IN THE MISSOURI SUPREME COURT

CASE NO. SC86937

TERRI JO HEMME and TERRY HEMME

Appellants,

vs.

SAM BHARTI, KUSUM BHARTI and BHARTI (MIDWAY) PROPERTIES, INC., and R.J. REYNOLDS TOBACCO COMPANY

Respondents.

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSOURI
FIFTEENTH JUDICIAL CIRCUIT
DIVISION 15

THE HONORABLE DENNIS A. ROLF

SUBSTITUTE BRIEF OF RESPONDENTS SAM BHARTI, KUSUM BHARTI and BHARTI (MIDWAY) PROPERTIES, INC.

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STATEMENT OF FACTS

Respondents/defendants Sam Bharti, Kusum Bharti and Bharti Midway Properties, Inc. (hereinafter "the Bhartis") submit a separate statement of facts to detail those facts that are material to the legal questions presented by this appeal.

This case is the second lawsuit stemming from a two-car accident on February 6, 1998. (LF 6-13). Initially, Deborah Harrison, driver of one of the vehicles, filed suit against Terri Jo Hemme, driver of the other vehicle (and an appellant herein) and Sam Bharti. Harrison alleged that Hemme negligently operated her vehicle when she pulled out of the Bharti Liquor Store parking lot onto Highway 13 and struck Harrison's car, traveling along the highway. Harrison's allegations against Sam Bharti, owner of Bharti Liquor Store, concerned Hemme's alleged inability to see Harrison's vehicle approaching the parking lot exit because of a sign located on or near Bharti's property. (SSLF 1-7).

Harrison subsequently filed a Second Amended Petition adding Kusum Bharti as another owner of the liquor store and Bharti Midway Properties, Inc. as the store's operator. (SSLF 8-14).

In her answer to the Second Amended Petition, Hemme denied Harrison's allegations against her, except that a collision had occurred, and sought to compare the negligence and fault of the Bhartis, should she be held liable for Harrison's injuries. (SSLF 15-17).

The Bhartis then filed a Third-Party Petition for Damages against R.J. Reynolds Company alleging that R.J. Reynolds placed the sign, which allegedly impaired Hemme's view, on the Bhartis' property. (SSLF 18-22).

After the Bhartis dismissed their third-party petition against R.J. Reynolds, plaintiff Harrison filed a Third Amended Petition adding R.J. Reynolds as a defendant, and Hemme filed an Answer. (SSLF 23-26) The Bhartis, on May 7, 2002, filed an Amended Answer and Cross-Claims against Hemme and R.J. Reynolds seeking contribution and apportionment of fault, based upon Hemme's negligence, should the Bhartis be found liable for Harrison's injuries. (SSLF 27-33).

R.J. Reynolds followed the Bhartis' lead and on May 21, 2002 filed its Amended Answer and Cross-Claims against Hemme and the Bhartis, also seeking apportionment of fault should it be found liable for Harrison's injuries. (SSLF 34-40).

Hemme responded by filing her Amended Answer and Cross-Claims on May 22, 2002 against the Bhartis and R.J. Reynolds seeking apportionment of fault should she be found liable for Harrison's injuries. Hemme did not make any allegations concerning any purported injuries she sustained in the accident. (SSLF 41-44).

In November 2002, the Harrison lawsuit settled and all claims were dismissed with prejudice. (SSLF 45-46).

Former defendant Hemme and her husband filed this lawsuit on February 3, 2003 against Sam and Kasum Bharti, Bharti (Midway) Properties and R.J. Reynolds. (LF 6-13). In Hemme's lawsuit, she alleged that she suffered personal injuries in the two-car accident that occurred on February 6, 1998. The Hemmes alleged that the Bhartis caused or contributed to cause the accident that resulted in her personal injuries by maintaining signs on or near their property that obscured her vision. The Hemmes alleged that R.J. Reynolds also caused or contributed to cause her injuries by negligently placing their

signs on or near the Bharti Liquor Store. Mr. Hemme asserted a claim for loss of consortium. (L.F. 6-13). In their First Amended Answers to Plaintiffs' Petition for Damages, the Bhartis and R.J. Reynolds asserted *inter alia* that plaintiffs' Petition failed to state a claim, and that Rule 55.32(a), the compulsory counterclaim rule, and the doctrine of *res judicata* barred plaintiffs' claims. (SLF 1-10).

Both the Bhartis and R.J. Reynolds filed motions for summary judgment asserting that plaintiffs' claims were barred by the compulsory counterclaim rule and the doctrine of *res judicata.* (LF 23-44). Following oral argument, the Honorable Dennis A. Rolf granted defendants' motions for summary judgment and dismissed the Hemmes' claims with prejudice. (LF 74). This appeal followed.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DISMISSING APPELLANTS' CLAIMS BECAUSE MISSOURI RULE OF CIVIL PROCEDURE 55.32(a), THE COMPULSORY COUNTERCLAIM RULE, BARS APPELLANTS' PRESENT CLAIMS AGAINST RESPONDENTS IN THAT AS CROSS-CLAIMANTS IN THE FIRST ACTION, APPELLANT AND RESPONDENTS BECAME "OPPOSING PARTIES"; AND THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE THE COURT DID NOT VIOLATE HEMME'S DUE PROCESS RIGHTS TO ASSERT HER SUBSTANTIVE CLAIMS IN THAT IT DID NOT DISREGARD OR CHANGE EXISTING PRECEDENT CONCERNING THE PROCEDURAL BAR OF THE COMPULSORY COUNTERCLAIM RULE

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ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AND DISMISSING APPELLANTS' CLAIMS BECAUSE MISSOURI RULE OF CIVIL PROCEDURE 55.32(a), THE COMPULSORY COUNTERCLAIM RULE, BARS APPELLANTS' PRESENT CLAIMS AGAINST RESPONDENTS IN THAT AS CROSS-CLAIMANTS IN THE FIRST ACTION, APPELLANT AND RESPONDENTS BECAME "OPPOSING PARTIES"; AND THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE THE COURT DID NOT VIOLATE HEMME'S DUE PROCESS RIGHTS TO ASSERT HER SUBSTANTIVE CLAIMS IN THAT IT DID NOT DISREGARD OR CHANGE EXISTING PRECEDENT CONCERNING THE PROCEDURAL BAR OF THE COMPULSORY COUNTERCLAIM RULE.

A. Standard of Review

The appellate court's review of a trial court's grant of summary judgment is "essentially *de novo* because the propriety of the court's action is purely an issue of law founded solely upon the record submitted and the applicable law. *Blunt v. Gillette*, 124 S.W.3d 502, 503 (Mo. App. 2004), *citing ITT Commercial Finance v. Mid-American Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). The appellate court "must measure the propriety of summary judgment by the same criteria used by the trial court." *Id.* Summary judgment must be granted where movant has proven he is entitled to judgment

as a matter of law. *THF Chesterfield North Development, L.L.C. v. City of Chesterfield*, 106 S.W.3d 13, 16 (Mo. App. 2003).

B. Discussion

The Western District Court of Appeals affirmed the trial court's grant of summary judgment in favor of respondents because it found the rationale of *Jacobs v. Corley*, 732 S.W.2d 910 (Mo. App. 1987), unpersuasive and the holding of *Jones v. Corcoran*, 625 S.W.2d 173 (Mo. App. 1981), the "correct application of the law relevant to the issues raised in that case." The *Jones* case, decided prior to the *Jacobs* case, holds that the filing of cross-claims in Missouri makes co-defendants "opposing parties" for purposes of Rule 55.32(a), the compulsory counterclaim rule. 625 S.W.2d at 175. For the reasons set forth below, the appellate court's ruling is the correct application of existing Missouri law.

Appellants argue, for the first time, that application of the compulsory counterclaim rule to them is unfair because they relied on the decision of *Jacobs* rather than on *Jones*. The *Jacobs* court, the same court that had decided *Jones*, did not overrule, distinguish or even mention *Jones* in its discussion. Therefore, the holding of *Jones* and its rationale still was controlling law when Mrs. Hemme filed her cross-claim and still is controlling law today. And, as the Western District stated in the case below, the *Jones* holding is better reasoned and is consistent with existing Missouri case law. *Hemme v. Bharti*, 2005 WL 1510220 (Mo. App. W.D.) at 5.

1. Rule 55.32(a) Bars Appellants' Claims

Appellants initially argue that because appellant Terri Joe Hemme's and respondents' cross-claims in the first action were permissive, the cross-claims did not

make the co-defendants opposing parties so as to require assertion of all related claims. This argument misses the point. The labeling of a cross-claim "permissive" is not determinative of whether two parties are opposing. Rather, the fact that the parties have filed cross claims against one another turns the parties into adversaries. Such is the instant case.

As the Eastern District held in *Jones v. Corcoran*, 625 S.W.2d 173, 175 (Mo. App. 1981), and the Western District affirmed below in *Hemme v. Bharti*, once a party files a cross-claim against other parties, those parties "become 'opposing parties,' thereby triggering the compulsory counterclaim rule, regardless of the fact that an initial cross-claim is permissive." *Hemme v. Bharti,* 2005 WL 1510220 at 5, *citing Jones v. Corcoran,* at 175.

The relevant part of Rule 55.32(a), Missouri's compulsory counterclaim rule, provides:

> A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same 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.

This Court has pronounced that the purpose of Rule 55.32 is "to serve as 'a means of bringing all logically related claims into a single litigation, through the *penalty of precluding the later assertion of omitted claims.'" Joel Bianco Kawasaki Plus v. Meramec Valley Bank,* 81 S.W.3d 528, 532 (Mo. banc 2002) *citing State ex rel. J.E.*

Dunn, Jr. & Associates, Inc. v. Schoenlaub, 668 S.W.2d 72, 75 (Mo. banc 1984), *quoting Cantrell v. City of Caruthersville*, 221 S.W.2d 471, 474 (1949) (emphasis added).

Appellants however, seek to ignore this state's long-recognized goal of bringing all logically related claims into a single litigation, relying on the holding of *Jacobs v. Corley*, 732 S.W.2d 910, 914 (Mo. App. 1987), which, contrary to *Jones*, held that when parties file cross-claims, the parties do not automatically become "opposing parties" so as to trigger Rule 55.32(a).

In ruling that the filing of cross-claims *does* trigger the compulsory counterclaim rule, the Western District held that "[t]he authority cited in *Jacobs* does not support its conclusions." *Hemme at* 5. The court in *Jacobs* relied on *Brown v. Harrison*, 637 S.W.2d 145 (Mo. App. 1982); yet, as the Western District noted below, the court in *Brown* never considered the issue present in *Jacobs* or in the instant case: whether the bringing of a permissive cross-claim makes the parties to the cross-claim "opposing parties" so as to trigger the compulsory counterclaim rule.

The *Jacobs* case came before the Southern District on direct appeal from an order sustaining defendant Corley's motion to dismiss plaintiff Jacobs' petition for breach of a contingent attorney fee contract and fraud. The case is procedurally and factually quite different from the instant case, the *Brown* case and *Jones*.

Initially, Corley and Jacobs were co-defendants in an interpleader action brought by Dean Witter Reynolds, Inc. ("Dean Witter"). Dean Witter sought the court's determination of whether Corley or Jacobs, the attorney who had represented Corley in a lawsuit with Dean Witter, was entitled to settlement proceeds. Following the filing of the

interpleader suit, Jacobs and Corley filed cross-claims against one another. After he received an unfavorable judgment in the first suit, Jacobs filed the second, alleging breach of contract and fraud. 732 S.W.2d at 911-912. The trial court granted Corley's motion to dismiss, ruling that Rule 55.32 precluded Jacobs from raising issues in the second case that could have been raised in the first suit. *Id.* at 912. The appellate court reversed based upon *Brown*. *Id* at 914.

As the *Hemme* court noted, the procedural posture of the parties in *Brown* is not the same as that in *Jacobs*. *Hemme* at 5. The *Brown* case involved an automobile accident in which the plaintiff, Brown, filed suit against Harrison and Oliver, alleging that each were driving on the wrong side of the road and that Oliver was following Harrison too closely. *Id.* at 146. Harrison filed a request for apportionment of damages and Oliver cross-claimed against Harrison. Prior to trial, at Oliver's request, the court severed the cross-claim. At the trial of Brown's claims, the jury found for Brown and assessed Harrison seventy-five percent negligent and Oliver twenty-five percent negligent. *Id.*

On the severed cross-claim, Harrison filed a motion for summary judgment, alleging that Oliver's cross-claim was barred as a matter of law because the first trial's judgment was res judicata or alternatively, Oliver was collaterally estopped from proceeding with his claim, based upon the jury's apportionment of fault in the Brown case. *Id.* In rejecting Harrison's argument, the appellate court recognized that cross-claimants, such as Harrison and Oliver, are in adversarial positions. *Id.* at 147. The

court's decision turned on the fact that because the cross-claim was severed, the issues between Harrison and Oliver never were litigated in the first case. *Id.*

Thus, *Brown*, does not stand for the proposition that permissive cross-claims do not trigger the compulsory counterclaim rule as the court in *Jacobs* maintains and the appellants in the instant case would have this court hold. As the appellate court stated below, "[t]he holding of *Brown* is that severing a cross-claim of a co-defendant leaves the co-defendants in the trial of the plaintiff's claims as though the cross-claim was never brought. And, because the issues raised in the cross-claim were never adjudicated, the verdict of the trial of the plaintiff's claims is not binding on the co-defendants in the subsequent trial of the severed cross-claim." *Hemme* at 5. In *Jacobs*, however, the claims were litigated before the second suit was brought.

The *Jacobs* court cites two federal court cases that also fail to support the court's holding. *Jacobs* cites *Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975) for the proposition that co-parties are persons on the same side while an opposing party is one who asserts a claim against the prospective counterclaimant. *Jacobs*, 732 S.W.2d 910, 914. Based upon this proposition, the *Augustin* court held that where co-defendants had not brought cross-claims in the underlying action, one of the co-defendants could independently bring his claim in federal court. *Augustin*, 521 F.2d 1215, 1216. The court did not address the issue of whether co-defendants who file permissive cross-claims become opposing parties for purposes of the compulsory counterclaim rule.

Similarly, *Peterson v. Watt*, 666 F.2d 361 (9th Cir. 1982), fails to support the *Jacobs* holding. *Peterson* merely holds that cross-claims are permissive; if a party

chooses not to bring a cross-claim against a co-defendant so that the claim is neither asserted nor litigated, the principles of res judicata, waiver or estoppel will not bar the party from asserting the claim in a later action. *Id*. at 363.

Appellants argue in their Brief at page 16 that Jacobs "was discussed and reaffirmed" in *Scott v. State Farm Fire & Casualty Co*., 947 S.W.2d 530 (Mo. App. 1997). A careful reading of *Scott*, however, indicates that the appellate court relied on *Jacobs* solely for the proposition that co-defendants are not opposing parties, and therefore, are not required to assert counterclaims. The opinion does not mention whether the co-defendants therein ever filed cross-claims against one another. Thus, the language of *Scott* does not support appellants' position.

The *Jacobs* court takes a major leap from the holdings of *Brown, Augustin and Peterson* to reach its conclusion that because cross-claims are permissive the compulsory counterclaim rule is not triggered. The rationale behind the holding of *Jacobs* is fatally flawed and should not be applied to the facts of the instant case.

2. *Jones v. Corcoran* Correctly States Missouri Law

The *Jones* case, which holds that once co-defendants file cross claims, the co-parties become opposing parties thereby triggering the compulsory counterclaim rule, is more soundly reasoned and supported by Missouri and federal case law. The underlying lawsuit was an action for wrongful death and personal injury resulting from a three-vehicle collision. Plaintiffs sued Jones and three other defendants. The co-defendants filed cross-claims against each other for indemnity or apportionment. *Jones,* 625 S.W.2d

at 174. Additionally, Jones filed a cross-claim against one of the defendants for injuries that he sustained in the accident. *Id.*

On the writ of prohibition Jones filed, challenging the trial court's granting of the plaintiffs' motion for severance of Jones' personal injury claim, that court held that in the absence of the indemnity and apportionment claims it would not have been necessary for Jones to file his personal injury claim. *Id.* at 175. However, once two co-defendants filed claims for indemnity and apportionment against Jones, the co-parties became "opposing parties", triggering the Rule 55.32(a) provisions. *Id.*

In both *Jones* and the underlying lawsuit in this case, the plaintiffs sought damages for personal injuries sustained in vehicular accidents—accidents in which one of the defendants also allegedly sustained personal injuries. And, in both cases, the defendants sought to blame other defendants for the injuries plaintiffs allegedly sustained. As the *Jones* court noted, resolution of the apportionment cross-claims would require determination of the two co-defendants' negligence, which would be the key issue litigated in the personal injury case of Jones against Wynne. Similarly, in the instant case, resolution of the apportionment cross-claims in the underlying case required determination of the three co-defendants' negligence, which would be the key issue litigated in the case appellants now wish to bring.

The compulsory counterclaim rule required appellants herein to assert their claims for personal injuries against respondents when Terri Jo Hemme filed her amended answers and cross-claims against them in the *Harrison* lawsuit. (SSLF 41-44). Respondents clearly had become opposing parties to her and she allegedly had a claim

against them for injuries she purportedly sustained in the same vehicular accident that was the subject matter of the pending lawsuit.

In fact, appellant Terri Jo Hemme twice testified in depositions taken in the *Harrison* case that she sustained personal injuries in the Harrison accident. (A-3, p. 22, l. 5-8; p. 23, l. 1-6; p. 24, l. 8-12); (A-5, l. 16-19). Therefore, Hemme's injuries were injected into the litigation. Once the *Harrison* case settled and was dismissed, it was reasonable for the *Harrison* co-defendants to assume that Hemme would not bring suit against them in a subsequent action because she had had the opportunity to litigate any claims she might have had arising from the accident, but failed to do so.

3. Federal Courts Have Ruled That Cross-Claimants Become "Opposing Parties"

Appellants attempt to distinguish cases wherein the cross-claims are for "substantive" claims as opposed to claims to determine fault, as with this case. Citing four federal cases, appellants claim that the majority rule in the federal courts is that cross-claimants do not become opposing parties for purposes of the compulsory counterclaim rule where the cross-claim is only for contribution or indemnity. While it is clear that the majority rule in the federal courts is that the term "opposing party" includes co-defendants once a substantive cross-claim is filed by one against the other, it is far less clear whether a majority of federal courts require a different outcome where the cross-claim is for indemnification or contribution. *See Kirkaldy v. Richmond County Board of Education, et al.*, 212 F.R.D. 289, 297-98 (M.D.N.C. 2002) (citations omitted).

Even the *Kirkaldy* court admits that the few federal cases that have addressed this specific issue merely *suggest* that the shifting status does not occur where the cross-claim is for contribution or indemnity. *Id.* at 298. *See Paramount Aviation Corp. v. Augusta*, 178 F.3d 132 146 n.11 (3d Cir. 1996) (cited by appellants) ("we *suspect* that a compulsory cross-claim rule would be limited to situations in which the initial cross-claim included a substantive claim") (emphasis added). Appellants also cite *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1503 (D.D.C. 1984), which holds that a third-party plaintiff is not "directly obligated by the [Federal] Rules" to bring all related claims at the same time. The court did not analyze the implications of distinguishing between substantive cross-claims and claims for indemnity.

However, as the appellate court noted below, it is not necessary in this case to determine whether a non-substantive cross-claim triggers Rule 55.32(a) because "in Missouri, '[t]he right to partial indemnity or contribution is substantive in nature.'" *Hemme* at 6, *citing Safeway Stores, Inc. v. City of Raytown*, 633 S.W.2d. 727, 728 n.1 (Mo. banc 1982) (*citing Roth v. Roth*, 571 S.W.2d 659 (Mo. App. 1978) (emphasis added).

The decision in *Kane v. Magna Mixer Company*, 71 F.3d 555 (6th Cir. 1995) is contrary to *Kirkaldy* and is consistent with Missouri law. In *Kane*, the court held that "once a defendant forces the issue by bringing an indemnity claim in the litigation for which indemnity is sought, the alleged indemnitor is obligated to assert its competing claims in a Rule 13(a) counterclaim." *Id.* at 562. The *Kane* court reasoned that "[p]ermitting a third-party defendant…to hold its indemnity claim in the wings, despite

the assertion of a competing claim by the third-party plaintiff, would result in piecemeal litigation and a waste of judicial resources, and possibly lead to inconsistent results." *Id.*

The problem with the *Kirkaldy* case is that it provides a weak rationale for its holding. The *Kirkaldy* court, relying on *Rainbow Management Group, Ltd. v. Atlantis Submarines Haw., L.P.*, 158 F.R.D. 656 (D.Haw. 1994), stated that "[s]uch a limitation is warranted because a cross-claim for indemnity or contribution 'would not introduce new issues into the case, and could, in all likelihood, be litigated without substantially increasing the cost or complexity of the litigation.'" *Kirkaldy* at 298, *quoting Rainbow Management Group* at 660.

In *Rainbow Management Group*, the court adopted the rule that co-parties become opposing parties within the meaning of Fed.R.Civ.R. 13(a) after one party pleads a cross-claim against the other. But, the court limited the rule to not include cross-claims for indemnity or contribution, stating: "The reason for this modification is that an unlimited rule may actually increase the amount or complexity of litigation." *Rainbow Management Group* at 660.

This analysis is not persuasive because it forces outcomes, such as would happen in the instant case (if it were allowed to proceed), where the negligence of the co-defendants is the key issue in the claim of the plaintiffs against co-defendants, the cross-claims for fault, and any claim a cross-claimant would have for injuries. (SSLF 1-44). In such a situation where a co-defendant would be allowed to subsequently file personal injury claims against her prior co-defendants, identical issues would be litigated twice, thereby increasing the amount, cost and length of litigation, and possibly leading to

inconsistent findings. Such a result is totally contrary to the stated purpose of Missouri's compulsory counterclaim rule.

4. State Courts Have Ruled That Cross-Claimants Become "Opposing Parties"

The Kentucky court of appeals, in construing its compulsory counterclaim rule, held that a party who asserts a cross-claim for contribution or indemnity becomes an opposing party against whom compulsory counterclaims must be asserted. *Ecker v. Clark*, 428 S.W.2d 620 (Ky.App. 1968). The court considered the compulsory counterclaim rule in light of its third-party practice rule and noted at 621 that:

> There would be no discernible reason for requiring a third-party defendant to plead a counterclaim against a third-party plaintiff who has cross-claimed for indemnity or contribution, but not to make the same requirement of an original defendant against whom a codefendant has asserted such a cross-claim.

Under Missouri Rule of Civil Procedure 52.11(a), a defending party may bring in another party "who is or may be liable to the defending party for all or part of the plaintiff's claim against the defending party." The rule further states that the third-party defendant "shall make defenses to the third-party plaintiff's claim as provided in Rule 55 and *counterclaims* against the third-party plaintiff and cross-claims against the other third-party defendants as provided in Rule 55." (emphasis added) A-3.

The language of the Missouri rules is substantially similar to the Kentucky rules and therefore, the solid reasoning of the *Ecker* court should apply to this case. If Rule 52.11(a) requires a third-party defendant to assert all counterclaims against a third-party

plaintiff, Rule 55.32(a) should be read to require that a defendant must assert all counterclaims against a co-defendant who has asserted a cross-claim.

The notion that co-defendants do not become opposing parties once one files a cross-claim against the other is purely fictitious. The truth is that in this case as in others where one defendant is blaming liability on the other defendants, the parties are pointing fingers and have become adversarial.

It is this adversarial position that is the key consideration in bringing a party within the mandates of the compulsory counterclaim rule. The Western District Court of Appeals, has recognized that adversaries are "opposing parties" as the term is used in Rule 55.32(a). In *Myers v. Clayco State Bank*, 687 S.W.2d 256 (Mo. App. 1985), the Western District, in analyzing the applicability of the compulsory counterclaim rule stated, "The rule compels a pleader to state any claim that a party has against an *adversary* which arises out of the transaction or occurrence which is the subject matter of the adversary claim." *Id.* at 260 (emphasis added).

The Western District similarly read "opposing" as synonymous with "adversary" in *Evergreen v. Killian*, 876 S.W.2d 633 (Mo. App. 1994):

> Rule 55.32 compels a party to state any claim it has against its *adversary* which arises out of the transaction or occurrence which is the subject matter of the suit.

Id. at 635 (emphasis added).

The reality is that the determination of fault in the accident Harrison litigated is central to the claim Hemme now wishes to litigate. In both cases, the issue is "Who caused the accident?" Both Harrison in the initial lawsuit and Hemme in this lawsuit

blame a sign for allegedly obstructing Hemme's view. (SSLF 1-7; LF 6-13). The question is whether the sign did obstruct her view and if so, who was responsible for the placement of the sign. Allowing Hemme to litigate these issues after they already were litigated in the Harrison case would ignore the purpose of the compulsory counterclaim rule. "Rule 55.32(a) is intended to discourage separate litigation covering the same subject matter…" *Schneeberger v. Hoette Concrete Construction Company*, 680 S.W.2d 301, 303 (Mo.App. 1984).

By arguing that the cross-claims in *Harrison* were not substantive and therefore, did not give rise to compulsory counterclaims, appellants improperly shift the analysis. The compulsory counterclaim rule specifically requires that "any claim that at the time of serving the pleading the pleader has against any opposing party" and that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" must be raised at that time or it is waived. Rule 55.32(a). Arguably, a claim for apportionment is contingent upon the finding of liability and has not yet matured; thus, it is subject to the permissive cross-claim rule. However, once that cross-claim is filed, a claim for personal injuries arising out of the exact same incident that is the subject matter of the cross-claimant's claim logically falls within the dictates of the compulsory counterclaim rule regardless of whether the cross-claim is for apportionment of fault or personal injuries.

Missouri courts traditionally have construed the compulsory counterclaim rule liberally. *See e.g. Schneeberger, Id.* (where defendant Hoette was a necessary party to the full adjudication of the issues in the initial lawsuit, it was the defendant's duty to

assure that Hoette was a party to the first suit); *Myers v. Clayco State Bank, supra* at 261 ("Our decisions affirm and reaffirm with emphasis that the *transaction* predicate of the compulsory counterclaims procedure is to be applied 'in its broadest sense,' to encompass all claims connected by a logical nexus."), citing *State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub*, 668 S.W.2d 72, 75 (Mo. banc 1984); *Jewish Hospital of St. Louis v. Gaertner*, 665 S.W.2d 638, 641 (Mo.App. 1983).

The shifting status approach taken by the *Jones* court—that co-parties become opposing parties after one files a cross-claim against the other, thereby triggering the compulsory counterclaim rule—is not only consistent with Missouri courts' general attitude toward the compulsory counterclaim rule, but also consistent with other states' approaches. Both the Supreme Courts of Alaska and Kansas have adopted this approach. *See Miller v. LHKM*, 751 P.2d 1356 (Alaska 1988), *Mohr v. State Bank of Stanley*, 734 P.2d 1071 (Kansas 1987) (holding that when a cross-claim is filed, the party against whom it is filed, must file an answer to it, and becomes subject to the compulsory counterclaim rule). *See also Jorge Construction Co. v. Weigel Excavating and Grading Company Corp*., 343 N.W.2d 439, 443 (Iowa 1984) (stating that co-parties are not opposing parties until one of them files a cross-claim against the other).

Appellants raise the spectre of legal chaos if this Court affirms the trial court based upon the holding in *Jones*, conjuring up situations where attorneys retained by insurance carriers to defend their insured won't know how to assert a counterclaim for personal injuries. Whether requiring personal injury claims to be brought in the same lawsuit where defendants cross-claim for contribution and apportionment actually causes parties

to more carefully select legal representation should not be the determining factor in this Court's decision. This Court should affirm the trial court and in so doing, affirm the law of Missouri and the principle that similar claims should be litigated in one lawsuit.

5. By Affirming the Trial Court's Ruling, This Court is Not Violating Appellants' Due Process Rights Because It Would Not Be Changing Existing Law

Appellants' request that application of the compulsory counterclaim rule to cases wherein permissive cross-claims have been filed should be made only prospectively is misplaced. If the Court affirms the trial court's ruling, it merely will be applying existing Missouri law, not changing the current status of the law. Therefore, this case is not one in which the Court must decide the question of whether its ruling should apply prospectively or retroactively.

The *Jones* decision has never been overruled. Thus, for this Court to affirm the trial court's decision based on *Jones* would not create new law.

If, however, the Court overrules *Jacobs* and in so doing recognizes that decision as a change in decisional law, the Court should follow the general rule of retroactive effect of changes in the law. *See Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985).

In *Sumners*, this Court clearly stated that the Supreme Court's decision must clearly overrule prior state law. If the decision of this Court is overruling, in order to determine whether it should be given prospective-only effect, "the decision in question 'must establish a new principle of law . . . by overruling clear past precedent . . ." *Sumners,* 701 S.W.2d 720, 724, *quoting Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92

S.Ct. 349, 355 (1971). By affirming the trial court based upon the holding in *Jones* this Court will not be establishing a new principle of law by overruling clear past precedent. Therefore, the holding should apply retroactively.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE APPELLANTS' CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA IN THAT RESPONDENTS' CLAIMS IN THIS SUIT ARE BASED UPON THE SAME SET OF FACTS AS LITIGATED IN THE PREVIOUS LAWSUIT.

A. Standard of Review

The appellate court's review of a trial court's grant of summary judgment is *de novo*. *Chiney v. American Drug Stores, Inc.*, 21 S.W.3d 14, 16 (Mo.App. 2000).

B. Legal Discussion

Respondents also asserted as grounds for summary judgment that Hemme's claim was barred by the doctrine of *res judicata*.

"The doctrine precludes not only those issues on which the court in the former case was required to pronounce judgment, 'but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.'" *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002), *quoting King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991).

"Claim preclusion", as the doctrine is often called, prohibits splitting a claim or cause of action. *Id.* at 318. Claims that could have been raised by a party in the first action "are merged into, and are thus barred by, the first judgment." *Id.* The Supreme Court has held that [t]o determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same 'act, contract or transaction.'" *Chesterfield Village* at 318-19, *quoting Grue v. Hensley*, 210 S.W.2d 7, 10 (Mo. 1948); *King General Contractors, Inc.*, 821 S.W.2d at 501.

Missouri courts have given the term "transaction" broad meaning. *Chesterfield Village* at 319, *citing King General Contractors, Inc.*

In *Chesterfield Village*, the court considered the factual bases for the claims, not the legal theories. *Chesterfield Village* at 319, *citing State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655, 660 (Mo. banc 1975). The *Chesterfield* case involved two lawsuits, both stemming from the city of Chesterfield's refusal to rezone property owned by Chesterfield Village, Inc. In the first suit, Chesterfield Village sought declaratory and injunctive relief and prevailed, obtaining a judgment that declared the zoning illegal that required rezoning. Chesterfield Village then filed a second lawsuit, this one seeking damages it allegedly incurred because of the city's failure to rezone the property initially.

The court held that Chesterfield Village's second suit was barred by the doctrine of *res judicata* because its action for damages was based upon the same set of facts as its action for declaratory and injunctive relief. 614 S.W.3d at 321. "A somewhat altered legal theory, or even a new legal theory, does not support a new claim based on the same operative facts as the first claim. Chesterfield Village cannot split its claim." *Id.*

Similarly, appellant is attempting to split her claim. In the first lawsuit, she blamed respondents herein for the fact that her vehicle struck Harrison's vehicle and, she asked that fault be apportioned to respondents. (SSLF 15-17, 23-26, 41-44). In this lawsuit, she asserted a claim for damages (personal injuries to herself), a claim that is based on the same set of facts—that a sign, for which respondents allegedly were responsible, caused her to be in a vehicular accident. (LF 6-13). Hemme cannot split her claim. She had the opportunity to allege personal injuries in the first suit and failed to do so. Having failed to seek damages in the Harrison case, she now is barred from seeking damages in a subsequent lawsuit.

CONCLUSION

The Court should affirm the trial court's granting of summary judgment in favor of Respondents Bhartis because the trial court properly ruled that appellants' claims in this lawsuit were barred by Rule 55.32(a), the compulsory counterclaim rule, and/or by the doctrine of *res judicata*.

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CERTIFICATE OF COMPLIANCE AND SERVICE

COMES NOW, the undersigned attorney for Respondents SAM BHARTI, KUSUM BHARTI and BHARTI (MIDWAY) PROPERTIES, INC., on this ____ day of August, 2005 and hereby certifies pursuant to Rule 84.06(c) the following:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. This brief contains 8,172 words and 761 lines according to statistics compiled by the Microsoft Word program.

4. Pursuant to Rule 84.06(g), a Microsoft Word file containing this Brief is being submitted on a floppy disk, which has been scanned for viruses and is virus-free.

5. Ten (10) copies of this brief have been sent via United States mail, postage prepaid, to the following:

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APPENDIX