supersede the Lease Agreement. Therefore, the Lease Agreement controls. The parties have now moved on to what that rent rate should be pursuant to paragraph six of the lease. Nothing changes the fact that Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the Order

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[105] Respondent's Brief at 6. *See also* Respondent's Brief at 8, citing the Business Court's recounting that 13-C-196 was not about determining rent.
[106] APP000096.
[107] Respondent's Brief at 6.
[108] Respondent's Brief at 37.
[109] *Mueller v. Shepherd Univ. Bd. Of Gov.*, No 11-0567, 2012 WL 5990134, at *22 (W. Va. Nov. 30, 2012) (quoting Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) (overruled on other grounds)).
[110] Respondent's Brief at 37.

other than, in violation of West Virginia law, attempting to relitigate its terms here and in its own appeal.[111] 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 [which] is prohibited."[112] "Failure to appeal an order does not render it 'non-final.'"[113] Horizon's cross assignment of error is baseless and must be denied.

I. Response to Respondent's Second Cross-Assignment of Error: The Circuit Court properly determined that collateral estoppel had no role in AMBIT's claims in this civil matter, as the Court and AMBIT had transitioned to stage 2 of the rent determination (despite Horizon's insistence, regardless of the law precluding same, on revisiting stage 1).

As Horizon itself has noted, collateral estoppel is a narrow application of *res judicata* – which Horizon equates to issue preclusion. Yes, the two litigations involve the same parties, but the issues are different. The prior action 13-C-196 worked to determine which method/document drives the rate of rent: the Lease Agreement or the 1996 Agreement. The Court's August 2017 Order held that paragraph 14 is clear: the 1996 Agreement cannot and does not supersede the Lease Agreement. Therefore, the Lease Agreement controls. It will not have escaped this Court's attention that the second litigation for everyone but Horizon was based upon paragraph six of the Lease Agreement only. The Business Court had moved to stage two of the rent determination – from source of rent determination (where the basis is located) to the actual rate of rent. Horizon's confusion that 'pay a certain percentage' is a concept in both the Lease and the 1996 Agreement does not change the established fact that the Lease Agreement prevails. The two litigations addressed different issues. Collateral estoppel does not apply. Horizon's cross assignment of error is baseless and must be denied.

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[111] Docket No. 20-0759 (pending).
[112] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13.
[113] Id.

J. Response to Respondent's Third Cross-Assignment of Error: The Circuit Court properly determined that judicial estoppel had no role in AMBIT's claims in this civil matter, as the Court and AMBIT had transitioned to stage 2 of the rent determination (despite Horizon's insistence, regardless of the law precluding same, on revisiting stage 1).

Horizon asserts that, pursuant to judicial estoppel, AMBIT should be precluded from asserting a contrary position than it took in the 1996 Agreement.[114] Whereas Horizon asserts that "AMBIT has taken a position directly inapposite to its bargained for, and admitted position set forth in the 1996 Agreement,' AMBIT's position is absolutely consistent. The 1996 Agreement expressly provides that, regardless of what is in the 1996 Agreement, it will not and cannot supersede the Lease Agreement. AMBIT has been and is now acting consistently with the Lease Agreement, working to enforce its contractual grant of discretion pursuant to paragraph six, as recognized by the 2017 Order and the proceedings before the Business Court in 18-C-130 relative to the renewed motion for summary judgment. The alpha and omega of the 1996 Agreement is that **nothing supersedes the Lease.** Horizon cannot and does not understand or accept that fact and, now, that rule of law. Nonetheless, AMBIT has been consistent in all litigations relative to the 1996 Agreement, the Lease and the 2017 Order. Judicial estoppel has no relevancy or role relative to AMBIT's positions in these claims. Horizon's cross assignment of error is baseless and must be denied.

Conclusion.

American Bituminous Power Partners, LP, seeks 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 impermissibly undercuts West Virginia's statutory limitations for contract claims. AMBIT further seeks

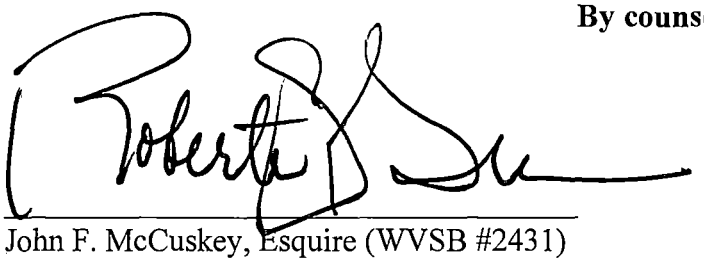
[114] Respondent's Brief at 39.

relief from Horizon Venture's baseless cross assignments of error and continued improper efforts to undo a final order from a prior litigation. 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 **"REPLY OF PETITIONER INCLUDING RESPONSE TO CROSS ASSIGNMENTS OF ERROR"** 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:

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