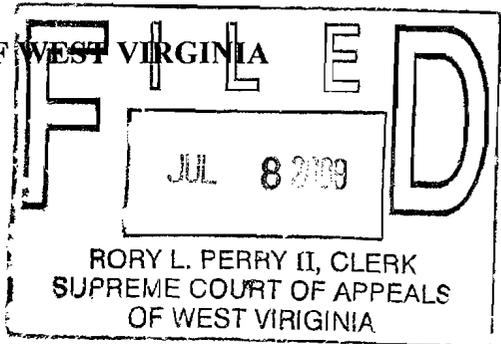


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



AJR, INC., a West Virginia corporation,
and JOHN M. RHODES,

Appellants,

v.

DOCKET NO. 34748

DANNY L. BENSON,

Appellee.

FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 99-C-105

APPELLANTS' BRIEF

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I. **KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The instant appeal stems from obvious errors of law, invited by Danny Benson's counsel, and committed by the presiding judge below, the Honorable Robert A. Waters of the Circuit Court of Wood County (the "Circuit Court"). Judge Waters erred when, more than two years after the jury returned an unequivocal general verdict in favor of AJR, Inc. ("AJR") and John M. Rhodes ("Mr. Rhodes") (collectively "Appellants"), he entered an order awarding damages to Plaintiff-below Danny Benson ("Benson").

This civil action -- brought by an admitted cocaine using supervisor of a welding shop -- has circulated throughout West Virginia's judicial system for nearly a decade. In 1999, Benson filed a complaint alleging breach of contract and false light invasion of privacy after Benson tested positive for cocaine and the Appellants terminated his employment. The Circuit Court granted summary judgment in favor of Appellants on all counts in 2002. Upon appeal to this Court, summary judgment on the false light invasion of privacy claim was affirmed while the grant of summary judgment on the breach of contract claim was reversed and remanded, with this Court finding that a genuine issue of material fact existed regarding whether Benson was discharged for dishonesty or using cocaine while serving as supervisor in a welding shop.

On remand, the Circuit Court conducted a full trial on the merits of the claims and defenses. Appellants presented evidence in support of the affirmative defense of material breach of contract and the jury was instructed on, among other theories, the law of material breach before retiring to deliberate. The jury subsequently found (i) by general verdict that Benson had materially breached his employment contract prior to the termination of his employment, and (ii) by answers to special interrogatories, that Benson was ultimately terminated for drug use rather than specifically for dishonesty.

After entering both the general verdict and special interrogatory, the Circuit Court failed to enter final judgment on the general verdict for more than two years. Instead, the Circuit Court held a post-judgment hearing to award damages to Benson and, by Order dated July 18, 2008, awarded Benson \$94,910.25 as breach of contract damages on a claim that Benson unequivocally *lost* at trial. In awarding Benson damages, the Circuit Court accepted Benson's argument that this Court, in its April 16, 2004, opinion in Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004), expressly limited the Circuit Court and the jury's province on remand exclusively to the narrow factual issue of whether Benson was discharged for dishonesty or for drug use. At Benson's urging, the Circuit Court somehow concluded that this Court, without legal argument or consideration of any kind¹, had stripped Appellants of their constitutionally guaranteed right to due process and thereby precluded Appellants from asserting any affirmative defense at trial. Based on this faulty rationale, the Circuit Court ruled that the jury's answers to the special interrogatories (dealing with the factual reason for Benson's termination) controlled the general verdict (i.e., that Benson's material breach terminated the contract prior to his discharge, making the reason for Benson's discharge irrelevant), and that Benson's material breach of contract, which occurred *prior* to his discharge, did not preclude recovery for breach of contract damages arising from his discharge, which occurred *after* Benson's material breach.

In the Circuit Court's July 18, 2008 Order, Judge Waters recognized that "[Appellants] object that the entry of judgment in favor of [Benson] on the issue of liability is contrary to the law and the verdict rendered by the jury at the trial on this matter." See July 18, 2008 Order at 1 ¶ 2. As noted by this very Court, "[a] fundamental question in any appeal is whether substantial justice has been done." Ward v. Sams, 182 W. Va. 735, 739, 391 S.E.2d 748, 752 (1990). In

¹ Appellants' affirmative defense of material breach was never before this Court because, as discussed below, the Circuit Court expressly declined to address that argument at the summary judgment stage because it found the issue to be mooted by the Circuit Court's other rulings on summary judgment.

this case, not only was substantial justice not done, but nearly a full decade later *no* justice has been done. The Circuit Court has committed a substantial legal error by arbitrarily depriving the Appellants of a general verdict to which they are rightly entitled in a case that has been dragged out for nearly ten years. Rather, the Circuit Court has attempted to justify an award of damages to a cocaine-using welding shop supervisor by relying on an answer to a special interrogatory that has no legal bearing by virtue of the jury's general verdict. It is from these legal errors that Appellants now appeal.

II. STATEMENT OF THE FACTS

In October 2005 a properly instructed jury rendered a general verdict, finding that Benson materially breached his contract *prior* to his termination. Despite the jury's general verdict, the Circuit Court found cause to strip Appellants of a verdict which is rightfully theirs, and instead declare that, regardless of constitutional safeguards to the contrary, Appellants have no right to be heard – ever – on their affirmative defense. If not corrected, the Circuit Court's flagrant disregard for the law in West Virginia, and the rights afforded under the constitutions of both West Virginia and the United States, will effectively silence the collective voice of the jury of Appellants' (and Benson's) peers which has properly decided this matter.

A. Danny Benson was employed by AJR, Inc. and John M. Rhodes.

AJR, a West Virginia corporation based in Wood County, West Virginia, is engaged in the manufacture of truck trailers. In the summer of 1997, Mr. Rhodes became the sole owner of AJR when he purchased the company from, among others, Robert Benson and Jackie Benson (Benson's father and uncle, respectively). Danny Benson had been employed by AJR as a welder/lead hand since 1990.

On April 27, 1997, prior to the sale to Mr. Rhodes, the then-current owners of AJR issued a memorandum (the "April memorandum"). The April memorandum changed Benson's title

from welder/lead hand to supervisor and delegated to Benson the duties of supervising steel and parts production, facilities and safety. The changes set forth in the April memorandum, both to Benson's job title and responsibilities, were effective May 1, 1997, nearly four months *before* Benson signed the employment contract at issue in this case. Benson's duties, as clearly spelled out in the April memorandum, included leading department personnel to accomplish tasks and assignments and setting a good work ethic and example for fellow workers to follow:

Q: And it says, "The supervisor will lead the department personnel to accomplish tasks and assignments." But then it says, "The following represents examples of general responsibilities." And the first one is "Lead and set a good work ethic and example for your fellow workers to follow," correct?

A: That's correct.

Q: Okay. And whether or not you were welder/lead hand or supervisor, you still had to follow that rule, you still had to set a good example, you still had to set a good work ethic and example for your fellow employees; correct?

A: *That's true.*

Q: Okay. And whether or not you were welder/lead hand or supervisor, you still had to communicate and enforce policies as described in the company manual; correct?

A: *Yes.*

(Trial Tr. 174:14-175:8) (emphasis added).

As part of the change in Benson's job duties and responsibilities, Benson was also appointed the supervisor in charge of safety at AJR. According to Benson, AJR's drug-free workplace policy fell within the safety program of which he was designated supervisor. Benson admitted at trial that "common sense" dictated that, as a supervisor, he was responsible for enforcing the drug-free workplace policy. (Trial Tr. 155:23-156:14; 171:7-172:11).

The April memorandum establishing Benson's job duties and responsibilities as lead hand/supervisor was effective May 1, 1997. Benson signed his employment contract on August

29, 1997. Benson readily admitted that he executed his employment contract *after* he received a clear articulation of his job duties, which included, *inter alia*, helping to enforce AJR's policies, leading by example, and, specifically, leading by example with regard to AJR's drug-free workplace policy. (Trial Tr. 157:16-161:19, 171:7-172:11). Furthermore, Benson was fully aware that he was required to perform his job duties under the contract in good faith:

Q: And you felt like you had an obligation to treat John Rhodes in good faith and fairly under the contract; right?

A: That's true.

Q: Okay. You had those obligations to fulfill in good faith your duties and responsibilities under the contract; right?

A: Yes. That's what I was supposed to do.

Q: You had a duty and responsibility to help enforce the policies; right?

A: Yes.

Q: You had a duty to lead by example to the people who worked under you?

A: Yes.

Q: Okay. *Did your responsibilities include to lead by example with regard to the drug free work place policy?*

A: *Yes, if that's what you're asking.*

Q: *It is what I am asking.*

A: *Okay.*

Q: *Thank you. And you answered yes, right?*

A: *Yes.*

(Trial Tr. 157:16-161:19) (emphasis added).

B. Benson intentionally violated AJR's drug-free workplace policy by reporting to work while high on cocaine.

Even though Benson admitted that he had a contractual obligation to lead by example with regard to AJR's drug-free workplace policy, Benson admitted in open court that he *intentionally* violated that policy:

A: I was terminated because of the drug controlled substance testing result.

Q: *You intentionally violated that company policy; correct?*

A: *Yes.*

(Trial Tr. 142:7-21) (emphasis added).

Q: And you intentionally went to work on Monday; correct?

A: That's correct.

Q: And when you went to work, you knew it was still in your system; correct?

A: That's right.

Q: *And so you went there knowing it's in your system and knowing that by being in your system you are violating the drug free work place policies; correct?*

A: *If that's the way you want to look at it.*

Q: *It is the way I want to look at it.*

A: *Okay, that's fine.*

(Trial Tr. 175:9-176:3) (emphasis added).

Indeed, Benson's drug test was positive for metabolized cocaine at a level more than three times that established by the United States Department of Transportation to determine use and impairment. Benson did not challenge the drug test results. The need for these tests is obvious: potential workplace dangers abound on AJR's shop floor. AJR manufactures truck beds and employees work continuously with heavy machinery possessing lethal power in

confined spaces. The intense heat of the welding torches coupled with the flammable materials present on the shop floor make explosions, fires, and burns a daily threat to both Benson, himself, and those working around him. Benson testified to these inherent dangers at trial:

Q: Well, wouldn't you agree with me that cocaine and explosives don't mix; is that right?

A: That's true.

Q: And you as a welder operate with anywhere from a 5,000 to 10,000 degree torch, correct?

A: Correct.

Q: And around that, there was a tank of oxygen around the plant; is that correct?

A: That's correct.

Q: *And yet you decided to go to work with cocaine in your system to operate a 10,000 degree torch around that oxygen tank and other explosives; correct?*

A: *That's correct.*

(Trial Tr. 144:24-145:12) (emphasis added).

From the evidence, the jury drew the only logical conclusion: Benson failed to meet his acknowledged and understood obligations to AJR in such a fundamental way that he materially breached his employment contract. Appellants performed as they were required under the employment contract by providing Benson with a job and paying him his wages. Benson accepted those wages, but then materially breached the employment contract by failing to perform his duties to the best of his ability and in good faith, as he had knowingly agreed under the contract. Benson materially breached the employment contract by failing to lead by example. Benson materially breached the employment contract by not only failing to enforce a fundamental safety policy, but by personally and flagrantly violating it to the point that he tested positive at more than three times the limit to show impairment from cocaine use.

C. Benson's employment was terminated by Appellants, and he subsequently sued, which resulted in the Circuit Court granting summary judgment in favor of Appellants.

Before the results of Benson's drug test were known, Mr. Rhodes conducted meetings with AJR personnel, including Benson, to ascertain whether anyone knew of an employee reporting to work under the influence of drugs or alcohol. Benson failed to disclose his abuse of cocaine. As a result of this failure, and Benson's failure to perform his job duties in good faith by reporting to work with cocaine in his system at a level more than three times that established by the United States Department of Transportation to determine use and impairment, Benson's employment with AJR was terminated on March 6, 1998.²

On March 4, 1999, Benson filed a complaint in the Circuit Court of Wood County, West Virginia, against Appellants alleging breach of contract and false light invasion of privacy. Appellants moved for summary judgment on the claims asserted by Benson. The Circuit Court granted Appellants' motion on July 23, 2003, and entered "Findings of Fact and Conclusions of Law" consistent with its Order. The Circuit Court concluded that Benson had failed to state a cognizable cause of action for false light invasion of privacy. The Circuit Court also found that "no reasonable jury could find Benson's failing of the drug test, under all circumstances present herein, was not dishonest behavior," and entered summary judgment in favor of Appellants on Benson's breach of contract claim. See "Findings of Fact and Conclusion of Law" at #8. Critically, the Circuit Court expressly *declined* to address Appellants' argument that Benson had materially breached his employment contract, concluding that its ruling that Benson was discharged for dishonesty rendered the material breach issue moot:

² Benson's employment contract with AJR, Inc., permitted his termination, upon one day's notice, for (i) dishonesty, (ii) conviction of a felony, or (iii) voluntary termination of the contract by Benson. In the event of termination for any of the enumerated reasons, Appellants were excused from paying the balance of Benson's salary for the remaining eight year employment period.

Defendants [AJR and Mr. Rhodes] also claimed, as a defense to Plaintiff's Motion for Summary Judgment, that Plaintiff may not recover for breach of contract because he materially breached his employment contract. Defendants claim that resolution of whether Plaintiff's breach is material is an issue for the jury which cannot be resolved on summary judgment (citations omitted). Because this Court's other holdings render this issue moot, the Court does not address Defendants' breach of contract defense. . .

.Id. at p.4 n.2.

Benson appealed the Circuit Court's summary judgment ruling and, on April 16, 2004, this Court issued its decision in Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004). This Court affirmed summary judgment on Benson's false light invasion of privacy claim. Benson, 215 W. Va. at 325, 599 S.E.2d at 748. However, this Court found that Benson "[was] entitled to have a jury determine the basis for AJR's decision to terminate Mr. Benson from its employ." Accordingly, summary judgment on the breach of contract claim was reversed and remanded for a jury trial. Id. at 328-29, 599 S.E.2d at 751-52. This Court **never** addressed the issue of material breach because that issue was not before it, having been deemed moot by the Circuit Court. Nowhere in its opinion did this Court preclude Appellants from presenting evidence to the jury in support of their affirmative defense of material breach.

D. By general verdict, the jury found that Benson materially breached his contract prior to his date of termination.

A trial was held in the Circuit Court from October 18-20, 2005. At trial, Appellants presented evidence supporting their affirmative defense of material breach. Benson admitted that he had an obligation, under the contract, to devote his best efforts to AJR when fulfilling his job duties and responsibilities:

Q: Okay. You had those obligations to fulfill in good faith your duties and responsibilities under the contract; right?

A: Yes, that's what I was supposed to do.

(Trial Tr. 158:4-7). Benson also admitted that his contractual duties, to which he was to devote his best efforts and perform in good faith, included the enforcement of AJR's drug-free workplace policy and leading by example. (Trial Tr. 161:12-19). Nonetheless, Benson intentionally reported to work as a safety supervisor while high on cocaine.

At the close of the evidence, the jury was instructed, without any objection as to the form of the instructions, on the law governing Benson's breach of contract claim and Appellants' affirmative defense of material breach:

A party who sues for damages for breach of contract must show his own compliance with the contract. If a party materially breaches a contract, that party is barred from recovering under the contract. A material breach is one that goes to the heart or essence of the contract. It is an action so substantial that the contract would not have been made without the promise.

(Trial Tr. 259:15-21). The Circuit Court further instructed the jury on the law governing Benson's duty to perform the contract in good faith:

Under West Virginia law, all contracts contain a covenant of good faith and fair dealing. In other words, West Virginia law imposes a duty that all parties to a contract act in good faith and deal fairly with one another. A covenant of good faith and fair dealings requires each party to be fair in their dealings with each other and to comply in good faith with the provisions of the contract.

(Trial Tr. 259:7-14).

Prior to deliberating, the jury, without objection from counsel, was provided with two forms to record their findings: (1) a general verdict form; and (2) special interrogatories designed to answer the factual question, believed by the Circuit Court, to have been specifically posed by this Court in its order of remand (i.e., whether Benson was discharged for dishonesty or drug use). After deliberating, the jury returned the following general verdict form based on the entirety of the case presented to them – including evidence presented on the affirmative defense of material breach:

GENERAL VERDICT

We, the jury, find by a preponderance of the evidence in this case that the Defendants AJR, Inc. and John M. Rhodes materially breached the terms of the employment contract and find in favor of the Plaintiff Danny L. Benson and against the Defendants AJR, Inc. and John M. Rhodes.

Foreperson

We, the jury, find by a preponderance of the evidence in this case that the Plaintiff Danny L. Benson materially breached the terms of the employment contract and find in favor of the Defendants AJR, Inc. and John M. Rhodes and against the Plaintiff Danny L. Benson.

/s/ Keith C. Neely

Foreperson

See Verdict Form. The jury answered the special interrogatories as follows:

SPECIAL INTERROGATORIES

We, the jury, find as follows:

Was the reason that the Plaintiff Danny L. Benson was terminated from his employment for being dishonest?

Yes _____ No X _____

Was the reason that the Plaintiff Danny L. Benson was terminated from his employment for drug use rather than dishonesty?

Yes X _____ No _____

See Special Interrogatories.

Following the jury’s verdict, the Circuit Court entered an order – drafted entirely by Benson’s counsel – recording the jury verdict “in favor of the Defendants and against Plaintiff on the issue of material breach submitted to the jury on the general verdict form.” See Order Entering Judgment. Further, the Circuit Court improperly entered “judgment” on the special

interrogatories “in favor of the Plaintiff and against the Defendants on whether dishonesty was the basis for the Plaintiff’s termination versus drug testing.” Id.

Appellants requested entry of final judgment in their favor based on the jury’s general verdict. The Circuit Court failed to enter final judgment on the jury’s general verdict for more than two years. During that period, Benson filed a motion for an award of post-judgment damages, advancing the egregious argument that this Court had previously determined that the *only* issue to be decided by the jury was whether Benson was terminated for drug use or dishonesty and that the general verdict rendered by the jury had no meaning or effect. The Circuit Court flatly ignored the general verdict and failed to enter a final judgment order. Thereafter, Appellants were forced, by virtue of the Circuit Court’s refusal to adhere to the clearly articulated general verdict, to file a Petition for Writ of Mandamus with this Court. This Court scheduled arguments on the Appellants’ Petition for September 3, 2008. Prior to that date, however, the Circuit Court, after having failed to enter a final order for more than two years, awarded Benson \$94,910.25 by Order dated July 18, 2008. This Court subsequently dismissed Appellants’ Petition for Writ of Mandamus as moot in light of the Circuit Court’s Order.

Not only has the Circuit Court stripped Appellants of a general verdict in complete derogation of the law, but it has also adopted the constitutionally untenable position that Appellants have no right to be heard – ever – on their affirmative defense. For the reasons set forth within, Appellants respectfully request that this Honorable Court reverse the Circuit Court’s July 18, 2008 Order and direct the Circuit Court to enter a final judgment order in favor of Appellants.

III. ASSIGNMENTS OF ERROR

AJR, Inc., and John M. Rhodes assign the following errors of law:

A. The Circuit Court of Wood County erred when it ruled that the sole issue to be decided on remand was whether Benson's termination was based upon dishonesty or drug use, thereby precluding any consideration of Appellants' affirmative defense of material breach. The Circuit Court expressly declined to address material breach because it found that its other rulings mooted the material breach issue. Consequently, that issue was never appealed by Benson to this Court and thus never addressed by this Court in its order reversing summary judgment in part. See Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004).

B. The Circuit Court of Wood County erred when it refused to enter final judgment on the general verdict returned in favor of Appellants, and apparently instead awarded damages to Benson based upon the jury's responses to special interrogatories. The general verdict and answers to special interrogatories are consistent and the Circuit Court erred by disregarding the general verdict. If there is an inconsistency between the general verdict and special interrogatories -- and none have been cited by either the Circuit Court or Benson's counsel -- the special interrogatories fail to "find a fact which inevitably overthrows the general verdict" that would permit entry of judgment on the special interrogatory. Runyan v. Kanawha Water & Light, Co., 68 W. Va. 609, 71 S.E. 259, 260 (1911).

C. The Circuit Court of Wood County erred by awarding damages to Benson, the losing party at trial, nearly 4 years after the trial of this matter had concluded. The Circuit Court awarded Benson breach of contract damages despite the jury's general verdict that Benson had materially breached his employment contract *prior* to his termination. The jury's finding by general verdict that Benson was in material breach prior to the date of his termination excused

Appellants from future performance under the contract and rendered the special interrogatory legally irrelevant.

IV. POINTS AND DISCUSSION OF LAW

- A. The Circuit Court erred as a matter of law when it ruled, after the jury verdict in Appellants' favor, that the sole issue to be decided on remand was whether Benson's termination was based upon dishonesty or drug use, thereby excluding Appellants' affirmative defenses.**

The Circuit Court erred as a matter of law when it entered judgment for Benson on the premise that this Court, in its opinion reversing summary judgment in part, expressly limited the issue to be decided on remand to whether Benson was terminated for dishonesty or drug use. The Circuit Court's conclusion runs contrary to settled principles of law governing appellate review in West Virginia and is further undermined by the Circuit Court's own "Findings of Fact and Conclusions of Law" accompanying its initial grant of summary judgment.

This Court did not eliminate Appellants' affirmative defenses from this case because it is a fundamental principle of appellate law that the Supreme Court of Appeals of West Virginia "will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court." Syl. Pt. 3, Dean v. West Virginia Dept. Motor Vehicles, 195 W. Va. 70, 464 S.E.2d 589 (1995); see also Hupp v. Sasser, 200 W. Va. 791, 800, 490 S.E.2d 880, 889 (1997); Korzun v. Shahan, 151 W. Va. 243, 254, 151 S.E.2d 287, 294 (1996).

As reflected in its "Findings of Fact and Conclusions of Law," the Circuit Court expressly *declined* to address Appellants' argument that Benson had materially breached his employment contract. See Findings of Fact and Conclusions of Law at p.4, n.2. Specifically, the Circuit Court recognized that:

Defendants also claimed, as a defense to Plaintiff's Motion for Summary Judgment, that Plaintiff may not recover for breach of contract because he materially breached his employment contract. Defendants claim that resolution of whether Plaintiff's breach is material is an issue for the jury which cannot be resolved on

summary judgment. Milner Hotels, Inc. v. Norfolk Western Ry. Co., 822 F. Supp. 351, 345 (S.D. W. Va. 1993), aff'd, 19 F.3d 1439 (4th Cir. 1994). *Because this Court's other holdings render this issue moot, the Court does not address Defendants' breach of contract defense to Plaintiff's Motion for Summary Judgment.*

Id. (emphasis added)

Despite (i) the settled principle of law that the Supreme Court of Appeals will not entertain an issue that the trial court has not addressed, and (ii) the Circuit Court's express abstinence from addressing the issue of material breach, the Circuit Court nevertheless concluded -- after allowing evidence on material breach, instructing the jury on the law of material breach, and providing the jury with a verdict form allowing them to find material breach -- that this Court precluded consideration of material breach on remand.

The original Benson Court was not in a position to address the issue of Appellants' affirmative defense of material breach, nor did it. The only issues that Benson appealed were (i) whether the Circuit Court properly granted summary judgment because Benson was dishonest, and (ii) whether the Circuit Court properly granted summary judgment on Benson's claim of invasion of privacy. See Benson v. AJR, Inc., 215 W. Va. 324, 599 S.E.2d 747 (2004). Benson did not appeal from the Circuit Court's ruling on material breach because the issue was never decided by the Circuit Court. The issue of Benson's material breach was never mentioned in Benson's petition for appeal,³ Benson's appellate brief,⁴ nor in this Court's April 2004 opinion. In fact, the *only* time on appeal that the issue of Benson's material breach was *ever* mentioned,

³ In the "Issues Presented" section of Benson's Petition for Appeal, Benson sought appellate review of the following issue: "1. Was the Plaintiff's termination for reasons other than "dishonesty" and therefore, in breach of the Plaintiff's employment contract?" See Petition for Appeal, p. 12.

⁴ In the section entitled "Nature of the Proceedings and the Ruling Below," Benson stated that he "appeals from the court's findings that the Defendants did not breach the written contract governing the terms and conditions of [his] employment by failing to make salary payments due to him after he was terminated from his job at AJR, Inc." See Opening Brief of the Appellant Danny L. Benson, p.2 ¶ 1. Furthermore, under the section heading "Issues Presented," Benson stated "Does the Defendant have a duty under the employment contract between the parties to

much less discussed, was the Appellants' first appellate brief at page 9, footnote 3, directing this Court's attention to the Circuit Court's "Findings of Fact and Conclusions of Law":

The Circuit Court specifically declined to address Appellees' argument that Appellant had materially breached his employment agreement because its ruling on whether Appellant had been discharged for dishonesty mooted the material breach issue. (Findings of Fact and Conclusions of Law at p.4 n.2; Rec. 376).

See Appellees' Br. p.9 n.5.

Nowhere in its opinion did this Court ever say, through a clear holding or even by way of dictum, analogy, or metaphor that the issue of Benson's material breach should not be submitted to the jury. To the contrary, it is well settled in contract law that "whether a breach is a material one is a question of fact for the jury." Milner Hotels, Inc., v. Norfolk & Western Railway Co., 822 F. Supp. 341, 345 (S.D. W. Va. 1993), aff'd, 19 F.3d 1429 (4th Cir. 1994). Nevertheless, Benson contended, and the Circuit Court inexplicably agreed, that Appellants' affirmative defense of material breach *was precluded*, arriving at such a conclusion by way of a tortured interpretation of language in this Court's earlier opinion:

Consequently, we conclude that Appellant is entitled to have a jury determine the basis for AJR's decision to terminate Mr. Benson from its employ. If the jury determines that drug use, rather than dishonesty, was the basis for the dismissal, then the provisions of the employment contract with regard to continued payment of Appellant's salary for the duration of the contractual term are applicable. If, however, the jury determines that Mr. Benson was in fact terminated for being dishonest, then AJR is not required to pay his salary under the terms of the employment contract.

See "Plaintiff's Memorandum in Support of Post-Judgment Damages" (citing Benson, 215 W. Va. at 328, 599 S.E.2d at 751); Circuit Court Order (Feb. 11, 2008). Benson, and ultimately the Circuit Court, interpreted this excerpt to mean that the *only* issue to be submitted to and decided by the jury was the factual reason for Benson's termination. Implicit in this interpretation is that

pay to the Plaintiff damages for wages due for the remainder of the contract period or was the Plaintiff terminated

this Court, in complete derogation of the due process safeguards afforded by the constitutions of both West Virginia and the United States, intentionally and purposely stripped Appellants of any and all affirmative defenses to Benson's claim for damages. This cannot be correct.

When read in the context of the original appeal and interpreted according to the governing principles of contract law in West Virginia, the quoted text simply means that if Benson was fired for drug use rather than dishonesty while the contract was in effect, he could possibly recover for damages per the terms of the contract. Unwritten, and unspoken by this Court, however, is that if no valid and enforceable contract existed when Benson was terminated (i.e., because of Benson's material breach), then Benson was an at-will employee and could not then recover under the referenced written contract.

Nothing in the above-quoted language indicates, in any way, that this Court intended to, or did in fact, strip Appellants of their affirmative defense. This Court did not rule that the factual reason for termination was the only issue that could be presented to and decided by the jury. Indeed, in this Court's opinion, in the paragraph preceding the above-quoted language relied upon by Benson for that very proposition, this Court held that:

Critically, however, *a factual issue* that must be determined for purposes of ascertaining whether AJR was required under the terms of the contract to pay [Benson] his salary for the remainder of the eight-year contractual period is the reason upon which AJR relied in terminating Mr. Benson's employment.

Benson, 215 W. Va. at 328, 599 S.E.2d at 751 (emphasis added). This Court's own language simultaneously (i) evidences the Court's contemplation that a number of issues surrounding Benson's breach of contract claim would be considered on remand, among them the reason for Benson's termination, and (ii) expressly rejects Benson's contention that this Court limited the issues for consideration on remand to one, as demonstrated by the Court's deliberate word choice

for "dishonesty" thereby relieving the Defendant from payment of any damages?" Id. at p. 15.

(i.e., “*a* factual issue” as opposed to “*the sole* factual issue”). This Court specified one factual question that had to be decided by a jury at trial rather than the Circuit Court on summary judgment. In fact, two years ago even the Circuit Court knew as much. Upon remand, the Circuit Court, as it would in any contract case, admitted evidence of material breach, instructed the jury on material breach, and provided a verdict form allowing the jury to decide if there was a material breach. Additionally, the Circuit Court provided a special interrogatory form to permit the jury to answer the factual question posed by this Court in its order of remand. The jury subsequently found that Benson materially breached his contract by coming to work as a safety supervisor in a welding shop under the influence of cocaine.

The Circuit Court erred as a matter of law when it cast aside Appellants’ affirmative defense -- and its own prior conclusions of law -- and awarded Benson damages on the mistaken belief that this Court instructed it to prohibit Appellants from putting on such a defense. Although the Circuit Court expressly refrained from addressing the issue of material breach, and this Court will not, and did not, rule on an issue the Circuit Court has not addressed, Judge Waters nevertheless stripped Appellants of their affirmative defense and awarded Benson damages. And, inexplicably, he did so after (i) allowing the parties to present evidence on the issue of material breach; (ii) instructing the jury on the law of material breach; (iii) providing the jury with a verdict form allowing them to find for Appellants on the material breach issue; (iv) after the jury rendered an unambiguous general verdict in favor of Appellants; and (v) entered judgment “in favor of the Defendants and against Plaintiff on the issue of material breach submitted to the jury on the general verdict form.” See Order Entering Judgment.

The Circuit Court’s conclusion is at odds with the settled law in West Virginia and the evidence presented in this case. This Court has consistently held that “where conflicting theories of a case are presented by the evidence, each party is **entitled** to have his view of the case

presented to the jury . . .” Catlett v. MacQueen, 180 W. Va. 6, 11, 375 S.E.2d 184, 189 (1988) (emphasis added).⁵ Appellants were entitled, as a matter of law, to submit their affirmative defense of material breach to the jury and the Circuit Court’s entry of judgment for Benson should be reversed in accordance with the plain verdict rendered by a Wood County, West Virginia jury.

B. The Circuit Court erred by refusing to enter final judgment on the general verdict returned by the jury in favor of Appellants.

Importantly, neither the Circuit Court nor Benson asserted that the jury’s answers to the special interrogatories caused confusion and thus nullified the general verdict. Rather, by entering judgment for Benson the Circuit Court completely *ignored* the general verdict which it had already entered. The validity and harmony among the special interrogatory answers and general verdict was recognized by the Circuit Court and Benson when the Circuit Court entered judgment on both the answer to the special interrogatory and the general verdict, without change to either, by order drafted completely by Benson’s counsel. If the Circuit Court thought there was an inconsistency between the general verdict and the special interrogatories, it could have attempted to alter the general verdict. It did not. The Circuit Court adopted the general verdict in whole. Inexplicably, the Circuit Court’s award of damages to Benson sets aside, without discussion or findings, the general verdict that it previously entered (and which is wholly consistent with the special interrogatory answers). This Court should reverse the Circuit Court’s ruling and order entry of final judgment for Appellants in accordance with the general verdict.

⁵ That evidence of Appellants’ defense of material breach was presented cannot be seriously called into question. The jury’s express finding by way of general verdict that Benson materially breached his employment contract is dispositive of this issue.

- 1. The jury's general verdict and answers to special interrogatories are consistent and the Circuit Court erred by disregarding the general verdict on the erroneous belief that this Court barred consideration of affirmative defenses on remand.**

For the Circuit Court to alter the general verdict, the general verdict and the jury's answers to special interrogatories "must be so inconsistent that both cannot stand together." Runyan v. Kanawha Water & Light, Co., 68 W. Va. 609, 71 S.E. 259, 260 (1911). More specifically, the Circuit Court "must be able to say that the [special interrogatories] find a fact which inevitably overthrows the general verdict. It must exclude every conclusion that would authorize a verdict for [Appellants]." Runyan, 68 W. Va. at 609, 71 S.E. at 260.

The Circuit Court did not find any inconsistency between the general verdict and the jury's answer to the special interrogatory which would necessitate overturning the general verdict. Nor did Benson ever argue that any such inconsistency existed. In fact, the general verdict (i.e., that Benson materially breached his employment contract *before* his discharge) and the special finding by interrogatory (i.e., that Benson was terminated for drug use *after* he materially breached his contract) are entirely consistent. The Circuit Court based its ruling on the erroneous conclusion that this Court, in its April 2004 opinion reversing summary judgment in part, directed the Circuit Court to ignore any general verdict rendered by the jury. As the Circuit Court erred in reaching that conclusion (See Section (A), above), casting aside the general verdict on the basis that the affirmative defense of material breach was barred by this Court is an equally untenable position.

- 2. Even if there is an inconsistency between the general verdict and answers to special interrogatories, the general verdict and special interrogatories are not so mutually exclusive as to permit entry of judgment on the special interrogatory.**

Even if there is an inconsistency between the general verdict and special interrogatory answer (and there is not), Benson cannot meet the heightened burden to overthrow the general verdict. As noted by this Court in Prager v. City of Wheeling, "[i]t is well established that

special findings must be inconsistent with the verdict in order to control it, and such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict.” Prager v. City of Wheeling, 91 W. Va. 597, 114 S.E. 155, 156 (1922). Moreover, in Runyan v. Kanawha Water & Light Co., this Court further recognized that, for a special interrogatory to upset a general verdict, the answer to the special interrogatory must “find a fact which inevitably overthrows the general verdict.” Runyan, 68 W. Va. at 609, 71 S.E. at 260.

It is beyond the pale to suggest, and not even Benson has mustered the temerity to expressly state or even infer, that the findings in the special interrogatories “inevitably overthrow” the general verdict or otherwise exclude “every reasonable conclusion that would authorize the [general] verdict.” The jury answered specific questions of fact posed to them in accordance with Benson’s theory of the case. However, after considering all of the facts and applying those facts to the law, the jury also found that Benson materially breached his employment contract *before* he was discharged by reporting to work as a safety supervisor while high on cocaine. Put simply, the jury believed that reporting to work under the influence of cocaine amounted to a material breach of the employment contract, which occurred before Benson’s discharge, because Benson promised to put forth his best efforts for AJR by performing his job duties and enforcing its policies, including AJR’s drug-free workplace policy. Having found that Appellants proved their affirmative defense, the jury concluded that Benson’s material breach excused any further performance by Appellants under the employment contract. The special interrogatories are of no consequence because of the jury’s finding of material breach prior to the date of termination. (See Section (C), below). The special interrogatories do not find a fact which inevitably overthrows the general verdict and any purported inconsistency between the general verdict and special interrogatory does not rise to the level that would substantiate entry of judgment on the special interrogatory.

The general verdict is controlling and dispositive of liability in this case. Benson could be fired for testing positive at three times the federal level for impairment *and* the jury could decide that a safety supervisor coming to work under the influence of cocaine materially breached his employment contract. Any conclusion to the contrary would not only foster and reward criminal conduct, but would also reject common sense.

The Circuit Court allowed Appellants to present evidence in support of their affirmative defense of material breach and then instructed the jury on the law of material breach. The Circuit Court even entered an order – drafted entirely by Benson’s counsel – recording the jury’s verdict and entering judgment in favor of Appellants on that very defense. The Circuit Court cast aside the jury’s general verdict on the erroneous belief that this Court barred consideration of affirmative defenses on remand. Such action gives rise to a legal error of such magnitude that this Court should not hesitate to reverse.

C. The Circuit Court erred as a matter of law in awarding Benson damages because the jury’s finding that Benson materially breached the contract prior to his discharge excused Appellants from liability under the contract.

The Circuit Court erred in awarding Benson damages in light of the jury’s general verdict that Benson materially breached his contract *prior* to the date of his discharge. In West Virginia, a material breach of a contract by one party excuses the other party from further performance under the contract. W.Va. Human Rights Commission v. Smoot Coal Co., Inc., 186 W. Va. 348, 353, 412 S.E.2d 749, 754 (1991); J.W. Ellison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S.E. 391, 394 (1911); Milner Hotels, Inc. v. Norfolk & Western Ry. Co., 822 F. Supp. 341, 345 (S.D. W. Va. 1993), aff’d, 19 F.3d 1429 (4th Cir. 1994) (citing Franklin v. Pence, 128 W. Va. 353, 36 S.E.2d 505 (1945)).

In the instant case, the jury found by general verdict that Benson materially breached his employment contract. The Circuit Court entered the general verdict without change.⁶ Such a finding is wholly appropriate and supported by the evidence. At trial, Benson admitted that he was charged with enforcing the drug-free workplace policy at AJR and that he worked around highly dangerous machinery and equipment. Nonetheless, Benson reported to work with a significant amount of cocaine in his system:

Q: Well, wouldn't you agree with me that cocaine and explosives don't mix; is that right?

A: That's true.

Q: And you as a welder operate with anywhere from a 5,000 to 10,000 degree torch, correct?

A: Correct.

Q: And around that, there was a tank of oxygen around the plant; is that correct?

A: That's correct.

Q: *And yet you decided to go to work with cocaine in your system to operate a 10,000 degree torch around that oxygen tank and other explosives; correct?*

A: *That's correct.*

(Trial Tr. 144:24-145:12) (emphasis added). Benson reported to work under the influence of cocaine despite his admitted obligation to "fulfill in good faith [his] duties and responsibilities under the contract," including enforcement of the drug-free workplace policy:

Q: And you understood that you not only had to abide by those rules, the drug-free workplace policy, you

⁶ The Circuit Court also incorrectly entered "judgment" in favor of Benson in accordance with the jury's response to the special interrogatories. The Circuit Court has clearly erred by entering "judgment in favor of the Plaintiff and against the Defendants on whether dishonesty was the basis for the Plaintiff's termination versus drug testing." A special interrogatory response is neither a verdict nor a "judgment," but only an aid to the jury before arriving at its verdict. Syl. pts. 15-16, Carper v. Kanawha Banking & Trust Co., 157 W. Va. 477, 480, 207 S.E.2d 897, 902 (1974).

understood that you also had to help enforce that rule; right?

A: Well, I've never told the employees anything like that.

Q: Okay. *You were supervisor in charge of safety, and you never understood that you had to enforce the drug-free workplace policy?*

A: *Common sense would tell you that.*

(Trial Tr. 156:5-14; 157:19-23) (emphasis added).

The jury was correct in finding that Benson's presence at work while under the influence of cocaine and his failure to adhere to his duties and obligations under the employment contract amounted to a material breach of that very contract. As a matter of law, Benson's material breach excused Appellants from any further obligation under the employment contract. W. Va. Human Rights Commission, 186 W. Va. at 353, 412 S.E.2d at 754; See also Emerson Shoe Co. v. Neely, 99 W. Va. 657, 129 S.E. 718, 719 (1925) (noting the general rule that "a party is not excused by the other party's breach of contract *unless* the breach is material or essential." (emphasis added)).

It is undisputed that the material breach (i.e., Benson reporting to work while high on cocaine) occurred *prior* to Benson's discharge. Consequently, Appellants were excused from any future performance of their contractual duties the moment there was "a material failure of performance" by Benson and thereafter could terminate Benson's employment for *any* reason without incurring liability for breach of the original contract. W. Va. Human Rights Commission, 186 W. Va. at 353, 412 S.E.2d at 754. Perhaps more importantly, however, is that the jury's general verdict relegated Benson to the status of an at-will employee at the time of his discharge, thereby rendering the jury's determination by special interrogatory that Benson was discharged for drug use rather than dishonesty irrelevant for purposes of Benson's breach of contract action.

The jury's verdict is dispositive – Appellants are not liable to Benson on his breach of contract claim. The jury was provided ample evidence of Benson's material breach and was properly instructed on the law of material breach. The jury found by a preponderance of the evidence that Benson materially breached his employment contract, that Appellants were excused from any future performance of, or liability under, the original employment contract, and that Benson forfeited any contractual remedy he might have otherwise had absent his material breach. In light of the jury's findings, the Circuit Court erred as a matter of law when it awarded breach of contract damages to Benson based upon the jury's answer to the special interrogatory and should be reversed.

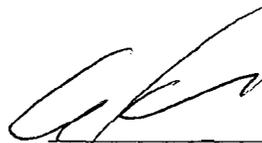
V. RELIEF PRAYED FOR

For the foregoing reasons, Appellants AJR, Inc., and John M. Rhodes respectfully request that the Supreme Court of Appeals of West Virginia reverse the July 18, 2008 order entered by the Circuit Court of Wood County and direct the Circuit Court to enter a final judgment order in favor of Appellants.

Respectfully Submitted,

**AJR, INC., and
JOHN M. RHODES**

By Spilman Thomas & Battle, PLLC



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Dated: July 7, 2009

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AJR, INC., a West Virginia corporation,
and JOHN M. RHODES,

Appellants,

v.

DOCKET NO. 34748

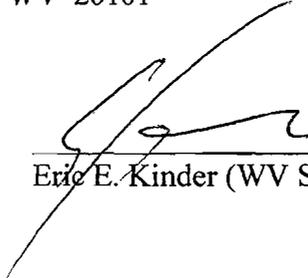
DANNY L. BENSON,

Appellee.

CERTIFICATE OF SERVICE

I, Eric E. Kinder, hereby certify that service of the foregoing "Appellants' Brief" has been made upon the Appellee by placing a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid, on this 7th day of July, 2009, addressed as follows:

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