IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2009-CA-00540

JACQUELINE BEENE **APPELLANT**

v.

FERGUSON AUTOMOTIVE, INC. **APPELLEE**

APPEAL FROM THE

CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE FERGUSON AUTOMOTIVE, INC.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made in order that the Circuit Court Judge may evaluate possible disqualification or recusal.

1. Honorable Circuit Court Judge Kathy King Jackson, Circuit Court Judge, Circuit Court of Jackson County, Mississippi;

2. Honorable County Court Judge T. Larry Wilson, County Court Judge, County Court of Jackson County, Mississippi;

3. Blewitt Thomas, Attorney for Appellant Jacqueline Beene;

4. Thomas Carpenter, Attorney for Appellee Ferguson Automotive, Inc.;

5. Jacqueline Beene, Appellant;

6. Ferguson Automotive, Inc., Appellee.

THOMAS L. CARPENTER
Attorney for Appellee Ferguson Automotive, Inc.

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STATEMENT OF THE ISSUES

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(2) Later, more modern Mississippi state court decisions simply require proof of the judgment itself so long as that judgment supplies the necessary information to determine whether *res judicata* applies.

B. Under today's Mississippi caselaw, res judicata bars claims which could have been made or should have been made in a cause of action, and therefore, by demonstrating that Beene could have made the contract-based claim in her original complaint or at any time prior to dismissal of her first county court suit, Ferguson has proven all of the elements applicable to sustain *res judicata*.

C. Ferguson is not judicially estopped from arguing *res judicata*, because there is no contradiction to Ferguson's position.

D. The issue of "adequate opportunity" to litigate the contractual claim before the Harrison County Court is invalid as an argument for procedural and substantive reasons:

(1) Beene did not argue this point at the County Court level as the trial court level, and thus this issue should not be heard by this Court;

(2) Further, Plaintiff's argument that *Thompson v. LaVere* applies is incorrect, as the Mississippi Supreme Court reversed the trial court application of *res judicata* on very different grounds than exist here, as in this case, Plaintiff had an adequate opportunity to plead her claim using due diligence;

(3) Finally, Plaintiff's argument would do an "end run" around scheduling orders or trial deadlines, as parties barred from filing untimely amended complaints, even were they filed on the date of trial, could simply file a new complaint including the barred causes of action, and begin anew.

STATEMENT OF THE CASE

Appellant alleged in her Jackson County Court Complaint a breach of contract action against Ferguson Automotive, Inc. (County C.P. 3).[1] Appellant asserts that since Hurricane Katrina destroyed Ferguson's business, along with her car, Ferguson breached the contract in not refunding the amount paid for the work they did, or by not otherwise fixing her car which was destroyed by the storm. (Beene Complaint, County C.P. 3-4).

Because Judge Wilson's opinion relies upon *res judicata,* it is important to discuss what the Harrison County Court determined in its judgment.

A. Harrison County Court proceedings and Final Judgment in case

Appellant filed a nearly identical lawsuit earlier, in the County Court of Harrison County, Mississippi, Second Judicial District against Ferguson Automotive, Inc., on April 11, 2006. (County C.P. 20-24, Harrison County Complaint).[2] The only difference between the Harrison County lawsuit and the Jackson County suit is that the Jackson County suit specifically requests contractual relief, and not negligence.

Ferguson filed a Motion for Summary Judgment on August 9, 2006, 120 days after the

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In this case, as Beene has been in both the County and Circuit Courts of Jackson County, there are two sets of Court papers and transcripts, to which Ferguson will distinguish by using County or Circuit ahead of the C.P. page number. Beene did not cite to any facts she asserts, so this issue should only arise in Ferguson's brief. However, it is difficult to know where her facts come from in this case.

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The County Court of Harrison County, Mississippi, Second Judicial District, had jurisdiction over the case, in that Plaintiff also sued V. Mai Dihn, the person who collided with her, for an accident which occurred in Biloxi. (C.P. 20-21).

filing of Plaintiff's Complaint. (County C.P. 31, Harrison County Court Judgment). 212 days elapsed between the date Ferguson filed its Motion for Summary Judgment, and the hearing date on the Motion, March 9, 2007. (County C.P. 30, Harrison County Court Judgment). This difference in time is important, as Plaintiff attaches great significance to the fact that they did not know until August 9, 2006 that they had facts supporting a contract-based cause of action through Ferguson's summary judgment motion:

> The record is uncontroverted that Benne (sic) had no knowledge prior to August 10, 2006 that Ferguson had been paid . . . therefore she was without facts or any reasonable basis upon which to assert the contractual claims."
>
> Appellant's brief, pg. 3.

After August 9, 2006, Beene still had 212 days from that date to the summary judgment hearing date on March 9, 2007 to file a Rule 15 motion to amend to include a contract claim. She had 212 days to file a Rule 56(f) Motion requesting time for discovery prior to having the summary judgment motion, had she needed an opportunity to do discovery based upon the August 2006 disclosures. In fact, Beene never filed a formal Rule 15 motion or a Rule 56(f) motion either before or after the hearing in March 2007. (County C.P. 31).

The county court judge, the Honorable Gaston Hewes, considered two things in his Final Judgment. First, did the Plaintiff make a showing of negligent bailment in how Ferguson handled Plaintiff's car then under repair as Katrina approached. (County C.P. 32-33). Second, was it appropriate to permit amendment of the First Complaint to include a contract claim, which the Court found was not mentioned in that complaint. (County C.P. 33).

The Harrison County Court Judge held that with the evidence developed before it over nearly one year from complaint (April 2006) to the date of the hearing (March 2007), the only

evidence before the Court is the Affidavit of Thomas Ferguson, the body shop owner, detailing what steps he took to protect Plaintiff's vehicle from damage. (County C.P. 32-33). The Court held, consistent with *Harry Cole Dodge of Pascagoula, Inc. v. Cox*, 246 So. 2d 918 (Miss. 1971), that Ferguson was not negligent through the steps he took to protect Plaintiff's vehicle. *Id.*

Regarding the amendment on the issue of contract, the Court noted that "[a]t first glance, this Court could determine that no such amendment may be permitted, in that no such Motion has been filed with the Court." (County C.P. 33). The Court considered Appellant's allusion to an amendment in her Response to Summary Judgment motion, and nevertheless declined permission for Appellant to amend her complaint. (County C.P. 33-34). The Court stated that the request for amendment was only requested on the date of the first scheduled hearing for summary judgment, which was the date Appellant filed her response to Ferguson's Motion for Summary Judgment, and at oral argument. (County C.P. 33).[3] The trial court held that under Mississippi Supreme Court caselaw, an amendment to include breach of contract was untimely, as unduly prejudicial. (County C.P. 34). Judge Hewes noted, in explanation, that the Appellant Beene, in the Harrison County Court action, never propounded discovery to learn about her case within the time frames permitted by discovery under the Uniform Circuit or County Court Rules. *Id.* Judge Hewes noted that the Mississippi Supreme Court had held that amendment motions

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Plaintiff asserts that Ferguson opposed in pleadings Beene's request for amendment, on October 25, 2006. (Appellant's brief, pg. 3). However, Beene provides no citation to these pleadings, and in fact, they are not in the Court record. Beene never filed a Rule 15 Request for Amendment by itself For purposes of this argument, it is irrelevant, as Judge Hewes noted that Beene's request was filed on the date of the first scheduled hearing for summary judgment, on October 19, 2006, as Beene admits on Page 3 of her brief. ("In conjunction with her response to Ferguson's motion for summary judgment ... Beene (sic) .. requested leave to amend her pleadings.").

made after the expiration of discovery deadlines were unduly prejudicial. *Id.*, *citing Webb v. Braswell*, 930 So. 2d 387, 395-96 (Miss. 2006).

The Harrison County Court then dismissed the action against Ferguson Automotive, Inc., stating "[a]ll of the asserted claims to be made against Ferguson Automotive, Inc. have been addressed by the Court in this opinion." (County C.P. 35). The Court filed its judgment on June 14, 2007. *Id.* The Court specially cited Rule 54(b) "as to its final judgment dismissing Ferguson Automotive, Inc." (County C.P. 35). This point is important, as it disproves Beene's argument that because the Court did not use the term "with prejudice," there is no final judgment which would preclude a new suit. As the Comment to Rule 54(b) notes:

> The second perquisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided. ... a dismissal for failing to state a claim upon which relief may be granted, made with leave to amend, clearly does not finally decide that claim and Rule 54(b) would not apply.

The Harrison County Court made it very clear that it was not forseeing additional suits when it stated "this Court makes an express determination for an entry of *complete and final judgment in favor of Ferguson Automotive, Inc.*, completely dismissing it from this cause of action." (County C.P. 35).

Significantly Appellant neither filed a Rule 59 motion to reconsider, nor an appeal of Judge Hewes' decision. Instead, while the appeal window of Judge Hewes' judgment was still open, Plaintiff filed this action in breach of contract on July 3, 2007 in Jackson County Court.

B. Jackson County Court proceedings

As noted, the Appellant filed a contract-based claim, based upon the very same Hurricane

Katrina-related loss to her car, against the very same defendant she had sued in Harrison County Court. (County C.P. 3-5). On September 6, 2007, Ferguson responded with an answer, incorporating in its answer the affirmative defenses of res judicata, claim splitting and collateral attack upon a "final, unappealed, Judgment of the County Court of Harrison County, Mississippi, Second Judicial District." (County C.P. 9).

Simultaneously, Ferguson filed a Motion for Summary Judgment based upon the preclusive effects of *res judicata* and claim splitting prohibitions.(County C.P. 12-16). As part of Ferguson's exhibits, Ferguson included the Jackson County Court Complaint (County C.P. 17-19), the Harrison County Court Complaint (County C.P. 20-24), Plaintiff's Response to Ferguson's Motion for Summary Judgment in the Harrison County Court case, (County C.P. 25-29), and the six page Final Judgment of the Harrison County Court. (County C.P. 30-35).

On October 26, 2007, fifty days after Ferguson's Motion, Appellant filed her Response to the Summary Judgment motion. (County C.P. 57). Significantly, there was no objection lodged by Appellant before the trial court in her Response that the record was incomplete, not having the entire Harrison County Court file, nor did she raise the argument that the Harrison County Court's judgment was "without prejudice." (County C.P. 57-62).

Appellant then filed a "supplemental response" to Ferguson's Motion, without leave of Court. (County C.P. 65-72). Neither one of the above two arguments were addressed in that improperly filed supplemental response. *Id.*

The Jackson County Court held oral argument on Ferguson's Motion on November 7, 2007. (County Tr. 1). In that argument, Ferguson acknowledged that Appellant's contract-based claim was not heard on the merits, but instead was not permitted upon the grounds that Appellant

had untimely attempted to file a motion to amend her Complaint to include those grounds. (County Tr. 8 and 27). Ferguson also noted in oral argument that Appellant's argument of cases from several decades ago had simply been superceded by more recent decisions on res judicata from the 1990s and 2000s, which clearly state that *res judicata* bars relitigation of causes which not only were, but could have been litigated in the first action. (County Tr. 10-15).

Ferguson also noted that Appellant's argument that she did not know she had a contract claim fails in light of her bailment claim against Ferguson she did travel under, since bailment requires a contract to make that claim. (County Tr. 15).

The Jackson County Court entered a Final Judgment on November 19, 2007, dismissing this cause of action "upon grounds of *res judicata*." (County C.P. 73). The Jackson County Court cited to *Alexander v. Elzie*, 620 So. 2d 909 (Miss. 1992) and *Channel v. Loyacano*, 954 So. 2d 415 (Miss. 2007), for support that the identities of *res judicata* are present, and that *res judicata* bars all claims which were, or could have been decided, in the first judgment. (County C.P. 74-75). Beene then filed her appeal to the Circuit Court of Jackson County, Mississippi on December 18, 2007. (County C.P. 79).

C. Jackson Circuit Court Proceedings

Beene asserted on appeal from the trial court's dismissal arguments not made in the Jackson County Court. Specifically, Beene asserted in the circuit court that:

(1) Ferguson had not met the burden of proof on *res judicata*; (Circuit C.P. 55). Beene made no such argument at the trial court (county court) level (County C.P. 57-62; 65-73 for Beene's county court briefs);

(2) The Harrison County Court's dismissal without prejudice precluded *res judicata.* (Circuit C.P. 55). Again, Beene made no such argument at the county court level. Further, as noted above, Beene is incorrect in stating the county court dismissed Beene's case

without prejudice, as the word "prejudice" is not used in that Final Judgment.

The Circuit Court of Jackson County rejected both the old arguments made at the county court level, and Beene's new arguments. (Circuit C.P. 112-14). In affirming the County Court decision, the Circuit Court noted that in accordance with *Walton v. Bourgeois*, 512 So. 2d 698 (Miss. 1987), where there is an unsuccessful suit on a negligence action, *res judicata* would prohibit a subsequent suit on contractual grounds. (Circuit C.P. 113). The Circuit Court noted that the County Court was correct in determining that *res judicata* applied. *Id.*

From that decision, Beene appealed the decision of the Circuit Court to this Court, on April 1, 2009 (Circuit C.P. 115).

Beene spends three additional pages, from pages 5 to 7 of her brief, summarizing her argument. Ferguson will respond to this argument in Ferguson's summary of the argument. Further, Beene cites issues presented on appeal, which is not a required part of the appellate brief under the Mississippi Rules of Appellate Procedure, as the Statement of the Issues presents the issues on appeal. M.R.A.P. 28(3) ("No separate assignment of errors shall be filed.").

SUMMARY OF THE ARGUMENT

The appellate record has the County Court of Harrison County's Final Judgment, which clearly not only dismissed Beene's action against Ferguson Automotive, but explained why final judgment was proper. Thus, under modern Mississippi caselaw, this Court has sufficient proof of why *res judicata* applies in this case. Furthermore, Beene failed to address this point before Judge Wilson, where he could promptly have had the parties order a copy of the Harrison County

Court record. Thus, this issue is precluded as not having been raised before the trial court.

Res judicata, in 2008 Mississippi caselaw, not only bars what was actually litigated before the Court. Res judicata also bars what could have been litigated before the trial court in the first action. This point is the entire principle behind the prohibition against claim-splitting. There is also no judicial estoppel present. Ferguson argued in Harrison County Court that Beene waited too long to allude to the need for an amendment to include contract claims (even though Beene never filed for such an amendment). The Harrison County Court agreed, and barred Beene's attempt at an untimely amendment. Ferguson's argument is not inconsistent with its Harrison County Court position. Here in Jackson County Court, Ferguson asserted that Beene did not argue her contract claim on the merits, because she failed to timely attempt to amend her complaint. That position is not inconsistent with Ferguson's Harrison County Court position.

Finally, regarding Beene's argument of "inadequate opportunity" to assert her contractual claims, Beene never made this argument to either the county or circuit court, and should thus be barred here. Second, Beene had more than adqequate opportunity, both before and after Ferguson filed his motion for summary judgment, to assert a contract claim, and never formally motioned the court to amend her complaint or to engage in any discovery, either before or after Ferguson's filing for summary judgment. Finally, permitting Beene to refile causes of action which other courts deemed untimely filed would permit plaintiffs and defendants alike to file subsequent cases asserting the validity of claims and defenses which they neglected to make in the first suit. This position would render scheduling orders meaningless, and promote multiple filings over the same incident. This problem is the very reason this Court adopted *res judicata* in the first place. To avoid multiplicity of litigation, and evasion of scheduling orders and Rules-

based deadlines, this Court should affirm the lower courts, and find *res judicata* applicable here.

ARGUMENT

A. Standard of Review

The trial court, the County Court of Jackson County, considered documents outside the Jackson County pleadings. Thus, the standard of review is the summary judgment standard. The party moving for a summary judgment must show the basis of its motion and identifying the portions of the record in the case which establish the absence of a genuine issue of material fact. *Franklin v. Thompson*, 722 So.2d 688, 691 (Miss.1998). However, once the moving party has properly supported his motion for summary judgment, the non-moving party must respond by setting forth specific facts showing there is a genuine issue for trial. *Brown v. Credit Ctr. Inc.*, 444 So.2d 358, 363 (Miss.1983).

There are no disputed material facts in this case. Where there are no disputed facts, and through an application of law the Court can determine a legal issue through the use of summary judgment, the Mississippi Supreme Court has upheld the granting of summary without hesitation. *Byrd v. Imperial Palace of Mississippi*, 807 So. 2d 433, 434 (Miss. 2001) ("If the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, this Court will not reverse."). In other words, where the undisputed fact indicates that a defendant is entitled to a judgment as a matter of law, the Mississippi Supreme Court has stated summary judgment is appropriate.

B. The principle that the defense of *res judicata* requires production of the entire record is meritless for two reasons.

There are procedural and substantive reasons why this argument is meritless, as stated in the following pages. Beene did not bring this point up before the trial court judge, when such a problem could have been addressed at that level. Further, Beene's caselaw fails to account for the most recent decisions from the Mississippi Supreme Court. These cases hold presentation of the judgment, if it supplies the basis for *res judicata* within it, is sufficient evidence. For either or both reasons, this Court should reject Appellant's argument in this section.

(1) First, Beene did not object with this point at the trial court, and cannot assert attacks upon appeal which were not considered by the trial court.

Appellant simply did not raise this objection to *res judicata* before Judge Wilson of the County Court. Last year, the Mississippi Supreme Court rejected consideration of appellate issues in a death penalty case, stating:

> The rule that failure to make a contemporaneous objection waives the issue on appeal generally applies to death penalty cases. *Williams v. State*, 684 So.2d 1179, 1189 (Miss. 1996). An objection must be made with specificity, and failure to articulate the grounds for objection constitutes a waiver of the alleged error. See, e.g., *Latiker v. State*, 918 So.2d 68, 74 (Miss. 2005) (failure to state a legal basis for objection waives right to appeal alleged error); *Irby v. State*, 893 So.2d 1042, 1047 (Miss. 2004) (general objection that jury instruction is "prejudicial," without more, is insufficient to preserve for appeal); *Crawford v. State*, 787 So.2d 1236, 1246 (Miss. 2001) (general objection that expert witness was "mistaken" insufficient to preserve issue for appeal).
>
> *Ross v. State*, 954 So. 2d 968, 987 (Miss. 2007).

Last month, the Mississippi Supreme Court reaffirmed this principle in civil cases:

> However, there is no evidence in the record that William either objected or responded to Chasity's "Motion for Reconsideration." The Mississippi Court of Appeals addressed a similar issue in *Scally v. Scally*, 802 So. 2d 128 (Miss. Ct. App. 2001), stating:
>
> [t]his Court does not review matters on appeal that were not first raised at the trial level. *Shaw v. Shaw*, 603 So. 2d 287, 292 (Miss. 1992). Before an issue can be presented to this Court, it must first be presented to the trial court. This is done by an objection. *Queen v. Queen*, 551 So. 2d 197, 201 (Miss. 1989). A timely objection brings the issue to the court's attention, and gives it the opportunity to address the issue. *Kettle v. State*, 641 So. 2d 746, 748 (Miss. 1994).
>
> *Scally*, 802 So. 2d at 132. Based upon that same reasoning, this Court concludes that William is procedurally barred from raising this issue for the first time on appeal.
>
> *Wilburn v. Wilburn*, 991 So. 2d 1185, 1191 (Miss. 2008)

There is nothing in the record which demonstrates that Beene brought this issue up before the county court. The county court did not make a ruling upon this issue. Beene did not bring this issue up in a motion for reconsideration at the county court. A timely objection could have corrected this problem. The Circuit Clerk of Harrison County, Mississippi could have then produced the entire record to the trial court.

Beene chose not to do so. Instead, she has waited until appeal. Because Beene chose not to assert this principle as a defense until appeal, this Court should reject her attempt to raise it for the first time upon appeal.

Even more interestingly, Appellant object to the use of the Harrison County Court judgment for *res judicata*, while at the same time, she makes that very judgment part of her record excerpts, and often cites to it throughout her brief, albeit arguing why it is wrong. Appellant wants to use the judgment for her purposes, and dismiss it when it cannot help her. This action supplies one more pragmatic reason why this Court should hold that Beene is now

barred from asserting an argument about presentation of the entire Harrison County Court file, when she did not assert this point at the trial court level.

(2) Later, more modern Mississippi state court decisions simply require proof of the judgment itself so long as that judgment supplies the necessary information to determine whether *res judicata* applies.

In 1994, the Mississippi Supreme Court remanded a case to the trial court upon a *res judicata* appeal, *only because the judgment itself* was not in the appellate record:

> With this appeal, Dillon is in essence asking this Court to determine the res judicata effect of a judgement that is not in the record. *Without having the actual judgement in front of us,* it is quite impossible to determine what preclusive effect it might have. Simply put, the record is such that this Court cannot determine this case.
>
> The proper course of action, therefore, is for this Court to remand to the lower court for the purpose of augmenting the record and more clearly setting out the issues. Once the necessary facts are before the Court a decision as to the merits of this case can be reached.

Dillon v. State, 641 So. 2d 1223, 1225 (Miss. 1994) (emphasis supplied).

In 1990, the Mississippi Supreme Court noted specifically that proof of *res judicata* could be demonstrated by submission of the judgment alone, so long as the judgment supplied sufficient basis for application of *res judicata*:

> *[B]y offering into evidence either the pleadings or the judgment of the interpleader case.* . . . This is in line with this Court's ruling in *Astro Transport, Inc. v. Montez*, 381 So. 2d 601 (Miss. 1980). In *Astro* the appellee Montez cross-appealed and argued that the trial court had erred in overruling his motion for dismissal. *Astro*, 381 So. 2d at 603. This Court held that "Montez's failure at the lower level to plead and prove his defense of res judicata by offering into evidence *either the pleadings or judgment of the companion case* leaves his cross-appeal without merit." *Id.* at 604.

Stubblefield v. Walker, 566 So. 2d 709, 711 (Miss. 1990).

Later decisions supercede earlier decisions, just as later-enacted statutes supercede earlier conflicting statutes. *United States v. Yuginovich*, 256 U.S. 450, 463 (1921). Thus, the latest

Mississippi Supreme Court pronouncements permitting the judgment as sufficient proof of *res judicata* supercede what the earlier Court may have required for *res judicata* in 1870.

Beene asserts that the "record provides no proof that Ferguson (sic) that the issue of Benne's (sic) contract claim was previously pled and litigated or otherwise adjudicated conclusively against Benne by the Harrison County Court." (Appellant's brief, pg. 13).

To the contrary, the Harrison County Court specifically dealt with this contract claim, stating:

(1) "[T]his Court notes that Beene concedes in her March 19, 2007 letter to this Court that her contractual claims "may not have been alleged in the original Complaint." (County C.P. 31).

(2) "[T]his Court is faced with the question of whether Plaintiff may be permitted to amend her complaint to include a breach of contract claim." (County C.P. 34).

(3) Citing *Webb v. Braswell*, 930 So. 2d 387, 395-96 (Miss. 2006), the Harrison County Court stated, "a Motion to Amend could have been made well within the discovery window permitted by Uniform Circuit and County Court Rule 4.04A. As Beene did not propound discovery, these contract-based theories were not developed through the discovery process in the course of this case. Beene seeks to amend her Complaint well after those discovery deadlines expired in July 2006. Clearly, this Amendment would burden Ferguson with discovery, preparation and expense without good reason, after the expiration of discovery. The Mississippi Supreme Court has held that of last year, such amendments should not be granted, as those amendments are unduly prejudicial, and this Court finds that Beene's motion to amend therefore cannot be granted." (County C.P. 34).

Thus, The Harrison County Court specifically set out, discussed, and explained why Beene's contract claim would not be allowed to be amended into this cause of action. Beene clearly understands what this Judgment means. She cites to this Judgment, discussing its meaning, often in her own brief. *See, e.g.,* Appellant's brief, pg. 15. Thus, a clear setting out of the issues which were presented or should have been presented is present in the Harrison County Court judgment, and this argument has no substantive merit either.

C. Under today's Mississippi caselaw, res judicata bars claims which could have been made or should have been made in a cause of action, and therefore, by demonstrating that Beene could have made the contract-based claim in her original complaint or at any time prior to dismissal of her first county court suit, Ferguson has proven all of the elements applicable to sustain *res judicata.*

Appellant did not get a decision on the merits of her contract-based claim on summary judgment, or before a jury. Appellant seems to think that destroys the defense of *res judicata.* It does not. The Mississippi Supreme Court stated *res judicata* bars:

> Res judicata, as a doctrine of claim preclusion, has two functions. Under the principle known as "bar," res judicata precludes claims which were actually litigated in a previous action. ***Under the principle known as "merger," res judicata prevents subsequent litigation of any claim that should have been litigated in a previous action.*** The United States Supreme Court has succinctly held, ***"res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."*** *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979). Likewise, this Court has been clear in regards to our application of the doctrine of res judicata, and we have held "'that when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from re-litigating claims that were decided ***or could have been raised in that action.***'" *Miss. Dep't of Human Services v. Shelby*, 802 So. 2d 89, 95 (Miss. 2001) (citing *Aetna Cas. & Ins. Co. v. Berry*, 669 So. 2d at 66).
>
> *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 231-32 (Miss. 2005) (emphasis supplied).

Beene claims it is "undisputed" that she was not aware that a third-party insurer had paid for the repair for her vehicle. Beene should have known, had she chosen to send out discovery any of the parties in this case. (County C.P. 34). Beene alleged that she took her vehicle to Ferguson to get her crash-damaged vehicle repaired. (County C.P. 1). Astonishingly, Beene now claims that prior to August 2006, when Ferguson had filed a "motion for summary judgment that

a third-party insurer had paid for the repair of her vehicle." (Appellant's brief, pg. 11). This Court should compare that comment with one of the first pleadings in her original Complaint, where she says "[s]ubsequent to August 16, 2005, the Defendant FERGUSON AUTOMOTIVE, INC. did commence the repair of the Plaintiff's vehicle, "*and prior to the completion of these repairs the Defendant was paid in excess of Three Thousand Dollars ($3000).*" (County C.P. 3-4). The Complaint never specifically states who paid for the repairs. However, the Plaintiff had to know at the time someone paid for the repairs, as she alleges in her original Complaint. If not her, then who? This point alone belies the issue that Beene either did not or could not know that an insurer had paid to repair her car prior to the arrival of Hurricane Katrina.

Further, Beene simply had to know she had a contract claim with Ferguson to fix her car. That contract to repair is the only basis for Ferguson's liability in negligent bailment, which she acknowledges in her original complaint, by stating Ferguson's repair "and resulting bailment being for the profit and benefit (of Ferguson)." (County C.P. 22).

One cannot have a bailment without a contract under Mississippi law:

> Under the law of bailment, where a bailor delivers personal property to a bailee in good condition, *under a contract to repair the bailed property*, or where the bailment was for their mutual benefit, and the property is destroyed or returned in a damaged condition, such fact creates a prima facie presumption of negligence on the part of the bailee.
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> *Hamm v. F.B. Walker and Sons*, 198 So. 2d 817, 818 (Miss. 1967).

However, even if Beene did not know this information, the fact that she was unaware of who paid for her car repairs prior to Ferguson's motion for summary judgment can be placed at her doorstep. Beene never propounded discovery in the Harrison County Court case. Ferguson then had between August 2006 and March 2007, the date of the Harrison County Court hearing, to file a motion to amend. Beene never filed a Rule 15 Motion for Leave to Amend, and doesn't

present one to this Court for review. The Court noted that Beene "alluded to a request for amendment," on the date of the first hearing for summary judgment, when Beene filed her Response to Motion for Summary Judgment, and at oral argument in March 2007. (County C.P. 33-34). The Harrison County Court noted that it could thus deny Appellant's motion to amend to include a contract claim, in that no such motion existed. (County C.P. 33). That Court did note that Appellant's Response "alluded" to such a motion, and then stated the following: "treating Plaintiff's Response as such a Motion, this Court must deny Plaintiff's Motion for Leave." *Id.* The Harrison County Court noted that *Webb v. Braswell* compelled the conclusion that Appellant's request was untimely and unduly prejudicial, and thus denied that claim. (County C.P. 34).

What this entire citation of the Harrison County Court opinion shows that while Beene's contract claim was not heard on the merits, but it *could have been made*, had Appellant pursued discovery and motions to amend in a timely manner. *Res judicata* bars claims that either were or could have been made on the merits.

As to Beene's claim that negligence and contracts are not the same causes of action? The Mississippi Supreme Court considered and rejected that argument on identity of causes of action when considering how *res judicata* would apply in 2005, stating and citing a case *specifically on point with this case, noting*:

> In *Walton v. Bourgeois*, 512 So. 2d 698, 702 (Miss. 1987), this Court barred an ***unsuccessful tort plaintiff in a medical malpractice suit from re-litigating her claim under a new legal theory of breach of contract.*** *Id.* at 702. In determining that the ***claims were indeed the same***, this Court explained that identity between claims exists "when the underlying facts and circumstances are the same [in the second suit] as those involved in the first suit." *Id.* at 701. We reasoned that "the primary right and duty asserted and the primary wrong complained of were the same in each action" and found that "only the legal bases advanced for relief were arguably different." *Id.* at 702. In *Walton*, this Court ultimately found that breach

of contract was a ground which should have been asserted in the parties' first suit

> inasmuch as "it was a claim that might have been litigated in the previous lawsuit and, indeed, it should have been." *Id.*
>
> *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 234 (Miss. 2005) (emphasis supplied).

Thus, the Mississippi Supreme Court has already rejected Beene's argument on no identity of the claim for *res judicata* between negligence and contract claims being separate causes of action, as she continues to assert through pages 12 and 13 of her brief. Beene continues by stating that the negligent bailment of Ferguson in failing to prevent her car from being destroyed by Katrina is different than their contract requirement to repair her car.

In *Walton v. Bourgeois*, the Plaintiff in that case attempted the same argument as Beene:

> Annie L. Walton filed her complaint . . . charging Drs. Michael Bourgeois and Frank Gruich with medical malpractice . . . Walton alleged that in July, 1977, Drs. Bourgeois and Gruich advised her that surgery was necessary to remove ovarian cysts and female organs. Following this operation, she charged that she continued to experience abdominal pain whereupon she continued to see the Defendants and they assured her that her pain could not be due to her female organs nor ovaries. Walton alleged that later in February, 1982, she visited Dr. Frank Martin, who hospitalized her and removed her female organs and ovaries. As such, Walton charged Drs. Bourgeois and Gruich were negligent in performing their duties towards her in that they failed to remove her female organs and ovaries.
>
> Drs. Bourgeois and Gruich denied they were negligent in treating her. . . On July 12, 1984, the Circuit Court granted the motion (for summary judgment) . . No appeal was taken from the granting of summary judgment, thus rendering that judgment final.
>
> On February 20, 1985, Walton commenced the present action when she filed another complaint, . . .charging the same underlying facts, but seeking recovery on a different legal theory. This time Walton sought recovery based on the theory that the Defendant doctors had breached their contract with her to remove certain ovarian cysts, ovaries and female organs.
>
> *Walton*, 512 So. 2d at 699.

The *Walton* Court responded as follows:

> Today's appeal presents an issue of res judicata. Plaintiff brought an action in 1984 charging medical malpractice and asserting a theory of recovery sounding in tort. She suffered an adverse final judgment dismissing her complaint. In 1985 she filed a second suit against the same defendants, charging the same underlying facts, only this time she sought recovery for breach of contract. There is nothing in her second complaint that could not as well have been asserted the first time around. . . For the reasons set forth below, we affirm.

Id.

As for Beene's claims that *res judicata* only bars claims heard on the merits? The very language of what *res judicata* precludes, noting "the parties or their privies are precluded from re-litigating claims that were decided ***or could have been raised in that action***." *Miss. Dep't of Human Services v. Shelby*, 802 So. 2d 89, 95 (Miss. 2001), destroys Beene's argument otherwise.

Finally, as to *Bowen v. Bowen*, the Mississippi Supreme Court was not destroying this principle of *res judicata* in this case. What the *Bowen* Court stated was that if a decision is rendered on procedural grounds alone, *res judicata* may not apply. *Bowen v. Bowen*, 688 So. 2d 1374, 1384 (Miss. 1997). However, a closer examination of the facts of that case eliminates its prejudicial effect in this case. In *Bowen*, the Mississippi Supreme Court affirmed that a chancellor had no authority to order a division of the husband's retirement separately as a matter of procedure, but stated that *res judicata* would not apply to hold that the chancellor would never have that authority, as on the final decree, the chancellor would have that authority. *Bowen*, 688 So. 2d at 1384. *Bowen*'s decision was purely procedural. In contrast here, the Harrison County Court ruled on the merits of what was before that Court, and further decided that Beene was too late in motioning to amend her suit to include other causes. (County C.P. 34).

Bowen does not strip the authority of a trial court judge to uphold the rules of this Court, and prior Court decisions, to decide that because a cause of action was untimely pled, it cannot be considered. Should this Court hold otherwise, litigants may avoid the effects of the timelines established by Court order and the rules of this Court by filing subsequent actions, which will be addressed in the last paragraph.

Finally, the Mississippi Supreme Court laid Appellant's argument to rest with their statement on *res judicata* and its principle against claims splitting, made in 2007:

> If the plaintiffs had filed a case against Loyacono and Verhine alleging negligence, and, after the conclusion of that case, filed a second action against Loyacono and Verhine alleging fraud, the second action could be properly barred by the doctrine of res judicata or claim preclusion.
>
> *Channel v. Loyacano,* 954 So. 2d 415, 425 (Miss. 2007).

C. Appellee is not judicially estopped from arguing *res judicata*, because there is no contradiction to Ferguson's position

Beene appears to be arguing that since this counsel argued against the Harrison County Court hearing the contract claim on the merits, he is estopped against arguing that the contract claim was heard there, thus being inconsistent.

Beene is incorrect. Ferguson is not arguing that the Harrison County Court heard Beene's contract claim on the merits. The Harrison County Court did decide that the contract claim would not be heard on the merits, because Beene untimely filed her Motion to Amend. (County C.P. 34). Beene could have appealed that decision, but did not.

What Ferguson is arguing is that the negligence cause was an cause of action that was pled. The contract action was one that could have been pled from the beginning, or at least after Beene had propounded discovery, which she did not. *Res judicata* bars causes which "were

decided ***or could have been raised in that action***.'" *Miss. Dep't of Human Services v. Shelby*, 802 So. 2d 89, 95 (Miss. 2001) (citing *Aetna Cas. & Ins. Co. v. Berry*, 669 So. 2d at 66). Simply put, no contradictory position is present, no matter what Beene says. Beene's argument here has no merits, as it relies upon a misapprehension of Ferguson's position.

D. The issue of "adequate opportunity" to litigate the contractual claim before the Harrison County Court is invalid as an argument for procedural and substantive reasons:

Beene's argument here is invalid for multiple reasons, discussed in detail next.

(1) Beene did not argue this point at the County Court level as the trial court level, and thus this issue should not be heard by this Court;

Beene simply did not raise this objection to *res judicata* before the County Court of Jackson County, Mississippi. As Ferguson noted earlier, "[o]ne of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level." *Estate of Myers v. Myers*, 498 So. 2d 376, 378 (Miss. 1986). As the trial court did not get an opportunity to review this objection, Beene should be barred from raising it for the first time on appeal.

(2) Further, Plaintiff's argument that *Thompson v. LaVere* applies is incorrect, as the Mississippi Supreme Court reversed the trial court application of *res judicata* on very different grounds than exist here, as in this case, Plaintiff had an adequate opportunity to plead her claim using due diligence;

Thompson v. LaVere, 895 So. 2d 828, 834 (Miss. 2004) would at first glance appear to be a strong case for Beene, in that the *Thompson* Court states "if Anderson tried, but was not allowed to make her claim of ownership, *res judicata* cannot bar litigation of the claim in the present action."

A closer look at the case demonstrates an entirely different picture from the one Beene states. In the first case from which *res judicata* was asserted, the issue before the trial court was

solely limited to the "administration of the Johnson estate, including an heirship to determine the heirs of Johnson." *Thompson*, 895 So. 2d at 833. In the second case, the question was who owned certain photographs of Robert Johnson, then worth a lot of money. *Thompson*, 895 So. 2d at 834. The *Thompson* Court noted that "[b]ecause the ownership of the photos and copyrights thereto was not the subject matter of the chancery action, there is no identity of the subject matter between the actions," thus precluding *res judicata. Id.*

The *Thompson* Court went further in dismissing the appellee's argument that the appellant could have petitioned the first court to make a decision on the ownership of the photos, which was the crux of the second suit, noting that since the identity of the subject matter is different, *res judicata* would not apply to what could have been brought in this suit. *Id.* at 835.

In contrast, the Mississippi Supreme Court has already held that claims in contract and in tort arising from the same operative facts do share an identity in subject matter, where an unsuccessful tort plaintiff brought a subsequent suit on the same operative facts in contract:

> The four identities discussed in *Dunaway* are indeed prerequisite to dismissal of a subsequent action on grounds of res judicata. . . . Today's question, however, is whether one may elude the bar of res judicata by employing a new legal theory of recovery and thereupon filing a second complaint, when the underlying facts and circumstances are the same as those involved in the first suit. . . . Where one has a choice of more than one theory of recovery for a given wrong, she may not assert them serially in successive actions but must advance all at once on pain of the bar of res judicata. Clearly breach of contract was a grounds upon which Walton may have sought recovery in the previous lawsuit. It was a claim that might have been litigated in the previous lawsuit and, indeed, it should have been. See Rule 18(a), Miss.R.Civ.P. Accordingly, the Circuit Court correctly dismissed the present action on grounds of *res judicata*.
>
> *Wilton v. Bourgeois*, 512 So. 2d 698, 701-02 (Miss. 1987).

Thus, unlike *Thompson*, where as in this case, the only difference is the assertion of a new theory of recovery, the four identities are present. The next issue concerns not being allowed to

make a claim for whatever reason as barring relitigation of the barred claim in the next lawsuit. There is no discussion in *Thompson* that Ms. Thompson was barred from making her claim of ownership on the grounds of untimeliness of her claim, or that such a claim violated a rule of Court or a scheduling order.

In contrast, the Harrison County Court noted that Beene had such an adequate opportunity. She could have made her motion to amend to include her contract action within the discovery window, but failed to do so, and thus her attempt to amend after the discovery window had closed was unduly prejudicial and thus denied. (County C.P. 34). This point distinguishes Beene's case from that of *Thompson.* Beene's failure to timely amend, coupled with the presence of the four identities of subject matter, distinguishes it from *Thompson.* It further leads to the problem which will arise should this Court permit causes of action which were untimely and denied to serve as future causes of action, which is discussed next.

(3) Beene's argument would do an "end run" around scheduling orders or trial deadlines, as parties barred from filing untimely amended complaints, even were they filed on the date of trial, could simply file a new complaint including the barred causes of action, and begin anew.

Beene argues, using Connecticut caselaw, and Restatements of Judgments, to assert that she should be permitted to have an "adequate opportunity," as she defines the term, to litigate alternative claims no matter if they are untimely submitted with a motion to amend, or whether he does discovery or not to determine what his causes might be.

It is important to note that Beene did not appeal the decision of the Harrison County Court that Beene's motion to amend was untimely submitted to the Court. Thus, that decision is final. Therefore, what Beene wishes to argue is his ability to get around the bar to his claim as untimely filed through its inclusion in new litigation.

This position has been argued to other courts, and uniformly fails. As the Ninth Circuit noted, citing ultimately to a Fifth Circuit decision:

> Though Mpoyo asserts (as Beene does) he was unaware of the FMLA and FLSA claims when he filed the initial complaint in *Mpoyo I*, we have held that "ignorance of a party does not . . . avoid the bar of res judicata unless the ignorance was caused by the misrepresentation or concealment of the opposing party." *Western Sys.*, 958 F.2d at 871-72 (citing Restatement (Second) Judgments § 26, cmt. j). "Different theories supporting the same claim for relief must be brought in the initial action." *Western Sys.*, 958 F.2d at 871 (citing Restatement (Second) Judgments § 25, cmt. d). There was no bar to Mpoyo presenting these claims in the original suit, discovery was completed in *Mpoyo I* before summary judgment was granted and the district court in *Mpoyo I* denied leave to amend because such action was untimely two years after the initial complaint was filed. Res judicata "relieve[s] parties of the costs and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (*quoting Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)). Permitting these later-filed claims to proceed would create incentive for plaintiffs to hold back claims and have a second adjudication. Denial of leave to amend in a prior action based on dilatoriness does not prevent application of res judicata in a subsequent action.
>
> ***Our holding in this case is consistent with case law in the First, Second, Third, Fifth and Eighth Circuits that bars under res judicata the subsequent filing of claims denied leave to amend.*** *Northern Assurance Co. of America v. Square D Co.*, 201 F.3d 84 (2d Cir. 2000); *Huck v. Dawson*, 35 V.I. 560, 106 F.3d 45 (3d Cir. 1997); *Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 678 (8th Cir. 1997); *Johnson v. SCA Disposal Servs. of New England, Inc.*, 931 F.2d 970 (1st Cir. 1991); *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983).
>
> *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988-89 (9th Cir. 2005)

Further, as the Fifth Circuit noted in *Nilsen*, *res judicata* applies to theories which were not timely presented, for valuable reasons of enforcement of court rules and judicial finality:

> In these circumstances, both courts and commentators agree that theories which were the subject of an untimely motion to amend, filed in the earlier action, "could have been brought" there. . . . The doctrine of res judicata contemplates, at a minimum, that courts be not required to adjudicate, nor defendants to address, successive actions arising out of the same transaction, asserting breach of the same duty. To reward Ms. Nilsen for her own delinquency by permitting her to maintain this action would be clearly at variance with this principle. We decline to

> do so. . . . Both claims were properly held barred, since in each case the procedural system offered a full and fair opportunity for litigation of the § 1983 theory had it been timely presented. We have already bindingly held that it would have been improper and prejudicial to the city to permit Ms. Nilsen to add that theory tardily to Nilsen II/III. That victory would be renedered a hollow one indeed were we now to determine that the proper consequence of her tardiness is the creation by us of a new exception to settled doctrines of claim preclusion to accommodate that tardiness, one authorizing an even tardier lawsuit. We decline to do so.
>
> *Nilsen v. City of Moss Point*, 701 F.2d 556, 563-64 (5th Cir. 1983).

Beene claims that the Harrison County Court completely failed to give her an adequate opportunity to present her contract-based claim, presumably through the actions of Ferguson's counsel in opposing her alluded-to, but never formally presented, motion to amend. (Appellant's brief, pg. 17, fn.5, citing Restatement (Second) Judgments, §28). This Court should note that Beene failed to do the following, which would have provided her that adequate opportunity:

(1) Recognize that bailments, by their nature, require the existence of a contract to even support such a claim under Mississippi law;

(2) Conduct discovery within the 90 day period prescribed by Rule 4.04 of the Uniform Circuit and County Court Rules, or ask for an extension of that period either before or after the 90 day deadline ran;

(3) Formally motion for an amendment under Rule 15 upon receipt of Ferguson's Motion for Summary Judgment, which provided further information noting that someone else (an insurer) had paid her for the claim;

(4) Request Rule 56(f) relief requesting a stay on the hearing on Motion for Summary Judgment until discovery could be propounded on this issue, which might support an amendment to the claim;

(5) Upon the ruling of the Harrison County Court, request a Rule 59 Reconsideration of the Court's decision on the grounds of inadequate opportunity to present that claim, and failing that, to file an appeal with either the Circuit Court of Harrison County, Mississippi, or this Court, asserting that the County Court's decision deprived Beene of an adequate opportunity to litigate her contract-based claim.

Beene did none of these things. Instead, she filed a second action to negate the effect of the Harrison County Court's decision that she could not present her contract claim because it was untimely. To allow her to mount such a collateral attack on the Harrison County Court's ruling would encourage multiplicity of litigation. This multiplicity is what *res judicata* is designed to preclude. However, Beene's attempt here, if successful, would allow a party to disregard the scheduling orders and rules of civil procedure which require submission of claims or arguments in a particular point in time.

Addressing Plaintiff's final issues, on page 16, Appellant next reurges her argument that a claim which was not brought in the first lawsuit may be brought in the second, citing caselaw from 1888. (Appellant's brief at pg. 16, *citing Davis v. Davis*, 65 Miss. 498, 504, 4 So. 554, 555 (1888). Both the United States Supreme Court and the Mississippi Supreme Court have subsequently expanded *res judicata*'s reach to include those claims which might have been brought, and as later caselaw, have precedence over nineteenth-century decisions. *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, 231-32 (Miss. 2005).

The Mississippi Supreme Court most recently answered this question in *Channel*, stating that:

> If the plaintiffs had filed a case against Loyacono and Verhine alleging negligence, and, after the conclusion of that case, filed a second action against Loyacono and Verhine alleging fraud, the second action could be properly barred by the doctrine of res judicata or claim preclusion.
>
> *Channel v. Loyacano,* 954 So. 2d 415, 425 (Miss. 2007).

If a first suit for negligence and second suit for fraud would trigger *res judicata*, then certainly a first suit for negligence and second suit for breach of contract would do so.

Appellant's discussion about *Fireman's Fund Ins. Co. v. Gulf Transport Co.*, 135 Miss. 537, 99 So. 515 (1924) helps Appellant nothing, for this reason. The two cases which the 1924 Mississippi Supreme Court were holding not bound under *res judicata* was in the first case, "that the vessel was not injured because of a peril of the sea, and consequently the insurance company was not liable on the reinstated policy." *Fireman's Fund*, 135 Miss. at 558, 99 So. at 517. Interestingly enough, this case may have been one of the first declaratory judgments on the coverage of an insurance policy to a claim in Mississippi legal history. The second suit was for "improper and inadequate repairs, which caused practically the loss of the barge." *Id.*, 135 Miss. at 562, 99 So. at 519.

There is no question that these two cases would not have an identity of the cause of action. The first is a declaratory judgment action on coverage of the claim. The second is on negligent repair of the vessel itself. *Fireman's Fund* cannot support Plaintiff's position that he can sue the same person twice for two different (or more) remedies on the same facts. This argument was made to the Circuit Court of Jackson County, and dismissed likewise.

The Mississippi Supreme Court said as much in 1992. In *Alexander v. Elzie*, the Plaintiff prosecuted his claim against the tortfeasor for the amount of his deductible, $200.00, when his liability carrier sued the tortfeasor for property damage. *Alexander v. Elzie*, 621 So. 2d 909, 909 (Miss. 1992). After that suit, the Plaintiff attempted to sue the tortfeasor separately for personal injury. *Id.* The Mississippi Supreme Court rejected Plaintiff's attempt, holding:

> Where a claim has been previously litigated, all grounds for, or defenses to recovery that were available to the parties in the first action, regardless of whether they were asserted or determined in the prior proceeding, are barred from re-litigation in a subsequent suit under the doctrine of res judicata. *Dunaway v. W.H.Hopper & Assoc.*, 422 So. 2d 749 (Miss. 1982). Res Judicata and the issue of splitting a cause of action are closely related. *Rosenthal v. Scott*, 150 So. 2d 433, 436 (Fla. 1963) (citing 1 Fla. Jur., Actions, Sec. 42). Mississippi is among

the majority of states which does not allow splitting a cause of action. *Kimball v. Louisville and National Railroad Co.*, 94 Miss. 396, 48 So. 230 (Miss. 1909).

The rule against splitting a cause of action and the reasons for it, is stated in Restatement, Judgments, § 62:

§ 62 SPLITTING CAUSE OF ACTION- JUDGMENT FOR PLAINTIFF OR DEFENDANT.

"Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action,

...

a. Rationale: The rule stated in this Section is based on the idea that where a person has a single cause of action, in the interests of convenience and economy to the public and to the defendant he should be entitled to but one right of action and hence should be required to unite in one proceeding all matters which are part of it.

Alexander v. Elzie, 621 So. 2d 909, 910 (Miss. 1992).

Finally, Beene argues on pages 19 and 20, citing *Simmons v. Thompson Machinery*, 631 So. 2d 798 (Miss. 1994) that the Mississippi Supreme Court should permit this suit to go forward because it was wrong for the Harrison County Court to deny Beene's amendment. This argument is precisely one which should have been made on appeal from that 2006 decision to this Court. The fact that Beene makes this argument shows Beene's second suit for what it is, an impermissible collateral attack on a final decision of a Mississippi trial court, by filing a second suit. Collateral attacks on final judgments are not permitted in Mississippi, yet this second suit would permit exactly that outcome. *Harvey v. Covington Cty.*, 161 Miss. 765, 773-74, 138 So. 403, 404 (1931).

Beene makes the claim that a California case asserts that *res judicata* does not apply to "new rights acquired during the action." (Appellant's brief at pg. 21, *citing Allied Fire*

Protection v. Diede Constr., Inc., 25 Cal. Rptr. 3d 195, 199 (Cal. Ct. App. 2005) ("Res judicata is not a bar to claims that arise after the initial complaint is filed."). Beene's problem is that her contract claim arose the same day as her negligence claim, on or about August 29, 2005, the date of Hurricane Katrina, and thus, this case does not support her claim.

In conclusion, the United States Supreme Court said it far better than this counsel in *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979), which stated:

> Res judicata ensures the finality of decisions. Under res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940); 1B J. Moore, Federal Practice para. 0.405 [1] (2d ed. 1974). Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

The United States Supreme Court, and the County Court and Circuit Court of Jackson County, Mississippi, are all right. Appellant's attempt to have her contract claim, which was available in her Harrison County Court suit, re-litigated in this Court is barred by claim-splitting and *res judicata*. This Court should thus affirm the decisions of two prior courts.

CONCLUSION

There can be no doubt that *res judicata* applies in this case, as it has been construed by the Mississippi Supreme Court for the most recent two decades, and by decisions from no less than the United States Supreme Court itself. *Res judicata* bars not only those claims which were decided upon the merits, but those claims that could have been decided upon the merits.

Claim splitting, a related principle, rests on the doctrine of judicial economy by not permitting parties to file several lawsuits to cover claims which could have been brought in the first one. Appellant's claim could have been brought in the first suit, because bailment relies

upon contract to create a duty in negligence between Ferguson and Appellant for the repair of her car. Further, had Appellant ever sent out discovery in this case, they would have learned about payments before Ferguson filed summary judgment, which defeats the claim Appellant did not know about the payment as a basis for not making the contract claim, or that they were deprived of an adequate opportunity to address this issue.

For the reasons stated in this brief, Ferguson Automotive, Inc., respectfully requests that this Court affirm the correct determination of the Jackson County and Circuit Court in this cause of action.

RESPECTFULLY SUBMITTED, this the 8th day of October, 2009.

FERGUSON AUTOMOTIVE, INC.,
Appellee

By: CARR, ALLISON, PUGH,
HOWARD, OLIVER & SISSON, P.C.

By: _____
THOMAS L. CARPENTER
MB [redacted]

CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure, I, Thomas L. Carpenter, Jr., attorney for the Appellee, do hereby certify that I have this date addressed and directed via United States Mail, first-class and postage prepaid, to the Clerk of this Court an original and three copies of the Brief for Appellee and one computer readable disk of the Brief for Appellee and further certify that I have forwarded via United States Mail, postage pre-paid, a true and correct copy of the same to the following:

The Honorable County Court Judge T. Larry Wilson
County Court Judge of Jackson County, Mississippi
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This the 8th day of October, 2009.

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