

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0331

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

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

PETITIONER,

v.

JEFFREY S. MIKLOS
PLAINTIFF BELOW,

RESPONDENT.

PETITIONER'S REPLY BRIEF

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ARGUMENT

The gravamen of Petitioner's case on appeal is that the circuit court erred in refusing to defer expansive and potentially unnecessary classwide discovery, which sought information and documentation concerning non-party former employees and the circumstances surrounding their separations from employment, pending a determination on a narrow and fundamental dispositive legal issue of statutory construction relating exclusively to Respondent's individual cause of action. Petitioner submits that the circuit court's ruling constitutes an abuse of discretion because it ignores the dictates of Rules 16 and 26(f) of the West Virginia Rules of Civil Procedure, and as a consequence is wholly inconsistent with the principles of active and effective case management embodied therein. Petitioner further submits that appellate jurisdiction is proper under the collateral order doctrine, because the circuit court's ruling easily meets each of the prerequisites to that well-recognized exception to the general rule of finality as set forth by this Court in Credit Acceptance Corp v. Front, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013).

Respondent's opposition largely ignores the principal issues raised by Petitioner in its opening submission to this Court, first and foremost the circuit court's disregard of appropriate, and indeed mandatory, considerations of effective and efficient case management. Instead, the bulk of Respondent's opposition is premised upon two related, yet equally faulty, propositions: (1) that the order in question represents nothing more than a pedestrian and commonplace discovery ruling; and (2) that the circuit court properly viewed Petitioner's request for protective relief as untimely because it was not advanced within thirty days of service of Respondent's written discovery. Respondent's arguments are superficial at best, in that they completely ignore the practical implications and reality of the circumstances presented here.

First, the circuit court's order cannot fairly be characterized as a mere discovery ruling. The relief requested by Petitioner in no way pertained to typical discovery objections, such as relevance or over breadth, but rather involved an important request for active, prudent and efficient case management. The context in which Petitioner's request was made is also extremely significant: 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. A plain reading of Petitioner's motion clearly demonstrates that the relief sought was protective in nature, and that it was designed to effectuate the case management procedures embodied in the West Virginia Rules of Civil Procedure. The circuit court therefore erred in treating Petitioner's requested relief as a routine discovery objection, and Respondent's opposition offers no compelling justification for its endorsement of the circuit court's error in that regard.

Respondent's position that Petitioner's motion to stay class discovery was properly denied as untimely is even more problematic, as it invites a fundamental and nonsensical misapplication of the West Virginia Rules of Civil Procedure. Although those Rules generally require discovery responses to be made within thirty days of service (see, e.g., W. Va. R.C.P. 33-34), in fact and in practice, the time periods set forth in those Rules are not intended to be absolute, particularly where the discovery requests, like those propounded by Respondent here, are served along with the service of original process, i.e., a copy of the complaint, and where such requests are broad ranging and seek detailed information and voluminous documentation concerning individuals who are not even parties to the litigation. Rather, West Virginia's Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." W.Va. R.C.P 1. Of course, in order to implement the Rules in such a manner, the courts must draw

upon not only their experience, but also common sense. Here, common sense dictates that it would have been extraordinarily difficult, if not impossible, 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.

As a result of his myopic focus on these insubstantial and flawed assumptions, Respondent's opposition essentially misses the point. As a threshold matter, Respondent fails to address in any way the fact that the circuit court's ruling clearly meets each of the three conventional criteria required for review under the collateral order doctrine, in that it (1) "conclusively determines the disputed controversy;" (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). Indeed, aside from his conclusory, and erroneous, contention that the circuit court's order is nothing more than a routine discovery ruling, Respondent offers no meaningful explanation as to how the order at issue fails to meet the standard as articulated by this Court for appeal as of right under the collateral order rubric.

Respondent likewise fails to address the fact that the order on review was issued in the absence of a properly conducted case management conference and scheduling order. Respondent's opposition offers no counter to Petitioner's well supported position that Rule 16(b) is mandatory,

nor does it make any effort to explain how the circuit court's ruling is in any respect harmonious with the vital principles of effective case management embodied in the West Virginia Rules of Civil Procedure. See Caruso v. Pearce, 223 W. Va. 544, 549, 678 S.E.2d 50, 55 (2009) ("We therefore hold that Rule 16(b) requires active judicial management of a case, and mandates that a trial court 'shall ... enter a scheduling order' establishing time frames for the joinder of parties, the amendment of pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a prompt, fair and cost-effective resolution of the case").

Moreover, Respondent's opposition ignores the fact that the underlying litigation was brought as a putative class action. As noted in the Fourth Edition of the United States Department of Justice's Manual for Complex Litigation, "[t]he court's responsibilities are heightened in class action litigation," and "[t]he court's first step in establishing control of the litigation is promptly scheduling the initial conference ... with sufficient time for counsel to become familiar with the litigation and prepare for the conference. The judge should hold the conference before any adversary activity begins, such as filing of motions or discovery requests." Dep't of Just. Manual for Complex Litigation, Fourth, § 4-5.000 (2004). Commenting on Federal Rule of Civil Procedure 16(b), upon which the corresponding West Virginia Rule is patterned, the Manual goes on to explain that "[s]cheduling orders are a critical element of case management. They help ensure that counsel will timely complete the work called for by the management plan. Rule 16(b) requires that a scheduling order issue early in every case, setting deadlines for joinder of parties, amendment of pleadings, filing of motions, and completion of discovery. Scheduling orders in complex cases should also cover other important steps in the litigation, in particular discovery activities and motion practice." *Id.* As noted by another commentator: "If plaintiffs have no real

factual basis to support a claim, it is wasteful to certify a class action. ... A court should be vigilant in deciding a summary judgment motion before certifying a class to save litigants unnecessary expense and to economize on judicial time. For these reasons, we encourage prompt judicial consideration of summary judgment motions in class actions.” Brunet, Parry, and Redish, FEDERAL LAW AND PRACTICE § 10:16 (January 2016).

Rather than answering any of the practical concerns and significant overarching policy considerations raised by Petitioner, particularly as they relate to the necessity of effective and efficient case management in complex cases, Respondent instead relies on insubstantial characterizations, portraying the circuit court’s order as an ordinary discovery ruling, and labelling Petitioner as dilatory. However, the facts of the present situation unquestionably illustrate the fundamental flaw, and resulting unfairness, of permitting a plaintiff to invoke the class action mechanism and its attendant procedures without first establishing the existence of a viable individual claim. Here, it would seem that Respondent seeks to utilize the discovery procedures provided for by the West Virginia Rules of Civil Procedure not only as an open-ended fishing expedition for additional, and perhaps more sustainable, WPCA clients, but also as a means by which to secure an early settlement. To be sure, the liberal rules governing pleading and discovery should not be permitted to combine to give private litigants both a substantial shield with which to conceal a baseless claim, and a substantial sword with which to intimidate a defendant into settlement. As aptly noted by the United States District Court for the Eastern District of Virginia, “[c]oncerned courts, in order to preserve scarce judicial resources and to protect innocent defendants from the escalating cost of defending a complex but meritless claim, must develop the means with which to pierce the shield and blunt the sword.” Brown v. Cameron-Brown Co., 1980

WL 1856, 30 Fed. R. Serv. 2d 1181 (E.D. Va. 1980). The problem of abusive class suits brought largely to secure settlement was long ago examined in a study, Durham & Dibble, Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation, 1978 B. Y. U. L. Rev. 299 (1978). In the view of the authors, “[o]ne of the most deeply troubling perversions of the discovery process involves using the threat of expensive discovery costs to extort substantial settlements from innocent defendants.” *Id.* at 302.

As for the limited substantive contentions raised in Respondent’s opposition, both are easily dispelled. First, relying on this Court’s decisions in Love v. Georgia Pac. Corp., 214 W. Va. 484, 590 S.E.2d 677 (2003) and Gulas v. Infocision Mgmt. Corp., 215 W. Va. 225, 599 S.E.2d 648 (2004), which were cited by the circuit court in the order on review. Respondent persists in arguing that discovery related to class certification must be allowed prior to the court deciding a dispositive motion. However, neither Love nor Gulas remotely support the position urged by Respondent. In both situations, the plaintiffs’ motions for class certification were denied without the benefit of discovery related to the prerequisites for certification. This Court found that this was an abuse of discretion, and that reasonable discovery related to class issues is appropriate before ruling on class certification. See, e.g., 214 W. Va. at 488, 590 S.E.2d at 681. Thus, those decisions considered the question of whether class discovery is permitted *at all* prior to a determination on certification. By contrast, the issue before the Court here is *not* class certification, but 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. Neither Love nor Gulas mention anything about the propriety of class discovery prior to ruling on a motion for summary judgment. Indeed,

the Court in Love specifically stated that it was not addressing the merits of the underlying causes of action. See id. at 487 n.7, 590 S.E.2d at 680 n.7. Thus, the cases referenced by Respondent in support of its position are inapposite, and the circuit court erred in relying upon them in its order denying Petitioner's request for protective relief.

Second, while noting that this Court cannot consider the merits of a summary judgment motion that is not even before it, Respondent nonetheless goes on to argue the merits, positing that Petitioner's dispositive motion will ultimately prove futile. In support of his position, Respondent relies upon the Northern District of West Virginia's decision in Eddy v. Biddle, No. 11-137, 2013 WL 66929 (N.D.W. Va. Jan. 4, 2013). In that case, the plaintiff alleged that her former employer violated the West Virginia Wage Payment and Collection Act when it did not pay her in full within seventy-two hours of her discharge. See id. at *16. The plaintiff contended that her termination was effective on May 27, 2011, the day the defendant actually told her she was fired. See id. The defendant employer, however, contended that the plaintiff advised it that she would be contesting her termination via the company's employee discrimination hotline, which rendered her termination administratively ineffective until the conclusion of an investigation into her claims. According to the defendant, the plaintiff did not place this call for several days, and the investigation consequently did not conclude until June 8, 2011. As the plaintiff was paid in full that same day, the defendant argued that her WPCA claim must fail. See id. Thus, the issue before the district court was whether the plaintiff was discharged on May 27, 2011, the day she was terminated and her last day of work, or on June 8, 2011, the day her discharge became effective in the employer's system. See id. at *17.

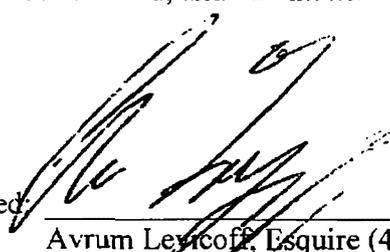
Relying upon regulations promulgated by the West Virginia Division of Labor defining “discharge” as “an involuntary termination *or the cessation of performance of work by employee* due to employer action,” the district court found that the plaintiff was discharged within the meaning of the WPCA on May 27, 2011, the day she ceased performing work for the defendant. See id. at *17-18 (quoting W. Va. C.S.R. § 42-5-2.8). Respondent’s reliance on the Northern District’s decision in Eddy is flawed in two respects. First, Respondent fails to appreciate the factual discrepancies between Eddy and the instant matter. In Eddy, unlike here, the initial employment action taken by the employer with respect to the plaintiff was a *discharge*; her discharge was then placed on an administrative hold pending an investigation initiated as a result of the plaintiff’s utilization of an internal employee grievance procedure. Here, however, Respondent was *not* initially discharged; rather, he suspended pending a review of the situation by Petitioner’s human resources department. No discharge action was taken until after that review was completed.

More significantly though, the regulatory definition of “discharge” relied upon by the Eddy court, which explicitly connects the concept of “discharge” to the “cessation of performance of work,” was modified by the West Virginia legislature effective July 1, 2014. The definition of “discharge” no longer bears that connection, and simply means “an involuntary termination of employment by an employer.” W. Va. C.S.R. § 42-5-3.7 (2014). Thus, Petitioner’s summary judgment position with respect to Respondent’s individual claim under the WPCA can hardly be characterized as “futile,” and, consistent with the multitude of authorities cited within Petitioner’s opening brief, the same should be fully reviewed by the circuit court prior to the inception of expensive and consuming discovery relating to individuals who are not even parties to this action.

The circuit court's order to the contrary, particularly in light of the circumstances presented here, is nothing short of an abuse of discretion.

CONCLUSION

For the reasons set forth in Petitioner's opening brief and herein, 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.

Signed: 

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Petitioner's Reply Brief** has been served upon the following counsel via-U.S Mail Only on September 6, 2016:

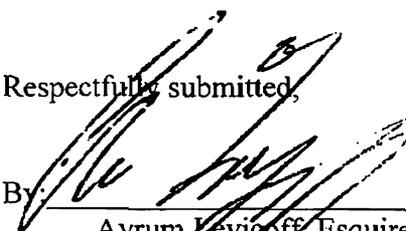
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