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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

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

**COPY**

**Appellants,**

**v.**

**DOCKET NO. 34748**

**DANNY L. BENSON,**

**Appellee.**

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

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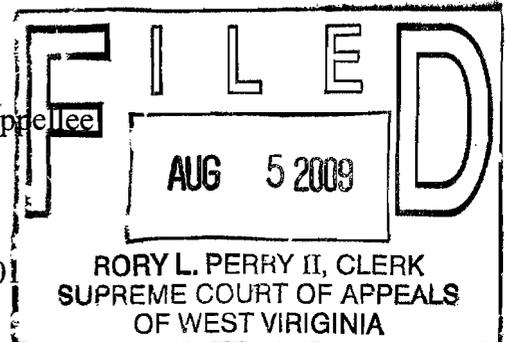
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**APPELLEE DANNY L. BENSON'S RESPONSE TO APPELLANTS' BRIEF**

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WALT AUVIL  
WV State Bar No.190  
Counsel for Plaintiff/Appellee

Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058



**TABLE OF CONTENTS**

Table of Contents.....i

Table of Authorities.....ii

I. Procedural Background ..... 1

II. Facts ..... 5

    A. Why Was Danny Benson Fired? ..... 5

    B. Why Was Danny Benson Not Fired? ..... 6

    C. Defendants’ Only Basis for Material Breach Was the Plaintiff’s Positive Drug Test . 6

III. Argument ..... 7

    A. The Circuit Court Did What this Court Told it to.....7

    B. Defendants’ Assignments of Error..... 11

IV. Conclusion ..... 15

Certificate of Service.....16

## TABLE OF AUTHORITIES

<u>Benson v. AJR, Inc.</u> , 215 W. Va. 324, 599 S.E.2d 747 (2004) .....	1, 7, 10, 12
<u>Bethlehem Steel Corp. v. Shook Land Co.</u> , No. 15105, Supreme Court of Appeals of West Virginia, 169 W. Va. 607, 310; 288 S.E.2d 139; 1982 W. Va. Lexis 684, February 23, 1982, decided .....	13
<u>Everly v. Peters</u> , No. 18668, Supreme Court of Appeals of West Virginia, 183 W. Va. 613; 397 S.E.2d 416; 1989 W. Va. Lexis 1007, July 3, 1989, filed. ....	13
<u>Horton v. Horton</u> , 254 Va. 111, 115, 487 S.E.2d 200 (1997).....	14
<u>Kesner v. Lancaster</u> , No. 18246, Supreme Court of Appeals of West Virginia, 180 W. Va. 607; 378 S.E.2d 649; 1989 W. Va. Lexis 16; 9 U.C.C. Rep. Serv. 2d (Callaghan) 122, February 17, 1989, filed. ....	13
<u>Kopelman &amp; Assocs., L.C. v. Collins</u> , No. 23183, Supreme Court of Appeals of West Virginia, 196 W. Va. 489; 473 S.E.2d 910; 1996 W. Va. Lexis 68, April 24, 1996, submitted, June 14, 1996, filed. ....	13
<u>Reece v. Yeager Ford Sales</u> , No. 12951, Supreme Court of Appeals of West Virginia, 155 W. Va. 461; 184 S.E.2d 727; 1971 W. Va. Lexis 216; 10 U.C.C. Rep Serv. (Callaghan) 82, September 28, 1971, submitted, November 23, 1971, decided. ....	13
<u>Runyan v. Kanawha Water &amp; Light Co.</u> , 68 W. Va. 609, 71 S.E. 259, 260 (1911). ....	12
<u>Teller v. McCoy</u> , No. CC900, Supreme Court of Appeals of West Virginia, 162 W. Va. 367; 253 S.E.2d 114; 1978 W. Va. Lexis 355, December 12, 1978, decided. ....	13
<u>Waddy v. Riggleman</u> , No. 31707, Supreme Court of Appeals of West Virginia, 216 W. Va. 250; 606 S.E.2d 222; 204 W. Va. Lexis 131, September 8, 2004, submitted, October 22, 2004, filed.).....	11, 13
<u>W. Va. Human Rights Comm'n v. Smoot Coal Co.</u> , No. 20115, Supreme Court of Appeals of West Virginia, ___ W. Va. ___, 412 S.E.2d 749; 1991 W. Va. Lexis 233; 57 Fair Empl. Prac. Cas. (BNA) 1344, September 24, 1991, submitted, December 12, 1991, filed. ....	13

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**Appellee.**

**APPELLEE DANNY L. BENSON'S RESPONSE TO APPELLANTS' BRIEF**

Now comes the Appellee Danny Benson, by and through WALT AUVIL his counsel, and hereby submits this brief in response to the Appellant's Brief.

**I. PROCEDURAL BACKGROUND**

This appeal is the third proceeding before this Court in this matter. The first resulted in the opinion by this Court, Benson v. AJR, Inc., 215 W.Va. 324, 599 S.E.2d 747 (2004). (Benson I). The second was a petition for a writ of mandamus filed by Defendants. This Court granted a rule to show cause. In the petition for a writ of mandamus Appellants/Defendants primarily complained that the Circuit Court committed error by failing to enter a final appealable order. The Court later dismissed the petition as having been mooted by the Circuit Court's entry of a final order.

Defendants and Plaintiff tried this case by agreement and direction of this Court on the "fairly narrow issue" namely "whether or not there was a breach of Mr. Benson's, Danny Benson's employment contract." TR 35.<sup>1</sup> Contrary to the Defendants' position, the jury verdict

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<sup>1</sup>References herein to "TR \_\_" are to the page numbers in the transcript of the proceedings before the Circuit Court.

in this matter was not a verdict in favor of Defendants, but, rather, a verdict reflecting the jury's findings on specific legal issues.

Contrary to the incendiary statement set forth in the Appellant's brief, Benson did not "report to work while high on cocaine." Appellant's brief, pg. i. In fact, the employer admitted it had no problem with Benson's performance had no reason to suspect him of drug use absent the positive random drug test. TR 14-15, 20-22, 235. Also, contrary to the Appellant's position, Benson did not occupy a supervisory role at the employer. TR 135-136, 154-155, 212-214.

Contrary to the position of the Appellants, the jury's verdict in this matter was far from unequivocal. In fact, as this Court may determine from review of the verdict form, the jury was asked to answer a set of special interrogatories. These special interrogatories included, at Defendants' insistence and over Benson's objection, a question regarding "material breach". However, the interrogatories also included a question regarding the reason for Benson's termination. It was properly left to the Circuit Court to determine, given the law of the case as determined by this Court, the legal significance of the jury's factual determinations in response to the special interrogatories. The Circuit Court, after extensive briefing and argument by the parties, and in direct accordance with the law of the case as established by this Court, ruled that the Plaintiff was entitled to contract damages because his termination was for a reason (testing positive for drugs) which did not excuse payment of the balance of the employment contract. The Circuit Court's ruling was correct and should be upheld.

Appellant's argument before this Court is that the Court should impose an implied, unwritten general duty on a party to a written contract which contradicts the specific language of the contract itself. Herein the employment contract speaks to the issue of termination and specifically provides causes for termination which excuse the nonpayment of the remainder of

the contract term. Testing positive for drugs is not among the causes for termination which excuse the nonpayment of the contract. In addition to violating basic principles of contract law, such a doctrine imposing a broad duty of good faith and fair dealing upon parties to an employment contract would have the unintended effect of converting West Virginia from an employment at will jurisdiction to a jurisdiction in which an employer was required to prove something akin to “just cause” before terminating an employee. Any implied duty of good faith and fair dealing (on which the defendants “material breach” theory depends) would, as a matter of law, have to be mutual.

Over Plaintiff’s objection, Defendants were permitted to propound the legal theory of “material breach” to the jury. As reflected in the verdict set forth below, the jury found for the Defendants on their theory of “material breach.” However, the issue of “material breach” was not an issue which the Circuit Court was directed by this Court in Benson I to address. Rather, as set forth in Benson I, and discussed below the sole issue for the Circuit Court on remand was whether the Plaintiff was fired for dishonesty (option 1), in which case Plaintiff was entitled to no damages under his employment contract, or whether the Plaintiff was fired for drug use (option 2), in which case Plaintiff was entitled to contractual damages under his individual employment contract with the Defendants.

Defendants repeatedly and strenuously urged the Court to add other defenses and issues and to permit Defendants to present the same to the jury. The Circuit Court acceded to the Defendants’ request and allowed them to present the theory of “material breach” to the jury. However, the Circuit Court never determined that a finding of “material breach” would relieve the Defendants from responsibility under the contract. Rather, the significance of such a finding was an issue left for post-trial resolution.

After an initial post-trial hearing in this matter and the submission of competing orders reflecting the Court's rulings, the matter lay dormant for months with neither party taking any action to pressure the Circuit Court to enter either of the parties' competing post-trial orders. Finally, the Circuit Court entered an order prepared by the Plaintiff accurately reflecting the findings by the jury, said order being the Court's order of September 14, 2007.

Thereafter, the parties attempted to resolve the matter, but were unsuccessful. The Plaintiff then sought to have the Court determine the damages available to the Plaintiff post-trial based upon the Defendants' breach of contract and the law of this case as set forth in Benson I. Defendants sought a writ of prohibition to prevent the Circuit Court from conducting any further proceedings to determine the contract damages available to Plaintiff. The parties agreed to a sixty day stay to allow Defendants to present a petition for a writ. The petition was filed and a rule to show cause issued. This Court's order issuing the rule appeared to direct the Circuit Court to hold a hearing and fix damages.

Pursuant thereto, the Circuit Court directed the parties to conduct a hearing on damages. At the damages hearing the parties stipulated as to the contract damages and offsetting mitigation by the Plaintiff, Defendants preserving their objection to the award of any damages based upon the argument that judgment should be for them in toto. These stipulated damages were awarded by the Circuit Court by its final order entered July 28, 2008. Upon receipt of the Circuit Court's order setting contract damages this Court dismissed Defendants' petition for a writ of mandamus as moot. It is from this final order on damages that this appeal is prosecuted.

## II. Facts

### A. Why Was Danny Benson Fired?

Defendants had no difficulties with Benson's performance before his termination. There were no pre-termination write-ups, disciplinary actions, or any indication of poor performance by Benson. TR 99.

AJR's employment manual made it clear that any employee who tested positive for a controlled substance would be terminated. TR 70. Defendants admitted that all employees who tested positive for drugs were terminated - that was an absolute rule: positive drug test = termination. TR 23-24. Defendants testified that if other employees' files were pulled (all were terminated due to positive drug tests the same day as the Plaintiff) forms exactly the same as Exhibit 4 (stating positive drug test as the reason for termination) would be found in each. TR 45-46.<sup>2</sup> After many evasions and attempts to avoid the question, Defendant Rhodes finally admitted that the actual reason for termination of the Plaintiff was exactly as reported on Exhibit 4 - testing positive for cocaine. TR 50-55, 242-245.<sup>3</sup> The jury found the same thing as well. Thus, by one accord Benson's positive drug test was the reason for his termination.

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<sup>2</sup>When Defendant Rhodes received a letter from previous counsel for Plaintiff requesting payment under the contract Rhodes discussed the employment contract with the Plaintiff by describing the contract as "guns and bullets". TR 47-48.

<sup>3</sup>Q. Okay. So, we're agreed, then, that the actual reason that you as the employer chose to take the action of termination of Mr. Benson was exactly what's reported on this form?

A. That is the actual cause, absolutely.

The form referred to is Plaintiff's Exhibit 4 stating the reason for termination as testing positive for cocaine.

Defendants admitted that the Plaintiff was not given the choice to remain employed by the company due to his positive drug test. TR 114, 116.

## **B. Why Was Danny Benson Not Fired?**

Defendants had no reason - other than Benson's positive drug test on March 2, 1998 - to believe or suspect that Benson used drugs while working at AJR. TR 14-15.<sup>4</sup> Defendants admitted that Plaintiff performed his on-the-job duties well and that Defendants had no complaints regarding his performance outside of the fact that he tested positive for drugs. TR 20-22. Despite leading questions by defense counsel, Defendant admitted that he saw nothing to imply that the Plaintiff was under the influence of cocaine at work. TR 235. Defendants admitted that the positive drug test did not tell them when the Plaintiff had used cocaine. TR 16.<sup>5</sup>

Defendants admitted that they had no reason to believe that Benson knew of anyone's drug use other than his own. TR 51-55, 65, Plaintiff's Exhibit No. 4. Defendants also admitted that it is possible for an employee to be dishonest, but nevertheless be terminated for something other than dishonesty. TR 56-57.

## **C. Defendants' Only Basis for Material Breach Was the Plaintiff's Positive Drug Test**

Defendant Rhodes testified that he prepared a document (Plaintiff's Exhibit 4) reflecting the real reason that Plaintiff was terminated (fired for cocaine use) after receiving a letter from an attorney for the Plaintiff requesting payment under the employment contract. TR 40-42.

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<sup>4</sup> Q. So, it's fair to say, then, that other than the fact that Mr. Benson tested positive for drugs -- and the drug test was on March 2<sup>nd</sup> of 1998, if I remember correctly.

A. I believe that's correct.

Q. March 2<sup>nd</sup> of 1998. Other than that positive drug test, you have no reason at all to believe that he used drugs while on the job; true?

A. That's true.

Q. Or that he used drugs during working hours?

A. True; not that I'm aware of.

<sup>5</sup>Q. And that a positive drug test does not necessarily tell you when that drug was used or ingested or taken by whoever tested positive?

A. Yes, I believe that.

Q. I know you're not a doctor or a drug tester or whatever those people are called, but assuming all of the things that they know about, they may last longer or less long, but it doesn't tell you exactly when just from looking at the test?

A. It doesn't tell me when it happened, the morning before tested or a week before, it doesn't tell me that.

Defendants admitted that there was nothing other than the Plaintiff's positive drug test which supported their contention that the Plaintiff had not lived up to his covenant of good-faith and fair dealing by coming to work and doing what he could to further the Defendants' interests as an employer. TR 238-245.<sup>6</sup>

### III. Argument

#### A. The Circuit Court Did What this Court Told it to

This Court defined the scope of the inquiry to be undertaken before the Circuit Court on remand as follows:

"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. n11 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."

"n11 We note, however, the salary which Appellant would be required to be paid is determined by the rate of salary that he was making at the time the employment contract was entered into on August 29, 1997. Under the clear terms of the contract, the continued payment of salary was expressly tied to the salary Mr. Benson was making "on the date of . . . [the] agreement." The terms of that salary arrangement are specified in paragraph 3 of the agreement and include a base salary plus a quarterly bonus of a net payment of \$ 1,000 after "required payroll deductions."

Benson v. AJR, Inc., 215 W. Va. 324, 328, 599 S.E.2d 747 751 (2004).

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<sup>6</sup>This was the subject of considerable discussion and evasion by Defendant Rhodes in pages 238 to 245 of the trial transcript which concluded as follows:

Q. The question in your deposition, Mr. Rhodes, is again at Page 80, Line 22. Now, again, we've touched on this before. Just to make sure I understand, other than the fact that there was a positive drug test, do you have any other reason to believe that Mr. Benson did not live up to his covenant of good faith and fair dealing by coming to work and doing what he could to further your interests as an employer?

Your answer to that question was --

A. It was no.

At trial, the sole question to be answered by the Circuit Court according to this Court was posed to the jury, along with other questions urged by the Defendants. The following verdict was returned:

**GENERAL VERDICT**

We, the jury, find a preponderance of 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 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.

**Keith C. Neely, Foreperson/s/**

**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 \_\_\_\_\_

**Kevin C. Neely, Foreperson/s/**

Comparing the verdict returned by the jury to the directions given to this Court by the West Virginia Supreme Court as set forth above, it follows that judgment on the contract damages available must be for the Plaintiff in the above-styled matter: the jury determined that dishonesty was not the basis for the Plaintiff's termination. Dishonesty is the only basis which this Court opined could obviate the necessity for Defendants' paying contract damages to the

Plaintiff. Recognizing the verdict as set forth above, the Circuit Court ordered judgment in this matter by its "Order Entering Judgment," which states as follows:

#### **ORDER ENTERING JUDGMENT**

This 18<sup>th</sup> day of October, 2005, came the Plaintiff, Danny L. Benson, in person and through his counsel, Walt Auvil, and also came the Defendants, AJR, Inc., and John M. Rhodes, in person and through their counsel, Niall A. Paul and Eric Kinder, for a jury trial in the above-styled case. And the jury having been duly selected to try the issues joined and having heard all the evidence, including the instructions as to the law and the closing arguments, does hereby render their verdicts, in this matter of which said verdicts are attached hereto. Based upon the attached verdicts and pursuant to Rule 58 of the West Virginia Rules of Civil Procedure, the Clerk of this Court is hereby ordered to enter judgment as provided by law. Specifically, judgment should be ordered in favor of the Defendants and against the Plaintiff on the issue of material breach submitted to the jury on the general verdict form. Further, judgment should be entered in favor of the Plaintiff and against the Defendants on whether dishonesty was the basis for the Plaintiff's termination versus drug testing.

It is further ordered that each party should bear its own costs, including the appropriate jury fee, which shall be divided equally between the parties, as determined by the Clerk of this Court.

The clerk of this Court is ordered to forthwith upon entry of this order mail to counsel of record a certified copy of this order. Said certified copy shall clearly show the date which this order was entered by the Clerk.

Following the Circuit Court's entry of judgment by its September 14, 2007, order as set forth above, the parties attempted to resolve the matter, but were unsuccessful in doing so. As a result, the Plaintiff requested the Circuit Court to either calculate damages as set forth in the contract or to schedule a trial before the Court on the issue of contract damages due the Plaintiff under the contract. Defendants urged the Court to dismiss the case. The Circuit Court ruled in favor of the Plaintiff and set forth its ruling in an order entered February 11, 2008. In substance this order states:

Came this 19<sup>th</sup> day of November, 2007, Plaintiff, by counsel, Walt Auvil, and Defendants, by counsel, Niall Paul and Eric Kinder, and, upon Motion of the Plaintiff in Support of Post-Judgment Damages, Plaintiff's Memorandum in Support of Post-Judgment Damages, Defendants' Response to Plaintiff's Motion

for Award of Post-Judgment Damages, argument of counsel, and all matters of record. As discussed at the hearing, the arguments of counsel have been elaborately developed in both pre-trial and post-trial motions as well as in argument of counsel in pre- and post-trial proceedings. The Court, however, understands its obligation to be defined by the West Virginia Supreme Court in Benson v. AJR, Inc., 215 W.Va. 324, 599 S.E.2d 747 (2004). Therein, the West Virginia Supreme Court of Appeals stated:

“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. n11 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.”

“n11 We note, however, the salary which Appellant would be required to be paid is determined by the rate of salary that he was making at the time the employment contract was entered into on August 29, 1997. Under the clear terms of the contract, the continued payment of salary was expressly tied to the salary Mr. Benson was making "on the date of . . . [the] agreement." The terms of that salary arrangement are specified in paragraph 3 of the agreement and include a base salary plus a quarterly bonus of a net payment of \$ 1,000 after "required payroll deductions.”

Benson v. AJR, Inc., 215 W. Va. 324, 328, 599 S.E.2d 747 751 (2004).

The following verdict was returned:

\* \* \*

The verdict as set forth above was reflected in this Court's September 14, 2007, order entering judgment.

Thereafter the parties were unable to reach a resolution on damages in this matter, occasioning the Plaintiff's Memorandum in Support of Post-Judgment Damages. The Court finds that under the holding of the West Virginia Supreme Court as set forth above, under the directions of the West Virginia Supreme Court as set forth above, and based upon the jury's verdict previously rendered, as entered by this Court on September 14, 2007, judgment as to liability in this matter is for the Plaintiff.

At the November 19, 2007, hearing in this matter, Defendants, by counsel, expressed their intent to seek a writ of prohibition from further proceedings by this Court in this matter. The parties, therefore, agreed to a sixty (60) day stay of discovery on the issue of damages for purposes of allowing Defendants to seek the intervention of the West Virginia Supreme Court of Appeals. Should the Defendants not seek the intervention of the West Virginia Supreme Court of Appeals, or should the West Virginia Supreme Court of Appeals choose not to

intervene, the parties shall set a hearing before this Court on the issue of damages, mitigation, and interest.

As discussed above, Defendants' petition for a writ was filed and initially a rule to show cause was issued directing the Circuit Court to enter a final order. Pursuant to this Court's order issuing the rule to show cause, a hearing was held before the Circuit Court on July 18, 2008. At the hearing, the parties stipulated to contract damages and mitigation. These findings were set forth in the Circuit Court's July 28, 2008, order. Therefore, this Court dismissed the rule to show cause as moot.

The Defendants' argument regarding "material breach" is that they could not lawfully contract for the provision relied upon by the Plaintiff herein, which is a liquidated damages provision setting the cost of terminating the Plaintiff except for certain specified reasons which excuse payment. They argue that the law imputes an unwritten "material breach" defense to any such liquidated damages provision and that this implied defense allows a contracting party to escape payment even if the specific liquidated damages provision is breached. None of the cases cited by Defendants stand for this proposition. Rather - as directed by this Court in its first opinion in this matter - the Circuit Court correctly applied the plain language of the contract to the reason for termination as determined by the jury and awarded the stipulated contract damages accordingly.<sup>7</sup>

## **B. Defendants' Assignments of Error**

Defendants assign the following errors of law in this appeal:

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

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<sup>7</sup>As this Court has repeatedly held, "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Waddy v. Riggleman, 216 W. Va. 250, 216 W. Va. 250 (2004) (citations omitted).

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 this 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).

As discussed above and below herein, Defendants' position that the "affirmative defense of material breach" was available is another way of asking this Court to rewrite the plain terms of the employment contract which this Court has twice previously declined to do. There is no reason for this Court to rewrite the terms of the contract to include a basis for avoidance of the liquidated damages clause which the parties did not choose to incorporate in the original agreement.

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).

As discussed above and below, the verdict which the Defendants tout as being a "general verdict returned in favor of Appellants" was not that at all, but, rather, simply responses provided to a series of three questions asked of the jury by the verdict form. The first, whether the Plaintiff "materially breached" the terms of the contract, the second, whether the Plaintiff was terminated for being dishonest, and the third, whether the Plaintiff was terminated for "drug use rather than dishonesty?" As the Plaintiff noted in the arguments before the Circuit Court over this verdict form, it is only the last two questions which this Court directed the Circuit Court to have the jury answer. However, the Circuit Court, at the insistence of the Defendants,

included the question styled “general verdict” regarding material breach. It is this inconsistency between the answers provided by the jury to the question regarding material breach and the direction given by this Court as to the scope of the jury’s inquiry under the employment contract which gave rise to the lengthy post-trial proceedings in this matter. The Circuit Court correctly resolved these post-trial proceedings by determining that, under the employment agreement, and under the law of the case as decided by this Court, a finding that the Plaintiff Danny Benson had been terminated for testing positive for drugs and not for dishonesty required a finding in favor of Danny Benson under the terms of the employment contract. This decision is correct under the law of the case and under the employment contract and should be sustained.

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.” Appellants’ brief, pg. 13.

The term “material breach” is cited in eight West Virginia decisions since 1970. Waddy v. Riggleman, 216 W. Va. 250; 606 S.E.2d 222 (2004); Kopelman & Assocs., L.C. v. Collins, 196 W. Va. 489; 473 S.E.2d 910 (1996); W. Va. Human Rights Comm’n v. Smoot Coal Co., \_\_\_ W. Va. \_\_\_, 412 S.E.2d 749 (1991); Everly v. Peters, 183 W. Va. 613; 397 S.E.2d 416 (1989); Kesner v. Lancaster, 180 W. Va. 607; 378 S.E.2d 649 (1989); Bethlehem Steel Corp. v. Shook Land Co., 169 W. Va. 607, 310; 288 S.E.2d 139 (1982); Teller v. McCoy, 162 W. Va. 367; 253 S.E.2d 114 (1978); and Reece v. Yeager Ford Sales, 153 W. Va. 461; 184 S.E.2d 727 (1971). None of these decisions develop the jurisprudence surrounding the term “material breach” to any significant degree. In Virginia the term “material breach” has been defined as “a failure to do something that is so fundamental to the contract that the failure to perform that

obligation defeats an essential purpose of the contract." Horton v. Horton, 254 Va. 111, 115, 487 S.E.2d 200 (1997). There is no evidence that, even according to the employer, Benson did anything to defeat the essential purpose of his employment contract. He performed well and without incident on the job according to all involved. The individual defendant corporate owner testified that he had no complaint regarding Benson's job performance.<sup>8</sup>

Appellants argue, without citation to any authority, that the Circuit Court's ruling deprived them of "the due process safeguards afforded by the constitutions of both West Virginia and the United States [and] intentionally and purposely stripped the Appellants of any and all affirmative defenses to Benson's claim for damages." Appellants' brief, pg. 17.

However, no complaint is made as to the basis for the damage calculation or mitigation offsets in this appeal all of which were agreed to by Defendants. Rather Defendants seek - for the third time - to have this Court acquit them entirely for breaching their contract with the Plaintiff. This the Court should decline to do.

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<sup>8</sup>Q. So, it's fair to say, then, that other than the fact that Mr. Benson tested positive for drugs - - and the drug test was on March 2<sup>nd</sup> of 1998, if I remember correctly.

A. I believe that's correct.

Q. March 2<sup>nd</sup> of 1998. Other than that positive drug test, you have no reason at all to believe that he used drugs while on the job; true?

A. That's true.

Q. Or that he used drugs during working hours?

A. True; not that I'm aware of.

Q. Or while he was on company business?

A. Well, he had sometime, because they were ingested and he came to work - - when he came to work, he was tested and it was in his system.

Q. We don't dispute that. My question is in terms so the jury can understand what the basis and the evidence is that you had when you made the decision that it was a positive drug test.

A. That's correct.

Q. And that alone?

A. That's correct.

TR 14-15.

#### IV. Conclusion

For all these reasons Appellee Benson respectfully requests that this Court affirm the Circuit Court in all regards.

DANNY L. BENSON,  
Plaintiff by Counsel,

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'WALT AUUVIL', enclosed within a large, hand-drawn oval.

WALT AUUVIL  
WV State Bar No.190  
Counsel for Plaintiff

Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

AJR, INC., a West Virginia corporation,  
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Appellants,

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DOCKET NO. 34748

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Appellee.

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff in the above-styled matter hereby certifies that on the 4th day of August, 2009, he served the foregoing "APPELLEE DANNY L. BENSON'S RESPONSE TO APPELLANT'S BRIEF" upon Niall A. Paul and Eric Kinder, counsel for Defendants, by depositing true copies thereof in the United States Mail, postage pre-paid, addressed as follows:

Niall A. Paul  
Eric Kinder  
Spilman Thomas & Battle  
P.O. Box 273  
Charleston, WV 25321-0273



WALT AUVIL  
Counsel for Plaintiff  
State Bar No. 190

Rusen & Auvil, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
(304) 485-3058