

In the Supreme Court of Appeals of West Virginia

No. 14-0058

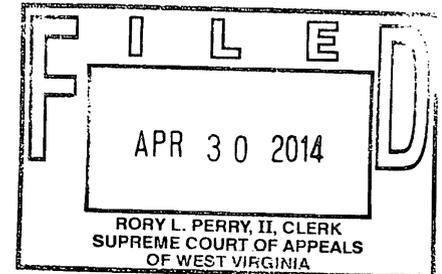
CITYNET, LLC,

Defendant Below, Petitioner,

v.

RAY TONEY,

Plaintiff Below, Respondent.



PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by ruling that, after Ray Toney voluntarily quit, Citynet, LLC's Employee Incentive Plan required Citynet to pay Mr. Toney his entire balance within 90 days of his request for payment, which was clearly contrary to the law, the terms of the plan, and the evidence.
2. The Circuit Court erred by ruling that the timely payment provisions of the Wage Payment and Collection Act apply to payments under Citynet, LLC's Employee Incentive Plan so that Mr. Toney is entitled to treble statutory damages and statutory fee-shifting, which was clearly contrary to the law and the evidence.
3. The Circuit Court erred by failing to credit Citynet with \$17,400 it had already had paid Mr. Toney under Citynet, LLC's Employee Incentive Plan, which was clearly contrary to the law and the evidence.

II. STATEMENT OF THE CASE

A. Procedural Background.

In this case, the complaint of Ray Toney ("Respondent" or "Mr. Toney") alleged three counts against Citynet, LLC ("Petitioner" or "Citynet").

In Count I, he alleged that Citynet violated the terms of Citynet's Employee Incentive plan by failing to pay him \$87,000 within 90 days after he quit his employment and requested payment.

In Count II, he alleged that Citynet "knowingly and willfully" violated the plan.

In Count III, he alleged that Citynet violated the timely payment provisions of the Wage Payment and Collection Act ("WPCA"), as the result of purportedly violating the 90-day payment provision of the plan. (*See* Compl., Civil Action No. 12-C-527 (March 23, 2012), A.R. 3-11.)

In response, Citynet moved to dismiss Mr. Toney's complaint. Citynet asserted that under the terms of the plan, which was the basis for Mr. Toney's complaint

and could be considered in ruling on a Rule 12(b)(6) motion, Mr. Toney failed to state a legal claim that Citynet violated the plan's terms. The plan vests full authority to interpret and administer the plan in a Board, so, as a matter of law, Mr. Toney could not show the Board's decisions violated the plan. Citynet also asserted that, as a matter of law, the timely payment provisions of the WPCA could not apply to time periods specified in the plan. Finally, Citynet asserted that no cause of action for willful breach of contract was available to Mr. Toney. (See Citynet Mot'n to Dismiss & Mem. (April 27, 2012) (attaching Citynet, LLC Employee Incentive Plan), A.R. 12-38.)

Mr. Toney then moved for partial summary judgment in his favor, attaching a memorandum of law in opposition to Citynet's motion to dismiss and in support of his motion for partial summary judgment. Mr. Toney also attached a copy of the plan and two letters to Mr. Toney from Citynet. In his memorandum, Mr. Toney asserted, albeit incorrectly, that the unambiguous terms of the plan entitled him to his full payout upon request after quitting. Also, while admitting the plan allowed Citynet 90 days to pay benefits, Mr. Toney nonetheless contended that the WPCA's timely payment provision requiring payment by the next payday, W. Va. Code § 21-5-4(c), somehow was violated. Finally, Mr. Toney asserted that his count for willful violation of the plan alleges a separate tort that presents factual issues to be decided by a jury. (See Plf.'s Mot'n for Partial Summ. J. & Mem. (May 24, 2012), A.R. 39-86.)

Citynet then responded to Mr. Toney's motion for partial summary judgment, and Citynet cross-moved for summary judgment. Citynet asserted that it was entitled to summary judgment that it did not violate the plan because Mr. Toney's

redemption request was void under the plan's terms. Citynet also asserted that the plan was not a contract that it could wrongfully breach or violate, and that Mr. Toney had alleged no fraud in support of his count for willfully violating the plan. (See Citynet, LLC's Resp. to Plf.'s Mot'n for Partial Summ. J. & Cross-Mot'n for Summ. J. (Aug. 9, 2012), A.R. 87-98.)

On August 22, 2012, Judge Stucky heard oral argument on the various early dispositive motions. (See Hearing Tr. (Aug. 22, 2012), A.R. 252-294.) At the conclusion of the hearing, Judge Stucky requested that both parties submit proposed orders. (See *id.* A.R. 291.) Mr. Toney and Citynet both submitted proposed orders, and Citynet submitted objections to Mr. Toney's proposed order (see A.R. 99-104).

On September 18, 2012, Judge Stucky entered the "Order Granting *Plaintiff's Motion for Summary Judgment* and Order Denying *Defendant's Motion to Dismiss* and Order Denying *Defendant's Cross-Motion for Summary Judgment*," which was identical to Mr. Toney's proposed order with only the addition of page numbers. (See Sept. 18, 2012 Order, A.R. 105-118.)

In the September 18, 2012, Order, the Circuit Court:

- Applied extrinsic evidence and "various provisions of the *Incentive Plan*" to determine what Citynet intended with its Plan, and concluded that Citynet had been obligated to pay Mr. Toney \$87,000.48 within 90 days of his request for it (see *id.* at 5-12, A.R. 109-116); and
- Held Citynet was liable to Mr. Toney for treble damages and litigation costs, including attorney's fees, pursuant to W. Va. Code §§ 21-5-4(e) & -12, because Citynet violated the timely payment provisions of the WPCA, *id.* § 21-5-1(c) (requiring payment by the next regular payday), because it had not paid

Mr. Toney within 90 days of his request (See Sept. 18, 2012 Order at 12-13, A.R. 116-17.)

On October 2, 2012, within ten business days of the September 18, 2012 Order, Citynet moved the Circuit Court to reconsider its Order pursuant to R. Civ. P. 59(e) and 60(b). In addition to making its legal arguments, Citynet attached to its motion evidence that it had paid to Mr. Toney \$17,400 of the \$87,000 he claimed, which Mr. Toney had failed to bring to the Circuit Court's attention. (See A.R. 119-134.) Although Mr. Toney's Count II for willful breach of the plan had not been resolved by the order, Citynet filed its motion to avoid any argument by Mr. Toney that Citynet had failed to timely move under Rule 59(e) to alter or amend a final order.¹

Judge Stucky again requested proposed orders from the parties. He denied Citynet's motion for reconsideration by "Order Denying *Defendant's Motion for Reconsideration and Motion Under Rules 59(e) and 60(b) of the West Virginia Rules of Civil Procedure*," entered November 20, 2012. (See A.R. 135-140.) The November 20, 2012 Order also was the identical order proposed by Mr. Toney.

In the November 20, 2012 Order, the Circuit Court:

- Refused to modify its September 18, 2012 Order awarding Mr. Toney payment under the Plan and applying the timely payment provisions of the WPCA, pursuant to either W. Va. R. 59(e) or 60(b) (*see id.* at 2-6, A.R. 136-140); and

¹ Although Mr. Toney had not moved for summary judgment on his Count II, he titled his proposed order, which the circuit court had entered, "Order Granting *Plaintiff's Motion for Summary Judgment*." Mr. Toney did not refer to the partial nature of his motion in the order's title, which led Citynet to believe that Mr. Toney might contend the non-final order was, in fact, final. Mr. Toney's later actions in obtaining and filing an abstract of judgment show that Mr. Toney did, indeed, wish to treat the September 18, 2012 Order as final, albeit incorrectly.

- Refused to remit \$17,400 of \$87,000.48 awarded to Mr. Toney under either W. Va. R. Civ. P. 59(e) or 60(b), because the evidence of the payment was raised too late (*See id.* at 3-6, A.R. 137-140.)

Mr. Toney ignored the fact that the September 12, 2012 Order was not a “final order” because it did not resolve all of his counts. On November 19, 2012, even before entry of the Circuit Court’s November 20, 2012 Order, Mr. Toney obtained an abstract of judgment, filed it with the County Clerk of Kanawha County, and began executing on the judgment as if it were final. (*See* Abstract of Judgment, attached as Ex. B to Defendant’s Motion for Rule 11 Sanctions (Oct. 13, 2013), A.R. 375.)

On December 10, 2012, Citynet moved the Circuit Court to stay execution on the “judgment” pending appeal. After briefing and a hearing on January 31, 2013, Judge Stucky entered a February 7, 2013 Order granting Citynet’s “Motion to Stay Execution of Judgment Pending Appeal.” (A.R. 199-204.) The February 7, 2013 Order specifically finds that Citynet is not required to post a bond. It also states that “Plaintiff must release its judgment lien in Kanawha County and any other county in which it has placed such a lien” until Citynet completes its financing through the West Virginia Economic Development Authority. The Order contemplated that once Citynet’s financing was complete, it would notify the Circuit Court and Mr. Toney, and Mr. Toney could re-file his abstract. As discussed below, *infra* n.3, however, subsequent events established that the November 2012 abstract of judgment Mr. Toney had obtained was precipitous and improper, because it was obtained on a judgment that was not final at that time.

In the interim, on December 19, 2012, as a prophylactic measure, Citynet timely noticed its appeal of the Circuit Court's denial of its Rule 59(e) motion within 30 days of the November 20, 2012, entry of the denial order, again to avoid any argument that a final appealable order has been entered in this case.² (A.R. 160-188.) This Court entered a Scheduling Order for the appeal styled *Citynet, LLC v. Ray Toney*, No. 12-1536. After Citynet perfected its appeal, the Court, on its own motion, then dismissed the appeal as interlocutory by Order entered April 18, 2013.³ (See Supreme Court Order Dismissing Appeal as Interlocutory, A.R. 295.)

As the result of the motions practice described above, Citynet did not answer Mr. Toney's Complaint, and no discovery occurred before the case returned to the Circuit Court after April 18, 2013. Once the case returned to the Circuit Court following this Court's April 18, 2013 dismissal of Citynet's appeal, Citynet attempted to perform discovery regarding the actual amount remaining due to Mr. Toney under the Employee Incentive Plan. No record evidence was created in this case of the actual amount that Mr. Toney had vested in the Plan prior to (or after) the entry of the Circuit Court's September

² On February 15, 2013, Mr. Toney also petitioned this Court for a writ of mandamus or prohibition relating to the Circuit Court's stay order. Mr. Toney sought to force the Circuit Court to require a bond and prohibit it from requiring him to release his judgment lien. Citynet submitted its response that the Circuit Court in no way abused its discretion such that Mr. Toney would be entitled to any extraordinary writ. By order entered March 28, 2013, in Case No. 13-0140, this Court denied Mr. Toney's petition for a writ.

³ One consequence of this Court's determination that Citynet's appeal was interlocutory was confirmation that Mr. Toney had precipitously and improperly obtained an abstract of judgment in November 2012 and filed it with the county clerk. Mr. Toney would be entitled to an abstract of judgment only if there was, in fact, a final judgment. The dismissal of Citynet's earlier appeal as interlocutory confirmed that no such final judgment existed in this case in November 2012, when Mr. Toney obtained and filed his abstract of judgment.

18, 2012 Order awarding Mr. Toney \$87,000.48 in damages under the Plan. (As noted above, the Circuit Court's September 18, 2012 Order also trebled that amount in calculating damages under the WPCA.)

Mr. Toney, however, refused to sit for deposition,⁴ and instead requested that the Circuit Court voluntarily dismiss his remaining count, Count II for willful breach of the Employee Incentive Plan. By Order entered December 30, 2013, the Circuit Court granted Mr. Toney's request to dismiss his remaining count, which effectively ended Citynet's efforts to obtain discovery from Mr. Toney.⁵ (See Order Granting Plaintiff's Motion to Dismiss and Denying Plaintiff's Motion to Reconsider, A.R. 378-79.)

On January 22, 2014, Citynet timely noticed the appeal of the Circuit Court's November 20, 2012 Order, which (i) denied Citynet's Rule 59(e) motion to reconsider the Circuit Court's September 18, 2012 Order (granting Mr. Toney partial summary judgment), and (ii) is now a final, appealable order as of the entry of the Circuit Court's December 30, 2013 Order. (See Notice of Appeal, A.R. 380-413.)

⁴ (See Plaintiff's Motion for Protective Order, A.R. 322-27; and Defendant's Response to Motion for Protective Order and Motion to Compel, A.R. 328-363.)

⁵ The Circuit Court's dismissal of Mr. Toney's final count also mooted motions relating to the judgment lien that Mr. Toney precipitously and improperly placed in November 2012. On August 23, 2013, Mr. Toney had inexplicably moved the Circuit Court to reconsider its ruling with respect to his November 2012 judgment lien. (See Plaintiff's Motion to Reconsider, A.R. 317-21.) The motion is inexplicable and improper, because this Court's dismissal of Citynet's first appeal as interlocutory confirmed that the lien never should have been placed at all. In response and after providing Mr. Toney with notice and the opportunity to withdraw the motion, Citynet was compelled to move for sanctions pursuant to R. Civ. P. 11. (See Defendant's Motion for Rule 11 Sanctions, A.R. 364-77.) At the final hearing in this case, once the Circuit Court determined to dismiss Mr. Toney's final count and denied Mr. Toney's motion to reconsider its ruling regarding an appeal bond, Citynet did not pursue its Rule 11 motion.

Because no discovery occurred in this case, the factual background that follows is not found in the case's pleadings, depositions, answers to interrogatories, and admissions on file other than in Mr. Toney's unanswered complaint.

B. Factual Background.

In September 2010, pursuant to the redemption procedures described below, Citynet paid Ray Toney \$17,400 of \$87,000.48 that he had vested in Citynet's Employee Incentive Plan (the "Incentive Plan" or, the "Plan"). (See Def.'s Mot'n for Recon., Exs. A & B, A.R. 131-34.) The amount of \$17,400 is exactly 20% of the \$87,000 Mr. Toney had vested in the Plan, and 20% is the maximum amount per year that a Plan participant may request be paid out.

A little more than a year after receiving his \$17,400 payment from the Plan, on October 12, 2011, Mr. Toney voluntarily resigned from Citynet.

This lawsuit arose from a dispute over the timing for payment of the remaining monies allegedly due Mr. Toney pursuant to the Incentive Plan, which Citynet created in January 2008. Despite the Plan's terms to the contrary, Mr. Toney alleged that all monies he had vested in the Plan were payable upon his demand after he voluntarily left Citynet.

Significantly, the Incentive Plan is not a contract. The Incentive Plan was not negotiated between Citynet and its employees. The Incentive Plan does not promise any consideration or payment by Citynet in exchange for any consideration or performance by employees. The Plan provides an *additional* incentive to Citynet employees, but employees provide Citynet no additional consideration in return.

Under the terms of the Incentive Plan and subject to the sole discretion of the Plan's Board (the "Board"), Citynet *may* award employees Performance Units that the recipients may cash in pursuant to the redemption provisions of the Plan.

Specifically, § 3.2 of 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 shall be final, binding and conclusive on all parties.

(Plan § 3.2, A.R. 28.⁶)

When Mr. Toney accepted the terms of the Incentive Plan, he accepted all of its terms, as follows:

By electing to participate in this plan, a participant shall be deemed conclusively to accept and consent to all the terms of this plan and to all actions and decisions of the Company and/or Board.

(*Id.* § 6.14, A.R. 37.)

When Mr. Toney voluntarily resigned on October 12, 2011, Citynet agrees that he was vested in the Performance Units (according to the Plan's definition of "vested") that had previously been awarded to him *less any prior redemptions*. Citynet further agrees that Mr. Toney requested to redeem all of his vested Performance Units at the time of his resignation. Mr. Toney's request, however, was not valid under the Plan.

On October 14, 2011, Citynet responded to Mr. Toney's redemption request and informed him that it was null and void. Citynet cited the Plan's provision, § 5.7(b), that establishes an annual voluntary redemption period of May 1 through August 31 in

⁶ Section 3.3 of the Plan further provides that the "construction and interpretation by the Administrator of any provision of this Plan shall be final and conclusive." (*Id.* § 3.3, A.R. 28.)

which participants may redeem up to a maximum of twenty percent (20%) of their vested Performance Units. Importantly, Citynet did not outright refuse to pay Mr. Toney his vested balance. Rather, Citynet informed Mr. Toney that he needed to follow the terms of the Plan.⁷

In general, § 5.7 of the Plan allows a participant to cash in, or “redeem,” Performance Units pursuant to the terms of the following four circumstances:

a) First, Section 5.7(a) allows Participants who have been terminated without cause to be eligible to redeem the vested Performance Units pursuant to the Payout Schedule of the Plan (§ 5.8).⁸ This provision is inapplicable to the present case because Citynet did not terminate Mr. Toney—with or without cause; rather, Mr. Toney voluntarily resigned from his employment with Citynet.

b) Second, Section 5.7(b), allows Participants who are not otherwise disqualified from seeking redemption to redeem up to 20% of their vested Performance Units per year. However, redemption requests under this provision must be made within the “Voluntary Redemption Period,” which runs from May 1st through August 31st. According to this provision, any redemption request exceeding the 20% maximum permissible request noted above is null and void. Additionally, redemption requests not made within the Voluntary Redemption Period, noted above, also are also null and void. Any valid redemption requests are payable pursuant to the Payout Schedule of the Plan (§ 5.8). This redemption provision is the only one applicable to a Participant who voluntarily resigns, as did Mr. Toney.

c) Third, Section 5.7(c), allows Participants under a financial hardship to file a written request to redeem vested Performance Units pursuant to the Payout Schedule of the

⁷ Under the terms of the Plan, any valid request that is not fulfilled by Citynet becomes an unsecured debt of the company and accrues interest at five percent. (See Plan, § 5.8.)

⁸ If Citynet terminates a Participant for cause, the Participant immediately loses all performance units. (Plan § 5.6(a).)

Plan (§ 5.8). This provision is inapplicable to the present case because Mr. Toney never claimed a financial hardship.

d) Fourth, Section 5.7(d), allows Participants who have reached at least the age of 65 and retired to redeem vested Performance Units pursuant to the Payout Schedule of the Plan (§ 5.8). This provision is inapplicable to the present case because Mr. Toney did not retire, but rather voluntarily resigned his employment.

(Plan § 5.7, A.R. 33.)

Of the four scenarios allowing redemption of vested Performance Units, immediately above, only Section 5.7(b) is applicable to Mr. Toney's circumstances (he voluntarily quit), because the terms of no other redemption provision applies to those circumstances.

Any request by Mr. Toney to redeem his vested Performance Units must be made pursuant to Section 5.7(b) of the Plan. According to Section 5.7(b) and according to the binding interpretation of the Board, any redemption request by Mr. Toney must be made within the Voluntary Redemption Period running from May 1st through August 31st of each year, and must not exceed 20% of his vested Performance Units. Any request made in contravention of these provisions is null and void. (See Plan § 5.7, A.R. 33.)

Mr. Toney's redemption request on October 12, 2011 was made *outside of the voluntary redemption period* and was made for all the units, *not the maximum of 20%*. Mr. Toney's redemption request thus contravened both requirements in Section 5.7(b) of the Incentive Plan. Accordingly, Mr. Toney's redemption request was null and void under the express terms of Section 5.7(b) of the Incentive Plan.

III. SUMMARY OF ARGUMENT

In this case, the Circuit Court precipitously granted summary judgment for the Plaintiff before any discovery occurred. As the result, the Circuit Court's summary judgment order and order denying Citynet's Rule 59(e) motion contain several errors.

First, the Circuit Court incorrectly ruled that, pursuant to Citynet's Employee Incentive Plan, Citynet was obligated to pay Mr. Toney the full value of his units within 90 days of his request after he quit. Any payment under the Plan was subject to the terms of the Plan as interpreted by Citynet. Mr. Toney agreed to accept Citynet's judgment about its own Plan when he accepted the Plan's benefits. Accordingly, Mr. Toney has no entitlement to bring a lawsuit under the Plan in the first place.

Furthermore, even if the Circuit Court were to have jurisdiction to interpret the Plan, it should not have done so without discovery. And the Circuit Court should not have decided factual disputes in response to a summary judgment motion.

Second, the Circuit Court was clearly incorrect to apply the timely payment provisions of the Wage Payment and Collection Act to the 90-day time period specified in the Plan. No payment to Mr. Toney under the Plan accrued at the time he quit or was capable of calculation at that time. Accordingly, Citynet had no obligation to make any payment to Mr. Toney by his next regularly scheduled pay period. The timely payment requirements of the WPCA cannot be applied to a payment that is due, if at all, according to express written terms taking it outside of the requirements of the WPCA. Regardless of the propriety of the Circuit Court awarding Mr. Toney his full amount under the Plan,

the timely payment provisions of the WPCA never should have been applied to treble that award and to award the costs of litigation.

Finally, even if the Circuit Court properly awarded Mr. Toney his full amount under the Plan, it clearly erred by failing to reduce the award by the \$17,400 already paid to Mr. Toney by Citynet. Citynet properly submitted with its Rule 59(e) motion evidence of an earlier \$17,400 payment to Mr. Toney—a payment made to Mr. Toney as the result of Mr. Toney making a proper request for the maximum 20% in conformance with the terms of the Plan. The Circuit Court improperly rejected the evidence as being presented too late. Because a Rule 59(e) motion to alter or amend a judgment is a proper motion to seek remittitur, the Circuit Court clearly erred. And finally on this point, the Circuit Court erred when it would not permit Citynet to conduct discovery of Mr. Toney after the case returned to the Circuit Court in April 2013, and, instead, the Circuit Court allowed Mr. Toney to voluntarily dismiss his remaining count rather than be subject to discovery, which among other things resulted in Mr. Toney receiving a \$17,400 windfall and additional damages on that windfall

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves assignments of error in the application of settled law, Petitioner respectfully submits that this case is suitable for oral argument pursuant to R. App. P. 19. Because reversal of the Circuit Court is warranted in this case, however, Petitioner respectfully submits that this case is not appropriate for a memorandum decision.

V. ARGUMENT

A. Standard of Review.

The Court's standard of review concerning summary judgment is well-settled. Upon appeal, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting *de novo* review, the Court is mindful that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In other words, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755.

Although Citynet moved the Circuit Court to reconsider its summary judgment order pursuant to R. Civ. P. 59(e), that does not alter the standard of review. "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. pt. 1, *Judy v. Grant County Health Department*, 210 W. Va. 286, 557 S.E.2d 340 (2001).

As discussed below, application of these tests reveals that the Circuit Court (1) erred by interpreting Citynet's Employee Incentive Plan, which Citynet has the sole authority to interpret, particularly before any discovery occurred, (2) erred by applying

the WPCA's timely payment provisions to a clearly written document taking its payment timing out of the ambit of the WPCA, and (3) erred by failing to recognize that Citynet already had paid out \$17,400 to Mr. Toney.

B. The Circuit Court Incorrectly Substituted its Judgment for the Judgment of the Employee Incentive Plan's Board in Ruling that the Plan Requires Citynet to Pay Mr. Toney His Entire Balance Upon Request.

1. The Circuit Court should not have substituted its judgment for the judgment of Citynet, which has complete authority to interpret its own Plan.

One of the Circuit Court's primary errors in granting Mr. Toney summary judgment was to construe the Incentive Plan as if it were a contract and, thereby, substitute its judgment for that of Citynet. (Sept. 18, 2012 Order at 6-12 ("[I]t appears to the Court that Citynet did intend for employees who leave Citynet, other than for cause, to be entitled to cash out his or her [sic] entire vested balance."), A.R. 110-16.) Instead, because Citynet has sole interpretive authority under its own Plan, the Circuit Court should have treated the Plan as a discretionary bonus and should have followed Citynet's interpretation of its Plan.

The Incentive Plan is not a contract. Citynet never negotiated the Plan with Mr. Toney, never made any definite promises to Mr. Toney regarding the awarding or redemption of Performance Units. And Citynet never solicited any promises or performance from Mr. Toney in return for adopting the Plan. Likewise, Mr. Toney never made any promises or gave any performance in return for Citynet's adoption of the Plan.

Moreover, Citynet awarded Mr. Toney his Performance Units at the time it initially enacted the Plan, when Mr. Toney already was an employee of Citynet.⁹

Instead, the Incentive Plan is bonus over which Citynet has sole discretion. Mr. Toney was entitled to that bonus 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.”** (Plan § 6.14, A.R. 37 (emphasis added).) And, “[t]he Board’s interpretation of the Plan or any Awards and **all decisions and determinations by the Board with respect to the Plan [were] final, biding and conclusive on [Mr. Toney].”** (*Id.* § 3.2, A.R. 28 (emphasis added).) Section 3.3 of the Plan further provides that the **“construction and interpretation by the Administrator of any provision of this Plan shall be final and conclusive.”** (*Id.* § 3.3, A.R. 28 (emphasis added).)

In providing the bonus of the Incentive Plan to its employees after they already had accepted the terms of employment, Citynet was completely free to set its terms. Indeed, even if Citynet was negotiating the terms of a fringe benefit with its employees, it would be able to freely set the terms on which it was offering the benefit. “It is clear that an employer is free to set the terms and conditions of employment and compensation, including fringe benefits, and employees are free to accept or reject these conditions.” *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 216, 530 S.E.2d 676, 689

⁹ See, e.g., *General Electric Co. v. Keyser*, 166 W. Va. 456, 468, 275 S.E.2d 289, 296 (1981)(formation of contract requires, *inter alia*, offer, acceptance, and consideration); *North American Royal Coal Co. v. Mountaineer Developers, Inc.*, 161 W. Va. 37, 39, 239 S.E.2d 673, 675 (1977)(same); *Cook v. Heck’s Inc.*, 176 W. Va. 368, 373, 342 S.E.2d 453, 458-59 (1986)(same).

(2000). *A fortiori*, Citynet was free to set the terms of a Plan that it gave to its employees as a bonus, rather than negotiated with them.

Furthermore, “nothing in the WPCA prevents employers from conditioning the vesting of a fringe benefit right on some eligibility requirement in addition to the performance of services or from providing . . . that unused fringe benefits will not be paid to employees upon separation from employment.” *Id.* Citynet—even if it was negotiating the terms of Mr. Toney’s employment, although it was not—had the ability to set the terms on which it would pay a benefit and even deny Mr. Toney the benefit upon his leaving Citynet.

Thus, the only rights Mr. Toney had in the Plan were rights granted by Citynet in the Plan, the interpretation of which was vested solely in Citynet. Citynet was free to choose whether to offer any bonus to its employees and, having chosen to do so, was free to set the terms of that bonus. In this case, the terms of the Incentive Plan specified that if Mr. Toney voluntarily left Citynet, he still was required to apply for payouts from the Plan of no more than 20% per year.

And when he accepted the terms of the Plan, Mr. Toney agreed to be bound by the Plan’s terms as conclusively interpreted by Citynet. Mr. Toney was free to reject the Plan and not receive any benefits under it, but once he accepted the Plan’s benefits, he was bound to accept them on Citynet’s terms.

This Court has agreed with the following assertion: “[A]ny entitlement must arise from the employment itself. Indeed, there must be an ‘express agreement’ between employer and employee that the employee is entitled to payment of a fringe

benefit upon separation from employment.” *Wolfe v. Adkins*, 229 W. Va. 31, 38, 725 S.E.2d 200, 207 (2011). Thus, in order to prevail on his claim of immediate entitlement to the value of his Performance Units, Mr. Toney would have to show entitlement to that amount under the express terms of the Plan. Again, he cannot and did not do prove such entitlement to the Circuit Court.

Recently, in *Henick v. Fast-Track Anesthesia Associates, LLC*, 2012 WL 5908939 (W. Va. Nov. 26, 2012)(memorandum), as in this case, an employee had sued his employer claiming that it had violated the Wage Payment and Collection Act by failing to pay him for certain benefits upon his separation of employment. Specifically, the employee complained that he was not reimbursed for accrued, unused vacation leave. Affirming the award of summary judgment for the employer, this Court observed:

[T]he Handbook provides that “an employee that resigns with the proper notice shall be reimbursed for any accrued, unused vacation at the time of resignation.” This phrase makes it clear that only an employee who resigns with notice can receive reimbursement of accrued, unused vacation leave. Because petitioner did not resign with notice, the circuit court correctly found petitioner to be ineligible for reimbursement.

Id. at * 3; *see also Wolfe*, 229 W. Va. 31, 725 S.E.2d 200 (where there was no provision in a written employment agreement or employer documents granting employees payment for unused, accumulated sick leave upon termination from employment, payment for such leave was not a vested, nonforfeitable benefit under the Wage Payment and Collection Act).

Similarly, in *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592 S.E.2d 811 (2003), this Court rejected an employee’s claim that she was entitled to unpaid vacation

wages and unpaid yield bonus pay where it was clear that the terms of her employment did not give rise to such rights:

Before a fringe benefit is payable to an employee, the fringe benefit must have accrued to the employee. As defined in *Meadows*, the employer's policies define when a fringe benefit accrues to an employee. The terms of the appellant's policy dictated that to qualify for the yield bonus an employee must have been employed by the appellant on the date that the appellant distributed the yield bonus payments. Ms. Gress was not employed by the appellant on the date that the appellant distributed the yield bonuses; therefore, the yield bonus fringe benefit had not yet accrued to Ms. Gress. Because the yield bonus had not yet accrued to Ms. Gress, we need not decide whether the yield bonus was a fringe benefit "capable of calculation" and payable directly to an employee under the WPCA. Thus, we find that the circuit court erred in granting summary judgment in favor of the appellee on the issue of yield bonus pay. . . .

In the instant case, there is no dispute that the appellant's employees, including Ms. Gress, were aware that the appellant had a practice of only allowing workers to take vacations in five-day increments after each full year of employment with the appellant. Further, Ms. Gress offered no evidence to contradict the appellant's assertion that the appellants had a consistent policy of not paying employees for partial weeks of unused vacation at the time of discharge. When employers have a consistently applied unwritten policy, employers have the protection offered by *Ingram* against a claim under the Wage Payment and Collection Act.

Applying *Ingram* to facts of the case at hand, we find that the circuit court erred in granting summary judgment in favor of Ms. Gress on the vacation pay claim.

Id. at 36-37, 592 S.E.2d at 815-816.

This Court has held, "Pursuant to W. Va. Code § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an

employee so as to be included in the term ‘wages’ are determined by the terms of employment and not by the provisions of W. Va. Code § 21-5-1(c).” Syl. pt. 5, in part, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999)(emphasis supplied).

In other words, employees are not permitted to re-write the terms of their benefit plans in order to accelerate their entitlement to payment at the time of their separation from employment for purposes of the Wage Payment and Collection Act. Rather, employees are entitled to payment at the time of their separation from employment only if, in accordance with the terms of that employment, they would have had a present and immediate entitlement to payment of the benefit in the absence of separation from employment.

In the instant case, for example, Section 5.7(b) of the Plan allows Participants who are not otherwise disqualified from seeking redemption to redeem up to 20% of their vested Performance Units per year. However, redemption requests under this provision must be made within the “Voluntary Redemption Period,” which runs from May 1st through August 31st. According to this provision, any redemption request exceeding the 20% maximum permissible request noted above is null and void. Additionally, redemption requests not made within the Voluntary Redemption Period, noted above, also are null and void. Any valid redemption requests are payable pursuant to the Payout Schedule of the Plan (§ 5.8). This redemption provision is the only one applicable to a Participant who voluntarily resigns, as did Mr. Toney, but the Circuit Court allowed Mr. Toney to alter the Plan’s terms.

In sum, by bringing his lawsuit and asking the Circuit Court to interpret the Plan, Mr. Toney asked the Circuit Court to tell Citynet that Citynet did not mean what it said in its own document. Mr. Toney, who agreed to accept Citynet's interpretation of its own Plan as conclusive, however, had no right to bring such a lawsuit in the first place.

Indeed, as reflected in the very first paragraph of the Plan, the goal of the Plan is to "retain" experienced employees. In contrast, Mr. Toney's view of the Plan would encourage employees to leave the employ of Citynet, and, based on his erroneous assertion of how the Plan operates, demand an immediate and full payout. Such employee-driven payouts outside of the Plan's provisions, which provisions are included to protect Citynet's financial position, very possibly could jeopardize the financial viability of the Plan—even the financial viability of the company, itself—to the detriment of the remaining employees.

Accordingly, the Circuit Court erred in awarding Mr. Toney \$87,000.48 pursuant to Citynet's Incentive Plan by substituting its judgment for Citynet's judgment.

2. **If the Circuit Court is going to interpret the Plan, Citynet is entitled to first have discovery on it and to have questions of fact submitted to a jury.**

Even if the Circuit Court had jurisdiction to interpret the Incentive Plan—although it did not, as discussed immediately above—it impermissibly entered summary judgment against Citynet before any discovery was conducted.

The Circuit Court's interpretation considered three documents in addition to the Incentive Plan. (Sept. 18, 2012 Order at 6-11, A.R. 110-15.) No members of Citynet's Board, however, had been deposed regarding Citynet's interpretation of its Plan and the

significance, if any, of those additional documents. At the very least, Citynet was entitled to discovery before its own Incentive Plan, which it had the sole authority to interpret, is construed against it.

This Court has held that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Cas. & Surety Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

In *Payne’s Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of W. Va.*, 200 W.Va. 685, 690, 490 S.E.2d 772, 777 (1997), this Court observed:

Summary judgment is appropriate only after the non-moving party has enjoyed “adequate time for discovery.” *Celotex Corp. [v. Catrett]*, 477 U.S. [317] at 322, 106 S. Ct. [2548] at 2552 [91 L.Ed.2d 265 (1986)]; *Anderson [v. Liberty Lobby Inc.]*, 477 U.S. [242] at 250 n. 5, 106 S. Ct. [2505] at 2511 n. 5 [91 L.Ed.2d 202 (1986)]. As this Court has recognized, summary judgment prior to the completion of discovery is “precipitous.” *Williams [v. Precision Coil, Inc.]*, 194 W. Va. [52] at 61, 459 S.E.2d [329] at 338 [(1995)], quoting *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc.*, 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980).

See also, e.g., Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar, 218 W. Va. 239, 245-246, 624 S.E.2d 586, 592-593 (2005)(“Again, at the time the circuit court interpreted the Dunbar firefighters’ CBA, its interpretation remained a question of fact to be decided in another proceeding. Therefore, we believe the circuit court erred by prematurely deciding this issue before it was fully litigated.”)

Likewise, in this case, it was precipitous for the Circuit Court to enter summary judgment against Citynet where the court's resolution of the legal issues implicated disputed issues of material fact.¹⁰

Accordingly, the Circuit Court erred by granting Mr. Toney summary judgment before even the commencement of discovery.

Moreover, the Circuit Court's exercise of interpreting the Incentive Plan in its October 18, 2012 Order, including construing terms against the drafter, clearly shows that the Circuit Court was attempting to resolve ambiguities in a contract. Most significantly, the Circuit Court purported to resolve conflicting interpretations of subsections 5.7(a) and (b) of the Plan, neither of which explicitly addresses voluntary termination of employment by a plan participant (as defined in subsection 5.6(b)), as if they were unambiguous. (Sept. 18, 2012 Order at 9-10, A.R. 113-14.)

The Circuit Court, however, was not applying unambiguous contract terms; it was construing terms. The Circuit Court's September 18, 2012 Order is facially inconsistent when it states the court is resolving "[u]ncertainties" in the Plan against its drafter (*id.* at 11, Concl. L. ¶ 3, A.R. 115.), and yet asserts that the document's language is "plain and unambiguous" (*Id.* at 11-12, Concl. L. ¶¶ 5-6, A.R. 115-116). The Plan cannot be both "plain and unambiguous" and, at the same time, have "uncertainties."

¹⁰ The Circuit Court further erred after this case returned to that court in April 2013, by agreeing to accept Mr. Toney's voluntary dismissal of his remaining count, which mooted Citynet's renewed efforts to conduct discovery.

Such factual determinations—if they, in fact, exist—are the province of a jury, which the Circuit Court impermissibly invaded by granting summary judgment to Mr. Toney. *See, e.g.*, Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Accordingly, and if nothing else, the Circuit Court erred by resolving questions of fact in a summary judgment order and this Court should reverse its judgment and remand with directions that Citynet be permitted to engage in discovery.

C. The Timely Payment Provisions of the Wage Payment and Collection Act Cannot be Applied to Payments Under Citynet’s Employee Incentive Plan; Accordingly, in No Event Could Mr. Toney Be Entitled to Treble Damages and Attorney’s Fees.

The Circuit Court’s September 18, 2012 Order illogically grafts the WPCA’s timely payment provisions onto the Incentive Plan’s clear redemption time period, and thus awards Mr. Toney treble damages and his legal costs and fees. (Sept. 18, 2012 Order at 12-13, Concl. L. ¶¶ 9-16, A.R. 116-17.)

Significantly, the Circuit Court’s order, as drafted by Mr. Toney’s counsel, omits any discussion or analysis of the application of the WPCA to the Plan. Instead, it makes the *ipse dixit* pronouncement that “Citynet failed to pay Mr. Toney his wages as required by the WV-WPCA.” (*Id.* at 13, Concl. L. ¶ 14, A.R. 117.)

The WPCA, however, is inapplicable to the timing of payments under the Plan.

Under the WPCA, if an employee quits (as happened in this case), the employer “shall pay the employee’s wages no later than the next regular payday” W. Va. Code § 21-5-4(c). As used in the WPCA, “[t]he term ‘wages’ means compensation for

labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation.” W. Va. Code § 21-5-1(c). For the purposes of the WPCA’s timely payment requirements, “wages” also “include[s] *then accrued* fringe benefits capable of calculation and payable directly to an employee.” *Id.* (emphasis added).

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.

Citynet did not have to provide its Employee Incentive Plan in the first place. Having chosen to give the bonus to its employees, then, Citynet certainly was entitled to specify the terms on which it would pay the bonus—*i.e.*, within 90 days after a valid request if the Board chooses to do so. *See Meadows*, 207 W. Va. at 216, 530 S.E.2d at 689.

The Incentive Plan specifies how vested Performance Units are to be redeemed and paid out. (Plan §§ 5.7, 5.8, A.R. 33-34.) In order to be paid for his Performance Units under the Plan, Mr. Toney must have made a request for payment of no more than 20% of his original total some time between May and August of any given year. (*Id.* § 5.7, A.R. 33.) If, after receiving all valid requests, Citynet determined that payouts were available that year, Citynet would then have 90 days after August 31 make the payout to Mr. Toney. (*Id.* § 5.8, A.R. 33-34.) If Citynet did not make the payment, then the amount due would become an unsecured debt of the company and accrue interest at five percent. (*Id.*)

Thus, Mr. Toney's quitting did not somehow transform vested units into immediately redeemable units. In other words, Mr. Toney's ability to be paid for his vested units did not "accrue" upon his quitting, and, because Citynet retained the right to make no payout in any given year, his payout was not calculable at the time he quit. At the time Mr. Toney quit, he did not possess "a present, enforceable right" to payment under the Plan. *Meadows*, 207 W. Va. at 215, 530 S.E.2d at 688 (quoting *Wood Coal Co. v. State Compensation Com'r*, 119 W. Va. 581, 583-84, 195 S.E. 528, 528 (1938) ("A note is said to accrue when it becomes due and payable.")).

Although *Meadows* generically equates "accrued" with "vested," "the fringe benefits must have vested according to the eligibility requirements of the terms of employment." *Meadows*, 207 W. Va. at 217, 530 S.E.2d at 690. Thus, because the Plan separately defines what it means to be "vested" in the Plan and further defines how vested units are to be paid out, vested units under the Plan are not "then accrued" at the time of separation from employment.

Furthermore, because Citynet retains the right under the Plan to make no payment in a given year, the amount of any payment due to Mr. Toney could not have been calculated at the time he resigned on October 12, 2011. *See id.* ("In order to ensure that the amount of accumulated benefits may be determined, only those benefits which are 'capable of calculation' under the terms of the applicable employment policy are protected.").

Moreover, no provision of the WPCA requires an employer to pay "fringe benefits" *within 90 days of an employee's request*, as the Circuit Court's order directs.

As a matter of law, just the opposite is true. “When fringe benefits are part of a compensation package, they are governed by the terms of employment,” not the Wage Payment and Collection Act. *See* W. Va. Code § 21-5-1(c); *Meadows*, 207 W. Va. at 215-217, 530 S.E. 2d at 688-690. By specifying the terms on which any benefits will be paid out, Citynet’s Employee Incentive Plan expressly is removed from the timely payment constraints of the WPCA.

Accordingly, even if benefits under the Incentive Plan were to be defined as “fringe benefits” under the WPCA, the Circuit Court had no basis to conclude that any payment under the Incentive Plan was a “fringe benefit” that “accrued” upon Mr. Toney’s quitting.

Furthermore, even if the Circuit Court was found to have correctly concluded that Citynet should have paid Mr. Toney the full amount of his request “within ninety (90) days” (Sept. 18, 2012 Order at 12, Concl. L. ¶ 8, A.R. 116), the WPCA cannot be applied to that conclusion. In no event could Citynet be required to make a payment to Mr. Toney for 90 days from his request. Thus, Citynet could not be required to make the payment by Mr. Toney’s *next regular payday*, which, by law, ***must be much sooner than 90 days.***¹¹

Accordingly, the Circuit Court had no legal basis to apply the timely payment requirement in W. Va. Code § 21-5-4(c) to any payment by Citynet under its Incentive Plan.

¹¹ *See* W. Va. Code § 21-5-3(a) (requiring employers to pay every two weeks).

D. By Sustaining its Award of \$87,000 to Mr. Toney Under the Plan, the Circuit Court Incorrectly Rejected Evidence that Citynet Already had Paid Mr. Toney \$17,400 of that Amount, Resulting in a Windfall to Mr. Toney.

Perhaps as the result of no discovery being conducted in the case, Mr. Toney's assertion that he was entitled to \$87,000.48 was not found to be erroneous until after entry of the Circuit Court's September 18, 2012 Order. Once Citynet found in its records that it already had paid Mr. Toney \$17,400 from the Plan in September 2010, it immediately submitted evidence of that fact in its motion for reconsideration.¹² (Def.'s Mot'n for Recon., Exs. A & B, A.R. 131-34.)

The Circuit Court, however, incorrectly rejected that evidence and left its award of \$87,000.48 standing.¹³ (Nov. 20, 2012 Order at 3, A.R. 137.) The Circuit Court based its ruling on the flawed notion that Citynet had improperly raised the issue too late when it raised the issue in its Rule 59(e) motion. (*Id.*)

By drafting his proposed order—which the Circuit Court entered—as he did, Mr. Toney disingenuously played “Gotcha!” with Citynet. Mr. Toney was fully aware that he had requested and received exactly 20% of the value of his Performance Units or \$17,400 in 2010, one year before he quit. Thus, Mr. Toney incorrectly (and falsely) claimed \$87,000.48 throughout the proceedings before the Circuit Court. He should not be rewarded for his own misrepresentations.

¹² Certainly, Mr. Toney should have been aware of Citynet's significant payment to him.

¹³ The Circuit Court's error was compounded because it trebled \$87,000.48, including the \$17,400 windfall, as a result of its incorrect conclusion that Citynet had violated the WPCA's timely payment provisions.

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.

Accordingly, the Circuit Court had no basis to reject Citynet's evidence that it had already paid Mr. Toney \$17,400, simply because of the time that Citynet raised the issue. As a consequence of the Circuit Court's error, Mr. Toney has recovered the sum of \$17,400 five (5) times—once when Citynet paid this amount to Mr. Toney in 2010 independently of this litigation, again when the Circuit Court awarded Mr. Toney this same amount under the Plan, and three more times when that award was incorrectly trebled under the WPCA.

The Circuit Court further compounded this error when, after the case returned to that court in April 2013, it agreed to accept Plaintiff's voluntary dismissal of his remaining count, which mooted Citynet's efforts to conduct discovery. Had Citynet been able to depose Mr. Toney, he could not have avoided admitting the truth of having requested and receiving a 20% distribution in the amount of \$17,400 in 2010.

VI. CONCLUSION

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.

This is not a case in which Citynet has refused to pay any amount due to Mr. Toney. Rather, the issue is one of the timing of payment to Mr. Toney. Citynet's interpretation of its Plan is that it has 90 days from a valid request to make a payment to the requesting party, and if it does not make the payment, the amount becomes an unsecured debt of the company accruing 5% annual interest. That interpretation is consistent with the goal of the Plan to encourage employees to remain with the company and to avoid placing the company in financial peril at times when it may not be in a cash-favorable position to make payments to Plan participants.

Alternatively, Petitioner respectfully requests that this Court reverse the Circuit Court's judgment and remand Respondent's claim under the Plan for further proceedings to afford Petitioner its rights of discovery, and for entry of judgment in Petitioner's favor on Respondent's claim that the timely payment provisions of the WPCA apply to payments under the conflicting express written terms of the Plan. Alternatively and at the very least, Petitioner respectfully requests that this Court reverse the Circuit Court's judgment and remand for remittitur in the amount of \$17,400 that Citynet already paid to Mr. Toney.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014, I served the foregoing **Petitioner's Brief and Appendix Record** 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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