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Separate Cause of Action for Contribution among Joint Tortfeasors, A

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NOTES

A SEPARATE CAUSE OF ACTION FOR CONTRIBUTION AMONG JOINT TORTFEASORS

Safeway Stores v. City of Raytown[1]

English common law allowed contribution among unintentional joint tortfeasors.[2] Early American common law, however, denied all rights to contribution, based upon a misinterpretation of *Merryweather v. Nixan*,[3] an English case decided in 1799. Gradually the bar eroded, and by 1971, contribution rights existed in nine American jurisdictions.[4]

Contribution rights in Missouri initially were only statutory.[5] In *Missouri Pacific Railroad v. Whitehead & Kales Co.*,[6] the Missouri Supreme Court expanded the right by allowing defendants to implead tortfeasors to determine contribution.[7] In the recent case of *Safeway Stores v. City of Raytown*,[8] the court held that a joint tortfeasor has a substantive right to contribution that can be asserted in a separate cause of action.[9]

John Esler was killed when a vehicle owned by Safeway collided with the lift from which he was repairing a streetlight.[10] Esler's wife brought a wrongful death action against Safeway in federal court. Safeway did not implead any third party to obtain a joint judgment of liability. Mrs. Esler received a judgment against Safeway.[11] Safeway filed suit seeking apportionment of lia-

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1. 633 S.W.2d 727 (Mo. 1982) (en banc).
2. *See* G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE §§ 25-54 (1932); Reath, *Contribution Between Persons Jointly Charged for Negligence*—Merryweather v. Nixan, 12 HARV. L. REV. 176, 177 (1898).
3. 101 Eng. Rep. 1337 (K.B. 1799); *see* Reath, *supra* note 2, at 177.
4. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 50, at 306-07 (4th ed. 1971).
5. Note, *Settling Joint Tortfeasor Can Sue for Contribution From Nonsettling Joint Tortfeasor*, 46 MO. L. REV. 886, 888 (1981). As enacted, MO. REV. STAT. § 537.060 (1978) (repealed 1983) only allowed contribution after the plaintiff secured a judgment against jointly sued tortfeasors. *See* note 127 *infra*. The statute did not change the common law rule forbidding a sued tortfeasor from seeking contribution from a joint tortfeasor that the plaintiff had chosen not to sue.
6. 566 S.W.2d 466 (Mo. 1978) (en banc).
7. *Id.* at 474.
8. 633 S.W.2d 727 (Mo. 1982) (en banc).
9. *Id.* at 731.
10. *Id.* at 728.
11. Esler v. Safeway Stores, 585 F.2d 903, 903 (8th Cir. 1978).

bility based upon relative fault among the City of Raytown, Contractor's Supply Co., and Fulton Industries.[12] The trial court dismissed the action, reasoning that Safeway could not bring a separate indemnity action against defendants who were not parties to the original suit.[13] Safeway appealed, and the Missouri Supreme Court reversed.[14] The court held that Safeway had a substantive right to contribution that could be asserted independently without obtaining a single judgment[15] against all parties.[16] The court stated that a separate action for contribution would not violate the defendants' due process rights.[17]

The court justified its holding as an interpretation of *Whitehead & Kales*.[18] *Whitehead & Kales* established contribution by impleader in Missouri between joint tortfeasors[19] based upon relative fault.[20] The action arose from Missouri Pacific's attempt to implead Whitehead & Kales[21] pursuant to Missouri Rule of Civil Procedure 52.11[22] and Missouri Revisted Statutes section 507.080.[23] Except for the statutory right to contribution from joint judgment tortfeasors, the general rule in Missouri had been that no right of contribution

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12. The City of Raytown employed Esler, Contractor's Supply Co. leased Esler the lift, and Fulton Industries manufactured the lift. 633 S.W.2d at 728.

13. *Id.* at 729. Safeway sought contribution. Contribution, indemnity, and partial indemnity are often confused. Contribution refers to distributing the loss among tortfeasors, requiring each to pay his proportionate share. Indemnity shifts the entire loss, requiring total reimbursement. *Safeway*, 633 S.W.2d at 729 n.3; *see* Stephenson v. McClure, 606 S.W.2d 208, 210-11 (Mo. Ct. App. 1980); W. PROSSER, *supra* note 4, § 51, at 310. Partial indemnity is a misnomer for contribution.

14. 633 S.W.2d at 728.

15. *Id.* While a joint judgment is not required, common or joint liability to the plaintiff is necessary. *See* State *ex rel.* Baldwin v. Gaertner, 613 S.W.2d 638, 640 (Mo. 1981) (en banc); Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 468-69 (Mo. 1978) (en banc); W. PROSSER, *supra* note 4, § 50, at 309.

16. 633 S.W.2d at 732.

17. *Id.*

18. *Id.* at 730. *Whitehead & Kales* has been said to apply only to actions for negligence. Comment, *Contribution in Missouri—Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691, 691 (1979). The action in *Safeway* was based on the humanitarian doctrine; the general negligence count was dropped. 585 F.2d at 904 n.1.

19. *Whitehead & Kales* applies to joint tortfeasors. Comment, *supra* note 18, at 692. Joint tortfeasors are parties causing wrongful acts that are separate and distinct but concur in time and directly cause a single injury. Mails v. Kansas City Pub. Serv. Co., 51 F. Supp. 562, 564 (W.D. Mo. 1943).

20. Controversy exists over whether the phrases "relative fault" and "joint and several liability" can be used consistently. Relative fault distributes the liability among defendants, and joint and several liability allows the plaintiff to collect any or all of the judgment from one defendant. Parks v. Union Carbide Corp., 602 S.W.2d 188, 197-201 (Mo. 1980) (en banc) (Welliver, J., dissenting).

21. Whitehead & Kalés manufactured and installed the auto rack from which the plaintiff fell. 566 S.W.2d at 467.

22. Rule 52.11(a) adopts FED. R. CIV. P. 14(a) ("defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him"). *See* State *ex rel.* Green v. Kimberlin, 517 S.W.2d 124, 126-27 & n.1 (Mo. 1974) (en banc) (allowed defendant to implead a person not a party to the action who "is or may be liable to him for all or part of the plaintiff's claim against him").

23. (1969) (third-party practice).

existed among parties of equal fault.[24] The trial court dismissed Missouri Pacific's third party petition,[25] thereby precluding a joint judgment against Missouri Pacific and Whitehead & Kales, and preventing any opportunity for Missouri Pacific to obtain contribution under the statute. The court of appeals affirmed.[26] The court reasoned that Missouri Pacific was not entitled to indemnity or contribution because Missouri law[27] prevented an "actively" negligent party from seeking indemnity.[28]

On appeal, the Missouri Supreme Court concluded that the active-passive distinction had no logical basis.[29] Based upon fairness and the need for predictability, the court held that damages should be apportioned based on relative fault.[30] The court permitted the original defendant to implead a third party for apportionment of liability[31] and thereby granted a procedural, and possibly substantive, right to contribution.[32]

According to the *Safeway* court, *Whitehead & Kales* implicitly authorized an independent action for contribution[33] because it granted the procedural

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24. *See* MO. REV. STAT. § 537.060 (1978) ("Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution."). The statute requires a "joint judgment" before contribution can be obtained. *See* Allen v. United States, 370 F. Supp. 992, 1009 (E.D. Mo. 1973); Crouch v. Tourtelot, 350 S.W.2d 799, 803 (Mo. 1961) (en banc). It was recently changed to clarify the effect of releases on claimants and joint tortfeasors. 1983 Mo. Legis. Serv. 398-99 (West) (codified at MO. REV. STAT. § 537.060 (Supp. 1983)).

25. 566 S.W.2d at 467.

26. *Id.* Missouri Pacific's contribution claim was originally dismissed because the railroad's negligence was considered active, barring contribution under the old criteria. *Id.* at 468. On remand, the trial court found that Missouri Pacific's relative fault was 25% and that Whitehead & Kales's relative fault was 75%. Missouri Pac. R.R. v. Whitehead & Kales Co., No. 73681 (Jackson County Cir. Ct. Oct. 22, 1981).

27. *E.g.*, Union Elec. Co. v. Magary, 373 S.W.2d 16, 21 (Mo. 1963); Johnson v. California Spray-Chem. Co., 362 S.W.2d 630, 634 (Mo. 1962); Crouch v. Tourtelot, 350 S.W.2d 799, 807-08 (Mo. 1961) (en banc); Kansas City S. Ry. v. Payway Feed Mills, 338 S.W.2d 1, 7 (Mo. 1960); Bratton v. Sharp Enters., 552 S.W.2d 306, 320 (Mo. Ct. App. 1977); Fields v. Berry, 549 S.W.2d 122, 127-28 (Mo. Ct. App. 1977); Hays-Fendler Constr. Co. v. Traroloc Inv. Co., 521 S.W.2d 171, 176-77 (Mo. Ct. App. 1975); Lewis v. Amchem Prods., 510 S.W.2d 46, 48 (Mo. Ct. App. 1974).

28. *Whitehead & Kales*, 566 S.W.2d at 471. Active or passive negligence was never determined with any consistency; an act could be deemed either depending upon how it was characterized. *Whitehead & Kales* gave as examples: " 'driving an automobile with bad brakes' or 'running through the stop sign' or 'using a defective crane' might be said to be 'active' negligence, while 'omitting maintenance of brake fluid level' or 'neglecting to apply the brakes' or 'failing to inspect the crane in order to discover its defectiveness' might be 'passive' negligence." *Id.*

29. *Id.* at 470-72.

30. *Id.* at 472.

31. *Id.* at 474. *Whitehead & Kales* overruled State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 127 (Mo. 1948) (en banc) (allowed the plaintiff in the original action to exclude a third-party defendant from the suit). *Safeway*, 633 S.W.2d at 733 (Welliver, J., concurring).

32. *See* Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 680-81 (E.D. Mo. 1979); Roth v. Roth, 571 S.W.2d 659, 672 (Mo. Ct. App. 1978); notes 33-37 and accompanying text *infra*.

33. Forty-two states and the District of Columbia permit contribution. Kutner, *Contribution Among Tortfeasors: The Effect of Statutes of Limitations and Other Time Limitations*, 33 OKLA. L. REV. 203, 269-71 (1980). Twenty of these 43 jurisdictions have adopted the UNIF. CONTRIBUTION AMONG TORTFEASORS ACT (1939) (revised 1955), 12 U.L.A. 63-107 (1975) & 58 (Supp. 1983) (provides for a separate contribution action) [hereinafter cited as UCATA]. Jurisdictions that have not adopted the Act often judicially provide for separate actions. *E.g.*, State

and substantive right to contribution through impleader.[34] The *Safeway* court reasoned that some substantive right must exist before impleader is allowed.[35] Since *Whitehead & Kales* granted the procedural right to impleader for contribution claims, it necessarily established a substantive right to contribution outside the statute.[36] The court further stated that a substantive cause of action can be asserted independently.[37]

The *Safeway* court acknowledged the conflict between its holding and the contribution statute.[38] Missouri Revised Statutes section 537.060[39] grants contribution rights to "[d]efendants in a judgment."[40] The courts had interpreted this phrase to require a judgment of joint liability before allowing contribution.[41] *Whitehead & Kales* attacked this limitation as "inartful and capricious,"[42] and *Safeway* construed the criticism as authorization for creating a separate contribution action.[43]

The reasoning employed in *Safeway* may be inconsistent with Missouri case law. An earlier Missouri decision stated that providing a right to impleader, as done in *Whitehead & Kales,* did not change substantive law because the right of contribution between joint tortfeasors accrues only upon joint judgment.[44]

The respondents in *Safeway,* who were not parties to the original action, contended that a separate contribution action would violate their procedural due process rights.[45] The court did not find this argument persuasive. The liability of a non-party defendant is not determined by the original action; thus,

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Farm Mut. Auto Ins. Co. v. Schara, 56 Wis. 2d 262, 263, 201 N.W.2d 758, 759 (1972).

34. *Safeway,* 633 S.W.2d at 731; *see* 3 J. MOORE, MOORE'S FEDERAL PRACTICE § 14.03[1] (1982).

35. The reasoning is that Rule 14 does not

> 'abridge, enlarge, nor modify the substantive rights of any litigant.' It creates no substantive rights. Thus unless there is some substantive basis for the third-party plaintiff's claim he cannot utilize the procedure of Rule 14. The Rule does not establish a right of reimbursement, indemnity, nor contribution; but where there is a basis for such right, Rule 14 expedites the presentation, and in some cases accelerates the accrual of such right.

3 J. MOORE, *supra* note 34, ¶ 14.03[1] (footnotes omitted); *see* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1448, at 264-65 (1971).

36. *Safeway,* 633 S.W.2d at 731.

37. *Id.; see* Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 680-81 (E.D. Mo. 1979) (*Whitehead & Kales* created a new substantive cause of action, implying that indemnity may be sought in a separate suit).

38. The courts have strictly adhered to the statute's requirement of a joint judgment. *See, e.g.,* Allen v. United States, 370 F. Supp. 992, 1009 (E.D. Mo. 1973); Layman v. Uniroyal, Inc., 558 S.W.2d 220, 225 (Mo. Ct. App. 1977).

39. (1978) (repealed 1983).

40. *See also* UCATA § 4, 12 U.L.A. 98 (1975) (releases and covenants not to sue).

41. Allen v. United States, 370 F. Supp. 992, 1009 (E.D. Mo. 1973); Crouch v. Tourtelot, 370 S.W.2d 799, 803 (Mo. 1961) (en banc); State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 22, 213 S.W.2d 127, 131 (Mo. 1948) (en banc).

42. 566 S.W.2d at 473.

43. 633 S.W.2d at 731.

44. State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 22, 213 S.W.2d 127, 131 (Mo. 1948) (en banc).

45. 633 S.W.2d at 732.

due process rights are not endangered by an independent contribution action.[46] Contribution defendants retain the right to discover and present evidence, cross-examine witnesses, and use any defense that would have been available in the original action.[47] The *Safeway* court cited *Sattelberger v. Telep,*[48] in which the New Jersey Supreme Court held that a subsequent contribution action did not violate the defendant's right to procedural due process. The *Sattelberger* court held that the right to seek contribution is substantive; therefore, it is enforced and protected by the rules of court.[49] These rules protect due process rights, including the rights of joint tortfeasors.[50]

The Missouri Supreme Court in *Safeway* referred to *Whitehead & Kales* to justify creating an independent contribution action. *Whitehead & Kales,* however, demonstrated reluctance to establish an independent action. The supreme court in *Whitehead & Kales* seemed to purposely avoid any conflict with the Missouri contribution statute.[51] Because the statute mentioned only judgment defendants, the court concluded that it must only bind defendants against whom a judgment has been rendered. *Whitehead & Kales* interpreted the statutory requirement to exclude pre-judgment proceedings;[52] *Safeway* extended this analysis to create a post-judgment action.[53]

In *Rudolph v. Mundy,*[54] the Arkansas Supreme Court faced a situation similar to *Safeway.* Arkansas's statute referred to "joint judgment debtor[s],"[55] and provided that if a party could obtain relief by third party practice, "no independent action shall be maintained to enforce the claim for

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46. *Id.; see also* Sattelberger v. Telep, 14 N.J. 353, 365, 102 A.2d 577, 583 (1954). Separate actions may present res judicata and collateral estoppel problems. Comment, *supra* note 18, at 704 & n.68. Nevertheless, courts have consistently held that an action is not barred by res judicata or collateral estoppel unless the defendant was found to be faultless in the original action. Due process is satisfied if the defendant has a full and fair opportunity to defend on the merits. *E.g.,* Shimp v. Sederstrom, 305 Minn. 273, 276, 233 N.W.2d 292, 295 (1975).

47. 633 S.W.2d at 732.

48. 14 N.J. 353, 102 A.2d 577 (1954).

49. *Id.* at 365, 102 A.2d at 583.

50. *Id.*

> The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover, a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligation. Every defendant may, of course, set up any defense personal to him.

Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 236 (1937).

51. 566 S.W.2d at 473-74 (statute does not apply to proceedings prior to judgment); *see also* Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 681 (E.D. Mo. 1979) (*Whitehead & Kales* implies that separate suit may be brought); Parks v. Union Carbide Corp., 602 S.W.2d 188, 196 (Mo. 1980) (Welliver, J., dissenting) (no sound reason why liability issue should not be decided by a jury prior to judgment). *But cf. Whitehead & Kales,* 566 S.W.2d at 474 n.8 (problems with separate trials).

52. 566 S.W.2d at 473.

53. 633 S.W.2d at 732.

54. 226 Ark. 95, 288 S.W.2d 602 (1956). Arkansas has since adopted the UCATA. *See* ARK. STAT. ANN. §§ 34-1001 to -1009 (1962).

55. 1941 Ark. Acts 315 ("[C]ontribution [is allowed] against any other joint judgment debtor, where in a single action a judgment has been entered.").

contribution."[56] Nevertheless, in dicta the court authorized a separate action for contribution.[57]

In *Rudolph,* three suits arising out of a three-car accident were consolidated. Rudolph's cross-claim against Mundy for contribution was dismissed by the trial court.[58] On appeal, the supreme court upheld the dismissal because impleader was permissive rather than mandatory.[59] The court suggested, however, that a plaintiff denied permissive impleader may not be precluded from seeking contribution in a separate action.[60]

The contribution right recognized in *Safeway* also may be analogous to the right to obtain contribution in a separate action following settlement. This right is recognized in most jurisdictions, including Missouri.[61] In *Stephenson v. McClure,*[62] the Missouri Court of Appeals applied *Whitehead & Kales* to settlements and concluded that the lack of a prior judgment for the plaintiff did not prejudice the co-tortfeasor's right to contribution.[63] The problem with this analogy is that settlement is a prejudgment remedy and thus falls within the language of *Whitehead & Kales.* Nevertheless, the analogy is relevant on a policy level: settlements often are reached at trial during jury deliberations. Therefore, the problems of relitigating issues and wasting court time exist in both situations.

Safeway's recognition of a separate cause of action for contribution presents significant problems. Although the judgment in *Safeway* occurred before *Whitehead & Kales* was decided, the parties did not contest its retroactive application.[64] Missouri applies a "procedure-substance" test to determine the effect of an overruling decision.[65] The mechanisms for carrying on the suit are classified as procedural; the rights and duties that give rise to the cause of action are substantive.[66] If the decision overruled involves substantive law, it is applied retroactively.[67] *Whitehead & Kales* affected apportionment of liability

56. *Id.* The statute has been superceded by ARK. R. CIV. P. 18: "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action."

57. 226 Ark. at 99, 288 S.W.2d at 604-05 (right to contribution through impleader is permissive and does not preclude separate contribution suit).

58. *Id.* at 99, 288 S.W.2d at 604.

59. *Id.,* 288 S.W.2d at 604-05. Missouri's impleader rule is permissive. *See* note 22 *supra.*

60. 226 Ark. at 99, 288 S.W.2d at 605. *Safeway* used the same argument. *See* 633 S.W.2d at 731.

61. *See* Stephenson v. McClure, 606 S.W.2d 208, 212 n.10 (Mo. Ct. App. 1980); Comment, *supra* note 18, at 715.

62. 606 S.W.2d 208 (Mo. Ct. App. 1980).

63. *Id.* at 212.

64. *Safeway,* 633 S.W.2d at 728 n.1.

65. Shepherd v. Consumers Coop. Ass'n, 384 S.W.2d 635, 640 (Mo. 1964) (en banc); Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 24 (Mo. 1959); Barker v. St. Louis County, 340 Mo. 986, 996, 104 S.W.2d 371, 377 (1937); Koebel v. Tieman Coal & Material Co., 337 Mo. 561, 570-72, 85 S.W.2d 519, 524-25 (1935); Roth v. Roth, 571 S.W.2d 659, 672 (Mo. Ct. App. 1978).

66. Shepherd v. Consumer Coop. Ass'n, 384 S.W.2d 635, 640 (Mo. 1964) (en banc).

67. *Id.*

and rights of recovery; hence, Missouri courts have classed it as substantive[68] and apply it retroactively.[69] If *Whitehead & Kales* authorized a separate action for contribution, as *Safeway* reasoned, the right to bring an independent contribution action may also be retroactive. To the extent it enlarges contribution rights beyond pre-judgment liability, *Safeway* may have implicitly overruled[70] *Whitehead & Kales*.[71] If so, *Safeway* may be retroactive.

Whether *Whitehead & Kales* authorized an independent contribution action or *Safeway* is retroactive, granting retroactive status remains problematic. A court that overrules a decision has the discretion, even in cases involving substantive changes in law, to determine the new law's retroactive effect.[72] When the court remains silent on retroactivity, the overruling decision is generally assumed to be retroactive.[73] *Whitehead & Kales* and *Safeway* did not discuss retroactivity; therefore, they normally would be retroactive to the extent that they overruled prior law. Nevertheless, a court may deny or limit a decision's retroactive effect to special circumstances.[74] The scope of retroactivity may be limited to the parties in the overruling decision, applied to transactions occurring before the decision, expanded to pending judgments, or encompass final judgments.[75] If Missouri courts decide that the right to independent post-judgment contribution dates back to *Whitehead & Kales,* suits tried years prior to *Safeway* may reappear on dockets as co-tortfeasors demand contribution rights.

The *Safeway* court acknowledged the general five-year statute of limitations for contribution actions,[76] but the court suggested that the legislature shorten the statutory period if five years proves too long.[77] In Missouri, the statute of limitations for contribution actions does not run until a joint tortfeasor pays more than his proportionate share after judgment or settlement.[78] Contribution proceedings may commence years after the statute of limitations on the original plaintiff's action has run.[79] As a result, the contri-

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68. *See* note 32 *supra.*

69. Roth v. Roth, 571 S.W.2d 659, 672 (Mo. Ct. App. 1978).

70. *See* note 51 *supra.*

71. *See* Asher v. Texas, 128 U.S. 129, 132 (1888) (precedent may be overruled by implication).

72. Dietz v. Humphreys, 507 S.W.2d 389, 392 (Mo. 1974); Barker v. St. Louis County, 340 Mo. 986, 999, 104 S.W.2d 371, 379 (1937).

73. *See* Burns v. Owens, 459 S.W.2d 303, 306 (Mo. 1970).

74. *See* Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 606 (Mo. 1969) (en banc); Dempsey v. Thompson, 363 Mo. 339, 347, 251 S.W.2d 42, 46 (1952); Klocke v. Klocke, 276 Mo. 572, 582, 208 S.W. 825, 827 (1919) (en banc).

75. *See* Dietz v. Humphreys, 507 S.W.2d 389, 392 (Mo. 1974); Shepherd v. Consumers Coop. Ass'n, 384 S.W.2d 635, 640 (Mo. 1964) (en banc); Lober v. Kansas City, 74 S.W.2d 815, 825 (Mo. 1934).

76. MO. REV. STAT. § 516.120(1) (1978) (five-year limitation for "[a]ll actions upon contracts, obligations or liabilities, express or implied").

77. *See* 633 S.W.2d at 732, 733.

78. Federated Mut. Ins. Co. v. Gray, 475 F. Supp. 679, 681 (E.D. Mo. 1979); Simon v. Kansas City Rug Co., 460 S.W.2d 596, 600 (Mo. 1970).

79. If the original plaintiff settles with tortfeasor *A* and does not settle with or sue tortfeasor *B* before the statute of limitations has run, the plaintiff no longer has a right to bring an

bution defendant, not a party to the original action, may be severely disadvantaged when confronted with a delayed contribution claim. Parties to the original suit and witnesses may forget or be unavailable, and evidence may be lost.[80] *Safeway* recognized that an extended statutory period may present difficulties. Because no excessive delay had occurred in *Safeway*,[81] the court did not address the problem except to recommend legislative action if necessary.[82]

Courts that interpret *Safeway* also may be faced with the use of defensive collateral estoppel. In *Oates v. Safeco Insurance Co.*,[83] the Missouri Supreme Court recognized the right to non-mutual defensive collateral estoppel. *Oates* replaced the mutuality requirement with the *Bernhard* doctrine.[84] *Bernhard* allows a defendant who was not a party to the initial action to raise collateral estoppel if: (1) the issues in both actions are identical; (2) the first suit was decided on the merits; and (3) the party to be estopped was a party or in privity with a party to the first lawsuit.[85] *Oates* added a fourth requirement: the party to be estopped must have had a full and fair opportunity to litigate the issue in the original lawsuit.[86] The *Bernhard* doctrine requires a case-by-case analysis; fairness is the overriding consideration.[87]

Missouri's adoption of the *Bernhard* doctrine may predetermine the issue of liability in independent actions for contribution. If the party asserting defensive collateral estoppel meets the requirements, the contribution plaintiff may be foreclosed from relitigating issues decided in the original suit. This estoppel problem might arise regarding liability. Percentages of liability may become difficult to ascertain in the subsequent contribution lawsuit. In the original suit the court may find tortfeasor *A* 60% liable and tortfeasor *B* 40% liable. If only tortfeasor *A* seeks contribution from tortfeasor *C*, who was not a party to the original action, apportionment may require relitigating the entire issue of liability.[88] The *Bernhard* doctrine may foreclose relitigation of liability; therefore, a party seeking contribution would be collaterally estopped from obtaining contribution in a separate action.

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action against *B*. *A* may, however, bring a contribution action against *B* because the statute of limitations for contribution does not begin to run until *A* has paid his proportionate share of liability to the original plaintiff. Settling tortfeasors and those sued by the victim may commence contribution actions even after the victim's action is barred. *See* Kutner, *supra* note 33, at 236-37.

80. *See Whitehead & Kales*, 566 S.W.2d at 474 n.8; Kutner, *supra* note 33, at 235; Comment, *supra* note 18, at 707.

81. The contribution suit in *Safeway* was filed within three years and one month of the accident. 633 S.W.2d at 732.

82. *Id.*

83. 583 S.W.2d 713 (Mo. 1979) (en banc).

84. *Id.* at 719; *see* Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). The mutuality doctrine required that the person asserting collateral estoppel and the person to be collaterally estopped both be parties to the original suit.

85. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895.

86. 583 S.W.2d at 719; *see* Jones v. Corcoran, 625 S.W.2d 173, 175 (Mo. Ct. App. 1981).

87. Oates v. Safeco Ins. Co., 583 S.W.2d 713, 719 (Mo. 1979) (en banc).

88. This also presents complications concerning *B*. What if *B* later seeks contribution from *C*? What if *C*, after *A*'s judgment against him, seeks contribution against *B*? Can this be remedied by making *B* a necessary or proper party to *A*'s contribution claim against *C*? These questions have not been answered.

Oates concluded that *Bernhard* should not be applied if it would result in unfairness to the defendant.[89] It would be inequitable to bind a tortfeasor to a percentage of liability that should be shared by a co-tortfeasor, not a party to the original lawsuit, merely because the percentages determined are permanent. Although tortfeasor *C* should be impleaded into the original action, penalizing a party for failing to implead under permissive impleader rules is inequitable.[90]

The impact of *Safeway* on contribution actions in Missouri will depend upon how broadly it is construed. The timing of the decision supports a strict interpretation of *Safeway* and adoption of a case-by-case analysis. The original action in *Safeway* was decided prior to the decision in *Whitehead & Kales,* but the contribution claim was filed after *Whitehead & Kales.*[91] The *Safeway* court considered the problems caused by the timing of the suit and found it inherently unfair to deny contribution because Safeway failed to use a procedural device, impleader, not recognized for contribution claims in Missouri when Safeway could have used it.[92]

The court also indicated that the facts of the case should determine the right to contribution.[93] In its conclusion, the court stated that it was not indicating a preference for separate actions.[94] The court reiterated the purposes of impleader,[95] thereby arguably supporting a case-by-case determination of whether impleader or a separate action should be allowed for contribution.

One purpose of impleader is avoiding duplication of time and effort. If two disputes involve the same facts, evidence, parties or issues, it is more efficient to try them in one lawsuit. The same is true for cost; doubling the court costs or the attorney's fees is needless when the rights of all parties could be litigated effectively in one trial. Impleader also avoids the detrimental effect of delay between judgments. Passage of time between the original action and a separate contribution action may result in loss of evidence, fading memories, or unavailability of witnesses and parties. Those problems do not occur when the decisions are made simultaneously under impleader. Much of this lan-

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89. 583 S.W.2d at 719.

90. *Safeway*'s independent contribution action may alleviate some of the difficulties created by *Whitehead & Kales,* which required joint tortfeasors to implead and bring their contribution actions in the plaintiff's original suit. If D_1 had a personal injury claim against D_2, a court would deny recovery to D_1 if D_1 was found even 1% negligent, based upon the doctrine of contributory negligence. *See* Jones v. Corcoran, 625 S.W.2d 173, 175 n.4 (Mo. Ct. App. 1981). *But cf.* notes 121-23 and accompanying text *infra* (Missouri recently adopted a pure comparative fault system).

91. 633 S.W.2d at 728-29.

92. *Id.* at 732. This statement must be considered a change in substantive law if it is to be applied retrospectively in Missouri. Roth v. Roth, 571 S.W.2d 659, 672 (Mo. Ct. App. 1978); *see* notes 32-37 and accompanying text *supra.* State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 127 (Mo. 1948) (en banc), giving the plaintiff the right to deny third-party practice, may have influenced Safeway's decision not to attempt impleader in the original action. *Whitehead & Kales* alleviated this dilemma. *See* note 31 *supra.*

93. 633 S.W.2d at 729.

94. *Id.* at 732; *see* 3 J. MOORE, *supra* note 34, § 14.04.

95. 633 S.W.2d at 732; *see also* Mo. R. Civ. P. 52.11.

guage in *Safeway* supports a case-by-case analysis to determine the right to a separate action for contribution. If interpreted narrowly, *Safeway* may cause only minimal changes in Missouri contribution law.

On the other hand, Missouri courts may construe *Safeway* broadly. The holding in *Safeway* authorizes a separate contribution action,[96] and any language limiting that holding is dicta. The court granted a separate cause of action for contribution based in part upon the permissive nature of impleader.[97] Once *Whitehead & Kales* gave the contribution plaintiff impleader rights, a substantive right to contribution logically followed, according to *Safeway*.[98] A party seeking contribution may exercise that substantive right either through impleader or a separate action. The *Safeway* court's analysis indicates no intention to limit that substantive right to contribution.

If *Safeway* is construed broadly, Missouri courts may face contribution claims from judgments rendered a decade ago.[99] The five-year statute of limitations applied in *Safeway*[100] would not begin to run until one tortfeasor has paid more than his proportionate share. A defendant could pay his proportionate share of the judgment over a span of many years, and the statutory period would not begin until more than the proportionate share has been paid. The original defendant, the plaintiff in the contribution action, could then wait almost five years to bring the contribution action. Courts would risk litigating stale claims, arriving at inconsistent verdicts,[101] and violating due process requirements.[102]

Judge Welliver, concurring in *Safeway*, suggested that the problems caused by a separate action for contribution may be remedied by making Missouri's impleader rule mandatory.[103] This solution responds to the majority's contention that a separate contribution action must be allowed because impleader is permissive.[104] Mandatory impleader would require a tortfeasor to implead all tortfeasors into the original action or be foreclosed from seeking contribution at a later date.[105] According to Judge Welliver, mandatory im-

96. 633 S.W.2d at 731.
97. *Id.*
98. *Id.*
99. *See* notes 32-37 and accompanying text *supra* (retroactive effect of *Whitehead & Kales*). If the plaintiff obtains a judgment of $152,000 (as in *Safeway*) and the defendant pays $500 a month and considers half of the judgment his proportionate share, the statute of limitations on his contribution claim would not commence until 13 years after the original judgment. The joint tortfeasor against whom contribution is sought might not learn of the contribution action until 18 years after the original action.
100. MO. REV. STAT. § 516.120(1) (1978).
101. Separate contribution actions raise the question of whether finding D_1 60% liable and D_2 40% liable in one contribution action precludes them from seeking contribution from D_3 in another action. If not, reapportioning liability at 33⅓% would result in an inconsistent verdict. The same problem would occur if D_1 or D_2 individually seek contribution from D_3.
102. *See* 633 S.W.2d at 733 (Welliver, J., concurring); Comment, *supra* note 18, at 707.
103. 633 S.W.2d at 733 (Welliver, J., concurring).
104. *Id.*
105. Mandatory impleader would probably be handled similarly to compulsory counterclaims.

pleader would ensure due process, judicial economy, consistent verdicts, and fairness.[106]

Mandatory impleader presents special problems. A defendant may be unable to complete services of process, obtain proper venue, or get jurisdiction over a tortfeasor due to the forum chosen by the plaintiff. In that instance, the co-tortfeasor could not be made a party in the original action, and the original defendant would be denied contribution. When information is incomplete at discovery, the defendant may be unable to ascertain all potentially liable parties in time to attempt to implead them and be fully prepared to litigate.

Adding parties to a lawsuit will increase complexities at trial and may confuse the jury. A defendant may not want to implead a third party into the original suit. Jurors may perceive a trial involving several defendants as a way to spread the effect of a verdict for the plaintiff among the defendants and thus shift the emphasis from *whether* the defendant is liable to the *amount* for which each defendant should be liable. Sympathy for the plaintiff may become even stronger if a jury views the defendants as "ganging up" against the lone plaintiff. Although judges have the discretion to sever claims for separate trials,[107] mandatory impleader would preclude them from doing so. On the surface, mandatory impleader seems to be a viable alternative to allowing independent contribution actions. The many drawbacks, however, make mandatory impleader undesirable.[108]

The negative effects of independent contribution actions could be reduced by shortening the statute of limitations. Some commentators have suggested that the limitations statute for contribution claims should run concurrently with the limitation placed on the tort action.[109] Such a rule, however, would create mandatory impleader for contribution claims where the original plaintiff delayed bringing suit.[110] A one-year statutory period for contribution actions proposed in section 3(c) of the Uniform Contribution Among Tortfeasors Act avoids that inequity.[111] The period does not accrue until a defendant has paid more than his pro-rata share of liability.[112] *Safeway* suggested that Missouri adopt the one-year statute of limitations.[113]

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106. 633 S.W.2d at 733 (Welliver, J., concurring).

107. Mo. R. Civ. P. 52.11(a), 66.02.

108. No state seems to require impleader, but see the statutes listed in note 119 *infra* (preclude independent action if contribution can be achieved through third-party practice).

109. *See* Kutner, *supra* note 33, at 246.

110. Concurrent statutes of limitations would make impleader mandatory if the original plaintiff files at the end of the statutory period. It would not have the same effect when the original plaintiff files at the beginning or middle of the statutory period. In the latter instance, the defendant may have time to file a separate claim for contribution.

111. The separate action must commence within one year after judgment has become final by lapse of time for appeal. UCATA § 3(c), 12 U.L.A. 88 (1975). Besides short-cutting attempts to prolong the time for asserting a right to contribution, a one-year period would alleviate problems in determining when a tortfeasor has paid more than his proportionate share.

112. *See* UCATA § 1(b), 12 U.L.A. 63 (1975).

113. 633 S.W.2d at 733 (citing State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis. 2d 262, 268, 201 N.W.2d 758, 761 (1972) (six-year statutory period)); *see* Wis. Stat. § 893.19(3) (1965). Wisconsin now has a one-year statute of limitations for tort contribution actions. *Id.*

The difficulties that result from allowing a separate cause of action for contribution are surmountable. A three-point plan will alleviate most of the problems arising from *Safeway*. First, the legislature should enact a one-year statute of limitations for independent contribution actions, accruing after the judgment is final by lapse of time for appeal or after final disposition of the appeal of the original plaintiff's action. A one-year statutory period was suggested in *Safeway*[114] and is implemented in many states that recognize separate contribution actions.[115] The one-year limitation would allow the contribution plaintiff reasonable time to identify the contribution defendants. Requiring that the separate action commence within one year after final judgment also avoids the current requirement of determining when a tortfeasor has paid more than his proportionate share[116] and precludes any attempt to use that requirement to prolong the period within which a right to contribution may be asserted. The shorter statutory period would help to ensure that witnesses and evidence would not be lost. The prevailing view is that the right to contribution accrues when the original judgment is final.[117]

Second, the legislature should enact a statute providing discretionary impleader for contribution, granting courts the discretion to decide if a separate action for contribution is necessary, and requiring the courts to make that determination based upon the doctrine of fairness. This provision would minimize relitigation of issues in separate contribution actions. The trial court would have the discretion to decide whether contribution should be sought through impleader in the original action or in an independent contribution action. Basing that determination upon the doctrine of fairness[118] protects the defendant from difficulties that would arise if impleader were mandatory and at the same time achieves most of the important benefits of mandatory impleader.[119]

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§ 893.92 (1979).

114. 633 S.W.2d at 732-33.

115. UCATA § 3(a), 12 U.L.A. 58 (Supp. 1983); *see, e.g.*, MASS. GEN. LAWS ANN. ch. 231B, § 3(c) (West Supp. 1982); NEV. REV. STAT. § 17.285(3) (1979); N.D. CENT. CODE § 32-38-03(3) (1976); OHIO REV. CODE ANN. § 2307.32(B) (Page 1981); WYO. STAT. § 1-1-112(c) (1982).

116. Missouri currently requires that the tortfeasor pay more than his proportionate share before the statute of limitations commences. *See* note 78 and accompanying text *supra*.

117. Kutner, *supra* note 33, at 208 n.25; *see, e.g.*, Evans v. Lukas, 140 Ga. App. 182, 184, 230 S.E.2d 136, 138 (1976); McGlone v. Corbi, 59 N.J. 86, 95, 279 A.2d 812, 817 (1971); Winn v. Peter Bratti Ass'n, Inc., 80 Misc. 2d 756, 759, 364 N.Y.S.2d 137, 140 (Sup. Ct. 1975); Godfrey v. Tidewater Power Co., 223 N.C. 647, 649, 27 S.E.2d 736, 737-38 (1943); Swartz v. Sunderland, 192 Pa. Super. 466, 468-69, 162 A.2d 91, 92 (1960), *rev'd*, 403 Pa. 222, 169 A.2d 289 (1961); Wnek v. Boyle, 172 Pa. Super. 222, 224, 92 A.2d 701, 702 (1952).

118. Fairness should be determined by looking at: the availability of information to the defendant; the opportunity to get venue, service of process, or jurisdiction over the joint tortfeasor; prejudice due to the number of co-defendants; multiplicity of lawsuits; and efficiency.

119. Discretionary impleader would encourage judicial economy, accelerating disposition and decreasing legal expenses. Unlike mandatory impleader, discretionary impleader avoids prejudice to the parties and ensures fairness. Some states statutes preclude independent actions if contribution can be obtained through third-party practice; however, they allow separate contribution actions if the defendant failed to complete service of process on the joint tortfeasor in the original action. *See, e.g.*, ARK. STAT. ANN. § 34-1007(3) (1962); DEL. CODE ANN. tit. 10,

Finally, the courts should use a case-by-case analysis to determine the equities involved in requiring impleader for contribution. Potential contribution plaintiffs should be guaranteed an individualized assessment before impleader is required.[120] Impleader should only be required if no prejudice results to any party. If prejudice would result, a separate contribution action should be granted.

Safeway is a beneficial change in Missouri contribution law. A defendant should not be required to implead every potential tortfeasor when procedural, evidentiary, or tactical considerations prevent him from doing so. A separate contribution action should also be available when it would be equitable. This plan retains the benefits from *Safeway,* minimizing its drawbacks.

Safeway extended the principles underlying *Whitehead & Kales* to allow the determination of relative or comparative fault among tortfeasors in separate and subsequent actions. Recently, the Missouri Supreme Court adopted a comprehensive system of comparative fault. In *Gustafson v. Benda,*[121] the court held: "Insofar as possible this and future cases shall apply the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act §§ 1-6, 12 U.L.A. Supp. 34-45 (1983). . . ."[122] The decision will have a monumental impact on the prosecution of tort actions in Missouri, including contribution and indemnity claims.

To the extent that it is "possible" to follow them, provisions of the Uniform Comparative Fault Act (Act) address some of the uncertainties created by *Safeway.* The key provision is section 4(a):

> A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced in the original action or by a separate action brought for that purpose. The basis for contribution is each person's equitable share of the obligation, including the equitable share of a claimant at fault, as determined in accordance with the provisions of Section 2.[123]

The Act provides for a one-year statute of limitations on contribution claims. If a judgment has been rendered, the contribution action must be commenced within one year after the judgment becomes final.[124] If no judgment is rendered, two variations arise. A party may discharge by payment the common liability within the period of limitation applicable to the claimant's right of

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§ 6306(b) (1975); HAWAII REV. STAT. § 663-17(b) (1976).

120. While this may increase processing time and costs, it will still reduce time and cost compared to allowing the defendant to bring a separate contribution action whenever he wishes.

121. 661 S.W.2d 11 (1983) (en banc).

122. *Id.* at 15-16. The court appended a copy of the Act and accompanying comments to its opinion. *Id.* app. A. Missouri is the first jurisdiction to judicially adopt the Act. *See* 12 U.L.A. 34 (Supp. 1983). *Gustafson* will apply only to cases filed after January 31, 1984. *See* 661 S.W.2d at 15.

123. 12 U.L.A. 42 (Supp. 1983). Although each defendant is jointly and severally liable to the plaintiff for the whole amount of damages, defendants are liable as between each other based on their equitable fault shares. *Id.* comment.

124. § 5(c), 12 U.L.A. 43 (Supp. 1983).

action against him. A contribution action based on this discharge must be brought within one year after payment. Alternatively, a party may agree while a lawsuit is pending to discharge the common liability. If so, he has one year to pay the liability and commence an action for contribution.[125]

For the most part, the judicial adoption of the Act reverses only common law developments. In the area of releases, however, the Act impacts on a statute recently changed by the legislature, Missouri Revised Statutes section 537.060.[126] This section provides that a tortfeasor who obtains a release from the claimant is insulated from the contribution claims of joint tortfeasors.[127] Under section 6 of the Act, however, a release does not protect a tortfeasor against contribution claims.[128] The court recognized this inconsistency in *Gustafson* and stated in dicta that section 537.060 controls.[129]

From *Whitehead & Kales* to *Safeway* and *Gustafson,* the Missouri Supreme Court has made significant progress in reforming antiquated common law tort concepts. Although these advances yield transient uncertainties, ultimately they will streamline tort litigation for parties, attorneys, and judges.[130]

GRETCHEN H. MYERS

125. *Id. Compare* text accompanying notes 76-77 *supra* (*Safeway* court recognized that five-year statute of limitations applies to contribution actions). Following *Gustafson,* it is unclear whether the Act or the dicta in *Safeway* will control.

126. (Supp. 1983); *see* 1983 Mo. Legis. Serv. 398-99 (Vernon); Fischer, *The New Settlement Statute: Its History and Effect,* 40 J. Mo. B. 13 (1984).

127. *Id.* ("[The] agreement shall discharge the tortfeasor to whom it is given from all liability for contribution or non-contractual indemnity to any other tortfeasor."). The statute is modeled after § 4(a) of the UCATA. *See* 12 U.L.A. 63, 98 (1975).

128. 12 U.L.A. 44 (Supp. 1983); *see generally* Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives,* 40 LA. L. REV. 343, 368-71 (1981).

129. 661 S.W.2d at 15-16 n.10. The original opinion did not contain this footnote. Gustafson v. Benda, No. 63857, slip op. at 8 (Mo. Nov. 22, 1983) (en banc).

130. *See Gustafson,* 661 S.W.2d at 15.