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 BRIEF OF APPELLANTS

THE PADBERG & CORRIGAN LAW FIRM
Matthew J. Padberg #31431
Anna E. Spink #57797
1926 Chouteau Avenue
St. Louis, Missouri 63103
(314) 621-2900
(314) 621-7607 (Fax)

ATTORNEYS FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This action involves the question of whether the Circuit Court of Saline County erred in dismissing Appellants' cause of action against Respondents State Farm Fire & Casualty Company and State Farm Mutual Automobile Insurance Company. As the action involves the above question, it does not fall within the exclusive appellate jurisdiction of the Supreme Court of Missouri pursuant to the provisions of Article V, Section 3, of the Missouri Constitution. The Supreme Court of Missouri has ordered the transfer of this case from the Court of Appeals for the Western District upon application by Respondents. The Supreme Court of Missouri has jurisdiction over this appeal pursuant to the provisions of Article V, Section 10, of the Missouri Constitution.

STATEMENT OF FACTS

The important facts of this case, for purposes of this appeal, include a summation of the claims brought in Appellants Nicole and Philip Kesterson's suit against Gary Wallut and State Farm in Case No. CV400-001 and a summation of the claims included in the present action. In Case No. CV400-001 (hereinafter "Kesterson I"), Appellants alleged that Mr. Wallut, a defendant in Kesterson I, negligently operated a motor vehicle in which Nicole Kesterson was a passenger. They further alleged that his negligence caused the vehicle to collide with a tractor-trailer on December 30, 1998. This collision caused permanent, progressive and painful injuries to Nicole Kesterson. Philip Kesterson alleged damages for loss of consortium. Appellants also brought a claim against State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company (hereinafter "State Farm"), their insurer, alleging that the vehicle operated by Mr. Wallut (hereinafter "Wallut") was not insured and thus Appellants were entitled to collect damages and compensation under their policy with State Farm, which provided them with uninsured motorist coverage. In Counts V and VI of their Third Amended Petition, Appellants alleged that they were entitled to uninsured motorist benefits based on the fact that a "phantom vehicle" rear-ended the vehicle operated by Wallut and caused or contributed to the damages suffered by them.

Mr. Wallut brought a motion to dismiss based on lack of subject matter jurisdiction, contending that he was a co-employee of Nicole Kesterson, and that Appellants' exclusive remedy was workers' compensation. The trial court granted this motion to dismiss and granted State Farm's summary judgment motion as to the Kestersons' uninsured motorist claim for Wallut. The trial court made no ruling on their

claim for uninsured motorist coverage for the phantom driver. Appellants appealed the summary judgment rulings in favor of Wallut and State Farm. On July 8, 2003, the Missouri Court of Appeals for the Western District affirmed the trial court's judgment in favor of Wallut. The appellate court would not decide whether State Farm was liable since another claim against State Farm was pending in the trial court. Kesterson I, 116 S.W.3d 590, 598 (Mo. App. W.D. 2003). The case was then remanded.

After remand, Appellants moved to dismiss their claim against State Farm for the phantom driver. That motion was granted. Appellants then appealed the issue of whether Wallut was an uninsured motorist. The Missouri Court of Appeals for the Western District, in Kesterson v. Wallut, et al., 157 S.W.3d 675 (Mo. App. W.D. 2004) (hereinafter "Kesterson II"), affirmed the trial court's decision and found that since Wallut was immune from suit, Appellants could not prove they were "legally entitled to recover" from him, and thus had no cause of action against State Farm on Wallut's conduct.

Appellants filed the present suit on April 20, 2005, alleging that on December 30, 1998, Appellant Nicole Kesterson was a passenger in a vehicle operated by Wallut when a phantom vehicle rear-ended the vehicle, causing or contributing to cause Wallut to loose control of the vehicle, collide with a semi tractor/trailer, and causing substantial injuries to Nicole Kesterson. (L.F. 5). Appellants further alleged that Nicole Kesterson was an insured under policies of insurance with Respondents State Farm providing coverage for damages Appellants sustained by reason of an uninsured motorist. (L.F. 4). In the policy issued by Respondents, a phantom vehicle that could not be identified

following the occurrence is included in the definition of an uninsured motor vehicle. (L.F. 5)

On May 12, 2005, Respondents filed their motion to dismiss and suggestions in support of motion to dismiss based on res judicata and/or improperly splitting a cause of action. (L.F. 9-14). The trial court took judicial notice of its file in Kesterson II. The motion was sustained and Appellants' petition was dismissed with prejudice on December 8, 2005. (L.F. 15).

Appellants appealed on the basis that the present claim is separate and distinct from the claims in Kesterson II. On May 9, 2007, the Court of Appeals for the Western District filed an opinion reversing the trial court's dismissal and remanding the case. Following that decision, Respondents filed their Application to Transfer to the Supreme Court and transfer was accepted on August 21, 2007.

POINTS 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.

Arana v. Koerner, et al., 735 S.W.2d 729 (Mo. App. W.D. 1987)

Chamberlain v. Mo.-Ark. Coach Lines, 189 S.W.2d 538 (Mo. 1945)

Collins v. Burg, 996 S.W.2d 512 (Mo. App. E.D. 1999)

Welch v. Contreras, 174 S.W.3d 53 (Mo. App. W.D. 2005)

MAI 31.11 (6th ed.)

MAI 31.13 (6th ed.)

ARGUMENT

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.

The scope of review of trial court's dismissal of a petition is de novo. Jordan v. Willens, 937 S.W.2d 291, 293 (Mo. App. W.D. 1996). In reviewing the grant of a motion to dismiss a petition, all facts alleged in the petition are deemed true, and all allegations are construed liberally and favorably to appellants. Kanagawa v. State of Missouri, et al., 685 S.W.2d 831, 834 (Mo. 1985). The appellate court reviews the trial court's dismissal of a petition by determining whether the facts pleaded and reasonable inferences drawn therefrom provide any basis for relief. Kanefield v. SP Distributing Co., 25 S.W.3d 492, 495 (Mo. App. E.D. 2000).

In Lee v. Guettler, 391 S.W.2d 311, 313 (Mo. 1965), this Court stated, "The rule against splitting a cause of action applies to bringing separate suits for

different elements of damage of the same cause of action and not to bringing separate suits on separate causes of action arising out of the same transaction or occurrence." (quoting Chamberlain v. Mo.-Ark. Coach Lines, 189 S.W.2d 538, 539 (Mo. 1945)). This premise is illustrated in many Missouri cases. In Chamberlain, this Court addressed the issue of whether the plaintiff's suit for the wrongful death of his wife barred his suit for his own personal injuries as both resulted from the same collision. The plaintiff asserted the two claims were "separate and distinct causes of action" while the defendant argued "that all claims for damages arising out of the same transaction or occurrence must be brought in one suit." Chamberlain, 189 S.W.2d at 538. This Court found the defendant's position "too restricted," providing examples of situations where several causes of action arise out of the same transaction or tort and are separately maintained. (for examples see Id. at 538). The Court stated that the rule against splitting a cause of action applies to bringing separate suits for different elements of damages, such as in a case of personal injury and damage to property caused by the same tort. Id. Where a tort causes injury to both the person and property of the same individual, a recovery of a judgment for either item of damages may be pleaded in bar of an action to recover for the other item of damage. Id.

"The test for whether a cause of action is single and cannot be split is: (1) whether the separate actions brought arise out of the same act, contract, or transaction; or (2) 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). There is no doubt under the case law in Missouri that separate and distinct causes of action can arise from the same act, transaction or contract. Collins v. Burg, 996 S.W.2d 512, 516 (Mo. App. E.D. 1999). Thus, "a later lawsuit does not necessarily or always violate the rule against splitting a single cause of action even when it meets the first prong … if at the same time it fails to meet the second prong." Id.

Applying this test to the present situation demonstrates that the case before the Court is separate and distinct from the cause of action brought in Kesterson I and II. On December 30, 1998, the actions of Wallut and the phantom vehicle ultimately caused the vehicle in which Appellant Nicole Kesterson was a passenger to collide with a semi-tractor/trailer, resulting in indivisible injuries to Appellants. However, Wallut and the phantom vehicle each acted separately to contribute to the outcome. Appellants alleged in their petition in Kesterson I and II, that Wallut negligently operated the motor vehicle in which Nicole Kesterson was a passenger. The petition in the present cause of action alleges that a phantom or hit-and-run vehicle negligently rear-ended the vehicle in which Nicole Kesterson was a passenger, thus contributing to or causing Wallut's loss of control over the vehicle. (L.F. 5). Thus, from these two separate acts, two causes of action arose.

However, even if the acts of Wallut and the phantom vehicle are considered one act or transaction, the analysis does not end there. As stated above and

illustrated by this Court in Chamberlain, Missouri case law leaves no doubt that separate and distinct causes of action can arise from the same act, transaction or contract. Collins v. Burg, 996 S.W.2d 512, 516 (Mo. App. E.D. 1999). Thus, the second prong of the test presented above (whether the parties, subject matter, and evidence necessary to sustain the claim are the same in both actions) must then be considered. As this Court stated, "Claims are considered separate if they require proof of different facts and the application of distinguishable law . . ." Committee for Educational Equality v. Missouri, 878 S.W.2d 446, 451 (Mo. 1994).

This Court has stated that the rule against splitting a cause "presupposes a claim and judgment of a single plaintiff against a single defendant." Lee, 391 S.W.2d at 313. This premise was recently re-iterated in Welch v. Contreras, 174 S.W.3d 53, 56 (Mo. App. W.D. 2005), where the court stated, "The Eastern District has established the principle that a plaintiff may not split her cause of action and try a single claim against different defendants seriatim. No authority is cited for this principle other than 'our rules.'" In contrast to this view, this Court stated, "The rule against splitting a cause of action applies only where the several causes of action are between the same parties." Id. (citing Lee, 391 S.W.2d at 313).

Here, the claims adjudicated in Kesterson I and II and the present claim are clearly separate for several reasons. First, each cause of action involves different parties. Kesterson I and II involved claims against Wallut, the driver of the vehicle in which Nicole Kesterson was a passenger, and against Appellants'

insurer, State Farm, based upon the negligence of Wallut and his alleged status as an uninsured. In the present action, Wallut is not a party. (L.F. 3-8) The present action arose due to the negligence of the phantom vehicle. Because the operator of this phantom vehicle was unidentifiable, the claim is brought against Appellants' own insurance carrier. (L.F. 4-5) Had Appellants been able to identify the operator of the phantom vehicle, their insurer would have no role in the present action. Because the operator or insurer of the phantom vehicle remains unknown, Appellants' only recourse to recover for the damages caused by the phantom vehicle is through their uninsured motorist coverage provided in their policy with Respondents State Farm.

Another distinction between the present action and Kesterson I and II is that the elements of each cause of action and the evidence presented in Kesterson I and II differ from the elements and the evidence in the present action. As explained above, Kesterson I ultimately focused on whether Wallut was an uninsured motorist and whether his actions caused the accident. Kesterson II focused on whether Wallut was an uninsured motorist from whom Appellants were "legally entitled to collect" under their policy with Respondents State Farm. This Court has held that, "To recover under an uninsured motorist policy, the insured … has the burden of proving (1) that the other motorist was uninsured, (2) that the other motorist is legally liable to the insured, and (3) the amount of damages." Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713, 715 (Mo. 1979). These same elements are listed as the necessary findings in MAI 31.11 (6th ed.). In Kesterson

I, 116 S.W.3d at 596, the appellate court found that Appellants were barred from suing Wallut due to the immunity of workers' compensation. In Kesterson II, 157 S.W.3d at 686, the appellate court held that because Appellants were not "legally entitled to collect" from Wallut under State Farm's uninsured motorist policy, State Farm was entitled to summary judgment. Thus, in Kesterson I and II the judgments stated simply that Appellants were barred from suing Wallut and thus, had no cause against Wallut or against State Farm for Wallut's conduct. Neither Kesterson I nor Kesterson II determined Appellants' rights against State Farm for the phantom vehicle.

The present action concerns a situation in which Appellants have suffered damages due to a hit-and-run vehicle, which requires proof of different elements, and therefore different evidence must be presented and considered. The MAI 31.13 (6^{th} ed.) provides the elements necessary for a plaintiff to prove a hit-and-run accident: First, the vehicle occupied by plaintiff was struck by a hit-and-run vehicle, and Second, the operator of the hit-and-run vehicle rear-ended the vehicle the plaintiff occupied, and Third, the operator of the hit-and-run vehicle was thereby negligent, and Fourth, as a result of such negligence, plaintiff sustained damage. Thus, in the present action, the factual issues will include the existence of a "phantom" or hit-and-run vehicle, that the vehicle rear-ended the vehicle which Appellant Nicole Kesterson occupied, and the damages caused to Appellants.

One distinct difference between Kesterson I and II and the present action is that in the case of a hit-and-run or phantom vehicle, it is not necessary to

determine whether the operator of that vehicle was an uninsured motorist. In Kesterson I and II, a main issue was whether Wallut, the operator of the vehicle, qualified as an uninsured motorist under Appellants' policy with Respondents because he was a fellow employee of Nicole Kesterson. In the present instance, there is no need to establish the status of the hit-and-run vehicle as an uninsured vehicle or the operator as an uninsured motorist. A "phantom vehicle" or hit-and-run vehicle is expressly defined as an uninsured motor vehicle in the policy issued by Respondents.

Furthermore, the causes are separate as the present cause asserts a distinct enforceable right, arising from a different provision of the insurance policy issued by Respondents. A "claim" may be defined as the "aggregate of operative facts which give rise to a right enforceable in the courts." Nicholson Construction, 112 S.W.3d at 10 (citing Committee for Educational Equality, 878 S.W.2d at 451). Courts in other jurisdictions have recognized that a breach of each coverage provision in an insurance policy gives rise to a separate cause of action that may be separately asserted. State Farm Mutual Insurance Co. v. Yenke, 804 So.2d 429, 432 (Fla. App. 5th 2001); Bryant v. Allstate Ins. Co., 584 So. 2d 194, 195 (Fla. 5th DCA 1991).

In Kesterson I, 116 S.W.3d at 593, a claim was brought against Wallut for negligently operating the vehicle in which Appellant Nicole Kesterson was a passenger. The cause of action against Appellants' insurer was based upon the negligence of Wallut, who was uninsured at the time of the accident. Id.

Appellants alleged that the uninsured motorist provision in their policy with State Farm gave them a right to sue State Farm for the negligence of Wallut. This provision states:

> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured and caused by accident arising out of the operation, maintenance or use of an uninsured motor vehicle.
>
> Uninsured motor vehicle means:
>
> 1. A land motor vehicle, the ownership, maintenance, or use of which is:
>
> (a) Not insured or bonded for bodily injury liability at the time of the accident; or
>
> (b) Insured or bonded for bodily injury liability at the time of the accident but: (1) the limits of liability are less than required by the financial responsibility act of the state where your car is mainly garaged; or (2) the insuring company denies coverage or is or becomes insolvent . . .”
>
> (See Appendix)

The present action arises from Appellants' right to receive compensation from their insurer, Respondents, for damages caused by a phantom vehicle. (L.F 3-8). This cause of action relies upon a different provision in the policy which

defines an uninsured motor vehicle as, "A 'phantom vehicle' which is a land motor vehicle whose owner or driver remains unknown and causes bodily injury to the insured." (See Appendix). This provision of the policy provides the insured with protection from a different type of loss--damage caused by a phantom vehicle.

The actions of Wallut and of the phantom vehicle created a situation in which joint tortfeasors caused an indivisible harm. Thus, the rules regarding bringing claims against joint tortfeasors should be adhered to in the present case. A plaintiff suffering from an injury caused by joint tortfeasors may sue each tortfeasor individually or may sue all of the tortfeasors in one action. Arana v. Koerner, et al., 735 S.W.2d 729, 734 (Mo. App. W.D. 1987) (citing Agnew v. Union Construction Co., 291 S.W.2d 106, 109 (Mo. 1956)). Defendants are considered joint tortfeasors in any of the following situations: 1) concerted action; 2) breach of a common duty; 3) vicarious liability; and 4) independent, separate, but concurring torts which cause a single, indivisible harm. Id. (citing Brickner v. Normandy Osteopathic Hospital, Inc. 687 S.W.2d 910, 912 (Mo. App. E.D. 1985)). In Arana, the court went on to state, "When joinder is permitted, it is not compelled, and each tortfeasor may be sued severally, and held responsible for the damage caused, although other wrongdoers have contributed to it . . .Since each is severally liable, a verdict in favor of one does not discharge the others, either in the same or separate suits…"

In Kesterson I, 116 S.W.3d 593, Appellants alleged that Wallut's negligence caused the damages resulting from the December 30, 1998, collision. Here, Appellants allege that the negligence of a phantom vehicle contributed to or caused the December 30, 1998 collision resulting in Appellants' damages. (L.F. 5). Wallut and the phantom vehicle each committed separate torts by their acts of negligence which caused a single indivisible harm. Wallut and the phantom vehicle are thus joint tortfeasors. In Kesterson I, 116 S.W.3d at 596, Appellants were barred from suing Wallut and the cause of action was dismissed. Here, Appellants bring their cause of action arising from the negligence of the phantom vehicle. Because the joint tortfeasor is an unidentified individual, Appellants have brought this suit against their own insurance carrier, Respondents State Farm, for coverage under their uninsured motorist provision.

Respondents cited Shelter Mutual Insurance Co. v. Vulgamott, 96 S.W.3d 96 (Mo. App. W.D. 2003), in their suggestions in support of their motion to dismiss and the trial court cited this case in its dismissal of Appellants' claim. (L.F. 13 and 15). Respondents also relied on Vulgamott in seeking transfer to this Court. Respondents contended that Vulgamott directs the dismissal of Plaintiffs' claim based on the doctrine of res judicata. However, Vulgamott is distinguishable from the present action in several significant ways. In that case, Chad Vulgamott (hereinafter "Vulgamott") was a passenger in an automobile owned by his employers, Hubert and Jeane Borgelt, and driven by his co-employee, Brent Perry (hereinafter "Perry"). Id. at 99. The automobile was

insured by a policy issued by Shelter Mutual Insurance Company (hereinafter "Shelter") to the Borgelts. Id. While Vulgamott was riding in this vehicle, it was involved in a collision. Id. Vulgamott filed suit against Perry and the operator of the other vehicle involved in the collision. Id. Shelter then filed a one-count petition for declaratory judgment against Perry, Vulgamott and the Borgelts seeking a declaration that its policy did not cover Perry's operation of the vehicle on the date of the accident, based on exclusions in its policy with the Borgelts. Id. at 100. Shelter obtained a partial summary judgment in which the court found the exclusions in Shelter's policy precluded coverage for Perry and Vulgamott, and that the policy issued by Shelter did not provide coverage for the accident beyond the sum of $25,000.00 per person liability coverage. Id. at 101. The court did not determine whether Shelter had an obligation to provide coverage up to $25,000.00. Shelter then filed a motion to dismiss without prejudice all remaining claims not resolved by the partial summary judgment. Id. The court granted this motion and entered a judgment stating such. Vulgamott appealed this judgment. Id.

On appeal, the court found that Shelter's motion to dismiss a portion of the sole count contained in its petition and leave intact the remainder of the partial summary judgment was improper. Id. at 104. The court went on to state that Shelter was attempting to transform the partial summary judgment into a final appealable judgment and allow it to litigate the remainder of its cause of action at a later date. Id. The court stated that this is not allowed by the rules of civil procedure. Id. The rule against splitting a cause of action serves to prevent a

multiplicity of suits and appeals with respect to a single cause of action. Id. at 105. "Rule 67.02 contemplates dismissal of an entire claim for relief without prejudice, not merely part of a single claim for relief." Id. at 105.

The present action can be distinguished from Vulgamott on several grounds. First, the cause of action brought by Shelter sought a declaratory judgment setting forth its responsibilities as an insurer with regard to the car accident. "Shelter pleaded a contract, its interest therein, a dispute over the effect of its provisions, and prayed for a declaration of the parties' rights thereunder." Id. at 102. Shelter's petition contained one count and one cause of action. Shelter sought only for the court to determine its responsibilities under its policy with the Borgelts with respect to the accident in which the defendants were involved. As the court's partial summary judgment did not completely set forth Shelter's responsibilities, no appeal was possible.

In Kesterson I, the petition contained several counts or claims, in contrast to the one claim brought by the plaintiff in Vulgamott. In Kesterson I, 116 S.W.3d at 591, the petition alleged: Gary Wallut negligently operated a motor vehicle, causing injury to the plaintiffs; because Wallut was uninsured, the injury caused by Wallut was covered by the plaintiffs' policy issued by State Farm; the negligence of a phantom vehicle caused injury to the plaintiffs; and injury caused by a phantom vehicle is covered under the uninsured motorist provision of the plaintiffs' insurance policy with State Farm. In Kesterson I and II, it was judicially determined that Appellants never had a cause of action against Wallut

and State Farm (based on Wallut's conduct). Appellants' claim related to the phantom vehicle, which had been dismissed, was never adjudicated.

Furthermore, in Vulgamott, the appellant appealed a judgment granting the voluntary dismissal of the remainder of Shelter's claim. Here, Respondents are not appealing the order granting the voluntary dismissal of Appellants' claim against the phantom vehicle and State Farm, but rather the case has gone beyond that point. If the present action was to determine whether the court erred in granting the order to voluntarily dismiss Appellants' claim against the phantom vehicle Vulgamott would control. However, this is not the present situation.

The dismissal of Appellants' phantom vehicle claim based on res judicata also runs contrary to the policy behind res judicata. Res judicata operates as a bar to the reassertion of a cause of action that has been previously adjudicated in a proceeding between the same parties or those in privity with them. Century Fire Sprinklers, Inc. v. CNA Transportation Ins. Co., 87 S.W.3d 408, 423-424 (Mo. App. W.D. 2002). In order for res judicata to preclude an action, a final judgment on the merits must have been rendered previously on the same claim. Lomax v. Sewell, 50 S.W.3d 804, 809 (Mo. App. W.D. 2001) (citing Robin Farms v. Beeler, 991 S.W.2d 182, 185 (Mo. App. W.D. 1999)).

Respondents convinced the trial court that the appellate court's decisions in Kesterson I and II resolved Appellants' phantom vehicle claim on its merits. However, neither Kesterson I nor Kesterson II dealt with Appellants' phantom vehicle claim. When narrowed to their essential holdings, the decisions in

Kesterson I and II were that Appellants did not have a cause of action against Wallut (because he was immune) and that Appellants did not have a cause against State Farm for Wallut's conduct (because they were not entitled to recover from Wallut). In effect, the appellate court in Kesterson I and II held that Appellants had no legal right of recovery (no cause of action) against Wallut and none against State Farm based on Wallut's conduct. It defies logic to then conclude that the cause of action against Wallut and State Farm, which did not exist, was an adjudication on the merits of Appellants' valid phantom vehicle claim. Respondents would have this Court believe that filing a non-existent claim is res judicata to a valid claim. Respondents cited no controlling authority to the trial court to support this contention. Nor did Respondents contend that the phantom vehicle claim was otherwise invalid.

Both res judicata and the rule against splitting a cause of action serve to foster "efficient and economic administration of the judicial system" and to "prevent a multiplicity of suits and appeals with respect to a single cause of action." Vulgamott, 96 S.W.3d at 105. Respondents' position is that if Appellants wanted to preserve their phantom vehicle claim, they had to proceed to trial solely on the phantom vehicle claim after Kesterson I. Then, after winning or losing that trial, appeal the trial court's dismissal of their uninsured motorist claim against Respondents predicated on Wallut's conduct. If Appellants won that appeal, they would then have to re-try the case. Such a result is contrary to the long-held principle and policy of encouraging judicial economy. Trying this case twice to

two different juries would not only be inefficient, but may have resulted in inconsistent verdicts.

Respondents have also relied on Felling v. Giles, 47 S.W.3d 390 (Mo. App. E.D. 2001), as support for the dismissal of Appellants' claim by the trial court on the basis of res judicata. In Felling v. Giles, the plaintiffs alleged that they had undertaken to assist the defendant in his salvage operations and that in return they were entitled to a share of the price received by the defendant when he sold the artifacts. Id. at 392. They sought equitable and legal remedies. The trial court ordered a separate trial for the equitable claims and ruled in favor of the defendant as to those counts. Id. The plaintiffs then voluntarily dismissed their remaining counts without prejudice and appealed the judgment. The appellate court affirmed the judgment. Id. at 393. While that appeal was pending, the plaintiffs filed another action against the defendant, based on the same transactions between the defendant and the plaintiffs. The trial court granted the defendant's motion for judgment on the pleadings, and the plaintiffs appealed. The appellate court found the plaintiffs' claims in the second suit were barred by res judicata. Id.

In Felling v. Giles, the Eastern District determined the plaintiffs had one cause of action with many alternate theories of relief. Id. The Court felt that res judicata barred the plaintiffs' claim because the dismissed the claims "should be part of a single suit." Id. at 395. This reasoning does not apply to Appellants' claim. The Kestersons had two claims, one for Wallut's conduct and one for the phantom driver's conduct. These claims, as shown above, did not have to brought

as a single suit because they were based on two independent torts. Thus, Felling does not control here. Because Appellants have brought a separate and distinct action in which the facts and parties are different from that of Kesterson I and II, the present situation is distinguished from Felling v. Giles.

The dismissal of Appellants' phantom vehicle claim was error for a variety of reasons, the most important being that the phantom vehicle claim is separate and distinct from the uninsured motorist claim predicated on Wallut's conduct. As stated previously, Missouri courts have long held that separate claims may be brought in separate causes of action. This principle, combined with the lack of any previous adjudication Kesterson I or Kesterson II on the merits of Appellants' phantom vehicle claim make it clear that the trial court erred in dismissing Appellants' cause of action.

CONCLUSION

For all the aforementioned reasons, the trial court erred in dismissing this cause of action on the basis of res judicata. The trial court's ruling should be overturned and this matter remanded for a trial on all of the issues.

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.	)	

CERTIFICATE OF COMPLIANCE

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

1. The undersigned do hereby certify that the Substitute Brief of Appellants filed herein complies with the page limits of Rule 84.06(b) and contains 5,108 words of proportional type.

2. Microsoft Word was used to prepare Appellants' brief.

3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

Respectfully submitted,

THE PADBERG & CORRIGAN LAW FIRM
A Professional Corporation
Attorneys for Plaintiffs/Appellants

By_____
Matthew J. Padberg #31431
Anna E. Spink #57797
1926 Chouteau Avenue
St. Louis, MO 63103
(314) 621-2900
(314) 621-7607 (Fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Substitute Brief of Appellants and one copy of the accompanying disk were mailed this September 19, 2007, to: J. Christopher Spangler, Attorney at Law, 1439 Thompson Blvd., Sedalia, MO 65301.

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