

In the Supreme Court of Appeals of West Virginia

No. 14-0058

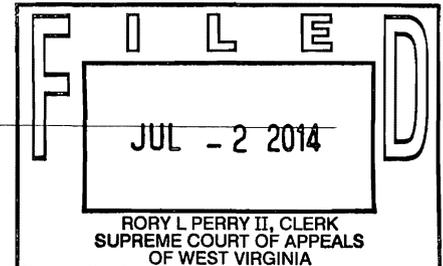
CITYNET, LLC,

Defendant Below, Petitioner,

v.

RAY TONEY,

Plaintiff Below, Respondent.



PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
II. ARGUMENT	3
<hr/>	
A. Mr. Toney Cannot Rewrite the Fact that He Already Received \$17,400 From the Plan in 2010, and Awarding Him that Amount Again Would Be a Windfall, which, if Trebled for WPCA Damages, Would Result in a \$69,600 Windfall	3
B. Mr. Toney Cannot Rewrite the Timely Payment Provisions of the Wage Payment and Collection Act to Apply to Payments under Citynet's Employee Incentive Plan	8
C. Mr. Toney Cannot Rewrite the Plan to Equate his Voluntary Quit with the Plan's Payout Provision Applying Only to the Company Firing an Employee	13
III. CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Alkire v. First National Bank of Parsons,</i> 197 W. Va. 122, 475 S.E.2d 122 (1996)	7
<i>Butler v. Smith's Transfer Corp.,</i> 147 W. Va. at 408, 128 S.E.2d at 37	5
<i>Cardinal State Bank v. Crook,</i> 184 W. Va. 152, 399 S.E.2d 863 (1990)	15
<i>Cauvel v. Schwan's Home Servs. Inc.,</i> 2011 WL 573378 (W.D.Va. Feb. 10, 2011)	15, 16
<i>Champagne v. Thurston County,</i> 178 P.3d 936 (Wash. 2008)	12-13
<i>City of Marshall, Minn. v. Heartland Consumers Power Dist.,</i> 384 F.3d 517 (8th Cir. 2004)	16
<i>Henick v. Fast-Track Anesthesia Associates, LLC,</i> 2012 WL 5908939 (W. Va. Nov. 26, 2012)	11-12
<i>In re Cesar L.,</i> 221 W. Va. 249, 654 S.E.2d 373 (2007)	5
<i>In re Starcher,</i> 202 W. Va. 55, 501 S.E.2d 772 (1998)	5
<i>Liberty Mut. Ins. Co. v. Morrissey,</i> -- W. Va. --, -- S.E.2d --, No. 13-0195, 2014 WL 2695524 (June 11, 2014)	16
<i>Meadows v. Wal-Mart Stores, Inc.,</i> 207 W. Va. 203, 530 S.E.2d 676 (1999)	9, 12
<i>PFS Distribution Co. v. Raduechel,</i> 387 F.Supp.2d 1020 (S.D. Iowa 2005)	15
<i>Spencer v. Steinbrecher,</i> 152 W. Va. 490, 164 S.E.2d 710 (1968)	5
<i>State v. Elder,</i> 152 W.Va. 571, 165 S.E.2d 108 (1968)	9

Stevenson v. Branch Banking & Trust Corp.,
861 A.2d 735, (Md. Ct. Spec. App. 2004)..... 12

Tribeca Lending Corp. v. McCormick,
231 W.Va. 455, 745 S.E.2d 493 (2013) 9

Wheeling-Pittsburgh Steel Corp. v. Rowing,
205 W. Va. 286, 517 S.E.2d 763 (1999)..... 6

Wilcox v. Conley,
2011 WL 8192211 (W. Va. Nov. 28, 2011)..... 12

Wolfe v. Adkins,
229 W. Va. 31, 725 S.E.2d 200 (2011) 12

STATUTES

W. Va. Code, 21-5-1 [1987]..... 12, 13

W. Va. Code § 21-5-4..... 8, 9

W. Va. R. Civ. P. 56 15

W. Va. R. Civ. P. 59(e)..... 7

II. STATEMENT OF THE CASE

The position of Respondent Ray Toney (“Respondent” or “Mr. Toney”) in this case—that under a bonus plan designed to attract and retain employees, he can voluntarily quit but have more entitlement to payment than current employees—is wholly nonsensical. Employees are entitled, under the Wage Payment and Collection Act (the “WPCA”), to the prompt payment of compensation to which they are entitled upon their separation from employment. The WPCA does not require prompt payment of compensation to which an employee is not entitled. Only by successfully rewriting the terms of Mr. Toney’s employment has he been awarded a trebled windfall of not only compensation to which he was not entitled, but compensation he acknowledges that he already received before he quit his employment.

Citynet, LLC (“Petitioner” or “Citynet”), a small West Virginia company, provides an incentive program to its employees. Citynet’s Employee Incentive Plan provides a detailed mechanism for employees to receive payouts from the Plan in a manner that does not jeopardize the on-going financial viability of Citynet. (A.R. 31-36.)

So that Citynet can administer the Plan in a manner that does not financially jeopardize the company, the Plan states, “The Board’s interpretation of the Plan or any Awards and **all decisions and determinations by the Board with respect to the Plan are final, biding and conclusive on all parties.**” (A.R. 28 (emphasis added).)

The Plan further provides that the “construction and interpretation by the Administrator of any provision of this Plan **shall be final and conclusive.**” (A.R. 28

(emphasis added).) An employee is entitled to Plan benefits only by “conclusively . . . accept[ing] and consent[ing] to all the terms of [the Plan] and to all actions and decisions of the Company and/or Board.” (A.R. 37 (emphasis added).) Thus, Mr. Toney agreed to all of the Plan’s terms when he accepted the benefits of the Plan.

Although the Plan’s stated purpose is to “attract and retain experienced individuals” (A.R. 24), Mr. Toney voluntarily quit Citynet in October 2011. Mr. Toney then sued Citynet for payments from the Plan.

In order to accomplish his objective of securing benefits to which he was not contractually entitled, Mr. Toney has rewritten history, the terms of the Plan, the language of the WPCA, and what occurred in Circuit Court.

The clearest example of Mr. Toney’s rewriting facts is his denial that the value of his Performance Units is worth \$17,400 less because he already withdrew that amount from the Plan. In 2010, Mr. Toney requested a 20% payout—the maximum allowed under the Plan. He received \$17,400, which is precisely 20% of the \$87,000 he still claims he is due. He refuses to reduce his current claim under the Plan by the \$17,400 that he already received.

It is equally clear that Mr. Toney seeks to rewrite the timely payment provisions of the WPCA. In the case of an employee quitting, the WPCA requires an employer to pay wages, including fringe benefits, by the next regularly scheduled payday. An employer, however, may inform employees that fringe benefits are not payable at all or are payable under only certain circumstances, so long as the employer does so clearly in writing.

The Plan has detailed payout provisions that remove the Plan from the scope of the WPCA. The Plan's payout provisions contain specific timeframes that notify employees that payouts after termination will not be made by the next regularly scheduled payday. Yet, Mr. Toney seeks to graft the WPCA's timely payment provisions onto the Plan without any basis to do so.

Finally, Mr. Toney seeks to rewrite the Plan itself. He seeks to write out of the Plan every provision regarding how Performance Units are to be redeemed under the terms of the Plan. He seeks to equate the Plan's provision regarding the company's decision to terminate an employee with the very different circumstance of an employee making the unilateral decision to quit. And ultimately, he seeks to write out of the Plan every provision that refers to Citynet's discretion.

As shown further below, nothing in Mr. Toney's Respondent's Brief shows that Citynet's arguments are incorrect or provides any legally supportable basis to rewrite the facts and the law.

III. ARGUMENT

A. Mr. Toney Cannot Rewrite the Fact that He Already Received \$17,400 From the Plan in 2010, and Awarding Him that Amount Again Would Be a Windfall, which, if Trebled for WPCA Damages, Would Result in a \$69,600 Windfall.

The clearest example of Mr. Toney's rewriting facts is his denial that his claim is worth \$17,400 less because he already withdrew that amount from the Plan. In his Respondent's Brief, Mr. Toney admits that in 2010, he "removed \$17,400.10" from the Plan. (Resp't's Br. at 35; *see also* A.R. 131-34 (Citynet records of the \$17,400 payment to Mr.

Toney from the Plan in September 2010).) Mr. Toney, however, asserts this is because “in 2010 the participants in the Plan were allowed to redraw [sic] 20% of their vested money.” (Resp’t’s Br. at 35.) That assertion is gibberish, and it contains no citation to the record. The assertion contains no citation, because nowhere in the record is there any evidence to support it.

Nothing in the record shows Mr. Toney’s 2010 redemption to be anything other than an annual voluntary redemption under § 5.7(b) of the Plan. (A.R. 33.) The amount that Mr. Toney received in 2010, \$17,400.10, is exactly 20% of the \$87,000.48 value of Mr. Toney’s Performance Units under the Plan. Twenty percent is the maximum amount that a participant is allowed to redeem per year. (*Id.*)

With full knowledge that he made a voluntary redemption of 20% of \$87,000.48 under the Plan in 2010, Mr. Toney asserted in his Complaint that when he quit Citynet in 2011, he still “was due . . . approximately eighty-seven thousand dollars (\$87,000.00).” (A.R. 8.) In short, Mr. Toney misrepresented the value of his Performance Units under the Plan in his Complaint. Citynet never answered the Complaint, so that amount remained a false allegation throughout the litigation below.

Citynet’s reference to an \$87,000 value for Mr. Toney’s Performance Units in its proposed Order denying Mr. Toney’s summary judgment motion (A.R. 416), was the product of Mr. Toney’s false allegation. At that point in the litigation, no discovery had taken place and so there had been no opportunity to test Mr. Toney’s asserted value.

Mr. Toney is incorrect that Citynet’s proposed finding was a judicial admission by Citynet. (Resp’t’s Br. at 36.) Citynet did not stipulate or agree to the

\$87,000 amount “in open court . . . in the trial of a case.” *In re Starcher*, 202 W. Va. 55, 61, 501 S.E.2d 772, 778 (1998) (quoting Syl. Pt. 1, *Butler v. Smith's Transfer Corp.*, 147 W. Va. 402, 128 S.E.2d 32 (1962)); *see also* Syl. Pt. 7, *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968). Nor was the proposed finding a pre-trial stipulation. *See Butler*, 147 W.

Va. at 408, 128 S.E.2d at 37; *Spencer*, 152 W. Va. at 499, 164 S.E.2d at 717.¹ Rather, Citynet merely submitted its proposed order directly to the Circuit Court. (A.R. 414.) It was not filed with the Circuit Clerk.² Of course, the Circuit Court did not enter Citynet's proposed order.

Mr. Toney also is incorrect that the value of his Performance Units was growing in a straight line at the rate of \$1,836.11 per month. (Resp't's Br. at 6.) That assertion has no basis in the Plan or the record. Mr. Toney's conjecture that “[i]f the plan had continued at its past growth rate it would have increased by \$40,394.52 (\$1,836.11 x 22 months)” (*id.* at 35) is just that—pure conjecture. The unfounded assumption directly contradicts the terms of the Plan; any increase in the value of an employee's Performance Units is tied directly to the increase in the equity value of the company, if any. Furthermore, this argument appears for the first time in Mr. Toney's Respondent's Brief. This Court, then, should disregard the entire argument.

¹ Certainly, the proposed finding was not a sworn statement pursuant to a statute. *See In re Cesar L.*, 221 W. Va. 249, 262, 654 S.E.2d 373, 386 (2007) (finding sworn relinquishment of parental rights pursuant to statute to be judicial admission).

² The facts asserted by Citynet in the document that it did file in this case, “Citynet, LLC's Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment,” do not contain any assertion by Citynet of the value of Mr. Toney's Performance Units. (A.R. 87-90.)

As noted, the Plan calculates the value of Performance Units based on the value of the company. (See A.R. 28-30.) Nothing in the Plan provides for any straight-line growth in the value of Performance Units. Mr. Toney alleged in his Complaint that the value of his performance units was approximately \$87,000 at the time he quit Citynet in October 2011. (A.R. 8.) He did not allege in his Complaint or argue in Circuit Court that it had grown by an additional \$40,394.52, as he now contends in his Respondent's Brief. (Resp't's Br. at 35.)

Because there was no discovery in the Circuit Court, Citynet never "refused to provide the actual amount that Ray Toney was entitled to under the Plan." (Resp't's Br. at 35.) Again, Mr. Toney attempts to rewrite facts. It would not have required "extensive litigation to obtain the true amount" of the value of Mr. Toney's Performance Units. (*Id.*) Thus, Mr. Toney's assertion that to avoid purportedly "extensive litigation," "both Citynet and Ray Toney agreed to simply submit the \$87,000.48 amount as a compromise to the Court" (*id.*) misrepresents what occurred in the Circuit Court. The parties never disagreed over the amount, and they never discussed any compromise stipulation.³

The value of Mr. Toney's Performance Units was not material to the substance of Citynet's proposed Order, which would have granted Citynet's motion and ended the case. Citynet did not refer to an \$87,000 value "for the purpose of withdrawing the fact from the realm of dispute." *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va.

³ In order to calculate the value of Mr. Toney's Performance Units, the number of which is 20% fewer after his 2010 redemption, the Plan's calculation found in Article IV of the Plan would have to be performed. (See A.R. 28-30.)

286, 302, 517 S.E.2d 763, 779 (1999) (quoting Syl. pt. 4, *State v. McWilliams*, 177 W. Va. 369, 352 S.E.2d 120 (1986)).

Instead, once the Circuit Court entered Mr. Toney's proposed Order, Citynet discovered Mr. Toney's 2010 redemption. Mr. Toney attempts to fault Citynet for not realizing the redemption earlier when he states that "[a]ll of these facts [that Mr. Toney received \$17,400] were known to the parties." (Resp't's Br. at 35.) But this statement by Mr. Toney about his own knowledge, as well, establishes that he knowingly misrepresented the value of his Performance Units throughout the litigation in Circuit Court. He has been aware of the \$17,400 payment since he received it, and yet he refuses to credit Citynet for making the payment.

Citynet timely sought remittitur of \$17,400 within ten days of the entry of the Circuit Court's Order. As Citynet explained in its Petitioner's Brief, Citynet's motion pursuant to R. Civ. P. 59(e) was a proper motion to seek reduction of the erroneously claimed amount, particularly where it was deprived of any opportunity to engage in discovery prior to entry of summary judgment. A "motion for a remittitur is technically a motion to alter or amend judgment pursuant to W. Va. R. Civ. P. 59(e)," even if it does not specify the rule. *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 127 n.6, 475 S.E.2d 122, 127 n.6 (1996). In this case, Citynet specified the rule in its timely motion.

Although Mr. Toney knows he received \$17,400 from the Plan in 2010, he seeks to rewrite facts. He wrongfully persists in seeking a windfall of that amount again. Mr. Toney's false allegation of the value of his Performance Units should not be rewarded with that windfall. Furthermore, because Mr. Toney incorrectly seeks treble damages

under the WPCA, he actually seeks a quadruple windfall totaling \$69,600 (\$17,400 x 4). As the following explains, however, Mr. Toney is likewise incorrect about the applicability of the WPCA to this case. He can rewrite that statute no more successfully than he can rewrite facts.

B. Mr. Toney Cannot Rewrite the Timely Payment Provisions of the Wage Payment and Collection Act to Apply to Payments under Citynet's Employee Incentive Plan.

Mr. Toney tries to rewrite the WPCA provision requiring payment of wages to a quitting employee by the next regular payday, W. Va. Code § 21-5-4(c), to also apply to the specific payout provisions of the Plan. (Resp't's Br. at 28-34 ("In this case, Ray Toney accepted the 90 day payout period. However once Citynet refused to make the required payout within the 90 days, then the West Virginia Wage Payment and Collection Act subjects Citynet to liquidated damages, costs and attorney fees.")) Nothing in Mr. Toney's Respondent's Brief or his briefing below, however, explains how the timely payment provisions of the WPCA apply to the Plan.

Citynet's Employee Incentive Plan has specific provisions taking the Plan outside the scope of the WPCA. The WPCA's timely payment provisions apply, by their terms, to "wages," including "then accrued fringe benefits capable of calculation and payable directly to an employee." W. Va. Code § 21-5-1(c). The Plan's specific provisions for the timing of payments establish that Mr. Toney's right to payment did not accrue immediately upon his quitting so that he was entitled to immediate payment. The WPCA's timely payment provisions simply are inapplicable to the timing of payments under the Plan.

Mr. Toney asks this Court to construe the timely payment provisions of the WPCA, W. Va. Code § 21-5-4, to state a general requirement of timely payment in all circumstances, not just the circumstances specified in the statute. But, “[p]lain statutory language does not need to be construed. In other words, ‘[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.’ Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).” *Tribeca Lending Corp. v. McCormick*, 231 W.Va. 455, 460, 745 S.E.2d 493, 498 (2013). Mr. Toney thus has no legal basis for his arguments regarding the WPCA.

Mr. Toney’s acknowledgement that the Plan has specific provisions for the timing of payments actually defeats any argument for the applicability of the WPCA. (*See* Resp’t’s Br. at 30 (“It is not disputed that the terms and provision of the *Incentive Plan* afford Citynet up to ninety (90) days to pay the vested benefits.”⁴)).) As Citynet stated in its Petitioner’s Brief, because the law allows Citynet to state to an employee that a fringe benefit is forfeited upon termination, it of course has the ability to state the terms on which a fringe benefit will be paid out. (Pet. Br. at 26-27 (quoting and citing *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (2000)).

Mr. Toney’s argument regarding the vesting of his Performance Units is off-base. (*Id.* at 28-34.) Again, he wants to rewrite the terms of the Plan. Citynet agrees that Mr. Toney’s Performance Units were “vested” according to the terms of the Plan. That Mr. Toney’s Performance Units were “vested” according to the Plan’s definition, however,

⁴ As discussed thoroughly elsewhere, Mr. Toney is incorrect that Citynet had only 90 days to make payouts to him under the Plan. His concession that Citynet had at least 90 days, however, establishes the inapplicability of the WPCA.

does not mean that he was entitled to immediate, 100% payout of the value of his Performance Units once he quit.

The Plan states that vested Performance Units “shall be available for redemption,” but then one must refer to the redemption provisions of the Plan for the terms of payout. (A.R. 32-35.) Mr. Toney quotes only a part of the example found in § 5.12 of the Plan when he quotes that “all of John’s Performance Units are available for redemption.” (Resp’t’s Br. at 5.) Mr. Toney fails to cite the rest of the example that states, “John would be due a total amount of \$96,000 (less applicable withholding) from the Company payable under the Payout provisions of the Plan.” (A.R. 35 (emphasis added).) Mr. Toney cannot write out of the Plan that being “vested” in Performance Units under the terms of the Plan means only that the Performance Units are **available** for redemption according to the terms of the Plan.⁵

Furthermore, the Plan contemplates Citynet determining that it does not have the current financial ability to pay a redemption request. If Citynet determines it is unable to pay a redemption request, the unpaid amount converts to an unsecured debt of the company that pays 5% annual interest. (See A.R. 33-34.) This Plan provision further supports the inapplicability of the WPCA. It cannot be the case that a valid but unpaid

⁵ Accordingly, Mr. Toney cites inapposite decisions from other jurisdictions for the proposition that incentive plan monies are wages. (Resp’t’s Br. at 32-34.) The applicability of the WPCA’s timely payment provisions does not turn on whether Plan monies are “fringe benefits” and thus “wages.” Citynet agrees that it has an obligation to ultimately pay to Mr. Toney the value of his vested Performance Units. That payout, however, must be according to the redemption terms of the Plan that Mr. Toney accepted when he accepted the benefits of the Plan.

redemption request converts to a debt of Citynet, but the WPCA penalizes Citynet for creating the debt by requiring it to also pay treble liquidated damages.

Even if Mr. Toney was correct that Citynet should have paid him his entire balance within 90 days of his request, the most he would be entitled to is an unsecured debt from Citynet earning 5% annual interest.⁶ Throughout this litigation, Mr. Toney has ignored the Plan's provision that Citynet's decision to not pay a redemption request creates an unsecured debt. He never has explained how that Plan provision does not apply to him. Instead, Mr. Toney misrepresents that "the application of subsection [5.7](b) could result in no payment to [him]." (Resp't's Br. at 10.) Mr. Toney, however, cannot rewrite the Plan to remove the unsecured debt provision of § 5.7(b) (A.R. 33).

In this case, Mr. Toney had no right to a payment under the Incentive Plan that "accrued" immediately upon his quitting. While Mr. Toney's Performance Units were vested according to the Plan's terms, they had been vested before he quit; they did not vest upon his quitting. Thus, Citynet had no obligation to make any payment under the Plan to Mr. Toney by the next regular payday after he quit. Mr. Toney still must seek redemption of his vested Units according to the Plan's terms for payout.

This Court has consistently held that the WPCA does not create rights to compensation that do not exist under the terms of employment. See, e.g., *Henick v. Fast-*

⁶ "If the Company fails to pay the amounts due to a Participant within the ninety (90) day period, the remaining balance shall be converted to an unsecured debt of the Company, the Company shall record the Participant as a lender to the Company, and the Company shall accrue interest at a rate of five percent (5%) per annum." (A.R. 33.) As Mr. Toney notes with respect to other Plan provisions, this provision also uses "the mandatory term 'shall.'" (See, e.g., Resp't's Br. at 10.)

Track Anesthesia Associates, LLC, 2012 WL 5908939 (W. Va. Nov. 26, 2012) (memorandum) (because employee did not resign with notice, he was ineligible for reimbursement of accrued, unused sick leave, and had no cause of action for non-payment of the same under the WCPA); *Wilcox v. Conley*, 2011 WL 8192211 (W. Va. Nov. 28, 2011) (memorandum) (legal secretary was not entitled to damages under the WCPA where she had no legitimate claim for hours worked under forty hours per week because she had already been paid for the same); *Wolfe v. Adkins*, 229 W. Va. 31, 725 S.E.2d 200 (2011) (jail employees were not entitled to damages under the WCPA where there was no provision in their employment agreement for payment for unused, accumulated sick leave upon termination from employment).

As this Court stated in *Wolfe, supra* at 35-36, 725 S.E.2d at 204-05:

Under the definitions set forth in W. Va. Code, 21-5-1 [1987], of the West Virginia Wage Payment and Collection Act, the term “wages” includes accrued fringe benefits. That section, in turn, defines the phrase “fringe benefits” as including sick leave. Specifically, W. Va. Code, 21-5-1(c) [1987], states, in part: “[T]he term ‘wages’ shall also include then accrued fringe benefits capable of calculation and payable directly to an employee: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.” *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). Whether a particular fringe benefit is payable to an employee is determined by the terms of employment and not by the provisions of W. Va. Code, 21-5-1(c). *Meadows, supra*, 207 W. Va. at 216, 530 S.E.2d at 689.⁷

⁷ See also *Stevenson v. Branch Banking & Trust Corp.*, 861 A.2d 735, 748-50 (Md. Ct. Spec. App. 2004) (holding that former employee had no claim under timely payment provision of Maryland’s Wage Payment Act, because severance payment sought was made not payable within the terms of the Act by written agreement); cf. *Champagne v. Thurston County*, 178 P.3d 936, 947

Here, Mr. Toney cannot rewrite the timely payment provisions of the WPCA to apply to the terms of the Plan when those terms plainly make the WPCA inapplicable, because though Mr. Toney's right to the fringe benefit at issue had vested prior to his voluntary separation from employment, there is no legitimate dispute that his right to the payment of that fringe benefit had not accrued at the time of his voluntary separation from employment. Accordingly, because whether "a particular fringe benefit is payable to an employee is determined by the terms of employment and not by the provisions of W. Va. Code, 21-5-1(c)," Mr. Toney had no cause of action under the WPCA.

C. Mr. Toney Cannot Rewrite the Plan to Equate his Voluntary Quit with the Plan's Payout Provision Applying Only to the Company Firing an Employee.

Mr. Toney likewise cannot rewrite Citynet's Employee Incentive Plan. Mr. Toney contends he was entitled to request an immediate payout of 100% of his Performance Units once he chose to quit, because he incorrectly equates his voluntarily quitting with a decision by Citynet to terminate an employee. Mr. Toney contends that § 5.7(a) of the Plan specifying the consequences "[i]n the event the Participant's employment is terminated without Cause," also applied when he unilaterally quit. (Resp't's Br. at 21-27.) While the phrase "is terminated without Cause" is written in the passive voice, the actor can be only Citynet. Only Citynet can terminate an employee

(Wash. 2008) (collective bargaining agreement providing for deferred compensation trumps timely payment provision of Washington's Wage Payment Act); *id.* at 947-48 (Madsen, J., concurring) ("The employees and the employer had thus agreed that overtime wages would not be due in the pay period in which they were earned, but would instead be paid in the following pay period. Accordingly, by express contractual agreement, payment for overtime was not part of 'all wages due' within the meaning of [Washington's Wage Payment Act].").

with or without Cause. An employee cannot voluntarily quit without Cause. Mr. Toney's contrary contention is merely an attempt to rewrite the Plan.

Section 5.7(a) of the Plan is not ambiguous. It specifies only one specific circumstance: termination of an employment by Citynet when the employee did not give Citynet "Cause" to terminate him or her. Should an employee be terminated by Citynet through no fault of the employee—for example, as a result of a downturn in business—the Plan gives that employee special consideration and allows a 100% payout.

On the other hand, an employee who unilaterally determines to quit Citynet, such as Mr. Toney, should not be and is not entitled to a faster payout than a current employee. The Plan's purpose is to "motivate Participants to put forth maximum effort toward the success and growth of the Company" and to "attract and retain experienced individuals." (A.R. 24.)

Mr. Toney was given all benefits under the terms of the Plan from the beginning in 2008; he already had been employed for five years. (Resp't's Br. at 22.) The Plan did not attract Mr. Toney to work for Citynet. And when Mr. Toney quit Citynet, he acted contrary to the Plan's purposes of motivating and retaining employees.⁸ Under these circumstances, Mr. Toney has no basis to assert that a quitting employee can obtain

⁸ Thus, the cases cited by Mr. Toney and the argument that a unilateral contract was created when Citynet made an offer and Mr. Toney accepted the offer by performance (Resp't's Br. at 19-21) are inapposite.

a payout immediately, but an employee who continues to work for Citynet is limited to withdrawing 20% per year under § 5.7(b) of the Plan.⁹

While Mr. Toney advances arguments that make no sense under the terms of the Plan, he ignores Citynet's argument that the Plan gives Citynet the exclusive ability to interpret and administer the Plan. (See Pet. Br. at 15-21.) Mr. Toney asserts and cites cases for the proposition that incentive plans such as Citynet's Plan are contracts "subject to interpretation by the Courts." (Resp't's Br. at 18.) He ignores, however, the holding of one of the very cases he cites: "When a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable." *PFS Distribution Co. v. Raduechel*, 387 F.Supp.2d 1020, 1023 (S.D. Iowa 2005) (citation omitted) (refusing to substitute court's judgment for judgment of employer given discretion to administer incentive plan).^{10,11}

⁹ At pages 22-23 of his Respondent's Brief, Mr. Toney improperly attempts to construe the Plan by reference to letters that are not properly a basis for summary judgment under W. Va. R. Civ. P. 56. Rule 56 limits the bases to establish undisputed facts to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." W. Va. R. Civ. P. 56(c). Accordingly, Mr. Toney's arguments based on letters that he merely attached to his summary judgment motion without supporting affidavits should be ignored. Moreover, Mr. Toney has no basis to construe the fully integrated Plan by reference to external documents. See, e.g., *Cardinal State Bank v. Crook*, 184 W. Va. 152, 156, 399 S.E.2d 863, 867 (1990) (*per curiam*) ("[G]enerally, a complete, unambiguous written instrument is the highest and safest evidence of the parties' agreement.") (citations omitted).

Mr. Toney's reference to an August 2013 affidavit, executed nearly a year after the Circuit Court's Orders appealed here, likewise is improper and should be disregarded. (Resp't's Br. at 27.) The affidavit, which never was considered by the Circuit Court, is not "evidence" in this case. Moreover, Citynet is entitled to negotiate agreements with employees for payments based on factors unique to each employee. Mr. Toney has no basis to equate his surprise voluntary quit, of which he notified Citynet via a 2:00 a.m. e-mail, with the negotiated departure of a management-level employee.

¹⁰ The other case that Mr. Toney cites at page 18 of his Brief, *Cauvel v. Schwan's Home Servs. Inc.*, 2011 WL 573378 (W.D.Va. Feb. 10, 2011) (unreported), likewise is unhelpful to Mr. Toney. *Cauvel* assumes without inquiry that the plan at issue was a contract, accepts the employer's interpretation of the contract, and rejects the former employee's interpretation.

Thus, characterizing Citynet's Plan as a contract does not help Mr. Toney. A court has no basis under the terms of the Plan to review the decisions of Citynet in interpreting and administering the Plan.

Finally, Mr. Toney's argument that this Court cannot review a Circuit Court's decision on cross-motions for summary judgment is just absurd. (Resp't's Br. at 27-28.) If Mr. Toney were correct, no Circuit Court decision after cross-motions would be reviewable. Mr. Toney also is incorrect that "[t]he relevant facts were agreed upon and the relevant documents submitted." (*Id.* at 27.) In response to Mr. Toney's premature motion for summary judgment, Citynet merely expanded on its motion to dismiss, but it did not base its arguments on any document beyond the Plan. (A.R. 87-98.) Citynet sought a judgment as a matter of law that it had the exclusive authority to interpret and administer the Plan, as the Plan states. Citynet did not waive any appeal rights simply because it converted its motion to dismiss to one for summary judgment in response to Plaintiff moving for summary judgment. *See, e.g., Liberty Mut. Ins. Co. v. Morrissey*, -- W. Va. --, -- S.E.2d --, No. 13-0195, 2014 WL 2695524 (June 11, 2014) (*per curiam*) (deciding appeal of statutory interpretation decision following agreement of parties before the circuit court that "the matter could be decided on cross motions for summary judgment").

¹¹ *See also City of Marshall, Minn. v. Heartland Consumers Power Dist.*, 384 F.3d 517, 519 (8th Cir. 2004) ("[J]udicial review of an unambiguous contract that leaves a decision to the discretion of one party is not warranted unless there is fraud, bad faith, or a grossly mistaken exercise of judgment.") (internal quotation marks and citation omitted). Mr. Toney nowhere alleged or proved fraud, bad faith, or a grossly mistaken exercise of judgment.

IV. CONCLUSION

For the reasons stated in its Petitioner's Brief and above, Petitioner, Citynet, LLC, respectfully requests that this Court reverse the judgment of the Circuit Court of Kanawha County and remand this case for entry of judgment in its favor that Respondent has no claim for violating Citynet's Employee Incentive Plan, and, therefore, also in Petitioner's favor on Respondent's claim for damages under the Wage Payment and Collection Act.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2014, I served the foregoing **Petitioner's Reply Brief** on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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