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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OF WEST VIRGINIA

BUNN, Justice, concurring:

I agree with the majority's ultimate resolution of this case. The circuit court erred by denying Ampler Burgers'[1] motion to compel arbitration, so reversing the denial and remanding for further proceedings is proper. While this opinion reaches the correct result, I write separately to elaborate on the majority's analysis of waiver. The majority's waiver analysis fails to thoroughly consider Ampler Burgers' conduct, particularly its participation in discovery. Applying a more thorough analysis still leads to the conclusion that Ampler Burgers did not waive its right to arbitration. Accordingly, I respectfully concur.

The circuit court found that Ampler Burgers impliedly waived its right to arbitration. "As with any contract right, an arbitration requirement may be waived through the conduct of the parties." *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000). To establish implied waiver under West Virginia law,

[1] For ease of reference, I use "Ampler Burgers" or "Ampler" to collectively refer to the petitioners, Ampler Burgers Ohio, LLC, d/b/a Burger King; Lesley McLaughlin; Sheila Spaulding; and Teresa Stephens.

Ms. Bishop, as the party asserting waiver, had to show that Ampler Burgers acted inconsistently with its right to arbitrate:

> 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.

Syl. pt. 6, *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016).[2]

To determine whether Ms. Bishop met her burden, Ampler Burgers' conduct must be examined in light of the totality of the circumstances.

> The common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right. A waiver 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. 138, 785 S.E.2d 844. *Accord Schwebke v. United Wholesale Mortg. LLC*, 96 F.4th 971, 976 (6th Cir. 2024) ("[T]he waiver analysis rests on

[2] *See also* Syl. pt. 4, *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W. Va. 451, 825 S.E.2d 779 (2019) ("The essential elements of the doctrine of waiver are: (1) the existence of a right, advantage, or benefit at the time of the waiver; (2) actual or constructive knowledge of the existence of the right, advantage, or benefit; and (3) intentional relinquishment of such right, advantage, or benefit.").

the totality of the circumstances—not on any bright-line rule."); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (to assess "whether [a party] took acts inconsistent with its right to arbitration, we consider the totality of the [party's] actions . . . [and] ask whether those actions holistically indicate a conscious decision . . . to seek judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right to arbitrate." (quotations and citations omitted)).

Ms. Bishop had to establish waiver by clear and convincing evidence. "[W]here the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right." *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). *See also Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950) ("'A waiver of legal rights will not be implied, except [by] clear and unmistakable proof of an intention to waive such rights.'" (citation omitted)).

Federal cases are now instructive as to the types of conduct that might signal an implied waiver. Previously, the federal waiver analysis included a prejudice element in most jurisdictions. However, in 2022, the United States Supreme Court considered whether prejudice should be an element of waiver in the context of arbitration contracts even though it is not part of the waiver analysis for other types of contracts. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). Because arbitration contracts

should be treated like all other contracts, the *Morgan* Court rejected an arbitration-specific waiver rule that requires proof of prejudice. *Id.* at 416, 142 S. Ct. at 1712, 212 L. Ed. 2d 753. Following *Morgan*, federal courts addressing waiver have applied a standard like ours, which does not consider prejudice.

When considering evidence of implied waiver, federal courts have examined whether the defendant substantially invoked litigation machinery. *Breadeaux's Pisa, LLC v. Beckman Bros.*, 83 F.4th 1113, 1117 (8th Cir. 2023) ("Arbitration can be waived . . . by substantially invok[ing] the litigation machinery rather than promptly seeking arbitration." (quotations and citations omitted)); *Payne v. Savannah Coll. of Art & Design, Inc.*, 81 F.4th 1187, 1201 (11th Cir. 2023) ("Our waiver doctrine is typically implicated when parties have invoked the litigation machinery before reversing course and claiming that arbitration was the proper avenue all along." (quotations and citation omitted)).

Seeking dispositive rulings or taking advantage of being in court are evidence of substantially invoking the litigation machinery. *See, e.g.*, *Nicosia v. Amazon.com, Inc.*, No. 21-2624-cv, 2023 WL 309545, at *4 n.2 (2d Cir. Jan. 19, 2023) (acknowledging that defendant Amazon had not waived arbitration because it had not "engaged in litigating any substantial merits questions before seeking arbitration" (quotations and citation omitted)); *Schwebke*, 96 F.4th at 976 ("[I]n most of our cases finding arbitration waiver, there has been an affirmative request for relief, such as the filing of a dispositive motion.");

Armstrong, 59 F.4th at 1015 ("[A] party generally acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." (quotations and citation omitted)). Here, Ampler did not "substantially invoke the litigation machinery" as it did not seek dispositive rulings on the merits or obtain an advantage from being in court.

In finding sufficient evidence of intentional waiver of Ampler Burgers' right to arbitrate, the circuit court relied on Ampler's actions in:

> answering and responding to two sets of discovery, supplementing discovery, responding to meet-and-confer emails and letters, entering an *Agreed Protective Order*, attending two scheduling conferences, negotiating an *Agreed Order for Substitution of Party*, participating in several emails and telephone calls, asking for deadline extensions, and making repeated requests for all of the deposition transcripts in the earlier matter.

The circuit court's order also stated that Ampler "demanded a jury trial" in its Civil Case Information Statement.[3]

[3] The circuit court further relied on the passage of more than a year between Ms. Bishop filing her complaint and Ampler Burgers filing its motion to compel arbitration. Notably, though, "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." *Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 149, 785 S.E.2d 844, 855 (2016).

The most significant conduct Ampler engaged in was participating in discovery. Ampler propounded and responded to discovery requests, responded to Ms. Bishop's discovery-related meet-and-confer communications, and participated in entering an agreed protective order. However, when properly viewed in light of the surrounding circumstances, these facts do not establish by clear and convincing evidence that Ampler intended to forgo its right to arbitrate.

Regarding Ampler's discovery activities, Ms. Bishop responded to Ampler Burgers' motion seeking to compel arbitration by arguing, in part, that Ampler filed its motion only after it had obtained "nearly 2,000 pages of testimony and exhibits" it "likely would not have otherwise obtained." These documents consisted of ten deposition transcripts, with exhibits, that were generated in another matter being litigated by Ms. Bishop's lawyer. In replying to Ms. Bishop's argument, Ampler tendered a declaration by one of its lawyers. This declaration explained that, during a phone conversation, Ms. Bishop's counsel described these deposition transcripts as "explosive discovery" that he wanted Ampler's counsel to review in considering the merits of Ms. Bishop's claims. In subsequent emails between counsel for Ms. Bishop and Ampler, the attorneys discussed the discovery materials and the need to determine whether the materials were covered under an existing protective order. In her brief to this Court, Ms. Bishop does not refute the evidence that her counsel offered the purportedly "explosive discovery," subject to an

appropriate protective order, for Ampler's counsel to consider in assessing the merits of Ms. Bishop's claims in this action.

Similarly, to the extent that Ms. Bishop's counsel considered the documents produced as "explosive discovery" that Ampler's counsel should consider, it does not appear that the documents provided Ampler with any unfair advantage to assert in subsequent arbitration. Furthermore, Ampler contends that it would have obtained this discovery in the arbitral forum.[4] Before the circuit court, Ampler noted that, according to its terms, the arbitration agreement was governed by American Arbitration Association Employment Dispute Resolution Rules. Pursuant to Rule 9 of those rules, "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute." Additionally, the arbitration agreement Ms. Bishop signed expressly permitted the parties to "make a reasonable request for copies of relevant documents from each other." Under these circumstances, Ampler's efforts to negotiate an acceptable protective order to receive "explosive discovery" that Ms. Bishop's counsel first offered, and its receipt of that discovery, which likely would be available in arbitration, do

[4] Before the circuit court, Ms. Bishop claimed, without any supporting facts or analysis, that Ampler Burgers obtained discovery that it "likely would not have otherwise obtained." Ms. Bishop does not repeat this assertion on appeal, and I find no support for it in the record.

not indicate by clear and convincing evidence that Ampler intentionally waived its right to arbitration.

Another ground for waiver relied on by the circuit court involved Ampler's cooperation with Ms. Bishop to enter an "Agreed Order for Substitution of Party." The purpose of this agreed order was to correct Ms. Bishop's complaint, which erroneously identified "Ampler Restaurant Group" as the corporate defendant when the correct entity was Ampler Burgers Ohio, LLC. As Ampler aptly contends, it could not have sought to compel arbitration until it was a properly named party to the litigation, and it filed its motion to compel just over two months after it was properly substituted pursuant to the agreed order. Thus, this conduct does not reflect Ampler's intent to forego arbitration.

Similarly, the circuit court incorrectly concluded that Ampler demonstrated its intent to litigate in lieu of arbitration because it "demanded a jury trial." Factually, the circuit court relied on Ampler's "Civil Case Information Statement," on which it checked a box indicating "Yes" after the phrase "Jury Demand." Significantly, Ms. Bishop's complaint plainly demanded a jury trial. Thus, Ampler checking "yes" in response to the phrase "Jury Demand" could easily have been nothing more than an acknowledgement that Ms. Bishop had already demanded a jury trial. Ampler's failure to demand a jury trial in its answer or to make a separate written jury demand as required by our Rules of Civil Procedure support this interpretation. *See* W. Va. R. Civ. P. 38 (requiring that a jury

demand be in writing and served on other parties). *See also* Louis J. Palmer, Jr. & Robin Jean Davis, *Litigation Handbook On West Virginia Rules of Civil Procedure*, § 38(b)[2], at 1039 (5th ed. 2017) ("A demand for trial by jury . . . must be in writing. . . . A party may demand a trial by jury in his/her pleading. As a general matter, courts hold that marking the jury box on a civil cover sheet does not satisfy the rule. The demand must be served upon the other party or parties." (footnotes omitted)).

Other conduct relied upon by the circuit court and Ms. Bishop to demonstrate implied waiver includes Ampler obtaining extensions to answer the complaint, participating in scheduling conferences, and communicating through emails and telephone calls. However, these routine matters do not involve litigation of any issues on the merits or an affirmative request for relief. *See Schwebke*, 96 F.4th at 976 ("[I]n most of our cases finding arbitration waiver, there has been an affirmative request for relief, such as the filing of a dispositive motion."); *Fox v. Experian Info. Sols., Inc.*, No. 1-22-CV-01197-DAD-DB, 2024 WL 755804, at *5 (E.D. Cal. Feb. 23, 2024) (finding certain filings in a case did not indicate waiver because "none sought judicial resolution of plaintiff's claims on the merits and together they do not present 'a clear narrative of . . . strategic choice to engage the judiciary for resolution of the . . . claims rather than to obtain a resolution from an arbitrator'").

In this case, Ampler Burgers did not seek to conceal the existence of the arbitration agreement. It first raised the possible existence of a governing arbitration agreement as an affirmative defense in its answer to Ms. Bishop's complaint. Thereafter, Ampler produced the arbitration agreement in its response to Ms. Bishop's initial discovery request. As explained above, when properly viewed in light of all the circumstances, the conduct relied upon by the circuit court falls short of demonstrating implied waiver by clear and convincing evidence. "The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Hoffman*, 133 W. Va. at 713, 57 S.E.2d at 735. *Accord Potesta*, 202 W. Va. at 315, 504 S.E.2d at 142; *Baker v. Baker*, 793 F. App'x 181, 185 (4th Cir. 2019). *See also Mundy v. Arcuri*, 165 W. Va. 128, 131, 267 S.E.2d 454, 457 (1980) ("One who asserts waiver . . . has the burden of proving it."). Ms. Bishop failed to meet her burden to establish Ampler's implied waiver by clear and convincing evidence. Accordingly, I respectfully concur because I would have conducted a different waiver analysis than that employed by the majority.