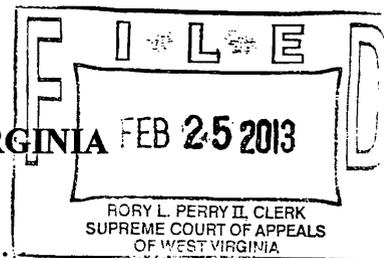


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0110



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

RESPONSE OF JAMES R. RAMSEY, SR. and VIRGINIA E. RAMSEY
IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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COUNTER-STATEMENT OF THE CASE

Respondents, James R. Ramsey, Sr. and Virginia E. Ramsey (hereinafter referred to individually as “Husband Ramsey” and “Wife Ramsey” and referred to collectively as “Ramseys”), instituted a civil action seeking recovery on behalf of Husband Ramsey for those injuries he sustained on February 20, 2009 in an automobile accident and seeking recovery on behalf of Wife Ramsey for a loss of her husband’s consortium. Ramseys initiated their claims in the United States District Court for the Northern District of West Virginia on February 1, 2011 (hereinafter “Ramseys’ Federal Action”). (App. 043-0055.)

At the time Ramseys’ Federal Action was filed, a companion case, which was initiated by Petitioner Toby Lynn Small (hereinafter “Small”) in the United States District Court for the Northern District of West Virginia (hereinafter “Small’s Federal Action”), was pending before the Honorable Irene M. Keeley¹. (App. 0215-0219.) Husband Ramsey was named as a defendant in Small’s Federal Action. (App. 0058.) Wife Ramsey was not a party in Small’s Federal Action nor did she face any potential liability as a result of his claims. (App. 0058.) She did, however, have a valid loss of consortium claim in connection with those injuries her husband sustained in the February 20, 2009 automobile accident.

At the time of the subject automobile accident, Wife Ramsey was a resident of the Commonwealth of Pennsylvania, not the State of West Virginia. (App. 0074-0076.) Wife Ramsey never resided in the State of West Virginia, did not work there and had no contacts with the State of West Virginia such that she could be subject to jurisdiction within its courts. (App. 0074-0076.)

¹ Small’s action was originally filed in the Circuit Court of Harrison County, West Virginia at docket number 10-C-233-3 but was removed to Federal Court on the basis of diversity. (App. 0058-0070.)

As such, Ramseys maintained that Wife Ramsey destroyed the applicability of Rule 13(a) of the Federal Virginia Rules of Civil Procedure. Small has never refuted Wife Ramsey's claim that she is not subject to personal jurisdiction in the State of West Virginia. (App. 0087-0093; 0127-0183; 0232-0253.)

As a result, Ramseys' instituted the separate Federal Action so as to preserve Wife Ramsey's loss of consortium claim. (App. 0043-0055.) Ramseys' Federal Action was filed before the expiration of the time period established by Judge Keeley to amend pleadings. (App. 0146-0158. See also, Petitioner's Brief, pg. 3.) The institution of a separate action was not the result of a failure to abide by Judge Keeley's scheduling order, but rather was filed as a way to ensure Wife Ramsey was not denied the ability to pursue her derivative claim. (App. 0146-0158. See also, Petitioner's Brief, pg. 3.) Ramseys' Federal Action was ultimately dismissed without prejudice *sua sponte* by the District Court due to a lack of diversity between Ramseys, who are residents of the Commonwealth of Pennsylvania, and the General Partner of Amerigas Propane, LP, which is a Pennsylvania corporation. (App. 0056-0057.)

Following the dismissal of their Federal Action, Ramseys initiated suit in the Circuit Court of Monongalia County, West Virginia ("Ramseys' State Court Action). (App. 0007-0023.) In response to Ramseys' State Court Action, Small filed a Combined Motion and Memorandum in Support of Motion to Dismiss². (App. 0033-0070.) The basis for the Motion to Dismiss was the claim that Husband Ramsey's claim constitutes a compulsory counterclaim under Rule 13 of the Federal Rules of Civil Procedure, necessitating a dismissal of the State Court Action. (App. 0033-

² Petitioners, Willie McNeal, Jack B. Kelley, Inc. and Amerigas Propane, L.P., also filed a Motion to Dismiss. (App. 0024-0032.)

0041.) At oral argument on the Motion to Dismiss, the Honorable Russell M. Clawges, Jr. Ordered Ramseys' State Court Action stayed. (App. 0094-0096.) Judge Clawges further directed Husband Ramsey to seek permission from Judge Keeley to amend his answer to assert a counterclaim against Small in Small's Federal Action and, if granted, to file a Motion seeking permission to Intervene on behalf of Wife Ramsey. (App. 0095.) His September 30, 2011 Order of Court directed that:

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. 0095.)

Despite the clear order by Judge Clawges, Small filed an objection to the Motion for Leave to Amend Answer and Assert a Counterclaim. (App. 218-docket entry 360.) Small's objection raised only a claim of prejudice if the scheduled trial was delayed. Small's objection in the Federal Action did not address the issue of a Rule 13 compulsory counterclaim. Judge Keeley agreed that the potential for prejudice existed, arguing that the trial would likely be delayed if Husband Ramsey's request was granted. (App. 0174-0181.) Judge Keeley did not engage in an analysis of either the applicability or inapplicability of Rule 13 of the Federal Rules of Civil Procedure. (App. 174-181.)

The trial in Small's Federal Action proceeded forward while the stay was still in place in Ramseys' State Court Action. (App. 0097.) In Small's Federal Action, Husband Ramsey was represented by counsel assigned by his insurance carrier. Husband Ramsey had no role in the selection of said counsel, and no control over the direction of the defense, including the procurement of any necessary experts. He also had no control over the insurance company's eventual decision

to settle the claims against him prior to the commencement of the trial in Small's Federal Action.

Once all claims in Small's Federal Action were resolved, either through settlement or jury verdict, the stay ordered by Judge Clawges in Ramseys' State Court Action was lifted. Small then filed a Motion for Summary Judgment, asserting again that Husband Ramsey's claims constituted a compulsory counterclaim under Federal Rule 13. (App. 0127-0183.) Following oral argument, Judge Clawges denied Small's Motion for Summary Judgment by Order of Court entered December 10, 2012. (App. 0003-0006.) Small thereafter filed a Motion for Reconsideration and Supplement to Motion for Summary Judgment. (App. 0232-0253.) Ramseys again objected and oral argument was again conducted. (App. 0254-0264.) By Order of Court entered January 14, 2013, Judge Clawges denied the Motion for Reconsideration and Supplement to Motion for Summary Judgment. (App. 0001-0002.)

On February 4, 2013 Small filed the instant Petition for Writ of Prohibition.

SUMMARY OF THE ARGUMENT

The Circuit Court did not exceed its jurisdiction when issuing its September 30, 2011 Order of Court. The Order did not impact upon Small's ability to pursue his Federal Court Claims, nor did it impact any aspect of Small's Federal Court Claim. Judge Keeley permitted Small to file an objection despite the existence of Judge Clawges' Order. In essence, Judge Clawges' Order served as a warning to Small that if he did not permit Judge Keeley to resolve Husband Ramsey's request for permission to amend his pleading to assert a counterclaim then he would be precluded from coming back into Judge Clawges' courtroom and arguing the applicability of Federal Rule 13(a). Judge Clawges did not attempt to usurp the authority of Judge Keeley to control the proceedings in her courtroom and his Order did not violate the Supremacy Clause.

As Judge Clawges retains the right to control the proceedings in his courtroom, his determination that Small violated the provisions of the September 30, 2011 Order of Court was within his discretion and does not constitute an act which exceeds his legitimate powers, as required under W. Va. Code. Ann. §53-1-1 (West).

Husband Ramsey's counterclaim is a permissive counterclaim, not a compulsory counterclaim. The clear provisions of Federal Rule 13(a) mandate that a compulsory counterclaim lies only where the assertion of the counterclaim "does not require adding another party over whom the court cannot acquire jurisdiction." It is undisputed that Wife Ramsey is not subject to personal jurisdiction in the State of West Virginia. It is also undisputed that her loss of consortium claim must be asserted in the same action as the claims of Husband Plaintiff or be forever lost. As she was not a party over whom the court could acquire jurisdiction, Husband Ramsey's counterclaim was

permissive, not compulsory.

The doctrine of res judicata is inapplicable to permissive counterclaims. *Mellon-Stuart Co. V. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987). As Husband Ramsey's counterclaim is permissive, his action in the Circuit Court was not barred.

Further, where an insured is prevented or inhibited in his ability to protect his interests as a result of the handling of his case by counsel assigned by his insurance carrier, he is deemed not to be in privity for purposes of a *res judicata* application. *Ranger Inc. Co. V. General Acc. Fire and Life Assur. Corp., Ltd.*, 800 F.2d 329, 331-332 (3rd Cir 1986); *Barron & Holtzoff, Federal Practice & Procedure*, 394.1 (Rules ed. 1958). Husband Ramsey's insurance counsel's decision to settle his claims prior to trial should not serve as a bar to his pursuit of his State Court Claims.

STATEMENT REGARDING ORAL ARGUMENT

Ramseys maintain that oral argument is unnecessary under the criteria established under Rule 18(a)(2) R.A.P. inasmuch as Small's Petition for Writ of Prohibition is frivolous.

ARGUMENT OF LAW

- A. Judge Clawges' Order prohibiting Small from opposing Husband Ramsey's Motion for Leave to Assert a Counterclaim in Federal Court did not exceed the jurisdiction of the Circuit Court; therefore, Small's flagrant disregard of the Order was properly found to constitute a waiver of the compulsory counterclaim defense by the Circuit Court.**

A "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code Ann. § 53-1-1 (West). A Writ of Prohibition may not be used "as a substitute for [a petition for appeal] or certiarai." *State ex rel. Taylor v. Nibert*, 220 W.Wa. 129, 130, 640 S.E.2d 192, 193, Syl. Pt. 1 (2006) *citing Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370, Syl. Pt. 1 (1953).

The Supreme Court has held that:

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.

Id. at Syl. Pt. 2 *citing State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996).

In his Petition, Small maintains that Judge Clawges exceed his jurisdiction when entering the September 30, 2011 Order. Ramseys, however, maintain that the correct analysis is whether Judge Clawges committed an error of law. Under either analysis, the Petition must fail.

1. Small incorrectly maintains the lower tribunal exceeded its jurisdiction when entering its September 30, 2011 Order of Court.

Initially, Small maintains that Judge Clawges September 30, 2011 Order violates the tenants of the Supremacy Clause of the United States Constitution. Specifically, Small maintains that Judge Clawges “exceeded the court’s jurisdiction” by including the following directive in his Order:

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.

Application of the Supremacy Clause to the afore-quoted portion of Judge Clawges’ September 11, 2011 Order of Court is unfounded. “The Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law.” *Morgan v. Ford Motor Co.*, Syllabus Pt. 2, 224 W. Va. 62, 680 S.E.2d 77, 80 (2009) *citing Cutright v. Metropolitan Life Ins. Co.*, Syllabus Point 1, 201 W.Va. 50, 491 S.E.2d 308 (1997). The Supremacy Clause is not implicated in the instant litigation as there is no state law which interferes

with or runs contrary to any federal law applicable to Small's Federal Action. We are dealing with a single Order, not a West Virginia statute or case law which purports to run afoul of federal law.

Furthermore, contrary to the assertion by Small, the afore-quoted portion of Judge Clawges' September 11, 2011 Order of Court does not enjoin any party from prosecuting an *in personam* action in federal court. Small's action proceeded without interruption in federal court. He was not barred from asserting any claim against any party in that action.

Small's reliance upon both *General Atomic Company v. Felter*, 434 U.S. 12, 98 S.Ct. 76 (1977) and *Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579 (1964), is also misplaced. *General Atomic Company* involved a challenge to the validity of a state court's injunction against the filing and prosecution of certain actions in the federal court. *Id.* The *General Atomic Company* court based its rejection of the state issued injunction precluding further federal court action "on the fact that the right to litigate in federal court is granted by Congress and, consequently, 'cannot be taken away by the State.'" *Id.* at 16, 98 S.Ct. at 78.

Donovan involved a scenario wholly distinguishable from the case at bar. In *Donovan*, the Texas Supreme Court enjoined individuals from initiating suit in federal court to further pursue their challenges to a municipal airport construction project and the related bond issuances. 377 U.S. at 409-410, 84 S.Ct. at 1581. The *Donovan* plaintiff disregarded the Texas Supreme Court's injunction and was thereafter held in contempt, fined and imprisoned. *Id.* After being released from jail, he dismissed his federal action. Upon review, the U.S. Supreme Court stated that "state courts are completely without the power to restrain federal-court proceedings in *in personam* actions like the one here." *Id.* at 413, 84 S.Ct. at 1582.

Unlike the scenarios in either *General Atomic Company* or *Donovan*, nothing within Judge

Clawges' September 11, 2011 Order of Court precluded Small from pursuing his Federal Action claims. What was prohibited, and ignored, was Small's attempt to block Ramseys' action on two fronts. Small had come into State Court arguing that Ramseys' claims constituted a compulsory counterclaim under the Federal Rules of Civil Procedure and that the Ramseys were required to pursue their claims as a counterclaim in Small's Federal Action. This was the basis for Small's Motion to Dismiss in the State Court Action. What was anticipated, and what came to fruition, was that Small would then seek to prevent a joinder in Small's Federal Action due to the pending trial. Ramseys' joinder request necessarily involved a two step process-one for Husband Ramsey's claims via a Motion for Leave to Amend and a second from Wife Ramsey's claims via a Motion to Intervene. Judge Clawges wished to enable a resolution by Judge Keeley of the underlying legal issue-whether the lack of personal jurisdiction over Wife Ramsey rendered Federal Rule 13(a) inapplicable to their claims as Ramseys maintained or whether it was nonetheless applicable as Small maintained.

Judge Clawges has absolute authority to control the proceedings in his courtroom. He is within his authority to direct a litigant in his courtroom on what actions he or she can or cannot take. He has no authority to go into another judge's courtroom and dictate how that courtroom is run. And, in fact, he did not do this. He merely issued an order, which established what conduct would be acceptable in his courtroom. If Small was going to take action to prevent a resolution of the underlying legal issues-the applicability of Federal Rule 13(a)- and the matter ended up back in front of Judge Clawges without a resolution of that issue because of Small's conduct, then, as the September 30, 2011 Order alerted Small, he would be in violation of the Judge's directives and suffer the consequences in Judge Clawges' court. Judge Clawges did not hamper Judge Keeley's

right to control the proceeding in her courtroom. His Order did not prevent Small's Federal Action from proceeding forward. It did caution Small against engaging in conduct which would block a resolution of the underlying legal argument, and then reassert the same Federal Rule 13(a) legal argument in Judge Clawges' courtroom.

Again, unlike the scenario presented in both *General Atomic Company* and *Donovan*, nothing within this Honorable Court's September 11, 2011 Order reduced Small's rights in Federal Court, including his right to pursue his action. Judge Keeley, as was her right in her courtroom, chose to allow Small to file an objection, which objection raised prejudice resulting from a potential continuance as the sole basis for blocking the Motion for Leave to Amend. Judge Keeley did not resolve the merits of what was being asserted in Ramseys' State Court Action-specifically, the claim that Husband Ramsey's claim was a compulsory counterclaim and/or the impact Wife Ramsey's derivative claim has upon such a position. When the litigation returned to Judge Clawges' courtroom, he was again within his discretion to deal with the flagrant disregard of his Order as he saw fit-which was to deem it to constitute a waiver of the issue in its entirety. (App. 0003-0006.)

"It is generally acknowledged that 'the lower federal courts do not have appellate jurisdiction over the state courts and their decisions are not conclusive on state courts, even on questions of federal law.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 162, 690 S.E.2d 322, 356 (2009)(citations omitted). In *Caperton*, the defendants attempted to have the claims removed to federal court, which resulted in a remand request by the plaintiff. *Id.* at 161, 690 S.E.2d at 355. The federal district court issued a written opinion through which it indicated that its ruling on the remand request would be held in abeyance pending a ruling by the bankruptcy court on the claims asserted by defendant as an intervenor. *Id.* Following a ruling by the bankruptcy court, the *Caperton* court

held that “[c]learly it is evident that the bankruptcy court's Joint Memorandum Opinion and Joint Order did not address the merits of any claim, issue or defense involved in the state court proceeding.” *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 163, 690 S.E.2d 322, 357 (2009). “Because the [forum selection clause] issue ... was neither decided on the merits nor necessary to support the bankruptcy court's judgment, we agree with [the Massey Defendants] that the doctrines of collateral estoppel and res judicata do not bar [raising the defense] in this case.” *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 163, 690 S.E.2d 322, 357 (2009).

Again, Judge Keeley’s February 8, 2012 Order did not resolve the merits of Small’s Rule 13 compulsory counterclaim argument. (App. 0174-0181.) Rather, Judge Keeley accepted Small’s basis for objecting to the Motion for Leave, specifically that it would result in undue delay. Judge Kelley stated:

Small has not contended that the proposed amendment is futile *or in bad faith*; thus the issue before the Court is whether the amendment “would be prejudicial to the opposing party.” Upon review, the Court finds that the proposed amendment would indeed be prejudicial to the plaintiff. Ramsey does not ask to merely clarify an ambiguity in his pleadings; rather, he seeks to add an entirely new counterclaim, and an entirely new intervenor, to a case set for trial on July 9, 2012...

(App. 0180, emphasis added). Due to Small’s claim of prejudice from a continuation of the trial date, Judge Keeley never addressed the issue of whether Husband Ramsey’s claim was a permissive or a compulsory counterclaim and what impact Wife Ramsey’s lack of personal jurisdictional status had on the counterclaim.

Even if Judge Keeley’s denial of the Motion for Leave involved an analysis of Federal Rule 13, which it clearly did not, under *Caperton* such a ruling would have no impact on Judge Clawges’ right to conduct the proceedings in his courtroom as he saw fit.

Ramseys maintain that the Order issued by Judge Clawges prohibiting Small from objecting to the Motion for Leave was proper. However, even if it was not, as is maintained by Small, it does not fulfill the requirements necessary to enable the Petition for Writ of Prohibition to be granted. Judge Clawges' Order did not impede Judge Keeley's ability to control the litigation in her courtroom nor did it result in circumstances by which Judge Clawges acted without jurisdiction in the subject matter of the controversy, as is required under W. Va. Code Ann. § 53-1-1 to move forward with the Writ of Prohibition.

2. Judge Clawges did not exceed his legitimate powers.

“In determining the third factor, the existence of clear error as a matter of law, [the Supreme Court] will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue.” *State ex rel Gessler v. Mazzone*, 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002).

Furthermore:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as 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.

State ex rel. Nelson v. Frye, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (2007) *citing Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744, Syl Pt.1 (1979).

As has been argued in Section 1, above, Judge Clawges has the absolute authority to control the manner of the proceedings in his courtroom. As such, enforcing the provisions of his Order, the terms of which were “reviewed and approved as to form” by Small’s defense counsel prior to its entry on September 30, 2011, does not constitute an abuse of his legitimate powers. (App. 0096.)

Small maintains in his Petition that he “moved for summary judgment in the Circuit Court of Monongalia County on October 9, 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.” (Petition, p. 11 citing App. 0127-0183.)

Following the denial of his Motion for Summary Judgment, Small filed a Motion for Reconsideration and Supplement to Motion for Summary Judgment. (App. 0232-0253.) Small based his entire supplement to his Motion for Summary Judgment on an Affidavit of Small’s counsel in the Federal Action, Attorney David J. Romano (“Romano”). (App. 237-238.) Ramseys argued that Romano’s Affidavit was irrelevant to any issue raised by Small in his Motion for Summary Judgment, and did not serve to support Small’s misplaced argument that Rule 13(a) of the Federal Rules of Civil Procedure served to bar Ramseys’ claims in the Circuit Court. Small reiterates the same arguments that he asserted in his Motion for Reconsideration within the instant Petition. (Petition, pg. 13-15.)

Ramseys have repeatedly and unwaveringly argued that Husband Ramsey’s counterclaim does not constitute a compulsory counterclaim under the clear language of Federal Rule 13 because Wife Ramsey is not subject to the jurisdiction of West Virginia’s state or federal courts. (App. 0071-0080; 0081-0086; 0198-0223; 0024-0231; 0254-0264.) Small cannot refute the fact that Wife

Ramsey is not subject to personal jurisdiction in West Virginia. Small has cited no case law from West Virginia or any other state within the union which holds that a wife's derivative claim (or any other party's derivative claim) falls under Federal Rule 13 where the wife (or other individual) is not individually subject to the court's jurisdiction. (See, Petitioner's Verified Petition. See also, App. 0033-0070; 0130-0183; 0232-0253.)

Small's reliance on Romano's affidavit in both the Motion for Reconsideration and the within Petition to purportedly establish that Husband Ramsey had "ample opportunity to assert a counterclaim in Toby Small's Federal lawsuit" is insignificant to the determination of what impact, if any, Federal Rule 13 has to Ramseys' claims. (App. 237.) Small asserted the Federal Rule 13 compulsory counterclaim argument three time-once in its Motion to Dismiss the State Court Action, once in its Motion for Summary Judgment in the same action and again in his Motion for Reconsideration. (App. 0033-0070; 0130-0183; 0232-0253.) Of course, Small also took steps to prevent a resolution of this issue by objecting to the Motion for Leave to Join in the Federal Court Action. (App. 0218.) In neither of the proceedings, either Small's Federal Action or Ramseys' State Court Action, has Husband Ramsey ever maintained that there was insufficient time or notice of the Federal Action for Ramseys to timely assert a counterclaim. Indeed, his Federal Action was filed before Judge Keeley's deadline for amending pleadings. (App. 0178.) Clearly, Husband Ramsey had ample time to present his claims against Small. What was missing was a clear path for Wife Ramsey to preserve her loss of consortium claims. Through all the filings made to date, Small has not cited any statutory or case law to oppose Ramseys' unwavering argument that Wife Ramsey's derivative loss of consortium claim undermined the applicability of Rule 13 to Husband Ramsey's claim as both Husband Ramsey's and Wife Ramsey's claims must be brought in the same action, which could

not be done in Small's Federal Action³.

The affidavit of Romano has no bearing on the issue of the applicability of Federal Rule 13 to Ramseys' claims. (App. 0249-0251.) Any conversation which Romano had, or which his former associate allegedly had⁴, pertaining to a possible counterclaim by Husband Ramsey against Small has no bearing on what the research has amplified-specifically, that Rule 13 is inapplicable due to the derivative claim possessed by Wife Ramsey, an individual not subject to the jurisdiction of the West Virginia court system. Simply stated, Romano's affidavit does not have any impact on nor does it shed any light on the law applicable to Ramseys' respective claims. It is respectfully submitted that it should have no bearing on the issues presented in Small's instant Petition.

B. HUSBAND RAMSEY'S COUNTERCLAIM WAS PERMISSIVE, NOT COMPULSORY, AND THEREFORE THE CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWERS BY FAILING TO GRANT SMALL'S MOTION FOR SUMMARY JUDGMENT.

Ramsey incorporates the law applicable to a claimed usurpation of a court's legitimate powers as set forth in Argument of Law, Section A and Section A(2) above, as though set forth herein in its entirety.

Small argues that Judge Clawges made a clear error of law when entering its Order denying Small's Motion for Summary Judgment. The basis for this alleged error is Small's contention that

³ In Small's Federal Action, Husband Ramsey would have had to have asserted his counterclaim, and Wife Ramsey would have had to seek leave to join in the Federal Action to assert her counterclaim. If she would have been denied leave to join her claim would have disappeared entirely, leaving both her and her husband without a means for full legal recovery for the injuries they each sustained in the subject accident.

⁴ It is inappropriate for Romano to include within his Affidavit a statement of which he has no first-hand knowledge, specifically an alleged conversation between his associate and any counsel or purported counsel of Husband Ramsey.

Husband Ramsey was required, under Federal Rule 13, to assert his claim as a compulsory counterclaim and that his failure to do so serves to bar his separate action. Small's argument is misplaced as Husband's Ramsey's claim does not fall within the clear language of Rule 13 and thus is not a compulsory counterclaim, but a permissive counterclaim. His separate action is therefore not barred.

Rule 13(a) of the Federal Rules of Civil Procedure, which sets forth the requirements for a compulsory counterclaim, provides:

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.*

(Emphasis added).

The Federal Rules of Civil Procedure are given their plain meaning. *See e.g., Marex Titanic Inc. v. The Wrecked and Abandoned Vessel*, 2 F.3d 544, 545 (4th Cir. 1993)(citation omitted). "As with a statute, [the court's] inquiry is complete if [it] find[s] the text of the Rule to be clear and unambiguous." *Id.* at 546 (citation omitted). In applying a Civil Rule, the text of the rule is to be applied so that each word is given effect.

Small's initial argument focuses on the provision within Rule 13(a) that the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Ramseys do not maintain, nor have they ever maintained, that their suit and the litigation pursued by Small in Federal Court arose out of separate or distinct transactions or occurrences. Rather, what Ramseys maintain is that Small is completely ignoring the second requirement-that the counterclaim "does

not require adding another party over whom the court cannot acquire jurisdiction.”

1. *Wife Ramsey is not subject to personal jurisdiction in the State of West Virginia*

It is undisputed that the only way Wife Ramsey can assert her derivative claim is in the same action as her husband’s claims are asserted, and as the courts in West Virginia, including the District Court, do not have jurisdiction over Wife Ramsey absent her voluntary submission to their jurisdiction, the provisions of Rule 13(a) are not applicable to this action.

In order for the compulsory counterclaim provisions within Rule 13 of the Federal Rules of Civil Procedure to be applicable to Ramseys’ claims, Wife Ramsey would have needed to have been subject to the jurisdiction of the United States District Court for the Northern District of West Virginia. As is alleged within Ramseys’ Complaint, which allegation has gone unrebuked by Small or any other Petitioner in this action, Wife Ramsey is a non-resident party. Within his Motion to Dismiss, his Motion for Summary Judgment and his Motion for Reconsideration and Supplement to Motion for Summary Judgment filed in the Circuit Court, Small does not address Wife Ramsey’s residency anywhere. (App. 0033-0070; 0130-0183; 0232-0253.) Instead, Small merely argues that Wife Ramsey “could have” intervened in Small’s Federal Action. However, the clear language of Federal Rule 13 requires that she be subject to the federal court’s jurisdiction, which she is not.

The determination of whether personal jurisdiction can be exercised over a non-resident defendant, as Wife Ramsey would be in the Small Federal Action, requires a two-step inquiry: (1) whether a statute authorizes service of process on the non-resident defendant, and (2) whether such service of process comports with the Due Process Clause. *See In re Celotex Corp.*, 124 F.3d 619 (4th Cir.1997). As the Fourth Circuit recognized in *In re Celotex*, “[b]ecause the West Virginia long-

arm statute is coextensive with the full reach of due process, it is unnecessary ... to go through the normal two-step formula for determining the existence of personal jurisdiction. Rather, the statutory inquiry necessarily merges with the Constitutional inquiry.” 124 F.3d at 627-28 (citations omitted).

In *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 941 (4th Cir.1994), the Fourth Circuit traced the history of Supreme Court jurisprudence on this question and observed that the exercise of personal jurisdiction over a person not physically present in the forum state is consistent with the Due Process clause if that person “(1) ha[s] certain minimum contacts or ties with the forum state such that (2) maintenance of the suit does not offend traditional notions of fair play and substantial justice.” 35 F.3d at 942 citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the United States Supreme Court limited those “minimum contacts” necessary to confer jurisdiction to those activities of an out-of-state person by which the person “purposely avails itself of the privilege of conducting activities within the forum state.” 357 U.S. at 253, 78 S.Ct. 1228. This occurs where the contacts “proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum state,” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)) (emphasis in original), or where the defendant's efforts are “purposefully directed” at the state. *Id.* at 476, 105 S.Ct. 2174, 35 F.3d at 942-43 (parallel citations omitted); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir.1997) (*ESAB I*).

Wife Ramsey does not fulfill the minimum contacts requirement necessary to subject her to

the jurisdiction of the United States District Court of West Virginia for the Northern District⁵. Wife Ramsey was not present in West Virginia when her husband's injuries giving rise to her loss of consortium claim arose, nor has she availed herself of the privilege of conducting activities within West Virginia or purposefully directed her activities toward West Virginia. Indeed, despite his need to establish the Federal Court's jurisdiction over Wife Ramsey in order to successfully argue Federal Rule 13's application, Small does not ever refute the claim that she is not subject to jurisdiction within the State of West Virginia. (App. 0033-0070; 0130-0183; 0232-0253.)

The fact that Wife Ramsey eventually voluntarily submitted herself to the District Court's jurisdiction in a separate action is irrelevant to the analysis, particularly where she did so as a co-plaintiff with her husband. Again, Wife Ramsey's underlying concern through every stage of this litigation process was preserving her individual claim for loss of consortium, something she was not guaranteed of if she was required to seek permission from Judge Keeley to intervene. Small argues that Wife Ramsey could have subjected herself to the District Court's jurisdiction, as she eventually did, and therefore Rule 13(a) is determinative. This position, if adopted, undermines the clear and unambiguous language of Rule 13(a). The clear language of Rule 13(a) requires that to fall within its ambit, Plaintiff Virginia Ramsey must have been subject to the District Court's jurisdiction independent of her voluntary submission to it. For Rule 13(a) to apply, Wife Ramsey had to be within the jurisdictional reach of the District Court. Such was not the case.

A claim for the loss of a spouse's consortium is derivative of the underlying claim . "It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done

⁵ Although Wife Ramsey could opt to voluntarily submit to the jurisdiction of the District Court, that takes her outside of the provisions of Rule 13.

to the principal.” *West Virginia Fire & Cas. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004) *citing* *Jacoby v. Brinckerhoff*, 250 Conn. 86, 93, 735 A.2d 347, 351 (1999). Indeed, West Virginia’s Supreme Court has recognized that “the derivative claims for loss of love, society, comfort, companionship, and services stand or fall with [the primary] claims[.]” *Marlin v. Bill Rich Constr., Inc.*, 198 W.Va. 635, 656, 482 S.E.2d 620, 641 (1996).

Wife Ramsey cannot maintain her claims for loss of consortium independent of Husband Ramsey’s claims. There existed no basis for her to be forced to join into Small’s Federal Action under Rule 20(a) of the Federal Rule of Civil Procedure, as she does not fulfill the requirements set forth within said Federal Rule. Furthermore, she was not a party required to be joined into Small’s litigation under Federal Rule 19 nor does Small make any argument that she could have or should have been joined under Federal Rules 19 or 20. Therefore, the argument put forth by Small, that Wife Ramsey “could have” sought permission to intervene places her in a potentially disastrous position. As she could not be compelled into the case due to the lack of jurisdiction over her, if her request to intervene was denied for any reason, whether upon objection of the Federal Court or the objection of any party, her claim would be forever lost. If Husband Ramsey’s claims were deemed to qualify as a compulsory counterclaim, as Small asserts, Wife Ramsey could have found herself in the position of being precluded from seeking recovery for her damages. Such a result runs contrary to the stated intent of Rule 13.

2. Res Judicata is not applicable to the claims asserted by the Ramseys.

Small’s second argument is that the Ramseys’ claims are precluded under the doctrine of *res judicata*. For the reasons that follow, Small’s argument is misplaced.

“Very broadly, *res judicata* is a doctrine which bars the subsequent litigation of any cause of action which has been previously tried on the merits by a court of competent jurisdiction, and includes within its bar issues which might have been tried.” *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987). Before a lawsuit will be barred under the doctrine of *res judicata* the following three elements must be satisfied:

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.

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

The issue of whether a subsequent action is precluded under the doctrine of *res judicata* when a permissive counterclaim is involved was resolved in the matter of *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124 (1987). In *Mellon-Stuart* the Supreme Court was called upon to resolve whether the failure of the State to assert a counterclaim in a prior proceeding before the Court of Claims precluded a second proceeding in state court. The Supreme Court initially undertook an analysis of whether the Court of Claims was subject to Rule 13(a) of the Rules of Civil Procedure and then, if it was, whether Rule 13(a) applied under the facts presented. *Id.* The Supreme Court ultimately determined that the language applicable to counterclaims in the court of claims rendered them permissive, not compulsory, and therefore concluded that *res judicata* did not apply. Specifically, the Mellon-Stuart court stated: “[i]t is generally recognized that where a counterclaim is not compulsory, then the failure to assert it does not bar a later action.” *Id.* at 303, 359 S.E.2d at

136.

Husband Ramsey has repeatedly argued his counterclaim was permissive. (App. 0071-0080; 0198-0223; 0254-0264.) Accordingly, under established West Virginia law, he is not barred from maintaining the instant action.

Prior to the trial of Small's Federal Action, the insurance carrier for Husband Ramsey elected to settle. Husband Ramsey did not have the opportunity or right, under the applicable insurance policy, to object to such a settlement. In light of the nature and extent of the injuries claimed by Small, it is reasonable to presume that Husband Ramsey's insurance company was motivated to settle those claims against its insured due to the risk posed by an excess verdict under *Shamblin v. Nationwide Mutual Ins. Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), and its progeny⁶. The effect of the settlement was that Husband Ramsey was precluded from offering evidence in support of his defense to the claims asserted by Small⁷. This was solely the result of the decision his insurance carrier made. Small is unfairly trying to use that settlement, and the resulting preclusion of participation during the Small trial, to bar Husband Ramsey from pursuing his claims in this action.

"One is not deemed a party to an *in personam* proceeding merely because he was present at a hearing or trial and cross-examined witnesses." *Barnett v. Wolfolk*, 419 W.Va. 246, 252, 140 S.E.2d 466, 470 (1965)(citation omitted). Husband Ramsey's presence at the trial of Small's Federal Action was so restricted as a result of his insurance carrier's decision to settle that it can in no way be deemed participation in the defense of the claims. Although he was called to testify at the trial,

⁶ *Shamblin* has been applied to actions pending in West Virginia's federal courts. See e.g., *Gallagher v. Allstate Ins. Co.*, 74 F.Supp.2d 652 (N.D.W.V. 1999).

⁷ Similarly, he was precluded from offering any evidence as to his damages in the non-bifurcated trial.

that is hardly the same as offering a fully developed defense. Husband Ramsey was not called by his attorney to offer his direct testimony as his attorney was not permitted to participate in Small's trial as a result of the settlement. He was called by a party adverse to him, as if on cross examination.

"The mere fact that a person appeared as a witness in the former judicial proceeding does not make him a party thereto" for purposes of the *res judicata* doctrine. *Id.*(citations omitted). In West Virginia, "privity" has been deemed to "ordinarily denote[] 'mutual or successive relationship to the same rights of property.'" *Id. citing Cater v. Taylor*, 120 W.Va. 93, 196 S.E. 558. Husband Ramsey and his insurance carrier did not ever have a mutual or successive relationship to the same right of property-Husband Ramsey did not have the right to personally claim any of his insurance proceeds and his insurance carrier did not have an interest in or an obligation to protect his right to recovery against Small. Their interests were entirely divergent, which was highlighted by his carrier's settlement of Small's Federal Action claims despite knowing Husband Ramsey sought to pursue his defense so he could maintain his instant action in Circuit Court⁸.

It is a well-recognized legal principal that the involvement of an insurer, and the counsel the insurer retains on behalf of its insured, prevents or inhibits the ability of the insured to protect his or her interests, including the filing of a counterclaim. *See, e.g., Me. R. Civ. P. 131⁹; Mass. R.C.P.*

⁸ Husband Ramsey's carrier could have had him sign a consent and acknowledgment refusing to settle and absolving it of any excess verdict as a result of the refusal to settle in order to protect the interests of both it and Husband Ramsey while at the same time enabling Husband Ramsey to present a defense but it chose to place its interest above those of its insured.

⁹ The Explanation of Amendments section that follows the Rule reads, in pertinent part, as follows: "The objective of Rule 13(a) as originally promulgated was to avoid the possibility of two trials on the same facts and the further possibility of the defendant's inadvertent loss of his own claim by reason of the adverse determination in the first trial of facts essential to that claim. Desirable though that objective may be conceded to be, the rule did not work satisfactorily in motor vehicle actions in which, as is usually the case, the defendant carried liability insurance."

13¹⁰; *La Follette v. Herron*, 211 F. Supp. 919 (E.D. Tenn. 1962); *Shoshone First Bank v. Pacific Empls. Ins. Co.*, 2 P.3d 510 (Wyo. 2000). Husband Ramsey, pursuant to his insurance contract with his automobile insurance carrier, was provided counsel of the insurer's choice, at the cost of the insurer. The primary, if not the solitaire, objective of Husband Ramsey's defense counsel was to avoid and/or minimize any judgment against Husband Ramsey, which ultimately would have to be paid by the insurer. Again, Husband Ramsey's counsel, as well as his insurer, would have been cognizant of the risk of liability for an excess verdict under *Shamblin*. The insurer and counsel have no incentive, and for that matter no duty, to protect Husband Ramsey's rights to preserve or protect his counterclaim. In that regard, in the interest of justice, the conflicting objectives of Husband Ramsey, his insurer and his assigned defense counsel should not serve as a bar to the instant claim by Ramseys, a claim which is opposed to the best interest of the insured in the Small Federal Action.

In *Reynolds v. Hartford Acc. & Indem. Co.*, 278 F. Supp. 331 (S.D.N.Y. 1967), the Reynolds were defendants in a lawsuit arising out of an automobile accident. The Reynolds' counsel, retained on their behalf by their insurer, did not have a duty to file a counterclaim on the Reynolds' behalf. Thus, the Reynolds filed a separate action alleging damages sustained in the accident. The Court noted the conflicting interests of the Reynolds, their counsel and their insurer and held that "...there are times when flexibility in the administration of Rule 13(a) is desirable. One circumstance where flexibility is valuable is in a case such as this where the defense is controlled by an insurance company." *Id.* at 333. The *Reynolds* Court continued, "[i]f a counterclaim is considered as part and parcel of the original claim, any dismissal with prejudice or other adverse determination of the claim

¹⁰ The Reporters' Notes section that follows the Rule includes the following commentary: "The application of the compulsory counterclaim rule to automobile accidents, where the defendant is usually represented by an attorney for the insurance company, presents several difficulties."

before interposition of the counterclaim can forever bar an injured insured from bringing an action for injuries he might have sustained. Such a result should not be mandated by the Rules which are to be construed liberally to achieve substantial justice." *Id.* The *Reynolds* Court concluded that the Reynolds should not be estopped from bringing a separate action for injuries suffered in the accident and cited to a leading treatise on Federal practice and procedure, *Barron & Holtzoff, Federal Practice & Procedure*, 394.1 (Rules ed. 1958), which provided as follows:

From a practical standpoint the maintenance of a separate action in cases of this kind seems the better idea. The insurance company has a substantial interest in the outcome of the *Haberstroh* action and should not be hampered in the presentation of the defense. If Rule 13(a) were viewed within a "res judicata" framework, then either the insurance company would have to bring the counterclaim- under a theory which would view the counterclaim as a necessary part of a complete defense - or the [insured] would be penalized because he had insurance coverage. As the insurance contract never contemplated the obligation to bring affirmative claims on behalf of its [insured] and the prosecution of counterclaims would no doubt entail extra expenditures on the part of the insurance carrier, to imply an obligation on its part to bring counterclaims would be manifestly unfair. By the same token, barring legitimate counterclaims of an [insured] simply because they are compulsory and the insurance company refuses to bring them would also be unjust. The only other alternative to those mentioned would be for two separate counsel to be present in the single action - one to conduct the defense and the other to prosecute the counterclaim, This alternative does not appear to us as feasible for the following reasons, i.e., possible conflict in presentation of the defense and assertion of their claims....

Id. at 333-334.

Similarly, in *Ranger Ins. Co. v. General Acc. Fire and Life Assur. Corp, Ltd.*, 800 F.2d 329, 331-332 (3rd Cir. 1986), the Third Circuit held that although insurers and insureds are generally "in privity for assessing the collateral estoppel consequences of the prior adjudication of a particular issue **unless in that prior adjudication the interests of the insured and the insurer conflicted on that issue.**" (Emphasis added.) Husband Ramsey's interest of presenting a defense so as to

preserve his right to pursue recovery from Small clearly conflicted with the insurer's interest of minimizing its risk of liability for payment of a verdict, including any potential excess verdict.

As was dictated by the Supreme Court in the matter of *Hannah v. Beasley*, 132 W.Va. 814, 826, 53 S.E.2d 729, 735 (1949):

The rule of *res judicata* should be so construed as not to deprive litigants of their day in court on an asserted claim, save only in cases where it clearly appears that their claim had been, or could have been adjudicated on the pleadings in a former suit or action. In its application, equitable principles should govern. 'Its purpose is to put an end to litigation, but it is to be applied in the furtherance of justice and not in destruction thereof.'

It is inequitable that the decision by Husband Ramsey's insurance carrier to settle the claims against Husband Ramsey in Small's Federal Action—a decision over which Husband Ramsey had no control and no power to block, and a decision made solely for its benefit in complete disregard for the best interests of Husband Ramsey—should be permitted to preclude his claims in the instant matter. Based on the unique circumstances that exist when counsel has been retained on behalf of an insured party, and the primary interests of that insured party and his or her counsel differ, the doctrine of *res judicata* is inapplicable to bar Husband Ramsey's permissive counterclaim.

CONCLUSION

For the foregoing reasons, Judge Clawges' September 30, 2011 Order did not impede Small's right to pursue his Federal Action and thus was not an exercise of jurisdiction where none existed. It was not an abuse of Judge Clawges' legitimate power to conduct the proceedings in his courtroom within the parameters he established and alerted the parties to.

Furthermore, for the foregoing reasons, as Wife Plaintiff was not subject to personal jurisdiction in any court in West Virginia, under the clear language of Rule 13(a) of the Federal Rules of Civil Procedure, Husband Ramsey's claims were not compulsory counterclaims, but rather permissive counterclaims. The doctrine of *res judicata* is both inapplicable to permissive counterclaims and inapplicable where there is no privity of the parties, such as is absent where an insurance company handles the defense of a claim.

Accordingly, Small's Petition for Writ of Prohibition is not well founded and, it is respectfully submitted, should be denied.

Respectfully submitted,

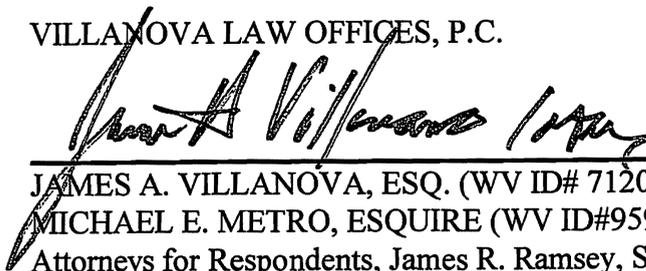
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response of James R. Ramsey, Sr. and Virginia E. Ramsey In Opposition to Petition for Writ of Prohibition, was forwarded to the following counsel of record this 22nd day of February, 2013:

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