

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 34866

Civil Action No.: 07-C-76 (Circuit Court of Braxton County, West Virginia)

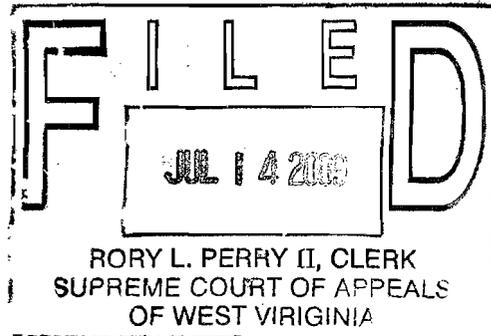
**LLOYD'S, INC., a West Virginia
Business corporation,**

Appellant,

v.

CHARLES R. LLOYD,

Appellee.



REPLY BRIEF ON BEHALF OF APPELLANT

Kenneth E. Webb, Jr. (WVSB #5560)
J. Mark Adkins (WVSB #7414)
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INTRODUCTION

This action is an appeal by Lloyd's, Inc. ("Lloyd's"), a West Virginia business corporation owned and operated by William G. "Greg" Lloyd, which operates a hardware store in Flatwoods, Braxton County, West Virginia. Lloyd's appeals an Order entered February 11, 2009, by Judge Facemire of the Circuit Court of Braxton County which denied Lloyd's Motion to Amend its Complaint and then dismissed Civil Action No.: 07-C-76. In the Civil Action, Lloyd's brought an action for unjust enrichment and conversion against Charles R. Lloyd (Appellee), who is the estranged father of Greg Lloyd and who performed bookwork for Lloyd's in the late 1990s and into the early 2000s. The Civil Action is based upon accounting entries in the books of Lloyd's made by the Appellee that conclusively show that the Appellee, or a company the Appellee owns or controls – Lloyd Stave Company – was overpaid on a debt by at least \$84,000.00.

This misapplication/overpayment came to light during the prosecution of an earlier civil action which included, *inter alia*, an action by the Appellee against Lloyd's to collect a \$132,000.00 Promissory Note. At the trial on the Promissory Note, Lloyd's sought to introduce evidence about the misapplication/overpayment in defense of the note obligation. Counsel for Appellee objected and claimed that the alleged overpayment went to Lloyd Stave Company – who was not a party to the earlier civil action – so that the misapplication/overpayment was not properly a part of the earlier civil action. Counsel for Lloyd's argued that the misapplication/overpayment issue was a proper defense and, in the alternative, asked that the pleadings be amended to conform to the evidence so that Lloyd's could present the misapplication/overpayment issue as a defense to the \$132,000.00 note obligation. The trial court – also Judge Facemire and the Circuit Court of Braxton County –

sustained the Appellee's objection and denied Lloyd's motion to amend the pleadings in the earlier civil action to conform the case to the evidence. Importantly, Judge Facemire ruled that the misapplication/overpayment would have to be pursued in another action. Accordingly, Lloyd's filed the proceeding below at the conclusion of the earlier action.

In response to the proceeding below, Appellee, by counsel, changed course entirely and argued that the misapplication/overpayment should have been asserted in the earlier civil action. Appellee's contention in the earlier civil action notwithstanding – that the misapplication/overpayment could not properly be considered in the earlier civil action – Appellee moved to dismiss the proceeding below on *res judicata* grounds. In the February 11, 2009, Order that Lloyd's seek relief from herein, Judge Facemire likewise changed course and now holds that Lloyd's should have raised the misapplication/overpayment issue in the earlier civil action even though Judge Facemire acknowledges that Lloyd's attempted to do so and that the trial court refused to allow Lloyd's to raise the misapplication/overpayment issue. See February 11, 2009, Order at ¶ 3 and 4.

Under the facts and law involved in the proceeding below and the earlier civil action, the trial court committed reversible error when it dismissed the proceeding below and refused to allow amendment of the proceeding to join Lloyd Stave Company as a party-defendant. The trial court misapplied the doctrine of *res judicata* and improperly held that the misapplication/overpayment issue was a compulsory claim under the facts and circumstances of the earlier case. Where, as in the earlier case, a party is prevented from presenting an issue on the merits, *res judicata* should not apply. Additionally, because the misapplication/overpayment issue was being offered as a defense to the note obligation and was discovered well after the

pleading stage of the earlier case, the lower court improperly held that misapplication/overpayment issue was a compulsory claim in the earlier case.

ARGUMENT

Under the unique facts and circumstances of this and the underlying action, neither the doctrine of *res judicata* or the argument that Rule 13 of the West Virginia Rules of Civil Procedure bars adjudication of the present action. As was argued in the initial appeal brief, Lloyd's unjust enrichment and conversion claims are not barred by the doctrine of *res judicata* because the requisite elements are not satisfied in the present action – namely, the causes of action and parties were not the same. *See* Appeal Brief at pp. 7-10. Likewise, Lloyd's claims for unjust enrichment and conversion were not compulsory counterclaims to the previous civil action because Lloyd's did not know of the existence of the claims at the time it answered Charles Lloyd's claims.. *See* Appeal Brief at pp. 10-12.

What makes this appeal unusual is that both counsel for Charles Lloyd and the lower court initially agreed that the unjust enrichment and conversion claims arising out of the misapplication of \$84,000.00 involved a separate party – namely, Lloyd Stave Company – and a separate transaction or occurrence, so that the issues could not be raised in the earlier case and had to be raised in a separate action. When Lloyd's filed the separate action, counsel for Charles Lloyd and the lower court reversed course with counsel arguing and the court finding that the separate action was precluded by *res judicata* and Rule 13 of the West Virginia Rules of Civil Procedure. Under the facts and circumstances of this case, the lower court's dismissal of the instant action is clearly wrong. Assuming that either the doctrine of *res judicata* or the preclusion of Rule 13 apply, counsel for Charles Lloyd's earlier position that the unjust enrichment and conversion claims involved a different party and a different transaction or

occurrence and the lower court's express reservation allowing for the filing of a separate action on the unjust enrichment and conversion claims, defeats any claim preclusion brought about by either the doctrine of *res judicata* or Rule 13.

The *Restatement (Second) of Judgments* – cited by counsel for Charles Lloyd in the response brief – recognizes instances where claims allegedly susceptible to either *res judicata* or Rule 13 may be prosecuted in a separate, subsequent action. Section 26 of the *Restatement (Second) of Judgments* provides for a list of exceptions to the general rule merging and then extinguishing allegedly related claims. Section 26 provides, in relevant part, that:

- (1) When any of the following circumstances exists, the general rule of § 24 [defining when claims are merged and subject to preclusion] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
 - (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
 - (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; ...

Restatement (Second) of Judgments § 26 (1982).

In the instant case, both of the above-cited exceptions apply. First, in the earlier case, counsel for Charles Lloyd argued that the \$84,000.00 claim involved a different party – Lloyd Stave Company and not Charles Lloyd – and involved a transaction or occurrence separate from the \$132,000.00 note claim at issue in the earlier action. The transcript from the earlier trial recorded counsel for Charles Lloyd's objections to considering the \$84,000.00 claim as follows:

This [Charles Lloyd's \$132,000.00 note claim] is a note that is owed directly to Mr. Lloyd, it's acknowledged, the debt is signed by the debtor, and it's acknowledged and it's not been repaid to Mr. Lloyd. They [Lloyd's Inc. and Greg Lloyd] have a problem with some Lloyd's Stave Company, uh, debt that's entirely separate . . . they [Lloyd's Inc. and Greg Lloyd] should have brought an action on that debt between Lloyd's Stave Company and Lloyd's Inc.

Trial Transcript from Civil Action No. 04-C-39 at pp. 1016 attached hereto as Exhibit A.

Second, based upon the arguments of counsel for Charles Lloyd, the lower court determined that the \$84,000.00 claim was separate and had to be brought in a separate action. In addressing the \$84,000.00 claim in relation to the \$132,000.00 note, Judge Facemire expressly ruled that the \$84,000.00 claim was reserved for a second action. Judge Facemire explained:

I would agree with, uh, Mr. Farmer, uh, if payments went to Lloyd's Stave Company, a corporate entity, is a separate entity and considered an individual person. And if, uh, they were wrongfully paid then, uh, a proper action to, uh, get that from Lloyd's Stave Company would be proper and that, uh, could be done, uh, in the matter. And, uh, I think that's the way to correct that if the, uh, if it's been misapplied or, uh, uh, whatever given[,] deposited, or whatever, not given[;] credited. And I certainly think if the Plaintiff[s] say[] that the debt was created and then it was extinguished by payment and there was another payment made, uh, after the thing was paid off, then [there is] unjust enrichment and those things. But, that's another day another dollar, so to speak, in the matter.

Trial Transcript from Civil Action No. 04-C-39 at pp. 1022 attached hereto as Exhibit B.

Under the restatement provision and facts cited above, the lower court should not have dismissed the second action. To be sure, counsel for Charles Lloyd – contrary to his position now – argued that the \$84,000.00 claim should be brought in a separate action. Likewise, the lower court – contrary to the ruling appealed from herein – initially ruled that the \$84,000.00 claim for unjust enrichment could be brought in a separate action. Assuming *in*

arguendo that the \$84,000.00 claim might have been subject to claim preclusion, the positions taken by opposing counsel and the lower court in the earlier civil action constitute exceptions to claim preclusion.

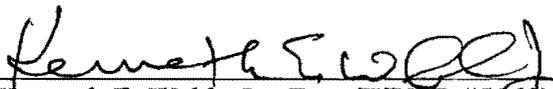
CONCLUSION

The trial court erred when it determined that the doctrine of *res judicata* barred Lloyd's misapplication/overpayment claims in the proceeding below because Lloyd's unjust enrichment and conversion claims were neither presented nor resolved in the previous civil action, despite Lloyd's attempt to address them. The trial court also erred when it determined that Lloyd's misapplication/overpayment claims in the proceeding below were compulsory claims because Lloyd's did not know that the claims existed when it answered Appellee's note claim. At the trial transcript demonstrates, counsel for Charles Lloyd advocated for and acquiesced in the maintenance of a separate action to pursue the \$84,000.00 claim. Likewise, the lower court agreed with counsel for Charles Lloyd and expressly reserved pursuit of the \$84,000.00 claim for a separate action. Under these facts and circumstances, the \$84,000.00 claim did not merge with any other claim or defense in the earlier action and nothing in the earlier action precludes maintenance of the present case raising the \$84,000.00 claim.

WHEREFORE, Appellant, Lloyd's, Inc., respectfully requests that this Honorable Court reverse the decisions of Judge Facemire of the Circuit Court of Braxton County and remand the matter to the trial court for further proceedings.

LLOYD'S, INC.,

By Counsel,


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IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA:

WILLIAM G. LLOYD,

Plaintiff,

VS: // CA #04-C-39

BRAXTON LUMBER COMPANY, INC.
A West Virginia Corporation; and
CHARLES R. LLOYD, II an individual

Defendants,

VS.

BRAXTON LUMBER COMPANY, INC.,
A West Virginia Corporation; and
CHARLES R. LLOYD, II, an individual,

Third-Party Plaintiffs,

VS.

LLOYD'S, INC.,

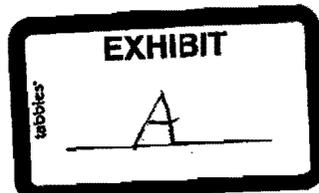
Third-Party Defendant.

IN RE: Jury trial held on the 27th day of March, 2007, in the Circuit Court of Braxton County, Braxton County Courthouse, Sutton, West Virginia.

BEFORE: Honorable Richard A. Facemire, Chief Judge

Appearances: Kenneth Webb, Jr. and Mark Adkins, Co-counsel for William G. Lloyd
Steven Thomas and Lucy Welborn, Co-counsel for Braxton Lumber Company, Inc., and Charles Lloyd, II
Steven Farmer, Attorney for Charles R. Lloyd

Reported by: Kelly S. White. ERO, 14th Judicial Circuit
Transcribed by: Edith Tichner.



1 payment to an obligation that had already been satisfied.
2 And so our defense is, that . . . that we're entitled to a
3 correct application of the \$84,000.00 payment. Which would
4 considerably reduce this \$132,000.00 obligation? We believe
5 that's a factual question, factual issue (unintelligible).

6 FARMER: I don't think you can invent a, invent a factual question
7 that way. This is a note that is owed directly to Mr. Lloyd,
8 it's acknowledged, the debt is signed by the debtor, and it's
9 acknowledged and it's not been repaid to Mr. Lloyd. They have
10 a problem with some Lloyd's Stave Company, uh, debt that's
11 entirely separate and we know that he made gifts, Lloyd Stave
12 Company loans, etc. that they should have brought an action
13 on that debt between Lloyd's Stave Company and Lloyd's Inc.
14 The fact is here, that Mr. Lloyd made a \$132,000.00 note,
15 loan evidenced by a note, the evidence is that loan has not
16 been repaid and it must be repaid. So, I think, I mean we
17 meet the legal, we satisfied the legal, uh, criteria for
18 collecting on a note. And we should be awarded the note plus
19 interest. But, there is no genuine issue in fact.

20 WEBB: This is about as unique a case as I think you're ever gonna
21 see. And it's unique because Charles is doing all the book
22 work and he has the unique ability as the CEO of all these
23 companies not only to do the books, but to say that well,

1 note in this matter. And the Plaintiff, uh, in the sum of
2 \$132,000.00 at 5% interest. And, uh, the Court does not
3 believe that is a factual issue, uh, that should go to the
4 jury. I don't see any genuine issue of material fact, uh, in
5 the matter. I would agree with, uh, Mr. Farmer, uh, if
6 payments went to Lloyd's Stave Company, a corporate entity,
7 is a separate entity and considered an individual person.
8 And if, uh, they were wrongfully paid then, uh, a proper
9 action to, uh, get that from Lloyd's Stave Company would be
10 proper and that, uh, could be done, uh, in the matter. And,
11 uh, I think that's the way to correct that if the, uh, if
12 it's been misapplied or, uh, uh, whatever given deposited, or
13 whatever, not given credited. And I certainly think if the
14 Plaintiff's says that the debt was created and then it was
15 extinguished by payment and then there was another payment
16 made, uh, after the thing was paid off, then their unjust
17 enrichment and those things. But, that's another day another
18 dollar, so to speak, in the matter. And I will note and
19 preserve all parties objections and exceptions. I note
20 there's an issue as to rental payments for the land of the
21 hardware store and the auto store, and I've outlined these
22 for myself, so I could understand it.

23 FARMER: Yes, yes, your Honor, there is and I was going to raise that.

EXHIBIT

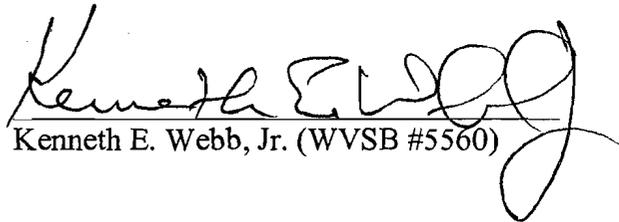
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CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., hereby certify that a true and correct copy of the foregoing *Reply Brief on Behalf of Appellant* was forwarded via U.S. Mail upon counsel of record, addressed as indicated, on the 13th day of July, 2009:

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Kenneth E. Webb, Jr. (WVSB #5560)