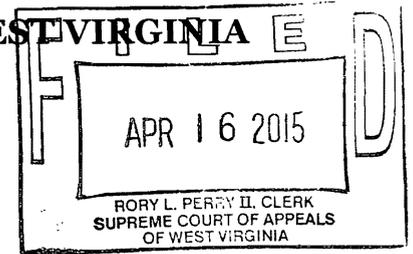


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 BRIEF

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ASSIGNMENTS OF ERROR

The sole issue in this appeal is whether the trial court failed to properly apply a well-settled rule of contracts: that when a party acts inconsistently with a contractual right, the right is waived. Here, Halliburton acted inconsistently with its right to arbitrate by: (1) initiating class discovery, even though the arbitration agreement prohibited class actions, and (2) requesting and receiving multiple extensions of deadlines while waiting more than seven months after the Complaint was filed to compel arbitration. Accordingly, the circuit court erred as a matter of law by dismissing Mr. Parsons' claims and compelling arbitration.

STATEMENT OF THE CASE

In December 2013, Mr. Parsons sued Halliburton in the Circuit Court of Kanawha County, asserting individual and class-action claims for violations of the West Virginia Wage Payment and Collection Act ("WPCA"). (See Appendix ("App.") at 2).

Within days of the filing of the complaint, counsel for Halliburton sent the following email to counsel for Mr. Parsons, volunteering to engage in class discovery:

Looks like we'll be working together again. I see you filed a [WPCA] class action on December 3, 2013 and served it on January 6, 2013 (sic). Our client is in the process of tracking down whether and to what extent employees in WV were not paid in accordance with the [WPCA]. We may be able to short-circuit a lot of this by giving you a conclusive list of violations, if any, as well as the amount of the final paycheck, etc. Obviously, however, we're going to need more time to do this. Are you able to provide us with an additional 45-60 days, particularly given the intervening holidays?

(App. 117). In response, Mr. Parsons' counsel wrote:

Hey Craig. Rod Smith and Jonathan Marshall of Bailey Glasser will be taking the lead on this case. They have no objection to a 45 day extension if Halliburton wants to enter an agreement to provide data in lieu of formal discovery responses. BG can work with you on the categories of data.

(*Id.* at 116). Halliburton's counsel responded:

Rod and Jon, I presume you want (1) name; (2) address; (3) reason for separation; (4) date of separation; (5) date of final paycheck; and (6) amount of final paycheck. Please advise if there are any other categories of information you need and we can discuss.

(*Id.*).

Forty-five days passed with no discovery or responsive pleading, and additional short extensions were requested and granted. At this point, Halliburton was in default, and Mr. Parsons could have sought the entry of a default judgment. However, on April 21, 2014, counsel for Halliburton again emailed counsel for Mr. Parsons, explained that he was actively engaged in compiling the class discovery responses, and reaffirmed Halliburton's intent to file a responsive pleading:

I believe we owe you some discovery on this claim, which I'm in the process of finalizing with my client. Are we still okay with the responsive pleading deadline and, if we're close, can I ask that it be pushed out again? I'm sorry to have to ask, but it's been a bit of a process on this end.

(*Id.* at 120). In a subsequent telephone conversation, Halliburton pledged to deliver the promised discovery within three weeks. (*Id.* at 123). In exchange for Halliburton's promise, counsel for Mr. Parsons agreed to another extension.

Unfortunately, Halliburton once again failed to keep its promise. As a result, counsel for Mr. Parsons emailed Halliburton with a final gesture of forbearance:

We have not provided an open-ended extension for Halliburton to respond to these discovery requests (which were served more than five months ago). We need to know when Halliburton is going to respond to the outstanding discovery requests. If you fail to respond to this email by Tuesday, May 27, we will have no choice but to get the court involved so we can get this litigation back on track.

(*Id.* at 123). Counsel for Halliburton responded “I am out of the office on an unexpected leave. I passed along your last message to . . . our managing partner and am leaving this in his hands. I have copied him on this email and he will take care of it from there. My apologies for the delay.” (*Id.* at 122-23).

On May 22, a new lawyer for Halliburton (within the same firm) wrote to explain that Halliburton would need still more time to respond: “Due to Craig’s extended absence, he will no longer be on the case. We will be in touch as soon as we can get a handle on the status, which may not be by the 27th [of May] due to preexisting commitments. We appreciate your patience.” (*Id.* at 122).

But instead of producing the delinquent discovery, Halliburton changed litigation tactics — after more than seven months — and elected to invoke an arbitration provision that it had not brought to Mr. Parsons’ counsel’s attention in any of the many communications between the parties. Without acknowledging its default or even seeking the circuit court’s leave, Halliburton filed an untimely motion to dismiss and compel arbitration of Mr. Parsons’ claims. (*Id.* at 28-95).

Halliburton relied on its employee Dispute Resolution Program (“DRP”), which required that all disputes be resolved through arbitration. (*Id.* at 49). Notably, the DRP also prohibited class actions. (*Id.*).

Mr. Parsons challenged Halliburton’s motion to compel on the ground that the DRP was no longer binding because Halliburton had waived its right to arbitrate through its representations to Mr. Parsons’ counsel and its voluntary participation in litigation. (*Id.* at 108-25).

Following a hearing, the Circuit Court granted Halliburton’s motion. The court based its ruling on its conclusions that Halliburton had not acted inconsistently with the right to arbitrate and had not actively participated in the lawsuit, and that Mr. Parsons had not shown that he was prejudiced by Halliburton’s delay. (App. 151-66). This appeal follows.

ARGUMENT SUMMARY

As this Court and the United States Supreme Court have made clear, an arbitration agreement is no different than any other contract, and is subject to normal contract rules. While this principle is frequently invoked to support the enforcement of an agreement to arbitrate, it also means that, as with any other contract right, a party can waive its right to arbitrate by acting inconsistently with that right.

In this case, that is exactly what happened. Mr. Parsons does not dispute that Halliburton could have asked to arbitrate this dispute, had Halliburton raised the issue in a timely manner. But instead, for more than seven months,

Halliburton actively participated in the underlying litigation and never informed Mr. Parsons that it intended to invoke arbitration. First, Halliburton took the lead in initiating class-wide discovery — a move completely at odds with the arbitration agreement in this case, which prohibits class actions. Second, Halliburton asked for and received multiple extensions of time to file a responsive pleading — repeatedly reaffirming, in writing, its intention to produce class discovery and litigate in Kanawha County Circuit Court. Critically, Halliburton’s actions prejudiced Mr. Parsons. In exchange for the pledge that class discovery would be provided, Mr. Parsons forbore seeking a default judgment. Now that Halliburton’s motion is granted, not only will the forum change, but Halliburton will be relieved from its agreement to provide the class discovery it repeatedly promised.

A contractual right, once waived, cannot be revived. That is simply not how contracts work, and a contract to arbitrate is no exception. Accordingly, the circuit court erred in dismissing Mr. Parsons’ complaint.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Parsons respectfully requests oral argument because none of the criteria set forth in Rule 18(a) preclude oral argument in this appeal. Specifically, this appeal merits oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure in that this appeal raises an issue of application of *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 539 S.E.2d 106 (2000). A memorandum decision applying *Barden* may be appropriate.

STANDARD OF REVIEW

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995). Likewise, this Court reviews de novo a circuit court’s decision to compel arbitration. *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 388, 729 S.E.2d 217, 223 n.7 (2012).

ARGUMENT

A. Like any contract right, the right to arbitrate may be waived through inconsistent conduct.

This Court has spoken clearly on this subject: the enforcement of an arbitration clause is purely a matter of contract and thus, “[a]s with any contract right, an arbitration requirement may be waived through the conduct of the parties.” *See State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (citing *Earl T. Browder, Inc. v. Cnty. Court of Webster Cnty.*, 143 W. Va. 406, 412, 102 S.E.2d 425, 430 (1958) (holding that defendant's neglect or refusal to arbitrate dispute constituted waiver of right to require arbitration)).¹

¹ Likewise, the Supreme Court of the United States has made clear that the “strong federal policy in favor of enforcing arbitration agreements” is based upon the enforcement of a contract, not a preference for arbitration as an alternative form of dispute resolution. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-24 (1985). “Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context.” *Nat’l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987).

In contract law, waiver by “conduct of the parties” is also known as “implied waiver.” See *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135, 142-43 (1998). An implied waiver may be “inferred from actions or conduct” that, “taken together . . . amount to an intentional relinquishment of a known right.” See *Hoffman v. Wheeling Sav. & Loan Ass’n*, 133 W. Va. 694, 713 57 S.E.2d 725, 735 (1950). Such actions or conduct include “the doing of something inconsistent with the right.” *Beall v. Morgantown & Kingwood R. Co.*, 118 W. Va. 289, 190 S.E. 333, 336 (1937). Since there is no dispute in this case that Halliburton knew all along about its right to arbitrate, the only question before this Court is whether Halliburton engaged in conduct inconsistent with that right. As demonstrated below, it did, and so the circuit court’s order should be reversed.

1. Halliburton acted inconsistently with its right to arbitrate by committing itself to engage in class discovery when the arbitration agreement expressly prohibits class actions.

Perhaps the clearest possible example of conduct inconsistent with the right to arbitrate is a party’s voluntary participation in litigation activity that would not be allowed in arbitration. More specifically, courts have held that when an arbitration agreement prohibits class actions, a party that nonetheless chooses to engage in class discovery has relinquished its right to arbitrate. See, e.g., *Bower v. Inter-Con Sec. Sys., Inc.*, 232 Cal. App.4th 1035, 1044 (Cal. App. 2014).

In *Bower*, for example, the plaintiff filed a wage-payment class action against his former employer. See *id.* at 1039. The defendant answered the

complaint and raised arbitration as a defense. The defendant also responded to discovery propounded by the plaintiff, but again objected on the basis that the dispute was subject to arbitration agreement that contained a class action ban. Later the defendant propounded discovery. *Id.* at 1040. Soon thereafter, the parties stayed discovery and pursued settlement discussions. *Id.* Ten months later, when negotiations stalled, the employer moved to compel arbitration, citing an agreement that also prohibited class actions. *Id.* The trial court denied the motion, concluding that the employer's conduct amounted to a waiver of the right to arbitrate. *Id.* at 1041. On review, the court of appeals agreed, observing that the employer's willingness to engage in class-wide discovery was "***fundamentally inconsistent*** with the claim that . . . arbitration would be limited to [the plaintiff's] individual claims." *Id.* at 1044 (emphasis added).

The same reasoning applies here. The DRP, which Halliburton drafted, unambiguously prohibits class actions. In other words, Halliburton had a "known right" not to participate in class action litigation or discovery. Nonetheless, Halliburton acted inconsistently with that known right when it repeatedly promised to produce class discovery that would be useless in arbitration. What conclusion could a reasonable person reach other than to infer that Halliburton did not intend to invoke its right to arbitrate? Indeed, Halliburton leveraged that inference to its advantage: had Halliburton not repeatedly obligated itself to provide class discovery, Mr. Parsons would not have repeatedly given Halliburton extensions of time to respond to the Complaint. If anything, Halliburton's

conduct is even stronger evidence of waiver than that of the defendant in *Bower* because Halliburton did not simply respond to the plaintiff's discovery requests, but actually **initiated** discovery on a class-wide basis by reaching out to Mr. Parsons' counsel and promising the disclosure of class information. As this Court has held, "[v]oluntary choice is of the very essence of waiver." *See Hoffman*, 57 S.E.2d at 735. Moreover, unlike the defendant in *Bower* that raised arbitration as a potential defense early in the proceedings in its answer and in response to discovery, Halliburton made no such mention for seven months.

2. Halliburton acted inconsistently with its right to arbitrate by waiting more than seven months to compel arbitration.

Halliburton's eagerness and commitment to engage in class discovery, when the arbitration agreement expressly prohibited class actions, is proof enough of Halliburton's intent to waive any right to arbitrate Mr. Parsons' claims. But the fact that Halliburton thereafter continued to litigate in the circuit court for more than seven months before filing its motion to dismiss provides an independent basis for concluding that Halliburton waived its right to arbitration.

In order to safeguard its right to arbitration, a party must "do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Cabinetree of Wisc., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995). For that reason, a party acts inconsistently with its right to arbitrate if it waits too long to move to compel arbitration after litigation has commenced. Because the waiver analysis

examines the totality of the circumstances, there is no bright-line test for how long of a delay is too long, but courts have found waiver based on similar — or shorter — delays than that which occurred in this case.

Indeed, in *Barden & Robeson*, this Court held that the defendant waived its right to arbitration by standing silent for a period of less than two months. In that case, a church and a builder entered a contract to construct an addition, 539 S.E.2d at 108. The contract provided that the parties would arbitrate disputes arising out of the contract. *Id.* After the work was completed, the church asserted that certain aspects of the construction did not meet contract specifications, and filed a suit in circuit court on April 7, 1999. *Id.* The defendant failed to respond in any way, and on June 1, 1999 — less than two months later — the church obtained a default judgment. *Id.* The defendant subsequently moved to set aside the judgment, asserting for the first time its contractual right to arbitrate. *Id.* When the circuit court refused to set aside the judgment, the defendant sought a writ from the Supreme Court. *Id.* at 109. This Court denied the writ, holding that as a result of the two-month delay and default alone, the defendant had “waived its right to assert arbitration as an affirmative defense” — despite the fact that the defendant had not actively participated in the litigation. *Id.* at 111.

Second, even if delay alone was not enough, Halliburton did much more than just delay. As discussed above, Halliburton actively participated in this litigation. Counsel for Halliburton initiated discovery and agreed upon a framework by which Halliburton would disclose the class data necessary to

resolve the litigation. Counsel spoke with and emailed one another on several occasions for a period of months and, of course, Halliburton requested and received numerous extensions of time to file a responsive pleading and to provide the discovery it had promised.

Moreover, to the extent that more “formal” activity did not occur, that is only because of Halliburton’s promises. Had Halliburton delivered the class discovery as it obligated itself to do, either the case would have shifted towards settlement or Mr. Parsons would have propounded additional written discovery requests and taken depositions. And had Halliburton not repeatedly leveraged the illusory promise of “conclusive” class discovery in order to obtain extensions of time to file its answer, Mr. Parsons could have secured a default judgment, just like the plaintiff in *Barden & Robeson*. As a result, Halliburton should not be allowed to benefit from its claim that it did not “actively participate” in the circuit court litigation.

Thus, the circuit court erred as a matter of law in concluding that Halliburton’s unexcused seven-month delay did not constitute a waiver of the right to arbitrate.

B. Mr. Parsons was substantially prejudiced by Halliburton’s conduct.

The circuit court further erred by concluding — as an independent basis for granting Halliburton’s motion — that Halliburton did not waive its right to arbitration because Mr. Parsons and the potential class members were not

prejudiced by Halliburton's delay. The circuit court's imposition of such a requirement is plainly at odds with *Potesta v. U.S. Fidelity & Guaranty Co.*, wherein this Court clearly and emphatically held that “[t]here is no **requirement of prejudice** or detrimental reliance by the party asserting waiver” of a contractual right. 504 S.E.2d at 143 (emphasis added). The rule is no different when the contractual right at issue is the right to arbitrate.

Even if there were such a requirement, Mr. Parsons was prejudiced by Halliburton's waiver. Prejudice is “damage or detriment to one's legal rights or claims.” Black's Law Dictionary (10th ed. 2014). In consideration for Halliburton's promised class discovery, Mr. Parsons granted multiple extensions of time to Halliburton and forbore his right to seek a default judgment, to the great detriment of his claims and the claims of the potential class members. If the circuit court's order stands, not only will the forum change, but most importantly, Halliburton will no longer be obligated to provide this promised class discovery because a class action ban exists.

C. Allowing Halliburton to strategically invoke the right to arbitration after committing to litigation in the Kanawha County Circuit Court is inconsistent with the very purpose of arbitration.

As the circuit court recognized, the primary virtue of arbitration is efficiency. (See App. 154, ¶ 17). According to the United States Supreme Court, “Congress' clear intent, in the [FAA], [was] to move the parties in an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Moses*

H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 22 (1983). The circuit court's conclusion in this case — that a party can affirmatively indicate its desire to litigate in state court, engage in dilatory tactics for seven months, and then strategically invoke arbitration without explaining its delay — flies in the face of efficiency.

Halliburton has never provided any explanation for its long-delayed decision to compel arbitration. The only apparent motivation was Halliburton's change in counsel, and a corresponding change in litigation strategy. For good reason, courts have rejected tardy motions to compel arbitration that reflect nothing more than a party's shift to "the arbitration option as a backup plan." *See, e.g., MC Asset Recovery, LLC v. Castex Energy, Inc.*, 613 F.3d 584, 590 (5th Cir. 2010). To hold otherwise would only encourage inefficient litigation tactics.

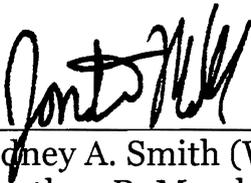
Of course, the desire for an efficient outcome is not an independent reason for declining to enforce an arbitration clause; after all, courts must not "substitute [their] own views of economy and efficiency for those of Congress." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 497, 729 S.E.2d 808, 819 (2012) (internal quotation marks omitted). The goal of efficiency does, however, emphasize the need to enforce established waiver rules, which are perfectly consistent with the FAA. Thus, in considering whether Halliburton's actions amounted to a waiver of its right to arbitrate, this Court must consider that the circuit court's application of waiver principles would undermine the very policy supporting arbitration in the first place.

CONCLUSION

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.

Respectfully submitted,

RICHARD PARSONS,
By counsel,



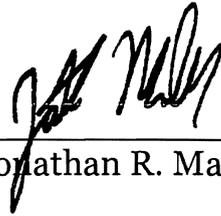
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **PETITIONER'S BRIEF** was this day served on the following by regular mail on this 16th day of April, 2015:

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