

IN THE SUPREME COURT OF MISSOURI

NICOLE KESTERSON and )  
PHILIP M. KESTERSON, )

Plaintiffs/Appellants, )

vs. )

No.: SC88648

STATE FARM FIRE & )  
CASUALTY COMPANY )  
and STATE FARM MUTUAL )  
AUTOMOBILE INSURANCE )  
COMPANY, )

Defendants/Respondents. )

**SUBSTITUTE REPLY BRIEF OF APPELLANTS**

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**POINT RELIED ON**

- I. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS STATE FARM FIRE & CASUALTY COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.'S MOTION TO DISMISS BASED ON RES JUDICATA/ IMPROPER SPLITTING OF A CAUSE OF ACTION BECAUSE APPELLANTS' PETITION ALLEGES A SEPARATE AND DISTINCT CAUSE OF ACTION IN THAT THE PARTIES, SUBJECT MATTER AND EVIDENCE DIFFER FROM THOSE OF KESTERSON I AND II, AND NEITHER KESTERSON I NOR KESTERSON II DECIDED THE MERITS OF APPELLANTS' PHANTOM VEHICLE CLAIM.

Bryant v. Allstate Ins. Co., 584 So. 2d 194 (Fla. 5th DCA 1991)

Creel v. Union Elec. Co. Inc., 950 S.W.2d 315 (Mo. App. W.D. 1997)

Nicholson Construction Co. v. Missouri Highway and Transportation Commission, 112 S.W.3d 6 (Mo. App. W.D. 2003)

State Farm Mutual Insurance Co. v. Yenke, 804 So.2d 429 (Fla. App. 5th 2001)

## ARGUMENT

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENTS STATE FARM FIRE & CASUALTY COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.'S MOTION TO DISMISS BASED ON RES JUDICATA/ IMPROPER SPLITTING OF A CAUSE OF ACTION BECAUSE APPELLANTS' PETITION ALLEGES A SEPARATE AND DISTINCT CAUSE OF ACTION IN THAT THE PARTIES, SUBJECT MATTER AND EVIDENCE DIFFER FROM THOSE OF KESTERSON I AND II, AND NEITHER KESTERSON I NOR KESTERSON II DECIDED THE MERITS OF APPELLANTS' PHANTOM VEHICLE CLAIM.

Respondents' Substitute Brief states that Appellants' claim against State Farm for the negligence of the phantom vehicle is prohibited because they have previously prosecuted claims against State Farm arising out of the same automobile accident and the same insurance contract provision. However, the determination as to whether a claim is prohibited by res judicata is not simply whether the claim arises from the same act, contract or transaction. As stated previously in the Substitute Brief of Appellants, there are many examples of several causes of action arising from the same accident. Thus, a plaintiff may sue a responsible party for injuries resulting from an accident, and the plaintiff's spouse may sue separately for loss of consortium. Courts state that while both injuries arise from the same accident and same facts, the "consortium claim is a separate distinct, and personal legal claim." Burke v. L&J Food and Liquor, Inc., 945 S.W.2d 662, 664 (Mo. App. W.D. 1997) (citing Wendt v. General Accident Ins. Co., 895 S.W.2d 210,

214 (Mo. App. E.D. 1995)). Furthermore, in such a situation, the plaintiff's claim cannot be used as res judicata to bar the spouse's claim. Burke, 945 S.W.2d at 665. Because more than one claim may arise from the same act, contract, or transaction, the court must also determine whether the parties, subject matter, and evidence necessary to sustain the claim are the same in both actions. Nicholson Construction Co. v. Missouri Highway and Transportation Commission, 112 S.W.3d 6, 10 (Mo. App. W.D. 2003) (citing Creel v. Union Elec. Co. Inc., 950 S.W.2d 315, 317 (Mo. App. W.D. 1997)). Appellants Nicole and Phillip Kesterson's present cause of action is distinct from the claim brought against State Farm for the negligence of Gary Wallut (hereinafter "Wallut") for the many reasons stated in the Substitute Brief of Appellants.

Respondents assert that Appellants dismissed the phantom vehicle claim in Kesterson I (Kesterson v. Wallut, et al., 116 S.W.3d 590 (Mo. App. W.D. 2003)) so they could immediately appeal the circuit court's summary judgment in favor of State Farm regarding whether the coverage in the State Farm policy applied to the negligence of Gary Wallut. However, Respondents omit an important portion of Judge Rolf's order in the circuit court. The Judgment and Order by Judge Dennis A. Rolf states, "the dismissal of this cause of action without prejudice would lead to judicial economy by avoiding at least one trial and potentially avoiding two trials." (Respondents' Substitute Brief, A15). Res judicata was designed to prevent a multiplicity of lawsuits. It appears that Judge Rolf, in permitting the dismissal, had considered judicial economy and contemplated Appellants bringing the phantom vehicle claim at a later time.

Respondents' Substitute Brief states that the two cases from Florida cited by Appellants, State Farm Mutual Insurance Co. v. Yenke, 804 So.2d 429, 432 (Fla. App. 5<sup>th</sup> 2001) and Bryant v. Allstate Ins. Co., 584 So. 2d 194, 195 (Fla. 5<sup>th</sup> DCA 1991), are not helpful in addressing the issue involved in this case. However, these cases directly address the issue presented in the present situation because in each of these cases, more than one claim was brought against the insurer and the multiple claims arose out of a single car accident and insurance policy.

In Bryant, the insured, who was involved in an automobile accident with an uninsured tort-feasor, first sued Allstate for damages to recover the costs of repairing her car. The insured then settled a second suit with Allstate for personal injury protection benefits. Id. at 195. When the insured attempted to sue Allstate as a party defendant in her suit against the uninsured tortfeasor, Allstate prevailed on its motion to strike the insured's claim against it on the basis of improper splitting of a cause of action. Id. When the insured appealed this action, the appellate court reversed stating that the uninsured motorist provision of her insurance contract was separate and divisible from the other risks underwritten by Allstate in the policy, and thus the breach of this provision was a separate cause of action. Id.

Bryant shows that many causes of action between an insured and his or her insurer can arise from a single car accident. In the present action, Appellants are seeking to enforce the provision which covers the risk of being in an accident with a phantom or hit-and-run vehicle. This provision is separate and apart from the risk of being hit by another motorist, who is identified, but does not have insurance. Appellants are covered for

either or both of these situations. It is worth noting that Respondents have cited no authority, whether Missouri or foreign, that agrees with its analysis of splitting a cause of action.

Respondents characterize the present claim and the claim brought against them for the negligence of Wallut as a single claim because it involves the same policy provision. This factor is not determinative. In Yenke, 804 So. 2d at 430-431, the plaintiff was involved in an automobile accident with another driver. She brought suit against the other driver who then asserted that a phantom vehicle caused the accident. The plaintiff then amended her complaint: first, to add a claim for underinsured motorist benefits against State Farm and second, to assert claims against State Farm for uninsured motorist benefits based on the claimed negligence of the phantom vehicle. Id. at 431. When the plaintiff amended her complaint the second time, she then left out the underinsured motorist claim. The case went to trial on the second amended complaint and the jury found the phantom vehicle not negligent and that the other driver was one hundred percent negligent. Id. The plaintiff then sought to enforce her underinsured motorist coverage. In Yenke, State Farm asserted res judicata and improper splitting of a cause of action, among other defenses. The plaintiff responded with the argument that each coverage provision in an insurance policy gives rise to a separate cause of action. Id. at 432. The court found that the claims for uninsured motorist coverage and underinsured motorist coverage relate to separate and distinct coverage provisions. Id. The court further stated, “The fact that the underinsured coverage provision and the uninsured

coverage are contained in the same paragraph of the instant policy does not change the fact that such claims involve separate and distinct coverage issues.” Id.

Here, the present claim involves a separate and distinct coverage issue from that involved in the claim against Respondents for the negligent driving of Wallut. The fact that the coverage for damages caused by an uninsured motorist and for damages caused by a hit and run or phantom vehicle fall under the heading “Uninsured Motor Vehicle Coverage” does not change the fact that each provides coverage for a different situation. It also does not change the fact that from each a separate claim arises.

Respondents rely heavily on Creel v. Union Electric Co. Inc., 950 S.W.2d 315 (Mo. App. Ct. W.D. 1997), in arguing that Appellants have split their cause of action. Creel does not support Respondents’ position. There, the plaintiff sued one defendant under two separate theories, negligence and strict liability, for damages caused by a single power surge. The appellate court refused to consider an appeal of the trial court’s dismissal of the claim for strict liability, believing that a resolution of the appeal would be tantamount to splitting a cause of action. Allowing the plaintiff to pursue a negligence cause of action separate from a strict liability cause of action would constitute “splitting a cause of action.” Creel has no application here for several reasons.

First, the Western District Court of Appeals held that a cause of action based on Wallut’s conduct did not exist. Second, the claim against Respondents for the phantom vehicle’s negligence is based upon a completely different set of facts from the negligence of Wallut. It is not a claim for damages based on different theories of liability for the actions of one party (as in Creel), but on different acts of negligence of two separate

parties (Wallut and the phantom driver). Had the Kestersons prevailed on either the Wallut claim or the phantom vehicle claim, they would have been entitled to recovery under the uninsured motorist policies. The claims are not dependant on one another, since they stand on different facts. Creel is not controlling.

Respondents also rely on Shelter Mutual Ins. Co. v. Vulgamott, 96 S.W.3d 96 (Mo. App. W.D. 2003) and Columbia Mutual Insurance Co. v. Epstein, 200 S.W.3d 547 (Mo. App. E.D. 2006) as supporting the dismissal of Appellants' claim based on splitting a cause of action. Respondents relied on Vulgamott in their motion to dismiss in the circuit court, and Appellants distinguished the present case from Vulgamott in their Substitute Brief (at Substitute Brief of Appellants, page 18-19). Epstein is also clearly distinguishable from Appellants' situation.

In Epstein, 200 S.W.3d at 548, the Columbia Mutual Insurance Company (hereinafter "Columbia") brought a declaratory judgment action against Epstein and the Doerrs, claiming it had no responsibility to defend or indemnify Epstein against allegations brought by the Doerrs in their lawsuit against him. Epstein then filed a counterclaim against Columbia for vexatious refusal to pay and bad faith. Id. at 549. The trial court granted Epstein's motion for partial summary judgment, finding the insurance policy provided coverage and obligated Columbia to defend and indemnify Epstein. The trial court then granted Columbia's request to designate the summary judgment decision a final decision for purposes of appeal pursuant to Rule 74.01(b). Columbia then appealed the summary judgment. Id. The appellate court determined that it did not have

jurisdiction to consider the appeal because the trial court did not dispose of one claim. Id. at 553.

Epstein is distinguishable from Appellants' claim for several reasons. The insurance company brought a declaratory judgment action, not a substantive claim. The nature of the interplay between the declaratory judgment action as to insurance coverage and the bad faith and vexatious refusal to pay counterclaim distinguishes Epstein from the present action. As the appellate court stated, "Columbia's request for declaratory judgment as to its duty to defend and indemnify is inextricably intertwined with Epstein's still-pending counterclaim for vexatious refusal to pay and bad faith." Id. at 551. In the present case, Appellants are attempting to bring a separate and distinct claim, based on the negligence of a different party.

Finally, State Farm fails to address or refute the fundamental reason why Appellants have not split a cause of action. The foundation of the doctrine rests upon establishing that an earlier action was resolved on its merits, and thus bars a later action. However, the Court of Appeals for the Western District, in Kesterson I and Kesterson II (Kesterson v. Wallut, et al. 157 S.W.3d 675 (Mo. App. W.D. 2004)), held that there was no cause of action under the State Farm policies for Wallut's actions. Since there was no cause of action, the claims could not be res judicata for an action based on the negligence of a phantom vehicle. Respondents do not deny the potential merits of the remaining claim, but argue only that it is barred procedurally. If Appellants had actually tried their uninsured motorist claim for the negligence of Wallut to a jury and lost, perhaps filing a claim against Respondents for the phantom vehicle claim would be a problem. Such is

not the case. In all the authorities cited by Respondents, res judicata was applied only when a potentially meritorious claim was actually adjudicated. Certainly that did not occur here.

Respondents have failed to cite any controlling authority to support its contention that the trial court's dismissal was appropriate. Likewise, it has failed to establish how the prior dismissal of a non-existent cause of action bars a later meritorious cause of action. Therefore, this Court should do as the Court of Appeals for the Western District and reverse and remand this matter for a trial on Appellants' phantom vehicle claim.

## **CONCLUSION**

Because Appellants' claim for the negligence of the phantom vehicle is a separate and distinct cause of action, the Circuit Court erred in dismissing this cause of action on the basis of res judicata or splitting a cause of action. Appellants request that this Court reverse the Circuit Court's judgment and remand this matter for a trial on all of the issues.

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**CERTIFICATE OF COMPLIANCE**

COME NOW counsel for Appellants, and for their certificate of compliance, state as follows:

1. The undersigned do hereby certify that the Substitute Reply Brief of Appellants filed herein complies with the page limits of Rule 84.06(b) and contains 2,446 words of proportional type.
2. Microsoft Word was used to prepare the Substitute Reply Brief of Appellants.
3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the Substitute Reply Brief of Appellants and one copy of the accompanying disk were mailed this 18<sup>th</sup> day of October 2007, to: J. Christopher Spangler, Attorney at Law, 3031 South Limit Avenue, Sedalia, MO 65301.

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Anna E. Spink

Subscribed and sworn to before me this 18<sup>th</sup> day of October, 2007.

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Notary Public

My Commission Expires: