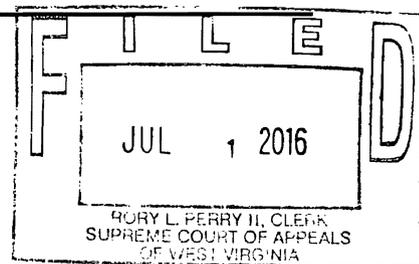


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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NO. 16-0331

(On Appeal from Circuit Court of Ohio County  
Civil Action No. 15-C-176  
Judge David J. Sims)



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GMS MINE REPAIR AND MAINTENANCE, INC.,  
DEFENDANT BELOW,

PETITIONER,

v.

JEFFREY S. MIKLOS  
PLAINTIFF BELOW,

RESPONDENT.

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S MOTION TO DEFER CLASS DISCOVERY PENDING A RULING ON A POTENTIALLY DISPOSITIVE ISSUE OF STATUTORY CONSTRUCTION AND IN TREATING THE MOTION AS A SIMPLE DISCOVERY OBJECTION WHERE THE RELIEF SOUGHT BY PETITIONER WAS DESIGNED TO EFFECTUATE THE GOALS OF THE CASE MANAGEMENT PROCEDURES EMBODIED IN RULES 16 AND 26 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, TO-WIT, ACHIEVING A JUST, SPEEDY, AND INEXPENSIVE RESOLUTION OF THIS PUTATIVE CLASS ACTION.

## STATEMENT OF THE CASE

This appeal sets the Court forth on a road less traveled.<sup>1</sup> Research fails to reveal any decision of this Court heretofore which directly reviews the substance of a case management decision of a circuit court. The case management decision from which Petitioner appeals herein concerns an order of the circuit court refusing to defer expansive, expensive class discovery pending a determination on a dispositive legal issue of statutory construction. (J.A. 069-070.) The adverse ruling was made at a point when the circuit court had yet to conduct a Rule 16 scheduling conference, or a Rule 26(f) discovery conference, and the ruling denying the relief requested had the effect of plunging the parties into the maelstrom of class discovery without the circuit court first considering whether it was proper and appropriate to defer it, pending a potentially dispositive ruling on the merits. The circuit court's ruling is inconsistent with considerations of active and effective case management embodied in Rules 16 and 26(f) of the West Virginia Rules of Civil Procedure; it fails to promote conservation of resources; it undermines fundamental fairness; and it does not make good common sense. The ruling which is the subject of this this appeal arises under the following circumstances.

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<sup>1</sup> "The Road Not Taken" by Robert Frost.

This is a putative class action. The action is brought procedurally under Rule 23 of the West Virginia Rules of Civil Procedure. Substantively, the Respondent asserts a claim for violation of the West Virginia Wage Payment and Collection Act (“WPCA”), W. Va. Code §§ 21-5-1, et seq. (J.A. 001-004.) Respondent is a former employee of Petitioner, who was discharged from his employment for poor attendance. (J.A. 008.) Respondent asserts that he did not receive his final wage payment within the statutorily mandated time period under the WPCA. (J.A. 001-004.) The version of the WPCA in effect at the time of Respondent’s discharge from employment directs that: “Whenever a person, firm or corporation discharges an employee...[the employer] shall pay the employee’s wages in full no later than the next regular pay day or four (4) business days, whichever comes first.” W. Va. Code § 21-5-4(b). As demonstrated below, the circumstances surrounding the discharge of Respondent gives rise to an intriguing, and as yet undecided, question of statutory construction, i.e., when a “discharge” is deemed to have occurred within the meaning of the WPCA.

Respondent was suspended from work on February 10, 2015 as a result of ongoing attendance policy violations. Petitioner authorizes its field supervisors to impose some disciplinary measures with respect to employees who engage in misconduct; however, they are not authorized to discharge employees. A discharge can only be effectuated by the company’s human resources department, and then only after a review process. A field supervisor who feels that termination may be in order is authorized to do no more than place the employee on suspension, with or without pay, and must immediately refer the matter to human resources. Accordingly, on February 10, 2014, Respondent was not terminated; rather, he was placed on suspension without pay pending human resources review. After thoroughly considering the situation, human resources

made a decision to discharge Respondent from employment on February 14, 2015. (J.A. 008-009, 044-048.)

As stated, the WPCA provisions in effect at the time mandate that when an employer discharges an employee, the final wages must be paid no later than the next regular pay day or four business days, presumably of the discharge, whichever comes first. See W. Va. Code § 21-5-4(b). The first day after the effective date of the discharge was February 15, 2015. February 16, 2015 was a legal holiday, which is statutorily excluded from the WPCA's definition of "business days." Thus the deadline for Respondent's final wage payment was February 20, 2015. See id.; see also W. Va. Code § 2-2-1(a)(3). Petitioner electronically transmitted all final wages due to Respondent via direct deposit, and the funds became available in Respondent's account on February 20, 2015. (J.A. 008-009.) Assuming that Respondent was "discharged" within the meaning of the WPCA on February 14, 2015 – the date his discharge was effectuated by human resources – his final wages were timely paid in accordance with the mandates of the WPCA. If the "discharge" is deemed to have occurred on February 10, 2015, the date on which Respondent was suspended, then the payment was not timely. This of course, is a fundamental, pure question of law and statutorily construction which is dispositive of the Respondent's claim.

At the outset of the litigation underlying this appeal, Respondent pursued the all too common and at times questionable practice of serving extensive class-based discovery requests along with the service of original process, i.e., a copy of the complaint. (J.A. 018-029.) Inter alia, Respondent requested that Petitioner identify all of its West Virginia employees who were discharged within the past five years, providing for each: the last day worked by the employee, the date the employee was informed that his/her employment was terminated, the official termination date, the gross amount of wages paid upon termination of his/her employment, an

itemized description of the wages paid, the date the wages were paid, and the manner in which the wages were paid. (J.A. 018-029.) In addition, for all such former employees, Respondent requested that Petitioner produce copies of all discharge letters, other documentation regarding discharge, letters and other documentation regarding final paychecks, and any other records evidencing the date of discharge, the amount of wages owed upon termination, the manner in which the final paychecks were delivered, and/or the reason for discharge, along with last known home addresses and telephone numbers. (J.A. 018-029.)

Because the Petitioner does not maintain the foregoing detailed information in conveniently accessible electronic form, there is considerable burden attendant upon compliance with the foregoing requests. Further, for obvious reasons, production of the detailed information requested by Respondent may prove unnecessary. If the core legal issue described above is resolved against Respondent, then Respondent's claim must be dismissed. Further, he cannot serve as a class representative under Rule 23 of the West Virginia Rules of Civil Procedure; in substance, the case must be dismissed. Consequently, efficient and effective case management considerations dictate that the record in this case should be developed sufficiently as to the Respondent's individual claim, and that the circuit court visit the core issue of statutory construction first, before the parties become enmeshed in protracted, time-consuming, expensive class discovery.

Thus, in response to Respondent's copious class-based discovery requests as described above, counsel for Petitioner suggested to Respondent's counsel that it would be more efficient, sensible, and a far better use of the parties' resources and energy, to defer class-wide discovery pending the development of the necessary record and the presentation to the circuit court of the threshold and dispositive legal issue, i.e., the date when Respondent was "discharged" within the

meaning of the WPCA. (J.A. 015, 057-059.) The logic of course, was to avoid expensive, time-consuming, and potentially unnecessary class-based discovery if possible. Significantly, counsel for Petitioner did not suggest delaying or deferring discovery of information relating to the facts and circumstances surrounding the discharge of Respondent on the date of payment of his final wages. Thus, deferring class-based discovery could not even arguably impair or impede Respondent from adequately presenting his particular claim for decision. Nor could deferring class-based discovery burden Respondent's opportunity to brief and argue the dispositive legal issue, which is essentially one of statutory construction. Nonetheless, Respondent summarily rejected Petitioner's proposal, instead suggesting that the way to avoid the cost of classwide discovery would be to settle the putative class action.<sup>2</sup> (J.A. 015, 057-059.)

After providing full and complete responses to those discovery requests directed at information pertaining to Respondent's individual claim, and raising objections to the extremely broad requests seeking information relating to other employees (J.A. 031-042), Petitioner submitted to the circuit court a motion dated December 22, 2015 requesting that broad and possibly needless class-based discovery be deferred pending a ruling on the central legal question. (J.A. 006-049.) Respondent submitted a response in opposition on February 29, 2016. (J.A. 050-068.) Based on the erroneous presumption that Petitioner's request for relief was grounded on nothing

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<sup>2</sup> The tenacious resistance of Respondent's counsel to the perfectly reasonable approach suggested by Petitioner's counsel, *i.e.*, deferring burdensome and potentially unnecessary class discovery pending a ruling by the circuit court as to whether Respondent has a viable individual cause of action, is paradoxical at best. Logic would seem to dictate that it would serve the interest of all concerned to secure a ruling on whether their client presents a meritorious claim before becoming submerged with the necessity of copying and reviewing voluminous documentation concerning other non-party former employees and the circumstances surrounding their separations from employment. The strategy employed by counsel for Respondent thus raises the specter of some undisclosed agenda, such as a misuse of the facilities of the courts and the discovery process to assist them in the identification of other potential clients.

more than a commonplace discovery objection, as opposed to a request for active, prudent and efficient case management, Respondent superficially argued that Petitioner's suggestion to defer class discovery was untimely. (J.A. 050-068.)

A hearing was conducted on the motion on March 3, 2016, at the conclusion of which the court took the matter under advisement. (J.A. 069-070.) By order dated March 3, 2016, Petitioner's motion was denied. (J.A. 069-070.) Presumably adopting the reasoning set forth in Respondent's insubstantial opposition, the circuit court's order addressed the issue as though it represented a mundane dispute over discovery objections, when in fact, it represented an important proposal for effective and efficient case management. The circuit court ruled that Petitioner's motion was not timely, because it was not advanced within thirty days of service of Respondent's written discovery, even though no Rule 16 scheduling conference had been held, no scheduling order was in place, no Rule 26(f) discovery conference had occurred, and no order authorizing discovery had been entered. Further, the court viewed the motion as untimely despite that the class discovery was served together with original process, and it would have been extraordinarily difficult for Petitioner to have retained counsel, and for counsel to have analyzed the case sufficiently within thirty days of original service of process to recognize that class-based discovery should be deferred pending a preliminary ruling on the threshold legal issue. Conversely, the March 3, 2016 order reflects no meaningful consideration of efficiency or avoiding unnecessary costs of litigation; nor does it address whether any prejudice to the rights or interests of the Respondent, or any other untoward consequence for that matter might be entailed by delaying class discovery, pending a visitation of the fundamental legal merit vel non of the Respondent's claim. In short, the circuit court's treatment of a seemingly logical, sensible case management proposal is perfunctory, at best. (J.A. 069-070.)

On April 1, 2016, Petitioner timely filed a Notice of Appeal with this Court regarding the circuit court's March 3, 2016 order, predicated jurisdiction on the collateral order doctrine.

### **SUMMARY OF THE ARGUMENT**

The circuit court erred in treating Petitioner's request to defer class discovery pending a ruling on the dispositive issue of statutory construction as a routine, commonplace discovery objection, where a plain reading of Petitioner's motion clearly demonstrates that the relief sought was protective in nature, and further designed to effectuate the case management procedures embodied in the West Virginia Rules of Civil Procedure. Because it erroneously considered Petitioner's requested relief as a routine discovery objection, the circuit court further erred in finding that Petitioner had waived any objection to class discovery. Furthermore, by summarily rejecting Petitioner's request to defer class discovery before it had held a properly conducted case management conference or entered any scheduling order, the circuit court failed to implement the effective case management procedures set forth in the applicable Rules of Civil Procedure.

Under these circumstances, the circuit court's ruling easily meets all of the requisites of the collateral order doctrine as set forth by this Court in Credit Acceptance Corp v. Front, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013). Moreover, and significantly, if circuit court rulings that implicate effective case management concerns are not subject to appeal under the collateral order doctrine, given the absence of any other realistically effective method of review, such rulings could never be challenged, and this Court will be deprived of its only method to meaningfully supervise the circuit courts' commitment to the dictates of active and efficient case management in complex civil actions, especially in Wage Payment and Collection Act class actions.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner submits that oral argument is necessary in view of the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Although the facts and arguments are significantly and adequately presented in Petitioner's brief, Petitioner believes the decisional process would be significantly aided by oral argument.

Petitioner believes that the instant matter would be appropriate for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure in that this appeal involves issues of first impression, as well as issues of fundamental public importance.

## **ARGUMENT**

### **Appellate Jurisdiction Is Proper Under the Collateral Order Doctrine**

To be clear, the ruling of the circuit court does not merely resolve a pedestrian dispute over discovery requests. As discussed, the circuit court's March 3, 2016 order refuses a reasonable and thoughtful request for staged discovery, specifically a request to defer protracted, expansive and expensive classwide discovery pending a potentially dispositive determination regarding the distinct, narrow issue of statutory construction that lies at the core of Respondent's claim. In the unique circumstances of this case, that ruling is inconsistent with considerations of effective case management, and is largely at odds with the objectives of Rules 16 and 26(f) of the West Virginia Rules of Civil Procedure.

Ordinarily, an appeal only lies as of right from a "final judgment" entered by a circuit court. See W. Va. Code § 58-5-1. A "final judgment" normally is an order that terminates the litigation on the merits and leaves nothing else to be done in the circuit court. See, e.g., Gooch v. W. Va. Dept. of Public Safety, 195 W. Va. 357, 465 S.E.2d. 628 (1995); Taylor v. Miller, 162 W. Va. 265,

249 S.E.2d 191 (1978). Although the order in question is unquestionably interlocutory, it is appealable, nonetheless, under the collateral order doctrine – a well-recognized exception to the general rule permitting appellate review only of final orders. The order easily meets the conventional criteria in that it (1) “conclusively determines the disputed controversy” (at least as to the staging of class discovery); (2) “resolves an important issue completely separate from the merits of the action;” and (3) “is effectively unreviewable on appeal from a final judgment.” See Credit Acceptance Corp v. Front, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)); see also Durm v. Heck’s, Inc., 184 W. Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991); Robinson v. Pack, 223 W. Va. 828, 679 S.E.2d 660 (2009). There is no question that the circuit court’s order here fits squarely within, and in fact is uniquely suited to, appeal as of right under this rubric.

As to the first factor of the collateral order test, that the ruling at issue “conclusively determines the disputed controversy,” the circuit court’s denial of Petitioner’s motion for protective relief, seeking a temporary stay of class-based discovery, finally and conclusively determines that class discovery will proceed, irrespective of the merits of Respondent’s individual cause of action. As such, the ruling presently requires Petitioner to allocate considerable time, effort, and expense to respond to potentially superfluous classwide discovery. Because the order below fully resolves the issue of Petitioner’s obligation to participate in the litigation, the first factor required for review under the collateral order doctrine is undoubtedly satisfied.

As to the second factor, which focuses on whether the circuit court’s ruling resolves significant issues separate from the merits, it is clear that the sequencing of discovery and corresponding application of effective case management procedures is conceptually distinct from the merits of Respondent’s claim under the WPCA. Similarly, there is no question that the circuit

court's ruling is important, given that it requires Petitioner to incur significant expenditures to participate in potentially needless class discovery, without first having an opportunity address the narrow question of whether or not Respondent is an appropriate representative for any purported class. Thus, the second factor is met.

The third and final factor considers whether the ruling at issue is effectively unreviewable at the appeal stage. Postponing review of a ruling denying a stay of class discovery is obviously fruitless, because the underlying objective of effective and reasoned case management would be forever lost through rigorous application of the final judgment requirement.

Significantly, this Court has never specifically addressed whether the collateral order doctrine is available as a means of seeking appellate review of important case management decisions of the circuit courts. As a practical matter, if circuit court rulings that implicate effective case management concerns are not immediately appealable under the collateral order doctrine, given the absence of any other realistically effective method of appeal, such rulings will be totally unreviewable. As such, this Court will be without any opportunity to meaningfully guide and supervise the circuit courts' commitment to the dictates of active and efficient case management in complex civil actions that require careful and aggressive case management, of which Wage Payment and Collection Act class actions are certainly an example.

Importantly, there is no West Virginia authority to support the proposition that the collateral order doctrine can never apply to an order regarding discovery. To the contrary, thoughtful reflection on the situation presented in this case leads ineluctably to the conclusion that the collateral order doctrine *must* be available as a mechanism to secure review of important, but erroneous case management decisions of our circuit courts, even though they deal with discovery-related case management problems. While this Court has not yet had the opportunity to consider

the application of the collateral order doctrine either to a discovery ruling, or to a case management ruling that arises in a context like the one presented here, the Court has likewise never limited the doctrine's application to any particular class or character of interlocutory orders. Nor has the Court articulated for a blanket rule that orders pertaining to discovery and/or case management issues are not appealable pursuant to the collateral order doctrine.

When there are no West Virginia decision on point, this Court has frequently looked to federal jurisprudence addressing analogous provisions of federal law. See, e.g., Dean v. State, 230 W. Va. 40, 46, 736 S.E.2d 40, 46 (2012) (“Given the lack of jurisprudence on this issue in our State, the Court turns to federal law....”); State v. Sutphin, 195 W. Va. 551, 563, 466 S.E.2d 402, 414 (1995) (referring to federal decisions as “persuasive guides”). In this instance, there is a perfect federal analogy: 28 U.S.C. § 1291 limits the jurisdiction of federal courts of appeals to the review of “final decisions” of the district courts, in exactly the same way that W. Va. Code § 58-5-1 limits the jurisdiction of this Court to the review of “final judgments.” Thus, the federal system follows an identical rule of “finality.” Nonetheless, the United States Supreme Court has long recognized a collateral order exception to the federal finality rule. See Cohen, 337 U.S. 541 (1949). The West Virginia collateral order doctrine is clearly predicated on an adoption of the federal analogue. See, e.g., Robinson, 223 W. Va. at 832, 679 S.E.2d at 664; James M.B. v. Carolyn M., 193 W. Va. 289, 292, 456 S.E.2d 16, 19-20 (1995). Thus, this Court has uniformly analyzed the appealability of interlocutory orders under the rubric frequently referred to as the federal “Cohen test.” See Robinson, 223 W. Va. at 832.

In light of the federal origin of the West Virginia collateral order doctrine, it is significant that on numerous occasions, the federal courts have permitted immediate appellate review pursuant to the collateral order doctrine of interlocutory orders that relate to discovery or otherwise arise in

the context of discovery. These decisions, which are abundant, unequivocally confirm that while orders dealing with ordinary, garden-variety discovery disputes are typically not appealable based on the collateral order doctrine, orders, like the circuit court's March 3, 2016 here, that meet the three recognized criteria under Cohen are not deemed non-appealable simply because they are related in some manner to discovery. See, e.g., In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997) (holding that order requiring production of documents was appealable collateral order); Smith v. BIC Corp., 869 F.2d 194, 196 (3d Cir. 1989) (stating "[w]e have never held as a blanket rule that discovery orders are not appealable," and holding that appeal from denial of protective order was permissible under collateral order doctrine); In re Grand Jury Investigation, 363 Fed. App'x 164, 165 (3d Cir. 2010) (finding that district Court's denial of motion for a protective order satisfied standard for collateral order doctrine); Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990) (holding that order compelling employee to submit to examination by employer's vocational rehabilitation expert in age discrimination action was appealable under collateral order doctrine); Osband v. Woodford, 290 F.3d 1036 (9th Cir. 2002) (order denying reconsideration of order permitting discovery of certain privileged materials was appealable under the collateral order doctrine, as protective order was conclusive determination of legal issue of scope of waiver of attorney-client privilege, resolved important issue separate from merits of underlying action, and would be effectively unreviewable on appeal); In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981) (interlocutory orders by prohibiting disclosure of deposition evidence, and quashing subpoenas seeking documents identical to those on which trial court had imposed protective order were appealable); Ameziane v. Obama, 620 F.3d 1 (D.C. Cir. 2010) (court of appeals had jurisdiction over interlocutory appeal from order denying motion to designate certain information as protected under the protective order, because order was conclusive, issue of disclosure was

entirely separate from merits and was sufficiently important to warrant immediate appellate review, and order was effectively unreviewable on appeal from a final judgment, since once the information at issue was revealed, its disclosure could not be undone); Al Odah v. United States, 559 F.3d 539, 543 (D.C. Cir. 2009) (court of appeals had jurisdiction to review district court's discovery order directing disclosure of unredacted classified information under the collateral order exception to the final judgment rule); Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007) (under the collateral order doctrine, court of appeals had jurisdiction over the interlocutory appeal of an order denying a motion to quash based upon a privilege); In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3d Cir. 2007) (court of appeals had jurisdiction under collateral order doctrine to review interlocutory order from district court which required party to produce documents to which attorney-client privilege had been asserted); Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007) (though not a final resolution of the case, an order for the production of documents over which a privilege is asserted is appealable as finally resolving a collateral discovery issue); In re Napster, Inc. Copyright Litig., 479 F.3d 1078 (9th Cir. 2007) (order requiring disclosure of privileged attorney-client communications was appealable under collateral order doctrine); Diamond Ventures, LLC v. Barreto, 452 F.3d 892 (D.C. Cir. 2006) (interlocutory review of order allowing the principals and employees access to applications submitted to the Small Business Administration was warranted because privacy and competitive interests of the program's applicants, who were required to disclose vital business strategies that would go unprotected without immediate appellate review overcame the interest in finality); Agster v. Maricopa Cty., 422 F.3d 836 (9th Cir. 2005) (although litigation had not terminated, court of appeals had jurisdiction over appeal of order compelling production of mortality review conducted by county correctional health services in connection with death of prisoner; significant strategic decisions

turned on issue of whether to recognize federal peer review privilege, and “review after final judgment might come too late”).

Moreover, while Petitioner acknowledges that truly routine discovery orders generally are not subject to appeal as of right under the collateral order doctrine, as discussed, Petitioner’s motion to stay class discovery obviously was not an objection to discovery in the ordinary sense, and the order denying the motion is not in any regard a commonplace discovery ruling. Instead, the motion was a request for active, prudent and efficient case management, specifically staged classwide discovery. And while standard case management orders also typically are not subject to immediate appellate review, under the circumstances presented here, where the circuit court completely overlooked the important considerations delineated in and procedures mandated by West Virginia Rules of Civil Procedure 16 and 26(f), appellate review is appropriate and necessary to foster the vital principles of effective case management embodied in those Rules.

As discussed at length below, the circuit court’s order is incongruous with the effective case management procedures embodied in Rule 16 of the West Virginia Rules of Civil Procedure because the denial of staged in discovery in this case is likely to result in lack of focus, inefficiency, and potential waste of assets. Further, the ruling is inharmonious with the vital goals which underlie Rules 16 and 26(f) to secure the just, speedy, and inexpensive determination of every action and proceeding. Indeed, perhaps the most obvious and compelling error in the circuit court’s ruling was mischaracterizing the issue as a mere discovery objection, rather than a request for active and effective case management.

In addition, it is critical to realize that the collateral order doctrine is as a practical matter the *only* mechanism under which this Court can realistically review a case management decision of a circuit court. Thus, application of the collateral order doctrine to this type of ruling is the only

way in which this Court can effectively regulate and supervise the conduct of the circuit courts with respect to the manner in which they manage civil litigation and administer effective case management procedures. As stated, ordinarily appealable review is only available of “final judgments.” *A fortiori*, a ruling on a request for case management procedures will *never* qualify as a final judgment; thus, the normal mode of appellate review will never be available. The problem is most pronounced in the case of interlocutory orders that are essentially unreviewable on appeal from a final judgment on the merits. As to such orders, a rule precluding immediate, interlocutory appeal, in effect, precludes review entirely.

There are only a very limited number of alternative mechanisms available to review such an interlocutory order, aside from the collateral order doctrine, but none of them apply to an important case management ruling like the one at hand. Certification of a question for immediate appellate review under W. Va. Code § 58-5-2 is limited to questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, upon a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party. See W. Va. Code § 58-5-2, as amended. Obviously, case management rulings do not even arguably fall within the statutory delineation. Further, the certified question procedure is usually relegated to decisions on the merits and ordinarily case dispositive ones at that: “certified question[s] will not be considered ... unless the disposition of the case depends wholly or principally upon the construction of law determined by the answer.” State ex rel. Advance Stores Co. v. Recht, 230 W. Va. 464, 740 S.E.2d 59, 63-64 (2013); see also Hairston v. General Pipeline Construction, Inc., 226 W. Va. 663, 672, n.5, 704 S.E.2d 663, 672, n.5 (2010) (“Only those questions should be certified up before judgment

which bring with them a framework sufficient to allow this Court to issue a decision which will be pertinent and inevitable in the disposition of the case below”); Morningstar v. Black & Decker Mfg. Co., 162 W. Va. 857, 861, 253 S.E.2d 666, 669 (1979) (“[C]ertification is limited to those questions which may be determinative of the cause then pending in the certifying court”); see also Franklin D. Cleckley, Robin J. Davis and Louis Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 3.4, at 68 (4th ed. 2012) (“The Supreme Court will decline to consider certified questions that are not necessary to the decision of a case”). Plainly, the certified question avenue of review is not suitable to the instant controversy.

Nor are the extraordinary writ procedures well-suited to the review of rulings of the circuit courts regarding case management procedures. It is well-settled that mandamus and prohibition only lie in “extraordinary” situations involving a circuit court’s usurpation or abuse of judicial power. W. Va. Code § 53-1-1 explicitly states that: “The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” This Court has uniformly limited the appealability of extraordinary writs accordingly. See, e.g., State ex rel. Cooper v. Tennant, 229 W. Va. 585, 730 S.E.2d 368 (2012) (“Petitions for writs of prohibition and mandamus are extraordinary forms of relief which are designed to remedy miscarriages of justice, and are used sparingly and under limited circumstances”); State ex rel. Sch. Bldg. Auth. of W. Va. v. Marockie, 198 W. Va. 424, 432, 481 S.E.2d 730, 738 (1996) (“The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.... As we have noted in our prior decisions, mandamus is a remedy that is available only in limited and truly exceptional circumstances”); State ex rel. Billings v. City of Point Pleasant, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995) (stating “[s]ince mandamus is an ‘extraordinary’ remedy, it should be

invoked sparingly” (footnote omitted)); State ex rel. United States Fidelity & Guar. Co. v. Canady, 194 W. Va. 431, 436, 460 S.E.2d 677, 682 (1995) (providing “[m]andamus, prohibition and injunction against judges are drastic and extraordinary remedies.... As extraordinary remedies, they are reserved for really extraordinary causes”) (citations omitted). Although issues of aggressive and effective case management are important issues that are becoming increasingly more important in the modern world of complex civil litigation, rulings of circuit courts refusing to implement prudent and effective case management procedures hardly rise to the level of an abuse or misuse of legitimate judicial powers or an abuse of jurisdiction or judicial authority. Indeed, the ruling of the circuit court in this case may represent an abuse of discretion, but it certainly does not constitute an abuse or misuse of judicial authority. Thus, review of rulings like the one in issue here under the rubric of mandamus or prohibition is not realistic. And, it is frankly unfair and almost unseemly to require that a litigant virtually accuse a trial judge of an abuse of power in order to facilitate a means of appellate review of an adverse case management decision.

Post-judgment review is also unavailing. This Court has previously held that “it is well settled that, ‘[m]ost errors ... are subject to harmless error analysis.’” State v. Warburton, No. 14-0625, 2015 WL 6181517, at \*3 (W. Va. Oct. 20, 2015) (quoting State v. Reed, 218 W. Va. 586, 590, 625 S.E.2d 348, 352 (2005)). “The harmless error inquiry involves an assessment of the likelihood that the error affected the *outcome* of the trial.” State v. Bradshaw, 193 W. Va. 519, 457 S.E.2d 456 (1995) (emphasis supplied). However, as discussed above, issues such as the one raised here, involving the sequencing of discovery in class litigation and the corresponding application of effective case management procedures, are conceptually distinct from the merits of the action, and thus, by definition are not outcome determinative, as required in order to invoke the harmless error doctrine.

Absent a meaningful method of appellate review, this Court cannot hope to effectively provide guidance to the circuit courts with respect to the manner in which they manage civil litigation. Nor can this Court ensure that the Rules requiring the effective, if not innovative, case management procedures are properly administered. This Court's guidance and oversight is particularly critical in complex matters such as the one currently presented for appeal. Class litigation presents unique challenges for effective case administration, including but not limited to a heightened need to curtail unnecessary discovery and avoid specious litigation expenses. Class actions, therefore, demand unique administration in which judges play a special and active role. Nonetheless, there are currently no special rules or procedures in place to manage and administer class actions. By contrast, the West Virginia specialized "Business Court Division" has been created to ensure the efficient management and resolution of litigation involving commercial issues and disputes between businesses (see W. Va. Code § 51-2-15, providing that "[t]he West Virginia Legislature finds that, due to the complex nature of litigation involving highly technical commercial issues, there is a need for a separate and specialized court docket to be maintained in West Virginia's most populated circuit court districts with specific jurisdiction over actions involving such commercial issues and disputes between businesses"). Similarly, the specialized "Mass Litigation Panel" is tasked with the efficient management and resolution of litigation involving catastrophic events, personal injury mass torts, property damage mass torts, and the like (see W. Va. Trial Court Rules 26.02, 26.04). Unfortunately, there is no similarly innovative judicial body, nor are there any special procedural mechanisms which apply to putative class actions brought pursuant to Rule 23. As a result, and in the absence of more fully developed procedures distinctively applicable to class action cases or the implementation of a specialized court docket to oversee such matters, it is imperative that this Court seize upon opportunities such

as the one presented here to stridently promote the circuit courts' use of the various procedural tools that are in place, such as the provisions of Rules 16 and 26, to ensure effective case management in complex cases.

By way of further illustration, some courts through the country have implemented local rules that more precisely delineate considerations designed to address effective and aggressive case management in complex actions. For instance, Rule 16.1(B)(2)(c) of the Local Rules for the United States District Court for the Western District of Pennsylvania directs litigants and district court judges to consider, as part of their early case management efforts, "limitations on the scope, method or order of discovery as may be warranted by the circumstances of the particular case to avoid duplication, harassment, delay or needless expenditure of costs." See W.D. Pa. L.R. 16.1(B)(2)(c). However, there is no similar counterpart in the West Virginia Rules of Civil Procedure that explicitly addresses such matters as "limitations on the scope, method or order of discovery." As a consequence, this Court, recognizing the trend toward more rigorous judicial participation in and oversight of effective case management concerns, must either adopt special rules to confront those issues or seize upon appropriate opportunities to address such concerns through appellate review. The instant matter presents an ideal example of such a suitable instance.

The importance of this Court's guidance with respect to the manner in which circuit courts manage class action litigation is further underscored by the apparent proliferation of class action litigation in West Virginia. The need for efficiency in the management of discovery is no more evident than in class action cases brought under the WPCA, especially in the context of WPCA claims founded on alleged brief delays in the payment of final wages, where the potential damages are likely extremely minimal. While this may justify the use of the Rule 23 class action device, by the same token, considerations of proportionality (see discussion at p. 27, infra) demand that

the circuit courts work aggressively to develop management strategies in these cases to hold down the costs of litigation whenever possible. This case is a prime example. If Respondent and his counsel have their way, costs of discovery will soon out distance the aggregate amount of damages that not only Respondent may hope to recover, but also the entire amount of recovery to which the putative class may be entitled as well. The circuit court instanter was not especially appreciative of the necessity or importance of these cost control concerns.

Therefore, it is important that this Court entertain this appeal, under the collateral order doctrine, so that the Court may carefully review the circuit court's ruling, and articulate views that foster and promote effective case management concerns embodied in the Rules.

#### **Standard of Review**

Petitioner seeks relief from the circuit court's order rejecting its request for protective relief and its corresponding proposal for effective case management through an appeal to this Court. There are woefully few prior cases of this Court reviewing case management decisions of our circuit courts. Therefore, there are no cases definitively establishing a precise standard of appellate review of such decisions. However, it has been held that the control and management of civil cases is essentially committed to the sound discretion of the circuit courts. See, e.g., B.F. Specialty Co. v. Charles M. Sledd Co., 197 W. Va. 463, 465, 475 S.E.2d 555, 557 (1996) (“[a] trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration”). In State ex rel. Leung v. Sanders, 213 W. Va. 569, 584 S.E.2d 203 (2003), this Court described an abuse of discretion as follows:

“In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them..... We have also cautioned, however, that we will not simply rubber stamp the trial court’s decision when reviewing for an abuse of discretion.” Id. at 575, 584 S.E.2d at 209 (internal quotations and citations omitted).

Therefore, Petitioner would urge this Court to enunciate a standard of appellate review essentially as follows: case management decisions of the circuit courts are reviewable for abuse of discretion; however, where a ruling of a circuit court ignores the dictates of Rules 16 and 26(f) of the West Virginia Rules of Civil Procedure, and/or disregards appropriate considerations of effective and efficient case management, such a decision constitutes an abuse of the circuit court’s discretion.

I. THE CIRCUIT COURT ERRED IN DENYING PETITIONER’S MOTION TO DEFER CLASS DISCOVERY PENDING A RULING ON A POTENTIALLY DISPOSITIVE ISSUE OF STATUTORY CONSTRUCTION AND IN TREATING THE MOTION AS A SIMPLE DISCOVERY OBJECTION WHERE THE RELIEF SOUGHT BY PETITIONER WAS DESIGNED TO EFFECTUATE THE GOALS OF THE CASE MANAGEMENT PROCEDURES EMBODIED IN RULES 16 AND 26 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, TO-WIT, ACHIEVING A JUST, SPEEDY, AND INEXPENSIVE RESOLUTION OF THIS PUTATIVE CLASS ACTION.

The circuit court indisputably had the authority to order the staged discovery requested by Petitioner. That authority is implicit in the subjects that are appropriately considered during a scheduling conference under the provisions of Rule 16(c), especially subdivisions (1), (3), (4), (5), and most especially (6), which addresses “[t]he control and scheduling of discovery....” The authority to order staged discovery is also textually explicit in the provisions of Rule 26(f), under which the circuit courts have the authority to, *inter alia*, enter orders “identifying the issues for discovery purposes; establishing a plan and schedule for discovery; settling limitations on

discovery, if any; and, determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action.” Aside from the plain text of those Rules, this Court should also recognize that circuit courts possess the overarching authority to effectively and efficiently manage litigation that appears on their dockets. Accordingly, the circuit court unquestionably could have granted the relief that Petitioner requested herein.

The circuit court’s denial of the relief requested by Petitioner in this instance, i.e., its refusal to defer classwide discovery pending a determination on the narrow and fundamental dispositive legal issue in this litigation, particularly in the absence of a properly conducted case management conference and scheduling order, constitutes an abuse of discretion. Not only is the circuit court’s ruling in direct contradiction of considerations of active and effective case management, it also is plainly “against the logic of the circumstances then before the court and so arbitrary and unreasonable as to ... indicate a lack of careful consideration.” B.F. Specialty Co., 197 W. Va. at 465, 475 S.E.2d at 557.

As a threshold matter, in denying Petitioner’s motion to stay class discovery, the circuit court erred in treating the motion as a generic discovery objection. A plain reading of Petitioner’s motion clearly demonstrates that the relief sought was protective in nature, and further designed to effectuate the case management procedures embodied in Rule 16, despite the absence of a properly conducted case management conference and scheduling order. Because it erroneously considered Petitioner’s requested relief as a routine discovery objection, the circuit court further erred in finding that Petitioner had waived any objection to class discovery. Notably, there is no authority for the circuit court’s waiver finding under the West Virginia Rules of Civil Procedure or under West Virginia decisional law.

Because it speciously regarded Petitioner's request for protective relief and proposal for the efficient administration of this action as a commonplace discovery objection, in denying the same, the circuit court failed to implement the effective case management procedures set forth in Rule 16 of the West Virginia Rules of Civil Procedure. Rule 16(a) directs courts to conduct a conference with the parties for the purposes of "[e]xpediting the disposition of the action," "[e]stablishing early and continuing control so that the case will not be protracted because of lack of management," and "[d]iscouraging wasteful pretrial activities...." W.Va. R.C.P. 16(a). Rule 16(b) goes on to state that "[e]xcept in categories of actions exempted by the Supreme Court of Appeals, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail or other suitable means, enter a scheduling order that limits the time: (1) [t]o join other parties and to amend the pleadings; (2) [t]o file and hear motions; and (3) [t]o complete discovery. The scheduling order also may include: [t]he date or dates for conferences before trial, a final pretrial conference, and trial; and [a]ny other matters appropriate in the circumstances of the case." W.Va. R.C.P. 16(b).

As this Court has explained, "Rule 16 is the principal source of the powers and tools that ... courts are to use to achieve the fundamental purpose articulated by Rule 1 of the ... Rules of Civil Procedure – securing 'the just, speedy, and inexpensive determination of every action and proceeding.'" Caruso v. Pearce, 223 W. Va. 544, 548-49, 678 S.E.2d 50, 54-55 (2009) (quoting James Wm. Moore, 3 Moore's Federal Practice, 3d Edition § 16.03 (2007)). "Put succinctly, '[u]nder Rule 16(b) trial courts must enter a scheduling order[.]'" Id. (quoting Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 16(b)[2], at 438 (3d Edition, 2008)). "The purpose of a scheduling order is to encourage careful pretrial management and to assist the trial court in gaining and maintaining control over the direction of

the litigation.” Id. As one treatise states: “Rule 16 is explicitly intended to encourage active judicial management of the case development process and of trial in most civil actions. Judges must ... actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial.” James Wm. Moore, 3 Moore’s Federal Practice, 3d Edition § 16.02 (2007).

Indeed, this Court has cautioned that “[t]he absence of a Rule 16(b) scheduling order ‘can result in lack of focus, inefficiency, and delays in disposition,’” (Caruso, 223 W. Va. at 549 (quoting James Wm. Moore, 3 Moore’s Federal Practice, 3d Edition § 16.10 [2])), and has explicitly held that “Rule 16(b) requires active judicial management of a case, and mandates that a trial court ‘shall ... enter a scheduling order’ ... generally guiding the parties toward a prompt, fair and cost-effective resolution of the case.” Id. Notwithstanding that Rule 16(b) is mandatory, the circuit court in this case did not conduct a conference with the parties or enter a scheduling order. In the absence of a court-imposed scheduling order carefully considering and delineating appropriate parameters for discovery, the circuit court’s precipitous denial of Petitioner’s well-founded motion for protective relief was an abuse of discretion, in that “a material factor deserving significant weight [wa]s ignored....” Leung, 213 W. Va. at 575, 584 S.E.2d at 209. The circuit court was obligated to evaluate Petitioner’s request for relief in light of the case management objectives of “[e]xpediting the disposition of the action,” “[e]stablishing early and continuing control so that the case will not be protracted because of lack of management,” and “[d]iscouraging wasteful pretrial activities....” However, in this instance, the circuit court failed to give any consideration whatsoever to any of these important factors.

The significance of the circuit court’s abuse of discretion is perhaps best illustrated through a brief examination of the recently adopted, far reaching and to some extent revolutionary

amendments to the Federal Rules of Civil Procedure, which went into effect on December 1, 2015. These amendments were intended to address three key concerns: (1) the need for better case management; (2) more effective use of the long-ignored principle of “proportionality”; and (3) an increased emphasis on the role of cooperation among the parties in discovery. *See Memorandum Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* (June 14, 2014), available at: [www.uscourts.gov/file/18218/download+&cd=1&hl=en&ct=clnk&gl=us](http://www.uscourts.gov/file/18218/download+&cd=1&hl=en&ct=clnk&gl=us). In its Report, the Advisory Committee noted that “cases are resolved faster, fairer, and with less expense when judges manage them early and actively. An important part of this management is an initial case management conference where judges confer with parties about the needs of the case and an appropriate schedule for the litigation.” *See id.* at B-12. The Report further notes a specific intention “to encourage judges to be more aggressive in identifying and discouraging discovery overuse.” *Id.* at B-38.

The final amendments to the case management provisions of Federal Rule 16(b) represent a continuation of the Committee’s efforts to streamline the initial stages of civil litigation and encourage early judicial involvement. Specifically, the Rule no longer provides for scheduling conferences by “telephone, mail, or other means” and the time for a court to issue a scheduling order is now the earlier of 90 days after any defendant has been served, or 60 days after any defendant has appeared. *See* Fed. R. Civ. P. 16. Rule 26 has also been significantly revised, now mandating that discovery be relevant to any party’s claim or defense and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1), providing that “[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the

importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” In sum, the recent amendments to the Federal Rules highlight an overarching concern that legal disputes be decided on their merits rather than the economic pressure one party can bring to bear on another. The circuit court’s ruling in the instant matter is in direct contradiction to that goal, and must be reconsidered by this Court.

The incongruity between the circuit court’s decision and the goals embodied in the recently amended Federal Rules is all the more troubling, given that the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. See, e.g., W. Va. Bd. of Educ. v. Marple, No. 14-1264, 2015 WL 7101971, at \*13 (W. Va. Nov. 10, 2015) (“Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, [this Court] often refer[s] to interpretations of the Federal Rules when discussing our own rules”); State v. Sutphin, 195 W. Va. 551, 563, 466 S.E.2d 402, 415 (1995) (“[W]e have repeatedly recognized that when codified procedural rules ... of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules.”) (citations omitted).

In addition to mistakenly treating Petitioner’s motion to defer class discovery as a commonplace discovery objection, and thereby failing to implement the effective case management procedures set forth in the West Virginia Rules of Civil Procedure, in denying Petitioner’s motion to stay class discovery, the circuit court erroneously relied upon this Court’s rulings in Love v. Georgia Pac. Corp., 214 W. Va. 484, 590 S.E.2d 677 (2003) and Gulus v. Infocision Management Corporation, 215 W. Va. 225, 599 S.E.2d 648 (2004), citing those decisions in support of the proposition that “class discovery is appropriate when there is factual uncertainty.” The circuit court’s reliance on Love and Gulus is entirely misplaced, however, as

those decisions considered the question of whether class discovery is permitted *at all* prior to a determination on certification. However, neither case gave any consideration whatsoever to the question that was before the circuit court, *i.e.*, whether, in the absence of a properly conducted case management conference and scheduling order, class discovery should be allowed before the court has ruled on a threshold substantive legal issue that is potentially dispositive of the entire action. Accordingly, the circuit court's reliance upon and application of Love and Gulus in this matter constitutes error.

Finally, although a stay of class discovery pending resolution of an anticipated summary judgment motion is a generally recognized method for dealing with class issues, and is particularly appropriate here because there is substantial doubt about the viability of Respondent's individual claim, and because the expense and burden of class discovery will be rendered meaningless if the summary judgment motion is successful, the circuit court did not consider the vast weight of authority throughout the country explicitly recognizing that a just, speedy, and inexpensive resolution of a putative class action can be obtained by resolving motions for summary judgment on the named plaintiff's claims before conducting class discovery. *See, e.g., Curtin v. United Airlines, Inc.*, 375 F.3d 88, 91-92 (D.C. Cir. 2001) (trial court had discretion to rule on summary judgment motion before doing "a needless, time-consuming inquiry into class certification"); Wright v. Schock, 742 F.2d 541, 544-45 (9th Cir. 1984) (proper for trial court to resolve threshold substantive legal issues "after quite limited discovery" before incurring expense of extensive class discovery); Marx v. Centran Corp., 747 F.2d 1536, 1552 (6th Cir. 1984) ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake. In short, the class action allegations in Marx's complaint presented no impediment to the district court's grant of summary judgment"); Thompson v.

County of Medina, 29 F.3d 238, 241 (6th Cir. 1994) (“neither plaintiffs nor the members of the class were prejudiced by the order of the court’s rulings, the district court acted well within its discretion in concluding that it should decide the motion for summary judgment first.”); Mitchell v. Industrial Credit Corp., 898 F. Supp. 1518, 1521, 1537 (N.D. Ala. 1995) (court’s concern regarding “extensive discovery, time and expense that would likely be involved on the class certification issue” resulted in court’s adoption of a two-stage discovery plan wherein “the first phase ... would focus on the claims of the named plaintiff and ... discovery regarding putative class members and class status would be allowed, if appropriate, at a later time”); Pieloor v. Gate City Bank, No. 12-039, 2012 U.S. Dist. LEXIS 148702, \*11-13 (D.N.D. Oct. 15, 2012) (exercising discretion to focus discovery on threshold merits issues before proceeding to “full-blown class and merits discovery”); Hager v. Vertrue, Inc., No. 09-11245, 2011 WL 4501046, \*1 (D. Mass. Sept. 28, 2011) (court “determined that discovery should be phased, with the first phase focused on the [plaintiffs’] individual claims, rather than issues related to any putative class of plaintiffs”); Mallo v. Public Health Trust of Dade Co., Fla., 88 F. Supp. 2d 1376 (S.D. Fla. 2000) (granting defendant’s motion to stay discovery and class certification pending disposition of defendant’s dispositive motion); Lawson v. Fleet Bank of Maine, 807 F. Supp. 136, 138 n.1 (D. Me. 1992) (“[T]he Court believes that its decision to defer action on the class certification motion and to stay discovery until after resolution of the dispositive motion was the more prudent use of judicial resources. That judgment has been borne out by the outcome here.”); Talley v. NCO Fin. Sys., Inc., No. 06-48, 2006 U.S. Dist. LEXIS 74419, \*2, \*7 (N.D. Ind. Oct. 12, 2006) (it is in the interests of judicial economy and efficiency to rule on motion for summary judgment before proceeding with potentially “unnecessary discovery and motion practice related to class certification”); State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 44, 658 S.E.2d 728, 735 (2008)

(noting that Rule 26(c) “may be used to stay discovery pending the outcome of a dispositive motion....”) (citing Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26(c)(2), p. 758); Rowe v. Citibank N.A., No. 13-21369, 2015 WL 1781559, at \*1 (S.D. W. Va. Apr. 17, 2015) (granting defendant’s motion to stay discovery pending resolution of its motion for judgment on the pleadings); Nee v. State Indus., Inc., 3 N.E.3d 1290, 1297 (Ohio Ct. App. 2013) (referencing trial court’s stay of class discovery pending ruling on summary judgment on named plaintiff’s individual claims); Degutis v. Fin. Freedom, LLC, No. 12-319-38, 2013 WL 10207621, at \*2 (M.D. Fla. Oct. 18, 2013) (staying class discovery, allowing discovery regarding named plaintiff’s claims, and indicating that “class discovery may commence, if necessary, after the Court’s ruling on the motion for summary judgment”); Blake v. Fin. Mgmt. Sys., Inc., No. 11-612, 2011 WL 4361560, at \*3 (N.D. Ill. Sept. 19, 2011) (granting defendant’s motion to stay class discovery); Niemiec v. NCO Fin. Sys., Inc., No. 05-219, 2006 WL 1763643, at \*1 (N.D. Ind. June 27, 2006) (noting magistrate judge’s entry of order granting defendants’ motion to stay pending the resolution of dispositive motion); Alliance to End Repression v. Rochford, 75 F.R.D. 441 (N.D. Ill. 1977) (granting defendants’ motion to stay class discovery in order to avoid needless discovery); McFoy v. Amerigas, Inc., 170 W. Va. 526, 531, 295 S.E.2d 16, 21 (1982) (“Where the factual circumstances of a case make it appropriate to determine liability before determining the class of plaintiffs, it is within the court’s discretion to do so”); In re W. Va. Rezulin Litig., 214 W. Va. 52, 63, 585 S.E.2d 52, 63 (2003) (same); White v. Coca-Cola, Co., 542 F.3d 848, 854 (11th Cir. 2008) (“The resolution of the merits of this controversy obviates any issue about [class certification]”); Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1343 (11th Cir. 2000) (“With no meritorious claims, certification of those claims as a class action is moot”).

**CONCLUSION**

For the foregoing reasons, the circuit court's order denying Petitioner's motion to stay class discovery should be reversed, and this matter should be remanded for further proceedings.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Petitioner's Brief** has been served upon the following counsel via-U.S Mail Only on June 30, 2016:

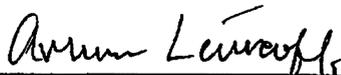
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