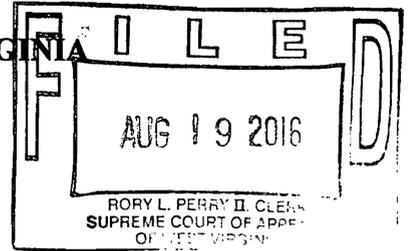


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

This appeal involves a dilatory party that waived its right to object to discovery by failing to respond for six months, and that has never put forth a shred of evidence of the supposed burden it would face in responding to discovery. Nevertheless, it invites the Court to overturn the circuit court's discovery order finding of waiver and refusal to stay discovery. Moreover, Defendant-Petitioner GMS Mine Repair and Maintenance, Inc. ("Defendant") cannot identify a single case in any court in the country where a court has accepted an interlocutory appeal of a similar issue. Plaintiff-Respondent Jeffrey Miklos ("Plaintiff") therefore requests that the Court decline to hear the interlocutory appeal in the first instance. Should the Court decide to hear the appeal, the circuit court's decision should be affirmed because it was not an abuse of discretion and because Defendant's motion for summary judgment has no chance of success.

On June 9, 2015, Plaintiff filed a complaint individually and on behalf of a class of similarly situated persons against Defendant. (JA001-5.) Plaintiff alleged that he worked for Defendant until his employment was involuntarily terminated on February 9, 2015. (JA002.) Following Plaintiff's termination, Defendant had a duty to pay Plaintiff his wages within four business days or by the next regular payday, whichever came first, under the West Virginia Wage Payment and Collection Act ("WPCA"), W. Va. Code § 21-5-1, *et seq.* (JA001-2.) Defendant breached its duty by not paying all owed wages to Plaintiff.

Plaintiff sought relief pursuant to Rule 23 of the West Virginia Rules of Civil Procedure on behalf of the following proposed class:

All persons formerly employed by the Defendant in West Virginia who were involuntarily discharged within five years of the filing of this complaint, and not paid all wages within 72 hours if discharged prior to July 12, 2013, or within four business days or the next regular payday, whichever comes first, if discharged on or after July 12, 2013.

(*Id.*)

On June 17, 2015, Plaintiff served his First Set of Interrogatories and Requests for Production of Documents to Defendant, which included discovery regarding the scope of the class. (JA018-29.) Without explanation, Defendant failed to respond in any way to Plaintiff's discovery requests within the time period required by the West Virginia Rules of Civil Procedure. (JA057.) Plaintiff met and conferred on Defendant's failure to respond to discovery. (JA057-59.) Plaintiff's counsel called Defendant's counsel in November 2015 to check on the status of the discovery. (*Id.*) Defense counsel emailed Plaintiff's counsel on December 13, 2015 to advise that Defendant would prefer to address individual issues before class issues and indicated that, in his opinion, GMS was not obligated to provide class information at that time. (*Id.*)

Plaintiff responded that Defendant's suggested approach was unacceptable for three reasons. (*Id.*) First, GMS had waived any objections it may have had to Plaintiff's first set of discovery requests because GMS's discovery responses were more than four months overdue. Second, even if GMS had not waived its objections, GMS was obligated to provide class discovery under *Love v. Georgia-Pacific Corp.*, 590 S.E.2d 677, 681 (W. Va. 2003) and *Gulus v. Infocision Management Corporation*, 599 S.E.2d 648 (W. Va. 2004). Third, Plaintiff explained why the evidence would show that GMS paid Plaintiff's wages late, and directed Defendant to *Eddy v. Biddle*, No. 1:11cv137, 2013 WL 66929, at **16-19 (N.D. W. Va. Jan. 4, 2013), in which the district court found that the WPCA clock begins to tick on the last day an employee works, not the date an employer gets around to "processing" and making "effective" an employee's termination. (*Id.*)

Notably, Defendant's only mention of its six month delay in its brief is in the form of attacking Plaintiff and the circuit court for addressing it. Defendant calls Plaintiff's argument regarding Defendant's untimeliness "superficial" and accuses the circuit court of misunderstanding the issue as a "mundane dispute over discovery objections." Def. Br. at 6. It is telling that Defendant to this day has no excuse for its conduct, which is unquestionably deserving of the result imposed by the circuit court. *See Franklin D. Cleckley et al., Litigation Handbook on West Virginia Rules of Civil Procedure* 810–11 (3d ed. 2008) ("[I]n the absence of an extension of time, the failure to answer interrogatories within the time fixed, will generally constitute a waiver of an objection.").

On December 22, 2015, Defendant moved for a stay of class discovery. (JA006-14.) Importantly, Defendant's motion was not supported by any evidence of what burden or prejudice it would suffer should the circuit court deny a stay. After a hearing on March 3, 2016, the Honorable David J. Sims of the Circuit Court of Ohio County denied that motion. (JA069-70.) In the Order, the circuit court noted Defendant's contentions that "Plaintiff is not an adequate class representative because he received his final wages in accordance with the WPCA," and that "class discovery should be stayed in favor of discovery on the merits of Plaintiff's individual claim after which Defendant anticipates filing a motion for summary judgment." (JA069.) The Order went on to state:

The Court finds that Defendant has waived all objections to class discovery by failing to timely answer the discovery or to request and receive an extension. Defendant concedes that it had no reason for its failure to timely respond to Plaintiff's discovery.

The Court further finds that Defendant has not met its burden of demonstrating why class discovery should not proceed. The West Virginia Supreme Court has held that class discovery is appropriate when there is factual uncertainty. *Love v. Georgia-Pacific Corp.*, 590 S.E.2d 677, 681 (W. Va. 2003); *Gulus v. Infocision Management Corporation*, 599 S.E.2d 648 (W. Va. 2004).

(JA070.)

On April 1, 2016, Defendant filed its Notice of Appeal in which it takes issue with this non-appealable discovery order.

SUMMARY OF ARGUMENT

The seventy circuit judges in West Virginia's thirty-one circuit courts routinely make case management decisions, exercising their judicial discretion to direct the course of discovery. Petitioner's poetic suggestion that the Court should throw wide its doors and begin accepting interlocutory appeals of routine discovery orders would set the Court on an unprecedented "road less traveled" of parsing through circuit court records, only to determine whether a judge's nondispositive determination that discovery should proceed in a particular fashion may have been an abuse of discretion. The impact of this farfetched idea becoming reality on both this Court's docket and the ability of circuit courts to efficiently manage their cases is unfathomable.

The proper course for seeking review of the circuit court's order would have been to file a writ of prohibition, which allows this Court to correct clear-cut legal errors in contravention of clear statutory, constitutional or common law mandates. The collateral order doctrine on which Defendant relies is applied sparingly and exists to allow interlocutory review of important issues in cases involving the denial of summary judgment based on the defense of qualified immunity, or the denial of a motion to compel arbitration. It has never been allowed for review of case management decisions, nor should it be. In support of its plea, Defendant relies on lengthy string cites of inapposite cases around the country, but has not identified a single case where a court has entertained interlocutory appeal of an order directing the order of discovery. Even federal courts only review lower court decisions under Rule 16 of the Federal Rules of Civil Procedure in "extraordinary" circumstances.

Should the Court decide to substantively review the circuit court's order, it should affirm. The circuit court's primary basis for denying Defendant's motion to stay was Defendant's dilatory conduct. Defendant does not even discuss whether this reasoning constitutes an abuse of discretion, and given the lengths of Defendant's negligence in the discovery process, there is no basis in fact or law to find that the circuit court's waiver finding was improper. Moreover, courts frequently allow class discovery before determination of merits as appropriate. And Defendant has produced no evidence to demonstrate that a stay is necessary.

Finally, Plaintiff vehemently disagrees that there is any "intriguing" question here regarding the underlying question of when he was discharged. Of course, the Court cannot consider the merits of a summary judgment motion that is not even before it. Nonetheless, there is no question that Plaintiff was involuntarily terminated on February 9, 2015 when his supervisor told him not to come to work anymore. The Wage Payment Act and case law interpreting it are clear that an employee is discharged when the employer no longer allows the employee to work, not when the employer finalizes its paperwork. Therefore, Defendant paid Plaintiff his wages late on February 20, 2015.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiff respectfully suggests that oral argument is unnecessary as the circuit court appropriately applied settled law to the facts below.

STANDARD OF REVIEW

Defendant correctly points out that, because the Court has never before taken up an appeal of a routine case management decision, there is no settled standard of review. Respondent suggests that such nondispositive case management decisions should not be subject to review through an interlocutory appeal. To the extent the Court undertakes to review the circuit court's decision as an interlocutory appeal, an abuse of discretion standard would be warranted. *See 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.”); *see also* Syl. Pts. 1–2, *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005) (the imposition of sanctions by a circuit court for a party’s failure to obey a court order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion). Further, a “trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances before the court, and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.” *B.F. Specialty*, 197 W. Va. at 465.

ARGUMENT

I. The Court should not accept this appeal.

- a. The circuit court’s case management decision is not appealable under the collateral order doctrine, as it is a routine discovery order.

Interlocutory orders are typically not subject to the Supreme Court of Appeals’ appellate jurisdiction. *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 522, 745 S.E.2d 556, 560 (2013) (citing *Coleman v. Sopher*, 194 W.Va. 90, 94, 459 S.E.2d 367, 371 (1995) (“The usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case.”)). “Rather, there is a narrow category of orders that are subject to permissible interlocutory appeal.” *Id.* (quoting *Robinson v. Pack*, 223 W.Va. 828, 831, 679 S.E.2d 660, 663 (2009)).

Defendant contends that its appeal falls into the narrow category of permissible orders subject to appeal under the collateral order doctrine, which provides that an interlocutory order may be subject to appeal if 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.” *Credit Acceptance*, 231 W. Va. at 523, 745 S.E.2d at 561. But the doctrine is applied sparingly, and primarily in cases involving the denial of summary judgment based on the defense of qualified immunity, or the denial of a motion to compel arbitration. *See, e.g., Robinson*, 223 W.Va. at 831 (reviewing denial of summary judgment predicated on qualified immunity); *West Virginia Dep’t of Health & Human Resources v. Payne*, 231 W. Va. 563, 746 S.E.2d 554 (2013) (same); *West Virginia Regional Jail & Correctional Facility Auth.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) (same); Syl. Pt. 1, *Credit Acceptance*, 231 W. Va. 518 (reviewing order denying motion to compel arbitration); *Geological Assessment & Leasing v. O’Hara*, 236 W. Va. 381, 780 S.E.2d 647 (2015) (same).

There are no West Virginia cases applying the collateral order doctrine to review of a circuit court’s order for a stay of discovery. The circuit court’s Order set forth the axiomatic principle that a party who ignores discovery for six months has waived its right to object to that discovery. This was not a resolution of an “important issue,” but a common sense, simple determination by a circuit court judge of a straightforward issue. There is simply no reason for this Court to upset the course of this proceeding by accepting an interlocutory appeal in these circumstances.

The proper mechanism for review of the circuit court’s order would have been a writ of prohibition pursuant to Article VIII (8), Section Three (3) of the West Virginia Constitution, which grants the Supreme Court of Appeals original jurisdiction in prohibition. “The writ of prohibition lies as a matter of right in all cases of usurpation and abuse of power when the court does not have jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472

(1968); W. Va. Code § 53-1-1. A writ allows this Court to “correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

Petitions for writs of prohibition are frequently employed for review of discovery orders. For example, in *State ex rel. Allstate Ins. Co. v. Bedell*, 203 W. Va. 37, 40, 506 S.E.2d 74, 77 (1998), which also involved a discovery bifurcation issue, the defendant insurer petitioned for a writ of prohibition, and this Court, applying an abuse of discretion standard, found no error in the trial court’s denial of defendant’s motion to bifurcate and stay. *See also State ex rel. Atkins v. Burnside*, 212 W. Va. 74, 85, 569 S.E.2d 150, 161 (2002) (finding issuance of writ of prohibition was the “only effective remedy” upon concluding that consolidation of twenty-three cases constituted abuse of discretion); *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E.2d 54 (1995) (denying writ of prohibition following extensive discussion of whether trial judge substantially abused his discretion when compelling discovery); *State ex rel. Nationwide Mut. Ins. Co. v. Marks*, 223 W. Va. 452, 676 S.E.2d 156 (2009) (same). Defendant is therefore wrong to suggest that this interlocutory appeal was its only recourse for review of the Order.

b. Even federal courts only review orders and rulings stemming from Rule 16 of the Federal Rules of Civil Procedure in “extremely rare” circumstances

Defendant invites the Court to change its long settled rules and accept interlocutory appeals of routine discovery orders. Defendant suggests that the Court consult federal law, which, according to Defendant, permits such interlocutory review.

But Defendant is entirely wrong on this point. As in West Virginia, appellate review in federal courts is generally available only after final judgment is entered in a case, with exceptions only in “extraordinary circumstances.” Patrick M. Regan, *Litigating Tort Cases, Scheduling and Pre-Trial Conferences and Orders*, 3 *Litigating Tort Cases* § 32:41 (2015) (citing J. Kraut, *Appealability of Order Entered in Connection with Pretrial Conference*, 95 A.L.R. 2d 1361 (originally published 1964)). As to the appealability of Rule 16 of the Federal Rules of Civil Procedure interlocutory orders specifically, a typical exception to the general prohibition of appellate review of Rule 16 orders prior to final judgment is “when a party disobeys a pretrial order and is found guilty of criminal contempt.” *Id.*

Federal courts follow the “Cohen rule,” which permits interlocutory appeals of decisions that “fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As to the “importan[ce]” at stake, courts accepting interlocutory appeals should “fe[el] that, because of the imperative of preventing impairment of some institutionally significant status or relationship, the danger of denying justice by reason of delay in appellate adjudication outweighs the inefficiencies flowing from interlocutory appeal.” *In re Ford Motor Co.*, 110 F.3d 954, 960 (3d Cir. 1997).

Given the true “importance” required to accept an interlocutory appeal of a discovery order, Defendant goes too far in its blanket statement that federal courts accept appeals when cases are simply “related in some manner to discovery.” Def. Br. at 11-14. Tellingly, each of the cases cited by Defendant involved a truly “important” issue implicating a real “danger of

denying justice.” Not one of the cases addressed waiver of objections or the sequence of discovery. Many of the cases involved interests protected by the attorney-client privilege.¹ Others involved protection of trade secrets or highly confidential information.² A few involved significant personal rights and privacy interests.³ One involved whether attorneys in a civil rights suit arising out of shooting of two suspected terrorists could disclose deposition evidence.⁴ The chasm between Defendant’s body of cases and the issue presented in this appeal – coupled with

¹ *Ford*, 110 at 962 (accepting appeal of privilege issue because “the attorney-client privilege is one of the pillars that supports the edifice that is our adversary system”); *Osband v. Woodford*, 290 F.3d 1036, 1040 (9th Cir. 2002) (issue of whether ineffective assistance claim constitutes unqualified waiver of attorney client privilege has an “importance... beyond doubt”); *In re Teleglobe Comm. Corp.*, 493 F.3d 345 (3d Cir. 2007) (“Once documents are disclosed, any dispute over their privileged status is effectively moot and unreviewable, as the very purpose of the privilege is frustrated by compelled disclosure”); *In re Napster Copyright Litig.*, 479 F.3d 1078, 1088 (9th Cir. 2007) (same); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 228 (3d Cir. 2007) (defendant contended that district court improperly ordered discovery of privileged documents).

² *Smith v. BIC Corp.*, 13 Fed. R. Serv. 3d 181, 199 (3d Cir. 1989) (finding collateral order exception because “the denial of BIC’s motion for protective order ‘conclusively determines’ that BIC must disclose its design, safety test, and other accident or complaint information to Smith without any choice as to how the information will be disseminated”); *Ameziane v. Obama*, 620 F.3d 1, 5 (D.C. Cir. 2010) (protective order governing common procedural issues in Guantanamo habeas cases involved sufficiently important “foreign relations and national security concerns”); *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (lawfulness of an order directing dissemination of information designated by the government at the “secret” level, “the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security” is an “important issue”); *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892 (D.C. Cir. 2006) (reviewing decision allowing plaintiff’s employees access to applications submitted to the Small Business Administration which contained private information); *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (reviewing whether privilege of peer review protected county’s mortality review).

³ *In re Grand Jury Investigation*, 363 Fed. Appx. 164 (3d Cir. 2010) (appealing decision allowing Government to publish individual’s fingerprints in a database); *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990) (appealing decision compelling submission to examination by employer’s vocational rehabilitation expert in age discrimination action without presence of counsel); *Koch v. Cox*, 489 F.3d 384, 386 (D.C. Cir. 2007) (court ordered plaintiff’s psychotherapist to produce confidential records and ordered plaintiff to make her available for deposition).

⁴ *In re San Juan Star Co. v. Barcelo*, 662 F.2d 108, 113 (1st Cir. 1981) (recognizing the “clearest case of urgency” to be presented by intervenor newspaper who presented an interest of “covering effectively an ongoing judicial proceeding of significant hard news interest.”)

the glaring absence of *any* case regarding waiver of objections or the sequence of discovery – shows that the collateral order doctrine is not the appropriate vehicle for appeal.

II. The Circuit Court was correct to deny Defendant’s motion to stay

a. The Circuit Court’s primary basis for denying Defendant’s motion to stay was Defendant’s dilatory conduct

The circuit court’s primary basis for denying Defendant’s motion to stay was Defendant’s inexplicable failure to respond to the discovery. Defendant has never made any attempt to defend its conduct, let alone argue that this Court should accept an interlocutory appeal of an order finding it waived its right to object to discovery. Nor could the Order possibly be considered an abuse of discretion, given the circuit court’s discretion to find that a failure to respond to discovery in a timely fashion may waive the right to object to such discovery. *See Franklin D. Cleckley et al., Litigation Handbook on West Virginia Rules of Civil Procedure* 810–11 (3d ed. 2008). Because this was the primary basis for the circuit court’s decision, and because Defendant fails to argue that this could constitute an abuse of discretion, the Order should be affirmed on this basis alone.

b. Courts routinely allow class discovery before determination of merits

Moreover, it is well settled that the sequence of discovery and the decision of whether to stay discovery are matters of discretion for the trial court. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *State ex rel. Allstate Ins. Co. v. Bedell*, 203 W. Va. 37, 40, 506 S.E.2d 74, 77 (1998). Although this Court has never had occasion to consider the discrete issue of whether class discovery should proceed when a defendant indicates it intends to move for summary judgment on a plaintiff’s individual claims, instructive guidance can be found in the Rules and other West Virginia case law.

First, West Virginia Rule of Civil Procedure 23 requires determination of class certification “[a]s soon as practicable after the commencement of an action brought as a class action”. W. Va. R. Civ. P. 23(c)(1); *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). The Rule’s emphasis on deciding the issue early in the litigation strongly supports a trial court’s decision to permit early class discovery.

Second, this Court has twice made clear that a plaintiff is entitled to class discovery before the Circuit Court can rule on motions for class certification. *Love v. Georgia-Pacific Corp.*, 214 W. Va. 484, 488, 590 S.E.2d 677, 681 (2003); *Gulus v. Infocision Management Corporation*, 215 W. Va. 225, 599 S.E.2d 648 (2004). In both cases, the Court reversed denials of class certification decisions because the trial courts had not permitted discovery on the prerequisites for class certification. The circuit court here cited both decisions in its Order, thus recognizing its obligation to permit class discovery. Had the circuit court declined to allow class discovery and instead stayed the case while Defendant prepared its dispositive motion, it would have allowed Defendant to further delay the proceedings.

Similarly, federal district courts in West Virginia consistently compel class discovery in the pre-certification stage. *See Kingery v. Quicken Loans*, No. 2:12-cv-01353, 2014 WL 1017180 (S.D. W. Va. Mar. 14, 2014) (overruling objections to Magistrate Judge’s Order requiring pre-certification 30(b)(6) testimony regarding the number of people in the proposed classes because the evidence was “relevant to class certification, particularly regarding the issues of typicality and commonality”); *Powell v. Huntington Nat. Bank*, No. 2:13-CV-32179, 2014 WL 5500729, at *8 (S.D.W. Va. Oct. 30, 2014) (ordering pre-certification production of proposed class members’ loan servicing records as well as the number of borrowers and late fees assessed because of the evidence’s relevance to the determination of class certification); Order, *Wymer v. Huntington*

Bank Charleston, No. 3:10-cv-865 at 4 (S.D. W. Va. May 19, 2011) (unpublished)⁵ (ordering pre-certification production of names, contact information, and account information of members of the putative class because of plaintiff's need to establish numerosity and also because "[e]vidence of similar transactions could confirm common issues of fact and law"); *Paulino v. Dollar Gen. Corp.*, No. 3:12-CV-75, 2013 WL 1773892, at *14 (N.D.W. Va. Apr. 25, 2013) (compelling disclosure of names and contact information of potential class members pre-certification because, *inter alia*, the information would be necessary to determine Rule 23 certification issues, including numerosity, commonality, typicality and adequacy of representative parties to fairly and adequately protect the interests of the class); *Delebreau v. Bayview Loan Serv. LLC*, No. 6:09-cv-245 at 2-3 (S.D. W. Va. Jan. 5, 2010) (unpublished)⁶ (compelling production of payment histories or loan history summaries for 277 loans in proposed class, as well as notes and deeds of trust for 70 loans to be selected by plaintiffs).

Third, in the analogous circumstance of trial courts considering whether to stay discovery on a bad faith claim against an insurer from an underlying action, the burden of proof on the issue is on the party seeking to stay discovery. *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 35, 506 S.E.2d 64, 72 (1998). Here, Defendant has never produced any evidence of why a stay should be entered, instead relying only on the argument of counsel. And though counsel may complain about the supposed burden of identifying records of putative class members, the WPCA *requires* every employer to make and preserve records of every person employed by it, "including wage and hour records." W. Va. Code § 21-5-9(6). Moreover, Plaintiff is only seeking to represent a discrete class of West Virginians employed by Defendant, not some behemoth national class.

⁵ This order is available online via Pacer.

⁶ This order is available online via Pacer.

The circuit court therefore correctly found that Defendant had not met its burden of demonstrating why discovery should not proceed.

Defendant relies on a three page string cite of cases for the proposition that motions for summary judgment should be resolved before the parties conduct class discovery. Def. Br. at 27-29. The majority of those cases are inapposite. Many of them addressed whether a court was permitted to decide a motion for summary judgment prior to class certification, and did not address whether a plaintiff should be able to conduct class discovery prior to summary judgment.⁷ Others involved even more factually distinct postures than here, such as a stay of class discovery while the class certification decision was on interlocutory appeal,⁸ or a stay of discovery against an insurer in litigation involving both the insurer and insured as defendants.⁹ Still others simply noted that a court had adopted a bifurcated discovery plan without any discussion of its reasons for doing so or whether the parties had consented to same.¹⁰ **And none of the cases involved an appellate court accepting an interlocutory appeal of the sequence of discovery issue.**

Moreover, Plaintiff can readily point to another body of cases where courts *refused* to stay class discovery while a defendant sought summary judgment. *See True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219, 2015 WL 273188 (N.D. Cal. Jan. 20, 2015) (denying defendants' motion to bifurcate individual and class discovery, finding that bifurcation would

⁷ *See Curtin v. United Airlines, Inc.*, 275 F.3d 88 (D.C. Cir. 2001); *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984); *Thompson v. County of Medina*, 29 F.3d 238 (6th Cir. 1994); *Lawson v. Fleet Bank of Maine*, 807 F.Supp. 136 (D. Me. 1992); *White v. Coca-Cola, Co.*, 542 F.3d 848 (11th Cir. 2008); *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 295 S.E.2d 16 (1982); *Talley v. NCO Fin. Sys., Inc.*, No. 2:06-cv-48, 2006 WL 2927596 (N.D. Ind. Oct. 12, 2006).

⁸ *Blake v. Fin. Mgmt. Sys., Inc.*, No. 11-612, 2011 WL 4361560 (N.D. Ill Sept. 19, 2011).

⁹ *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008).

¹⁰ *Mitchell v. Industrial Credit Corp.*, 898 F.Supp. 1518 (N.D. Ala. 1995); *Hager v. Vertrue, Inc.*, No. 09-11245, 2011 WL 4501046 (D. Mass. Sept. 28, 2011); *Mallo v. Public Health Trust of Dade Co., Fla.*, 88 F.Supp. 2d 1376 (S.D. Fla. 2000).

prevent certification at “an early practicable time” and would be inefficient and result in a “lack of judicial economy”); *Adams v. AllianceOne, Inc.*, No. 08-cv-248, 2011 WL 2066617, at *2 (S.D. Cal. May 25, 2011) (denying defendant’s motion to stay class discovery over defendant’s objection that “a grant of its summary judgment motion would vitiate the need for the discovery”); *Donnelly v. NCO Fin. Sys., Inc.*, 263 F.R.D. 500 (N.D. Ill. 2009) (ordering production of majority of requested class discovery by magistrate judge after district court judge denied defendant’s “motion to stay class discovery pending resolution of its ‘to-be-filed’ motion for summary judgment”); *Wike v. Vertrue, Inc.*, No. 3:06-0204, 2007 WL 869724, at *11 (M.D. Tenn. Mar. 20, 2007) (overruling as moot magistrate judge’s decision not to stay class discovery pending district court’s decision on dispositive motion).

At the end of the day, whether to bifurcate individual and class discovery is a discretionary determination for the trial court judge. The circuit court judge here, with the benefit of briefing and argument, determined that Defendant had waived its right to object to the class discovery, and further that class discovery at that juncture was appropriate. This decision was not an abuse of discretion.

c. There is no “intriguing” question here regarding the date of Plaintiff’s discharge.

At the heart of all of Defendant’s arguments urging this Court to open its doors to the interlocutory review of routine discovery orders is Defendant’s insistence that class discovery is unnecessary because Plaintiff’s individual claim should be dismissed. Defendant’s suggestion that this Court should be considering the merits of a summary judgment motion that would not be the product of discovery and is not even before it is frankly bizarre. And Defendant is as wrong on the merits of this issue as it is on the scope of appellate jurisdiction. Tellingly, Defendant fails to cite or distinguish the few on-point cases below, and does not direct the Court

to any contrary authority supporting its conclusion that its own internal workings can serve to delay the statutorily mandated period for payment of final wages.

This unremarkable issue has been addressed directly by one judge in the District Court for the Northern District of West Virginia. In *Eddy v. Biddle*, No. 1:11cv137, 2013 WL 66929 (N.D. W. Va. Jan. 4, 2013), Judge Irene Keeley considered a WPCA case wherein, like here, the parties disagreed as to when the “discharge” occurred. The plaintiff contended that her termination was effective on May 27, 2011, the day defendant actually told her she was fired. The defendant contended that plaintiff advised it on May 27, 2011 that she would be contesting her termination which “rendered her termination administratively ineffective until the ERC concluded its investigation into Plaintiff’s claims.” *Id.* at *16. According to defendant, plaintiff did not place the call for several days and the investigation did not conclude until June 8, when plaintiff was then paid in full.

The district court went on to interpret and apply the WPCA and this Court’s rulings as follows:

Notably, the WPCA is “remedial legislation designed to protect working people and assist them in collection of compensation wrongly withheld,” *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676, 688 (W. Va. 1999) (quoting *Mullins v. Venable*, 297 S.E.2d 866 (W. Va. 1982)), and must be “constru[ed] ... liberally so as to furnish and accomplish all the purposes intended.” *Meadows*, 530 S.E.2d 676 (quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (W.Va.1995)). The statute itself plainly provides that “[w]hensoever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.” W. Va. Code § 21-5-4(b). As noted, the regulations define “discharge” as “an involuntary termination or the cessation of performance of work by employee due to employer action.” W. Va.C.S.R. § 42-5-2.8 (emphasis added).¹¹ The

¹¹ In May 2014, the definition of “discharge” was amended to mean an “involuntary termination of employment by an employer.” As of May 2016, there is no longer a specific definition for “discharge” in the regulations, but other current definitions fully support Judge Keeley’s interpretation and would guide the analysis here. For example, to “employ” means to “hire, permit, or suffer to work.” WV ADC § 42-5-3.9. Plaintiff was not “permit[ted]” to work as of

regulations further elaborate that “[a]n employee who is discharged shall be paid all wages including fringe benefits within seventy-two (72) hours of the *employee's final hour of employment.*” W. Va. C.S.R. § 42-5-13.1 (emphasis added).

Id. at *17 (emphasis in original). After making these observations about the language of the statute, the district court found that defendant’s “‘administratively active’ theory finds no support in either the plain language the statute or its accompanying regulations. The regulations, for example, speak in terms of ‘cessation of performance of work,’ not the cessation of an employee’s ‘active’ status within her employer’s computer system.” *Id.* (citing W. Va. C.S.R. § 42-5-2.8) (emphasis added). Moreover, “[a]n ‘employee’s final hour of employment,’ ... bears little relation to the hour an employer decides to remove the employee from its ‘active’ rolls.” *Id.* (citing W. Va. C.S.R. § 42-5-13.1). “Indeed, there is no indication that the statute or its regulations mean anything other than what they say—that an employee is entitled to receive her wages within seventy-two hours of the date her employer causes her to cease working.” *Id.* (emphasis added).

This case requires the same analysis, and the same conclusion: Plaintiff’s “final hour of employment” occurred on February 9, 2015, when Plaintiff’s supervisor told him not to come to work anymore. Defendant’s internal administrative details documenting or finalizing the termination do not impact Plaintiff’s employment as any practical matter, and should have no bearing on the WPCA calculation. The *Eddy* court recognized the unfairness that would result if Defendant’s argument were to carry the day:

February 9, and was therefore no longer employed by Defendant. Similarly, “hours worked” means “the time an employee is under the control and direction of his employer”. WV ADC § 42-5-3.11. Plaintiff was not under Defendant’s control or direction once he was told not to return to work.

From a policy perspective, moreover, [defendant's] proposed interpretation would permit knowledge of the official "discharge" date under the WPCA to be held within the exclusive province of employers, making it more difficult for employees to decide whether to pursue wage payment claims and, consequently, undermining the statute's primary purpose of "protect[ing] working people and assist[ing] them in collection of compensation wrongly withheld." *Meadows*, 530 S.E.2d at 690. It is also easy to see how any number of employers could capitalize on [defendant's] nebulous, criteria-free theory in order to "investigate" an employee's discharge, while delaying payment of her wages, for far longer than the twelve days at issue in this case. Again, such an interpretation of the statute would frustrate the fundamental purposes of the WPCA.

Id. at *18. The court continued by emphasizing the mandatory nature of the WPCA: "An employer *must* pay earned wages to its employees." *Id.* (quoting *Szturm v. Huntington Blizzard Hockey Assocs. Ltd. P'ship*, 516 S.E.2d 267, 273 (W. Va. 1999)) (emphasis added). Finally, because "the parties do not dispute that Eddy did not return to the Blackville store after May 27, 2011" and "further do not dispute that she did not ultimately receive her regular salary for the days between May 27, 2011 and June 8, 2011," the court found that, "[a]s the plaintiff was thus neither working nor earning a salary after May 27, 2011, it is plain that she had "ce[ased] ... performance of work," W. Va. C.S.R. § 42-5-2.8, and had consequently been "discharg[ed]." W. Va. Code § 21-5-4(b)" and denied defendant's motion for summary judgment. *Id.* at *18.

The *Eddy* court's analysis should be applied here. The parties do not dispute that Plaintiff was told not to return to work on February 9, 2015. Thus, as Plaintiff was "neither working nor earning a salary" as of February 9, it is plain that he had ceased performance of work, and had consequently been discharged as of that date.

Judge Keeley revisited the issue under slightly different circumstances in *Frisbie v. Rite Aid Corp.*, No. 5:14-cv-03836, 2014 WL 6818380 (S.D. W. Va. Dec. 2, 2014). In *Frisbie*, the WPCA plaintiff had received notice of his discharge on March 8, 2013. *Frisbie*, 2014 WL 6818380 at *2. Defendant Rite Aid left plaintiff on the payroll until March 9, and then paid his

final wages on March 12. The court found that, because plaintiff “continued to earn compensation after his notice of discharge on March 8, 2013, specifically, through March 9, 2013,” he had been paid within 72 hours “of the conclusion of the parties’ employment relationship.” *Id.* Like *Eddy*, applying *Frisbie* here leads to the conclusion that the parties’ employment relationship concluded when Plaintiff was told not to return to work.

Accordingly, because Defendant’s summary judgment motion will ultimately prove futile, there was no reason for the circuit court to stay class discovery.

CONCLUSION

Plaintiff asks the Court to reject Defendant’s appeal because it is an improper attempt to seek interlocutory review of a routine case management decision. Defendant’s inability to point to a single case where any court, let alone this Court, has accepted such an appeal should be dispositive. Should the Court decide to hear the appeal, the circuit court’s decision should be affirmed because it was not an abuse of discretion to refuse Defendant’s request for a stay, and because Defendant’s motion for summary judgment is not supported by the relevant law.

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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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of August, 2016, the foregoing **Respondent's Brief** was served on the following by regular mail:

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