**ORAL ARGUMENT — 10/21/98**
**97-1168**
**INGERSOLL-RAND V. VALERO**

GRAY: I am Kendall Gray. I represent Ingersoll-Rand Co., and Dresser Rand Co., petitioners I will collectively refer to as "Rand." Part way through the opening portion of this argument, I will attempt to to yield the floor to Mr. Salmon, who will then address the court on behalf of the Kellogg petitioners.

There are essentially three touchstones necessary to determining the resolution of this case. First, Rule 97 of the Texas Rules of Civil Procedure is the one and only yardstick by which a court can determine whether a claim held by a defendant, such as Rand, is barred by res judicata. There is no other standard. Second, Rand's contractual claim for indemnity of defense costs was not a compulsory counter-claim to Valero's explosion litigation, because it had not accrued at the time that Rand answered the explosion litigation. And because the contractual claim for defense costs really isn't the same occurrence as the DTPA in court explosion claims.

PHILLIPS: It would not have been improper to put it in the initial case would it?

GRAY: It would not have been improper, but the balance has already been struck by the court. I would encourage the court to read one provision of the restatement and the commentary that goes with it. Section 22, of the restatement and its commentary does a tremendous job of establishing not only what the rule is, and it is the rule that we advocate, but also why exactly that rule is that way. And the restatement clearly encompasses a policy choice that has been made by this court, has been made by the federal courts, that a defendant is not robbed of the right to determine the timing of his claim, the battlefield on which he will fight that claim, simply because the plaintiff has sued him if that claim is either unaccrued or if the claim arises from a different transaction.

Now true it was allowable that it could have been brought in the procedural sense that it could have been joined, but that is not the standard for defendants. The courts set out the standard in *Jones v. Strauss*, which I think heretofore may not have been cited by any party when the court said that a judgment bars matters that could have been raised either by affirmative defense or compulsory counterclaim. Well this was not a compulsory counterclaim, and so it is not barred. The affirmative defense of waiver and release was raised. It was litigated and it was successful. The judgment was severed then from all remaining disputes in the case. It was affirmed by the Corpus Christi CA and this court denied the writ of error.

HECHT: But you asserted the indemnity provision defensively in the tort litigation did you not?

GRAY: Remember the test is not whether the...

HECHT: Did you though, first?

GRAY: No. The indemnity provision in the sense of did we assert a claim for indemnity, the answer is no.

HECHT: No. Did you assert the provision as a defense to the tort litigation?

GRAY: The contractual paragraph itself was one of the defenses that was urged in the summary judgment along with several others. But that paragraph alone includes two things, and this court in *Dresser Industries v. Page Petroleum*, 1993, distinguished between what are affirmative defenses and what are affirmative claims for relief. Waiver and release, which is what Rand asserted in the underlying explosion litigation, is not an affirmative claim for relief. It is merely an affirmative defense in the nature of confession and avoidance. No affirmative claim for relief was asserted; therefore, *Getty,* then does not apply because Rand had not asserted that aggressor status.

Now I grant you had Rand asserted aggressor status in the underlying litigation, then *Getty* would be fully applicable and the only test would be: Would rule 51 have permitted the joinder of those claims? But absent becoming a plaintiff for res judicata purposes, which is the language that this court used in *Getty*, the *Getty* rule applying to claimants doesn't apply. The rule that does apply is rule 97. And in Rule 97, what we have is competing policy choices. On the one hand, you have the policy in favor of finality of judgments. On the other hand, you have a policy that people who hold claims generally ought to be permitted to determine where and when those claims are brought.

HECHT: You were incurring attorney fees all this time, I take it, that you claim from the moment you entered the case later on in the litigation, that you claim now should be reimbursed under the indemnity provision. Did your cause of action for those accrue then?

GRAY: No. In fact this question was first raised, and this again is a case that heretofore hasn't been cited, *Eller v. Erwin*, as early as 1924, this defense was raised by an indemnitor saying: Well listen, you started incurring loss when you were sued more than 4 years before you sued me. And the Dallas court said, and this rule has remained unchanged since: The very terms of the contract of indemnity preclude the idea that it was the intention of the parties that on the payment of any sum by defendant in error there should accrue on that date a cause of action to enforce the payment of such sum. And if one looks in practicality how this would work out, one can see that that is still the law today. One need only consider the absurdity of Rand starting to submit its monthly invoices to *Valero* in the underlying explosion litigation, and requesting payment or calling *Valero* for permission to hire a consulting expert on metallurgy, and *Valero* asking: "Well, who is it?" "I'm not going to tell you." "What's he going to do?" "Well that's privileged, I don't have to tell you." The mere fact that some of the information that Rand must disclose in the indemnity case would be privileged in the underlying explosion litigation. There's a very convincing indication that this claim does not form a convenient trial unit, which is one of the factors that the court uses

in determining whether it is a compulsory counterclaim.

What Valero is essentially asking the court to do is to hold that a claim for breach of an indemnity contract accrued before the contract was breached, before there was a duty to pay. The rule for any breach of contract claim is that the limitations accrues when there is a duty to perform.

HECHT: I don't understand that. I thought you were taking the position tort litigation, that bringing that suit was in violation of the indemnification provision. That's one position you took.

GRAY: No, that is the way that the CA characterized the decision.

HECHT: Well how are you going to get summary judgment if that's not your position?

GRAY: The position is that Valero had waived and released its claim. That was one of the defenses. That is not a breach of contract cause of action.

HECHT: Well they said they didn't.

GRAY: They did assert affirmative defenses to the waiver and release provisions of the contract contending that it was unenforceable. But let's remember too, that those defenses weren't urged until May 1991. That was the first pleading that was filed by Valero that ever challenged the validity of the contract. But remember there is no affirmative claim for relief by Rand in that case. Had there been, then yes, *Getty* would apply and in all probability we would be barred.

But we also have in this case even if claims of this type might ordinarily be barred by Rule 97, Valero in actually requesting and creating parallel proceedings and making stipulations on the record about the nature of those proceedings is not in a position to complain about those parallel proceedings now. The court in language has essentially said the very same thing in *Seul Paint & Glass*, a case as old as 1932 when it said: to allow such a ruling would allow *Valero* to escape liability entirely by securing a ruling in one action, that the claim could not be litigated there, and then securing a ruling in another proceeding that it ought to have been litigated there. That's what they are attempting in this action. Moreover, let's remember that in the parallel proceedings that *Valero* created, the trial judge entered a total ban on pleadings until 22 days before Rand filed its claim. Valero is essentially arguing that Rand should have risked the contempt of the DC in disobeying that ruling and filing its claim earlier.

HANKINSON: One of your arguments in this case that you're alluding to now is that even if res judicata could perhaps apply in this case, in fact, Valero agreed to the claim's splitting?

GRAY: That's correct.

HANKINSON: Have all the requirements - the restatement list requirements for claim's splitting - are all those requirements made in this case? The restatement talks about claim's splitting and when it needs to be recognized and when it can prevent res judicata from operating.

GRAY: I would say in answer to your question, that all the requirements for express or implicit agreement to claim's splitting have been met both by the express statements on the record of counsel, but also simply because of the actions of counsel. Even if you took those statements entirely away, the cases cited demonstrate that express or implicit agreement is met. Also, I would say that the restatement would also say that claim's splitting is not occurring here. Notably absent from any briefing that Valero has filed in this case is a single case holding that: an indemnity claim is a compulsory counterclaim. Totally absent. It's absent because it doesn't exist. An indemnity claim is not a compulsory counterclaim.

HANKINSON: Is there any reason for treating the rules or the law differently with respect to this case because it's a first party action as opposed to the other cases that are primarily relied upon since we typically see this question coming up in the context of third-party actions?

GRAY: No there is not.

HANKINSON: Why not?

GRAY: The reason is contractual language only has one meaning. The timing of the contract breach, the timing of the legal injury in limitations _____ only occurs at one single time. First off, the factual premise just doesn't fit this case, because there were third-party claims we were defending at the same time. Valero has admitted as much in their response brief to the Kellogg brief on the merits. But were it just a first-party claim it shouldn't change the rule here. The court must not only fashion a rule that works for this case, but works for other similar cases. I'm involved in a case right now in which the defendant is purchasing the plaintiff, he's acquiring by merger the plaintiff. If there were an indemnity agreement under those facts would there ever be a loss? No. It is not certain that there would be a loss. Other cases have occurred where one defendant assumes the defense obligations of a co-defendant for strategic reason. All of these things can occur. And what one starts to do if you make too many exceptions will all become so well-rounded that you no longer have any points and nobody knows what the rule is. There is one accrual time. There is one breach of contract that happened after the judgment.

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SALMON: I represent the M.W. Kellogg Co., and related entities. It was the M.W. Kellogg company who was initially sued along with H. B. Zachary Co. and John Zink Co., in 1986, which started this whole series of events which led to eventually a claims in excess of $1 billion against Kellogg and Rand, and primarily against Kellogg in this case.

In 1986, when this suit was first filed, it was a subrogation case involving an explosion and fire which occurred at the refinery back in July 1984. That case was filed in 1986. When my firm first became involved in this matter in 1989, that was right at the time when a series of amended complaints were filed in this case alleging DTPA violations that's took on a whole new life. We filed answer in 1991, alleging contractual defenses. We filed a motion for summary judgment based upon among other things article 6.8 of the contract, which was negotiated over a period of 4 years between Valero and the M.W. Kellogg Co. for Kellogg to provide architectural engineering and procurement services. That contract has been held to have been a valid binding contract negotiated by sophisticated parties - big boys as the court referred to them. They knew what they were doing. They agreed in that contract, Valero agreed to indemnify the M.W. Kellogg Co. for attorney's fees and losses out of any transaction arising out of that at the refinery.

It is upon that provision, which has already been held by the CA to be valid, that we have sued. An indemnification provision or obligation on the part of the indemnitor under Texas law does not accrue until the obligation of the indemnitor is fixed and certain. That did not occur until summary judgment was granted. In Oct. 1991, we filed our counterclaim for attorney's fees within 25 days after a judgment was entered. We filed on Nov. 20, 1991. And our counterclaim was specifically severed by the court in the reformed order of severance and was remained to be tried upon. If it came back, that money was to be tried and that's what we have asked for in this case.

HANKINSON: Why was the CA in error when it determined that the contract had been repudiated in an earlier point in time when Valero sued Kellogg, and therefore, the statute should begin to run at that point in time?

SALMON: It's not a repudiation. At best, you can call it an anticipatory repudiation. But even under the law, Kellogg in this case had its option. They could attempt to do something or not do something. They could wait until a later time. There may be very good reasons why you don't run in and sue somebody in the same proceeding or file a counterclaim against somebody for indemnification. There may be very good reasons. They could have written a letter to Kellogg, to everybody and say: We don't intend to honor our agreement. The fact of the matter is, they had a contractual obligation to honor it. That obligation still exist and we are asking the court to send this back for a trial on damages.

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RESPONDENT

WATKINS: We had hoped for the end of a long travail of a huge lawsuit that went on for a long time and turned out poorly for us. And at the time that the motion for summary judgment was granted, a certain state of facts exist which I want to set up for you.

HANKINSON: Before you do that, since we've just heard on this limitations point, let me ask you one quick question. Is there any Texas law that talks about limitations running on a breach of

contract action from the time of an anticipatory breach as opposed to an actual breach?

WATKINS: Yes, there is law. What are you asking me about that?

HANKINSON: The CA determined that limitations began to run with respect to Kellogg's claim at the point in time that Valero sued Kellogg, because they repudiated or as your opponent characterized it, there was an anticipatory breach of the contract at that point in time. And can an anticipatory breach if that's what it was then, in fact, begin the running of limitations under Texas law in a contract action?

WATKINS: Yes. An anticipatory repudiation can start the statute of limitations running under certain circumstances.

HANKINSON: And what are those circumstances?

WATKINS: Those circumstances for an anticipatory repudiation is there has to be a clear communication of the repudiation and it has to be accepted by the other party.

HANKINSON: Are there any particular cases that address it in a limitations context?

WATKINS: Yes.

HANKINSON: Is it cited in your brief?

WATKINS: No, they are not.

BAKER: Is filing suit a clear indication you're not going to follow the contract?

WATKINS: In this case it is.

BAKER: And is answering it a clear indication that you're accepting that repudiation?

WATKINS: I'm not sure about that. What I want to talk about other than limitations, is this a compulsory counterclaim? Does it have any preclusive effect in this case? Is there any conduct either by the parties or by me at the time of the trial, or by the court that would void the preclusive effect of what we think is the res judicata impact. And I will go through it in that order.

One, are these claims for attorney's fees compulsory counterclaims? And the answers is: Clearly they are. The *Kaminsky* case cited in the brief holds that you must bring your attorney's fees case in the main case. Is there anything about this which says that it shouldn't be? Well the six-part test that's in *Wyatt v.* _____ says that there are 6 things you've got to do to have a compulsory counterclaim. The petitioners in this case have raised only two possibilities of why this

is not a compulsory counterclaim: the one that requires it to arise out of the same occurrence or transaction, and the one that determines whether or not the claim is mature. If you get by both of those, then both of their claims for attorneys' fees are compulsory counterclaims. Did it arise out of the same transaction?

Tab 1, is a cite from the *Valero Energy v. M.W. Kellogg Construction* case, page 257, which is the original lawsuit. That's *Valero 1*. And in *Valero 1,* in the part that I have highlighted, is the very contract clause which the petitioner in this case says gives them the right to the attorney's fees. But they say that this is not arising out of the same occurrence or transaction when that is the same clause they used to beat us in the first case. The only thing separated and I highlighted it, the yellow part is the part they used in the first case in order to defeat our claim. The orange part is the part they have to use in order to justify getting their attorney's fees. Under a current or transaction case it's separated by a comma. The only distance between this occurrence and that occurrence as far as what was litigated in *Valero 1* verses what is here, is the comma that comes between the words "release" and the words "defend, indemnify and hold harmless." There cannot be any doubt that the first lawsuit was about the explosion and the contract which might protect those defendants from any liability they might have for that explosion. And then in this case they go to the same contract and say: we get attorneys' fees under the same clause that we used in the first case. Clearly it's out of the same occurrence or transaction.

Now is it mature? There is not any doubt about that. Everybody who has an attorney's fee claim under a contract can bring it in the first lawsuit. It doesn't make any difference whether it's indemnify, whether it's under the statute, whether it's under the DTPA. You can always bring an attorney's fees claim in the original contract.

ENOCH: Suppose Kellogg had sued Rand, you go through the entire litigation, Kellogg wins or loses. I don't know which happens. Rand, then sues Valero under this provision for indemnity because Valero says they will hold them harmless. Is there any statute of limitations problem there?

WATKINS: You certainly have an election for any kind of contribution indemnity that you have against any co-defendants either to bring it in the same lawsuit or you can wait until it's over and bring it later for two reasons: One, there is no compulsory counterclaim. 97 doesn't apply to their claims between those two parties and that's why it doesn't apply. But limitations is different from whether or not it's a compulsory counterclaim. In other words, it can be mature for purposes of *Wyatt v. Shaw* and be a compulsory counterclaim, but the limitations might not start to run because it's one of those claims that you have an election to either bring now or bring later. And so maturity is different from accrual for purposes of limitations.

ENOCH: You're getting ahead of me. So you're really not arguing that a person who has an indemnity claim has to bring it in the initial lawsuit. You're simply arguing that because we were the ones that are parties to this litigation, we are *Valero*, and Rand's indemnity claim is with

us. The fact that we're suing Rand directly rather than indirectly through the contractor, the compulsory counterclaim kicks in and that is the reason that they have to bring their indemnity claim against us immediately as opposed to waiting until we find out whether we have the viable claim against them because it's just us against them and now they've got to bring their counterclaim?

WATKINS: Said another way is, if the indemnity claim is against a third-party or a co-defendant, rule 97 doesn't force you to bring it because it's not a compulsory counterclaim. If the indemnity claim is against the plaintiff, then rule 97 applies, and you test it as to whether or not it's a compulsory counterclaim. You may have that election to bring it then, which you could against a cross-defendant, or election to wait until after the case is over. You do not have that election even in an indemnity claim if it's back against the plaintiff because rule 97 imposes compulsory counterclaim with obligations that you don't have for claims against co-defendants.

So, the maturity question then is different from the question of when it accrues for purposes of statute of limitations, because you might have an election on some kind of claim that statute is not running on you, but it's mature because you can bring it. It's then controlled by the compulsory counterclaim rule. So we think that the law is clear, *Kaminsky* says it. We think it's in these facts that this is clearly a compulsory counterclaim.

Assuming that it's a compulsory counterclaim, does it have any preclusive effect in this case? The first exhibit, that I've got on that page, here the summary judgment is granted for Rand on Oct. 25, 1991. There are four things listed there that are incontrovertibly true as of that date when the summary judgment is granted. All of Valero's claims are dismissed. Now that's an important distinction. The court that day didn't just deny our claim or grant their summary judgment, he dismissed all our claims. There is nothing to file a counterclaim against. As of the date of the motion for summary judgment, he dismissed our claims. That is a significant factual difference from any of the cases that have been cited to the court. I don't know why the court did it, but the court did it. As of that date, our claims were all dismissed. There was no pending Kellogg claim for attorney's fees. None. There was no pending Rand claim for attorney's fees. None. There weren't even any pending claims for our other contract claims existing of that day. The ones we are trying to assert contingently hearing say if they get to go back and bring something up they didn't have on the day of the summary judgment, we get to go back and bring up something that we didn't have pled on the day of the summary judgment.

The point is, and the reason that we say it's contingent is because we think the law ought to be if that summary judgment disposes of everything between the parties to that summary judgment, and it did, all of the pleadings pending by Valero, by Kellogg and Rand on the day of the summary judgment were disposed of, we were kicked out of court - were determined as of that day.

It is the law of the case. It disposes everything. The only thing that was left pending - "and it is a final judgment" for purposes of res judicata we believe as of that date. It may

not be final for purposes of starting an appeal deadline, but it's final for its preclusive effect. Because the only thing left is all these derivative claims that the parties attempted to sever out, put over in to another thing, and if the case ever got reversed and sent back down for trial on the merits, all those things over in that second lawsuit were going to be added back in and everybody was free to replead. But the stuff that was stored over there was presumed by the TC, as shown in the record and certainly intended by me, that if the thing got affirmed like it did, it was dead and it all went away. And we stored everything over there. We put our amended pleading, which added in other breach of contracts claims that we hadn't filed at the time of the summary judgment, put in to Kellogg's attorney's fees claim which they got filed after the summary judgment, but before the severance, and all of that got stuffed over in the lawsuit and it was intended to die if the thing got affirmed on appeal which it did. So the question is, whether or not that totality, everything that was pending at the time the summary judgment was rendered between all of the parties to the summary judgment has any preclusive effect on these two defendants.

PHILLIPS: If that was your intent couldn't that have been written a little clearer?

WATKINS: Of course. And as I go back and read the stuff I'm accused of saying, I'm getting to old to remember for sure, and I shouldn't get in a fight about what I said or didn't say, because I'm just going to have to say: well whatever is down there is what I remember. Any conduct by either of these two defendants, by me or by the court, then eliminates the preclusive effect of that summary judgment ruling, and any counterclaim that was a compulsory counterclaim to it.

Kellogg is going to argue: We filed before it became final. As a matter of policy that shouldn't matter in this case. They should have filed before the summary judgment. The summary judgment was a trial for everything that was involved between those parties. It disposed of everything that was pending between the parties. It is a rendition of a totality of judgment for all the parties there. Kellogg comes in after that, after realizing that the judge is going to go their way and hold that this clause which really meant the third-party indemnification means in part indemnification between the two parties to the contract, which I still maintain is a bad ruling and shouldn't stand, and that's why we have all of these squirrelly reading language that usually talks about contingent liability for third-parties when it's really just between the two parties. But the court held that, that's the rule and that's what we are here under. The court says: That applies; and therefore, you're dead Valero, you can't go forward. They should have filed then their attorney's fees claims seven days prior to that hearing under the pleading rule. So there is preclusive effect by res judicata of that summary judgment to everything that wasn't filed that was a compulsory counterclaim.

HANKINSON: One of the requirements for res judicata is that a judgment be final.

WATKINS: Yes.

HANKINSON: And this is not a final judgment until the severance occurs.

WATKINS: That's correct.

HANKINSON: So how can it have preclusive effect if it's not a final judgment and instead is interlocutory?

WATKINS: Because we are asking you to hold that a summary judgment that disposes of everything between the parties and it's a rendition by the court and a dismissal of our cause of action if the only reason it's not final is because of claims by other parties that are derivative, that it has the same effect as a final judgment and should be treated.

HANKINSON: You're asking us to change res judicata law then? You're asking us to engraft another exception or something on the law of res judicata that's not there right now aren't you?

WATKINS: We are asking you to hold that Kellogg was too late in filing its counterclaim.

HANKINSON: Well but that's different than the question of our deciding that an interlocutory order by a trial court is now final and preclusive for res judicata purposes when the judgment itself is not final under well established principles of finality?

WATKINS: And as the CA in this case said - I mean you're absolutely right - as the CA said. But in Kellogg's case it was a compulsory counterclaim. It had accrued and it was matured, and they didn't file it before the summary judgment, but they say they implied that this court granted them a right to file that counterclaim. And we say that's just wrong on the facts.

HANKINSON: That's a different question in terms of looking at the facts and whether the TC in this proceeding that had not yet been severed, so it was not yet final, allowed people to come in and file other claims or take other actions, and what the parties agreed to in connection with the severance that made the summary judgment order final?

WATKINS: Correct. And I am asking you as a first level, which I know I'm not going to sell to you, that you change the preclusive effect of the summary judgment rule and say: That if all the transactions between the parties are disposed of by the court on that day, you shouldn't be allowed to come in and amend after the rendition of the summary judgment but before the other party's claims are disposed of.

HANKINSON: Why not? The TC still has plenary power. The TC could have wiped out the summary judgment the next day if it chose to? But under your rule, the court can't do anything after that. It's final, done, you can't touch it, finished, the TC can't do anything.

WATKINS: And I think the right question is, can the TC - I am saying that the preclusionary effect of the summary judgment is final if the TC doesn't do something about it before it becomes absolutely final.

HANKINSON: But the TC here did, because you all went to the court with a stipulation severance occurred, various other things happened?

WATKINS: Yes, and the TC did nothing to effect the preclusive effect of the summary judgment by what they did here.

HANKINSON: Well that presumes that it had a preclusive effect. Your argument asks us to presume that the summary judgment had preclusive effect when in fact it was interlocutory and that nothing that the trial judge did after that while the TC still - while it was still interlocutory could have any effect? It sounds like a big step.

WATKINS: There's a difference between it having a preclusive effect and it being formal res judicata. In other words, you wouldn't, I don't think, let me ask the plaintiff in that case come in and amend my petition without leave of court, and get around the summary judgment.

HANKINSON: That's a different issue.

WATKINS: No, it's the same issue in this case. It's different from res judicata, but it is the same issue that the CA wrote on, which said: It is a compulsory counterclaim. And they say: They filed their counterclaim timely. And I say, the evidence is clear, they didn't file it timely. The court never granted them leave to file it. Our petition was already dismissed and they filed a counterclaim against a petition that didn't exist. We had been dismissed. There is nothing to file a counterclaim against. And we shouldn't presume that this TC held that it was granting leave for them to file it, because as the second exhibit which was attached here, is the court's order at the time that he's doing all this stuff. I've highlighted it. We filed a motion to strike their counterclaim. This TC should not be presumed to have granted leave, which they did not have, to file their counterclaim because the TC specifically wrote: Valero's motion to strike Kellogg and Ingersoll's counterclaims is moot because he had already held that they were precluded.

Roman I(e) above, which is Valero's motion for summary judgment dismissing the counterclaim is granted. So he says: By granting our summary judgment, he rendered moot the fact of whether or not the counterclaims had been filed, was properly filed. And so he did not rule on our motion to strike because they didn't have leave.

HANKINSON: Which means he left the counterclaim pending?

WATKINS: No, he left our motion to strike pending. Our motion to strike is moot because he's already kicked out their counterclaim. So the motion to strike is still pending. It hasn't been ruled upon and we can't presume that the TC has granted them leave to file. That, added to the fact that there was no petition to file the counterclaim against because it had already been dismissed means that there is no way we can say that the TC has gotten around by any of its conduct, the preclusive effect of this summary judgment.

I'm not going to call that preclusive effect res judicata again, because I know what I would get from you concerning res judicata. I am going to try to find some other word to call it.

HANKINSON: Isn't that what res judicata means?

WATKINS: Yes, but there are preclusive effects of interlocutory judgments that are not res judicata.

BAKER: Would it be asking too much for an example of that?

WATKINS: Oh, yeah. A TC strikes my witness and says I can't call him because I didn't respond to it. That's an interlocutory order, but it certainly has a preclusive effect on me throughout the trial. The point I'm suggesting here is, a summary judgment is res judicata on the issues before the court at the summary judgment unless the court grants something to the petitioner to change something.

HANKINSON: Well it looks like the TC, you all went in to court and made an agreement in which the court did a severance and said: counterclaims can be moot. So why didn't the TC do something then at that point in time saying: any counterclaim or we're going to keep some stuff alive over in this new action?

WATKINS: Let's turn to exhibit 3. I've highlighted what I said. That is all of the claims between any parties other than *Valero v. Ingersoll-Rand* will be severed into a new cause of action leaving pending under this cause *Valero v. Ingersoll-Rand* and *Valero v.* _____. We're trying to set up the summary judgment to go up on appeal. That's what everybody is doing. Everything else, the intervenor, all the cross-claims, any counterclaim by Kellogg against any other party. Not what do I mean by that? I have no idea, that sentence makes no sense. You can't have a counterclaim against any other party because the two parties that are over in that other lawsuit are staying there. But I'm agreeing to move any counterclaim they might have against any other party, any counterclaim by Ingersoll-Rand, any cross-claim by Ingersoll-Rand against any other party would be severed.

If you come down to the bottom of the page, the whole point of the next two pages, is that if it got reversed these things would come back alive. The only stipulation I entered into was if it got reversed, and these things came back down. Look at the orange highlighting and the rest of that, all was dependent upon a reversal and we could come back to trial. The attorney's fees claims could have become alive if it got reversed and we all had a chance to replead. But what happened in the summary judgment was going to be final based on this stipulation at least if appellate court affirmed them and we were out and we were dead.

All I can say to you is, that the court intended, and I intended everything die

if the thing got affirmed, everything came back alive if it got reversed. I believe there is preclusive effect although not technically summary judgment, not technically res judicata to not having filed their attorney's fees claim before 7 days prior to the trial. And the court didn't do anything about it.

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REBUTTAL

GRAY: The absolutely absurd position that Valero is trying to convince this court to adopt is that by entering into this stipulation in the explosion lawsuit, that had Rand lost the explosion appeal it's indemnity claims would be preserved. But because Rand prevailed it's claims are gone. You can parse this stipulation word-for-word, or you can read it as a whole. While the highlighting is very colorful it's not nearly as colorful as what was actually going on. Valero had suffered an immense adverse judgment on a claim that they valued at $1 billion. They desperately wanted to appeal and were flushed with confidence that it would be reversed. Flushed with confidence even today that it was wrong. The fact that it wasn't reversed, the fact that things turned out differently than they thought, does not change the meaning of the words used. It is absolutely absurd that the parties intended any preclusive effect by that severance.

Justice Hankinson well recognizes that they are asking for a gaping exception in the law both of limitations and in the law of res judicata. She asked for a case that held that anticipatory repudiation would start limitations running. They are unable to give you one because none exist. The case in their brief, *Pitts,* Austin CA 1977, writ ref'd n.r.e., that case held that limitations had not started running with the anticipatory repudiation, because the factual predicate to the promisor's duty to perform under the contract, which in this case would be liabilities fixed and certain had not yet accrued. There is not a single case that I am aware of in all of Texas jurisprudence holding that limitations begins running upon the anticipatory repudiation of a contract. Not only that, but they are asking for a gaping exception to the law of finality of judgments. This court held in *Mower v. Boyer*, an interlocutory summary judgment is not final for res judicata purposes. I can tell you what an interlocutory summary judgment is final for purposes of, because they've cited two different kinds of cases in their brief. We're trying to move the preclusive effect back to the summary judgment hearing. The two kinds of cases that they've cited are: 1) cases which involve a totally final judgment - all issues and all parties; we didn't have that here prior to the severance; and 2) cases where the loser at the interlocutory summary judgment stage tries to undo the issues decided without filing a motion for rehearing, by taking an end-run around the judgment.

Let's remember, Kellogg and Rand won interlocutory summary judgment. All that was decided was that Valero should take nothing by its claims. Adding in an indemnity claim for defense costs, does not undo any issue decided in the interlocutory summary judgment. As a matter of law, the only preclusive event if there is one, and there is not in this case, is the severance. They cannot change the legal effect of the terms that they use.

Finally, they rely on one case, *Kaminsky,* to say that: An attorney's fees claim

is a compulsory counterclaim. Well first, this is an attorney's fees claim. This is an indemnity claim. It includes attorney's fees, and all defense costs, including deposition costs; experts, etc. And indemnity contract is reached in an entirely different way from the contract in *Kaminsky*. Plus *Kaminsky* is entirely distinguishable in this respect. The defendant in *Kaminsky*, as the defending party in *Getty*, had assumed aggressor status. They were a plaintiff for res judicata purposes, because they asserted the claim of constructive eviction. Constructive eviction is merely a claim for breach of a lease agreement. Well everyone knows that if you assert a claim for breach of contract, you get attorney's fees under Ch. 38 of the Civil Pract. & Rem. Code. What the defendant in the *Kaminsky* case did, was asserted and prevailed on a breach of contract claim, but left out one of his remedies. *Kaminsky* is correctly decided. You can't bring a second lawsuit to assert a remedy that you have left out of a cause of action that you have previously asserted. That's not what is going on here. We have a continuing litigation between the parties. We have a new and independent claim that doesn't even arise until liability is fixed and certain.

To the question of whether it should be different for first and third party, I don't think I satisfactorily answered that. The answer is, no. Part of the reason is, because there is only one contractual _____. The only reason that you should treat them differently is if Rand could have lost the explosion litigation, and then tried to recoup its damages from Valero through the indemnity agreement. That can never happen under a proper application of res judicata because the issue of the enforceability of the indemnity agreement would have been already litigated and Rand would have already lost it. We could not relitigate it. And because §22 of the restatement clearly provides that even if it's not a compulsory counterclaim if it would undo rights that were granted in the first judgment it is barred.

HANKINSON: Would you respond to Mr. Hilger's argument that the stipulation contemplated that the only way the severed action would be revised would be in the event of a reversal and remand of the adverse judgment against Valero?

GRAY: Sure. I respond to it in pointing out three different things. First, at the beginning of the statement, we a had a statement of purpose telling the TC why are we doing this. They told the TC we're only doing this - he didn't put it in the exhibits that he gave you - it's page 1 of vol. 8 of the reporter's record. It says: We're doing this in order that we can appeal this. Then you have the statements that he included about any counterclaim by Ingersoll-Rand, etc. We have a statement later - remember there was already an indemnity claim pending by our co-defendants. You have the statement - a question from that co-defendant specifically: "Our claim isn't barred is it?" "No, we're not giving this in preclusive effect, we're not adjudicating that claim." We also have a statement of what claims are to be barred. The only claims that he pointed out in the portion of the transcript that he didn't provide you, that should be barred, were Valero's claims against other similarly situated defendants.

Their task in front of you today is to convince you that they acquiesced to the indemnity claims of our co-defendant, but preserved res judicata as to Rand's claims. And that

certainly appears nowhere here.