

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 34866

LLOYD'S, INC.,

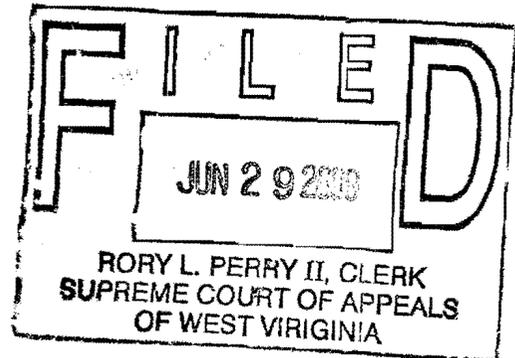
Appellant,

v.

CIVIL ACTION NO. 07- C-76
Circuit Court of Braxton County

CHARLES R. LLOYD,

Appellee.



BRIEF ON BEHALF OF APPELLEE CHARLES R. LLOYD

Stephen B. Farmer, Esq.
Erin K. King, Esq.
FARMER, CLINE & CAMPBELL, PLLC
746 Myrtle Road (25314)
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990

Table of Contents

Table of Authorities	ii.
Appellee's Brief	1
Statement of Facts	1
Standard of Review	4
Argument	4
A. Appellant's Claims Are Barred by the Doctrine of <i>Res Judicata</i> .	4
B. Appellant's Claims Are Barred by Rule 13 of the <i>West Virginia Rules of Civil Procedure</i> as Compulsory Counterclaims to the Original Action.	7
C. Allowing Lloyd's Inc. to Pursue its Claim Would Impair Mr. Lloyd's Rights Established in the Judgment Order in 04-C-39.	9
D. Where a Circuit Court's Written Order Conflicts With its Oral Statement, the Written Order Controls.	10
Conclusion	12
Certificate of Service	14

Table of Authorities

Cases

<i>Advanced Health-Care Servs., Inc. V. Radford Community Hospital</i>	4
910 F.2d 139, 143-144 (4 th Cir. 1990)	
<i>Antolini v. West Virginia Division of Natural Resources</i>	5
220 W.Va. 255,647 S.E.2d 535, 538 (2007)	
<i>Blake V. Charleston Area Medical Center</i>	5,6,7
201 W.Va. 469, 477, 498 s.E.2d 41, 49 (1997)	
<i>Carper v. Kanawha Banking & Trust Co.</i>	8
157 W. Va. 477, 515, 207 S.E.2d 897, 920 (1974)	
<i>Conley v. Spillers</i>	5, 6
171 W.Va. 584, 301 S.E.2d 216 (1983)	
<i>Legg v. Felinton</i>	11
219 W.Va. 478, 637 S.E.2d 576 (2006)	
<i>McGraw v. Scott Runyan Pontiac-Buick, Inc.</i>	4
194 W.Va. 770, 461 S.E.2d 516 (1995)	
<i>Mellon-Stuart Co. v. Hall</i>	5
178 W. Va. 291, 298, 359 S.E.2d 124, 131 (1987)	
<i>Migdal v. Rowe Price-Fleming Int'l, Inc.,</i>	4
248 F.3d 321, 326 (4 th Cir. 2001)	
<i>Randall v. U.S.</i>	4
30 F.3d 518, 522 (4 th Cir. 1994)	
<i>Sattler v. Bailey</i>	5
184 W. Va. 212, 217, 400 S.E.2d 220, 225 (1990)	
<i>Sayre's Adm'r v. Harpold</i>	5
33 W.Va. 553, 11 S.E. 16 (1890)	
<i>Schenerlein and Sliger, Inc. v. Hancock County</i>	4
<i>Federal Savings & Loan Association of Chester</i>	
176 W. Va. 98, 100, 341 S.E.2d 844, 846 (1986)	

<i>Slider v. State Farm Mut. Auto. Ins. Co.</i>	6
210 W.Va. 469, 498 S.E.2d 41 (2001)	
<i>Walker v. Option One Mortg. Corp.</i>	9
220 W.Va. 660, 649 S.E.2d 233 (2007)	
<i>State v. White</i>	11
188 W.Va. 534, 425 S.E.2d 210 (1992)	
 West Virginia Rules of Civil Procedure	
Rule 12(b).....	4
Rule 13	7, 8, 12, 13
 Restatement of Judgments	
<i>Restatement (Second) of Judgments, § 22 (2)(b)</i>	9, 10

BRIEF ON BEHALF OF APPELLEE CHARLES R. LLOYD

COMES NOW, Charles R. Lloyd, the Appellee herein and the Defendant and Counterclaim Plaintiff below, by counsel, and respectfully offers the following as his Response Brief to the Petition for Appeal and Brief on Behalf of Appellant filed by Lloyd's, Inc. In support of his Response, Charles R. Lloyd, hereinafter "Mr. Lloyd," states as follows:

I. STATEMENT OF FACTS

The underlying action, 07-C-76, is the attempted rejuvenation of an action between the same parties, civil action 04-C-39, that was decided by the Honorable Richard A. Facemire, at trial, less than one year prior to the filing of 07-C-76, and subsequently refused, on appeal, by this Court. The information which forms the basis for Lloyd's, Inc.'s claims in this case was the subject of complete discovery in civil action 04-C-39. Nevertheless, Lloyd's, Inc. never asserted those claims in 04-C-39, even though it was aware of those claims during the discovery of that case and could have asserted them therein.

In response to William G. Lloyd's accusations in the original case, and in an attempt to resolve all of the disputes between the parties in the same lawsuit, Mr. Lloyd filed an answer, along with a counterclaim against Charles R. Lloyd and a third-party complaint against Lloyd's Inc. in civil action 04-C-39.¹ The counterclaim and third-party complaint pertained to a hardware store which was owned by Mr. Lloyd and located on Mr. Lloyd's property, but which was run by William G. Lloyd and Lloyd's, Inc. Briefly, in 1995 or early 1996, William G. Lloyd and Charles R. Lloyd, II approached Mr. Lloyd, their father, and presented a proposal for opening and operating a hardware

¹ See Defendant, Charles R. Lloyd's Answer to the Amended Complaint, Amended Counterclaim Against William G. Lloyd and Amended Third-Party Complaint Against Lloyds, Inc., attached as Exhibit A.

store. Before the hardware store was built, Mr. Lloyd agreed to lease the property on which it was located to William G. Lloyd and Charles R. Lloyd, II for \$3,000.00 per month. Mr. Lloyd later agreed to accept \$1,000.00 per month for rent. Soon after the lease agreement was entered into, Charles R. Lloyd, II and William G. Lloyd agreed that a corporation should be created to own and operate the hardware store, Lloyd's Inc., and that William G. Lloyd should be the sole shareholder and President of that corporation. Following its formation, Lloyd's, Inc. began and has continued to operate the hardware store on the property owned by Mr. Lloyd. William G. Lloyd and/or Lloyd's, Inc. thereafter refused to pay rent for the use of the premises to Mr. Lloyd.

Beginning in June 1996, and on several occasions thereafter, William G. Lloyd sought financial assistance from his father in the form of monetary loans to assist with the commencement and operation of Lloyd's, Inc. In 1996, Mr. Lloyd made loans to William G. Lloyd in the amount of \$150,000.00. According to the records of Mr. Lloyd, \$50,000.00 was loaned to William G. Lloyd directly and \$150,000.00 was loaned to Lloyd's, Inc. In 1997, Mr. Lloyd loaned an additional \$32,000.00 to Lloyd's, Inc. in two (2) separate loans, bringing the total money loaned to Lloyd's, Inc. to \$132,000.00. On or about December 29, 1999, William G. Lloyd paid Mr. Lloyd \$100,000.00. At that time William G. Lloyd also owed Mr. Lloyd monthly payments on a note given by Lloyd's Stave, Co. in regard to another matter, in addition to unpaid rent for the property on which the hardware store was situated. Shortly thereafter, Mr. Lloyd returned \$34,000.00 to William G. Lloyd in the form of another loan. With the consent of William G. Lloyd, Mr. Lloyd entered the payments on his books as credits toward the unpaid rent for one (1) year in the amount of \$12,000.00 and \$54,000.00 toward the note in the other matter. The \$132,000.00 owed by Lloyd's, Inc. to Mr. Lloyd was never repaid. As stated, all of the information concerning the matters being asserted by Lloyd's, Inc. in this action, including the alleged offset payments, were available to Lloyd's, Inc. during the

discovery phase of 04-C-39. Nevertheless, Lloyd's, Inc. did not amend its pleadings in 04-C-39 to assert the argument that it was due credit for offset payments on the money owed to Mr. Lloyd.

Civil Action 04-C-39 came on for trial in the Circuit Court of Braxton County on March 27, 2007, the Honorable Richard A. Facemire presiding. On April 4, 2007, at the conclusion of the evidence, the parties orally moved for judgement as a matter of law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*. The Circuit Court, upon consideration of the motions, granted Charles R. Lloyd's motion for judgment as a matter of law against Lloyd's, Inc. in regard to the \$132,000.00, with pre and post-judgment interest.² In July 2008, Lloyd's, Inc. filed a Petition for Appeal of civil action 04-C-39 with this Court of Appeals seeking review of the trial court's rulings. On December 8, 2008, this Court entered an Order refusing Lloyd Inc.'s Petition for Appeal of 04-C-39, effectively affirming the trial court's ruling.³

Now, Lloyd's, Inc. is back before the Circuit Court of Braxton County in an attempt to put issues before the court that could have been disposed of in 04-C-39. The complaint in this action, 07-C-76, filed against Mr. Lloyd, alleges unjust enrichment and conversation. Specifically, Lloyd's, Inc. is questioning Mr. Lloyd's allocation of the monies paid to Mr. Lloyd by William G. Lloyd. Lloyd's, Inc. is asserting that some of the money it paid to Mr. Lloyd in 1999 should have been used as an offset to the \$132,000.00 debt Lloyd's, Inc. owed to Mr. Lloyd. Again, all of the information upon which Lloyd's, Inc. rests its grievances in 07-C-76 was available and actually discovered during the pendency of 04-C-39. As such, on July 21, 2008, Mr. Lloyd moved to dismiss the underlying lawsuit. Mr. Lloyd asserted that Lloyd's, Inc.'s claims should have been, and to some

² See Judgment Order entered March 5, 2008, attached as Exhibit B.

³ See Order refusing Petition for Appeal in 04-C-39, attached as Exhibit C.

extent were, raised in the original action and are barred by Rule 13 of the *West Virginia Rules of Civil Procedure* as un-asserted compulsory counterclaims and by the doctrine of *res judicata*. On February 11, 2009, Judge Facemire granted the Mr. Lloyd's request for dismissal of 07-C-76 based upon the doctrine of *res judicata* and Lloyd's, Inc.'s failure to file a compulsory counterclaim in the original action, 04-C-39. While the circuit court recognized that the issues in 07-C-76 were not precisely the same as those in the original cause of action, Judge Facemire clearly ruled that the issues in 07-C-76 could have been resolved in 04-C-39 if they had been properly presented to the Court by Lloyd's, Inc.

II. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismissal a complaint is *de novo*. *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). "The purpose of Rule 12(b) is to test the legal sufficiency of a complaint. *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir. 1994). However, while motions to dismiss are rarely granted, the legal conclusions in the complaint must be accompanied by factual allegations that are sufficient to support them. *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d 321, 326 (4th Cir. 2001). Accordingly, a court may grant a motion to dismiss where "it appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim." *Advanced Health-Care Servs., Inc. v. Radford Community Hospital*, 910 F.2d 139, 143-44 (4th Cir. 1990).

III. ARGUMENT

A. Appellant's Claims Are Barred by the Doctrine of *Res Judicata*.

In general, "the doctrine of *res judicata* provides that a judgment on the merits rendered by a court of competent jurisdiction in a prior proceeding bars subsequent litigation by the same parties of all matters which were adjudicated or could have been litigated in the prior proceeding." See

Schenerlein and Sliger, Inc. v. Hancock County Federal Savings & Loan Association of Chester, 176 W. Va. 98, 100, 341 S.E.2d 844, 846 (1986) (citing, *Gentry v. Farruggia*, 132 W. Va. 809, 53 S.E.2d 741 (1949)). This doctrine is long-established in this country's common law and is recognized as serving several important public policy goals, including: (1) promoting fairness by preventing vexatious litigation, (2) conserving judicial resources, (3) preventing inconsistent decisions, and (4) promoting the finality of judgments. *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 298, 359 S.E.2d 124, 131 (1987); see also *Sattler v. Bailey*, 184 W. Va. 212, 217, 400 S.E.2d 220, 225 (1990).

In determining what matters are subject to the doctrine of *res judicata*, “[i]t 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.” See Syl. Pt. 1, *Sayre’s Adm’r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890); See Syl. Pt. 1, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). “Thus, *res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.” See *Blake v. Charleston Area Medical Center, Inc.*, 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997).

Before the prosecution of a lawsuit may be barred by the doctrine of *res judicata*, three elements must be satisfied. See *Antolini v. West Virginia Division of Natural Resources*, 220 W. Va. 255, 647 S.E.2d 535, 538 (2007). First, “there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.” *Id.* Second, “the two actions must involve either the same parties or persons in privity with those same parties.” *Id.* Finally, “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.” *Id.*

In this case, all three elements have been met. There has been a final adjudication on the merits. The Circuit Court of Braxton County entered a directed verdict with regard to Mr. Lloyd's counterclaim in the original action, 04-C-39, in April 2007. In March 2008, the Court entered a Judgment Order in 04-C-39 granting Mr. Lloyd a \$132,000.00 judgment, plus pre and post-judgment interest, against Lloyd's, Inc. Mutuality of parties has also been met. Both Lloyd's, Inc. and Mr. Lloyd were parties to the original action. William G. Lloyd is and was the sole shareholder and President of Lloyd's, Inc. Finally, resolution/ability of resolution has also been met. In the original action, both the court and the jury considered some of the issues at stake in the instant action. More importantly, Lloyd's, Inc. could have presented all of the issues at stake in the instant action to the court and/or jury for resolution through the use of a counterclaim in 04-C-39. For reasons known only to Lloyd's, Inc., Lloyd's, Inc. chose not to put those issues properly and squarely before the trial court in 04-C-39. Neither Lloyd's, Inc. or William G. Lloyd filed a claim against Charles R. Lloyd in the earlier action, although admittedly they had the same information then they possess now. All information relied upon by Lloyd's, Inc. in this action was revealed through actual discovery in 04-C-39. It is irrelevant to their cause that they raised this issue for the first time in response to Mr. Lloyd's motion for a directed verdict. Since the alleged potential claim was known to Lloyd's, Inc., it was incumbent upon Lloyd's, Inc. to bring the claim in the original case either by complaint or counterclaim.

Res judicata may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined. *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 477, 498 S.E.2d 41, 49 (1997); *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 481, 557 S.E.2d 883, 888 (2001). Furthermore, "a party's failure to present a particular issue in the course of litigation may

preclude its determination in a subsequent action.” *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 481, 557 S.E.2d 883, 888 (2001). The only exception to this rule is if “the party bringing the subsequent lawsuit claims that fraud, mistake, concealment, or misrepresentation by the defendant of the second suit prevented the subsequent plaintiff from earlier discovering or litigating his/her claims.” *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 477, 498 S.E.2d 41, 49 (1997).

Lloyd’s, Inc. chose not to pursue a cause of action for unjust enrichment and/or conversion in 04-C-39. Moreover, Lloyd’s, Inc. has not alleged fraud or misrepresentation prevented it from litigating its unjust enrichment and conversion claims. In fact, all information now relied upon by Lloyd’s, Inc. was actually discovered in 04-C-39. Lloyd’s, Inc.’s sole argument against dismissal is that it should have been permitted to present an offset argument at trial of the original action even though it had never pled the offset issue or properly placed it before the circuit court for consideration prior to trial.⁴ Because Lloyd’s, Inc. failed to file its claim during the original action, it is now prohibited, pursuant to the principles of *res judicata*, from presenting the same claim in a subsequent action.

B. Appellant’s Claims Are Barred by Rule 13 of the *West Virginia Rules Of Civil Procedure* as Compulsory Counterclaims to the Original Action.

Rule 13(a) of the *West Virginia Rules of Civil Procedure* states, in part:

(a) Compulsory counterclaims - 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.

⁴ Additionally, this Court of Appeals denied Lloyd’s Inc.’s appeal from Judge Facemire’s Order in 04-C-39.

In this case, the claims at issue in the underlying case are clearly compulsory. First, they arise out of the same transaction or occurrence that is the subject matter of Mr. Lloyd's claim. Mr. Lloyd's counterclaim and third-party complaint in the original action dealt with the debts that Lloyd's, Inc. owed to him. Lloyd's, Inc.'s claim in this action, although it alleges dealings by Mr. Lloyd with regard to that debt, also deals with that same debt. As stated, William G. Lloyd is the sole shareholder and President of Lloyd's, Inc.

Second, the proposed compulsory counterclaim would not have required the presence of third parties over whom the court could not have acquired jurisdiction. It would have merely required the presence of Lloyd's, Inc. and Mr. Lloyd, who were already parties to the original action. Thus, both parts of Rule 13(a)'s two-part test are satisfied. Accordingly, as a compulsory counterclaim not raised is a claim forever waived, Lloyd's, Inc. Has forever waived its right to bring before a court the claims at issue in this litigation when it did not assert its claims as compulsory counterclaims in the original action. See *Carper v. Kanawha Banking & Trust Co.*, 157 W. Va. 477, 515, 207 S.E.2d 897, 920 (1974).

Additionally, the alleged offset claim was not a newly discovered claim that Lloyd's, Inc. was not aware of at the time of its answer to the counterclaim. The loans Mr. Lloyd made to William G. Lloyd and Lloyd's, Inc. occurred in 1996 and 1997. The partial repayment William G. Lloyd made to his father and/or Lloyd's Stave occurred in 1999. All of this occurred four (4) to five (5) years prior to the original lawsuit and six (6) years prior to when Mr. Lloyd filed his counterclaim and third-party complaint in November 2005 alleging that Lloyd's Inc. was indebted to Mr. Lloyd \$132,000.00 plus accrued interest. During the trial of the original action, Lloyd's, Inc. unsuccessfully defended the counterclaim with the same arguments and facts that comprise the underlying complaint in this action, namely, that a Lloyd's, Inc. payment was misapplied to a

nonexistent debt allegedly held by Lloyd Stave Co. The Appellant cannot candidly allege it was unaware of the claims being pursued in the instant action during the pendency of 04-C-39. The information at issue now is the exact information that was discovered in 04-C-39. Lloyd's, Inc.'s response to Mr. Lloyd's motion to dismiss, as well as the attached trial transcript, are evidence that Lloyd's, Inc., at the time of the original action, knew of all facts comprising the current complaint. Thus, despite learning of some of these facts during the latter stages of litigation and discovery, Lloyd's, Inc. could have filed a counterclaim. See *Walker v. Option One Mortg. Corp.*, 220 W.Va. 660, 649 S.E.2d 233 (2007). Instead, Lloyd's, Inc. opted to use these facts as a defense to Mr. Lloyd's \$132,000.00 counterclaim. By not pleading the offset issue when it was required to do so, Lloyd's, Inc. waived its right to pursue it in a subsequent action.

C. Allowing Lloyd's Inc. to Pursue its Claim Would Impair Mr. Lloyd's Rights Established in the Judgment Order in 04-C-36.

Lloyd's, Inc. currently seeks to achieve through a new claim what it could not accomplish by its previous defense in the original case: a reduction of the \$132,000.00 judgment awarded to Mr. Lloyd in the original action. By filing the underlying complaint, Lloyd's, Inc. seeks to nullify the original judgment and impair Mr. Lloyd's rights that were established in the original action. See *Restatement (Second) of Judgments*, § 22 (1982).

According to the *Restatement (Second) of Judgments*, § 22, titled "Effect of Failure to Interpose Counterclaim," Lloyd's Inc.'s attempt at a second bite of the proverbial apple is expressly forbidden:

- (1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2);

- (2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:
- (a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
 - (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

Restatement (Second) of Judgments § 22 (1982).

Mr. Lloyd's brief in this matter outlines why the issues in the underlying complaint were required to be raised as a compulsory counterclaim in the original action. However, pursuant to the *Restatement (Second) of Judgments*, § 22 (2)(b), an additional reason for dismissing Lloyd's, Inc.'s complaint is provided. Accordingly, if Lloyd's, Inc. is successful in prosecuting its complaint herein, Mr. Lloyd's rights to the previously awarded \$132,000.00 judgment will be impaired. Lloyd's, Inc. has already argued that the \$132,000.00 judgment should be offset by \$84,000. However, the circuit court denied that argument by directing a verdict for Mr. Lloyd at trial in April 2007, and entering a Judgment Order in March 2008, and this Court of Appeals refused to hear Lloyd's Inc.'s appeal thereon by the Order denying Lloyd's, Inc.'s appeal petition in December 2008. In its current complaint, Lloyd's, Inc. is presenting the same defense it used in 04-C-39 as a new and separately filed claim and is seeking the exact same result, an \$84,000.00 offset of the original judgment. Allowing Lloyd's, Inc. to present this same argument could impair Mr. Lloyd's rights to his previous judgment and should be disallowed.

D. Where a Circuit Court's Written Order Conflicts with its Oral Statement, the Written Order Controls.

Finally, Lloyd's, Inc. asserts that Judge Facemire, at the trial of 04-C-39, not only indicated that Lloyd's Inc. should bring a separate claim for unjust enrichment and/or conversion against Mr. Lloyd, but actually directed to the Appellant to do so. Mr. Lloyd disputes that recitation of events and denies that the trial judge ordered and/or instructed Lloyd's, Inc. bring this separate civil action to address its alleged grievances. It is clear from the trial record and Order dismissing this case, presented herein, that the trial court found that Lloyd's, Inc. did not properly put the offset issue before the court in 04-C-39.⁵ Therefore, the court ruled that it was not able to adjudicate the issue. As stated, the offset was never pled as part of a counterclaim or third-party complaint in the original action. However, the court's ruling that the offset issue could not be heard at trial of 04-C-76 did not "green light" Lloyd's, Inc.'s complaint in 07-C-76. The propriety of a second, subsequently filed civil action was not an issue before the court during the trial of 04-C-39.

However, even if the trial court's bench ruling in 04-C-39 is seemingly in conflict with its written Order in 07-C-76, granting Mr. Lloyd's dismissal motion, the subsequent written ruling controls. A court of record speaks only through its records or orders. This Court has held that a litigant's concerns in regard to the difference between a circuit court's ruling from the bench and the subsequent written order have no merit. *Legg v. Felinton*, 219 W.Va. 478, 637 S.E.2d 576 (2006). When a circuit Court's written order conflicts with its oral statement, the written order controls. *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992). Thus, the Order entered in 07-C-76 granting dismissal of the underlying case is the only Order at issue in this appeal.⁶

⁵ See page 1078 of 04-C-39 Trial Transcript, attached as Exhibit E.

⁶ This Court has already rejected Lloyd's Inc.'s appeal of 04-C-39.

Further, the circuit court's Order of February 11, 2009 granting dismissal of 07-C-76 makes it clear that while the "cause of action in this case is not precisely that same as that in the prior case, it could have been resolved had it been properly presented in the prior action."⁷ The circuit judge's Order clearly holds that Lloyd's, Inc. was barred from making its case regarding the alleged misapplied funds in 04-C-39, not because the court felt the argument was more suited to a subsequent action, but because the Appellant did not raise the issue in the original case until after the jury trial was well underway and Mr. Lloyd was arguing for a judgment as a matter of law. The circuit court acknowledged that the offset argument was on the periphery of the of the original proceedings, but clearly stated that Lloyd's, Inc. did not squarely and properly put the issue before the court. Also, the trial court in April 2007 could not have ruled on whether a subsequently filed complaint would be barred by the doctrine of *res judicata* or barred by failure to previously assert a compulsory counterclaim. At that time, the court could not know contents of any subsequently filed complaints. The court could not rule whether a subsequently filed complaint was proper before it was even filed. Thus any dicta by the trial court during its bench ruling regarding hearing the issues on another day or during another trial is not binding.

IV. CONCLUSION

In order for this state's judicial system to function, it is essential that judgments be final and that litigants not be twice faced with the expense and vexation of being a party to the same lawsuit. Rule 13 of the *West Virginia Rules of Civil Procedure* and the doctrine of *res judicata* exist to ensure that basic safeguards are met. Lloyd's Inc. has tried, through duplicitous litigation and various appeals and post-judgment motions, to avoid paying a valid judgment entered against it more than two (2) years ago. Civil action 07-C-76 should be not be a vehicle for Lloyd's Inc. to obtain another

⁷ See Order, entered February 11, 2009, attached as Exhibit F.

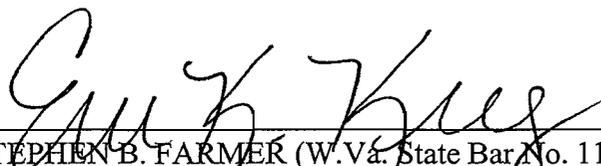
shot at appellate review of the circuit court's decision in 04-C-39. In this case, Plaintiff already had the opportunity to fully address the matters pled in its underlying complaint in the original action, 04-C-39. Moreover, the information which forms the basis of this lawsuit was the subject of complete discovery in the original action. Lloyd's Inc. asserts that it was barred from being able to address the alleged offset payments in 04-C-39, but the fact is that it chose not to put the issue squarely in front of the court. Mr. Lloyd should not face the burden of two trials and be forced to wade through the same discovery process twice because Lloyd's, Inc. now wishes to raise an argument that it should have properly raised in the original proceeding. Accordingly, Lloyd's, Inc. should be estopped by both Rule 13 of the *West Virginia Rules of Civil Procedure* and by the doctrine of *res judicata* from relitigating the issues raised in this matter through its underlying complaint and the dismissal of Lloyd's, Inc.'s complaint should be affirmed.

WHEREFORE, for the foregoing reasons, Appellee Charles R. Lloyd respectfully requests that this Court deny the Appellant's Petition for Appeal and affirm Judge Richard A. Facemire's February 11, 2009 Order granting Mr. Lloyd's Motion to Dismiss 07-C-76 in its entirety.

CHARLES R. LLOYD

Defendant,

By Counsel:



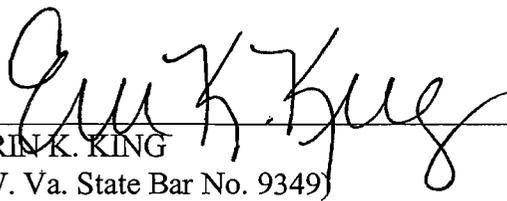
STEPHEN B. FARMER (W.Va. State Bar No. 1165)
ERIN K. KING (W.VA. State Bar No. 9349)
FARMER, CLINE & CAMPBELL, PLLC
746 Myrtle Road
Post Office Box 3842
Charleston, West Virginia 25338
(304) 346-5990

CERTIFICATE OF SERVICE

I, Erin K. King, do hereby certify that on the 29th day of June, 2009, I served the foregoing **“Brief on Behalf of Appellee Charles R. Lloyd”** upon all counsel of record by sending a true and accurate copy thereof, U. S. Mail, postage prepaid addressed as follows:

Kenneth E. Webb, Esquire
Bowles, Rice, McDavid, Graff & Love, LLP
P. O. Box 1386
Charleston, WV 25325-1386
Counsel for William G. Lloyd

The Honorable Richard A. Facemire, Judge
Braxton County Circuit Court
Braxton County Courthouse
300 Main Street
Sutton, West Virginia 26601


ERIN K. KING
(W. Va. State Bar No. 9349)

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE