

No. _____

**In The
Supreme Court of the United States**

—————◆—————
MICHAEL M. WALLACE,

Petitioner,

v.

CLAIRE HAYDEN WALLACE,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—————◆—————
PETITION FOR A WRIT OF CERTIORARI

—————◆—————
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QUESTIONS PRESENTED

This Court in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) narrowly confined the scope of the domestic relations exception to diversity jurisdiction holding that it encompasses only cases involving a divorce, alimony or child custody decree. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), the Court distinguished between jurisdiction and preclusion principles and held that the concurrent jurisdiction conferred by Congress precludes dismissal of a federal action solely because it asserts similar or identical claims in parallel actions in state and federal court.

While a divorce was pending in state court, Petitioner filed a diversity action in federal district court under §570.223 R.S.Mo. against his estranged wife for identity theft seeking actual and statutory damages. The same conduct by the wife had been the subject of discovery in the ongoing divorce litigation. The district court dismissed for lack of jurisdiction under the domestic relations exception. The Eighth Circuit affirmed holding that the exception applied because the issue of the wife's conduct was "inextricably intertwined" to the issue of marital misconduct in the ongoing divorce proceeding.

The questions presented are:

1. Is Petitioner's diversity action for identity theft a "suit seeking a divorce, alimony, or divorce decree" under this Court's decision

QUESTIONS PRESENTED – Continued

in *Ankenbrandt v. Richards* which warrants application of the domestic relations exception?

2. Does the decision of the Court of Appeals impermissibly expand the scope of the domestic relations exception by including cases that, though closely related, do not fall within the core domestic relations proceedings required by this Court in *Ankenbrandt v. Richards*?

3. May the domestic relations exception, consistent with *Ankenbrandt v. Richards*, *Marshall v. Marshall*, 547 U.S. 293 (2006), and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, be expansively interpreted to incorporate preclusion principles and divest federal courts of jurisdiction solely because a pending state court proceeding presents the same or identical questions, notwithstanding the long-established system of concurrent state and federal jurisdiction?

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 736 F.3d 764, App. 1. The order and opinion of the United States District Court for the Eastern District of Missouri is unreported, App. 9-13.



JURISDICTION

The Eighth Circuit Court of Appeals issued its opinion on November 20, 2013. It denied rehearing and rehearing *en banc* on January 13, 2014, App. 14. An extension of time for filing the Petition for Certiorari was granted on April 10, 2014 extending the time for filing through May 13, 2014.

Jurisdiction of this Court is involved under 28 U.S.C. §1254(1). Jurisdiction in the district court was based on 28 U.S.C. §1332. Jurisdiction for the court of appeals was based on 28 U.S.C. §1291.



STATUTES INVOLVED

28 U.S.C. §1332 – Diversity of citizenship; amount in controversy; costs.

- (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of \$75,000.00, exclusive of interest and costs, and is between –

(1) citizens of different states;

* * *

Section 570.223 Revised Statutes of Missouri –
Identity Theft.

1. A person commits the crime of identity theft if he or she knowingly and with the intent to deceive or defraud obtains, possesses, transfers, uses, or attempts to obtain, transfer or use, one or more of identification not lawfully issued for his or her use.

2. The term “means of identification” as used in this section includes, but is not limited to, the following:

1. Social Security numbers;
2. Drivers license numbers;
3. Checking account numbers;
4. Savings account numbers;
5. Credit card numbers;
6. Debit card numbers;
7. Personal identification (PIN) code;
8. Electronic identification numbers;
9. Digital signatures;
10. Any other numbers or information that can be used to access a person’s financial resources;
11. Biometric data;
12. Fingerprints;
13. Passwords;
14. Parent’s legal surname prior to marriage;
15. Passports; or
16. Birth Certificates

3. A person found guilty of identity theft shall be punished as follows:

* * *

(4) Identity theft which results in the theft or appropriation of credit, money, goods, services or other property exceeding five thousand dollars and not exceeding fifty thousand dollars in value is a class B felony;

* * *

4. In addition to the provisions of subsection 3 of this section, the court may order that the defendant make restitution to any victim of the offense. Restitution may include payment for any costs, including attorney fees, incurred by the victim:

(1) In clearing the credit history or credit rating of the victim; and

(2) In connection with any civil or administrative proceeding to satisfy a debt, lien, or other obligation of the victim arising from the actions of the defendant.

5. In addition to the criminal penalties in subsections 3 and 4 of this section, any person who commits an act made unlawful by subsection 1 of this section shall be liable to the person to whom the identifying information belonged for civil damages of up to five thousand dollars for each incident, or three times the amount of actual damages, whichever amount is greater. A person damaged as set forth in subsection 1 of this

section may also institute a civil action to enjoin and restrain further acts that would constitute a violation of subsection 1 of this section. The court, in an action brought under this subsection, may award reasonable attorneys' fees to the plaintiff.



STATEMENT OF THE CASE

Michael and Claire Wallace were married on December 21, 2006 and resided in Missouri until their separation in May 2010. Claire, an administrator for the Caruthersville, Missouri public schools, retained the marital home. Michael moved to Arkansas where he was employed as a public school principal and became a citizen of the State of Arkansas.

In early 2011, the wife filed for a divorce in the Circuit Court of Pemiscot County, Missouri. Shortly thereafter, Michael began receiving calls at the school where he worked from debt collectors demanding payment of delinquent credit card balances in his name. The credit cards had been taken out without his knowledge or authorization. In the course of the litigation in the divorce proceedings, he learned that his wife had applied for multiple credit cards in his name listing herself as an authorized signer. As she opened each account in Michael's name, she made large cash withdrawals and balance transfers to pay off her credit card debts that existed prior to the marriage. She initially denied all knowledge of the credit cards, but several months later, finally

produced correspondence she had with the credit card companies prior to the time she filed for the divorce in which she requested that her name be removed from the accounts as an authorized signer. The companies confirmed by fax to her that her name had been removed and informed her that as an authorized signer she had incurred no liability for the credit card debt.

On December 14, 2011, Mr. Wallace filed suit in the United States District Court for the Eastern District of Missouri, Southeast Division for identity theft pursuant to Missouri's identity theft statute, §570.223 R.S.Mo., based on the wife's fraudulent conduct involving the credit cards. He invoked the court's jurisdiction under 28 U.S.C. §1332 asserting the requisite jurisdictional amount and diversity of citizenship. He sought actual and statutory damages, and declaratory and an injunctive relief prohibiting the wife from further using his personal information and means of identification.

On September 11th and 25th, 2012, the state court heard evidence in the dissolution action. Michael did not assert any claim for identity theft or seek any relief or damages thereon throughout the entire course of divorce action. Thereafter, on November 8, 2012, the district court *sua sponte* without notice entered an order dismissing the tort claim for lack of subject matter jurisdiction under the domestic relations exception to Federal jurisdiction. In an accompanying memorandum opinion, the court based its ruling on controlling circuit precedent contained in

Kahn v. Kahn, 21 F.3d 859 (8th Cir. 1994). It held that when a cause of action closely relates to, but does not precisely fit the contours of an action for divorce, subject matter jurisdiction does not lie in the federal court. It found that conduct which formed the basis for the identity theft claim arose during the marriage, was a matter to be addressed by the divorce court, and was therefore “inextricably intertwined” with an ongoing divorce proceeding. On December 7, 2012, Petitioner filed a timely notice of appeal to the Eighth Circuit Court of Appeals.

On July 10, 2013, the state court entered its Judgment and Decree of Dissolution of Marriage. Plaintiff filed a motion to amend the judgment and for leave to file a claim for identity theft. On September 26, 2013, the Eighth Circuit held oral argument in the federal appeal. On September 27, 2013, the state court held a hearing on the on the pending post-trial motions. It amended its judgment to correct errors in the valuation of property, but denied leave to assert a counter-claim for identity theft as untimely. After reviewing the course of the federal identity theft action, the court ruled that a statutory identity theft claim was not a compulsory counter-claim under Missouri law and that the husband was not hindered by any decision in the dissolution proceeding from pursuing his claim for identity theft under applicable state statutes. It stated, “The tort of ‘identity theft’ is a statutorily created tort that has specific elements, has specific damages and grants the right to trial by jury. This Court is sitting as a ‘court of equity’ in the dissolution action which does not contemplate a jury trial.”

On November 20, 2013, the Eighth Circuit affirmed the dismissal by the district court following its precedent established in *Kahn v. Kahn, supra*. In doing so, it held that it was bound by the prior panel decision, and that this Court's decision in *Marshall v. Marshall*, 547 U.S. 293 (2006) did not constitute an inconsistent intervening decision which would permit it to ignore a precedent.



REASONS FOR GRANTING PETITION

THE EIGHTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE DOMESTIC RELATIONS EXCEPTION BEYOND THE CORE PROCEEDINGS FOR DIVORCE, ALIMONY AND CHILD CUSTODY IS CONTRARY TO THIS COURT'S DECISIONS IN *ANKENBRANDT v. RICHARDS*, *MARSHALL v. MARSHALL* and *EXXON MOBIL CORP. v. SAUDI BASIC INDUSTRIES CORP.* AND CONSTITUTES AN UNWARRANTED AND UNFETTERED INTRUSION ON FEDERAL DIVERSITY JURISDICTION.

A. The Eighth Circuit's Test for the Domestic Relations Exception in Ongoing, Concurrent Litigation in State and Federal Court is Contrary to the Decisions of This Court.

In response to a trend by lower courts expanding the domestic relations exception to federal diversity jurisdiction, 28 U.S.C. §1332, this Court in its

decision in *Ankenbrandt v. Richards*, 504 U.S. 689, 703-704 (1992) and *Marshall v. Marshall*, 547 U.S. 293, 299 (2006), clarified the scope of the exception and narrowly confined it to core actions seeking a decree of dissolution, alimony or child custody. In *Ankenbrandt* and *Marshall*, the court strictly circumscribed the scope of the domestic relations and probate exceptions to suits in federal court. *Ankenbrandt* defined the core proceeding within which a federal suit must fall to qualify for the exception. The court held:

By concluding as we do, that the domestic relations exception encompasses only cases involving issuance of a divorce, alimony or child custody decree we necessarily find that the Court of Appeals erred by affirming the District Court's invocation of the exception. (*Id.* at 704).

In reaching its decision, the Eighth Circuit relied solely on the domestic relation exception to subject matter jurisdiction. In its opinion, it explained its test for application of the exception in the context of parallel actions in federal court as follows:

Kahn thus stands for the proposition that a federal suit is "inextricably intertwined" with a state domestic proceeding, thereby depriving the federal court of jurisdiction, where the requested federal remedy overlaps the remedy at issue in the state proceeding. *Id.*

This occurs where the federal suit involves a remedy which is essentially domestic – where in addressing the same conduct involved in a state domestic proceeding, the effect of the remedy in the federal suit is to modify, nullify, or predetermine the domestic ruling of the state proceeding.

This test, first advanced in *Kahn v. Kahn* and since reaffirmed and extended in the present case, incorporates elements of preclusion law in its formulation of the domestic relations exception. In doing so, the court confounds jurisdiction with preclusion and runs afoul of concurrent jurisdiction conferred by Congress upon the district court and decisions of this Court. Not only does the court of appeals apply preclusion principles out of context, but it seeks to establish a federal preclusion test for diversity actions rather than applying state preclusion law.

The Eighth Circuit has significantly expanded the scope of the domestic relations exception permitting the application of the exception where the underlying claim is deemed to be “inextricably intertwined” with an ongoing state court’s domestic relations proceeding. In its discussion of the proper standard for applying the domestic relations exception, the court did not mention this Court’s decision in *Ankenbrandt v. Richards* but relied entirely on *Kahn*. It was of the opinion that nothing in *Marshall v. Marshall*, including the discussion of *Ankenbrandt*, warranted a reconsideration of the holding.

Petitioner's claim for identity theft is a well recognized statutory cause of action under §570.223 R.S.Mo. designed to vindicate an important public policy for protecting the public and compensating victims of identity theft. The statute authorizes the award of actual and statutory damages as well as providing for restitution and injunction relief to restrain future violation of the statute.

Petitioner in his diversity action in federal court has sought only the relief authorized by the statute. At the time it was filed, he and his wife were parties to a divorce proceeding in state court. No decree of dissolution was entered for more than nineteen months after the suit was filed and more than eight months after the district court dismissed the suit for lack of subject matter jurisdiction.

The fact that Petitioner and Respondent were married at the time of the action constituting identity theft or that a divorce was pending cannot change the character of statutory claims for identity theft. Where as here, a party has an independent cause of action and does not require a determination of status to establish his claim, the claim has no relation to a domestic proceeding and therefore does not come within its scope of the exception. Petitioner submits that his tort action does not fall within the domestic relations exception to diversity jurisdiction and that the Court should grant this petition for certiorari, reverse the decision below, and order Petitioner's federal tort claim reinstated.

B. The Eighth Circuit's Test for Application of the Domestic Relations Exception Improperly Incorporates Preclusion Principles and Is Contrary to This Court's Decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*

The Eighth Circuit holds that Petitioner's identity theft action falls within the domestic relations exception, not because it is a core domestic relations proceeding seeking a divorce, but because the claim arose during the marriage and the same issue pertaining to conduct of the wife was also raised in the ongoing divorce action. App. 5-6.

As further support of its opinion, the court noted that Respondent had advised during oral argument that the state court had entered a decree of dissolution.¹ It reasoned that allowing the tort action to proceed would lead to federal involvement in the marital relationship of the parties. It accordingly held the statutory action was beyond the district court's jurisdiction. App. 5.

The court found the fact that the same or similar issues were raised in both proceedings was decisive of the jurisdictional issue. In reaching that decision, the court improperly applied principles of preclusion

¹ The decree was entered on July 10, 2013 some eight (8) months after the district court's dismissal and proceedings were still pending at the time of oral argument on September 26, 2013.

rather than jurisdiction. In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), the Third Circuit in similar fashion had applied the *Rooker-Feldman* doctrine to parallel proceedings between the parties in state and federal court. Saudi Basic Industries (SABIC) filed a preemptive action against Exxon Mobil seeking a declaratory judgment that certain royalty charges it had made to Exxon Mobil as a joint venture partner were proper. Exxon Mobil counter-sued in federal district court alleging that SABIC had overcharged the joint ventures. Six months later, Exxon Mobil filed an answer in the state court action asserting as counterclaims the same claims it had made in its federal action. After Exxon prevailed on its counterclaim in state court, the district court denied SABIC's motion to dismiss.

On appeal, the Third Circuit applied the *Rooker-Feldman* doctrine to hold that the claims were "inextricably intertwined" and federal jurisdiction terminated upon the entry of the judgment by the state court. It concluded that Exxon Mobil in the state action was attempting to invalidate a state court judgment and that *Rooker-Feldman* applied to bar federal jurisdiction. This Court reversed. It held:

This Court had repeatedly held that "the pending of an action in the state court is no bar to proceedings concerning the same matter in federal court having jurisdiction."
(*Id.* at 292).

It further stated that while comity or abstention doctrines might be applied in the appropriate

circumstance to stay or dismiss a federal action, properly invoked concurrent jurisdiction “[does] not vanish if a state court reaches judgement on the same or related question while the case remains *sub judice* in federal court.” It stated that disposition of the federal action would be governed by preclusion law and that district court is not precluded from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. It further held:

If a federal court plaintiff “present[s] some independent claim, albeit one that denies the legal conclusion that a state court has reached in a case to which he was a party there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.” [Citations omitted]. (*Id.* at 293).

The Eighth Circuit’s alternative formulation for applying the domestic relations exception likewise confuses preclusion with jurisdiction. Preclusion as this Court has noted is not a matter of jurisdiction and can only be addressed by a court properly exercising subject matter jurisdiction. Jurisdiction in this case, like that in *Exxon Mobil*, existed at the time the identity theft suit was filed, and the fact that the state court a year and a half later entered a divorce decree had no effect on jurisdiction.

Exxon Mobil is also important because it holds that when Congress has conferred concurrent jurisdiction, a federal court tort action is not subject to

dismissal because it asserts a similar or identical claim in a parallel state court action. Absent abstention or dismissal based on comity, both actions may proceed to judgment. Once a final judgment disposes of one of the cases, the issue then becomes one of preclusion and *res judicata* under state law, not an issue of jurisdiction.

The same point was prominent in this Court's decision in *Marshall v. Marshall*, 547 U.S. 293 (2006). The Court in addressing the probate exception, closely akin to the domestic relations exception, reached the same conclusion as it did in *Exxon Mobil* the year before. Raising the identical claims in concurrent actions provided no basis for dismissal on jurisdictional grounds. It rejected the Ninth Circuit's decision that applied the probate exception where the tort claim did not involve the administration of an estate or any other purely probate matter. (547 U.S. 293, 304). The court of appeals, like the Eighth Circuit *sub judice*, had held that a case nevertheless falls within the exception if it raised a question which would ordinarily be decided by a probate court in determining the validity of an estate planning instrument whether the questions involved fraud, undue influence, or tortious interference. The fact that the issue of tortious interference and fraud might be issues in both the federal suit and the probate court was insufficient to deprive the district court of jurisdiction.

In the present case, the Eighth Circuit bases its decision on the fact that the wife's conduct was raised

in both the identity theft action and in the divorce court. Indeed the court noted that the state court was required to consider the conduct of the parties. App. 6. These considerations have no relevance to the issue of jurisdiction. Whether Petitioner's tort claim is subject to preclusion is not a jurisdictional question but one that arises only after jurisdiction has been established.

C. The Eighth Circuit's Decision Directly and Irreconcilably Conflicts With A Majority of the Courts of Appeals.

A majority of the courts of appeals have followed and conformed their decisions addressing the domestic relations exception to *Ankenbrandt* and *Marshall*. These include the First, Second, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, which narrowly limit the application of the domestic relations exception to suits seeking a divorce, alimony, or a child custody decree. See *Dunn v. Cometa*, 238 F.3d 38 (1st Cir. 2001); *Mooney v. Mooney*, 471 F.3d 246 (1st Cir. 2006); *Matusow v. Trans-County Title Agency*, 545 F.3d 241 (3d Cir. 2008); *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998); *Friedlander v. Friedlander*, 149 F.3d 739 (7th Cir. 1998); *McNtyre v. McNtyre*, 771 F.2d 1316 (9th Cir. 1985); *Johnson v. Rodrigues*, 226 F.3d 1103 (10th Cir. 2000); and *Stone v. Wall*, 135 F.2d 1438 (11th Cir. 1998). They generally accept that this Court in *Ankenbrandt* strictly limited the scope of the exception to three categorical or core domestic proceedings. In doing so, they decline to apply it to

suits beyond the core proceedings, even where closely related or identical to matters at issues in an ongoing state domestic action.

Where parallel actions are pending in state and federal courts, courts conduct an initial inquiry to determine the character of the federal action. In the process, they typically address such questions as whether it involves a traditionally recognized tort or statutory cause of action, whether damages are sought, and its primary objective. If the action falls outside the core proceedings, the domestic relation exception does not apply and the court has jurisdiction. Even in those instances where jurisdiction is proper, the courts have a degree of flexibility in lessening the tensions posed by concurrent jurisdiction. Where the same or similar issues are closely related or intertwined in both cases and the circumstances warrant, a federal court may retain jurisdiction over a damage claim, defer to a state court on abstention grounds, and stay its hand from proceeding further pending resolution of a parallel state action.

The Eighth Circuit jurisprudence presents a sharp and irreconcilable conflict with the decisions of the majority of the circuit courts of appeals which have addressed the issue. In its decision below and prior precedent in *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994), the court goes beyond this Court's admonitions by expanding the exception to establish an alternate test for the domestic relations exception. Unlike the

other courts of appeals, it made no reference to this Court's ruling in *Ankenbrandt* or its treatment of the domestic relations exception. It did mention *Marshall*, but only to the extent that it considered its discussion of the exception to be nothing more than a description of what the Court had done in previous cases and that it was insufficient to permit it to ignore its precedent. Its test involves a two-step process. First, it determines whether the federal suit falls within a core domestic relations proceeding and if so the exception applies. In the matter below, the court did not expressly address whether the identity theft action was a core proceeding – a suit seeking a decree of divorce, alimony, or child custody. Nevertheless, it is implicit in its decision that identity theft action was not a core domestic proceeding and therefore did not fall within the exception. Second, once the court has determined that the suit is not a core action, the Eighth Circuit makes an abrupt departure from the other circuits. It applies the exception and bars jurisdiction when elements of a suit are closely related or “inextricably intertwined” with issues in a state court domestic relations proceeding. That part of the test is derived from preclusion principles of the *Rooker-Feldman* doctrine.² Though the district court

² The “inextricably intertwined” language originated with the *Rooker-Feldman* doctrine. The doctrine is based on the two cases from which it takes its name, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 68 L. Ed. 2d 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 75 L. Ed. 2d 206, 103 S.Ct. 1303 (1983). It prohibits a federal court

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and court of appeals in the present case did not rely on *Rooker-Feldman* or abstention as a basis for its holding, it has incorporated the preclusion elements of the doctrine into the jurisdictional analysis, without its principled framework to give it meaning. Since no prior judgment had been entered in the divorce proceeding, Petitioner's identity theft claim could not be so intertwined with the state judgment as to constitute a *de facto* appeal required by the doctrine.

The Eighth Circuit asserts that the suit for identity theft was so intertwined with the consideration of marital misconduct in divorce that any remedy that might have been granted on it would have overlapped, interfered with, or pre-determined the state court's ruling in any future judgment. App. 6. It likewise asserts that granting any relief on the tort claim would modify or nullify any subsequently entered divorce decree.

In *Dunn v. Cometa*, 238 F.3d 38 (1st Cir. 2001), the First Circuit held the domestic relations exception did not apply to bar diversity jurisdiction in a case by a disabled husband against his wife for tortious infliction of emotional distress. The issue of the

from exercising subject matter jurisdiction over a suit that is a *de facto* appeal from a state court judgment. By definition it applies only in circumstances where a pre-existing state court judgment has been issued and then only to prevent a federal court from entertaining federal suits that are "inextricably intertwined" with a state court judgment. *Feldman*, 460 U.S. at 483, fn. 6.

wife's conduct was a subject of discovery in the ongoing divorce and a judgment had been entered before the tort action was filed. The court determined that the tort claim was not within the domestic relations exception. It stated that although the same underlying events may affect more than one set of legal relationships, a civil suit for fraud even between spouses is not a suit for alimony or divorce. It noted the Eighth Circuit's holding in *Kahn v. Kahn* as a conflicting decision.

Mooney v. Mooney, 471 F.3d 246 (1st Cir. 2006) is a First Circuit case which, following *Ankenbrandt* and *Marshall*, stated that a circuit precedent would no longer be followed where it approved abstention simply because the claim in a diversity action was closely related to, but not within, the probate exception.

Matusow v. Trans-County Title Agency, 545 F.3d 241 (3d Cir. 2008) was a suit by a former spouse seeking recovery of damages in tort resulting in the breach of a property separation agreement. The Third Circuit noted that *Ankenbrandt* had recognized the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree and that the domestic relations exception did not apply to statutory and tort claims asserted. In doing so it signaled that a formulation of the exception in a prior case was broader than recognized by *Ankenbrandt* and *Marshall* and announced that to the extent it conflicted with those decisions it had been abrogated. (*Id.* at 245, fn. 6).

The Sixth Circuit in *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), citing *Ankenbrandt*, held that the domestic relations exception applies only in the narrow situation where a plaintiff positively sues in federal court for a divorce, alimony or child custody. (*Id.* at 292).

In *Friedlander v. Friedlander*, 149 F.3d 739 (7th Cir. 1998), the Seventh Circuit held a suit for intentional infliction of emotional distress that arose in connection with a suit to collect alimony arrearages did not fall within the core proceeding and was therefore outside the domestic relations exception. It held the exception did not extend to a proceeding that merely arose out of a domestic dispute. It further stated that to the extent a diversity tort action and a domestic relations proceeding in state court “may overlap, though not to the point where the suit falls within the domestic relations exception,” a stay may be available to avoid tension and duplication. (*Id.* at 741).

The Ninth Circuit’s decision in *McNtyre v. McNtyre*, 771 F.2d 1316 (9th Cir. 1985) is a pre-*Ankenbrandt* decision but is consistent with the majority of the circuits. It held that the court had jurisdiction over a father’s action for damages for tortious conduct by an ex-wife and her family denying him his parental rights and visitation with his minor daughter. The court held that where the primary issues of the tort claim did not involve spousal or parental status but only damages for the injury suffered and there was no dispute as to the validity of the domestic relations judgment, the exception did not apply.

Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000) was a tort claim for intentional infliction growing out of the wrongful adoption of a child. The Tenth Circuit held such tort claims did not fall within the domestic relations exception under *Ankenbrandt*.

In *Stone v. Wall*, 135 F.2d 1438 (11th Cir. 1998), a father and his minor daughter filed suit seeking damages for interference with custody of the daughter against the child's aunt and grandmother. The district court, while acknowledging the tort claim did not fall within the core domestic relations proceedings, held abstention was appropriate because resolution of the damage claim would require an examination of the domestic relation between the parties. The court of appeals held that the case was just a suit for money damages and did not fit its precedents for application of the domestic relations exception and that it was not inclined to extend the exception to the circumstance. It also held abstention was inappropriate.



CONCLUSION

The Court should grant the petition for writ of certiorari and summarily reverse the decision of the Eighth Circuit Court of Appeals and order Petitioner's claims reinstated.

Respectfully submitted,

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App. 1

**United States Court of Appeals
for the Eighth Circuit**

No. 12-3912

Michael M. Wallace
Plaintiff-Appellant

v.

Claire Hayden Wallace
Defendant-Appellee

Appeal from United States District Court
for the Eastern District of Missouri – Cape Girardeau

Submitted: September 26, 2013
Filed: November 20, 2013

Before RILEY, Chief Judge, BYE and GRUENDER,
Circuit Judges.

RILEY, Chief Judge.

Collateral to an ongoing divorce proceeding in Missouri state court, Michael Wallace filed an identity theft tort claim in federal court under Mo. Rev. Stat § 570.223 against his wife, Claire Wallace, and alleged diversity jurisdiction, *see* 28 U.S.C.

§ 1332(a)(1). Michael asserted that during their marriage Claire stole his identity and “surreptitiously open[ed] multiple credit cards in [his] name.” Noting the Wallaces’ pending state divorce proceeding, the district court¹ dismissed the case for lack of subject matter jurisdiction under the domestic relations exception to federal jurisdiction. Having appellate jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

The Wallaces married in late 2006. They separated on May 10, 2010, and in February 2011, Claire filed for divorce in the Circuit Court of Pemiscot County, Missouri. Michael alleges that shortly after the divorce filing he discovered Claire had used his social security number and other personal information, without his knowledge, to obtain several credit cards in his name. Michael also claims Claire charged approximately \$40,000 on these cards, and since his discovery of Claire’s conduct, at least one credit card company has filed suit against him for failing to pay such charges. According to Michael, Claire had herself listed as an “authorized signer,” enabling her to use the card without retaining any liability for the charges. All of this alleged conduct occurred during the Wallaces’ marriage.

¹ The Honorable Stephen N. Limbaugh Jr., United States District Judge for the Eastern District of Missouri.

On December 14, 2011, Michael filed a diversity action in federal district court against Claire claiming identity theft, under Mo. Rev. Stat. § 570.223. Michael requested \$100,000 in actual damages, statutory treble damages, and injunctive and declaratory relief requiring Claire to satisfy the debts and prohibiting her from using his identifying information. Claire failed to respond, whereupon the clerk entered a default against her. Michael moved for a default judgment, and Claire moved to set aside the entry of default.

On November 8, 2012, the district court, without deciding the parties' motions, vacated the clerk's entry of default and *sua sponte* dismissed this suit for lack of subject matter jurisdiction. The district court held the domestic relations exception precluded its jurisdiction over Michael's claims because the claims were "tied so closely to matters appurtenant to the ongoing divorce litigation." Relying on *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994), the district court found two facts decisive: (1) Claire's alleged credit card charges were made during the marriage, and (2) the discovery requests involved in the state court divorce proceeding indicated these charges were "among the matters being raised by the parties" to be addressed by the state court.² Michael timely appealed.

² At the time the district court dismissed this case, the divorce proceeding was ongoing. The Missouri circuit court has since entered judgment.

II. DISCUSSION

“The existence of subject-matter jurisdiction is a question of law that this court reviews *de novo*.” *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011). “The domestic relations exception, first articulated in *Barber v. Barber*, 62 U.S. ([2]1 How.) 582, 584 (185[8]), divests the federal courts of jurisdiction over any action for which the subject is a divorce, allowance of alimony, or child support,” including “the distribution of marital property.” *Kahn*, 21 F.3d at 861. The question here is whether Michael’s identity theft claim against Claire falls within the domestic relations exception to federal jurisdiction.

A. Domestic Relations Exception

In *Kahn*, a Missouri state court entered a decree of dissolution, which distributed marital property disproportionately in favor of the ex-wife. *See id.* at 860. Almost a year later, the ex-wife brought a federal diversity tort law action against her ex-husband. *See id.* Both the federal suit and the state divorce proceeding essentially alleged the same misconduct of the ex-husband: “extramarital affairs, procuring loans secured by marital property and [the ex-wife]’s property,” “misappropriating the net profits” from sales of the ex-wife’s property, and “converting funds” without rendering an accounting. *See id.* at 860-61. All of his misconduct occurred during the parties’ marriage. *See id.* at 861.

In *Kahn* we held, “[The ex-wife]’s claims for relief, although drafted to sound in tort, are so inextricably intertwined with the prior property settlement incident to the divorce proceeding that subject matter jurisdiction does not lie in the federal court.” *Id.* In reaching that conclusion, we pointed to a Missouri statute requiring a divorce court take into account “[t]he conduct of the parties during the marriage’” when distributing marital property, *id.* (quoting Mo. Rev. Stat. § 452.330.1(4) (emphasis in original)), as well as the impact the distribution would have on an alimony award, *see id.* (quoting Mo. Rev. Stat. § 452.335.2(1)). Given the scope of a divorce court’s considerations under Mo. Rev. Stat. § 452.330.1, we concluded that the fact “[t]hat [the ex-wife] received property in the dissolution proceeding in part based on the wrongful conduct constituting the intentional torts [wa]s relevant to any award of damages based on that same conduct.” *Id.* at 861-62. With the two remedies – tort damages in the federal suit and a disproportionate property distribution in the state divorce proceeding – based on the same “wrongful conduct,” the tort action would require a federal court to “inquire into matters directly relating to the marital relationship or the property settlement.” *Id.* at 862. Claims so “inextricably intertwined” with a state divorce proceeding were beyond the scope of federal jurisdiction. *Id.* at 861-62.

Kahn thus stands for the proposition that a federal suit is “inextricably intertwined” with a state domestic proceeding, thereby depriving the federal

court of subject matter jurisdiction, where the requested federal remedy overlaps the remedy at issue in the state proceeding. *Id.* This occurs where the federal suit involves a remedy which is essentially domestic – where, in addressing the same conduct involved in a state domestic proceeding, the effect of a remedy in the federal suit is to modify, nullify, or predetermine the domestic ruling of the state proceeding.

As in *Kahn*, Michael alleges a tort claim based on conduct that occurred during the marriage. And the state divorce proceeding, like that in *Kahn*, took place in a Missouri state court bound by Mo. Rev. Stat. § 452.330.1(4) to consider “[t]he conduct of the parties during the marriage.” During two days of the state court proceeding the parties disputed the credit card charges and the identity of the card user. According to Claire’s statements at oral argument here, the state court labeled the debt “marital” and divided it evenly between Michael and Claire. If the federal district court were to award Michael the injunctive and declaratory relief he requests here, the award, at least in part, would undermine the judgment of the state court. These remedies would essentially require that the federal court remove the label “marital debt” and reallocate the debt division the state court has already “deem[ed] just after considering” the conduct at issue here. Mo. Rev. Stat. § 452.330.1. In this same vein, an award of damages would modify the state court’s marital distribution. Because the remedies requested here effectively would nullify part of the

divorce court's judgment based on the same conduct, the two cases are "inextricably intertwined" within the meaning of *Kahn*.

The domestic relations exception, as explained in *Kahn*, precludes subject matter jurisdiction over this case.

B. Continuing Validity of *Kahn*

We decline Michael's request to reconsider *Kahn*. "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (quoting *Owsley v. Luebbbers*, 281 F.3d 687, 690 (8th Cir. 2002) (per curiam)). We are bound by *Kahn*.

We reject Michael's contention that *Marshall v. Marshall*, 547 U.S. 293 (2006) constitutes an "intervening Supreme Court decision [] inconsistent with" *Kahn*. *McCullough v. AEGON USA Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009). *Marshall* involved the probate exception to subject matter jurisdiction. *See Marshall*, 547 U.S. at 308. The *Marshall* court's discussion of the domestic relations exception did nothing to alter the scope of that exception. *See id.* at 305-08. Rather, the Supreme Court's discussion described what the Supreme Court had done in previous cases. *See id.* Such discussion does not constitute an inconsistent "intervening Supreme Court decision" such that we would ignore our prior ruling. *See McCullough*, 585 F.3d at 1086 (explaining that a Supreme Court decision which did not specifically

change the law does not allow our court to disregard its prior decisions).

III. CONCLUSION

Following *Kahn*, we affirm.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

MICHAEL M. WALLACE,)
)
 Plaintiff,)
)
vs.)
)
CLAIRE HAYDEN WALLACE,)
)
 Defendant.)

Case No.
1:11-CV-222 SNLJ

ORDER

IT IS HEREBY ORDERED that the clerk's entry of default is vacated.

IT IS FURTHER ORDERED that this matter is dismissed for lack of subject matter jurisdiction.

Dated this 8th day of November, 2012.

/s/ Stephen N. Limbaugh, Jr.
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

MICHAEL M. WALLACE,)
)
 Plaintiff,)
)
vs.)
)
CLAIRE HAYDEN WALLACE,)
)
 Defendant.)

**Case No.
1:11-CV-222 SNLJ**

MEMORANDUM

Plaintiff Michael Wallace brought this action against his wife, Claire Wallace, pursuant to § 570.223 R.S.Mo.. Plaintiff alleges that defendant stole his identity to open multiple credit cards in plaintiff’s name and used those credit cards to incur \$40,000 in charges. Plaintiff further alleges that the defendant had bills sent to her work address in order to conceal their existence. Plaintiff and defendant were married on December 21, 2006, but they separated on May 10, 2010. The defendant filed for divorce in the Circuit Court of Pemiscot County on February 21, 2011, and that matter is still pending.

Plaintiff filed this action on December 14, 2011. Although plaintiff’s lawyer in this action is the same attorney representing him in the divorce action, plaintiff’s divorce attorney did not call defendant’s divorce attorney to advise of the lawsuit or request waiver of service. *See* Fed. R. Civ. P. 4(d)(1) (“An individual . . . subject to service under Rule 4(e), (f),

or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced . . . ”). Rather, the defendant was served at her place of work (a school) by a process server.

Six months passed, and defendant did not answer the complaint. Plaintiff sought and obtained a Clerk’s Entry of Default against defendant (#7) on July 2, 2012. Plaintiff filed his motion for default judgment on July 13, 2012 (#10). Then, defendant filed a motion to set aside the entry of default on July 25, 2012, arguing, among other things, that she believed the service of the instant lawsuit on her had been a hoax perpetrated by her husband to pressure her to settle their divorce case (#13). Those two motions are presently pending before this Court.

The Court need not reach either motion, however, because this Court does not have jurisdiction over plaintiff’s claims. Plaintiff alleges that this Court has diversity jurisdiction because (1) plaintiff is a resident of Arkansas and defendant is a resident of Missouri, and (2) the amount in controversy is well over \$75,000 when the Missouri statute’s damage calculation is considered.¹ See 28 U.S.C. § 1332.

The domestic relations exception to federal jurisdiction precludes this Court from exercising

¹ Civil damages pursuant to § 570.223 R.S.Mo. are either \$5,000 for each incident of identity theft or three times the amount of actual damages, whichever is greater.

jurisdiction over plaintiff's claims. "The domestic relations exception, first articulated in *Barber v. Barber*, 62 U.S. (1 How.) 582, 584, 16 L.Ed. 226 (1859), divests the federal courts of jurisdiction over any action for which the subject is a divorce, allowance of alimony, or child custody." *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994). In *Kahn*, the former wife sued her former husband for breach of fiduciary duty, conversion, and fraud seeking tort damages and an accounting stemming from conduct that occurred during the parties' marriage. The district court granted summary judgment to the husband, and the wife appealed. The Eighth Circuit, however, held that the allegations were "inextricably intertwined with those issues subject to the parties' previously adjudicated dissolution proceeding," and the Court dismissed the appeal with instructions to the district court to dismiss the action for lack of subject matter jurisdiction. 21 F.3d at 860.

Here, according to the complaint, memoranda, and exhibits filed by the parties, it is clear that the matter at hand is inextricably intertwined with (and, indeed, the subject of) the parties' divorce proceeding. The \$40,000 credit card charges were made during the marriage, and, as indicated by the discovery requests in the divorce case, they are among the matters being raised by the parties and addressed by the divorce court. "When a cause of action closely relates to but does not precisely fit the contours of an action for divorce, . . . federal courts generally will abstain from exercising jurisdiction." *Kahn*, 21 F.3d

at 861. Although sounded to draft in tort, plaintiff's claims are tied so closely to matters appurtenant to the ongoing divorce litigation that subject matter jurisdiction does not lie in the federal court. *See id.*

This matter will be dismissed by separate order, and the entry of default will be vacated.

Dated this 8th day of November, 2012.

/s/ Stephen N. Limbaugh, Jr.
UNITED STATES
DISTRICT JUDGE

App. 14

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 12-3912

Michael M. Wallace

Appellant

v.

Claire Hayden Wallace

Appellee

Appeal from U.S. District Court for the
Eastern District of Missouri – Cape Girardeau
(1:11-cv-00222-SNLJ)

ORDER

The petition for rehearing en banc is denied. The
petition for rehearing by the panel is also denied.

January 13, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans
