

NO. 34865

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

HEATHER RUCKDESCHEL, Administratrix of the
Estate of Thomas G. Miller, Jr., Plaintiff Below,
Appellee

v.

Civil Action No. 07-C-49M
Judge John T. Madden

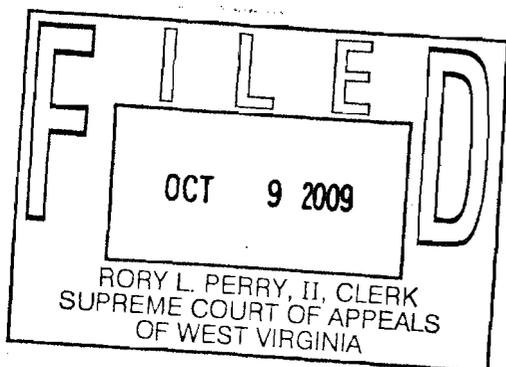
FALCON DRILLING, COMPANY, L.L.C., TEXAS KEYSTONE,
INC., and HALLIBURTON ENERGY SERVICES, INC.,
DEFENDANTS BELOW

HALLIBURTON ENERGY SERVICES, INC., APPELLANT

Appellee.

FROM THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA
THE HONORABLE JOHN T. MADDEN

**HALLIBURTON ENERGY SERVICES, INC.'S RESPONSE TO SUBMISSION BY
FALCON DRILLING, LLC AND MOTION TO STRIKE FALCON'S SUBMISSION
WITH INCORPORATED MEMORANDUM**



James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)
McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035
***Counsel for Defendant
Halliburton Energy Services, Inc.***

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**STATEMENT OF THE KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW**

For purposes of its Response to Falcon's Brief, Halliburton reincorporates the pertinent information contained in this section of its Appellate Brief. Halliburton submits this Response to the submission of Falcon Drilling. Falcon is not a party to this appeal.¹ Upon information and belief, Falcon has never petitioned this Honorable Court to intervene in the this appeal. Falcon does not have an appealable issue that this Court currently could consider, even if Falcon did adhere to proper procedure for appellate litigation in West Virginia. For these reasons, Halliburton, by and through the undersigned counsel, pursuant to Rules 17, 18 and 23 of the West Virginia Rules of Appellate Procedure requests entry of an Order striking Falcon's submission and awarding Halliburton fees and costs associated with submission of this Response Brief.²

STATEMENT OF FACTS

The *Memorandum Order*, entered by the Court on or about October 29, 2008 does not make any mention of Halliburton Energy Services (hereafter "Halliburton") cross-claim against Falcon Drilling, L.L.C. (hereafter, "Falcon") for indemnity and common law contribution. See, *Id.* The

¹ For purposes of this Brief and Halliburton's Reply to Texas Keystone's Response Brief, Halliburton has changed the caption of the case to reflect the case caption contained in this Court's Order setting the briefing schedule. Halliburton notes for purposes of the record that Halliburton is the sole appellant and Texas Keystone is the sole appellee.

² Rule 17 of the West Virginia Rules of Appellate Procedure states in pertinent part: Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with service on all other parties. The motion shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought.

Halliburton has included all information pertaining to its Motion to Strike Falcon's Submission and Halliburton's substantive response to Falcon's Submission in this Response Brief, in an effort to limit the amount of paperwork forwarded to the Court. The substantive and procedural aspects of Falcon's submission are interrelated and thus are addressed collectively herein. To the extent that this Court requests that the Motion to Strike and Halliburton's substantive response be filed separately, Halliburton will await a directive from this Court before doing so.

reason for the lack of discussion concerning Halliburton's cross-claim against Falcon is because Falcon never filed a responsive pleading to Halliburton's cross-claim, nor joined in *Texas Keystone's Motion to Dismiss*. After entry of the *Memorandum Order*, Halliburton filed a *Motion for Clarification*. Halliburton further sought to make the Order final for purposes of appeal, pursuant to Rule 54 of the West Virginia Rules of Civil Procedure.

At the hearing before the Circuit Court on January 16, 2009, the Court found that the *Memorandum Order* would be applicable to Halliburton's common law contribution claim against Texas Keystone. As Falcon is forced to acknowledge on page one (1) of its submission: "[a]mong the rulings made by the circuit court in its February 6, 2009 Order was a finding that, despite Halliburton's voluntary settlement with Plaintiffs a year earlier, its cross-claims against Falcon for contribution and implied indemnity remained pending." See *Falcon Brief*, at pg. 1; see also, *February 6, 2009 Order* (hereafter, *Supplemental Order*).

At the time of the entry of the *Supplemental Order*, Halliburton's cross-claim against Falcon had been active for approximately sixteen (16) months. Falcon had yet to file a responsive pleading, or join the other parties in briefing the legal merits of Halliburton's cross-claim against the other two defendants, despite Halliburton's assertion of its cross-claim at the initiation of the lawsuit. Pursuant to the Scheduling Order entered by the Circuit Court of Tyler County, West Virginia, the deadline for filing dispositive motions was set for March 20, 2009. Halliburton was forced to file a Motion for Default Judgment against Falcon on or about March 16, 2009, to protect the claims contained in its cross-claim against Falcon. The Circuit Court set a briefing schedule for the respective parties to fully outline their positions concerning *Halliburton's Motion for Default Judgment*. The Court awarded Default Judgment against Falcon, by Order, entered April 10, 2009

on Halliburton's cross-claim. Falcon has filed a *Motion to Vacate the Default Judgment*, which remains pending before the Circuit Court of Tyler County.

On or about September 25, 2009, Falcon unilaterally decided to submit a brief to this Honorable Court, in the midst of the appellate process to which they were not a party. Halliburton is frankly puzzled by this course of action. The following facts are unassailable and are instructive for whatever action this Honorable Court may take with respect to Falcon's submission: Falcon had counsel present at every hearing and deposition during the entire pendency of this litigation; Falcon never filed an *Answer to Plaintiff's Complaint, Amended Complaint* or *Halliburton's Cross-Claim* until after *Halliburton's Motion for Default Judgment* was filed, despite the lapse of approximately eighteen (18) months since the filing of the *Complaint* and *Halliburton's Cross-Claim*. Halliburton's settlement of Plaintiffs' claims against it was approved by *Order* dated February 29, 2008. Falcon did not object to Halliburton's settlement with Plaintiffs in this matter; Falcon did not join in the *Motion to Dismiss* filed by Texas Keystone, related to Halliburton's cross-claim; Falcon did not object or raise any issue when Halliburton clarified that its cross-claim was still active as of the January 16, 2009 hearing, when the Circuit Court clarified that it was dismissing Halliburton's cross-claim against Texas Keystone; Falcon did not seek to join this appellate process in the Petition phase; and Falcon did not seek to join this appellate process after this Honorable Court accepted Halliburton's petition for appeal.

Falcon has now offered a submission to this Court, presumably in a belated attempt to: (1) present the future potential appellate issue of the default judgment entered against Falcon prior to the proper time for its consideration in an attempt to influence the lower court's consideration of the *Motion to Vacate Default Judgment*, currently pending before the Circuit Court of Tyler County,

West Virginia; and (2) Remedy Falcon's precarious situation resulting from Falcon's failure to join in the issues before the Circuit Court of Tyler County and before this Honorable Court.

STANDARD OF REVIEW

The standard of review is not relevant as Falcon is not authorized to file their brief with this Court.

POINTS AND AUTHORITIES

I.) This Court Must Enter An Order Striking Falcon's Submission From Consideration Because Falcon Was Not A Party To Halliburton's Appeal And Did Not Avail Itself of the Opportunity to Join This Litigation

Gooch v. West Virginia Dep't of Pub. Safety,
195 W. Va. 357, 465 S.E.2d 628 (1995) 7

Hill v. Als,
27 W. Va. 215 (1885) 6

Parsons v. McCoy,
157 W. Va. 183, 202 S.E.2d 632 (1973) 7

Province v. Province,
196 W. Va. 473, 473 S.E.2d 894 (1996) 7

State v. Bailey, 154 W. Va. 25, 173 S.E.2d 173 (1970) *overruled on other grounds*,
State v. Walters, 186 W. Va. 169, 411 S.E.2d 688 (1991) 7

West Virginia Code § 58-5-1 7

West Virginia Rules of Civil Procedure, Rule 55(c) 7

West Virginia Rules of Civil Procedure, Rule 60(b) 7

II.) There is No Support in the Rules of Appellate Procedure for Falcon’s Submission and Falcon’s Attempted Reliance On *Levine v. Headlee* and *Buskirk v. Musick* to Justify Submission of Their Appellate Brief is Misguided and Not Supported By Settled Case Law

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Levine v. Headlee,
148 W. Va. 323, 134 S.E.2d 892 (1964) 9-11

Weekly v. Hardesty,
48 W. Va. 39, 35 S.E. 880 (1900) 9, 11

West Virginia Code § 58-5-2 11

West Virginia Code § 58-5-25 11

West Virginia Rules of Appellate Procedure, Rule 18 12

West Virginia Rules of Appellate Procedure, Rule 18(a) 12

West Virginia Rules of Appellate Procedure, Rule 18(b) 12

West Virginia Rules of Appellate Procedure, Rule 23 12

III.) Falcon’s Substantive Arguments Acknowledge the Validity of Halliburton’s Claim for Contribution From Falcon

18 Am.Jur.2d *Contribution* § 1, *et seq.* (1965) 18

Automobile Underwriters Corp. v. Harrelson,
409 N.W.2d 688 (Iowa 1987) 22

Board of Educ. v. Zando Martin & Milstead,
182 W. Va. 597, 390 S.E.2d 796 (1990) 19, 21

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217 W. Va. 15, 614 S.E.2d 15 (2005) 15-17, 19-21

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145 W. Va. 676, 116 S.E.2d 697 (1960) 18

<u>Howell v. Luckey,</u> 205 W. Va. 445, 518 S.E.2d 873 (1999)	16, 19, 20
<u>Lombard Can. Ltd. v. Johnson,</u> 217 W. Va. 437, 618 S.E.2d 466 (2005)	21
<u>M. Pierre Equipment Co., Inc., v. Griffith Consumers Co.,</u> 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003)	22
Restatement of the Law (Second) Torts, § 886A	23
Restatement of Torts: <i>Contribution Among Joint Tortfeasors</i> , § 886(A)(2)	23
<u>Sanders v. Roselawn Memorial Guardians, Inc.,</u> 152 W. Va. 91, 159 S.E.2d 784 (1968)	20
<u>Sydenstricker, et al. v. Unipunch Products, et al.,</u> 169 W. Va. 440, 288 S.E.2d 511 (1982)	15, 17-19
<u>Transport Ins. Co. v. Chrysler Corp.,</u> 71 F.3d 720 (8 th Cir. 1995)	22
<u>Travelers Ins. Co. v. United States,</u> 283 F.Supp. 14 (S.D. Texas 1968)	22
Uniform Contribution Among Joint Tortfeasors Act, 12 U.L.A. 202 (2008) § 1(d)	22
Uniform Contribution Among Joint Tortfeasors Act, 12 U.L.A. 202 (2008) § 2	22
West Virginia Code § 55-7-13	15
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LEGAL ARGUMENT

I.) This Court Must Enter An Order Striking Falcon's Submission From Consideration Because Falcon Was Not A Party To Halliburton's Appeal And Did Not Avail Itself of the Opportunity to Join This Litigation

The jurisdiction of the Supreme Court of Appeals is wholly statutory; and unless an appeal can be brought within some provision of the statute authorizing appeals, it must be dismissed. *See generally, Hill v. Als*, 27 W. Va. 215 (1885). Appellate jurisdiction is derived from the constitutional or statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed. Thus, the determination of the existence and extent of appellate jurisdiction depends on the terms of the statutory or constitutional provisions in which it has its source. *State v. Bailey*, 154 W. Va. 25, 29, 173 S.E.2d 173, 175 (1970) *overruled on other grounds, State v. Walters*, 186 W. Va. 169, 411 S.E.2d 688 (1991).

Pursuant to West Virginia Code § 58-5-1, appeals may only be taken from final decisions of a circuit court. A case is only final 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. *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 362, 465 S.E.2d 628, 633 (1995). The required finality under this section is a statutory mandate, not a rule of discretion. *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996). An order granting a motion to set aside a default judgment made under the provisions of Rules 55(c) and 60(b) of the West Virginia Rules of Civil Procedure is appealable under this section. *Parsons v. McCoy*, 157 W. Va. 183, 202 S.E.2d 632 (1973). At this stage, the Motion to Vacate Default Judgment has not been ruled upon and as such any consideration of Falcon's motion or Falcon's default are premature.

At the hearing before the Circuit Court of Tyler County, West Virginia on January 16, 2009, the issue of the status of Halliburton's cross-claim against Falcon was addressed after clarification of the scope of Texas Keystone's Motion to Dismiss Halliburton's cross-claim against it. The transcript prepared from that hearing, attached hereto as *Exhibit A*, clearly indicates that Falcon's cross-claim was still active before the Circuit Court. *Transcript of January 16, 2009 Hearing*, at pg. 33, lines 9-24, pg. 34, lines 1-24, pg. 35, lines 1-15.³ The *Supplemental Order*, entered after the January 16, 2009 hearing memorializes that Halliburton's cross-claim against Falcon remained pending before the Circuit Court of Tyler County.

Falcon's brief, filed after Halliburton's appellate brief, is styled "*Brief of Appellee, Falcon Drilling Company, LLC.*" However, as the Circuit Court's *Supplemental Order* makes clear, the claims against Falcon were still before the Circuit Court of Tyler County, West Virginia. As previously mentioned, a *Default Judgment* was entered against Falcon, by Order of the Circuit Court of Tyler County, West Virginia on or about April 10, 2009, after extensive briefing by Halliburton and Falcon. Falcon cannot be considered an Appellee, as a final order has not been entered terminating the litigation between Falcon and Halliburton.

While Falcon or Halliburton may choose to appeal the ultimate ruling of the Circuit Court after Falcon's *Motion to Vacate Default Judgment* has been ruled upon, this Court cannot permit Falcon to disregard appellate procedure and the guidelines set forth, pursuant to Rule 54 of the West

³ Halliburton did not include a transcript of the January 16, 2009 hearing in the record for this appeal, as the issues related to its cross-claim against Falcon were not before this Court. Attached to this brief, Halliburton has attached a copy of the transcript of the January 16, 2009 hearing, obtained from the Court reporter, after Falcon filed its brief on or about September 24, 2009. Halliburton includes the transcript as an Exhibit pursuant to Rule 17 of the West Virginia Rules of Appellate Procedure.

Virginia Rules of Civil Procedure by now attempting to argue two issues that are premature when viewed in their most favorable light.

In the last sentence of Falcon's submission, Falcon requests this Court to "reverse the circuit court's April 10, 2009 Order granting Halliburton's motion for default judgment as a legal nullity." See, *Falcon Submission*, at pg. 19. This is not an accurate description of the stature of a default judgment. Falcon's brazen attempt to extricate itself from the harsh consequences of its dilatory conduct warrants the most severe of sanctions. Halliburton requests the entry of an Order striking Falcon's brief from consideration in the pendency of Halliburton's appeal of the dismissal of Halliburton's cross-claim against Texas Keystone. Halliburton further requests an award of fees and costs for this response to Falcon's submission.

Supporting Halliburton's position to strike Falcon's pleading is the Order Approving Distribution of Wrongful Death Settlement Proceeds. That Order approving settlement specifically states, "It is further ORDERED that nothing in this Order shall affect any pending cross-claim issues existing by and between Halliburton Energy Services, Falcon Drilling Company, L.L.C. and Texas Keystone, Inc., which are on appeal, or still in litigation in the Tyler County, Circuit Court, respectively." See, *Exhibit C*, attached to *Falcon's Submission*. Falcon was well aware of the status of Halliburton's claims against it and has chosen to disregard the procedural posture of this entire litigation in an aborted attempt to improve its current predicament.

Simply stated, Falcon is asking this Court to substantively consider arguments which would require this Court to *sua sponte* usurp the trial court's role as the court charged with developing the record. Such a demand cannot be accepted.

II.) There is No Support in the Rules of Appellate Procedure for Falcon's Submission and Falcon's Attempted Reliance On *Levine v. Headlee* and *Buskirk v. Musick* to Justify Submission of Their Appellate Brief is Misguided and Not Supported By Settled Case Law

The only argument proffered by Falcon in support of their position that it should be entitled to submit a pleading before this Honorable Court places entire reliance on three West Virginia Supreme Court of Appeals decisions, placed in a footnote of Falcon's brief: *Levine v. Headlee*, 148 W. Va. 323, 334, 134 S.E.2d 892, 898 (1964) (*quoting* Syl. Pt. 1, *Buskirk v. Musick*, 100 W. Va. 247, 130 S.E. 435 (1925); and *Weekly v. Hardesty*, 48 W. Va. 39, 35 S.E. 880 (1900). As a review of these cases demonstrates, there is no support for Falcon's unilateral decision to submit a brief, addressing issues that cannot be properly before the Court at this time.

A. The Decision of *Levine v. Headlee* Does Not Support the Right of a Party to File an Appellate Brief When There is No Final Order On the Issues Addressed In Their Brief; No Order Permitting a Party to Intervene After a Petition has Been Accepted and No Party Has Consented to the Filing of the Submission

Falcon attempts to find traction for its position that this Court should consider its submission in the context of Halliburton's appeal in this Court's holding in *Levine v. Headlee*, 148 W. Va. 323, 134 S.E.2d 892 (1964). Falcon relies on a portion of the opinion that states: "Where one party only appeals, but his rights and the rights of others are not only involved in the same questions, but are equally affected by the decree or judgment, the appeal of the one will call for an adjudication also of the rights of those not appearing." *Levine*, at 334 (*quoting* Syl. Pt. 1, *Buskirk v. Musick*, 100 W. Va. 247, 130 S.E. 435 (1925)). A review of the entirety of the opinion finds that the Court further held, "Where, in a tort action, judgment is entered on a verdict against the two defendants involved in the action and only one of the defendants appeals to this Court, the judgment may be

reversed as to the defendant who has appealed and left undisturbed as to the defendant who has not appealed.” Syl. Pt. 4, Levine.

The facts of Levine, as applied to the issues now under consideration, addressed a judgment by a trial court against two defendants. Both defendants elected to join in a written motion to set aside the verdict and grant a new trial, but each assigned separate grounds. Id., at 334. Subsequently only one of the defendants pursued his appellate rights. Id. The Court acknowledged that the common law rule that, “judgments were not severable and, if a judgment were set aside as to one defendant, it was necessary to set aside as to the remaining defendants, even though they had not appealed. Id. The Court cited with approval to West Virginia Code § 58-5-25, which authorized the Supreme Court of Appeals to reverse a judgment in whole or in part.⁴

The Court in Levine referenced the following passage, also relied upon by Falcon, to demonstrate the type of analysis the appellate court should consider:

an appeal brings up the entire record, and any error to the prejudice of an appellee not appealing or cross assigning error may be corrected or reversed, though his right do not depend on the same errors assigned by the appellant, but is even separate from or hostile to it, if justice requires such correction or reversal.

Levine, at 334, quoting Syl. Pt. 2, Weekly, *supra*. However, the Court in Levine later ruled that “[h]aving before us the appeal only as it related to defendant Headlee, no error having been assigned by any party to the judgment of Yates, and believing that *no injustice will result from a reversal of the judgment only in part*, we do not undertake to disturb the judgment as it relates to defendant Yates.” Levine, at 338 (emphasis added). As applied to the matter before the Court, it must be acknowledged that Falcon is a sophisticated commercial litigant. It decided on a litigation strategy

⁴ West Virginia Code § 58-5-2 was repealed by the West Virginia legislature in 1998. *See*, Acts, 1998, c. 110.

presumably with its overall litigation goals in mind. One of those strategies was to not join Halliburton and Texas Keystone “in the fray” over the issue of Halliburton’s cross-claim. Falcon could have chosen to join in the argument on the issue of contribution, seemingly like Falcon could have filed a responsive pleading to Halliburton’s cross-claim. Falcon avers that it did not file a responsive pleading to Halliburton’s cross-claim because it was not necessary. See, *Falcon’s Submission*, at pg. 5. Falcon cannot now be permitted to address issues that are not even on appeal. Falcon’s apparent belief that it did not need to file a formal response to a cross-claim, after the two other parties extensively litigated a cross-claim for sixteen (16) months does not warrant this Court assuming extraordinary jurisdiction of Falcon’s arguments.

B. There is no Support in the West Virginia Rules of Appellate Procedure for Falcon’s Ability to File its Submission and Rules 18 and 23 of the West Virginia Rules of Appellate Procedure Support Striking Falcon’s Submission and Awarding Halliburton Fees and Costs

Rule 18 of the West Virginia Rules of Appellate Procedure provides:

(a) *By party* - At any time after the granting of an appeal, any party to the action appealed from may move the Supreme Court to dismiss the appeal on any of the following grounds: (1) failure to properly perfect the appeal; (2) failure to obey an order of the Court; (3) *failure to comply with these rules*; (4) *lack of an appealable order, ruling, or judgment*; or (5) lack of jurisdiction. Such motion shall be filed and served in accordance with Rule 17, together with a memorandum of authorities.

(b) *By Court*. – The Supreme Court may on its own motion notify any party who is in violation of the grounds set out in subsection (a) and fashion appropriate sanctions including the dismissal of the appeal.

See, W. Va. R.A.P 18(a) and (b) (emphasis added). Additionally, Rule 23 of the West Virginia Rules of Appellate Procedure states the following:

- (a) To whom allowed – Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties.

W. Va. R.A.P. 23(a). While Falcon is not an “appellant” in actual terms, they have attempted to raise issues pertaining to the default judgment entered against them, which are not before the Court. Falcon should be taxed costs and fees for the filing of their brief and Halliburton’s necessary response.

III.) Falcon’s Substantive Arguments Acknowledge the Validity of Halliburton’s Claim for Contribution From Falcon

A. Falcon and Texas Keystone Are Closely Held Companies Which Are Essentially the Same Entity

During the discovery phase of this litigation, depositions and written discovery revealed that Falcon and Texas Keystone are essentially the same entity. The ownership of the two companies is identical. See, *Deposition of Deposition Transcript of Larry D. Winkler*, at pg. 6, lines 18-24, pg. 7, lines 1-8, attached hereto as *Exhibit B*. After Halliburton settled Plaintiffs’ claims against it, Falcon and Texas Keystone proceeded to mediation with Plaintiffs. As Falcon acknowledges in its submission, during mediation, which occurred on or about April 8, 2009, Falcon and Texas Keystone resolved Plaintiffs’ claims against them for identical amounts and at the same time.⁵ Falcon and

⁵ Falcon and Texas Keystone excluded Halliburton from mediation informing Halliburton that both entities had no interest in attempting to resolve Halliburton’s cross-claims against them. Halliburton was not even informed that mediation was being contemplated, until after the date and time had been arranged by counsel for Falcon and Texas Keystone. As the letter from Falcon, dated April 8, 2009 indicates, Falcon and Texas Keystone then attempted to utilize their settlement with Plaintiff as the vehicle to argue that Halliburton’s claims for contribution were eliminated as a result of the settlement. See, *Exhibit A*, attached to Falcon’s submission.

After the default judgment was entered by the Court on April 10, 2009, Falcon attempted to argue that the entry of the default judgment against it potentially jeopardized its settlement with Plaintiffs. See, *Exhibit E*, attached hereto. At that point, Halliburton and Falcon had extensively briefed the issues surrounding the default judgment. Attached hereto as *Exhibit F*, is the correspondence from Plaintiffs’ counsel, submitted in response to Falcon’s warnings about the danger to its settlement. Plaintiffs make clear

Texas Keystone engage in weekly meetings. *Deposition transcript of David Sweeley* attached hereto as Exhibit C, pg. 81, lines 21-24. Additionally, attached hereto is the contract which governed the relationship between Falcon and Texas Keystone, pursuant to the operations at the Wiley Number 8 well. See, *Exhibit D*. As the Court will note, the contract provides for indemnification and contribution flowing from each entity to the other. As the Court will note at Paragraph 19.1 the contract between Texas Keystone and Falcon, the following is stated:

19.1 In the performance of all work herein contemplated on a "footage basis" Contractor (Falcon) is an independent contractor, *with the authority* to control and direct the performance of the details of the work. Operator (Texas Keystone) only being concerned in the results obtained. (emphasis added) (parenthetical information added)

This contractual provision illustrates the inherent danger of following Texas Keystone's arguments about arbitrating this dispute, from the standpoint of Halliburton. Falcon cannot be joined as a party in arbitration, despite its potential liability to Halliburton. If Falcon had authority and control over the Wiley Number 8 well-site, Halliburton will be forced to litigate two separate forums. Falcon's submission to this Court highlights the danger of following Texas Keystone's theory of arbitration.

Because of the closely held nature of the respective companies, Falcon and Texas Keystone must be considered the same entity for purposes of the actions undertaken by Falcon in filing its brief.⁶ An note of interest concerning the contract between Falcon and Texas Keystone, related to

in their correspondence, that Falcon had assured Plaintiffs that the pending default judgment would have no effect on the settlement between Falcon, Texas Keystone and Plaintiff.

⁶ Halliburton does not in anyway suggest that it's claims against the two entities are identical, nor does Halliburton suggest that the procedural posture of its cross-claims against Falcon and Texas Keystone are similar.

this litigation: On the first page of the contract, in the paragraph titled: "IN CONSIDERATION," the following is stated:

While drilling on a footage basis Contractor (Falcon) *shall, direct, supervise and control drilling operations* and assumes certain liabilities to the extent specifically provided herein (emphasis added) (Parenthetical information added).

See, Exhibit D. Texas Keystone has argued that Paul Gellis, the employee of Falcon that signed the contract at issue in this litigation had no authority to bind Texas Keystone to the contract. As the above provisions clearly indicate, Paul Gellis, as the representative of Falcon in charge of drilling operations for Falcon, had contractual, as well as implied authority to bind Texas Keystone to the contract with Halliburton.

B. Falcon's Argument that Halliburton's Right to Recover Contribution Is Not Available because of Halliburton's Settlement With Plaintiffs is Incorrect

Falcon asserts that the only way to recover contribution in West Virginia is through the "rendering of a joint judgment against non-settling tortfeasors, of which one tortfeasor has been forced to pay more than his proportionate share in satisfying the judgment." *See, Falcon Submission*, at pg. 6. This is incorrect. While it is true that claims for contribution which are asserted pursuant to West Virginia Code § 55-7-13 require a joint judgment against non-settling tortfeasors, Halliburton's claim for contribution is "inchoate." Similar to Texas Keystone, Falcon asserts that pursuant to this Court's decisions in CAMC, *infra*, and Sydenstricker, et al. v. Unipunch Products, et al., 169 W. Va. 440, 288 S.E.2d 511 (1982), Halliburton's right to contribution was not available to a party that voluntarily settles with the Plaintiff prior to a judicial determination of liability. As has been more fully briefed in Halliburton's Appellate Brief, the CAMC opinion is easily differentiated from the issue now before the Court.

In CAMC, prior to the filing of any suit, CAMC settled with a young boy's estate, releasing CAMC from any claims. CAMC then filed a contribution suit against Parke-Davis and others, in the Circuit Court of Marshall County, West Virginia, alleging that the drug Cerebyx label was misleading and defective and caused the child's injuries. CAMC, 217 W. Va. at 18. The defendants removed the case to federal court, where at trial, a jury returned a verdict in CAMC's favor on December 3, 2001. Parke-Davis was found to be 70% at fault for the child's death and CAMC was found to be 30% at fault. The jury awarded CAMC \$1.75 million.⁷ Id. The respective defendants appealed the district court's judgment to the United States Fourth Circuit Court of Appeals. The Fourth Circuit subsequently certified the following question to this 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 another party claimed to be a second joint tortfeasor, and thereafter obtain a judgment against the second joint tortfeasor in an action for contribution, although the second joint tortfeasor was not a party to, not aware of, and had no notice of the settlement.

Id., at 18. The defendants in CAMC argued that West Virginia law only permits a separate action by a joint tortfeasor for contribution where there has been a judgment of fault against the joint tortfeasors in an action initiated by the injured party or his representative. Id., at 19. Defendants further asserted that CAMC could only pursue its claim for contribution if the court were to overrule precedent and "create a new cause of action which would permit the assertion of an inchoate right of contribution by a settling tortfeasor against another tortfeasor who was not involved in the settlement agreement and not a party to any action initiated by the injured party." Id. In footnote 6

⁷ The West Virginia Supreme Court decision in CAMC, at footnote 5, states: The Defendants *unsuccessfully* sought to have the contribution claim dismissed by arguing that this Court's decision in Howell v. Luckey, 205 W. Va. 445, 518 S.E.2d 873 (1999) barred such a claim. (emphasis added).

of the CAMC opinion, the Court referenced Syl. Pt. 5 of Howell v. Luckey, 205 W. Va. 445, 518 S.E.2d 873 (1999): “Defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure.” CAMC, at 19, *citing* Syl. Pt. 5, Howell v. Lucky, 205 W. Va. 445, 518 S.E.2d 873 (1999).⁸

In Sydenstricker, a certified question was accepted by this Court from the United District Court for the Southern District of West Virginia. The underlying action was for the recovery of damages for personal injuries by plaintiff. Id., at 443. Plaintiff asserted that products used by him during his employment were negligently designed, manufactured and delivered. Id. Plaintiff, husband and wife, sued the maker of a punch press, Unipunch Products, Inc. (hereafter, “Unipunch”) and various parts suppliers for the presses. Unipunch and Niagra Machine & Tool Works (hereafter, “Niagra”) filed separate third-party complaints, by which they asserted claims against third-party defendant, Terrell Tool and Die Corporation (hereinafter “Terrell”), which was the employer of the plaintiff, John C. Sydenstricker. Niagra asserted that Terrell was liable on grounds of contribution and indemnity to it, as a result Terrell’s “‘negligence and carelessness’ in failing to provide a safe place to work, in failing to adopt and furnish adequate safety devices, each of which is required by West Virginia Code, Chapter 21, Article 3, §2, and 29 U.S.C. §651, *et seq.* and regulations thereunder, and in further failing to take certain specified steps to protect its employee. . .” Id., at 444. Niagra further asserted that Terrell willfully, wantonly, and wrongfully engaged in misconduct,

⁸ The Court engaged in a brief discussion on the potential merits of statutory indemnification under West Virginia Code § 55-7-13 (1923). Halliburton does not assert an entitlement to statutory indemnification, but rather solely upon a common-law theory of contribution only.

coupled with statutory and regulatory breaches. Id. Unipunch's specific allegations comprised three claims of indemnity against Terrell in its third-party complaint.

The Court answered the certified question in the affirmative, after re-phrasing the question:

[W]hether an employer under our Workmen's Compensation Act may be held liable as a third-party defendant to such defendant manufacturers as third-party plaintiffs, upon the theory of contribution and/or implied indemnity based upon allegations in the third-party complaint that such employer was guilty of willful, wanton and reckless misconduct or intentional tort toward the plaintiff employee resulting in plaintiff employee's personal injuries? Id., at 444-445.

In the instant matter, the lower court dismissed Halliburton's contribution claim because the Court found that Halliburton had relinquished its right to pursue contribution because of its settlement of Plaintiffs' claims. The Court in Sydenstricker analyzed the history of contribution in West Virginia. Initially, and important for this Court's consideration, is the settled position that "[t]he doctrine of contribution also has its roots in equitable principles. The right to 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." Id., at 447-448, *citing* Tenant v. Craig, 156 W. Va. 632, 195 S.E.2d 727 (1973); Hardin v. New York Central Railroad Company, 145 W. Va. 676, 116 S.E.2d 697 (1960); Brewer v. Appalachian Construction, Inc., 135 W. Va. 739, 65 S.E.2d 87 (1951); 18 Am.Jur.2d *Contribution* § 1, *et seq.* (1965). Falcon has adopted Texas Keystone's argument that Halliburton's settlement with the Plaintiffs, eliminated its right to pursue contribution from the other defendants. In essence, Falcon argues that Halliburton should have been required to litigate Plaintiff's claims through trial to recover contribution.

With respect to Falcon's claim that the Sydenstricker opinion forecloses Halliburton's right to seek contribution from Falcon, a thorough review of the Sydenstricker decision unequivocally

negates this position. While discussing the potential for recovery for a contribution claim, at the same time considering the effect of the workers' compensation statute, the Court stated,

[o]ur right to contribution before judgement is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured Plaintiff. However, 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 452 (emphasis added). Taking into account that Sydenstricker involved a separate third party suit, it is clear that the opinion announced a strong policy favoring a party's ability to recover on a theory of contribution from another responsible tortfeasor. To deny Halliburton's right to assert a claim for contribution would be to place an onerous burden on those defendants named in multi-defendant litigation.

Specifically, if the lower court's ruling is upheld, future defendants will be forced to seriously reconsider early settlement in litigation in that they would be foreclosed from asserting a right to contribution against other defendants who remain in the litigation. In this instance, the strong policy favoring resolution of disputes through settlement is upended in favor of aggressive defensive litigation. These are results that this Court cannot and should not support by upholding the Tyler County Circuit Court's dismissal of Halliburton's claim for contribution. Discussing the policy behind the ruling in CAMC, this Court stated:

The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiffs injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. Moreover, as we have already indicated, joinder of contribution claims serves to ensure that those who have contributed to the plaintiffs damages share in that responsibility . . . Finally, while the right of contribution is

designed to promote equality among defendants, it is not automatic and must be properly preserved.

CAMC, at 21, *citing Howell*, 205 W. Va. at 449, 518 S.E.2d at 877 (*quoting Zando*, 182 W. Va. at 603-604, 390 S.E.2d at 802-803.) While the factual basis of the aforementioned decisions is slightly different from the matter at bar, the Court's rationale for its holdings in Howell, Zando, and CAMC is similar. It is logical and promotes judicial economy. Under the aforementioned holdings, all parties may be joined in a single suit, whereby one purported tortfeasor can assert a right of contribution against another tortfeasor for recovery when each of the parties are or may be liable to a Plaintiff, from acts or omissions, which caused the Plaintiff to file suit.

Texas Keystone, Falcon and Halliburton were all named as defendants in suit brought by Plaintiffs. Halliburton asserted its right to contribution against Texas Keystone and Falcon in its answer to Plaintiffs' Amended Complaint. Texas Keystone and Falcon were present for the settlement conference whereby Halliburton settled Plaintiffs claims against it. Falcon raised no objection to the settlement, with full knowledge that Halliburton's cross-claim remained pending.

If Halliburton had not asserted its right to contribution when it filed its Answer to Plaintiffs' Complaint and instead waited until a judgment was rendered after trial, Halliburton would not have been able to assert its right to contribution under the guidelines of the Howell opinion. *See, CAMC*, at 21, *citing Howell*, 205 W. Va. at 446, 518 S.E.2d at 874. Although not explicitly stated in the Howell and CAMC decisions, the Court appears to have recognized that a tortfeasor would suffer prejudice if it was not involved in an actual civil action, when a second tortfeasor is permitted to settle with the Plaintiffs and then proceed against the first tortfeasor. This is not the case in the matter before this Court.

From a policy perspective, the position asserted by Falcon would promote a chilling effect on settlements between Plaintiff and putative tortfeasor in a situation where there is more than one potentially liable tortfeasor. It has long been held that “the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation.” Syl. Pt. 1, *in part*, Sanders v. Roselawn Memorial Guardians, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968).

C. The West Virginia Court Appeals Decision in Zando Is Not Applicable To Halliburton’s Claims for Contribution Against Falcon

Falcon attempts to place reliance on the West Virginia Supreme Court opinion of Board of Educ. v. Zando Martin & Milstead, 182 W. Va. 597, 390 S.E.2d 796 (1990), for its argument that a settling defendant cannot remain in the case to seek recovery from a non-settling defendant. This is not true. The Court in Zando held that “. . . one who settles with the plaintiff prior to verdict is discharged from any liability for contribution.” Id., 182 W. Va. at 604, 390 S.E.2d at 803. The Zando opinion does not foreclose a party’s right to pursue contribution after settlement. Halliburton asserted its cross-claims in its Answer to Plaintiff’s Amended Complaint and reserved the right to continue pursuit of those claims after settlement with Plaintiffs. Halliburton’s cross-claim for contribution against Falcon should be properly before the Circuit Court.

The cases Falcon has relied upon to support its position that Halliburton’s cross-claim for contribution are extinguished, notably Charleston Area Medical Center, 217 W. Va. 15, 614 S.E.2d 15 (2005), and Lombard Can. Ltd. v. Johnson, 217 W. Va. 437, 618 S.E.2d 466 (2005), provide that “[a] defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure.” Lombard, *supra*, at 441.

Lombard and CAMC do not stand for the proposition that the right to contribution and allocation of fault are extinguished by a plaintiff's settlement with a joint tortfeasor. The contribution claim is essentially a bifurcated matter, where the a party seeking contribution may litigate its claims in lieu of initiating an entirely separate civil action to proceed on the same course.

D. Holdings From Other Jurisdictions Support Halliburton's Right to Recover Contribution from Texas Keystone and Falcon

In M. Pierre Equipment Co., Inc., v. Griffith Consumers Co., 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003), the District of Columbia Court of Appeals, found that a settling tortfeasor maintains the ability to assert a claim for contribution against a non-settling tortfeasor. The court held that a settling tortfeasor "has the burden of establishing common liability and the reasonableness of the settlement. Id., at **2. The factual backdrop of the court's ruling involved an apparent pre-suit settlement, whereby the settling tortfeasor was assigned the rights of the damaged party. Id., at **3. The settling tortfeasor proceeded to file suit against the non-settling tortfeasor and recovered a jury award in the amount of \$600,000.00, based on the evaluation that this amount "would have been a reasonable settlement with the Galstons for their damages." Id., at **4. See also, Automobile Underwriters Corp. v. Harrelson, 409 N.W.2d 688 (Iowa 1987); Transport Ins. Co. v. Chrysler Corp., 71 F.3d 720, 722 (8th Cir. 1995); Travelers Ins. Co. v. United States, 283 F.Supp. 14, 31 (S.D. Texas 1968).

A final note related to Falcon's defenses to Halliburton's claims for contribution addresses Falcon's reference to the Uniform Contribution Among Joint Tortfeasors Act ("UCATA"). Falcon cites to the UCATA for the proposition that it supports Falcon's position that a settling tortfeasor is not entitled to contribution from a non-settling tortfeasors. See, *Falcon's Submission*, at pg. 15, Uniform Contribution Among Joint Tortfeasors Act, 12 U.L.A. 202 (2008) § 1(d). West Virginia

has not adopted the UCATA and § 2 of the UCATA eliminates the notion of comparative negligence in a contribution action: “In determining the *pro rata* shares of tortfeasors in the entire liability . . . their relative degree of fault shall not be considered.” *See also, M. Pierre*, at ** 6. Falcon also attempts to invoke authority from the Restatement of Torts: *Contribution Among Joint Tortfeasors*, § 886(A)(2) in apparent support for its position on contribution in the instant action. However, Comment (d) to the Restatement of the Law (Second) Torts, § 886A actually provides:

Unreasonable Settlements. In particular, when a tortfeasor without suffering a judgment against him has voluntarily made a settlement with the plaintiff and a payment that exceeds any amount that would be reasonable under the circumstances, he should not be permitted to inflict liability for contribution regarding the excess upon another tortfeasor who has not entered into the same settlement. The reasonableness of the settlement is always open to inquiry in the suit for contribution, and the tortfeasor making it has the burden of establishing the reasonableness of the payment he has made.

Comment (g) to § 886A states: “If one from whom contribution is sought is not in fact liable to the injured person, he is not liable for contribution.” Collectively, these passages support the position that a settling tortfeasor has a right to seek contribution from a nonsettling tortfeasor.

IV.) Falcon’s Argument Concerning Halliburton’s Cross-Claim for Implied Indemnity Is Premature

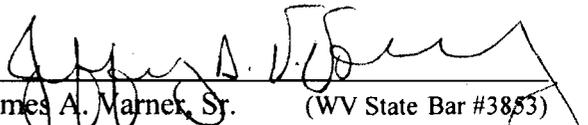
Falcon has presented arguments related to Halliburton’s claim against it for implied indemnity. Specifically, Falcon, although not a party to this appeal, has requested that this Court dismiss Halliburton’s indemnity claims against it. Halliburton reincorporates its previous arguments about the lack of any support for Falcon’s filing. Halliburton will not address the substantive considerations of Falcon’s argument on the issue of Halliburton’s claims for indemnification against it, as there is no support for addressing these issues.

CONCLUSION

WHEREFORE, Halliburton Energy Services, Inc. requests this Court enter an Order striking the filing of Falcon pursuant to Rules 17, 18 and 23 of the West Virginia Rules of Appellate Procedure. Falcon is not a party to this appeal and the issues raised in its brief are premature. Halliburton further requests an award of costs and fees, arising as a result of Falcon's untimely and unsanctioned submission. If this Honorable Court does consider the substantive issues in Falcon's submission, Halliburton requests entry of an Order finding that Halliburton's cross-claim for contribution remains pending before the Circuit Court of Tyler County, West Virginia pursuant to the arguments contained in this brief and Halliburton's filings with this Court, pertaining to its appeal.

Respectfully submitted this the 9th day of October, 2009.

Appellant, HALLIBURTON ENERGY SERVICES, INC., By Counsel:


James A. Marnet, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)

Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Tel: (304) 626-1100 / Fax: (304) 623-3035

McNeer, Highland, McMunn & Varner, L.C.
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of October, 2009, I served the foregoing "**Halliburton Energy Services, Inc.'s Response to Submission by Falcon Drilling, LLC and Motion to Strike Falcon's Submission**" upon all counsel of record by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as follows:

M. Eric Frankovitch, Esquire
Mark A. Colantonio, Esquire
Frankovitch, Anetakis, Colantonio & Simon
337 Penco Road
Weirton, WV 26062
Co-Counsel for Plaintiffs

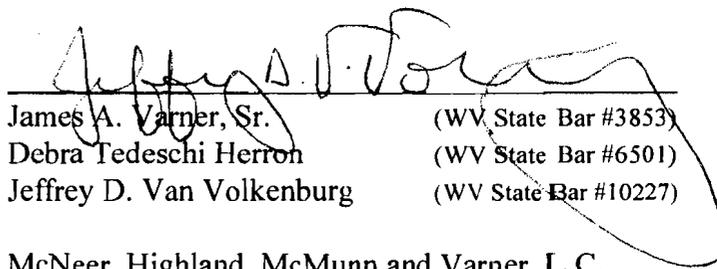
Scott L. Summers, Esquire
Offutt, Fisher & Nord
812 Quarrier Street, Suite 600
P. O. Box 2833
Charleston, WV 25530-2833
Counsel for Texas Keystone, Inc.

Don C. A. Parker, Esquire
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, WV 25321-0273
Co-Counsel for Falcon Drilling Company, LLC

Jason E. Matzus, Esquire
Raizman, Frischman & Matzus
7300 Penn Avenue
Pittsburgh, PA 15208
Co-Counsel for Plaintiffs

Michael G. Gallaway, Esquire
Elba Gillenwater, Jr., Esquire
Spilman, Thomas & Battle, PLLC
1217 Chapline Street
P.O. Box 831
Wheeling, WV 26330
Co-Counsel for Falcon Drilling Company, LLC

J. Eric Barchiesi, Esquire
Eisenberg & Torisky
2925 One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
Counsel for Falcon Drilling Company, LLC


James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)

McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035

EXHIBITS

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