IN THE SUPREME COURT OF MISSOURI

NO. SC88648

ON APPEAL FROM THE CIRCUIT COURT OF OF SALINE COUNTY, MISSOURI

NICOLE KESTERSON and PHILIP M KESTERSON,

APPELLANTS,

VS.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND STATE FARM FIRE & CASUALTY COMPANY

RESPONDENTS.

RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Respondents State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company (hereinafter "State Farm") do not disagree with the Statement of Facts proffered by the Kestersons. State Farm filed a Supplemental Legal File with the Missouri Court of Appeals – Western District containing the pertinent pleadings, motions and orders from the first Saline County case involving these parties, which State Farm will hereinafter refer to as "*Kesterson I*."

Counts III and IV of the Kestersons' Third Amended Petition in *Kesterson I* asserted a claim for uninsured motorist coverage (hereinafter "UM") under a theory that Gary Wallut was operating an uninsured motor vehicle at the time of the accident and that Wallut carelessly and negligently caused the automobile accident in question, thereby injuring Nicole Kesterson. (Sup. L.F. 25 – 27). In Counts V and VI of the Third Amended Petition, the Kestersons asserted an alternative claim for UM coverage based upon an allegation that a phantom vehicle struck the rear of the vehicle operated by Wallut, with the operator of the phantom vehicle being careless and negligent. (Sup. L.F. 28 – 30). The circuit court dismissed Wallut from the suit based upon workers' compensation immunity and also granted summary judgment in favor of State Farm as to Counts III and IV of the Third Amended Petition. On appeal, the Western District affirmed the dismissal of Wallut but declined to address the propriety of summary judgment in favor of State Farm since the phantom vehicle claim remained pending. *Kesterson v. Wallut,* 116 S.W.3d 590, 598 (Mo. App. 2003). In so holding, the court held that Counts III – VI constituted "one complete claim" by the Kestersons against State

Farm such that resolution of the phantom vehicle portion of the claim was required before appellate jurisdiction could be invoked. *Id.*

On November 24, 2003, the circuit court scheduled Counts V and VI of the Third Amended Petition for a jury trial on March 10 – 12, 2004. (Sup. L.F. 40). On March 3, 2004, the Kestersons filed a Motion to Dismiss Counts V and VI for the express purpose of appealing Counts III and IV. (Sup. L.F. 32 – 34). The circuit court granted the dismissal, over State Farm's objection, on March 9, 2004. (Sup. L.F. 35). The Kestersons then pursued the appeal as to Counts III and IV and the Western District affirmed the summary judgment in favor of State Farm. *Kesterson v. Wallut*, 157 S.W.3d 675 (Mo. App. 2004).

On April 20, 2005, the Kestersons filed the instant action, which will hereinafter be referred to as "*Kesterson II*." The Petition in *Kesterson II* is nothing more than a restatement of the phantom vehicle claim contained in Counts V and VI of the Third Amended Petition in *Kesterson I*. State Farm filed its Motion to Dismiss *Kesterson II* on the basis of res judicata and the rule against splitting a cause of action. (L.F. 9 – 13). The circuit court heard argument on State Farm's motion on September 27, 2005 and entered a Judgment of Dismissal with Prejudice on December 8, 2005. (L.F. 15). The Kestersons have appealed the Judgment of Dismissal with Prejudice.

POINT RELIED ON

THE CIRCUIT COURT CORRECTLY SUSTAINED STATE FARM'S MOTION TO DISMISS FOR THE REASON THAT RES JUDICATA PROHIBITS THE KESTERSONS' REASSERTION OF THE PHANTOM VEHICLE CLAIM IN THIS CASE SINCE THE KESTERSONS PREVIOUSLY PROSECUTED TO JUDGMENT CLAIMS AGAINST STATE FARM IN *KESTERSON I* ARISING OUT OF THE SAME AUTOMOBILE ACCIDENT AND SAME INSURANCE CONTRACT PROVISION.

Chesterfield Village, Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc 2002)

Shelter Mutual Ins. Co., v. Vulgamott, 96 S.W.3d 96 (Mo. App. 2003)

Felling v. Giles, 47 S.W.3d 390 (Mo. App. 2001)

ARGUMENT

THE CIRCUIT COURT CORRECTLY SUSTAINED STATE FARM'S MOTION TO DISMISS FOR THE REASON THAT RES JUDICATA PROHIBITS THE KESTERSONS' REASSERTION OF THE PHANTOM VEHICLE CLAIM IN THIS CASE SINCE THE KESTERSONS PREVIOUSLY PROSECUTED TO JUDGMENT CLAIMS AGAINST STATE FARM IN *KESTERSON I* ARISING OUT OF THE SAME AUTOMOBILE ACCIDENT AND SAME INSURANCE CONTRACT PROVISION.

A. STANDARD OF REVIEW

State Farm responded to the Kestersons' Petition by filing a Motion to Dismiss. As a part of the motion, State Farm requested the circuit court to take judicial notice of its file in *Kesterson I*. Supreme Court Rule 55.27(a) provides that if matters outside the pleadings are presented, the court treats the motion to dismiss as a motion for summary judgment under Supreme Court Rule 74.04. *See also: King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 499 (Mo. banc 1991)(res judicata defense raised in motion to dismiss). An appellate court employs de novo review when a motion for summary judgment is granted; summary judgment should be affirmed when the moving party establishes a right to judgment as a matter of law where there is an absence of any genuine issues of material fact. *United Missouri Bank, N.A. v. City of Grandview*, 105 S.W.3d 890, 895 (Mo. App. 2003).

B. FACTUAL BACKGROUND

On December 30, 1998 Nicole Kesterson was a passenger in a vehicle driven by Gary Wallut on Interstate 70 in Saline County. Wallut and Kesterson were both employed by the Missouri Department of Natural Resources and were headed to Kansas City for a job-related trip. Interstate 70 was covered with snow and/or ice and Wallut lost control of the vehicle. The vehicle slid across the median and into the path of an oncoming tractor/trailer at which time a collision occurred. Kesterson was injured and received Workers Compensation benefits for her injuries.

At the time of the accident in question, the Kestersons had four policies of automobile insurance in force which were issued by State Farm, all of which contained UM coverage. In accordance with §379.203 RSMo. 2000, the State Farm policies provide UM coverage: (a) when the insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, or (b) when the accident is caused by a phantom vehicle.

The Kestersons' Third Amended Petition in *Kesterson I* (Appendix, pp. A1 – A11) asserted a personal injury, tort claim against Wallut and contract claims against State Farm for UM coverage under theories that Wallut was driving an uninsured motor vehicle or, alternatively, that the accident was caused by a phantom vehicle. The circuit court dismissed Wallut from the suit based upon workers' compensation immunity and also granted summary judgment in favor of State Farm as to the claim that UM coverage applied due to Wallut's operation of the vehicle. On appeal, the Western District affirmed the dismissal of Wallut but did not rule the merits of the summary judgment in favor of

State Farm upon an express finding that the Kestersons had but one claim against State Farm and this claim was not resolved since the phantom vehicle aspect of the UM claim was not addressed. *Kesterson v. Wallut*, 116 S.W.3d 590, 597-598 (Mo. App. 2003).

Subsequent to the first appeal in *Kesterson I*, the circuit court scheduled the phantom vehicle claim for trial. Shortly before the trial date, the Kestersons filed a Motion to Dismiss the phantom vehicle claim so that they could "thereafter appeal this court's dismissal of the claims against State Farm based on the negligence of Gary Wallut." (Appendix, pp. A12 – A14). The circuit court, over State Farm's objection, granted the dismissal. (Appendix, p. A15). The Kestersons then perfected their second appeal to the Western District and that court affirmed summary judgment in favor of State Farm as to that portion of the UM claim regarding Wallut's operation of the vehicle. *Kesterson v. Wallut*, 157 S.W.3d 675 (Mo. App. 2004).

The Kestersons refiled the phantom vehicle claim, which is the basis of this appeal, on April 20, 2005. State Farm filed a Motion to Dismiss the Petition on the basis of res judicata/improper splitting of a cause of action. The circuit court heard argument on the motion on September 27, 2005 and also took judicial notice of the file in *Kesterson I*. The circuit court sustained State Farm's motion on December 8, 2005.

C. ARGUMENT

The circuit court properly sustained State Farm's Motion to Dismiss based upon res judicata. "Res judicata, or its modern term, claim preclusion, prohibits splitting a claim or cause of action." *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002). 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.* To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of a same act, contract or transaction. *Id.* at 319. This rule is designed to prevent a multiplicity of lawsuits and the penalty for violating this rule is that an adjudication on the first suit is a bar to the second suit. *Collins v. Burg*, 996 S.W.2d 512, 515 (Mo. App. 1999).

The Kestersons' claim for UM coverage, whether related to Wallut or to the operator of the phantom vehicle, clearly arises out of the same accident and same insurance contracts such that they have only one cause of action, which they previously prosecuted to an adverse judgment. While the Kestersons argue that the evidence in a trial in this case might be different from the prior case since Wallut is no longer a defendant, claim preclusion "prevents reassertion of the same claim even though additional or different evidence or legal theories might be advanced to support it." *Chesterfield Village*, 64 S.W.3d at 320. In any event, the fact of the matter is that the evidence would be exactly the same in this case had either aspect of the UM claim gone to trial in *Kesterson I*; Wallut would deny liability and claim that the phantom vehicle caused the accident.

The Kestersons dismissed the phantom vehicle claim in *Kesterson I* so they could obtain an immediate ruling as to the propriety of the circuit court's summary judgment ruling in favor of State Farm regarding that part of the UM claim which alleged that UM coverage applied to Wallut's operation of the vehicle. As the Western District noted in *Shelter Mutual Ins. Co. v. Vulgamott*, 96 S.W.3d 96, 104 (Mo. App. 2003), a party cannot

"maneuver" around the rules of procedure by dismissing portions of a claim in order to obtain immediate appellate review of another portion of the claim. Likewise, in *Felling v. Giles*, 47 S.W.3d 390 (Mo. App. 2001), the Missouri Court of Appeals – Eastern District stated the following:

> Plaintiffs manifestly split their cause of action by seeking recovery based on the same core of facts in separate lawsuits. Does it make any different that the plaintiffs initially included in their petition in the first action the claims sued on in the second, and then obtained an order of dismissal without prejudice of all claims that were not the subject of a separate trial? We think not … The plaintiff should not be permitted to experiment by prosecuting successive actions. The plaintiffs cannot take solace from the court's order dismissing the counts now sued on without prejudice upon plaintiffs' motion. The plaintiffs sought to split their cause of action. The trial court could have, and did, order separate trials of the several counts, but could not authorize the maintenance of a second action containing claims which were required to be included in the prior action which had become the subject of a final judgment…Our procedure discourages such experimentation with the court's processes.

47 S.W.3d at 394 – 395. "The rule against splitting a cause of action would have little meaning if it could be avoided by first filing and then dismissing claims that should be part of a single suit." *Id.*

There are two pertinent insurance law cases which are quite on point herein. In *Shelter Mutual Ins. Co. v. Vulgamott*, *supra.*, which was relied upon by the circuit court, Shelter Mutual Insurance Company filed a declaratory judgment action and obtained partial summary judgment in its favor. Shelter then dismissed, without prejudice, the unresolved portions of its claim so that it could immediately defend the favorable ruling on appeal. An appeal was taken by the adverse party and the Western District dismissed the appeal for lack of jurisdiction. In so doing, the Western District held as follows:

> In sum, Rule 67.02 simply does not allow a plaintiff to dismiss select portions of a claim for relief as to an individual defendant without prejudice and thereby convert a previously entered partial summary judgment into a final judgment and allow the remaining issues to be litigated at a later date. Moreover, no useful purpose would be served by allowing a plaintiff to manufacture finality in this manner. For all the foregoing reasons, we hold that Shelter Mutual's attempt to transform the previously entered partial summary judgment into a final and appealable judgment by purportedly dismissing without prejudice any issues left unresolved by that partial summary judgment is not authorized under our

> rules of civil procedure. Accordingly, Shelter's attempted dismissal was invalid and of no legal effect, and the trial court's entry of judgment based upon that pleading was likewise improper.

96 S.W.3d at 106. This is exactly what the Kestersons did in this case.

Columbia Mutual Ins. Co. v. Epstein, 200 S.W.3d 547 (Mo. App. 2007) is also instructive. In *Epstein*, Columbia Mutual Insurance Company filed a declaratory judgment action wherein it claimed it had no duty to defend or indemnify Epstein under Epstein's homeowners policy with Columbia Mutual. Epstein filed a counterclaim against Columbia Mutual for damages for vexatious refusal to pay and bad faith. The trial court granted summary judgment in favor of Epstein as to the declaratory judgment claim but the trial court did not decide the counterclaim. Columbia Mutual appealed and the Eastern District dismissed the appeal. In dismissing the appeal, the Eastern District stated as follows:

> Columbia's declaratory-judgment action and Epstein's counterclaim are inextricably intertwined in that they arise from the same contract, involve the same parties, and share the same factual underpinnings. The subject matter involved is the same and the evidence necessary to resolution of each issue substantially overlaps. Consequently, we hold that the trial court's determination of Columbia's duty to defend and indemnify did not dispose of "one claim" or of a "distinct

> judicial unit" because Epstein's counterclaim for vexatious refusal to pay and bad faith remains pending.

200 S.W.3d at 553.

Another analogous case, outside the insurance context, is *Creel v. Union Electric Co., Inc.*, 950 S.W.2d 315 (Mo. App. 1997). In *Creel*, the Western District held that the plaintiff could not immediately appeal the circuit court's dismissal of a strict liability claim, since an alternative negligence theory was also pleaded, but not dismissed. In determining that the plaintiff had but one cause of action, the Western District noted that the plaintiff could only obtain one recovery against the defendant, even if the plaintiff was successful on both theories. *Id.* at 317. The same rationale applies in this case. The Kestersons can only make one recovery against State Farm for UM coverage for their damages arising out of this accident, whether the UM coverage is triggered by Wallut or the operator of the alleged phantom vehicle.

In essence, what the Kestersons are asking the Court is to allow them two opportunities to try the same case with the same evidence regarding liability and the same evidence regarding damages. If Wallut had not been dismissed in *Kesterson I* and the Kestersons' argument herein is adopted, there could have been two separate trials, to wit:

<u>Trial Scenario Number One – Kestersons Allege Negligence by Wallut.</u>

Kestersons go to trial on their UM claim that Wallut was uninsured and negligently caused the accident. Wallut is called as a witness and denies negligence, claiming that he was struck by a phantom vehicle. The Kestersons then call as witnesses the two independent witnesses who saw the accident and testify there was no phantom

vehicle. The Kestersons argue to the jury that Wallut was at fault and there was no phantom vehicle. If the jury finds against the Kesterson, we then go to . . .

Trial Scenario Number Two – Kestersons Allege Negligence of Phantom Vehicle

Having lost the first trial, the Kestersons have a second trial. The Kestersons now treat Wallut as a friendly witness for the purpose of eliciting his testimony about being struck by a phantom vehicle. State Farm now calls as witnesses the two independent witnesses who testify that there was no phantom vehicle.

As this demonstrates, the evidence in both potential trials or lawsuits is the same but the effect is to give the Kestersons two different trials and two inconsistent arguments in order to recover the same insurance coverage.

The Kestersons have cited two Florida cases, neither of which is helpful in addressing the issue in this case. In *State Farm Mutual Ins. Co. v. Yenke*, 804 So.2d 429 (Fla. App. 2001), that court ruled that it would not be an improper splitting of a cause of action for the plaintiff/insured to first sue State Farm for UM coverage and then file a second suit based upon a separate policy provision for underinsured motorist ("UIM") coverage. In *Bryant v. Allstate Ins. Co.*, 584 So.2d 194 (Fla. App. 2001), that court held that improper splitting of a cause of action did not occur when the plaintiff/insured sued Allstate in the first case for collision coverage, for personal injury protection ("PIP") benefits in the second action and UM coverage in the third action. In this case, both suits involved the same UM policy provision.

While the trial court's dismissal of the Kestersons' petition in this case was legally correct, the dismissal can be affirmed by this Court for other reasons as long as the trial

court reached the correct result. *Graue v. Missouri Property Ins. Placement Facility*, 847 S.W.2d 779, 781 (Mo. banc 1993). Another such reason to affirm is the law of the case doctrine, which this Court recently addressed and reaffirmed in *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc 2007). The first appeal of this case resulted in a finding by the Western District that the Kestersons had but one "complete claim" against State Farm for UM coverage such that the court had no jurisdiction to entertain the appeal of that part of the "one complete claim" which dealt with the allegation that Wallut was operating an uninsured motor vehicle. 116 S.W.3d at 598. Therefore, this ruling conclusively established that the Kestersons had but one claim for UM coverage per res judicata/splitting a cause of action principles. When the Kestersons proceeded to an adverse judgment in *Kesterson I*, their one claim for UM coverage was finally and fully adjudicated and they are not entitled to maintain this second action for the same coverage, under the same insurance policies, and arising from the same accident.

CONCLUSION

The circuit court correctly dismissed this case upon application of res judicata. The Kestersons asserted both aspects of their UM claim against State Farm in *Kesterson I* and then dismissed the phantom vehicle portion of the claim in order to obtain immediate appellate review of a portion of the claim. The purpose of res judicata is to prevent a multiplicity of lawsuits and appeals and this case is a classic example of why the rule should be invoked; this is the third appeal defended by State Farm and all of the issues against all past and present parties could have been resolved with one trial upon the same evidence that the Kestersons would present at a trial should this case be allowed to continue. This is not the type of legal maneuvering which this Court has countenanced in the past and should not condone in this case.

WHEREFORE, State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company pray the order of this Court affirming the decision of the circuit court.

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

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RULE 84.06 CERTIFICATION AND CERTIFICATE OF SERVICE

COMES NOW J. Christopher Spangler, counsel for Respondents State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty and certify that this Brief complies with Rule 84.06(b); that this Brief contains 3,517 words; that this Brief contains 346 lines of monospaced type and that this Brief has been provided in disk format and that said disk has been scanned for viruses and found to be virus-free.

This it to further certify that two copies of this Brief and a disk containing the Brief were mailed via United States Mail, postage prepaid, this 3rd day of October, 2007 to Matthew J. Padberg and Anna E. Spink of The Padberg & Corrigan Law Firm, 1926 Chouteau Avenue, St. Louis MO 63103.

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