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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0110

STATE OF WEST VIRGINIA, ex rel. TOBBY LYNN SMALL, Petitioner

v.

HONORABLE RUSSELL M. CLAWGES, JR., Judge of the Circuit Court of Monongalia County, JAMES R. RAMSEY, SR., VIRGINIA E. RAMSEY, WILLIE McNEAL, JACK B. KELLEY, INC. and AMERIGAS PROPANE, LP, Respondents

VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

This is a verified petition for a writ of prohibition by Defendant Tobby Lynn Small from an Order entered by the Circuit Court on January 14, 2013 denying Tobby Lynn Small's Motion for Reconsideration of the Court's denial by Order entered on December 10, 2012 of his Motion for Summary Judgment based upon the compulsory counterclaim requirement of Rule 13 of the Federal Rules of Civil Procedure. The Court's ruling presents the following questions:

1. Whether the Circuit Court exceeded its jurisdiction by issuing an Order which prohibited Small from opposing Ramsey's Motion for Leave to amend his answer to assert a counterclaim in Small's personal injury action pending in the United States District Court for the Northern District of West Virginia, and finding that Small, by opposing Ramsey's Motion for Leave to amend to assert a counterclaim in the federal action, waived the compulsory counterclaim defense to Ramsey proceeding with a personal injury action against Small in the Circuit Court.

2. Whether the Circuit Court exceeded its legitimate powers by denying Small's summary judgment Motion where Ramsey failed to assert his personal injury claim as a compulsory counterclaim in United States District Court for the Northern District of West Virginia (Civil Action No. 1:10-cv-121), thereby failing to afford full faith and credit to Rule 13 of the Federal Rules of Civil Procedure.

II. STATEMENT OF THE CASE

This action arises out of an automobile accident that occurred on February 20, 2009 in the southbound lanes of Interstate 79 near milepost 96 in Lewis County, West Virginia. At that location, Tobby Lynn Small (hereinafter "Small") was operating his vehicle in a southbound lane when he encountered icy conditions on a bridge, lost control of his Jeep, and ultimately came to a stop in the center median off to the left of the southbound lanes. Thereafter, James R. Ramsey, Sr. (hereinafter "Ramsey"), while approaching the same area in a Nissan Frontier, lost control of his vehicle, which was struck by a tractor trailer operated by Willie McNeal (hereinafter "McNeal"). The tractor trailer operated by McNeal then impacted the cable guardrail located in the median. The wire struck Small's legs causing severe injuries.

As a result of this accident and the injuries sustained, Small instituted a lawsuit in the Circuit Court of Harrison County on August 5, 2010, which was removed to the United States District Court for the Northern District of West Virginia at Clarksburg based upon diversity jurisdiction.[1] Small named multiple Defendants including James R. Ramsey. (See Complaint in Tobby Lynn Small v. Jack B. Kelly, Inc., Amerigas Propane, LP, Willie McNeal, James R. Ramsey, Sr., et al., Civil Action No. 1:10-CV-121, App. at 0058-0070). The Small Complaint contained negligence claims against Ramsey and McNeal alleging that they failed to keep a proper lookout, were driving too fast for the conditions, and failed to maintain control of their vehicles. Ramsey filed an Answer to the Small Complaint on September 10, 2010. Ramsey's initial Answer did not assert a counterclaim against Small for injuries Ramsey sustained in the accident.

[1] Tobby Lynn Small was represented in the federal action by attorneys David J. Romano and David E. Goodard.

Ramsey had an attorney for injuries he allegedly sustained at least as early as May 7, 2009. App. at 0252. In early December 2010, an attorney representing Ramsey spoke with one of Small's attorneys in the federal court case, David Romano, about the possibility of Ramsey asserting a counterclaim against Small in the federal court case. Mr. Romano indicated to Ramsey's attorney that he could not agree to an order allowing a counterclaim against his own client but that a motion in federal court seeking permission to file a counterclaim would likely be granted as the pleadings were not yet complete, and answers were being filed by other Defendants. App. at 0250-0251.

On January 11, 2011, the Federal District Court entered a Scheduling Order setting trial for July 9, 2012 and providing a March 18, 2011 deadline for the joinder of parties and amendment of pleadings. In addition, on January 25, 2011, Ramsey filed an Answer to Plaintiff's First Amended Complaint. This was just over a month after his privately retained attorney's discussion with Mr. Romano. Nonetheless, he did not assert a counterclaim at that opportunity to do so.

On February 1, 2011, rather that moving for leave to file a counterclaim in the pending federal court action, Ramsey and his wife, Virginia E. Ramsey, instituted a separate civil action in the United States District Court for the Northern District of West Virginia in Elkins, Civil Action No. 2:11-CV-0009, naming Small as a Defendant, as well as Willie McNeal, Jack B. Kelley, Inc. and Amerigas Propane, LP, the driver and owners of the tractor and trailer. App. at 0043-0055. The Ramsey suit was dismissed on June 10, 2011 on the ground that complete diversity did not exist to support jurisdiction as both Ramsey and members of Amerigas Propane L.P. were residents of Pennsylvania. App. at 0056-0057.

Ramsey then filed the present case on June 21, 2011 in the Circuit Court of Monongalia County asserting a personal injury claim and his wife asserting a loss of consortium claim. App. at 0007-0023. Ramsey claims in his Complaint that Small was stopped in the center median in the

southbound lane of Interstate 79. As Ramsey was approaching in the southbound lane, he claims that Small, who was outside his vehicle, suddenly and unexpectedly moved himself onto the roadway and into the path of the Ramsey approaching vehicle. Ramsey contends that this caused him to take evasive measures, causing his vehicle to spin and, ultimately, resulting in the accident. App. 0009-0010. On August 3, 2011, Small filed a Motion to Dismiss and Memorandum in Support thereof asserting that the action filed by Ramsey in the Circuit Court of Monongalia County was barred by the compulsory counterclaim rule pursuant to Rule 13 of the Federal Rules of Civil Procedure. App. at 0033-0070.[2] The other Defendants had also moved to dismiss the Ramsey Complaint. App. at 0024-0032.

On September 30, 2011, the Circuit Court of Monongalia County entered an Order denying Tobby Small's, Willie McNeal's, Jack B. Kelley, Inc.'s and Amerigas Propane, LP's respective Motions to Dismiss without prejudice. App. at 0094-0096. The Court further ordered, in part, as follows:

> 3. Plaintiffs are directed to file the necessary Motions to enable the filing of a Counterclaim on behalf of James R. Ramsey, Sr. and an Intervention on behalf of Virginia E. Ramsey in the matter pending before the Honorable Irene Keeley in the United States District Court for the Northern District of West Virginia at docket number 1:10-CV121, styled *Tobby Lynn Small v. James R. Ramsey, et al.* ('the Federal Action');
>
> 4. Defendants shall not object to the filing of the Motion to Intervene or the Motion for Leave to Amend Answer and Assert a Counterclaim and, if oral argument is held on these matters, the Defendants in this action shall take no position; . . . .

App. at 0095.

[2] Small was represented in the instant action by the undersigned counsel.

On October 3, 2011, Ramsey filed a Motion for Leave to Amend his Answer to assert a counterclaim in the Federal Court action.[3] Because of the September 30, 2011 Order from the Monongalia County Circuit Court, Small's counsel in the federal action moved the Federal District Court for leave to permit them to file a response to Ramsey's Motion to Assert a Counterclaim. They argued that the Circuit Court Order prohibiting Small from objecting to Ramsey's Motion to Amend was unlawful as it violated the Supremacy Clause of the United States Constitution. App. at 0241-0246. On January 5, 2012, Federal District Judge Irene Keeley, for good cause shown, issued an Order granting Small's Motion for Leave to file a response to Ramsey's Motion to Amend. App. at 0247-0248. On January 12, 2012, Small filed a Memorandum in Opposition to Ramsey's Motion for Leave to amend his Answer to assert a counterclaim, arguing that Ramsey failed to adhere to the Court's Scheduling Order and that Small would suffer significant prejudice by this late amendment.

The Federal District Court heard oral arguments on Ramsey's Motion for Leave to amend his Answer on January 31, 2012. On February 8, 2012, Judge Keeley issued a Memorandum Opinion and Order denying Ramsey's Motion for Leave to amend his Answer to assert a counterclaim finding that the Ramseys had made the strategic decision to pursue other avenues of litigation as opposed to timely filing a Motion for Leave to assert a counterclaim. App. at 0174-0181. The Court noted that Ramsey failed to demonstrate why his counterclaim could not have been asserted pursuant to the Court's Scheduling Order; thus, he had failed to demonstrate good cause as is required pursuant to Rule 16(b) of the Federal Rules of Civil Procedure. The Court observed that the alternative of the Ramseys asserting a counterclaim and a motion to intervene

[3] Virginia E. Ramsey did not file a Motion to Intervene to assert her loss of consortium claim as had been directed by the Circuit Court's Order.

were available to them well before the Federal Court's March 18, 2011 deadline for joining parties and amending pleadings. Further, the District Court found that Ramsey's counterclaim at the current stage of litigation would impact the long-standing Scheduling Order and jeopardize the timely disposition of the case, thus being prejudicial to Small. App. at 0174-0181.

On February 22, 2012, the Circuit Court issued an Order acknowledging the federal court decision and ordered that the instant action would remain on the docket of the Circuit Court and stayed until resolution of the federal court action, at which time counsel for the Plaintiffs was to notify the Circuit Court and set up a status conference. App. at 0097.

The federal action proceeded to trial on July 9, 2012. Ramsey had settled out as a Defendant with Small prior to the trial. The trial proceeded with Plaintiff Small against McNeal, Jack B. Kelley, Inc., and Amerigas Propane, LP. Ramsey remained on the verdict form. On July 12, 2012, the jury returned a verdict in favor of Small allocating fault as follows: 23% to tractor trailer driver McNeal; 60% to Ramsey; and 17% to Small. App. at 0182-0183. The District Court entered a Judgment Order on September 14, 2012.

On September 5, 2012, the Circuit Court issued a Notice of Status/Scheduling Conference scheduled for September 28, 2012. At the scheduling conference, the Circuit Court entered a Scheduling Order setting forth witness disclosure, discovery deadlines and setting the matter for a pretrial conference on January 4, 2013.

Small filed an Answer to Ramseys' Complaint on October 8, 2012, raising as an affirmative defense that Ramseys' Complaint was barred by the compulsory counterclaim rule of Rule 13 of the Federal Rules of Civil Procedure and *res judicata.* App. at 0098-0107. On October 19, 2012, Small filed a Motion for Summary Judgment and Memorandum in Support thereof seeking dismissal of Ramseys' action against Small based upon Rule 13 of the Federal Rules of Civil

Procedure, which required Ramsey to assert a compulsory counterclaim in the federal action. App. at 0127-0183. On November 19, 2012, Small's Motion for Summary Judgment was brought on for hearing. The Circuit Court, by Order entered December 10, 2012, denied Small's Motion for Summary Judgment. The Circuit Court did not address the compulsory counterclaim argument of Small but, rather, ruled that the issues were waived:

> Despite this Court's specific directive not to object to James Ramsey's Motion for Leave to Assert a Counterclaim and Virginia Ramsey's Motion to Intervene, Tobby Lynn Small filed a Response in Opposition to Motion to Amend/Correct Answer to Assert Counterclaim on January 12, 2012. As a result of Tobby Lynn Small's action contrary to the Order of this Court, the Court deems the issues raised in the Motion for Summary Judgment to have been waived.

App. at 0003-0006.

On December 19, 2012, pursuant to Rule 59(e), Small filed a Motion for Reconsideration and Supplement to Motion for Summary Judgment asking the Circuit Court to reconsider its ruling on the waiver issues based upon its lack of jurisdiction to issue an Order restricting Small's participation in the federal court action and given that Ramsey and his counsel had ample opportunity to have timely counterclaimed - and for Ms. Ramsey to intervene in the federal court action, but they chose not to do so for strategic purposes. App. 0232-0253. By Order entered on January 14, 2013, the Circuit Court denied Small's Motion for Reconsideration. App. at 0001-0002. Trial is presently set to begin on June 25, 2013.

III. SUMMARY OF ARGUMENT

The Circuit Court of Monongalia County exceeded its jurisdiction by issuing an Order which prohibited Small from opposing Ramsey's Motion to Amend his Answer to assert a counterclaim in a federal district court action pending in the Northern District of West Virginia,

Civil Action No. 1:10-CV-121. The Circuit Court's ruling that Small waived his right to raise the compulsory counterclaim defense to Ramseys' suit in Monongalia County was predicated upon an Order which the Circuit Court had no jurisdiction to issue under the Supremacy Clause of the United States Constitution. A state circuit court does not have the power to enter an order which restricts a party's right to participate in a pending federal court action.

To constitute a waiver, there must be a voluntary relinquishment of a known right. Small's opposition to Ramsey's Motion to Amend to assert a counterclaim in the federal action did not constitute a voluntary relinquishment of a known right. Rather, Small's counsel moved the Federal District Court for leave to file a brief in opposition to the Motion to Amend advising the District Court of the Circuit Court of Monongalia County's directive in its order enjoining any opposition to Ramsey's motion. Only after obtaining leave of court to respond did Small file a brief in opposition to Ramsey's Motion to Amend as untimely and on the grounds that such late intervention would prejudice Small's case.

Further, a writ of prohibition should issue to prohibit the Ramsey action in the Circuit Court of Monongalia County from proceeding because Ramsey did not timely assert a compulsory counterclaim in the federal action. The Circuit Court is required to give full faith and credit to Rule 13 of the Federal Rules of Civil Procedure pertaining to compulsory counterclaims and dismiss Ramsey's Monongalia County civil action as Ramsey failed to timely file his counterclaim in the Federal District Court action and since his claim would now be precluded by *res judicata*. In its Order denying Ramsey's Motion to Amend to assert a counterclaim, the Federal District Court found Ramsey had the opportunity to file a counterclaim in a timely manner, but for strategic reasons, chose not to do so. Ramsey's recourse to the District Court ruling would have been to appeal to the United States Fourth Circuit Court of Appeals. Forcing Small to again litigate a

lawsuit arising out of the same occurrence previously litigated to a jury verdict in federal court would completely undermine the purpose and effect of the compulsory counterclaim rule set forth in Rule 13 of both the Federal Rules of Civil Procedure and the West Virginia Rules of Civil Procedure.

The Circuit Court's orders violated principles under the Supremacy Clause and failed to accord full faith and credit to the Federal Rules of Civil Procedure. This warrants issuance of a writ of prohibition.

IV. STATEMENT REGARDING ORAL ARGUMENT

Because the Circuit Court exceeded its jurisdiction and its legitimate powers in its rulings, the Petitioner requests oral argument in the matter pursuant to R. App. P. 20(a)(3).

V. ARGUMENT

A. The Order enjoining Small from opposing Ramsey's Motion for leave to assert a counterclaim in federal court exceeded the jurisdiction of the Circuit Court; therefore, Small's opposition to the motion in the federal action cannot constitute waiver of the compulsory counterclaim defense as found by the Circuit Court.

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1.

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425, Syl. pt. 2 (1977). "The writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction. Vineyard v. O'Brien, 100 W.Va. 163,

130 S.E. 111, Syl. pt. 1 (1925); State ex rel. Johnson v. Reed, 219 W.Va. 289, 633 S.E.2d 234, Syl. pt. 1 (2006).

The Circuit Court of Monongalia County exceeded its jurisdiction by entering the September 30, 2011 Order prohibiting Small from opposing Ramsey's Motion to Amend to assert a counterclaim filed in the Federal District Court for the Northern District of West Virginia and, subsequently, by giving effect to that order in ordering that Small, by opposing said motion in the federal forum, waived his right to assert the compulsory counterclaim defense to the instant action. See General Atomic Co. v. Felter, 434 U.S. 12, 98 S.Ct. 76 (1977); Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579 (1964); Henderson v. Henrie, 61 W.Va. 183, 56 S.E. 369 (1907).

It is well established that state courts do not have power to enjoin parties from prosecuting *in personam* actions in federal courts. General Atomic, 434 U.S. at 16, 98 S.Ct. at 78. Any such action conflicts with the Supremacy Clause of the United States Constitution.[4] Id. at 15, 98 S.Ct. at 77. States cannot take away one's right to litigate in federal court as that is granted only by Congress. General Atomic, 434 U.S. at 16, 98 S.Ct. at 78. See also Gross v. Weingarten, 217 F.3d 208, 221 (4th Cir. 2000). The Supreme Court in General Atomic relied upon its earlier decision in Donovan, 377 U.S. 408, 84 S.Ct. 1579.

In Donovan, the Court recognized the well-established rule that "state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself." Id. at 413, 84 S.Ct. at 1582. The Court in Donovan found a Texas

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Court of Civil Appeal's restraining order prohibiting litigants from pursuing remedies in federal court invalid, and it observed that the Texas court had punished the petitioners with contempt for disobeying an invalid order. The Texas court's judgment was vacated and the case remained. 377 U.S. at 414, 84 S.Ct. at 1583. On remand, the Texas Court of Civil Appeals vacated its contempt order and refunded the fines and costs paid by those improperly held in contempt. City of Dallas v. Brown, 384 S.W.2d 724 (Tex.Civ.App. 1964).

Small moved for summary judgment in the Circuit Court of Monongalia County on October 19, 2012 on the grounds that Plaintiffs' claims against him were barred by Ramsey's failure to assert a compulsory counterclaim against Small in a case that was pending in the United States District Court for the Northern District of West Virginia. App. at 0127-0183. By Order entered December 10, 2012, the Circuit Court denied Small's Motion for Summary Judgment. App. at 0003-0006. The Circuit Court had previously denied (without prejudice) a Motion to Dismiss on the same basis and had directed the Ramseys to file motions in federal court seeking to assert a counterclaim on Mr. Ramsey's behalf and to intervene on Mrs. Ramsey's behalf. The Order provided, in part, as follows:

> 3. Plaintiffs [Ramseys] are directed to file the necessary Motions to enable the filing of a Counterclaim on behalf of James R. Ramsey, Sr. and an Intervention on behalf of Virginia E. Ramsey in the matter pending before the Honorable Irene Keeley in the United States District Court for the Northern District of West Virginia at Docket No. 1:10-CV121, styled *Tobby Lynn Small v. James R. Ramsey, et al.*;
>
> 4. Defendants shall not object to the filing of the Motion to Intervene or the Motion for Leave to Amend Answer and Assert a Counterclaim and, if oral argument is held on these matters, the Defendants in this action shall take no position;

App. at 0094-0096.

The Circuit Court ruled in its December 10, 2012 Order that, despite its directive noted above not to object to the Ramseys' respective motions, Small "filed a Response in Opposition to Motion to Amend/Correct Answer to Assert Counterclaim on January 12, 2012. As a result of Tobby Lynn Small's action contrary to the Order of this Court, the Court deems the issues raised in the Motion for Summary Judgment to have been waived." App. at 0003-0006. Thus, Small's Motion for Summary Judgment was denied.

The Circuit Court of Monongalia County's action in attempting to enjoin Small's participation in a motion in the personal injury action he filed in Federal District Court violates the Supremacy Clause and the United States Supreme Court's decision and mandate in Donovan. Thus, the Circuit Court exceeded its jurisdiction in enjoining Small from opposing Ramsey's Motion to Amend to assert a counterclaim in the federal court action. As such, the Circuit Court's subsequent ruling that Small's opposition to Ramsey's Motion to Amend in federal court constituted a waiver was predicated upon an unlawful Order, was in error and further exceeded its jurisdiction and legitimate powers.

Given the Circuit Court's Order enjoining Small from contesting Ramsey's motion in federal court, on October 17, 2011, Small's counsel in the federal action first filed a motion with the Federal District Court to allow him to respond. App. at 0241-0246. Small's counsel advised the Court of the specific direction that came from the Circuit Court not to object to the motion to amend and intervene and quoted the directive from the Order. The complete Order from this Court had previously been filed along with Ramsey's motion. Small argued that the Circuit Court's Order violated the Supremacy Clause of the United States Constitution as the Order interfered with the Federal District Court's jurisdiction and authority to control its own docket. App. 0242. By Order dated January 5, 2012, United States District Judge Irene M. Keeley found

that good cause existed for her to grant Small's Motion for Leave to File a Response to Ramsey's Motion. Plaintiff Small was ordered to file any response within seven days of the Order. App. at 0247-0248.

Ramsey was dilatory in pursuing his compulsory counterclaim in the pending federal court action. Rather, he chose alternative forums, including the Circuit Court of Monongalia County, for strategic purposes. As set forth in the affidavit of David J. Romano, who represented Small in the federal court case, James R. Ramsey, Sr. was represented by counsel, a Mr. Lichtenstein of Edgar Snyder & Associates, at least as early as May 7, 2009. App. at 0249-0253. Mr. Romano received a letter from Mr. Lichtenstein dated May 7, 2009. App. at 0252. Mr. Romano was contacted about a year later, on or about June 9, 2010, by another attorney who indicated that his firm was going to represent Ramsey in a personal injury matter. App. at 0250, ¶ 6.

After suit was filed on behalf of Small on June 11, 2010, a former associate of Mr. Romano received a call from attorney James A. Villanova on November 23, 2010. Mr. Villanova indicated that he was representing Ramsey with regard to his personal injuries. App. at 0250, ¶ 8. Thereafter, Mr. Romano spoke with Mr. Villanova, at which time Mr. Villanova expressed interest in asserting a counterclaim against Small in the federal court case. App. at 0250-0251, ¶ 9. Mr. Villanova asked whether Mr. Romano would agree to Ramsey filing a counterclaim in the federal court case. Although Mr. Romano indicated that he could not agree to an order allowing a counterclaim against his own client, he advised that such a motion seeking permission to file a counterclaim would likely be granted as the pleadings were not yet complete. App. at 0250-0251, ¶ 9. This conversation occurred approximately three weeks after November

23, 2010 (by December 10, 2010). Despite having been so advised, Ramsey did not then seek to amend to assert a counterclaim and did not do so until October 3, 2011.

The Scheduling Order in Small's United States District Court case was not entered until January 11, 2011. The Scheduling Order set a deadline for motions to join additional parties and motions to amend of March 18, 2011. Also, Ramsey, as a Defendant in Small's Federal Court case, filed an Answer to Plaintiff's First Amended Complaint on January 25, 2011, more than a month after his counsel's conversation with Mr. Romano. Ramsey nonetheless failed to assert a counterclaim at that opportunity.

Small appropriately sought leave in the federal court case before Judge Keeley to respond to Ramsey's Motion to Amend. App. at 0241-0246. He sought that permission because of the Circuit Court's Order of September 30, 2011 that directed the Defendants (including Small) to not object to or take any position concerning the Ramseys' motions. After having been fully apprised of what was contained in the Circuit Court's Order, Judge Keeley granted leave for Small to respond. App. 0247-0248. Only then did Small, through his counsel, take any position on the Ramseys' motions. Thereafter, Judge Keeley denied Ramsey's Motion to Amend by her Memorandum Opinion and Order dated February 8, 2012. App. at 0174-0181.

Further, the Circuit Court's finding that Small's opposition to Ramsey's Motion to Amend to Assert a Counterclaim constituted a waiver of the right to assert a summary judgment defense misconstrues West Virginia law on waiver. To establish waiver, there must be evidence demonstrating the party has intentionally relinquished a known right. Ara v. Erie Ins. Co., 182 W.Va. 266, 387 S.E.2d 320, Syl. pt. 2 (1989). This intentional relinquishment, or waiver, may be expressed or implied. Ara at 269, 387 S.E.2d at 323. However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the

known right. Hoffman v. Wheeling Savings & Loan Ass'n, 133 W.Va. 694, 713, 57 S.E.2d 725, 735 (1950). In the instant case, there is no evidence that Small voluntarily relinquished a known right. Rather, Small's counsel in the federal action, acting in the best interest of Small and convinced that the Circuit Court's Order exceeded its jurisdiction, sought leave in the Federal District Court to oppose Ramsey's motion. The Federal District Court, for good cause shown, granted Small's motion and ultimately denied Ramsey's Motion for Leave to Assert a Counterclaim as untimely and prejudicial to Small. The Circuit Court's ruling that Small's opposition to Ramsey's motion in the federal court action constituted a "waiver" was predicated upon the Order enjoining Small from participating in a federal court action, an Order which exceeded the Circuit Court's jurisdiction.

Small's opposition to Ramsey's motion in federal court was lawful as it was solely within the jurisdiction of the federal court to control its proceedings. As such, Small did not waive his right to assert the compulsory counterclaim rule on summary judgment against Ramsey's claims in Monongalia County Circuit Court.

B. The Circuit Court exceeded its legitimate powers by failing to give full faith and credit to Rule 13 of the Federal Rules of Civil Procedure pertaining to compulsory counterclaims when it failed to grant Small's Motion for Summary Judgment and dismiss Ramsey's action pending in Circuit Court by virtue of his failure to assert a compulsory counterclaim in the action previously litigated in Federal District Court for the Northern District of West Virginia.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and

> important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12, Syl. pt. 4 (1996).

Applying the third factor in Hoover, the Circuit Court's Order is clearly erroneous as a matter of law. Rule 13 of both the West Virginia Rules of Civil Procedure[5] and the Federal Rules of Civil Procedure[6] require that any claim must be asserted as a compulsory counterclaim if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim

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[5] Pursuant to Rule 13(a) of the West Virginia Rules of Civil Procedure, Revised:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

[6] Pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, Revised:

> A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim:
>
> **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> **(B)** does not require adding another party over whom the court cannot acquire jurisdiction.
>
> **(2) Exceptions.** The pleader need not state the claim if:
>
> **(A)** when the action was commenced, the claim was the subject of another pending action; or
>
> **(B)** the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

and does not require adding another party over which the Court cannot acquire jurisdiction.

The action by Ramsey against Small arises out of the same transaction and occurrence as the claim asserted by Small against Ramsey in the previously filed federal court action. This Court has recognized that "... claims arising out of a single automobile accident arise out of a common occurrence or transaction. . . ." Sorsby v. Turner, 201 W.Va. 571, 575, 499 S.E.2d 300, 304 (1997). "Failure to assert a compulsory counterclaim is a waiver and abandonment of such a claim and an adverse decision to the putative claimant is *res judicata*" Carper v. Kanawha Banking & Trust Co., 157 W.Va. 477, 515, 207 S.E.2d 897, 920 (1974). "[C]laims and counterclaims arise out of the same 'transaction or occurrence' if there is a logical relationship between the claims and the counterclaim." State ex rel. Strickland v. Daniels, 173 W.Va. 576, 582, 318 S.E.2d 627, 633 (1984).

> A claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

State ex rel. Taylor v. Nibert, 220 W.Va. 129, 133, 640 S.E.2d 192, 196 (2006) (*quoting* Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970)).

Ramsey's claim arises out of the same transaction and occurrence as that prosecuted by Small in the Federal Court action. Both the Small suit and Ramsey's Monongalia County Circuit Court suit involve the same accident that occurred on February 20, 2009. Both involve negligence causes of action. Both involve the same determinative issues of fact, i.e., whether Small unexpectantly came out in front of Ramsey as is alleged in the instant suit, and whether Ramsey was negligent in operating his vehicle as alleged in the Small suit. The Small suit and the instant suit are inextricably tied in terms of time, place and proof as well as the legal theories involved.

The Full Faith and Credit Clause of the United States Constitution[7] requires that state courts give full faith and credit to the judicial proceedings of the Federal Courts. This includes giving effect to the compulsory counterclaim requirement of Rule 13 of the Federal Rules of Civil Procedure, which required Ramsey to assert his claim in the Small Federal action. The Virginia Supreme Court of Appeals addressed this issue and followed the position of the majority of jurisdictions, holding that "the forum court must look to the original court's construction of its compulsory counterclaim rule, and accord it full faith and credit." Nottingham v. Weld, 237 Va. 416, 420, 377 S.E.2d 621, 623 (1989); (*citing* McDonald's Corp. v. Levine, 108 Ill.App.3d 732, 747, 64 Ill.Dec. 224, 234-36, 439 N.E.2d 475, 485-86 (1982); See also O'Neal, Booth and Wilkes, P.A. v. Andrews, 712 P.2d 1327, 1329 (Mont. 1986); Jocie Motor Lines v. Johnson, 231 N.C. 367, 371, 57 S.E.2d 388, 392 (1950); London v. City of Philadelphia, 412 Pa. 496, 499-500, 194 A.2d 901, 902 (1963); Meacham v. Haley, 38 Tenn.App. 20, 36-37, 270 S.W.2d 503, 510 (1954); Schoeman v. New York Life Ins. Co., 106 Wash.2d 855, 864, 726 P.2d 1, 5-6 (1986)).

In determining whether a counterclaim is compulsory or permissive in nature, the Fourth Circuit Court of Appeals looks at four factors:

> (1) are the issues of fact and law raised in the claim and the counterclaim largely the same;
> (2) would *res judicata* bar a subsequent suit on the party's counterclaim, absent the compulsory counterclaim rule;
> (3) will substantially the same evidence support or refute the claim as well as the counterclaim; and
> (4) is there any logical relationship between the claim and counterclaim?

[7] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

Banner Industries of New York, Inc. v. Sansom, 830 F.Supp. 325, 327 (S.D.W.Va. 1993), *citing,* Painter v. Harvey, 863 F.2d 329, 331 (4th Cir. 1988); Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048, 1051-53 (4th Cir. 1976). "These inquiries need not all be answered in the affirmative for the counterclaim to be deemed compulsory." Painter, 863 F.2d at 331. The scope of the compulsory counterclaim rule plainly is broader than that of *res judicata.* Otherwise, Rule 13(a) would be superfluous. Painter, 863 F.2d at 333.

In Banner Industries, the Federal District court for the Southern District of West Virginia applied the four factors from Painter to determine whether an action filed in that court should be dismissed because it should have been brought as a compulsory counterclaim in a lawsuit pending in the Circuit Court of Jackson County. Judge Haden granted the defendants' motion to dismiss concluding that the complaint constituted a compulsory counterclaim in state court. 830 F.Supp. at 328. In similar fashion, a state court must recognize and honor the federal court's compulsory counterclaim rule.

Additionally, resolution of Small's federal court action bars Ramsey's Circuit Court action under the principle of *res judicata.* The elements of *res judicata* under West Virginia law:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action **or must be such that it could have been resolved, had it been presented, in the prior action.**

(emphasis added). Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41, Syl. pt. 4 (1997).

There is an identity of cause of actions in both the federal action and the later filed Ramsey Circuit Court suit. Both actions assert negligence causes of action against each other arising from the same accident. Further, there is an identity of parties or their privies in the two suits. The Plaintiff in the federal action was limited to Tobby Small. The other Defendants sued by the Ramseys in Circuit Court also were parties in the federal action. The Plaintiffs in the Circuit Court action are James R. Ramsey and his wife, Virginia E. Ramsey, who has asserted a loss of consortium claim. The addition of a spouse as a plaintiff asserting a loss of consortium claim does not defeat *res judicata* as a loss of consortium claim is derivative of the plaintiff-husband's claim and must be brought in a single action. See Warner v. Hedrick, 147 W.Va. 262, 126 S.E.2d 371 (1962); West Virginia Fire & Cas. Co. v. Stanley, 216 W.Va. 40, 54, 602 S.E.2d 483, 497 (2004).[8]

Application of the compulsory counterclaim rule and principles of *res judicata* bar Ramsey's claim in the Circuit Court of Monongalia County. This follows from Rule 13 and also from this Court's decision in Lloyd's, Inc. v. Lloyd, 225 W.Va. 377, 693 S.E.2d 451 (2010). In Lloyd, a corporation, Lloyd's Inc., brought suit for misappropriation and conversion of payments against Charles R. Lloyd. The circuit court denied the corporation's motion to amend the complaint

[8] In his brief in the underlying Court, Plaintiff Ramsey argued that "this claim is not a compulsory counterclaim as Ms. Ramsey was not subject to the jurisdiction of the Federal District Court and, thus, would not be added pursuant to Rule 13(a) of the Federal Rules of Civil Procedure." However, the jurisdiction limitation of Rule 13(a) (B) applies to adding a defendant required for the counterclaim over whom the court cannot acquire jurisdiction. This does not apply to Virginia Ramsey because she would not have been a defendant but, rather, an intervening plaintiff asserting her derivative consortium claim in conjunction with Ramsey's counterclaim. In addition, Mr. Ramsey's claim did not require Ms. Ramsey's presence in the case. To be sure, she could have intervened as a matter of right under Fed.R.Civ.P. 24(a)(2) had her husband timely counterclaimed and had she timely moved to intervene. The Constitutional protection and concept of personal jurisdiction applies to protect non-resident defendants from defending claims in foreign jurisdictions where they lack minimum contacts. Plaintiffs, of course, avail themselves to a court's jurisdiction.

and granted Charles Lloyd's motion to dismiss based upon the compulsory counterclaim rule and *res judicata*. Specifically, a previous action had been filed by Greg Lloyd against his father, Charles Lloyd, on April 20, 2004 alleging that Charles Lloyd and Chuck Lloyd, plaintiff's brother, were conspiring to keep Greg Lloyd from participating in business decisions of a family business. Charles Lloyd filed a counterclaim against Greg Lloyd and a third-party complaint against Lloyd's, Inc. in which he sought repayment of a $132,000.00 Note as well as repayment from Greg Lloyd for unpaid rent. Thereafter, Charles Lloyd filed a motion for summary judgment as to his counterclaim and third-party complaint. In response to the motion, Greg Lloyd alleged that Charles Lloyd had misapplied payments while keeping books for Lloyd's, Inc. Greg Lloyd did not, however, move to amend his complaint to add a cause of action against Charles Lloyd for misappropriation or conversion nor was there a separate lawsuit filed. At trial, the Court prohibited Greg Lloyd and Lloyd's, Inc. from using misapplication of funds as a defense. On March 5, 2008, the trial court granted Charles Lloyd's motion as a matter of law in favor of Charles Lloyd against Lloyd's, Inc.

Lloyd's, Inc. filed a separate lawsuit against Charles Lloyd in the Circuit Court of Braxton County which was the basis of the appeal. In the second suit, Lloyd's, Inc. asserted that Charles Lloyd had misappropriated and converted payments in satisfaction of debts. Charles Lloyd filed a motion to dismiss arguing that the claims asserted therein were barred "(1) as un-asserted compulsory counterclaims pursuant to Rule 13(a) of the West Virginia Rules of Civil Procedure, and (2) by the doctrine of *res judicata* . . ." Lloyd, 693 S.E.2d at 455. The circuit court granted Charles Lloyd's motion to dismiss and denied Lloyd's, Inc.'s motion to amend its complaint finding that Lloyd's instant claim is barred by the doctrine of *res judicata*. This Court affirmed the circuit court ruling and its application of the compulsory counterclaim rule and principles of *res judicata*. Detailing the elements of *res judicata*, this Court recognized the third element of *res judicata*

requires that "the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been present, in the prior action." Lloyd's, 693 S.E.2d at 455, *quoting* Blake, 201 W.Va. 469, 498 S.E.2d 41, Syl. pt. 4 (1997). The Court found that the first filed action required the adjudication of Lloyd's obligation to repay the $130,000.00 note and any defenses Lloyd had thereto, including the alleged misappropriation by Charles Lloyd. Thus, "it could have been resolved, had it been presented, in the prior action." Id. at 458. This Court found "[m]oreover, upon having learned of the existence of this misappropriation claim, Lloyd's was required to *timely* assert it in the prior litigation as a compulsory counterclaim pursuant to Rule 13(a) of the West Virginia Rules of Civil Procedure." Id. at 459. This Court held "whether the lower court erred in refusing to permit Lloyd's to assert its misappropriation claim in the prior litigation is of no moment because, even if an error had occurred, it would not protect the claim from being barred by *res judicata*." Id. at 459, *quoting* Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216, Syl. pt. 1 (1983). This Court concluded that the circuit court had correctly dismissed Lloyd's misappropriation claim since it could have been presented in the prior litigation if it had been timely presented as it was required to be pursuant to the compulsory counterclaim rule.

As in Lloyd, in the instant case, Ramsey was a party Defendant to Small's personal injury action in the United States District Court. Small's personal injury claim unquestionably arose out of the same transaction and occurrence as Ramsey's present claim against Small. As such, Ramsey had a duty to raise his personal injury action as a compulsory counterclaim in the federal court action. Ultimately, the federal court denied Ramsey's late Motion to Amend to assert a compulsory counterclaim. Nonetheless, as in Lloyd, Ramsey could have litigated his claim in the federal court action had he timely moved to assert his compulsory counterclaim. The Federal District Court's

denial of Ramsey's Motion to Amend to assert a counterclaim, even if disagreed with by this Court, would not prevent application of the compulsory counterclaim rule or principles of *res judicata*. See Lloyd's, Inc. v. Lloyd, 225 W.Va. 377, 693 S.E. 2d 451, Syl. pt. 4 (2010). Ramsey could have appealed the District Court's ruling, but he did not do so.

Permitting the Monongalia County Circuit Court action to continue after the federal action was fully litigated would fail to give effect to the purposes underlying the compulsory counterclaim requirement of Rule 13 and the related principle of *res judicata* by risking inconsistent verdicts and failing to promote judicial economy. Petitioner has no other adequate means, such as a direct appeal, to obtain the relief and protection meant to be afforded by the compulsory counterclaim rule and principles of *res judicata*. Thus, both factors one and two set forth in Hoover, support the issuance of a writ of prohibition in this case. Further, the Circuit Court's Orders disregard the principles set forth in the Supremacy Clause and the Full Faith and Credit Clause of the United States Constitution. As such, both factors four and five in Hoover also weigh in favor of a writ of prohibition in the instant matter.

VI. CONCLUSION

Because the Circuit Court exceeded its jurisdiction in its Order enjoining Small from opposing Ramsey's Motion in federal court and in its Order concluding that Small waived his summary judgment defense, Petitioner requests that this Court issue a writ of prohibition in this matter prohibiting the Circuit Court from enforcing such orders. Further, Petitioner requests that full faith and credit be given to the Federal Rules of Civil Procedure as Ramsey was required to assert a counterclaim in the Federal District Court action but did not do so. As such, Petitioner also requests that this Court issue a writ of prohibition against the instant Circuit Court action

proceeding against him as it is barred by the compulsory counterclaim rule and principles of *res judicata*, and order the Circuit Court to dismiss the action against Small.

Respectfully submitted.

TOBBY LYNN SMALL,

Petitioner,

By Counsel,

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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF RANDOLPH, TO-WIT:

Jeffrey S. Zurbuch, being duly sworn, on his oath deposes and says that the facts and allegations contained within the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION are true upon my best information and belief.

JEFFREY S. ZURBUCH

Subscribed and sworn to before me this 1st day of February, 2013.

My commission expires: December 19, 2021.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LISA S. SEVERINO
BUSCH ZURBUCH & THOMPSON PLLC
PO BOX 1819
ELKINS, WV 26241
My commission expires December 19, 2021

NOTARY PUBLIC

MEMORANDUM LISTING THE NAMES AND ADDRESSES OF THOSE PERSONS UPON WHOM THE RULE TO SHOW CAUSE IS TO BE SERVED, IF GRANTED

1. The Honorable Russell M. Clawges, Jr.
   Circuit Court of Monongalia County
   243 High Street
   Morgantown, WV 26505-5491
   Respondent Judge

2. James A. Villanova, Esq.
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   Counsel for Respondents/Plaintiffs Below

3. Mark F. McKenna, Esq.
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   Counsel for Respondents/Plaintiffs Below

4. Peter T. DeMasters, Esq.
   Flaherty Sensabaugh Bonasso PLLC
   48 Donley Street, Suite 501
   Morgantown, WV 26501
   Counsel for Respondents/Defendants Below

CERTIFICATE OF SERVICE

I hereby certify that February 1, 2013, I served the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

The Honorable Russell M. Clawges, Jr.
Circuit Court of Monongalia County
243 High Street
Morgantown, WV 26505-5491
Respondent Judge

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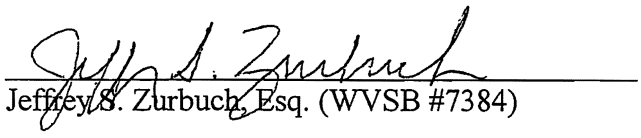

Jeffrey S. Zurbuch, Esq. (WVSB #7384)