

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

No. 34865

**HALLIBURTON ENERGY
SERVICES, INC.**

Appellant,

v.

**Civil Action No.: 07-C-49M
Honorable John T. Madden**

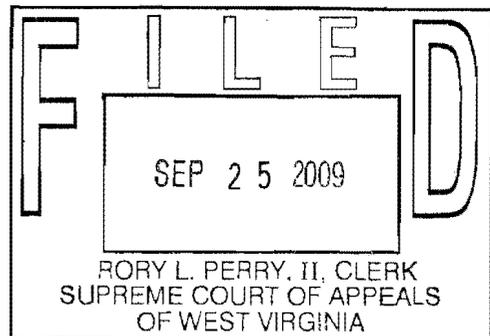
**TEXAS KEYSTONE, INC. and
FALCON DRILLING, LLC**

Appellee.

**RESPONSE OF TEXAS KEYSTONE, INC TO THE APPEAL OF
HALLIBURTON ENERGY SERVICES, INC. FROM RULINGS OF THE
CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA**

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**RESPONSE OF TEXAS KEYSTONE, INC TO THE
APPEAL OF HALLIBURTON ENERGY SERVICES, INC.
FROM RULINGS OF THE
CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA**

Comes now the Appellee herein, Texas Keystone, Inc., (hereinafter "Texas Keystone") by counsel Scott L. Summers, Esquire and the law firm of Offutt Nord, PLLC, pursuant to the West Virginia Rules of Appellate Procedure and respectfully files this Response to the Appeal filed on behalf of Halliburton Energy Services, Inc. (hereinafter "Halliburton").

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Halliburton's appeal to the Supreme Court of Appeals of West Virginia is taken from an Order of the circuit court of Tyler County, West Virginia, entered on October 29, 2008 and Supplemental Order entered on February 6, 2009. (Appellate Record pages 198-207 and 233-236. hereinafter "App. Rec. pgs. ___.") Said Orders granted Appellee Texas Keystone, Inc's motion to dismiss the cross claim filed by Halliburton against Texas Keystone for contribution and indemnification.

The circuit court held that Halliburton's claim against Texas Keystone for indemnification was subject to arbitration. Therefore, the circuit court dismissed Halliburton's cross claim for indemnification against Texas Keystone in favor of arbitration.

With regard to Halliburton's cross claim against Texas Keystone for contribution, the circuit court held that "Halliburton's cross-claim for contribution against Texas Keystone is dismissed in accordance with the West Virginia Supreme Court of Appeals' holding in Charleston Area Medical Center, Inc. v. Parke Davis." (App. Rec. pg. 235)

II. STATEMENT OF RELEVANT FACTS

The Plaintiff below, Heather Ruckdeschel, Administratrix of the Estate of Thomas G. Miller, Jr., brought suit against Falcon Drilling Company, L.L.C., Texas Keystone, Inc. and Halliburton Energy Services, Inc. concerning an accident which occurred on October 19, 2005 at the Wiley #8 well site in Tyler County, West Virginia. The Plaintiff alleged that the decedent, Thomas G. Miller, Jr., was working at the site cleaning a ditch leading from the well head to the adjacent sediment pit when an explosion and fire occurred which ultimately killed Mr. Miller. (See Plaintiff's Amended Complaint. App. Rec. pgs. 1-6)

Halliburton filed a cross claim against Texas Keystone alleging contractual indemnification and contribution claims. (App. Rec. pgs. 70-83) Texas Keystone then filed a motion to dismiss the cross claims asserted by Halliburton against Texas Keystone. (App. Rec. pgs. 84-87) Subsequent to the filing of Halliburton's cross claim against Texas Keystone, Halliburton entered into settlement negotiations with the Plaintiff. Neither Texas Keystone nor Falcon Drilling were aware of, or invited to participate in, the settlement negotiations. Through those negotiations, Halliburton reached a settlement with Plaintiff.

Halliburton then began pursuing its indemnity claim against Texas Keystone for the amount paid by Halliburton in settlement with Plaintiff. The sole basis for Halliburton's indemnity claim against Texas Keystone is a Halliburton work order which was signed by an employee of Falcon Drilling (Paul Gelles) who had no authority to bind Texas Keystone through any contract or otherwise.

The work order through which Halliburton is attempting to assert its indemnity claim also contains a provision which requires all disputes to be settled through arbitration. It is Texas

Keystone's position that it is not bound by the terms of the work order in light of the fact that the work order was never executed by Texas Keystone. It is also Texas Keystone's position that whether this indemnity provision is enforceable against Texas Keystone must be litigated through arbitration pursuant to the clear language of the work order which was drafted by Halliburton.

By order entered October 29, 2008, the Circuit Court of Tyler County agreed with Texas Keystone's analysis of the issues and dismissed Halliburton's cross claim against Texas Keystone "upon the basis that the claim is subject to arbitration...." (App. Rec. pg. 206)

Halliburton then began asserting that its cross claim against Texas Keystone for contribution was still alive, despite the fact that Halliburton's cross claim had been dismissed in its entirety by the circuit court's October 29, 2008 Order. Halliburton filed a Motion for Clarification asking the circuit court to clarify the October 29 Order and find that Halliburton's cross claim for contribution against Texas Keystone was still alive. (App. Rec. pgs. 208-213) By Supplemental Order entered on February 6, 2009, the circuit court found that the October 29, 2008 Order "was meant to encompass both Halliburton's claim for indemnification and contribution" and ordered that the cross claim for contribution was "dismissed in accordance with the West Virginia Supreme Court of Appeals holding in Charleston Area Medical Center, Inc., v. Parke Davis." (App. Rec. pg. 235)

III. POINTS AND AUTHORITIES

CASES

American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996)

Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 52 S.Ct. 230, 76 L.Ed. 416 (1932)

Board of Education of the County of Berkeley v. W. Hartley Miller, Inc., 236 S.E.2d 439 (W.Va. 1977)

Board of Education of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W.Va. 1990)

Charleston Area Medical Center, Inc. v. Parke Davis, 614 S.E.2d 15 (W.Va. 2005)

Correct Piping Co. v. City of Elkins, 308 F.Supp. 431 (N.D.W.Va.1970)

Crawford v. Taylor, 75 S.E.2d 370 (W.Va.1953)

Dunbar Fraternal Order of Police v. City of Dunbar, 624 S.E.2d 586 (W.Va. 2005)

McGraw v. American Tobacco Company, et. al., 681 S.E.2d 96 (W.Va. 2009)

Nisbet v. Watson, 251 S.E.2d 774 (W.Va., 1979)

Sitzes v. Anchor Motor Freight, 289 S.E.2d 679, 688 (W.Va. 1982)

State Ex Rel. Barden and Robeson Corporation v. Hill, 539 S.E.2d 106 (W.Va. 2000)

State Ex Rel. City Holding Company v. Kaufman, 609 S.E.2d 855 (W.Va. 2004)

State ex rel. Dunlap v. Berger, 567 S.E.2d 265 (W.Va. 2002)

State Ex Rel. Erik P. Wells v. Matish, 600 S.E.2d 583 (W.Va. 2004)

Stipeich v. Insurance Co., 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895 (1928)

Stone v. National Surety Corporation, 125 S.E.2d 618 (W.Va. 1962)

Sydenstricker v. Unipunch Products, In et al., 288 S.E.2d 511 (W.Va. 1982)

Vaughan v. Greater Huntington Park and Recreation Dist., 678 S.E.2d 316, 321 (W.Va. 2009)

Wachovia Bank, N.A. v. Schmidt, 445 F.3d 762 (2006)

OTHER AUTHORITY

Rule 12(a)(2) and (3) of the West Virginia Rules of Civil Procedure

Rule 8(e)(2) of the West Virginia Rules of Civil Procedure

IV. STANDARD OF REVIEW

Halliburton asserts in its brief that the proper standard of review for this matter is *de novo* in so much as the issue involves a question of law arising from a motion to dismiss. As to the issue surrounding the dismissal of Halliburton's contribution claim, Texas Keystone agrees that the standard of review is *de novo*.

However, as to the dismissal of Halliburton's indemnity claim, Texas Keystone submits that a different standard is applicable. While it is true that the dismissal of the indemnification claim arose out of a motion to dismiss, the end result was an order compelling arbitration. As such, this matter should have been brought before this Court through a Writ of Prohibition seeking an order from this Court prohibiting the circuit court of Tyler County from compelling arbitration. In so much as Halliburton has filed a direct appeal, rather than a Writ of Prohibition with regard to the arbitration issue, Halliburton's appeal of this issue must be dismissed.

In State ex rel. Saylor v. Wilkes, 613 S.E.2d 914, 920 (W.Va. 2005) this Court stated, "[w]e have acknowledged that a petition for a writ of prohibition is an appropriate method by which to obtain review by this Court of a circuit court's decision to compel arbitration." *citing* State ex rel. Dunlap v. Berger, 567 S.E.2d 265, 271 (W.Va. 2002). The Court, in Saylor, explained, "[a]s it is an extraordinary remedy, '[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.' Syl. Pt. 1, Crawford v. Taylor, 75 S.E.2d 370 (W.Va. 1953)."

This Court has recently clarified its holdings in this regard. In McGraw v. American Tobacco Company, et. al., 681 S.E.2d 96 (W.Va. 2009), this Court, in Syllabus Point 1, held:

In order to clarify any uncertainty which may have existed in our law, we now hold that an order compelling arbitration is not subject to direct appellate review prior to the dismissal of the circuit court action unless the order compelling arbitration otherwise complies with the requirements of West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure. A party seeking this Court's review of a circuit court order compelling arbitration prior to the entry of a final order which complies with the requirements of West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure must do so in an original jurisdiction proceeding seeking a writ of prohibition.

The circuit court's October 29, 2008 Order contains no language that it is a final order pursuant to West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure. The October 29, 2008 Order merely states "[t]his is a Final Order as to the Cross Claim of Halliburton and Texas, and therefore may immediately be appealed." (App. Rec. pg. 207)¹ The circuit court's Supplemental Order entered on February 6, 2009 does contain the Rule 54(b) language. Specifically, "It is accordingly, ORDERED that, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court makes an express determination that, as to the previous order of this Court, there is no just reason for delay and finds for the Defendant Texas Keystone, Inc., as to its Motion to Dismiss the Cross-Claim of Halliburton Energy Services." (App. Rec. pg. 234). Although the Orders appealed from in this case state that they are final orders, simply stating so, is not enough. As this Court has recently stated, "To reiterate, although both orders on appeal declared the trial court's intention that they were 'final and appealable,' such indication by itself does not satisfy the requirements of finality." Vaughan v. Greater Huntington Park and Recreation Dist. 678 S.E.2d 316, 321 (W.Va. 2009). Both Orders

1. The Appellee does acknowledge that, if this Court finds that the Orders of the Circuit Court of Tyler County which are at issue herein are final appealable Orders which are subject to direct appeal rather than via a Writ of Prohibition, then the appropriate standard of review is *de novo*.

at issue in the Vaughan case contained the statement, "The Court further finds that there is no just reason for delay. Therefore, this is a final and appealable Order of this Court." The Court, in Vaughan, held that, "[s]tanding alone, this statement does not satisfy the elements of a final judgment making an order ripe for appeal." Id. at 321.

In Vaughan, the Court cited to Syllabus Point 3 of James M.B. v. Carolyn M., 456 S.E.2d 16 (W.Va. 1995) which,

recognizes a statutory basis for a rule of finality which limits appellate review to final judgments of a lower court:

Under W.Va. Code, 58-5-1(1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

Id. at 320.

With specific reference to orders compelling arbitration, this Court, in McGraw, held:

Where a circuit court directs a matter be arbitrated, but does not dismiss the matter from the circuit court's docket, the order is not final in reality nor effect because there may still be issues needing the attention of the circuit court such as enforcing the arbitration decision or determining the procedural propriety of the arbitration proceedings. (internal citations omitted) Without a final order, this court does not have appellate jurisdiction. Thus our review of a circuit court's order compelling arbitration is limited to original jurisdiction proceedings.

Id. at 106.²

2. In the context of this discussion in the McGraw opinion, the Court recognized, in footnote 10, that:

Several courts have found that orders compelling arbitration are not final, appealable orders. *See, e.g., Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353, 354 (1988) (order compelling arbitration not appealable "did not in effect determine the action or discontinue it. The matter

In its brief, Halliburton itself argues that this matter is not fully resolved in the Circuit Court of Tyler County. "It is entirely plausible that an arbitration panel would remand this matter back to the circuit court for an appropriation of damages between Texas Keystone and Falcon, based upon Halliburton's cross-claim against both Texas Keystone and Falcon." (See footnote 14 of Halliburton's brief on appeal.)³

The Circuit Court of Tyler County has also recognized that it may still have work to do in relation to this civil action. On June 2, 2009, the Circuit Court of Tyler County entered an "Order Vacating Court's Previous Scheduling Order."⁴ In the Order, the Circuit Court states:

In consideration of the Plaintiff's settlement of their claims with Texas Keystone and Falcon Drilling at hearing on May 4, 2009, and in further consideration of the Petition for Appeal filed by Halliburton Energy Services in response to this Court's previous ruling on its cross-claim against Texas Keystone, this Court hereby finds that the previously set Scheduling Order in this matter shall be vacated. There are currently issues of fact and law outstanding between Halliburton Energy Services, Texas

has merely been referred to arbitration and the appellant can obtain review of the arbitration decision and raise the very question presented here, whether the trial court was right in referring the case to arbitration."); *Muao v. Grosvenor Properties, Ltd.*, 99 Cal.App.4th 1085, 122 Cal.Rptr.2d 131, 134-5 (2002) (order compelling arbitration not appealable until such time as judgment has been entered on the arbitration award); *Wesley Retirement Services, Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 28 (Iowa 1999) (order compelling arbitration is not one finally adjudicating rights of parties on the merits but is simply an initial step in obtaining a final adjudication.)

3. As is discussed later in this brief, the issue of Halliburton's cross claim for contribution against both Texas Keystone and Falcon Drilling is moot. Halliburton's contribution claims against Texas Keystone and Falcon Drilling were extinguished as a result of Halliburton's early settlement with the Plaintiff. If not at that point, then Halliburton's cross claims for contribution against Texas Keystone and Falcon Drilling were certainly extinguished when Texas Keystone and Falcon Drilling later entered into a settlement with Plaintiff.

4. It is important to note that this Order was drafted and submitted to the Court by Halliburton's counsel.

Keystone, Inc and Falcon Drilling, L.L.C., and as such further proceedings in this matter will be necessary. Furthermore, a trial date in this matter is premature due to the status of the claims between the respective parties. The Court will contact the parties at a later date to set further proceedings in this matter and set a new trial calendar.

In light of the foregoing, it is clear that the Order referring Halliburton's indemnity claim to arbitration is not a final appealable Order as contemplated by West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure. Therefore, the only avenue for Halliburton to contest the referral of its indemnity claim against Texas Keystone to arbitration is through a Writ of Prohibition, not a direct appeal. Therefore, Halliburton's direct appeal of the referral of this matter to arbitration must be dismissed as improperly pled and filed.

Halliburton's argument does not support the relief it seeks under the appropriate standard of review. Therefore, this Court should affirm the rulings of the circuit court of Tyler County.

V. DISCUSSION OF LAW AND ISSUES

1. The Circuit Court Did Not Make a Specific Finding and Order That the Work Order Constituted a Binding Contract.

Halliburton argues that it is entitled to indemnity from Texas Keystone, Inc. by virtue of a work order that was signed by a person who was not an employee of Texas Keystone, nor an agent of Texas Keystone. Texas Keystone, Inc. does not owe indemnification to Halliburton due to the fact that the work order is not enforceable.

At the outset, it is important to note that Texas Keystone, Inc. was not asking the circuit court of Tyler County to determine whether there exists an enforceable contract between Texas Keystone, Inc. and Halliburton Energy Services vis-a-vis the work order. Instead, Texas Keystone was asking the circuit court to enforce the arbitration provision contained in the work

order. Whether the work order is binding and the indemnification provision is enforceable are the issues that must be determined through arbitration.

In footnote 15 of Halliburton's brief, Halliburton asserts that "The issue of whether a binding contract was formed, due to the signature of a Falcon employees being placed on the work order was fully briefed by the parties." This is simply incorrect. In fact, the opposite is true. In the *Reply of Texas Keystone, Inc. to Supplemental Brief of Halliburton Energy Services Regarding Texas Keystone, Inc.'s Previously Filed Motion to Dismiss Cross-Claim*, (App. Rec. pg. 188) Texas Keystone specifically states,

Halliburton's brief devotes several pages to discussions of whether the indemnity provision is enforceable. Since that is the issue that must be decided through arbitration, Texas Keystone will not address the enforceability of the indemnity provision herein. If the Court determines that this matter is not subject to arbitration, Texas Keystone will address the validity of the indemnification provision once discovery has been completed and the issue is ripe for determination.

Further, in footnote 1 of that Reply, Texas Keystone states,

If the Court is inclined to deny Texas Keystone's motion to dismiss Halliburton's cross-claim and then address whether the indemnification provision is enforceable, a period of discovery will be necessary in order to develop the facts upon which the parties base their respective positions. The record is insufficient for the Court to make a determination as to the enforceability of the indemnification provision at this time.

Based upon its motion to dismiss and referral to arbitration, Texas Keystone has consistently objected to any and all discovery solely related to the issue of whether the work order created a binding contract between Halliburton and Texas Keystone. Therefore, it would be impossible to fully brief the issue of "whether a binding contract was formed, due to the

signature of a Falcon employees being placed on the work order.” Ironically, the only discovery to date on this issue is completely contrary to Halliburton’s assertion.

The only direct discovery on this issue came through the deposition testimony of Falcon Drilling’s Chief Operating Officer, Mr. Larry Winckler. Mr. Winckler is Paul Gelles’ supervisor. Paul Gelles is the Falcon Drilling employee who signed the Halliburton work order at issue.

Questioning by Halliburton’s counsel:

Q. Do you believe Mr. Gelles had authority to sign the work order with Halliburton in this instance?

A. I wouldn’t know who he would have gotten the authority from.

Q. But do you think he had the authority?

A. No.

Questioning by Texas Keystone’s counsel:

Q. In October of 2005, was Paul Gelles an employee of Falcon Drilling?

A. Yes, he was.

Q. Was he an employee of Texas Keystone –

A. No, he was –

Q. – to your knowledge?

A. No, he was not.

Q. Did you ever tell Paul Gelles that he had authority to execute a document on behalf of Texas Keystone?

A. Absolutely not.

Q. Okay. Would you expect Paul Gelles to have authority to execute a document on behalf of Texas Keystone?

A. Absolutely not.

Q. Has anyone from Texas Keystone ever said that Paul Gelles has authority to execute a document on their behalf?

A. Not to my knowledge.

(App. Rec. pg. 237- Deposition Transcript of Larry D. Winckler, pages 103, 106 and 107.)

Further, in an Affidavit from Robert Kozel, the President and Chief Executive Officer of Texas Keystone, Inc. Mr. Kozel testifies as follows:

1. I am the President and Chief Executive Officer of Texas Keystone, Inc.
2. Paul Gellis is not and has never been an employee of Texas Keystone, Inc.
3. Paul Gellis does not have and has never had any authority to sign any contract on behalf of Texas Keystone, Inc. or to do any act which binds Texas Keystone, Inc. in any manner.
4. Specifically, Mr Gellis did not have the authority to bind or sign, on behalf of Texas Keystone, Inc., the work order upon which Halliburton Energy Services, Inc. is attempting to rely in the Ruckdeschel, et al. v. Falcon Drilling Company, LLC. case, bearing civil action number 07-C-49 in the Circuit Court of Tyler County, West Virginia.
5. All OSHA citations originally issued against Texas Keystone, Inc. as a result of the Wiley No. 8 well accident were completely withdrawn by OSHA with Texas Keystone, Inc. paying no fines or assessments.

(App. Rec. pgs. 143-144 - Exhibit A to *Reply of Texas Keystone, Inc. In Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc.*)

Halliburton asserts numerous times in its brief that the circuit court of Tyler County found that a valid contract existed between Texas Keystone and Halliburton. Texas Keystone submits that Halliburton is placing a generous spin on the rulings of the circuit court. The pertinent language of the October 29, 2008 Order at issue is as follows:

Applying the facts provided in the respective briefs by the parties concerning the execution of the work order, the Court feels the work order is valid. However, perhaps more discovery would be needed on this issue for the Court to decide that issue upon summary judgment. It may be the case that even after discovery is concluded, certain issues of fact remain for jury determination before the Court could find as a matter of law that the work order constituted a binding agreement between Texas and Halliburton. (App. Rec. pg 205)

* * * * *

This Court has earlier herein opined that from the brief amount of discussion submitted by the parties surrounding the execution of the work order, that both parties were bound.(App. Rec. pg 206)

The circuit court never found, as a matter of law, that the work order constituted a valid contract between the parties. Instead, the circuit Judge merely stated that he “feels the work order is valid.” In fact, the circuit Judge acknowledged that,

perhaps more discovery would be needed on this issue for the Court to decide that issue upon summary judgment. It may be the case that even after discovery is concluded, certain issues of fact remain for jury determination before the Court could find as a matter of law that the work order constituted a binding agreement between Texas and Halliburton.(App. Rec. pg 205)

This language is a far cry from a judicial finding with the import that Halliburton seeks to apply. Instead, it is an acknowledgment by the circuit Judge that he simply does not have enough information to make the finding. Further, even if he did have more information, there could very well still be a question of fact for Jury determination.

2. The Circuit Court Did Not Commit Error in Dismissing Halliburton’s Indemnity Claim and Compelling Arbitration of that Claim

Halliburton’s argument with regard to its second assignment of error misses the thrust of the issue decided by the circuit court. As it did before the circuit court, Halliburton focuses on whether the indemnity provision in the work order is enforceable. The circuit court

understood that Texas Keystone was not asking the circuit court to determine whether there exists an enforceable contract between Texas Keystone, Inc. and Halliburton Energy Services for indemnification vis-a-vis the work order. Instead, Texas Keystone was asking the circuit court to enforce the arbitration provision contained in the work order. Whether work order constitutes a valid contract and the indemnification provision is enforceable are the very issues that must be determined through arbitration.

The circuit court fully understood the issue it was deciding. On page 5 of the October 29, 2008 Order, the circuit court states,

The issue before this Court is whether the Motion of Texas Keystone to Dismiss the Halliburton Cross Claim on the basis that the work order construction and application to this case should be decided by arbitration should be granted or denied. (App. Rec. pg 202)

In rendering its decision to compel arbitration in the matter, the circuit court followed the dictates of West Virginia law. This Court has made a clear statement concerning the enforcement of arbitration provisions.

Therefore in West Virginia only if it appears from the four corners of a written contract or from the obvious nature of the contracting parties, or from the obvious nature of the activity covered by the contract, that the arbitration provision is so inconsistent with the other terms of the contract or so oppressive under the circumstances that it could not have been bargained for, should a court refuse to enforce the arbitration provision.

Board of Education of the County of Berkeley v. W. Hartley Miller, Inc., 236 S.E.2d 439, 447 (W.Va. 1977).

In fact, arbitration provisions are presumptively binding and specifically enforceable.

The end result of the rule which we enounce today is that all arbitration provisions in all contracts which indicate that the parties intended to arbitrate

their differences rather than litigate them are presumptively binding, and specifically enforceable.

Id. See also, State Ex Rel. Barden and Robeson Corporation v. Hill, 539 S.E.2d 106 (W.Va. 2000); State Ex Rel. Erik P. Wells v. Matish, 600 S.E.2d 583 (W.Va. 2004); State Ex Rel. City Holding Company v. Kaufman, 609 S.E.2d 855 (W.Va. 2004)

Halliburton had a hefty burden to overcome with the circuit court if it wished to avoid the arbitration requirements contained in a work order which it drafted. In the end, the result is unavoidable and the circuit court made the right decision. Halliburton's work order requires that the disputes over the validity of the work order and indemnity provision be resolved through arbitration.

Halliburton makes an additional assertion that, "If Texas Keystone had requested a provision in the contract at issue that would have predicated Halliburton's right to indemnification upon first proceeding to arbitration, they could have chosen to do so." This argument is completely without merit. The work order in question is a pre-printed form which was never presented to Texas Keystone for discussion or negotiation. Instead, it was presented to an employee of Falcon Drilling on the day of the accident in question, presumably under the threat that no work would be performed by Halliburton unless the work order was signed. It is disingenuous to imply that Texas Keystone was provided with an opportunity to negotiate the terms of a pre-printed form document.

The question under consideration by the circuit court was whether the motion of Texas Keystone to dismiss the Halliburton cross claim on the basis that the work order construction and application to this case should be decided by arbitration should be granted or denied. Based upon

the Order drafted by the circuit Judge and entered on October 29, 2008, it is clear the circuit court understood the issue before it and made an informed and legally correct ruling which should be affirmed in this appeal.

3. The Circuit Court Did Not Improperly Expand the Scope of the Arbitration Clause.

Halliburton unnecessarily spends considerable space in its brief arguing that the circuit court expanded the scope of the arbitration provision at issue. As is discussed below, that is not the case. The analysis is simple, straight forward and leads to one conclusion. The issue presented in Halliburton's indemnity claim arises out of Halliburton's performance of the contract. Under the clear unambiguous terms of the provision unilaterally drafted by Halliburton, whether Halliburton is entitled to indemnity for its alleged negligence in performing the work which is the subject of the work order, is a question for arbitration.

The arbitration provision at issue states as follows:

G. DISPUTE RESOLUTION - Customer and Halliburton agree that any dispute that may arise out of the performance of this contract shall be resolved by binding arbitration by a panel of three arbitrators under the rules of the American Arbitration Association. The arbitration will take place in Houston, TX.

Contrary to Halliburton's assertion, the controversy that has arisen between Halliburton and Texas Keystone necessarily "arises out of the performance of this contract."

Halliburton cites to the case of Wachovia Bank, N.A. v. Schmidt, 445 F.3d.762 (2006) to argue that the circuit court improperly extended the scope of the arbitration provision. As Halliburton acknowledges, the Wachovia decision points out that "an arbitration clause encompassing all disputes 'arising out of or relating to' a contract embraces 'every dispute

between the parties having a significant relationship to the contract regardless of the label attached to a dispute.” *Id.* at 767

Halliburton argues that the indemnity issue arises out of the assertion of a claim by a party who was not a party to the work order and that Halliburton’s “claim for indemnification was triggered by the filing of a suit by a third-party for personal injury.” (Brief at page 14) Halliburton also argues that, “If not for the filing of the wrongful death claim by the Plaintiffs, there is no dispute present between Texas Keystone and Halliburton.” (Brief at page 16)

An important fact that Halliburton does not state is that Plaintiff’s wrongful death claim alleges negligence on behalf of Halliburton. Such negligence is alleged to have occurred while Halliburton was performing the operations arising out of the work order. To follow Halliburton’s logic, but for the fact that Halliburton performed its work required in the work order negligently, there would be no wrongful death action and no dispute between Texas Keystone and Halliburton.

The “performance of the contract” was Halliburton’s work at the Wiley #8 well site. It is largely undisputed that the ignition source for the fire that claimed Mr. Miller’s life was the Halliburton truck. It is also clear that, due to the work being performed at the time of the fire, Halliburton was the sole defendant working with the well head.

In trying to distinguish the situation in the case at bar from the numerous decision of this Court upholding arbitration provisions, Halliburton argues that “[i]n the matter currently before the Court, the dispute between Halliburton and Texas Keystone was not a breach of contract action, nor any cause of action that stemmed from the performance of the contract between the parties.” (Brief at page 16) Further, Halliburton argues that “inquiry into the arbitration clause in the matter *sub judice* requires no examination of the actual terms of the contract between the

parties, as there has been no allegation by either Halliburton, nor Texas Keystone that the contract was not performed.” (Brief at page 19) Although never specifically called a breach of contract, as a practical matter, the dispute between Halliburton and Texas Keystone is a breach of contract issue. Halliburton asserts that Texas Keystone is contractually bound to indemnify it for the claims made by the plaintiff in this case. Texas Keystone has refused to accept the validity of the “contract” (work order) in general and specifically refused to accept the validity of the indemnity provision contained therein. Halliburton’s remedy is a breach of contract action.

There is no question that the underlying issues which gave rise to Halliburton’s indemnity claim arise out of the work performed pursuant to the work order. Halliburton asserts that the terms of this work order requires Texas Keystone to indemnify it. This assertion is based upon an indemnity provision in the work order which allegedly requires that performance. Texas Keystone disputes that it is required to perform under the work order as Halliburton asserts. Simply put, Texas Keystone disputes that it is required to perform a clause contained in the contract. The arbitration provision requires arbitration of “any dispute that may arise out of the performance of this contract.” This issue of indemnification, which Halliburton asserts arises out of this work order, must be decided through binding arbitration.

Although Halliburton relies on many federal cases to support its arguments, there is no need to look beyond the prior decisions of this Court. Syllabus Point 1 of Board of Education of the County of Berkeley v. Miller, 236 S.E.2d 439 (W.Va. 1977) holds:

Where parties to a contract agree to arbitrate either all disputes, or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, such provision is binding, and specifically enforceable, and all causes of action arising under the contract which by the contract terms are

made arbitrable are merged, in the absence of fraud, into the award of the arbitrators.

As a result, assuming, *arguendo*, that the work order constitutes a valid contract, the arbitration provision must be enforceable and the disputes which arise out of the performance of the contract must be resolved by an arbitration panel in Houston, Texas.

Halliburton attempts to use this Court's decision in State Ex Rel. City Holding Company v. Kaufman, 609 S.E.2d 855 (W.Va. 2004) to get around the clear statement of Syllabus Point 1 of Board of Education of the County of Berkeley v. Miller, by arguing that the arbitration language at issue contains a "carve out" provision which does not encompass the indemnity provision. Contrary to the position of Halliburton, the arbitration language of the work order at issue is, on its face, "all-encompassing." The arbitration provision at issue states as follows:

G. DISPUTE RESOLUTION - Customer and Halliburton agree that any dispute that may arise out of the performance of this contract shall be resolved by binding arbitration by a panel of three arbitrators under the rules of the American Arbitration Association. The arbitration will take place in Houston, TX.

The arbitration provision requires arbitration of "**any dispute** that may arise out of the performance of this contract shall be resolved by binding arbitration"

As Halliburton points out on page 22 of its brief, "It is well-settled in West Virginia that, 'specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given to them consistent with the whole contract' Dunbar Fraternal Order of Police v. City of Dunbar, 218 W.Va. 239, 244, 624 S.E.2d 586, 591 (2005)."

Any dispute, means any dispute. It does not mean, any dispute except a dispute over indemnification.

In the context of the “carve out” discussion, Halliburton again argues that, if Texas Keystone wanted particular language “a drafting that utilized that language could have been required by Texas Keystone.” (Brief at page 22)

As is stated earlier, Texas Keystone was not afforded an opportunity to discuss or even review the work order at issue, much less negotiate its terms. The work order in question is a pre-printed form which was never presented to Texas Keystone for discussion or negotiation. Instead, it was presented to an employee of Falcon Drilling on the day of the accident in question, presumably under the threat that no work would be performed by Halliburton unless the work order was signed. It is disingenuous to imply that Texas Keystone was provided with an opportunity to negotiate the terms of a pre-printed form document.

Halliburton cites to the United States Supreme Court’s opinion in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) for the proposition that “the Court has retreated to a more narrow reading of arbitration clauses.” (Brief at page 23). In support of this proposition, Halliburton quotes the Howsam opinion as follows:

[w]hile the United States Supreme Court has long recognized and enforced a liberal federal policy favoring arbitration agreements, there is a policy exception, pursuant to which there is a presumption, or interpretive rule, that the question of whether the parties have submitted a particular dispute to arbitration—that is, a question of arbitrability—is an issue for judicial determination, unless the parties clearly and unmistakably provide otherwise. For such purposes, the phrase ‘question of arbitrability’ has far more limited scope than encompassing any potentially dispositive gateway question. In regard to particular issues, a gateway dispute about whether the parties are bound by a given arbitrability clause raises a question for a court to decide. Similarly, a disagreement whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for a court to decide. However, procedural questions which grow out of a dispute and bear on its final disposition are presumptively not for a judge, but for an arbitrator, to decide. Moreover, the presumption is that an arbitrator should

decide allegations of waiver, delay, or a like defense to arbitrability. (Original internal citations were omitted from Halliburton's quote of the opinion)

Appellee submits that this is exactly what occurred in the case at bar. A dispute arose over whether an issue was arbitrable. In accordance with the United States Supreme Court's holding in Howsam, a dispute over "a question of arbitrability" is for judicial determination and "a gateway dispute about whether the parties are bound by a given arbitrability clause raises a question for a court to decide." In the case at bar, the dispute arose, and the circuit court of Tyler County made a judicial determination and decided that the issue before it was subject to arbitration. The only distinction is that the case at bar does not involve "a concededly binding contract." Whether the work order is binding is precisely what must be determined through arbitration.

Moreover, if there is any ambiguity as to the meaning of "any dispute that may arise out of the performance of this contract," then such ambiguity must be resolved in favor of Texas Keystone. The work order was drafted by Halliburton. It is "well settled that any ambiguity in a contract must be resolved against the party who prepared it." Nisbet v. Watson, 251 S.E.2d 774, 780 (W.Va., 1979) *citing* Stone v. National Surety Corporation, 125 S.E.2d 618 (W.Va. 1962); Bergholm v. Peoria Life Ins. Co., 284 U.S. 489, 52 S.Ct. 230, 76 L.Ed. 416 (1932). Stipcich v. Insurance Co., 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895 (1928); Correct Piping Co. v. City of Elkins, 308 F.Supp. 431 (N.D.W.Va.1970).

The Circuit Court of Tyler County did not "improperly expand the scope" of the arbitration clause at issue. Whether Halliburton is entitled to indemnity is a dispute that arises out

of the performance of one of the terms of the contract. Therefore, this issue must be decided through arbitration. The ruling of the circuit court in this regard must be affirmed.⁵

4. The Circuit Court was Correct in Finding that Texas Keystone Did Not Waive its Right to Arbitration.

The circuit court was correct in finding that Texas Keystone did not waive its right to arbitration with regard to whether Halliburton is entitled to indemnification under the work order.⁶

5. In footnote 14 of Halliburton's brief, Halliburton attempts to place the burden on Texas Keystone to "formally" submit this matter to arbitration. Texas Keystone has done all it needs to do in relation to Halliburton's cross-claim for indemnification.

Halliburton made a demand to Texas Keystone for indemnification based upon the language contained in the work order. Texas Keystone denied the demand for indemnification and affirmatively stated that it was not bound by the indemnity provision in the work order. Texas Keystone then filed a motion to dismiss Halliburton's cross claim for indemnification on the basis the work order was not valid and any determination of the validity of the work order must be determined through arbitration. Texas Keystone did not, and need not, ask that the matter be arbitrated. All Texas Keystone is required to do is point out that Halliburton is pursuing its claim in the wrong forum. The circuit court agreed and found that the dispute must be settled in arbitration.

Simply put, the ball is in Halliburton's court. Based upon the proper rulings of the circuit court in this matter, if Halliburton wishes to pursue its claim for indemnification against Texas Keystone, it must do so via arbitration. Texas Keystone has no obligation to begin that process. To assert otherwise defies logic. By way analogy, at the beginning of this case, Texas Keystone and Falcon Drilling filed a motion to dismiss plaintiff's Complaint on the basis of *Forum Non Conveniens* arguing that the appropriate forum was in Pennsylvania, not West Virginia. Texas Keystone and Falcon Drilling did not prevail on that motion. However, if the Court would have dismissed plaintiff's Complaint, Texas Keystone would not have been required to file a suit in the appropriate jurisdiction to ensure that plaintiff could litigate the claims. What Halliburton suggests is no different. Texas Keystone is not required to institute a new proceeding so Halliburton can litigate its claims in the appropriate forum. If Halliburton wishes to pursue its claim in the appropriate forum, it must institute the proceedings.

6. Interestingly, the United States Supreme Court's opinion in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) specifically states that "Moreover, the presumption is that an arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." Id. at 80 (This pronouncement is also included in the quote by Halliburton on page 26 of its brief.)

Halliburton's reliance on Rule 8(c) of the West Virginia Rules of Civil Procedure to assert a waiver by Texas Keystone is misplaced. In lieu of filing an Answer to Halliburton's cross claim, Texas Keystone filed a Motion to Dismiss pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure.

If there is a motion to dismiss filed, Rule 12(a)(3) of the West Virginia Rules of Civil Procedure alters the period of time in which an answer to a cross claim must be filed. West Virginia Rules of Civil Procedure, Rule 12(a)(2) and (3)(A) state as follows:

(2) a party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The Plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service and the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) Unless a different time is fixed by the order of the court. - The service of a motion permitted under this rule alters these periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; ...

In accordance with Rule 12(a)(3)(A) of the West Virginia Rules of Civil Procedure, the pleading of affirmative defenses required by Rule 8(c) of the West Virginia Rules of Civil Procedure does not become due until such time as the Court denies the motion to dismiss. "[I]f the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action." Rule 12 (b)(3)(A)

Therefore, the West Virginia Rules of Civil Procedure do not require Texas Keystone to formally assert its affirmative defense of arbitration via an Answer to Halliburton's cross claim unless and until the circuit court denies Texas Keystone's motion to dismiss Halliburton's cross

claim. In fact, the circuit court dismissed Halliburton's cross-claim against Texas Keystone, therefore, Texas Keystone was never required to file an answer to the cross-claim.

In addition, there was no undue delay in Texas Keystone's assertion of its right to arbitration. Texas Keystone asserted its right to arbitration in its "Reply of Texas Keystone, Inc. in Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc." which was filed on November 1, 2007. Therefore, Texas Keystone, Inc. asserted its right to arbitration a mere forty-eight (48) days after Halliburton filed its cross-claim against Texas Keystone. The circuit court correctly found that "no prejudice has been shown for the brief delay." (App. Rec. pg 205)

In its supplemental brief to the circuit court, Halliburton cited to the Fourth Circuit Court of Appeals' decision in American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88. The holding in the American Recovery case actually supports the ruling in favor of Texas Keystone. Although speaking to the "strong federal policy favoring arbitration," the Court, in American Recovery stated,⁷ "we will not lightly infer the circumstances constituting waiver. Our key inquiry is whether the party opposing the stay has suffered any actual prejudice." "[M]ere delay, without more, will not suffice to constitute waiver."

There can be no supportable argument that Halliburton was prejudiced by the passage of forty-eight (48) days between the time it filed its cross-claim and the time Texas Keystone asserted its right to arbitration.

7. Citing Maxum Foundations, Inc. v. Salus Corp., 779 F.2d. 894 (4th Cir. 1985)

There is also an interesting bit of dicta in the American Recovery decision at page 96 that is very similar to the facts of this case and the discussion contained above in this section.⁸

By the time it propounded its first discovery requests on November 22, ARC had known for nearly two weeks that CTI planned to pursue arbitration of the claims and also that *ARC had not yet filed its answer, the pleading where the affirmative defense of arbitration must be raised, see Fed.R.Civ.P. 8(c)* (providing that arbitration is required to be raised as an affirmative defense in the answer). Under these circumstances, we cannot find that CTI waived its right to arbitration. See Maxum Foundations, Inc., 779 F.2d at 982-83 (holding that defendant had not waived its right to arbitrate when it did not raise arbitration as an affirmative defense in its answer, it delayed three months after the complaint to file a motion to dismiss because of arbitrability, and it filed the motion to dismiss after discovery had been initiated in the action). (Emphasis Supplied)

Based upon the discussion above, it is clear that Halliburton's argument that Texas Keystone waived its right to arbitration has no merit. However, since Halliburton has spent considerable energy arguing that Texas Keystone presented two divergent paths of defense and was permitted to argue alternate theories of defense, Appellee will briefly address the same.

Rule 8(e)(2) of the West Virginia Rules of Civil Procedure provides:

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or both. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 8(e)(2) of the West Virginia Rules of Civil Procedure clearly permits the advancement of alternative and inconsistent defenses. Although Halliburton may take issue with

8. The time period between the making of the claim and the assertion of the right to arbitration in the American Recovery case is similar to the case at bar - September to November 1.

the results obtained by Texas Keystone in this matter, there is no issue with regard to the method by which those results were obtained.

The circuit court of Tyler County was correct in determining that Texas Keystone did not waive its right to assert arbitration. Therefore, the ruling of the circuit court of Tyler County must be affirmed.

5. The Circuit Court was Correct in Dismissing Halliburton's Common Law Contribution Against Texas Keystone, Inc.

Halliburton incorrectly argues that it is entitled to continue with a common law contribution claim against Texas Keystone, Inc. and Falcon Drilling in this action.

- a. Halliburton's argument over its contribution claims against Texas Keystone and Falcon Drilling have been rendered moot by Texas Keystone and Falcon Drilling's subsequent settlements with the plaintiff.**

As a preliminary and important note, subsequent to the filing of Halliburton's Petition for Appeal, both Texas Keystone and Falcon Drilling have settled the claims made against them by Plaintiff in this action. The circuit court found that the settlements were entered into in good faith and approved the same. (See "Order Approving Wrongful Death Settlements Between The Plaintiffs and Falcon Drilling Company, LLC and Texas Keystone, Inc." App. Rec. pgs. 239-244) The effect of the settlements of Texas Keystone and Falcon Drilling with the plaintiff renders Halliburton's position with regard to its cross claims against these defendants moot.

As discussed below, Halliburton's contribution claim against Texas Keystone and Falcon Drilling were extinguished long before Texas Keystone and Falcon Drilling settled with the plaintiff. Specifically, Halliburton's contribution claims were extinguished when Halliburton voluntarily entered into an early settlement with plaintiff. Although Halliburton argues that its

settlement with plaintiff did not extinguish its contribution claims against Texas Keystone and Falcon Drilling, Halliburton can take no issue with the fact that its contribution claims against Texas Keystone and Falcon Drilling were certainly extinguished when Texas Keystone and Falcon Drilling entered into a settlement with the Plaintiff.

It is well settled that “a party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution.” Syllabus Point 6, Board of Education of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796 (W.Va. 1990)

b. Halliburton’s cross claims against Texas Keystone and Falcon Drilling were extinguished when Halliburton voluntarily entered into an early settlement with Plaintiff.

This issue presents an important case of first impression for the Court. Therefore, although Halliburton’s cross-claims for contribution against Texas Keystone and Falcon Drilling were extinguished when Texas Keystone and Falcon Drilling entered into a settlement with the Plaintiff, Appellee will address the validity of Halliburton’s cross claims after Halliburton entered into a voluntary settlement with the plaintiff in late 2007.⁹

9. This is also an important issue with regard to Halliburton’s contribution claims against Falcon Drilling. Halliburton has taken the position that its claim for contribution is still alive despite the fact that Falcon Drilling has reached a settlement with the plaintiff. Subsequent to Falcon Drilling reaching a settlement with the plaintiff through mediation, but before the settlement was approved by the Court, Halliburton obtained a default judgement against Falcon Drilling. Halliburton argues that the default judgement permits it to pursue its contribution claims against Falcon Drilling despite the clear rule of law set forth by this court in Board of Education of McDowell County v. Zando, Martin & Milstead, Inc..

As discussed herein, Halliburton’s attempt to keep its contribution claim against Falcon Drilling alive via the default judgement is without merit. The default judgment was entered against Falcon Drilling because Falcon Drilling did not file an answer to Halliburton’s cross claim. The default judgment was entered in error. Procedurally Falcon Drilling was not required

This Court has explained that “[t]he right of contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is *forced* to pay more than his *pro-tanto* share of the obligation.” (emphasis supplied) Sydenstricker v. Unipunch Products, in et al., 288 S.E.2d 511, 516 (W.Va. 1982)

In Charleston Area Medical Center, Inc v. Parke Davis, 614 S.E.2d 15, 22 (W.Va. 2005) this Court recognized the significance of whether a party is “forced” to pay more than its *pro-tanto* share so as to trigger the right to contribution. In the Charleston Area Medical Center (CAMC) case, this Court addressed the issue as to whether a party who settles with a plaintiff pre-suit is entitled to seek contribution from entities who were not parties to the settlement negotiations and against whom the plaintiff had made no direct claims.

In the CAMC case, CAMC negotiated a settlement with the estate of a deceased infant. CAMC then filed a lawsuit against a prescription drug manufacturer and its parent company seeking contribution toward monies paid by CAMC in settlement. The case went to trial in the United States District Court for the Northern District of West Virginia and a Jury rendered a verdict in favor of CAMC. The drug manufacturer and its parent company appealed. The Fourth Circuit Court of Appeals certified the following question to the West Virginia Supreme Court:

Does the law of West Virginia allow a tortfeasor to negotiate and consummate a settlement with the injured party on behalf of itself, before any lawsuit is filed, which would benefit also another party claimed to be a second joint tortfeasor, and thereafter obtain a judgment against the second joint tortfeasor in an action for

to file an Answer to Halliburton’s cross claim for contribution. When Halliburton reached a settlement with plaintiff in late 2007 Halliburton’s cross claim for contribution was extinguished. There was no need for Falcon Drilling to then file an Answer to a non-existent claim. There is currently pending before the Circuit Court of Tyler County a motion to set aside the default judgment entered against Falcon Drilling.

contribution, although the second joint tortfeasor was not a party to, not aware of, and had no notice of the settlement.

Id., at 18. This Court ultimately decided that the Charleston Area Medical Center could not pursue its contribution claim.

The facts of the case at bar are slightly different than those in the CAMC case. In the case at bar, Plaintiff's suit named Halliburton, along with Texas Keystone and Falcon Drilling as Defendants. Therefore all relevant parties are before the circuit court in a single action. Also, Halliburton's settlement was negotiated after suit had been filed. However, like the facts in the CAMC case, neither Texas Keystone, nor Falcon Drilling had any knowledge of the settlement negotiations occurring between Plaintiff and Halliburton, thereby foreclosing the opportunity for Texas Keystone and Falcon Drilling to participate in those settlement negotiations.

Although the procedural posture of the CAMC case is different from the case at bar, the rationale of this Court in reaching its decision applies equally to this case. The operative facts for the discussion at hand, and the Court's consideration, are that both CAMC and Halliburton entered into a **voluntary** settlement with the Plaintiffs in their respective cases.

As discussed above, this Court, in Sydenstricker, held that the "right of contribution arises when ... one party is *forced* to pay more than his *pro-tanto* share." In denying Charleston Area Medical Center its claim for contribution, this Court held:

Moreover, the underlying basis for the contribution claims asserted by CAMC against Defendants arose out of the *voluntary* payment by CAMC of an amount reached by means of a settlement agreement. In characterizing CAMC's payment as voluntary, as opposed to compulsory, we do not suggest that CAMC was wrong to settle with the child's estate. We choose this designation based on our need to determine whether inchoate rights of contribution can be invoked under the facts presented by the underlying case. *But see Merchants Bank of New York v. Credit Suisse Bank*, 585 F.Supp. 304, 309-10 (S.D.N.Y.1984) (holding that settling party

cannot seek contribution from other tortfeasor on rationale that no debt can be implied from voluntary payment). (footnote omitted) (emphasis in original)

Id. at 23. This Court went on to hold that, “[g]iven that CAMC acted of its own salutary accord in deciding to settle the claims raised by the child's estate, **it cannot claim to have been ‘forced to pay more than [its] *pro tanto* share.’**” (internal citation omitted) (emphasis supplied).

Like CAMC, Halliburton acted of its own salutary accord in deciding to settle with the Plaintiff. Therefore, Halliburton cannot claim to have been “forced to pay more than its *pro-tanto* share.” As such, pursuant to this Court’s holding in Charleston Area Medical Center v. Parke Davis, Halliburton is precluded from pursuing a claim for contribution against the remaining defendants in this action.

What this Court has done in Sydenstricker v. Unipunch Products, in et al., Charleston Area Medical Center v. Parke Davis and their predecessor Haynes v. City of Nitro, 240 S.E.2d 544 (W.Va. 1977), is to permit “a tortfeasor to bring in as a third-party defendant a fellow joint tortfeasor to share by way of contribution on the verdict recovered by Plaintiff.” Sydenstricker at 517 citing Haynes. The CAMC case clarified the rule by providing that a tortfeasor cannot wait until judgement is rendered and then seek to enforce the same against a joint tortfeasor who had no opportunity to participate in the defense of the primary action.

Sydenstricker further instructs that “it is clear that the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action.” Id. At 518.

A thorough analysis of this Court’s primary opinions relating to contribution reveals that any recovery for contribution cannot be had until the verdict is rendered and the judgment entered

for the plaintiff in the primary action. This rule is succinctly set forth in Charleston Area Medical Center v. Parke Davis.

While Haynes and its progeny permit contribution to be sought by joint tortfeasors in advance of judgment and separate from the protections of West Virginia Code § 55-7-13, the procedural requirements for asserting contribution in advance of a joint judgment are clear. To permit the inchoate right of contribution to be successfully asserted, the injured party must bring a cause of action against an alleged tortfeasor who then joins additional non-named tortfeasors by means of third-party joinder, *following which a judgment is rendered that establishes a common obligation owed by the joint tortfeasors to the injured party. Absent compliance with this procedural mechanism for asserting contribution in advance of the rendering of a joint judgment*, there is no right of contribution outside the statutory rights provided by West Virginia Code § 55-7-13.

Id. at 24. (Emphasis added) The requirement of a judgment makes sense. Without this final figure, along with a determination of relative percentages of fault between the parties, it is impossible to determine relative shares of contribution among the parties.

From a practical aspect, taking into consideration judicial economy, what Halliburton is seeking is not feasible. In order to make a final determination of relative fault among the parties, the complete case would have to be tried to a verdict, despite the full settlement of all issues with the plaintiff.¹⁰ This would be a complete waste of judicial resources as well as the time and energy of the parties involved.

Taking Halliburton's position to its logical conclusion, what happens if the final verdict determination is that Halliburton paid less than its allocated value of fault?

10. The "method for invoking the right of comparative contribution is by requesting that special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure be given to the jury requiring it to allocate the various joint tortfeasors' degree of primary fault." Sitzes v. Anchor Motor Freight, 289 S.E.2d 679, 688 (W.Va. 1982)

In this case, Halliburton's settlement with the plaintiff was in the amount of \$825,000.00. Texas Keystone's settlement with the plaintiff was in the amount of \$1,200,000.00. Falcon Drilling's settlement with the plaintiff was in the amount of \$1,200,000.00. Therefore, the total amount received by plaintiff was \$3,225,000.00.

What if it were determined, either by a Jury or some other mechanism, that the relative fault of the three defendants were equal. Then the relative value of each defendants' fault would be \$1,075,000.00. This means that Halliburton would have underpaid by \$250,000.00.¹¹ Under Halliburton's theory, Texas Keystone and Falcon Drilling should be able to pursue cross-claims against Halliburton for the settlement monies they paid in excess of their responsibility. This clearly flies in the face of this Court's holding in Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.. Unless this Court intends to completely overturn Zando, either directly, or by implication, Halliburton, or any defendant for that matter, cannot be permitted to pursue its contribution claims once it has settled with the plaintiff.

The circuit court was correct in its ruling dismissing Halliburton's claims for contribution and the circuit court's ruling must be affirmed.

VI. RELIEF REQUESTED

Based upon the foregoing, the Orders and rulings of the circuit court at issue herein are appropriate and are supported by law. Therefore, The Appellee, Texas Keystone, Inc respectfully

11. This is a very simplistic illustration of the practical pitfalls of Halliburton's position. Based upon unique circumstances presented in every case, this scenario could become extremely problematic.

prays that the Supreme Court of Appeals of West Virginia affirm the rulings of the Circuit Court of Tyler County at issue in this Appeal.



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CERTIFICATE OF SERVICE

I, Scott L. Summers, counsel for Texas Keystone, Inc hereby certify that on September 25, 2009, a true and correct copy of the foregoing “**Response of Texas Keystone, Inc to the Appeal of Halliburton Energy Services, Inc. from Rulings of the Circuit Court of Tyler County, West Virginia**” was served on the parties hereto by United States Mail, postage prepaid, addressed as follows:

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