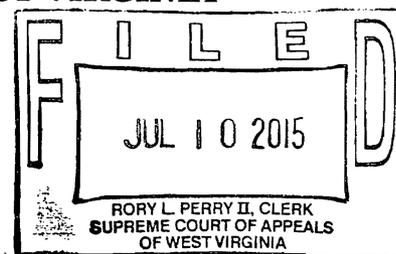


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1288



RICHARD PARSONS,

Plaintiff-Petitioner,

v.

**Case No. 14-1288
(On Appeal from Kanawha
County Circuit Court,
Civil Action No. 13-C-2241
Judge Stucky)**

HALLIBURTON ENERGY SERVICES, INC.,

Defendant-Respondent.

PETITIONER'S REPLY BRIEF

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Introduction

West Virginia law is clear: when a party acts inconsistently with a known contract right, including the right to arbitrate a dispute, the right is waived. *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000). In his opening brief, Mr. Parsons established that Halliburton acted inconsistently with its right to arbitrate by offering to participate in class discovery, bargaining for extensions of deadlines, and waiting until it had missed the deadline to file a responsive pleading (more than seven months after the filing of the complaint) to compel arbitration. As a result, the circuit court erred by dismissing Mr. Parsons' claims.

In its response, Halliburton relies on a litany of inapposite, non-binding opinions from other jurisdictions, while giving the back of its hand to the squarely-on-point West Virginia authority that supports Mr. Parsons' position. In *Barden & Robeson*, this Court held that a defendant waives its right to arbitrate by failing to assert the right in a timely responsive pleading. And more recently, in *Schumacher Homes of Circleville, Inc. v. Spencer*, this Court suggested that a defendant who "ambush[es]" a plaintiff by waiting seven months to assert even a portion of an arbitration clause could be found to have waived the right to enforce it. --- W. Va. ---, --- S.E.2d ---, 2015 WL 1880234, at *9 & n.12 (2015).

Finally, in claiming that Mr. Parsons cannot show prejudice, Halliburton glosses over the significant impact of its broken promises to Mr. Parsons. After he filed his suit, Mr. Parsons and Halliburton negotiated a bargain: Mr. Parsons would forgo his right to a timely answer and responses to discovery, essentially delaying the prosecution of the case, and Halliburton would deliver comprehensive information about the putative class. Mr. Parsons kept his end of the deal. Halliburton did not, and then used Mr.

Parsons' agreeability against him. Halliburton deprived Mr. Parsons of the benefit of the bargain and gained a substantial tactical advantage by doing so. If that isn't prejudice, nothing is.

Argument

A. Standard of Review: De Novo, Not "Clear-Cut Legal Error"

Halliburton's brief asserts an incorrect and too-deferential standard of review: that Mr. Parsons must show the circuit court's order was a "clear-cut, legal error." But that standard applies only when a party challenges an order compelling arbitration via a petition for extraordinary relief. *See McGraw v. Am. Tobacco Co.*, *See* 224 W. Va. 211, 221-22, 681 S.E.2d 96, 106-07 (2009). Instead, as this Court recently reiterated, a direct appeal of a circuit court's ruling on a motion to compel arbitration, like any other motion to dismiss, is simply reviewed *de novo*. *Schumacher Homes of Circleville, Inc. v. Spencer*, --- W. Va. ---, --- S.E.2d ---, 2015 WL 1880234, at *3 (2015).

B. Halliburton's Resort to Non-Binding, Extra-Jurisdictional Authority is Not Persuasive.

The court should not be persuaded by Halliburton's citation to non-binding authority that is factually different from this case and in many instances inconsistent with the standards articulated by this Court. Just months ago, this Court cited the Ninth Circuit's test for determining waiver of an arbitration clause, yet Halliburton relies primarily on Fourth Circuit cases that have rejected the Ninth Circuit's approach. Most of Halliburton's citations to cases from other jurisdictions also apply the wrong standards.

Moreover, waiver determinations are particularly ill-suited for analysis by rote analogy. Waiver decisions come in hundreds of shapes and sizes, each predicated on the

particular facts of the case. And despite its reliance on string-cite after string-cite, Halliburton fails to identify a single case that is more squarely on point than this Court's opinions in *Barden* and *Shumacher*, which require reversal of the circuit court's order.

1. Halliburton relies on authority that is not only non-binding, but is also expressly inconsistent with West Virginia's waiver test.

Whether the right to arbitrate has been waived is a question of state law.

Shumacher, 2015 WL 1880234, at *4 (“[A]n agreement to arbitrate is a contract . . . controlled by the state law of contracts.”). Recently, West Virginia utilized the Ninth Circuit's three-part test for determining whether waiver has occurred:

“To demonstrate waiver of the right to arbitrate, a party must show: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.”

Id. at *9 n.12 (quoting *U.S. v. Park Place Assoc., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009) (citations omitted)).

Ignoring that test, Halliburton relies primarily on Fourth Circuit authority.¹ It is axiomatic that when it comes to West Virginia law, Fourth Circuit opinions may be persuasive, but they are neither binding nor controlling. *See, e.g.*, Syl. Pt. 3, *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003). Here, the persuasive effect of the Fourth Circuit's waiver jurisprudence is severely diminished by the Fourth Circuit's rejection of the Ninth Circuit waiver test this Court adopted in *Shumacher*.

Among courts, the Fourth Circuit's waiver analysis is particularly narrow, focusing on whether a party substantially “utilize[s] the litigation machinery.” *See Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 702 (4th Cir. 2012). The

¹ *See* Br. For Resp't at 8-16.

Fourth Circuit itself has noted that the Ninth Circuit takes a markedly broader view. *Id.* at 703 n.12. Indeed, *Shumacher* cited waiver opinions from within the Ninth, Eleventh, and D.C. Circuits — but not a single case from the Fourth. Accordingly, Halliburton’s heavy reliance on Fourth Circuit authority is misplaced.²

2. Waiver is a fact-intensive inquiry that does not lend itself to analysis by rote analogy.

There are thousands of waiver cases in all shapes and sizes. As a result, it is unsurprising that Halliburton can “*see, e.g.*” several cases where a court found no waiver despite a delay of over seven months. But Halliburton also cites cases where waiver occurred in less time.³ And although Halliburton points to its cases as though they establish rigid thresholds for time and litigation activity, the cases themselves almost universally forswear such an approach, insisting on a “totality of the circumstances” analysis that rejects bright-line rules. *See, e.g., Grumhaus v. Comerica Secs., Inc.*, 223 F.3d 648, 650 (7th Cir. 2000) (asserting that the court must determine waiver “based on all the circumstances” (citation omitted)); *In re S&R Co. of Kingston v. Latona*

² Similarly, Halliburton relies on cases from outside the Fourth Circuit that also apply the wrong tests or are factually inapposite. *See e.g., In re S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1998) (applying different two-part test); *Smith v. IMG Worldwide, Inc.*, 360 F. Supp. 2d 681, 686 (E.D. Pa. 2005) (same); *Grumhaus v. Comerica Secs., Inc.*, 223 F.3d 648, 650 (7th Cir. 2000) (finding waiver where party attempting to compel arbitration had filed suit, then wished to compel after the claim was dismissed); *St. Mary’s Med. Ctr., Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992) (finding waiver where defendant filed a motion for summary judgment, and there was no bargain between parties).

³ *See Wilson Sporting Goods Co. v. Penn Partners*, No. 03-c-5236, 2004 WL 2033063, at *3 (N.D. Ill. Aug. 31, 2004) (finding waiver after five-month period of discovery); *Ernst & Young LLP v. Baker O’Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) (finding waiver after a four-month delay).

Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998) (“[T]he issue is fact-specific and there are no bright-line rules.”).

Each case is a unique blend of litigation activity, delay, and other circumstances. In light of the many variables that contribute to each opinion, Halliburton’s superficial barrage of extra-jurisdictional string cites is an unreliable method for conducting the analysis the waiver inquiry requires. The proper analysis, as demonstrated below, is a disciplined application of *West Virginia* law to the facts of *this* case.

C. The Only Binding Authority Cited by Either Party Supports Reversal of the Circuit Court’s Order.

In contrast to Halliburton’s reliance on ill-fitting cases from other jurisdictions, a straightforward application of this Court’s precedent supports the conclusion that Halliburton waived its right to compel arbitration.

1. Under West Virginia law, the primary inquiry is whether Halliburton acted inconsistently with its right to arbitrate — and it did.

Shumacher reaffirmed a West Virginia contract principal that has been well-settled for nearly 80 years: that the *sine qua non* of waiver is conduct inconsistent with a known contract right. 2015 WL 1880234 at *9 n.12; *Barden & Robeson*, 208 W. Va. at 163; *Beall v. Morgantown & Kingwood R. Co.*, 118 W. Va. 289, 190 S.E. 333, 336 (1937).

Halliburton’s brief focuses only on the length of its delay and the amount of litigation activity that occurred prior to compelling arbitration. But “conduct inconsistent with the right to arbitrate” can encompass much more than those two factors. Halliburton sidesteps the most damning evidence of waiver: its offer to participate in class discovery, which would not have been permitted in arbitration. As explained in Mr. Parsons’ opening brief, the arbitration clause at issue prohibits Mr.

Parsons' participation in a class action. As a result, Halliburton's unsolicited offer to provide a list of potential employee-class members in lieu of formal discovery cannot be reconciled with its right to arbitrate. Such an affirmative act in contravention of the arbitration clause ought to be given even greater weight in the waiver analysis than more circumstantial evidence like the length of Halliburton's delay.

2. *Barden & Robeson*, West Virginia's leading case on waiver of the right to arbitration, is squarely on-point.

The facts in *Barden & Robeson* are strikingly similar to the facts here. *See* 208 W. Va. at 165-66. There, a church sued a builder over a construction project gone bad. The contract contained an arbitration clause, but the defendant remained silent and failed to file a timely answer. Two months later, after the entry of a default judgment, the defendant finally asserted its right to arbitrate, but the circuit court held that the right had been waived. On appeal, this Court affirmed. *Id.* at 169.

Though this case and *Barden & Robeson* are almost squarely analogous, Halliburton asks the Court to ignore *Barden & Robeson* on account of an analytically insignificant distinction. Mr. Parsons does not deny that, unlike the plaintiff in *Barden & Robeson*, he never asked the Clerk to enter Halliburton's default. *See* W. Va. R. Civ. P. 55(a).⁴ But importantly, the entry of default was not the essential fact in that case, and it is not dispositive here.

The *Barden & Robeson* Court did not conclude that the defendant had waived its right to arbitrate because the Clerk entered default. After all, the circuit court could have

⁴ It is worth noting, however, that Mr. Parsons only chose to forgo the option of seeking a default judgment because of his misplaced reliance on Halliburton's broken promises. Indeed, by relying on the lack of a default judgment, Halliburton asks the Court to reward it for this conduct.

set aside the default judgment. Rather, the court held that the defendant waived its right to arbitrate by failing to plead it as an affirmative defense in a *timely* answer, as required by Rule 8(c). *Barden & Robeson*, 208 W. Va. at 168. That failure, the Court reasoned, was conduct plainly inconsistent with the desire to arbitrate. *Id.* at 169.

Thus, just as in *Barden & Robeson*, the key fact in this case is that by the time Halliburton asserted its contractual right to arbitrate, the deadline to file a timely pleading had long passed.⁵ That the clerk never entered default was and is of no moment.

3. This Court's recent opinion in *Shumacher* provides further support for Mr. Parsons' waiver argument.

The *Shumacher* opinion, filed after Mr. Parsons' opening brief, provides further support for reversing the circuit court's order. First, as discussed above, *Shumacher* adopted the Ninth Circuit's broad standard for determining waiver, in sharp contrast to the circuit court's narrow view. Second, despite Halliburton's claim that Mr. Parsons has "no support" for his position that a seven-month delay constitutes waiver, that is exactly the period of time at issue in *Shumacher*. See 2015 WL 1880234, at *9. And third, *Shumacher* specifically frowned on the reason for Halliburton's delay: a tactical "ambush" brought on by a change in litigation strategy. *Id.*

⁵ Halliburton's brief incorrectly asserts that "the parties were operating under an extension of time until the Motion [to Compel] was filed." Br. of Resp'd't at 16. The record shows otherwise. Mr. Parsons originally granted Halliburton a 45-day extension of the responsive pleading deadline, which Halliburton did not honor. Then, on April 23, 2014, Mr. Parsons agreed to an additional extension of "2-3 weeks." (App. 123). When Halliburton *again* exceeded the deadline, Mr. Parsons' counsel informed Halliburton, in no uncertain terms, that Mr. Parsons *did not* consent to an "open-ended extension," and set a final deadline of May 27, 2014. (*Id.*). Halliburton did not file its motion to compel until July 7, 2014, when it had been in default for at least 40 days. (*Id.* at 41).

This point is driven home by the fact that Halliburton offers no explanation whatsoever for its failure to file a motion to compel arbitration for seven months. Halliburton would have the Court believe that its intention all along was to file a motion to compel arbitration and that it took no actions inconsistent with this position. If that were the case, why wait? With that question left open, the best argument that Halliburton has is that it never had any intention to provide class discovery, despite its promises, but instead sought to delay the prosecution of this case for seven months until it could spring the instant motion. That is the type of conduct specifically prohibited by *Shumacher*.

D. *Shumacher's* Prejudice Requirement is “Not Onerous,” and is Easily Satisfied by the Harm Resulting from Halliburton’s Tactics.

In light of *Shumacher*, the plaintiff concedes that West Virginia law requires a showing of prejudice to establish waiver. Courts applying the Ninth Circuit approach from *Shumacher*, however, have held that the prejudice requirement “is not onerous.” *Hooper v. Advance Am. Cash Advance Centers of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) (citing *Park Place*, 563 F.3d at 921). In addition, courts have required only a “modicum of prejudice” when a defendant engages in dilatory tactics, reasoning that “as justice delayed may amount to justice denied, so it is with arbitration.” *In Re Tyco Int’l Ltd. Sec. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005).

Halliburton’s brief seeks to convince the Court that Mr. Parsons offered open-ended extensions to Halliburton for seven months with no apparent expectation that something would be provided in return. In fact, Halliburton expressly disclaims that it agreed to do anything in exchange for the multiple generous extensions that it received. Halliburton’s position is neither supported by common sense nor the record in this case.

The only reason that Halliburton was given the requested extensions was because Halliburton promised to provide class discovery and continued to dangle that promise out to Mr. Parsons during this seven-month period. The circuit court's order, if upheld, will result in Mr. Parsons no longer having the benefit of the bargain he reached with Halliburton. Accordingly, *Shumacher's* prejudice requirement is easily satisfied.

Conclusion

In its brief, Halliburton applies the wrong standard of review, relies on unpersuasive extra-jurisdictional authority, ignores on-point West Virginia law, and misconstrues the prejudice requirement.

At bottom, however, this case requires nothing more than the straightforward application of established contract law. When a party acts inconsistently with a contractual right, the right is waived. In the seven months between the filing of Mr. Parsons' complaint and Halliburton's motion to dismiss, Halliburton's every act was inconsistent with the right to arbitrate. Accordingly, Halliburton's right to arbitrate was waived, and the circuit court erred in dismissing Mr. Parsons' complaint and compelling arbitration.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of July, 2015, the foregoing **Petitioner's Reply Brief** was served on the following by regular mail:

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