No. 23-49 – *Ampler Burgers Ohio LLC d/b/a Burger King, Lesley McLaughlin, Sheila Spaulding, and Teresa Stephens v. Kenna Bishop*

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Justice Hutchison, dissenting, joined by Justice Wooton:

I dissent from the majority's opinion that compels plaintiff Kenna Bishop to arbitrate her complaint. The opinion gives five different reasons why the trial court erred, but the first four are inconsequential fluff. It is the fifth section, pertaining to the concept of contractual waiver, that is controlling in this case. By every measure, Ampler Burgers Ohio LLC ("Ampler") waived its right to arbitration. Therefore, the majority opinion is dead wrong in its application of Syllabus Point 6 of *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016). I say this because, while the majority footnotes the central holding of *Parsons* (that one party's waiver does not require prejudice to be suffered by another party), the majority ignores *Parsons* and instead does a prejudice analysis to reach its conclusion no waiver occurred, albeit without using the word "prejudice." It also employs an analysis that violates the Federal Arbitration Act.

I start my analysis with the overarching question: How does a party to a contract waive a right given to them in the contract's terms? The answer: the same way any right is waived, by having knowledge of the right (actual or constructive), and then acting in a way contrary to that right such that any outside observer would believe the party has relinquished the right. "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right." Syl. pt. 2, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989). "A waiver may be express or may be inferred

from actions or conduct, but all of the attendant facts, taken together, must amount to an intentional relinquishment of a known right." Syl. pt. 2, in part, *Parsons*, 237 W. Va. at 141, 785 S.E.2d at 847.

The Court in *Parsons* emphasized that waiver of a right is an individual, unilateral choice. Waiver occurs irrespective of its impact on any other party and of the actions by any other party.

> Waiver does not require proof of prejudice or detrimental reliance because waiver is within the control of the party who chooses to relinquish a condition in the contract, quite apart from whether another party relies on relinquishment. Waiver is essentially unilateral in its character; it results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it.

Id. at 144, 785 S.E.2d at 850 (cleaned up). To emphasize the point that a party can waive a contract right regardless of whether an opposing party is prejudiced, the Court in *Parsons* overruled several cases that suggested waiver might "require proof of prejudice or detrimental reliance." *Id.* at 146, 785 S.E.2d at 852.

The *Parsons* Court explicated the doctrine of waiver in the general context of all contracts. The Court then noted the well-established rule that the Federal Arbitration Act ("the FAA") places "arbitration agreements on the same footing as other contracts, where [they] belong." *Id.* at 147, 785 S.E.2d at 853 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). Essentially, because of the FAA, courts cannot devise special tests, rules, or

guidelines for arbitration contracts that would not apply to other general contracts. Hence, the *Parsons* Court concluded that the general rule of waiver also extended to arbitration agreements.

The majority cites to Syllabus Point 6 of *Parsons*, which contains this extension-of-waiver-to-arbitration rule, and which provides:

> The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. *There is no requirement that the party asserting waiver show prejudice or detrimental reliance*.

(Emphasis added). The United States Supreme Court, in *Morgan v. Sundance, Inc*., 596 U.S. 411, 419 (2022), mirrored *Parsons* in that it rejected any requirement of prejudice in its test to determine whether waiver of an arbitration agreement existed. The *Morgan* Court likewise stated that it rejected a prejudice requirement because general contract law does not require prejudice, and "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* at 481.[1] The majority opinion did cite *Morgan*, but just once, and in a footnote.

[1] Incidentally, the winning party in *Morgan* cited to *Parsons* in her briefs to the United States Supreme Court. *See* Brief of Petitioner Robyn Morgan, 2021 WL 6286090, at *26-27.

In *Parsons*, decided eight years ago, this Court rejected the panoply of "federal and state cases with a broad spectrum of factors and guidelines for courts to consider" in deciding whether a contractual right to arbitration had been waived. *Id.* at 148, 785 S.E.2d at 854. The majority opinion not only sidesteps this language in *Parsons*, but it also sidesteps the U. S. Supreme Court's admonition not to create special rules for arbitration contracts not already extant for other contracts because those rules violate the FAA. Instead, the majority opinion quotes and applies a forty-four-year-old federal Tenth Circuit Court of Appeals case that lists the factors and guidelines courts should consider in deciding whether an arbitration agreement has been waived. *See Reid Burton Const., Inc. v. Carpenters Dist. Council of S. Colorado*, 614 F.2d 698, 702 (10th Cir. 1980). Worse, the majority opinion wholly omits any discussion that the Tenth Circuit expressly adopted the *Reid Burton* factors and guidelines to (1) weigh whether prejudice arose, (2) exclusively in the context of arbitration contracts.[2] Importantly, cases like *Reid Burton* were disavowed

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[2] Without question, the *Reid Burton* factors cited by the majority opinion violate *Morgan* because they create a special prejudice test intended to support "the federal policy . . . to promote . . . the inclusion of a provision for arbitration of grievances[.]" *Reid Burton*, 614 F.2d 702. The Tenth Circuit applied the factors and found that prejudice existed:

> While it is true that the trial court made no specific finding of prejudice, the sum and substance of those findings as a whole is one of *prejudice and detriment* to Burton. . . . The preparations until that time for trial in the court do, in our opinion, *amount to sufficient prejudice* that it is inequitable for a party at that point to shunt the controversy over to the arbitration procedures.

Id. at 703 (emphasis added).

in *Parsons* and by the U. S. Supreme Court in *Morgan*, yet the majority opinion chose to base its opinion on those factors for assessing prejudice. Except, of course, the majority opinion never *used* the word "prejudice."

In addition to being a "special" approach devised exclusively for arbitration cases (and hence, in violation of the FAA), the majority opinion's approach suggests an *ad hoc*, variable, fairness analysis. Such an analysis is inexact and, in the future, will impose delay, uncertainty, and costs on litigants and on the judicial system. The facts of this case show that, after the plaintiff filed her complaint, and despite Ampler never *saying* it was waiving arbitration, Ampler engaged in litigation activities with the plaintiff and obtained discovery materials it could never have obtained in arbitration. The parties litigated, in court, for some 400 days, before Ampler asserted that it had a contract right to arbitration.[3] These attendant facts, taken together, indicate that Ampler repeatedly acted contrary to its known right to arbitrate and, thus, waived that right.

The majority makes light of what happened after the plaintiff filed suit, boiling it down to one sentence: "the litigation process had barely begun when the motion

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[3] I concede that the plaintiff named the wrong party in her complaint ("Ampler Restaurant Group"), but the right party got the complaint. Several months of delay occurred when Ampler asked the plaintiffs for extra time to answer the complaint, and extra time to answer discovery, and got both. Our holding in *Parsons* shows that simply asking for delay is not a litigation activity that waives arbitration. *Parsons*, 237 W. Va. at 149, 785 S.E.2d at 855 ("The delay alone is meaningless; it is the circumstances surrounding the defendant's acts and language that determine whether the defendant implicitly intended to waive the right to arbitrate.").

to compel was filed." Balderdash. In reality, and directly contrary to Ampler's right to invoke arbitration, Ampler answered the plaintiff's complaint in January 2022. Normally, answering a complaint without expressly seeking to enforce one's right to arbitration is an act inconsistent with the right to arbitrate. Ampler's answer to the plaintiff's complaint, therefore, could be construed as a waiver of any contractual right to arbitrate. However, it is fair to say that Ampler "preserved" its right to later assert arbitration with its formulaic answer that it may have an affirmative defense to the plaintiff's claims in the form of arbitration. *See* W. Va. R. Civ. Pro. Rule 8(c).

The problem is that, despite saying it had a right to arbitration in its answer, Ampler's actions over the next eleven months of 2022 said the complete opposite. To begin, on February 9th, Ampler answered the plaintiff's discovery which consisted of 24 multi-part interrogatories and 43 requests for documents. As part of this discovery, Ampler produced the arbitration agreement it now seeks to enforce. Eight-and-a-half months later, Ampler supplemented its answers and responses. Such detailed, expensive discovery is often not available in arbitration proceedings. Regardless, spending time and money answering discovery in a circuit court without asserting a right to arbitration is an act inconsistent with the right to arbitration and, thus, is a waiver of that right.

Thereafter, the waivers compounded. On February 22nd, Ampler served its own detailed discovery requests for information and documents on the plaintiff, discovery requests not generally available in arbitration. The plaintiff responded to Ampler's discovery requests on April 8th, providing information not available in arbitration. The

plaintiff later supplemented her responses. Again, seeking and receiving civil discovery are activities contrary to the speedy processes available in arbitration; both the plaintiff's actions and Ampler's actions show a willful abandonment of the arbitration process, or, in a simpler word, waiver.

And the record goes on and on. In March, the plaintiff's lawyers and Ampler's lawyers continued to negotiate and exchange letters over whether "Ampler Burgers Ohio LLC" was the correct name of the party. In April, the plaintiff proposed an order substituting Ampler as the correct name of the defendant; Ampler responded with nine substantive edits to the proposed order. In June, Ampler's lawyer declared he wanted to go back to the proposed order and "finish negotiating those terms." It took until August 31st for the circuit court to enter a substitution order that met with Ampler's approval. On June 23rd, Ampler participated in a scheduling conference with the other parties and the circuit court, and on July 22nd, Ampler drafted and proposed a scheduling order for the circuit court's signature. Ampler assembled and disclosed its list of fact witnesses on September 15th and accepted service of plaintiff's list of fact witnesses. All of these actions by Ampler are in direct contradiction with its supposed right to arbitrate.

Finally, and quite importantly, the plaintiff sent interrogatories and document discovery to Ampler's management employees at the Burger King restaurant (employees who were also sued as defendants). On their behalf, Ampler answered that discovery but allegedly did so in a superficial manner, as the plaintiff's lawyers felt impelled to write an eight-page, single-spaced letter seeking clarification of Ampler's answers. Ampler did not

ignore the plaintiff's letter and assert arbitration, but rather it replied that it would not provide detailed discovery responses until the plaintiff procured confidential, protected depositions from a separate lawsuit (by a minor plaintiff who sued the prior owner of the same Burger King for abuse and sexual harassment similar to that asserted against Ampler). *See Yoxtheimer v. RMS Inc.*, Civil Action No. 20-C-41 (Kanawha County, 2020). Again, not to sound like a broken record, but these kinds of confidential, sealed depositions and exhibits are not materials typically obtainable without great difficulty in a circuit court case; Ampler and the plaintiff had to jointly ask the circuit court to enter a protective order allowing this information to be exchanged. These materials are not obtainable in an arbitration proceeding. Then, on November 1st, Ampler obtained 1,271 pages of deposition transcripts and 635 pages of exhibits, all of which were marked as confidential and include highly prejudicial, inflammatory testimony by Ampler's management employees. These materials were not available to Ampler's lawyers because the defendant in the separate lawsuit was represented by different counsel.

Seven days after receiving these reams of normally undiscoverable, confidential information, and some 400 days after the plaintiff filed her complaint, Ampler filed the motion to compel arbitration that is at the heart of this case.

Accordingly, it was quite a stretch for the majority opinion to say that the litigation process had "barely begun" when the motion to was filed. Whether the litigation process has barely begun, or jury selection is almost complete, once a party acts contrary to his/her/its right to arbitration, then the right is waived.

This is why I dissent. Ampler made a pro-forma statement about the affirmative defense of arbitration in its answer, but it never formally tried to preserve its right to arbitration with a motion to compel. Instead, for the better part of a year, Ampler acted directly contrary to its contractual right to arbitration. Furthermore, in that time, Ampler procured piles of information that it might never have obtained in the arbitration process. And, in the end, the majority opinion blames *the plaintiff* for making "a conscious effort to obtain the benefits of discovery[.]" As I noted earlier, waiver is unilateral and "results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it." *Parsons*, 237 W. Va. at 144, 785 S.E.2d at 850. Of course, the plaintiff plainly waived her right to arbitration the moment she filed her complaint; but, contrary to the majority opinion, she had no legal obligation to preserve the defendants' rights. Knowing its rights, Ampler's conduct to the contrary triggered the doctrine of waiver, and nothing the plaintiff did was necessary to make that waiver complete.

The majority opinion's adoption of a special test for Ampler, citing factors and guidelines special for arbitration claims, certainly helped Ampler even if it violated tests established in *Parsons* and *Morgan*. Problematically, I reiterate that when the majority opinion creeps up in future cases, these inexact, *ad hoc*, variable factors will impose delay, uncertainty, and costs on litigants and on the judicial system. That uncertainty and cost obliterates the reason for incorporating an arbitration provision into a contract.

Accordingly, I would suggest that this Court, in the future, adopt a clear, bright-line rule to more sharply define the circumstances under which a party waives its contractual right to arbitration when it participates in litigation. I believe such a rule is simple: A party that files or answers a civil complaint without asserting a contractual right to arbitration has waived the right.[4]

A bright-line rule serves the policy goals of both federal and state arbitration law, namely speed, simplicity, and low cost. More importantly, the parties' interests in efficient dispute resolution are better served by a clear rule, specifically one that requires the parties to choose their forum at the pleading stage of their dispute. A clear rule discourages parties from engaging in bad faith delay or "forum-seeking" behavior. Under the approaches employed by the majority opinion, litigants can jump between courtroom and arbitration forums before settling on the more "favorable" one, all the while arguing that there has been no "significant" or "substantial" or "fundamental" action that "prejudiced" the opposing side. Allowing a party to participate in "some" litigation before the opposing side is sufficiently prejudiced to constitute waiver essentially encourages parties to dawdle in court without losing the right to later arbitrate. For instance, as in the current case, a party might see what judge is assigned, or might induce a party to reveal

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[4] *See*, *e.g.*, Thomas J. Lilly, Jr., *Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 Neb. L. Rev. 86 (2013) (arguing that a defendant should lose its right to compel arbitration if it fails to invoke the right in its answer); Noa Gutow-Ellis, *Arguing Arbitration Waiver After Morgan v. Sundance: A Path to Hold Debt Buyers Accountable for Abusive Collection Litigation*, 30 Cardozo J. Equal Rts. & Soc. Just. 193 (2023).

their litigation or discovery strategy, before invoking arbitration. A party might rely upon discovery tools available in court but not in arbitration. Or a party may invoke arbitration only after seeing litigation going in the wrong direction, or after receiving an unfavorable ruling.

Adopting a bright-line rule encourages parties to seek either courtroom litigation or an arbitration forum, not both. Forcing parties to choose their forum at the pleading stage encourages efficient resolution of disputes and effectuates the purpose of both federal and state arbitration laws. By making a clear statement as to when the right to arbitration should be pled, this Court could eliminate uncertainty that will plague future litigation.

Accordingly, I respectfully dissent from the majority's opinion. I am authorized to state that Justice Wooton joins in this dissent.