IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioners,

v.

Case No. 20-0762

HORIZON VENTURES OF WEST VIRGINIA, INC.

Respondent.

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENTS OF ERROR

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1. The lower court erred in finding that Ambit's claims were not barred by *res judicata.*

2. The lower court erred in finding that Ambit's claims were not barred by collateral estoppel.

3. The lower court erred in finding that Ambit's claims were not barred by judicial estoppel.

II. Statement of the Case

AMBIT's claim for rent overpayment is based on a gross misinterpretation of a lower court decision, and buttressed by a series of confusing errors by the lower court in analyzing the same. To untangle the competing arguments at issue here, it is critical to understand the history of the appealed issues here, as follows.

A. Facts of the Case

On or about November 29, 1989, Horizon Ventures of West Virginia, Inc. ("Horizon") and American Bituminous Power Partners, L.P., a Delaware limited partnership ("AMBIT") entered into an Amended and Restated Lease Agreement ("Lease Agreement") regarding the operation of the Grant Town Power Plant ("Power Plant") in Marion County, West Virginia.[1] *See, inter alia,* 1989 Agmt., Appx. 000211 - 00396. Under the Lease Agreement, AMBIT leased parcels of real property in Marion County from Horizon for "constructing, operating, and maintaining an electric generation plant on the Leased Premises for generation and sale of electricity, steam, ash, hot water, and hot air. Appx. 000006. The Power Plant was constructed using One Hundred Fifty Million Dollars ($150,000,000) in tax exempt Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. See, *e.g.*, AMBIT Mot. To Dismiss, Appx. 000085. The repayment

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

of those bonds is governed by a January 1, 1990 "Trust Indenture," which dictates and sets forth the priority of payments to be made. Appx. 000095.

The November 29, 1989 Lease Agreement was amended three (3) times - first, by an Amended and Restated Lease Agreement on December 28, 1989, second, by a Second Amendment to Amended and Restated Lease dated January 11, 1990, a March 31, 1993 letter of agreement, and third, by a Third Amendment to Amended and Restated Lease ("Third Amendment"), dated April 1, 1993, and finally, by a May 23, 1996 Settlement Agreement. Appx. 000037-000077.

Pursuant to the Amended and Restated Lease Agreement, AMBIT agreed to pay three percent (3%) of its revenue to Horizon as rent, so long as AMBIT used Local fuel. Appx. 000231 -000237. The percentage remained the same if AMBIT used Local fuel, which is useable waste coal, for "non-operating reasons." *Id.* However, if AMBIT used Foreign fuel for a "operating reason," that percentage decreased to one percent (1%). *Id.*

The Amended and Restated Lease Agreement set forth that "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 a series of reasons, the most important of which is "due to exhaustion of the usable waste coal material on the Demised Premises." Appx. 000231 - 000232. In contrast, the "Non-Operating Reasons" are merely that "such use is designed to reduce the cost of limestone usage by a Plant or . . . there is no operating reason to do so." *Id.* at 000233-000234.

In the Third Amendment, however, AMBIT agreed that for a period of eighteen (18) years, from 1993 to 2011, *all* use of "Foreign fuel" was for non-operating reasons, which required the three percent (3%) gross payment to Horizon for the use of Foreign fuel. Appx. 000040. Despite this clear and unambiguous agreement, Horizon was forced to institute litigation on April 12, 1994

to recover past due rents.[2] This litigation ultimately resulted in AMBIT paying Horizon Two Hundred One Thousand Seven Hundred Thirty-Nine Dollars and Fifty-Seven Cents ($201,739.57) for owed rental payments and other costs. Following AMBIT's additional and intentional failures to pay rent, On February 2, 1996, Horizon was again forced to institute litigation to recover past rents, which litigation was settled by written agreement.[3] The May 28, 1996 Agreement to Resolve Pending Litigation ("Settlement Agreement") states, in relevant part:

2. Tenant's Admissions

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

Appx. 000053 (emphasis added).

Pursuant to this Settlement Agreement, AMBIT was required to pay an additional Two Hundred Forty-Four Thousand Eight Hundred Eighty-Five Dollars and Eighteen Cents ($244,885.18) to Horizon. AMBIT further agreed, in writing, that the then agent for the group of banks securing repayment under the Trust Indenture would "not challenge payments made in accordance" with AMBIT's agreement that "so long as Local Fuel is located at the site, it is

[2] *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, Civ. A. 94-43-C (N.D. W. Va. 1994).
[3] *Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P.*, Civ. A. 96-C-32 (N.D. W. Va. 1996).

reasonable to conclude that all Foreign Fuel is being used for non-operating reasons." Appx. 000070. In consideration for this agreement by AMBIT, Horizon agreed to reduce the amount AMBIT owed to Horizon from three percent (3%) to a base of two and one-half percent (2.5%), along with a series of additional payments at Paragraph 5. Appx. 000054-00055. This Settlement Agreement also voided the Third Agreement, in its entirety. *See, e.g.*, Appx. 000058.

From the date of the Settlement Agreement between the parties until December 2012, AMBIT paid its rent pursuant to the Settlement Agreement's terms.[4] Specifically, from May 28, 1996, until December 2012, AMBIT paid 2.5% as stipulated in the 1996 Settlement Agreement. Appx. 000028, ¶ 24. However, beginning in December 2012, and thereafter, AMBIT refused to pay the agreed rent to Horizon. Appx. 000030 – 000031, ¶¶ 33 – 34.

AMBIT then, without any proper legal basis, stopped paying Horizon rent, in violation of the Settlement Agreement. On June 17, 2013, Horizon was forced to initiate additional litigation,asserting claims for declaratory judgment, breach of contract, injunctive relief, and specific performance, which claims were predicated upon AMBIT's unilateral decision to stop paying rent to Horizon.[5] AMBIT counterclaimed, arguing that they were owed overpaid rent from Horizon.

Unlike the instant case, this prior dispute primarily revolved around the priority order of when Horizon was to be paid rent in the aforementioned "waterfall" of priority. Appx. 000090-000092. Horizon was initially granted summary judgment on its declaratory judgment and breach of contract claims. *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *1 (W. Va. May 13, 2015). AMBIT appealed to this Court,

[4] On November 20, 2002, AMBIT asserted that it was not to pay Horizon rent until the 7th priority in the Trust Indenture Agreements. Appx. 000075-000077. It did not question the percentage to be paid.

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

which reversed the lower court, finding summary judgment was inappropriate and remanded the case, with instructions that it be transferred to the Business Court Division. *Id.* at *6.

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

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

Appx. 000099-000100. Ultimately, the Business Court determined that there was Senior Debt remaining, and that Horizon had not obtained written consent of the holders of Senior Debt, *i.e.*, the banks involved in the Trust Indenture. Accordingly, the Court found in AMBIT's favor.[6] The Business Court did, however, dismiss Horizon's claims for rent *without* prejudice. Appx. 000101-000102. Notably, AMBIT's claim for overdue rent was also dismissed without prejudice for the sake of judicial economy. As the lower court explained:

> Count II is dismissed, for the sake of equity and judicial economy as the issues regarding the payment of rent between AMBIT and Horizon need to be pursued together, as potential damages are likely to offset one another. As detailed above, Horizon is currently precluded from bringing an action to seek rent. Therefore, to further the prospect of judicial economy Count II of AMBIT's Counterclaim is dismissed without prejudice.

Appx. 000101.

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

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

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

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

Appx. 000093. The Court found, in short, that Deutsche Bank holds senior debt; that Horizon's right to collect debt is subordinate to that senior debt; that rent was to be calculated in accordance with ¶ 6 of the Lease Agreement, subject to ¶ 5 of the 1996 Agreement; and that, ultimately, Horizon could not bring an action to collect rent because it had contracted away its right to do so. *See, e.g.,* Appx. 000093 – 000095, 000099.

AMBIT, seized onto the Court's finding that:

> In analyzing the 1996 (Settlement) Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement because it provides that the 1996 Agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent.

Appx. 000098.

AMBIT's improper and overbroad interpretation of the Court's holding spawned the instant litigation, even though the lower court *explicitly did not resolve this issue* when it dismissed both parties' rent-related claims. Appx. 000101-000102. The lower court's opinion did not eliminate the Admissions contained within the Settlement Agreement from consideration, as AMBIT claims. If it did, then the court could have resolved the issue on the spot. It did not, however, and as late as the Court's Motion for Summary Judgment hearing on January 15, 2020, Horizon raised that issue with the Court. The Court agreed, stating:

24 And Judge, for -- for the plaintiff's position to be

accurate, then on Page 13 of your order in the 2013 case, these two words, or these three words, "granted without prejudice," mean nothing, mean nothing. And that's what the Court ruled, that that issue with respect to this 1996 agreement and those issues with respect to rent, were dismissed at that time without prejudice. What the plaintiff would have the Court do is make this order a prejudicial order against my client, and that's expressly not what the Court intended. I don't have anything further on this issue, Judge.

Appx. 001185 – 001186. The lower court expressly disabused AMBIT of its ill-conceived interpretation during the Motion for Summary Judgment hearing, explaining that in 2015, it was merely deciding which provisions of the 1996 Agreement applied *to the specific settlements of the lawsuit at issue*:

THE COURT: Just let me make sure so the record's clear, my findings then were not based on -- I was not determining rents then. My sole issue was determining the settlement agreement of '96, is what you're speaking of, and basically what the Court found was that the lease applied except for those provisions as contained in Paragraph 14.

MS. GREEN: And four and five, I think, Your Honor.

THE COURT: Because those went to the specific settlements of that particular lawsuit.

Appx. 001185 – 001186.

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

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

Appx. 001186. After *granting Horizon summary judgment as it pertained to AMBIT's claim,* the Court explained:

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

MR. SCHILLACE: Judge, it would be my understanding of the Court's ruling with respect to the counterclaim that this granting of summary judgment is dispositive of those issues remaining.

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

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

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

Appx. 001186-001187.

In other words, the lower court found that the issue of whether or not the Admissions within the Settlement Agreement applied **was not previously decided**, and that it would do so in this matter.[7] It was not, as AMBIT claims, a *fait accompli*. Ultimately, the final resolution of the 2013 suit occurred on July 2, 2018. AMBIT then filed the instant lawsuit on August 27, 2018, seeking "overpaid rent" from Horizon for the time period 2003 to 2013. Appx. 000005.

B. Procedural History

AMBIT filed the instant lawsuit on or around August 28, 2018, claiming, *inter alia*, that because the 2013 court found that the May 28, 1996 agreement "had no prospective effect relative to the Lease agreement," it overpaid rent and was owed recompense from Horizon for the same. Appx. 000009, ¶ 22. More specifically, AMBIT claimed that Local fuel, or usable waste coal, was in fact exhausted in 2003, that it had overpaid its past rents to Horizon, and that it was due reimbursement for the same from Horizon. Appx. 000009-000010, ¶¶ 26-28.

Horizon counterclaimed against AMBIT, claiming, *inter alia*, that: i). AMBIT made payments as required by the Settlement Agreement from that date until December 2012; ii). that AMBIT was currently breaching its agreement by not paying the same; iii) that AMBIT constructed an electric generation plant that was not capable of utilizing a large percentage of the "Local fuel" located on the premises; iv) that AMBIT constructed a smokestack which was inadequately designed, and v) that AMBIT had intentionally concealed that fact from Horizon for decades. Horizon Counterclaim, Appx. 000014-000035. Horizon asked for declaratory relief reinforcing AMBIT's agreement to pay rent, compensatory damages, disgorgement of all sums

[7] Unfortunately, however, the issue of the application of the Admissions was not subsequently expressly addressed by the court, prompting Horizon's appeal at Dkt. No. 20-0759.

improperly paid to third parties, and pre- and post- judgment interest. Appx. 000035. Horizon also explained that it did not seek rent, but that it requested recognition of the appropriate rent rate. *Id.*

AMBIT moved to dismiss Horizon's counterclaim, asserting, in relevant part, that the bonds in question have been repaid, but that AMBIT is still paying the related indebtedness to the lending group, which is prioritized higher than Horizon under the aforementioned "waterfall," and, therefore, AMBIT could not contractually be forced to pay rent to Horizon until that debt had been paid. Appx. 000081-000087. Horizon asserted, in its response to that motion, that AMBIT could not file a lawsuit demanding an accounting of rent, while attempting to deny Horizon the ability to seek remedies based on the same facts. Appx. 000116-000122. After procedural delays while the case made its way to Business Court, the Business Court held, in relevant part, that:

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

Appx. 000428 - 000431. The Court dismissed the rest of Horizon's claims, explaining, *inter alia*, that Horizon was not entitled to seek payment of rent while Senior Debt is outstanding and that Horizon had failed to name the third parties from which it was seeking disgorgement. Appx. 000429-000430. Moreover, the Business Court found that the Amended and Restated Lease Agreement prohibited Horizon from seeking rent payments before third parties were paid. *Id.*

Importantly, Horizon, at paragraphs 20 and 21 of its counterclaim, alleged that the May 28, 1996 Agreement to Resolve Pending Litigation ("Settlement Agreement") contained an express

admission by AMBIT that it had always used Foreign fuel for non-operating reasons, and that **so long as any Local fuel is located on the premises, any Foreign fuel being used in the operation of the Plant is being used for Non-Operating Reasons.** Appx. 000026-000027; the Admissions provision is quoted, *in toto, supra* at pp. 5-6. (emphasis added). AMBIT, in its Answer to paragraphs 20 and 21 of Horizon's counterclaim, argued, in relevant part, that "AMBIT denies that the 1996 Agreement has any prospective force/effect beyond two paragraphs (per Order of this Court, entered on 8.31.17)." Appx. 000437. AMBIT then repeated this denial at paragraphs 23 and 24 of its Answer. *Id* at 000438.

In accordance with the Scheduling Order, both parties also filed Motions for Summary Judgment. AMBIT claimed, in its Motion for Summary Judgement, that it was forced to use Foreign fuels, *inter alia*, because "the quality of local waste coal was significantly lower than predicted in the Comprehensive Mining Plan," and that after exhausting the "good" waste coal, the lesser quality coal impaired AMBIT's ability to reach optimum output at the Plant. Appx. 000763-000766. Notably, however, AMBIT admitted in its Motion for Summary Judgment that *waste coal (Local fuel) was still located on the premises*, and that it had unilaterally determined, in its "reasonable judgment," that said Local fuel was not usable. Essentially, AMBIT claimed that it has "had no choice" but to use Foreign fuel to operate the plant since the 1990s. Appx. 000765. AMBIT maintained that it could unilaterally decide to use Foreign fuel "in its reasonable judgment," and that the "reasonable judgment" standard "allows AMBIT the discretion to use any mix of Local and/or Foreign fuel it considers is appropriate." Appx. 000774. AMBIT further claimed that Section 6 of the Lease Agreement is the only internal standard for "reasonable judgment." *Id.*

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

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

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

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

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

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

Appx. 000839-000840 (emphasis added).

Horizon's Motion also pointed out that AMBIT had further agreed, in the 1996 Settlement Agreement, *that its right to pay its partners was subordinate to its responsibility to pay rent, and that it was obligated to receive permission from the banks to do so.* Appx. 000840. AMBIT further confirmed this duty to receive permission from the banks, which confirmation was contemporaneously documented by Horizon.[8] Most importantly, AMBIT admitted, in its Motion for Summary Judgment, *that Local fuel was still present on the site.*

Horizon's Motion further explained that "[t]he plaintiff and the defendant participated in a course of performance with respect to rent owed for the demised premises from May 20, 1996 up to and including December 2012." Appx. 000841, ¶ 8. Horizon correctly argued that AMBIT was judicially estopped from denying the Admissions contained in the 1996 Agreement, that AMBIT

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

waived any claim regarding the existence of local fuel by those Admissions, that AMBIT was collaterally estopped from claiming it overpaid rent, and that both *res judicata* and laches barred AMBIT's claims because of the 2013 ruling. Appx. 000851 – 000860.

AMBIT, in both its Response in Opposition to Horizon's Motion for Partial Summary Judgment, and in its Response in Opposition to Horizon's Motion for Summary Judgment, disingenuously claimed that since the 2013 Court found that only paragraphs four and five of the 1996 Settlement Agreement superseded the Lease Agreement, that Horizon's reliance on AMBIT's actual Admissions in the 1996 Settlement Agreement was improper, and that *res judicata* barred *Horizon's* arguments. *See* Appx. 001003-001004, 001006-001007. The court's unexplained and incorrect resolution of those issues are the basis for Horizon's cross- assignments of error.

At the Court hearing on the Motions for Summary Judgment, Horizon again argued that AMBIT had admitted, as part of the 1996 Settlement Agreement, that AMBIT's use of Foreign fuel is for a non-operating reason. Appx. 01174-01177. AMBIT countered with the same ill-founded argument it had previously made – that somehow the Court's 2013 opinion stating that the 1996 Settlement Agreement does not supersede the lease also invalidates the Admissions contained within the Settlement Agreement. Appx. 01128-01129. The Court, in response to this assertion by AMBIT, explained that it was not "determining rents" in 2013. Appx. 01130-01132.

AMBIT attempted 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.*[9] Appx. 001131 – 001133. The lower court denied AMBIT's attempted filing, opining that

[9] The record is replete with AMBIT's quasi-legitimate pleadings asking the court to consider or reconsider various issues *ad nauseam*, including, but not limited to, a Renewed Motion to Dismiss Counterclaim, Supplemental Renewed

AMBIT had expressly waived its right to contest prior rent payments, *and* that AMBIT's payment of the higher rent satisfied the clear and convincing standard AMBIT now proposed. Appx. 001159.

In its ruling, the Court rightfully found that AMBIT had waived its ability to bring its claim for back rent because it had made rent payments from 2003 – 2012. Appx. 001160. The Court (and, of course, Horizon) expressly disagreed with AMBIT's characterization of these payments as "mutual mistake." *Id.*

Finally, and most importantly, the Court found that AMBIT's theory of law, *i.e.*, that "since it filed its actions within the Statute of Limitations, its performance and actions under the contract could not constitute waiver," was incorrect. *Id.* If AMBIT's theory of law were true, opined the Court, "contractual waiver would cease to exist as a party could not invoke waiver as a defense if within the Statute of Limitations and if outside the Statute of Limitations, the party would simply invoke the Statute of Limitations." *Id.*

The Court then *granted summary judgment to Horizon on AMBIT's claim for back rent.* Appx. 001159 – 001161. This Order contains a series of findings of fact critical to the resolution of this matter. First, the Court found that "[f]rom the entry of the May 28, 1996 Agreement to Resolve Pending Litigation until a partial payment in December of 2012, [AMBIT] made payment as if "Local Fuel" remained on the leased premises as provided by the 1996 Agreement." Appx. 001166, ¶ 14. Further, "[AMBIT] has made no rent payments from January 2013 to the present." *Id.*, ¶ 15. The Court then added, as a separate finding of fact, that:

> [AMBIT] made the same arguments regarding 'Local Fuel' versus "Foreign Fuel" that it asserted in the 2013 litigation and that it is asserting in this litigation despite

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Motion to Dismiss Counterclaim, Supplemental Memorandum in Support of a Motion to Compel, Motion for Leave to File Surresponse out of time, the actual Surresponse, and, finally, a Renewed Motion for Summary Judgment. Thankfully, the Rules of Appellate Procedure only allow for an Appeal, a Response, and a Reply.

> the admissions made in Section 2a of the May 28, 1996 Agreement and the express agreement to not make such claims after May 28, 1996.
>
> From the execution of the May 28, 2019 agreement until the filing of the counterclaim in the 2013 action, the plaintiff paid and/or acknowledged that the monthly rent was due to be paid based upon the existence of "Local Fuel" and any use of "Foreign Fuel" being for a non-operating reason.

Id., ¶¶ 16 – 17.

Ultimately, the Court found that AMBIT had waived its right to contest prior rent payments, and that its claim for the same was prohibited by waiver and laches. Appx. 001167, ¶¶ 4-5, 001169-001170, ¶¶ 16-20.[10]

AMBIT now appeals this matter, alleging, for a variety of reasons, that the lower court was wrong in its determination that paying rent for sixteen years did not qualify as waiver or laches. Horizon's asserts that the lower court was not only correct in determining that waiver and laches both bar AMBIT's claim, but also that the lower court's findings of fact and holdings in this matter precluded it from determining that *res judicata* and collateral estoppel did not apply to bar AMBIT's claims, based on the simple application of the 1996 Settlement Agreement to this case.

III. Summary of Argument

AMBIT's claims regarding the application of waiver and laches to the facts of this case are without merit. AMBIT's argument that it and Horizon engaged in some sort of "mutual mistake" for sixteen years, a theory with which the lower court expressly disagreed, is a convenient fiction which must be accepted for AMBIT's larger, equally fictive, argument, that the 2017 Order somehow nullified AMBIT's bargained-for admissions, to succeed.

[10] The court ultimately decided that going forward, AMBIT was only required to pay 1%, and not the 2.5% they had been paying under the 1996 Agreement. This decision is currently on appeal before this Court at Dkt. No. 20-0759.

AMBIT's argument appears to be 1) to push the Court into accepting the AMBIT interpretation of the 2017 decision, and 2) to claim *res judicata,* in lieu of any actual legal justifications for that interpretation, only when it is convenient to AMBIT's position.

AMBIT's claims that Horizon waived its ability to object to this incorrect interpretation because it did not appeal the 2017 Order are false. Horizon did not oppose the *actual* 2013 decision. Horizon opposes AMBIT's novel interpretation of that decision, which AMBIT first raised in this case. *See, e.g.*, Appx. 001184 – 001187. Horizon is not obligated to prospectively appeal decisions on the off chance that other parties may interpret and/or apply those decisions incorrectly.

AMBIT's Appeal Brief incorrectly claims, *inter alia*, that the lower court dismantled the ten-year statute of limitations on contracts when it found that sixteen (16) years of abiding by a settlement agreement constituted waiver, and AMBIT makes ill-founded claims regarding the amount of discovery necessary to discern the intent of a company which paid bills in the same fashion from 1996 until 2013. It also indirectly asks this Court to endorse its crabbed reading of the 2017 Order by claiming the Circuit Court relied upon "documents previously struck down" in making its decision, and AMBIT apparently also wants some sort of remedy from this Court to allow it to paper the case with surresponses and other legal detritus. Finally, AMBIT claims that its summary judgment motion should have been granted, which, presumably, is the purpose of AMBIT's other four (4) Assignments of Error.

However, AMBIT is wrong. AMBIT settled litigation with Horizon in 1996 *by agreeing that all Foreign fuel that had ever been used at the plant was used for non-operating reasons,* that Local fuel included "waste coal material" on the premises, and, importantly, that Local fuel was not dependent on the quality of waste coal material, and that AMBIT expected Horizon to detrimentally rely on that admission. Appx. 000053. AMBIT and Horizon agreed to the terms in

the settlement agreement to put an end to the never-ending disputes over the quality of and usability of the local waste coal, and as to the "operating" and "non-operating" reasons for doing so.

AMBIT honored this bargained-for settlement agreement for sixteen (16) years. Then, as Horizon's counsel explained, AMBIT's new management decided that the company should not be paying so much to Horizon *after* Horizon sued AMBIT for not paying its bills. Appx. 001179-001181. The prior lower court, in resolving the 2013 litigation, found, in the context of determining the priority of AMBIT's payments to its various lenders and paymasters, that:

> In analyzing the 1996 (Settlement) Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement because it provides that the 1996 Agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent.
>
> Appx. 000098.

AMBIT used this language to twist and expand this fairly benign holding into a juridical prybar by which it could escape the 1996 Settlement Agreement, and filed the instant lawsuit claiming that the 2017 decision rendered its Admissions within the 1996 Settlement Agreement inert. Unfortunately, largely because of AMBIT's self-serving and incorrect interpretation of the 2017 Order, the instant case is riddled with inconsistent and incorrect holdings, irreconcilable factual and legal interpretations from the Court, and other litigatory chaos, including, but not limited to, the lower Court's inconsistent findings in regards to the application of *res judicata*, collateral estoppel, waiver, and laches which are at issue in this appeal, and the lower Court's inexplicable application of law to facts, which Horizon has appealed separately to this Court, regarding the summary judgment granted to AMBIT on Horizon's counterclaim.

The applicability of the 1996 Settlement Agreement to this case is essentially dispositive of the vast majority of AMBIT's claims here and to Horizon's claims in its parallel appeal. The

lower Court's inconsistency and/or lack of clarity with regard to both the 2017 Order and this case largely necessitated both appeals. This Court should hold that AMBIT admitted in 1996 that all use of foreign fuel was non-operative, and that it would pay 2.5% to Horizon when it used foreign fuel and is therefore bound by that admission. Accordingly, AMBIT's arguments against waiver and laches would then automatically fail because *AMBIT still owes, and have always owed, 2.5% to Horizon since it agreed to do so in 1996.* Combined with the actual decision in the 2013 litigation, AMBIT would pay all levels of the priority "waterfall" as ascertained in the 2017 Order, with Horizon in 7th place. Once everyone above Horizon in the priority list is paid, AMBIT would resume paying Horizon at 2.5%, per the Settlement Agreement.

To the extent the lower Court ruled in ways that conflict with a finding regarding *res judicata* and collateral estoppel, those rulings are incorrect, and Horizon has, therefore, assigned the same as cross-assignments of error. Moreover, even if this Court finds, somehow, that the 2017 Order did invalidate those Admissions, AMBIT's assignments of error are incorrect on the merits. AMBIT's hyperbolic claims aside, the lower court clearly applied the doctrines of waiver and laches as intended, and, contrary to AMBIT's assorted complaints, did not err in doing so.

IV. Statement Regarding Oral Argument

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

V. Argument

A. AMBIT's claim that the lower court interpreted W. Va. Code § 55-2-6 in a fashion which causes it to cease to exist, is without merit, and the lower court did not err in finding that AMBIT waived its cause of action during the statute of limitations period.

AMBIT's first two assignments of error are best taken together, inasmuch as they appear to argue the same issues, and blend waiver and statute of limitations arguments.[11] Notably, AMBIT often references the lower Court's finding that laches does not apply to AMBIT. AMBIT's claims that the lower court misapplied the doctrine of waiver and that the Court has caused the ten-year statute of limitations on contract claims to disappear are both incorrect, and its appeal should therefore be denied.

i. AMBIT waived its cause of action during the statute of limitations period.

The lower court correctly found, multiple times, that the elements for waiver under West Virginia law are:

1. The existence of a right;
2. Actual or constructive knowledge of the existence of the right, advantage, or benefit; and
3. Intentional relinquishment of such right, advantage, or benefit.

Appx. 001159 – 001160 (citing *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 460, 825 S.E.2d 779, 788 (2019); Appx. 001167 (citing *Hoffman v. Wheeling Savings and Loan Assn.*, 133 W. Va. 694, 57 S.E.2d 725 (1950)), *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). [12]

Applying that law to the facts in this case, the Court explained, "[h]ere, AMBIT is claiming (1) the existence of a right (lower rent rate), (2) AMBIT had knowledge of the contractual terms it entered into, and (3) AMBIT intentionally relinquished this right by making rent payments at the higher rate from 2003 to 2012." Appx. 001160.

[11] For example, the first few pages of Assignment of Error 1 expressly reviews the Court's ruling on waiver, despite Assignment of Error 2 ostensibly being the "waiver" assignment of error.

[12] The Court essentially had to rule on this twice when it denied AMBIT's Motion to File a Surreply Out of Time.

More specifically, the lower court found that, if AMBIT was aware that the "Local fuel" was exhausted, it had the right, under the November 29, 1989 Agreement, to reduce the percentage upon which monthly rent was calculated,[13] and 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." Appx. 001160.

The lower court "specifically disagree[d]" with the notion that AMBIT's alleged overpayment of rent was "not a waiver but a mutual mistake," since Horizon "assumedly presumed that AMBIT was paying the correct amount of rent and treated the rent payment as such." *Id.* Finally, the lower court opined that if AMBIT's assertions were correct, then "contractual waiver would cease to exist as a party could not invoke waiver as a defense if within the Statute of Limitations and if outside the Statute of Limitations, the party would simply invoke the Statute of Limitations." *Id.*

In fact, AMBIT's claim of "mutual mistake" is predicated upon AMBIT's euphemistic reference to its own manipulation of the 2017 Order's ruling to try and invalidate the bargained-for 1996 Admissions. The supposed "mutual mistake" AMBIT alleges occurred for sixteen years was nothing more than *the parties abiding by the settlement agreement.*

AMBIT also relies upon a lengthy discussion of a single case, *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 825 S.E.2d 779 (2019) which is factually different from this case. In *Bruce McDonald Holding Co.*, the parties *litigated* the issue, so the alleged waiver there was intentional, unlike this case, where "neither the Court nor Horizon cited any affirmative act by AMBIT nor external event . . . whereby AMBIT signaled that it knew of a cause of action available to it and delayed." AMBIT App. Brief, p. 18, ¶ 1.

[13] Horizon disagrees that it actually had that right. *See generally Horizon v. AMBIT*, No. 20-0759, currently pending before this Court.

This claim by AMBIT is, of course, farcical. AMBIT did not "signal" that it knew of a cause of action available to it because *it settled litigation on this exact issue in 1996*, and it was not until counsel's new "interpretation" of that agreement, that it disputed the plain language of the 1996 Settlement to pay 2.5% when it used Foreign fuel. The only plausible reason that AMBIT did not "know" of a cause of action was because none existed until it constructed one, first in 2013 and again in the instant case.

Nevertheless, the Court found, correctly, that AMBIT's sixteen years of payment to Horizon, without objection until 2013, constituted waiver, and that its payments were "clear and convincing evidence" that it waived its ability to bring a claim for past rent. Appx. 001159. AMBIT's only factual argument to this Court as to why the finding of waiver should be overturned, is that its paying Horizon for sixteen years at 2.5% was "more consistent with mutual mistake than with waiver, given the complex relationship and intense litigation history between the companies." *Id.* This argument, however, is supported by precisely zero (0) case law citations, let alone one where inventive terms of art like "complex relationship" or "intense litigation history" were used to attempt to invalidate a finding of waiver.

The case law on waiver is clear, and it contradicts AMBIT's assertion.

> The 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. A waiver may be express **or may be inferred from actions or conduct**, but 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.

Syl. Pt. 2, *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844, 848 (2016), *Williams v. Tucker*, 239 W. Va. 395, 400, 801 S.E.2d 273, 278 (2017) (emphasis suppled). Moreover, parties, particularly sophisticated parties like AMBIT, are expected to have knowledge of contracts into which they enter:

> Relating to knowledge of the right, we have held that it may be actual or constructive. Further, we have noted that "it does not seem unduly onerous to charge the parties to a contractual dispute with constructive knowledge of the terms of the underlying contract" and, likewise, that "a party should be deemed to have knowledge of the terms of agreements that he has executed."

Williams v. Tucker, 239 W. Va. 395, 401, 801 S.E.2d 273, 279 (2017) (internal citations omitted).

AMBIT shamelessly claims that it "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." AMBIT App. Brief, p. 19, ¶ 1. However, AMBIT was in possession of the 1989 Contract and the 1996 Settlement Agreement at all times relevant to this litigation. Its lawyers helped draft it. Accordingly, It had actual and constructive knowledge of its agreement to pay 2.5%, which was agreed to so the parties no longer had to litigate "operational" and "non-operational" use of Foreign fuel. AMBIT's inability to concoct a legal theory by which it could evade its Settlement Agreement in 1996 until it was sued again in 2013 is not evidence of "mutual mistake" or "lack of knowledge" which would override a finding of waiver.

AMBIT's brief provides no support for that assertion, let alone enough support which would justify overruling the Court's findings. Instead, AMBIT simply claims that NRG (the new management company) came in in 2012 and "actually looked" at the paperwork, presumably for the first time. Appx. 001179-001181. Even if that claim is true, that is not a defense to waiver. Perhaps AMBIT should look into bringing a case against prior management, rather than demanding Horizon suffer for AMBIT's claimed, and admitted, internal errors.

AMBIT attempts to claim to this Court that Horizon did not produce enough evidence to support a finding of waiver, other than the fact that *AMBIT paid the 2.5% rent to Horizon required by the 1996 Settlement Agreement for sixteen years*. The lower Court correctly found that the evidence of these payments alone was "clear and convincing evidence" as required by *Potesta v.*

U.S. Fid. & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998) and its progeny. All of the legal requirements for a finding of AMBIT's waiver are present here.

It is unclear what other evidence AMBIT believes would need to be adduced here. AMBIT admits that it possessed both the 1989 contract and the 1996 Settlement Agreement, and that it paid rent, as aforesaid, from 1996 - 2013. AMBIT claims that, despite being a sophisticated business entity and possessing all documents relevant to its 2018 lawsuit more than 22 years prior, it did not "knowingly waive" anything because it *failed to understand the alleged significance* of part of the contract for, at a minimum, *seventeen years*. AMBIT App. Brief, p. 19, ¶ 1.

AMBIT's assignment of error further states that the Court erred in finding waiver "even absent clear and convincing evidence of a knowing and voluntary intent to waive a known right." AMBIT App. Brief, p. 22, ¶ 1. This claim is legally and factually incorrect. The lower Court correctly found that AMBIT's sixteen years of compliance with the Arbitration Agreement, from 1996 to 2012, was clear and convincing evidence and stated the same. Appx. 001159. Moreover, AMBIT implies that some sort of affirmative evidence, other than this uncontradicted finding by the lower court, needed to be adduced for the Court to make this finding. As above, the law is clear that "[a] waiver may be express **or may be inferred from actions or conduct**, but all of the attendant facts, taken together, **must amount to an intentional relinquishment of a known right**." Syl. Pt. 2, *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844. (emphasis added). The lower court found, consistent with *Parsons*, that the nearly two decades of conduct by AMBIT amounted to an intentional relinquishment of a known right, constituting waiver. AMBIT's implication that another standard should have been applied is demonstrably incorrect.

AMBIT's claim that the lower court should have found "mutual mistake" instead of waiver, or that it did not have enough evidence to find in Horizon's favor, is without legal or factual support, and AMBIT's attempt to overturn the lower court's finding of waiver should fail.

ii. Waiver can occur within the statute of limitations period.

AMBIT's other primary argument, that the lower court has somehow disemboweled W. Va. Code § 55-2-6 by finding that waiver can exist within the statute of limitations period, is also without merit. As the lower Court explained to AMBIT, contractual waiver would not exist if it could not be invoked within the Statute of Limitations. Appx. 001160. Undeterred, AMBIT now incorrectly attempts to frame the Court's ruling as finding that:

> 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 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.
>
> AMBIT App. Brief, p. 22, ¶ 1.

Unfortunately for AMBIT's arguments, none of these things happened. The ten (10) year Statute of Limitations for a contract claim does, in fact, still govern AMBIT's case, and, upon last review, is still present in the West Virginia Code. AMBIT's position, though, is that a party can *never* waive a claim inside the statute of limitations. Appx. 001183. As the lower Court explained, that assertion by AMBIT is meritless, because there would otherwise be no purpose to the doctrine of waiver. Appx. 001160. AMBIT's brief further conveniently never addresses this issue – that the *complete invalidation of the doctrine of waiver* is necessary for AMBIT's theory to be correct. Of course, such an interpretation cannot occur under even the simplest axioms of interpretation:

> Neither will we construe a statute to achieve an absurd result. Rather,"[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense

> of the words in a statute, when such construction would lead to injustice and absurdity." Therefore, "[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made."

Napier v. Bd. of Educ. of Cty. of Mingo, 214 W. Va. 548, 553, 591 S.E.2d 106, 111 (2003) (citing Syl. Pt. 2, *Click v. Click,* 98 W.Va. 419, 127 S.E. 194 (1925), Syl. Pt. 2, *Conseco Fin. Serv'g Corp. v. Myers,* 211 W.Va. 631, 567 S.E.2d 641 (2002), Syl. Pt. 2, *Newhart v. Pennybacker,* 120 W.Va. 774, 200 S.E. 350 (1938)) (internal citations omitted).

AMBIT's interpretation runs afoul of practically every waiver claim resolved by this Court. Horizon could find no meaningful mention of the statute of limitations in any cases dealing with waiver in West Virginia. Rather, cases determining the existence of waiver, or lack thereof, in a contract, are regularly filed within the ten-year statute of limitations. Similarly, Horizon could not locate a single instance when a court resolved one of those cases by pointing out that there cannot be a waiver within the statute of limitations period. *See, e.g.*, *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 149, 785 S.E.2d 844, 855 (2016), *Citibank, N.A. v. Perry*, 238 W. Va. 662, 664, 797 S.E.2d 803, 805 (2016), *Williams v. Tucker*, 239 W. Va. 395, 801 S.E.2d 273, 274–75 (2017). One would imagine that any number of insurance companies doing business in West Virginia would be ecstatic to know that they are legally incapable of waiving anything, from arbitration to coverage, within the ten-year statute of limitations, so long as they claim that they "believe[] they were lawfully complying," as AMBIT claims in its appeal brief.[14] AMBIT App. Brief, p. 22, ¶ 1.

AMBIT offers no legal support for its claim that waiver cannot be found within a statute of limitations, nor could Horizon find any support for this claim. This is likely because AMBIT's

[14] Coincidentally, Horizon also believes AMBIT was lawfully complying when it abided by the 1996 Settlement Agreement for 16 years.

claim is false. Because this argument is without legal support or merit, it cannot serve as a basis to overturn the lower Court's decision in this matter.

B. The lower court did not err in relying on the 1996 Admissions in resolving the summary judgment motion, and the lower court's reliance on the same invalidates AMBIT's argument that they were deemed inapplicable.

AMBIT incorrectly claims that the lower Court erred in granting Horizon's fact-based motion based on the parties' performance under the 1996 Settlement Agreement, which Agreement AMBIT claims was nullified for the purposes of rent through prior litigation. AMBIT App. Brief, p. 26, ¶ 1. This is the ill-founded premise upon which AMBIT's legal arguments are incorrectly derived. AMBIT further argues that the lower Court found "the parties had knowingly entered the 1996 Agreement, but they did so as a settlement agreement, not as a knowing and voluntary intent to waive a known right to pay rent according to the Amended and Restated lease agreement." *Id.* This assertion is false, as Horizon has painstakingly explained both in this brief and in Horizon's parallel appeal at Dkt. No. 20-0759.

AMBIT generically cites, for this proposition, the 2017 Order, beginning at Appx. 000089. As above, however, the entirety of the 2017 Order's "discussion" on this issue consists of this one (1) paragraph, which AMBIT has spent three years clinging to in this litigation:

> In analyzing the 1996 (Settlement) Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement because it provides that the 1996 Agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent.

Appx. 000098. AMBIT also cites to the lower Court's explanation that it determined the same. Appx. 001185 – 001186. However, lost in AMBIT's surprisingly terse offering of support on this issue, is the lower Court's expressed explanation, that *it was not determining rent* in that

opinion. Appx. 001186. This explanation is supported by the fact that the 2017 Order *dismissed all claims for rent without prejudice*, a fact which is fatal to AMBIT's incorrect assertion.

Instead, AMBIT, is intent on arguing to this Court that the lower Court tacitly *did* determine rent, notwithstanding the lower Court's own words, because AMBIT's Admissions in the Settlement Agreement are somehow invalidated by the above paragraph. This interpretation of the Settlement Agreement is untenable, and clearly not what the 2017 Court intended.

In the 1996 Settlement Agreement, AMBIT agreed that:

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

Appx. 00064 (emphasis added).

This Admission by AMBIT, by its plain language, categorizes all Foreign fuel used by AMBIT before and after 1996 to be "Non-Operating", by express definition. Paragraph 5 of the 1996 decision, *which the lower Court expressly found applicable in both 2013 and 2018, contains an agreement to reduce the amount AMBIT owes for using Foreign fuel for non-operating reasons from three percent (3%) to a base of two- and one-half percent (2.5%), with a series of additional payments as mitigation.* Appx. 000053-000055.

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

Horizon had explained this to the lower Court numerous times. In its Motion for Summary Judgment, Horizon explained that AMBIT made these Admissions, upon which Horizon relied, and that AMBIT was bound by those Admissions. *See* Appx. 000839-000840. Even a cursory reading of the applicable contracts renders AMBIT's interpretation legally illogical and incorrect.

There are twenty-one (21) provisions in the 1996 Settlement Agreement, including Provision 14, which states, in relevant part, that "this Agreement does not supersede the lease, except only that the provision in paragraph 4 of this Agreement for the dismissal of the Pending Action and the provisions of paragraph 5 of this Agreement for the waiver of the Waived Percentage Rent and related provisions of paragraph 5 shall limit Horizon's rights under the Lease." Appx. 000058.

The Admissions contained within that Settlement Agreement explicitly state that AMBIT "acknowledges**, as a fact,** that so long as any Local fuel is located at the Demised Premises, any Foreign fuel being used in the operation of the Plant is being used for Non-Operating Reasons."

(emphasis added). The phrase "so long as" is not capable of interpretation as anything other than prospective. The 2013 Court was not declaring the Admissions non-prospective any more than it was declaring the Definitions, Recitals, or Manner of Giving of Notice section invalid. This issue, contrary to AMBIT's continual misrepresentations regarding the same, was never resolved by the lower Court and in fact was *dismissed* by the lower Court in 2017.

Perhaps the best evidence that the Admissions were not invalidated by the 2017 Order is the fact that *the same judge relied upon those admissions in 2020.* AMBIT did not, apparently, consider the that the most likely reason the lower court relied on the 1996 Agreement in deciding waiver is that the lower court recognized that it never specifically ruled the Admissions inapplicable in 2017, and that the lower court did not explicitly accept AMBIT's theories.

Alternately, even assuming, *arguendo,* that the lower court *had* found the 1996 Admissions inapplicable to the determination of rent, it is incongruent with AMBIT's assertion that the lower court looked to those Admissions when determining waiver, as AMBIT alleges in its assignment of error. The lower court makes mention of the Settlement Agreement in its ruling, finding that AMBIT made payments in accordance with those Admissions, and that it was *aware* that it had the right to reduce the percentage it paid.[15] Appx. 001167. AMBIT seems to believe that the lower court would be required to turn a blind eye to the Settlement Agreement, even though AMBIT admits that it was the Settlement Agreement that caused it to pay Horizon two- and one-half percent (2.5%) from 1996 to 2012. One wonders how, exactly, AMBIT believes that the lower court was to analyze the issue of waiver at all without examining *the stated reasons for AMBIT's actions*. AMBIT offers no legal support for this ill-founded claim, outside the bald statement that *"res judicata* must preclude that inquiry." AMBIT App. Brief, p. 26, ¶ 1. Ironically, AMBIT cites,

[15] As above, Defendant disagrees with this finding.

as its only case, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55, (1996), a case where this Court found that "when a court approves a settlement by entry of a judgment order . . . said judgment, left unappealed, becomes final and subject to the consequences of the doctrine of res judicata." *Id.* at 60, S.E.2d at 60.[16]

As both Horizon and the lower court set forth, *res judicata* bars claims when:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 239 W. Va. 549, 560, 803 S.E.2d 519, 530 (2017). Here, the issue of determinations of rent was raised by both parties in the 2013 litigation. The 2013 litigation dismissed all claims related to determinations of rent, without prejudice. Appx. 000100 – 000102. While the issue could have been resolved in the prior action, the Court explicitly declined to do so. AMBIT does not substantively address, in its Appeal Brief, how the elements of *res judicata* apply to a claim that was dismissed without prejudice, and it is not incumbent on either Horizon or this Court to guess at its theories. As such, its reliance on this theory for its Appeal is misplaced and it should be denied.

C. The lower court did not err in denying AMBIT the ability to file its surresponse, and AMBIT's continued clogging of the court's docket with supplements, renewed motions, and similar pleadings is inappropriate.

AMBIT next claims that it should have been allowed to file its surresponse. Apparently, AMBIT needed another way to assert that Horizon did not do enough discovery for AMBIT's liking in regard to the thoughts, feelings, and emotions that AMBIT, as a company, went through,

[16] This is ironic because while *res judicata* does not apply here, it certainly applies to AMBIT's repeated and deleterious disregard of the settlement agreement.

in the sixteen (16) years it paid Horizon the two- and one-half percent (2.5%) rent agreed upon in the 1996 Settlement Agreement. As discussed above, this argument is a *non sequitur*. AMBIT's continued payments, despite possessing all documents necessary to determine whether a cause of action existed, constitute more than sufficient evidence of a knowing waiver by a sophisticated entity like AMBIT.

In fact, AMBIT's haggling over the surreply brings up a serious issue with regard to its motion practice in this case. AMBIT has filed, in this matter, the following pleadings which attempt to modify or relitigate motions and/or orders in this case: Renewed Motion to Dismiss Counterclaim, Supplemental Renewed Motion to Dismiss Counterclaim, Supplemental Objections and Responses to Counterclaimant's Combined First Set, Amended Designation of Potential Expert Witnesses, Provisional Designation of Potential Expert Witnesses, Supplemental Memorandum in Support of a Motion to Compel, Motion for Leave to File Surresponse out of time, the actual Surresponse, letters to the judge regarding outstanding issues, and, finally, a Renewed Motion for Summary Judgment, which was ultimately granted. *See generally* Dkt. Sheet, pp. 1-6.

This continued papering of the lower Court's file with ceaseless supplements, amendments, and provisional designations, borders on vexatious and oppressive litigation. Parties are expected to file "simple, concise, and direct" pleadings under W. Va. R. Civ. P. 8. The compounded effect of AMBIT's continued inability to complete and stand by a singular pleading places an undue burden on opposing counsel to prepare to respond to multiple versions of the same argument, across multiple pleadings. Further, many of these pleadings are inappropriate. In fact, Horizon complained about this practice throughout the litigation in the lower court, culminating in its Response to AMBIT's Renewed Motion for Summary Judgment. There, Horizon explained that

AMBIT's filing of its Surresponse, after the lower court denied AMBIT's Motion for Summary Judgment, and subsequent filing of a Renewed Motion for Summary Judgment after the Surresponse was denied, despite the fact that these were both thinly-concealed Motions for Reconsideration, were unauthorized filings under the West Virginia Rules of Civil Procedure. *Builders Service & Supply Co. v. Dempsey*, 224 W. Va. 80, 680 S.E.2d 95 (2009), *Brown v. Grayson Assisted Living, Inc.*, 2018 WL 318459 (2018). Appx. 001585-001587. This Court should not only find this assignment by AMBIT meritless, but it should also make clear that AMBIT cannot continue to flood the docket with extraneous pleadings.

AMBIT's assignment of error here is particularly pointless. In refusing to accept AMBIT's Surresponse out of time, the lower court specifically applied AMBIT's argument and found that AMBIT's waiver was *clear and convincing*, the exact standard which AMBIT sought to apply in its Surresponse. *Compare* Appx. 001133 – 001135, Appx. 001159, 001161. There appears to be no discernible reason why the lower court would have to *accept* the Surresponse if it already read the Surresponse and found that it would not alter the Court's decision. In fact, in dealing with amended pleadings, this Court has a long history of explaining that "[t]he liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures." *See, e.g.*, *Pyles v. Mason Cty. Fair, Inc.*, 239 W. Va. 882, 889, 806 S.E.2d 806, 813 (2017). Why that would not be the case here is beyond Horizon's ken. Finally, the practical applications of this assignment of error are curious, at best. Even if this Court remanded the case with instructions to the lower court to officially accept the surresponse, rather than ruling on the substance of the surresponse in its Motion denying the Motion for Leave, one imagines the ruling would remain the same.

Again, AMBIT's request that this Court approve its papering of the case with extraneous motions is inappropriate, underscores the weakness of its Appeal, and must be denied.

D. AMBIT's Assignment of Error claiming that the lower court erred in denying its motion for summary judgment is without merit.

Lastly, AMBIT argues that the lower court should have granted its motion for summary judgment. No new arguments are expressed here; rather, AMBIT claims, apparently based on its continued misinterpretation of the 2017 Order, that rent must be determined by Section 6 of the Amended and Restated Lease Agreement. In support of this claim, AMBIT argues that it had experts who support its claim that AMBIT, in its "reasonable judgment," used Foreign fuel for operating reasons and, therefore, its Motion for Summary Judgment should have been granted.

It is unclear why this assignment of error even exists. As this Court is aware, AMBIT was granted summary judgment regarding the calculation of rent in this matter, which Horizon has already appealed to this Court. Apparently, this Assignment was intended only as a preview of AMBIT's Response to Horizon's appeal, as this argument has no viable application to the instant matter before the Court.

While findings of reasonable judgment and expert testimony are arguably applicable to the lower court's incorrect determination of rent calculation and its formulation of an "arbitrary and capricious" standard as set forth by Horizon in its Appeal, those findings have nothing to do with AMBIT's waiver of claims. Put another way, AMBIT's expert testimony on the validity of AMBIT's use of Foreign fuel, or to its actions in operating the plant over the last 30 years, are meaningless to the resolution of the waiver-based decision that AMBIT is ostensibly appealing here. To the extent this assignment of error even constitutes an argument, it must be denied.

E. AMBIT does not appear to contest the lower Court's findings on laches, but to the extent AMBIT intended to address laches, the lower Court was correct to apply it.

The lower Court also found that the equitable doctrine of laches barred AMBIT's claim for back rent. Appx. 001169. As the Court explained, laches consists of two elements, (1)

unreasonable delay and (2) prejudice." *State ex rel. Webb v. W. Virginia Bd. of Med.*, 203 W. Va. 234, 237, 506 S.E.2d 830, 833 (1998), *see also* Appx. 001169.

Laches is, of course, an equitable defense which prohibits "a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." *Id.* (citing *State ex rel. West Virginia Dept. of Health and Human Resources, Child Advocate Office, on Behalf of Jason Gavin S. by Diann E.S. v. Carl Lee H.,* 196 W.Va. 369, 374, 472 S.E.2d 815, 820 (1996)).

The lower court correctly found that laches applied to this case because AMBIT engaged in unreasonable delay in attempting to claim an overpayment of rent, and, based on that finding, precluded AMBIT from pursuing the claim. Appx. 001169.

Notably, AMBIT does not explicitly raise an objection to the Court's finding regarding laches. *See* AMBIT App. Brief, p. 1. However, W. Va. R. App. P. 10 states:

> Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

W. Va. R. App. P. 10(d). Accordingly, while it appears AMBIT agrees with the Court's application of laches, because it did not list that finding in its assignments of error, and to the extent this Court may find that AMBIT intended to do so, Horizon must, therefore, brief the same.

AMBIT mentions "laches" only a few times throughout the brief. It points out, briefly, that Horizon "failed to identify prejudice in its brief," and that Horizon alleged in the hearing "the undecipherable 'continuing to have this issue.'" AMBIT App. Brief, pp. 5-6. AMBIT also states that "[t]he 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 file and that Horizon was without even a suggestion of unreasonable, unexplained delay or evidence or prejudice." AMBIT App. Brief, p.

13. AMBIT further states that laches offers only equitable remedies "but does not supplant the applicable statutory limitation nor drive dismissal." AMBIT App. Brief p. 15. AMBIT reiterates that claim again later in the brief, claiming that since it did not claim equitable remedies, the doctrine of laches is inapplicable. *Id.*, p. 21. All of these claims are wrong.

The allegedly "undecipherable 'continuing to have this issue'" is far from undecipherable when the actual transcript of the hearing is reviewed.[17] Horizon's counsel clearly explained that "the issue" is that Horizon resolved the matter of payment in the May 28, 1996 agreement, and it has still been in court over that same issue multiple times two decades later. Appx. 001185. The lower court explained that the "prejudice" to Horizon was that AMBIT "never made any claim of overpayment prior to the filing of the counterclaim in the 2013 civil action," despite paybening or acknowledging the rent from May 28, 1996 to July 29, 2013. Appx. 001169, ¶¶ 7-8.

Similarly, AMBIT's confusing assertion that "delay" is somehow cabined by whether "the length of delay caused critical or dispositive evidence to be lost, destroyed, or otherwise made unavailable" is a misappropriated citation from *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996). There, the Court was explaining prejudice in the context of the dispute over alimony in the *Banker* case and found that laches can be equitably applied in any situation "[w]here a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced." *Brand v. Lowther*, 168 W. Va. 726, 737, 285 S.E.2d 474, 482 (1981). Here, Horizon had assumed, for sixteen (16) years, that it was receiving the correct payment from AMBIT.

[17] One would assume that since AMBIT's counsel was present for the hearing, it would be able to "decipher" the same.

Finally, AMBIT's assertion that it "expressly did not raise equitable claims nor seek equitable relief" is false. AMBIT specifically requests, *inter alia*, the return of its overpaid rent, and "such other relief as the Court deems just and proper." Appx. 000010. In other words, AMBIT is seeking reimbursement. This Court has held numerous times that reimbursement can be defended with laches, so long as it was raised as an affirmative defense. *See, e.g.*, *State Dep't of Health & Human Res., Child Advocate Office on Behalf of Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 766, 466 S.E.2d 827, 834 (1995), *Hartley v. Ungvari*, 173 W. Va. 583, 587, 318 S.E.2d 634, 638 (1984), *Kimble v. Kimble*, 176 W. Va. 45, 50, 341 S.E.2d 420, 426 fn. 8 (1986). Horizon raised laches as an affirmative defense in its initial Answer. Appx. 000015.

Laches is, therefore, applicable to AMBIT's claim for reimbursement. As AMBIT has not specifically pointed out the Court's application of laches as an assignment of error, it appears that the Court's application of the same is unchallenged. To the extent AMBIT intended to challenge that application, its scattered references to laches are without merit and must be denied.

F. The lower court erred in finding that *res judicata*, collateral estoppel, and judicial estoppel did not bar AMBIT's claims.

Confusingly, the lower court found, at ¶¶ 9 – 11 of its Order Granting Summary Judgment to Horizon, that judicial estoppel, *res judicata* and collateral estoppel did not apply to bar AMBIT's claims. Appx. 001168 – 001169. The Court's Order merely cites some case law about judicial estoppel, *res judicata*, and collateral estoppel, but, incorrectly, finds that those doctrines do not apply here. *Id.* at ¶ 10.

Horizon has continually asserted that all of those doctrines applied, based on AMBIT 's admissions in the 1996 Agreement. *See* Appx. 000851 – 000855, 000856 – 000859. Horizon can find no explanation given by the Court in the Order as to why those doctrines do not apply to bar AMBIT's claim. *See* Appx. 001163 – 001171.

The lower court then confusingly found that it was not determining rent in its previous finding, and that there "may be merit" in Horizon's claims, and then *expressly relied upon the 1996 Admissions* to find waiver and laches. Horizon asserts that if the 1996 Admissions applied to determine waiver and laches, there appears to be no discernible reason why they would not apply to determinations of *res judicata*, judicial estoppel, and collateral estoppel.

i. *Res judicata* bars AMBIT's claims.

As AMBIT has pointed out *ad nauseam*, *res judicata*, *i.e.*, claim preclusion, applies to bar claims which have already been litigated and decided.

> Three elements must be satisfied before the prosecution of a lawsuit may be barred on the basis of res judicata: (1) there must have been a final adjudication on the merits in the first proceeding; (2) the second proceeding must involve the same parties, or persons in privity with those same parties, as the first proceeding; and (3) the cause of action in the second proceeding must be identical to the cause of action determined in the first proceeding or must be such that it could have been resolved, had it been presented, in the first proceeding.

Mueller v. Shepherd Univ. Bd. of Governors, No. 11-0567, 2012 WL 5990134, at *2 (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)). Here, as Horizon explained, the parties executed the May 28, 1996 Settlement Agreement to resolve pending litigation, the 1996 action and this one involve identical parties, and the cause of action, *i.e.*, the resolution of a dispute over foreign and local fuel. Appx. 000859. In fact, *Mueller*, *supra*, **specifically holds that *res judicata* is applicable to settlement agreements.** *Mueller* at *1. There appears to be no reason why it would not apply to bar AMBIT's claims here.

ii. Collateral estoppel bars AMBIT's claims.

This Court has explained that "[c]oncerning the distinction between res judicata and collateral estoppel, it has been stated":

> Collateral estoppel is a narrower application of res judicata. Where a second lawsuit between the same parties, or those who stand in their place, involves a different cause of action, the judgment in the first action estops relitigation of only those matters that were litigated and the subject of a final determination or verdict. In other words, the effect of the prior judgment is limited to specific issues in the second action and does not dispose of the entire suit.

Jordache Enterprises, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 204 W. Va. 465, 476–77, 513 S.E.2d 692, 703–04 (1998). Unsurprisingly, then, the application of collateral estoppel, *i.e.*, issue preclusion, is similar. Collateral estoppel bars claims if four conditions are met:

> (1) The issue previously decided is identical to the one presented in the action in question; (2) there is final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. Pt. 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); *W. Virginia Dep't of Transportation v. Veach*, 239 W. Va. 1, 11, 799 S.E.2d 78, 88 (2017). Once again, "the issue" of what AMBIT is obligated to pay is identical to the 1996 issue, which was conclusively decided by the Settlement Agreement. The parties are identical. Further, whether preclusive effect would be given to the settlement has been conclusively decided by this Court:

> [I]n concerning whether collateral estoppel applies to a Rule 68 judgment, the contract principles noted above should govern. That is, effect should be given to the intent of the parties to the judgment as stated in the judgment order. We hold, therefore, that judgment entered pursuant to W.Va. R. Civ. P. 68, if silent regarding liability and the collateral estoppel effect of the judgment, has no issue preclusive effect and is not an admission of liability by the offerer. Of course, issue preclusive effect will be given to a judgment pursuant to W. Va. R. Civ. P. 68 which expressly admits liability or states that it is to be given collateral estoppel effect, thereby reflecting the intent of the parties.

Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 221–22, 530 S.E.2d 676, 694–95 (1999). Here, the parties' intent is clear. The *issue* of whether AMBIT is to pay a certain percentage of fuel was conclusively decided, via Admission, by AMBIT's own agreement. It would be difficult to envision a more logical application of *issue preclusion* than to an issue which a party

has already conclusively admitted its position. Accordingly, collateral estoppel should apply to bar AMBIT's claims.

iii. Judicial estoppel bars AMBIT's claims.

Judicial estoppel "is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 504, 618 S.E.2d 506, 513 (2005).

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.
>
> *Robertson* at 506, S.E.2d at 515.

Here, AMBIT admitted, as part of the 1996 Settlement Agreement, that all uses of foreign fuel going forward were to be deemed non-operational. As always, the parties were the same. AMBIT, by ceding that position in 1996, reached a settlement agreement with Horizon, rather than going to Court for yet another contractual violation. Now, after 24 years, AMBIT wants to change its position, or, more accurately, have the Court find that AMBIT's position inexplicably *never existed at all*, due to purposeful misrepresentation of a holding in another matter, which would invalidate the entire purpose of the 1996 Settlement Agreement.[18]

Under the doctrine of judicial estoppel, a party is "generally prevent[ed] ... from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in

[18] Without the Settlement Agreement, the entire 1996 Agreement basically consists of an agreement deciding the ladder by which parties get paid, and would not actually have resolved the fuel-based dispute that continues until today.

another phase." *Pegram v. Herdrich,* 530 U.S. 211, 227 n. 8 (2000). This Court recognized long ago that "[t]here are limits beyond which a party may not shift his position in the course of litigation[.]" *Robertson* at 504, S.E.2d at 513.

The doctrine prohibits parties from taking "successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts." Syl. Pt. 2, *Dillon v .Board of Educ. of Mingo County*, 171 W. Va. 613, 301 S.E.2d 588 (1983). The doctrine fulfills its goals by "bind[ing] a party to his or her judicial declarations, and precludes [that] party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding." *Robertson* at 505, S.E.2d at 514.

Here, AMBIT has taken a position directly inapposite to its bargained-for, and admitted, position set forth in the 1996 Agreements. AMBIT does so in an attempt to have this Court validate a tortured interpretation of a five-year-old ruling which AMBIT clearly views as an escape hatch for the Agreement it entered into and the admissions it made, but no longer chooses to accept. AMBIT, in short, needs this Court's approval to break its bargained-for promise. As "even an appellate court, may raise [judicial] estoppel on its own motion in an appropriate case," there appears to be no reason why AMBIT should not be estopped, either by its claims in the lower court or in the claims before this one, from taking positions against its own admissions.

VI. Conclusion

Wherefore, Defendant moves this Court to deny AMBIT's appeal, to grant Horizon's cross-assignments of error and find the lower court erred in not granting Horizon summary judgment on *res judicata*, collateral estoppel, and judicial estoppel, and for any and all other relief this court deems appropriate.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS POWER
PARTNERS, LP,

Petitioners,

v. Case No. 20-0762

HORIZON VENTURES OF
WEST VIRGINIA, INC.

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT'S BRIEF** was mailed to counsel of record at the address shown below by United States Mail, postage prepaid this 12th day of February, 2021:

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