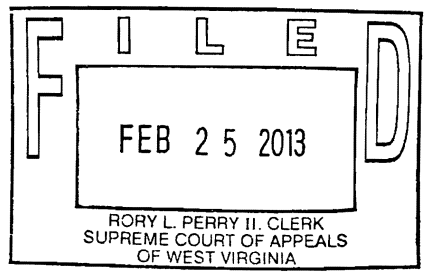
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

SUMMARY RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION

Filed on behalf of Jack B. Kelley, Inc., Willie McNeal, and Amerigas Propane, LP

Counsel of Record for these Parties:

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I. Introduction

NOW COME Jack B. Kelley, Inc., Willie McNeal, and AmeriGas Propane, PLLC, by counsel, Peter T. DeMasters, Esquire, and Lindsey M. Saad, Esquire, and hereby file this summary response, pursuant to Rule 16(h) of the Revised Rules of Appellate Procedure, to the *Verified Petition For Writ Of Prohibition* ("writ").

II. Standard of Review

W.Va. Code 53-3-1 provides that a writ of prohibition shall lie as a matter of right when the inferior court does not have jurisdiction over the subject matter or, having such jurisdiction, exceeds its legitimate power. Further, a writ of prohibition, like writs of mandamus and habeas corpus, is an extraordinary remedy and should only be issued for extraordinary causes. *State ex rel Suriano v. Gaughan*, 198 W.Va. 339, 480 S.E.2d 548 (1996). In determining whether to issue a writ of prohibition, "this Court will look to the adequacy of other available remedies such as an appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

III. Argument

Defendants Jack B. Kelley, Inc., Willie McNeal, and AmeriGas Propane, LP join in Tobby Small's petition for a writ of prohibition based on the legal theory of *res*

judicata. As fully described in the petition, the same parties to the instant lawsuit were also parties to a prior lawsuit in the United States District Court for the Northern District of West Virginia (Civil Action No. 1:10-cv-121). Accordingly, because the Plaintiff's in this state court action, James R. Ramsey and Virginia E. Ramsey, could have raised their personal injury claims in the federal court action, these claims should be barred by the doctrine of *res judicata*.

This Court has previously established that three elements must be satisfied before *res judicata* will apply to bar a lawsuit from proceeding: (1) there must have been a final adjudication on the merits in the first proceeding; (2) the second proceeding must involve the same parties, or persons in privity with those same parties, as the first proceeding; and (3) the cause of action in the second proceeding must be identical to the cause of action determined in the first proceeding or must be such that it could have been resolved, had it been presented, in the first proceeding. *See* Syl. Pt. 1, *Antolini v. West Virginia Division of Natural Resources*, 220 W.Va. 255, 647 S.E.2d 535 (2007), (quoting Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997)).

In applying this three part test from *Antolini* to the case at hand, the first element is satisfied as the federal action (Civil Action No. 1:10-cv-121) was ultimately tried before a jury and resulted in a verdict. Second, the federal action involved the same parties to the instant action, with the exception of James R. Ramsey's wife, Virginia E. Ramsey, who is solely pursuing a consortium claim in this case. As a consortium claim is a derivative claim and must be brought at the same time as the underlying claim, it does not defeat *res judicata*. *See Warner v. Hedrick*, 147 W. Va. 262, 126 S.E.2d 371

(1962). Third, the claims presented in the instant case by James R. Ramsey and Virginia E. Ramsey are personal injury claims that arose from the same motor vehicle accident that was litigated in the prior federal action. James R. Ramsey was a defendant in the federal action and could have raised and resolved the claims in the federal action that he is now litigating in the case at bar.

As more fully stated in the Petition, in Syl. Pt. 4, *Lloyd's, Inc. v. Lloyd*, 225 W. Va. 377, 693 S.E.2d 451(2010) this Court found:

> "'An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*." *Adm'r v. Harpold, 33 W. Va. 553 [.11 S.E. 16 (1890)].'* Syllabus Point 1, *In re Estate of McIntosh, 144 W. Va. 583, 109 S.E.2d 153 (1959).* Syllabus point 1, *Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983).*

Pursuant to the Court's clear conclusion in *Lloyd*, the Plaintiffs, James and Virginia Ramsey, in the case below *could have* had their personal injury matter disposed of on the merits in the prior federal action. *Res judicata* has strong public policy values that protects parties from duplicitous litigation, promotes judicial economy, and ensures consistent judicial results.

IV. Conclusion

Accordingly, Jack B. Kelley, Inc., Willie McNeal, and AmeriGas Propane, LP join in the Petitioner's request that this Court issue a writ of prohibition against the instant Circuit Court action. Furthermore, these respondents respectfully request that said writ

of prohibition apply equally to Jack B. Kelley, Inc., Willie McNeal, and AmeriGas Propane, LP on the sound principles of *res judicata* as set forth above and that the underlying case pending before the Circuit Court for Monongalia County be dismissed against all defendants.

Respectfully submitted this the 25th day of February, 2013.

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CERTIFICATE OF SERVICE

I, Peter T. DeMasters, counsel for the Jack B. Kelley Inc., Willie McNeal, and AmeriGas Propane, LP, do hereby certify that on the 25th day of February 2013, the foregoing **SUMMARY RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION** was served via U.S. Postal Service upon the following counsel of record:

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