

No. 33225 - Helen P. Walker v. Option One Mortgage Corporation, a corporation,
and H & R Block Mortgage Corp., a corporation

FILED

June 18, 2007

released at 10:00 a.m.

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., dissenting:

The majority has remanded the case to permit the defendants to amend their answer to the complaint, to add a counterclaim, and to implead a third party. I dissent from this disposition of the case for the following reasons: (1) the order appealed was a nonappealable interlocutory order, (2) judgment has been rendered and satisfied in favor of the plaintiff, (3) the counterclaim issue was reviewed under an incorrect legal standard, and (4) the impleader issue was incorrectly analyzed by the lower court.

A. The Order Appealed Was a Nonappealable Interlocutory Order

The initial problem I have with the majority opinion is that the appeal should have been dismissed as improvidently granted. The order denying the defendants' motion to add a counterclaim and implead a third party was a nonappealable interlocutory order. *See McDaniel v. Kleiss*, 198 W. Va. 282, 284, 480 S.E.2d 170, 172 (1996) ("Since the circuit court's order . . . is interlocutory and not subject to appeal, we find the petition for appeal was improvidently granted and accordingly dismiss the same for lack of appellate jurisdiction."); *Sipp v. Yeager*, 194 W. Va. 66, 67, 459 S.E.2d 343, 344 (1995) ("[W]e find that the circuit court's decision is an interlocutory rather than a final order and therefore, we

dismiss this appeal as improper before this Court.”). Our law is clear. “Under W. Va. Code, 58-5-1 [1998], appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.” Syl. pt. 3, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). “The required finality is a statutory mandate, not a rule of discretion.” *Province v. Province*, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996). In other words, this Court generally has no discretion to permit an appeal of an interlocutory order that does not terminate a claim or the litigation between parties.¹ As Justice Neely wrote, “we are adamantly opposed to being in the interlocutory appeals business.” *Hinkle v. Black*, 164 W. Va. 112, 116, 262 S.E.2d 744, 747 (1979). “To be appealable, therefore, an order either must be a final order or an interlocutory order approximating a final order in its nature and effect.” *Guido v. Guido*, 202 W. Va. 198, 202, 503 S.E.2d 511, 515 (1998).

With respect to an order denying a motion to assert a counterclaim, courts have

¹One exception to this general rule involves injunction proceedings. See Syl. pt. 2, *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 445, 582 S.E.2d 885, 892 (2003) (“West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.”). Another exception comes under the collateral order doctrine. See *Durm v. Heck’s, Inc.*, 184 W. Va. 562, 566 n.2, 401 S.E.2d 908, 912 n.2 (1991) (“An interlocutory order would be subject to appeal under this doctrine if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.”).

held that “[a]n order denying a defendant leave to amend an answer to add a counterclaim is an interlocutory order.” *Ramada Franchise Sys., Inc. v. Royal Vale Hospitality of Cincinnati, Inc.*, No. 02-C-1941, 2004 WL 2966948, at *3 (N.D. Ill. Nov. 24, 2004). Further, “an order denying a motion to amend an answer to assert a [counterclaim] is not appealable as a final judgment. A party must wait until a final judgment in the case to appeal the order.” *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 248 (7th Cir. 1992). *See Bridges v. Department of Maryland State Police*, 441 F.3d 197, 206 (4th Cir. 2006) (ruling on motion to amend pleading interlocutory and nonappealable); *Levy v. Securities & Exch. Comm’n*, 405 F.2d 484, 486 (5th Cir. 1968) (same); *Walker v. City of Pine Bluff*, 414 F.3d 989, 993 (8th Cir. 2005) (same); *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1081 (Fed. Cir. 1993) (same).

With regard to an order denying a motion to implead a third party, it has been held that “denial of a motion to implead a third party defendant is not appealable.” *Dollar A Day Rent A Car Systems, Inc. v. Superior Court In & For Maricopa County*, 482 P.2d 454, 456 (Ariz. 1971). *See Thompson v. American Airlines, Inc.*, 422 F.2d 350, 351 (5th Cir. 1970) (order denying impleader not appealable). Moreover, “the federal courts have held that where a defendant’s motion to implead a third party is denied the order would not be appealable inasmuch as it does not finally dispose of any rights of the defendant.” *Davis v. Roper*, 167 S.E.2d 685, 686 (Ga. Ct. App. 1969). In other words, “when a trial court denies the motion of a party to the action to implead other persons, that order is not appealable for

the reason that a party to an action can have that and other intervening orders reviewed on an appeal from the final judgment.” *Fahrenkrug v. D. M. Builders, Inc.*, 164 N.W.2d 281, 282 (Wis. 1969). *See Moynahan v. Fritz*, 367 P.2d 199, 201 (Ariz. 1961) (“If on final determination of the cause in the superior court a judgment is rendered against the plaintiff and in favor of the defendants, defendants having prevailed the impleader would have been purposeless. If judgment is rendered against defendants, they can still appeal to this Court to determine the question whether third parties should have been added. Public policy is against the piecemeal adjudication of litigation by appeals to this Court with the resultant delay in determination of a plaintiff’s rights.”).

In order for this Court to have jurisdiction, the case had to be filed as a writ of prohibition. *See State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) (writ of prohibition sought to prevent enforcement of order allowing pleading to be amended); *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 584 S.E.2d 203 (2003) (writ of prohibition filed to prevent enforcement of order denying leave to implead third party). No writ of prohibition was filed. Consequently, the majority has established improper precedent by issuing an *ultra vires* opinion. To the extent that the majority felt compelled to address the merits of the issues presented, they should have done so, as urged in the plaintiff’s brief, by treating the appeal as a request for a writ of prohibition and

reviewed the case under the standard for that writ.² See *State ex rel. Register-Herald v. Canterbury*, 192 W. Va. 18, 19 n.1, 449 S.E.2d 272, 273 n.1 (1994) (“In this case, it is logical to treat the appeal filed by Mr. Thomas as a prohibition since it challenges the scope of the injunction entered by the circuit court.”); *State ex rel. Lloyd v. Zakaib*, 216 W. Va. 704, 705 n.1, 613 S.E.2d 71, 72 n.1 (2005) (“[W]e will treat the writ of prohibition as an appeal rather than a matter requiring exercise of this Court’s extraordinary jurisdiction.”); *State ex rel. Riley v. Rudloff*, 212 W.Va. 767, 770 n.1, 575 S.E.2d 377, 380 n.1 (2002) (“Although this case was brought as a petition for writ of mandamus, we have concluded that this matter should be treated as a writ of prohibition.”).

B. Judgment Was Rendered and Satisfied in Favor of the Plaintiff

The defendants filed their interlocutory appeal with this Court on September 26, 2005. On that same date, the circuit court entered judgment in favor of the plaintiff. The defendants did not appeal the judgment. A satisfaction of the judgment was entered on July 25, 2006.³ Even though the action brought by the plaintiff was dismissed from the circuit court’s docket, the majority opinion permits the defendants to add a counterclaim and

²As I discuss in the next section of my dissent, a final judgment was entered in this case while this appeal was pending. This fact did not change the status of the improper interlocutory appeal because the defendants failed to appeal that final judgment.

³On March 6, 2006, the circuit court entered an order awarding the plaintiff attorney’s fees and costs.

implead a third party to an action that no longer legally exists in the circuit court.⁴ The majority decision is inconsistent with, and implicitly overrules, prior precedent by this Court.

The issue of whether or not a party may amend a pleading, to add additional parties after a final judgment has been rendered, was squarely addressed by this Court in *Ash v. Ravens Metal Products, Inc.*, 190 W. Va. 90, 437 S.E.2d 254 (1993). The decision in *Ash* involved a complaint by 149 plaintiffs seeking vacation from their employer after they were terminated. The trial court granted judgment in favor of the plaintiffs. Subsequent to entry of the judgment, the plaintiffs filed a motion to add additional plaintiffs. The trial court denied the post-trial motion. The plaintiffs filed an appeal on numerous grounds, one of which involved the denial of their motion to add additional plaintiffs.⁵ Although this Court reversed the case on several issues and remanded for further litigation, the opinion affirmed the trial court's denial of the plaintiffs' motion to add additional plaintiffs. In so doing, this Court stated "[w]e are not cited nor have we found cases that apply Rule 15 of the West Virginia Rules of Civil Procedure or its federal counterpart to amend a complaint to add additional parties *after a final judgment*." *Ash*, 190 W. Va. at 95, 437 S.E.2d at 259 (emphasis in original).

⁴I will note that the majority opinion failed to discuss the fact that the plaintiff obtained a judgment in this case, which was satisfied, and that the matter was dismissed from the circuit court's docket. The majority opinion had to omit such discussion in order to reach the merits of the case.

⁵The defendant filed a cross-appeal.

Unfortunately, this Court has, in the case *sub judice*, permitted the defendants to implead a third party and file a counterclaim to an action in which a final judgment has been rendered and satisfied. This disposition is inconsistent with *Ash*. The decision in *Ash* actually reversed the judgment in part and remanded the case for further litigation on the merits of the complaint. Even so, this Court refused to allow an amendment to add additional parties because a final judgment had been rendered. In the instant case, the final judgment rendered by the circuit court has not been reversed—it was never appealed. Clearly, this case presented a stronger basis for denying the relief sought than the facts presented in *Ash*.

The issue of permitting a post-judgment pleading amendment is discussed in the commentary to our Rules of Civil Procedure as follows:

When a trial court enters a final judgment dismissing an action, and no appeal is taken, a [party] must request leave to amend only by seeking to alter or reopen the judgment under Rule 59 or Rule 60. This is because once a judgment is entered . . . an amendment cannot be allowed until the judgment is set aside or vacated.

Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 15(a), at p. 458 (2d ed. 2006). In the instant case, the final judgment has not been set aside or vacated by the trial court; nor has the final judgment been reversed by this Court. Absent setting aside or reversing the final judgment in this case, it is simply not legally possible to allow the defendants to add a counterclaim and bring in a third party to a nonexistent case.

C. The Counterclaim Issue Was Reviewed under the Wrong Legal Standard

Here, the defendants argued that they sought to add their counterclaim⁶ pursuant to the “when justice requires” provision in Rule 13(f) of the West Virginia Rules of Civil Procedure.⁷ Further, the defendants argued that insofar as Rule 15(a) states that leave to amend “shall be freely given,” the trial court should have allowed their answer to be amended to add the counterclaim. The majority opinion agreed with the defendants and analyzed the issue as outlined by the defendants. This is error.

When determining whether to permit a defendant to assert an omitted counterclaim under Rule 13(f), the initial inquiry concerns whether the amendment was sought before or after the Rule 16(b) scheduling order deadline for amendments. If the amendment was sought *after* the scheduling order’s deadline passed, then the analysis

⁶Pursuant to Rule 13(a), a compulsory counterclaim is required to be set out in a defendant’s answer to a complaint. *See Carper v. Kanawha Banking & Trust Co.*, 157 W. Va. 477, 515, 207 S.E.2d 897, 920 (1974) (“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.”).

⁷Rule 13(f) reads in full as follows:

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or *when justice requires*, the pleader may by leave of court set up the counterclaim by amendment.

(Emphasis added).

involves Rule 13(f)⁸ and Rule 16(b).⁹ However, if the amendment was sought *before* the scheduling order's deadline passed, then the analysis is under Rule 13(f).¹⁰ This issue has been summarized as follows:

⁸Factors that courts have looked at in determining whether to permit an amendment under Rule 13(f) include “whether the counterclaim is compulsory, whether the pleader has acted in good faith and has not unduly delayed filing the counterclaim, whether undue prejudice would result to the plaintiff, or whether the counterclaim raises meritorious claims.” *Northwestern Nat’l Ins. Co. of Milwaukee, Wis. v. Alberts*, 717 F. Supp. 148, 153 (S.D.N.Y. 1989).

⁹“Generally, Rule 15 governs the amendment of pleadings, including answers. . . . Where, however, the Court has issued a scheduling order establishing a deadline for amendments to the pleadings, and a party seeks leave to file an amended pleading after such deadline has passed, the ‘more stringent’ standards of Rule 16(b), not those of Rule 15(a), apply.” *Synopsys, Inc. v. Magma Design Automation, Inc.*, No. C-04-3923-MMC, 2007 WL 420181, at *2 (N.D. Cal. Feb. 6, 2007).

¹⁰In the instant proceeding, the majority opinion has implicitly adopted the position that Rule 13(f) and Rule 15(a) should be read together. Therefore, under the majority opinion, if a counterclaim is sought to be added before a scheduling order's deadline passed, then the analysis would be under both Rule 13(f) and Rule 15(a). There is a split of authority in federal courts as to whether Rule 15(a) applies to an amendment under Rule 13(f) under any circumstances. *See Stoner v. Terranella*, 372 F.2d 89, 91 (6th Cir. 1967) (“With respect to the scope of [Rule 13(f)], it is clear that it provides a remedy for setting up omitted counterclaims which is separate and apart from the remedy provided in Rule 15(a) dealing with pleading amendments in general. . . . Thus, the courts which have passed upon motions for leave to file amended pleadings embracing previously omitted counterclaims have generally considered only Rule 13(f), and not Rule 15.”). *But see Perfect Plastics Indus., Inc. v. Cars & Concepts, Inc.*, 758 F. Supp. 1080, 1083 (W.D. Pa. 1991) (“The better approach is to construe both rules together so that Rule 13(f) supplements the general provisions of Rule 15 by setting forth a particular standard for allowing the late assertion of omitted counterclaims. Once the standard set forth in Rule 13(f) is satisfied and leave of court to set up the omitted counterclaim by amendment has been granted, the remaining provisions of Rule 15 should be fully applicable and the amendment should relate back if it meets the test provided by Rule 15(c).”); *Bank of New York v. Sasson*, 786 F. Supp. 349, 352 (S.D.N.Y. 1992) (“Courts must read [Rule] 13(f) together with [Rule] 15(a), which provides that leave to amend a pleading ‘shall be freely given when justice so requires.’”).

When a defendant files a motion to amend his/her answer, to add a counterclaim after the scheduling order's time period for amendments has passed, the court must apply both the Rule 16(b) analysis and the Rule 13(f) analysis before allowing the amendment. Insofar as Rule 16(b) should require the "show good cause" standard, this is tougher on the movant than Rule 13(f)'s "no undue prejudice to the opposing party" standard. The effect of reading the two rules together is that the liberal policy of Rule 13(f) only governs motions to amend made *before* the deadline for amendments set by the trial court's scheduling order. Afterwards the defendant must meet the more rigorous Rule 16(b) standard before even reaching the Rule 13(f) prejudice issue.

Cleckley, Davis, & Palmer, *Litigation Handbook*, § 13(f), at p. 432 (emphasis in original). *See DeWitt v. Hutchins*, 309 F. Supp. 2d 743, 748 (M.D.N.C. 1994) ("[A] defendant seeking to amend his answer to add a compulsory counterclaim under Rule 13(f) after the time for amendments in the scheduling order has passed must satisfy both the Rule 16(b) analysis and the Rule 13(f) analysis."); *Escobar v. City of Houston*, No. 04-1945, 2007 WL 471003, at*1 (S.D.Tex. Feb. 11, 2007) ("All circuit courts to consider the issue have held that the Rule 16(b) 'good cause' standard, rather than the 'freely given' standard of Rule 15(a), governs a motion to amend the pleadings filed after the deadlines set in the scheduling order.").

In the instant case the defendants have conceded that the scheduling order's deadline for amendments had passed before the motion was filed. Consequently, the majority opinion was required to look at Rule 16(b) as the first step in its analysis.¹¹ If, and only if,

¹¹The standard under Rule 16(b) for assessing a motion to amend after the scheduling order deadline has passed has been summarized as follows:

the majority opinion found that the defendants established good cause under Rule 16(b) would it then be necessary to examine the issue under Rule 13(f). Insofar as the majority opinion analyzed the counterclaim only under Rule 13(f) and Rule 15(a), the opinion is wrong. *See Berwind Prop. Group Inc. v. Environmental Mgmt. Group, Inc.*, 233 F.R.D. 62, 66 (D. Mass. 2005) (“[I]t is the more stringent ‘good cause’ standard of [Rule] 16(b), not the ‘freely given’ standard of Rule 15(a), that governs motions to amend after a scheduling order is in place.”); *Melvin v. UA Local 13 Pension Plan*, 236 F.R.D. 139, 145 (W.D.N.Y. 2006) (“It is settled law that when a responsive pleading has been filed and a party seeks an amendment after the pretrial scheduling order, Rule 16 is controlling and the movant must satisfy the more stringent standard of good cause.”).

The circuit court’s order specifically found that the deadline for amending the pleadings “passed nearly fourteen months ago . . . and Defendants have failed to provide good cause why the deadline should be extended.” The majority opinion relied exclusively upon the “leave shall be freely given” provision in Rule 15(a) in order to disregard the circuit

The first step in the analysis of whether or not to permit a party to amend a pleading after a Rule 16(b)(1) deadline has passed, is for the moving party to establish good cause for failing to comply with the deadline. The good cause standard primarily considers the diligence of the party seeking the amendment. Mere absence of prejudice to the nonmoving party does not satisfy the good cause standard. If the moving party was not diligent, the inquiry should end.

Cleckley, Davis, & Palmer, *Litigation Handbook*, § 16(b)(1), at p. 488.

court's finding and erroneously conclude that the defendants reasonably filed their motion fourteen days after learning that they had a counterclaim. Even if I accepted the manner in which the majority opinion interpreted the facts to reach its erroneous fourteen days conclusion, this fact alone does not address the issue of good cause under Rule 16(b). "Where a party seeks to amend a pleading after the pretrial scheduling order's deadline for amending the pleadings has expired, the moving party must satisfy the stringent 'good cause' standard under [Rule] 16, not the more liberal standard under Rule 15(a)." *Fremont Inv. & Loan v. Beckley Singleton, Chtd.*, No. 2:03-CV-1406-PMP-RJJ, 2007 WL 1213677, at *5 (D. Nev. Apr. 24, 2007). *See Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) ("If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure."). The defendants failed to satisfactorily explain to the circuit court and to this Court the reason why they could not have learned of the counterclaim prior to the expiration of the deadline for amending the pleadings. Consequently, the circuit court correctly denied the defendants' motion to add a counterclaim.

D. The Impleader Issue Was Incorrectly Analyzed

The majority opinion concluded that the trial court abused its discretion in denying the defendants' motion to implead Paula Paul as a third-party defendant. In doing so, the majority opinion cited to Rule 14(a) and Rule 16(b). *See McSherry v. Capital One*

FSB, 236 F.R.D. 516, 519 (W.D. Wash. 2006) (“Motions to file third-party complaints made after [the scheduling] deadline must meet not only the standards relevant to the Rule 14(a) substance of the motion, but also meet Rule 16(b)’s requirement of a showing of good cause why the late-filed motion should be permitted.”). The flaw in the majority’s analysis concerned the substance of the impleader motion. That is, the majority opinion focused exclusively upon the issue of good cause for the untimeliness of the motion, without giving any consideration to the substantive requirements of impleader under Rule 14(a).

Rule 14(a) allows a defendant to implead “a person not a party to the action who is or may be liable to the [defendant] for all or part of the plaintiff’s claim against the [defendant].” What is important about this passage from the rule is that a defendant may only implead a third party if that third party will be derivatively liable to the defendant for all or part of the plaintiff’s original claim. “Derivative liability is central to the operation of Rule 14. It cannot be used as a device to bring into a controversy matters which merely happen to have some relationship to the original action.” *Watergate Landmark Condo. Unit Owners’ Ass’n v. Wiss, Janey, Elstner Assocs., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987). That is, a “third-party defendant’s liability cannot simply be an independent or related claim but must be based upon plaintiff’s claim against defendant.” *Baltimore & Ohio R. Co. v. Central Ry. Servs., Inc.*, 636 F. Supp. 782, 786 (E.D. Pa. 1986) (internal quotation marks and citation omitted). Moreover, “[i]f there is no right to relief under the substantive law, impleader under Rule 14 is improper.” *In re Department of Energy Stripper Well Exemption*

Litig., 752 F. Supp. 1534, 1536 (D. Kan. 1990). In the instant proceeding, the defendants failed to satisfy the standards for impleading under Rule 14(a).

The defendants' claim against Ms. Paul is centered around allegations that she embezzled money from her employer and that the money was given to the plaintiff to secure a down payment on the plaintiff's home. Assuming, for the sake of argument, that Ms. Paul did, in fact, embezzle money from her employer and then gave it to the plaintiff to make the down payment, how does this assumption make Ms. Paul liable for part or all of the judgment rendered against the defendants for the predatory lending claim asserted by the plaintiff? It is generally recognized that the mere fact "[t]hat the wrongful conduct of a third party results in a defendant's liability to the plaintiff under a contract between them is not sufficient to implead the third party under Rule 14(a)." *Ruthardt v. Sandmeyer Steel Co.*, No. 94-6105, 1995 WL 434366, at *2 (E.D. Pa. July 21, 1995). *See F.D.I.C. v. Bathgate*, 27 F.3d 850, 873 (3rd Cir. 1994) (that alleged fraud, breach of duty of good faith and other wrongful conduct by third parties resulted in acceleration by plaintiff of defendant's obligations under notes would not support Rule 14(a) impleader); *Blais Constr. Co., Inc. v. Hanover Square Assocs. -I*, 733 F. Supp. 149, 157 (N.D.N.Y. 1990) (that breach by third party of contract with defendant allegedly caused its liability to plaintiff under its contract with defendant is insufficient for Rule 14); *Marshall v. Pointon*, 88 F.R.D. 566, 567 (W.D. Okla. 1980) (defendant may not implead third parties whose conduct allegedly caused FLSA violations for which plaintiff seeks to hold defendant liable); *Kellos Constr. Co., Inc. v. Balboa Ins.*

Co., 86 F.R.D. 544, 545 (S.D. Ga. 1980) (defendant may not implead supplier whose breach of duty to contractor resulted in defendant's liability to plaintiff on bond securing performance of work by contractor).

The record is clear. No contract, agreement or other relationship existed between the defendants and Ms. Paul.¹² Consequently, Ms. Paul owed no legally recognized duty to the defendants to refrain from giving the plaintiff embezzled money to use as a down payment on the home. Without a duty owed to the defendants by Ms. Paul, the defendants would not be entitled to indemnity or contribution from her. Contribution or indemnity are prerequisites for impleader under Rule 14(a).¹³

Further, assuming for the sake of argument that the defendants may have a valid counterclaim against the plaintiff, for using embezzled money to make a down payment on the home, “[c]ourts are united in holding that impleading is improper . . . where it is based merely upon a counterclaim by the [defendant] against the plaintiff in the underlying action” Cleckley, Davis, & Palmer, *Litigation Handbook*, § 14(a), at p. 443. *See Baltimore & Ohio R. Co. v. Central Ry. Servs., Inc.*, 636 F. Supp. 782, 786 (E.D. Pa. 1986) (“The claims asserted by the defendants/third-party plaintiffs against the third-party defendants are not

¹²The defendants’ contractual relationship existed only with the plaintiff.

¹³To the extent that a cause of action existed against Ms. Paul, it rested exclusively with her employer.

based upon the plaintiffs' claims against the defendant. Instead, they are based upon the defendants' counterclaims against the plaintiffs. Although the third-party claims and counterclaims are factually related to the original claim, that relationship is insufficient under Rule 14."'). The facts of this case clearly establish that the defendants' impleader claim is not based upon the plaintiff's predatory lending claim. It is based solely upon the defendants' counterclaim. This is an impermissible basis for impleader because "impleader under Rule 14(a) may not be used as a way of combining all controversies having a common relationship in one action." *Continental Ins. Co. v. McKain*, No. 91-2004, 1992 WL 7030, at *2 (E.D. Pa. Jan. 10, 1992) (internal quotation marks and citation omitted). In summary, the majority opinion did not properly analyze impleader under Rule 14(a) and therefore reached a result that is inconsistent with the rule.

Based upon the foregoing, I respectfully dissent. I am authorized to state that Justice Starcher joins me in this dissenting opinion.