

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

No. 2009-CA-00540

JACQUELINE BENNE

APPELLANT

versus

FERGUSON AUTOMOTIVE, INC.

APPELLEE

APPEAL FROM THE CIRCUIT COURT
JACKSON COUNTY, MISSISSIPPI

BRIEF FOR THE APPELLANT

ORAL AGRUMENT NOT REQUESTED

SUBMITTED BY:

Blewett William Thomas
PO Box 7706
Gulfport, MS 39506
Tel. (228) 863-4800
Fax (228) 563-5301
MSB # [REDACTED]

Attorney for the Appellant,
Jacqueline Benne

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

No. 2009-CA-00540

JACQUELINE BENNE

APPELLANT

versus

FERGUSON AUTOMOTIVE, INC.

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

Jacqueline Beene, Appellant

Ferguson Automotive, Inc., Appellee

Blewett William Thomas, Attorney for the Appellant

Thomas Carpenter, Jr., Attorney for the Appellee

Honorable T. Larry Wilson, Jackson County Court Judge

Honorable Kathy King Jackson, Jackson County Circuit Court Judge

This the 17th day of September 2009


BLEWETT W. THOMAS
Attorney for Appellant

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
ISSUES PRESENTED ON APPEAL	8
SUMMARY OF THE ARGUMENT	9
ARGUMENT	9
1. Has the Appellee sustained its burden of proof concerning its defense of <i>res judicata</i> in regard to the proceedings in Harrison County Court Cause No. D2402-06-153?	9
2. Did the Appellee establish all elements necessary to sustain its defense of <i>res judicata</i> ?	11
3. Is the Appellee judicially estopped from raising a defense of <i>res judicata</i> to the Plaintiff's claims due to its opposition to the Plaintiff's motion to amend her Harrison County Court complaint and allege the claims herein?	14
4. Did the Harrison County Court's failure to provide the Appellant an adequate opportunity to litigate the contractual claims preclude the Appellee's defense of <i>res judicata</i> ?	16
CONCLUSION	22
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Cases

<i>Allied Fire Protection v. Diede Construction, Inc.</i> , 127 Cal. App. 4th 150, 25 Cal. Rptr.3d 195 (3d Dist. 2005)	21
<i>Anaconda Aluminum Co. v. Sharp</i> , 243 Miss. 9, 136 So.2d 585 (1962)	18
<i>Armstrong v. Jones</i> , 198 Miss. 627, 22 So.2d 7 (1945)	10
<i>Astro Transport, Inc. v. Montez</i> , 381 So.2d 601 (Miss. 1980)	9
<i>Bowen v. Bowen</i> , 688 So.2d 1374 (Miss. 1997)	11
<i>Bridgeman v. Bridgeman</i> , 192 Miss. 800, 6 So.2d 608 (1942)	10
<i>Bush, et ux. v. City of Laurel</i> , 105 So.2d 562 (Miss. 1958)	16
<i>Davis v. Davis</i> , 65 Miss. 498, 4 So. 554 (1888)	16
<i>Dockins v. Allred</i> , 849 So. 2d 151 (Miss. 2003)	15
<i>Dogan v. Brown</i> , 44 Miss. 235 (1870)	10
<i>Fireman's Fund Insurance Co. v. Gulf Transportation Co.</i> , 99 So. 515 (Miss. 1924)	18, 19
<i>Harrison v. Chandler-Sampson Insurance, Inc.</i> , 891 So. 2d 224 (Miss. 2005)	12
<i>Hubbard v. Flynt</i> , 58 Miss. 266 (1880)	16
<i>In re Municipal Boundaries of City of Southaven</i> , 864 So.2d 912, (Miss. 2003)	15
<i>Jackson v. R. G. Whipple, Inc.</i> , 627 A.2d 374 (Conn. 1993)	17
<i>Murphy v. Hutchinson</i> , 93 Miss. 643, 48 So. 178 (1908)	18
<i>Paine v. Wilemon</i> , 227 Miss. 185; 85 So.2d 790 (1956)	9

<i>Palmer Exploration, Inc. v. Dennis</i> 759 F. Supp. 332 (S.D. Miss. 1991)	13
<i>Pate v. Evans</i> , 232 Miss. 6, 97 So.2d 737 (1957)	10
<i>Riley v. Moreland</i> , 537 So.2d 1348 (Miss. 1989)	12
<i>Simmons v. Thompson Machinery</i> , 631 So.2d 798 (Miss. 1994)	19
<i>Thompson v. LaVere</i> , 895 So. 2d 828 (Miss. 2004)	16, 21
<i>Tomiyasu v. Golden</i> , 400 P.2d 415 (Nev. 1965)	13
<i>Troy Lumber Co. v. Hunt</i> , 112 S.E.2d 132 (N.C. 1960)	21
<i>Viator v. Stone</i> , 201 Miss. 487, 29 So.2d 274 (1947)	10, 13
<i>Walton v. Bourgeois</i> , 512 So.2d 698 (Miss. 1987)	14
<i>William Iselin and Co., Inc. v. Delta Auction and Real Estate Co.</i> , 433 So.2d 911 (Miss. 1983)	20

Secondary authorities

47 Am.Jur.2d Judgments, §480	13
47 Am.Jur.2d Judgments, §539	13
47 Am.Jur.2d Judgments, §553	13
Restatement (Second), Judgments § 27	17
Restatement (Second), Judgments § 28	17

Statement of the Issues

In this appeal, the Appellee Ferguson Automotive, Inc. (hereinafter referred to as "Ferguson") asserts a defense of *res judicata* to the contractual claims of the Appellant Jacqueline Benne (hereinafter referred to as "Benne"). This is based on Ferguson's assertion that the granting of summary judgment on Benne's negligence claims in proceedings before the Harrison County Court (which were the only claims pending against Ferguson) was a *de jure* dismissal with prejudice of all potential claims that could have been asserted by Benne in the previous litigation. This position ignores the fact that Benne was denied an adequate opportunity to assert these claims in the initial proceedings, as she was not aware of the contractual claim until Ferguson produced invoices with its summary judgment motion showing that a third-party insurer had paid for the repair of Benne's vehicle, which is the subject of this litigation. Ferguson opposed these claims being tried in the Harrison County proceedings and thereby deprived Benne of an adequate opportunity to assert the contractual claims. Based upon Ferguson's objection to any amendment of Benne's complaint, the contractual claims were neither at issue nor adjudicated by the Harrison County Court.

Benne further asserts that the record in Jackson County Court Cause No. CO2007-20998 did not contain the complete record of the proceedings in Harrison County Court No. D2402-06-153, therefore Ferguson has not sustained its burden of proof concerning the defense of *res judicata*. Benne also asserts

that, due to the fact that she was neither cognizant of contractual claims nor allowed an adequate opportunity to assert these claims before the Harrison County Court, *res judicata* is inapplicable in this instance due to Benne's inability to plead the contract claims in the prior litigation.

In sum, the defense of *res judicata* is inapplicable to the Jackson County Court proceedings due to the failure of Ferguson to sustain its burden of proof concerning this defense and further due to the fact that Benne was denied an adequate opportunity to assert the contractual claim in the prior litigation.

Statement of the Case

On September 5, 2007, Ferguson filed its Motion for Summary Judgment in Jackson County Court Cause No. CO2007-20998, alleging that the Beene, as a result of the dismissal of her negligence claims pled against Ferguson in Harrison County Court No. D2402-06-153, was barred from asserting before the Jackson County Court her subsequently discovered contract claims, which Ferguson acknowledged were not pled before the Harrison County Court and which it opposed being tried before the Harrison County Court.

Ferguson had been named a defendant in *Jacqueline Benne v. V. Mai Dihn and Ferguson Automotive Inc.*, Cause No. D2402-06-153 before the Harrison County Court of the Second Judicial District. In the Harrison County case, the only cause of action alleged against Ferguson was based upon a claim that it was negligent in storing Benne's vehicle at its repair facility prior to the

advent of Hurricane Katrina. Although Benne filed her initial complaint in the Harrison County Court on April 11, 2006, the record is uncontroverted that Benne had no knowledge prior to August 10, 2006, that Ferguson had been paid in full for the repairs to her damaged vehicle by a third-party insurer prior to the completion of this work, therefore she was without facts or any reasonable basis upon which to assert these contractual claims in Harrison County Court Cause No. D2402-06-153. As her claim before the Harrison County Court was based in negligence, there was no need to conduct discovery on issues beyond those pled in her complaint.

In conjunction with her response to Ferguson's motion for summary judgment on the negligence claims pending before the Harrison County Court, on October 19, 2006, Benne advised the county court judge that she had only recently discovered the contract claim and requested leave to amend her pleadings in order to assert the contractual claims against Ferguson for its failure to complete repairs to her car after it received payment in full.

On October 25, 2006, Ferguson filed its opposition to Benne's request for amendment of her complaint. Specifically, Ferguson agreed in its response that Benne had not asserted a contractual claim before the Harrison County Court, however it opposed any amendment of Benne's complaint to assert this claim. Benne was denied her request for the amendment of her complaint, and the Harrison County Court never adjudicated the issue of her contractual claims against Ferguson. Instead, Ferguson was dismissed from the Harrison County

case on June 12, 2007, for the stated reason that Benne had failed to prove her negligence claims against Ferguson due to the intervening effects of Hurricane Katrina. There is nothing within the Harrison County Court record to support any assertion that any and all prospective claims against Ferguson were dismissed with prejudice. The fact that the Harrison County Court specifically dismissed Ferguson without adjudicating any prospective claims reinforces the Benne's assertion that she was denied an adequate opportunity to assert the contract claim and that there was no adjudication in those proceedings of the entirety of her claims against Ferguson.

Subsequently, Benne filed suit in Jackson County Court Cause No. CO2007-20998 on July 3, 2007, alleging her contractual claims resulting from Ferguson's failure to complete repairs to her vehicle after it received payment, a claims that was neither alleged nor adjudicated by the Harrison County Court. Thereafter, Ferguson moved to dismiss the case on September 5, 2007, on the basis that the prior judgment rendered by the Harrison County Court on June 12, 2007, was *res judicata* as to all claims by Benne against Ferguson.

On November 19, 2007, the Jackson County Court dismissed Benne's contractual claims against Ferguson. Benne then appealed the decision of the Jackson County Court to the Jackson County Circuit Court on December 18, 2007. The Jackson County Circuit Court affirmed the decision of the County Court on March 6, 2009. A timely appeal of that decision was filed on April 1, 2009.

Addressing the *res judicata* defense raised by Ferguson, Benne submitted evidence showing that Ferguson had consistently opposed Benne's assertion of contractual claims against it before the Harrison County Court. Specifically, Benne referenced Ferguson's rebuttal dated October 26, 2006, whereby Ferguson clearly states in Paragraph I, "The Plaintiff has not made a contractual claim in this case to date. This Court should deny the Plaintiff's attempt to do so now." Ferguson was successful in its opposition of these contractual claims before the Harrison County Court.

Based on Ferguson's prior assertions before the Harrison County Court that no contract claims were plead or at issue in Cause No. D2402-06-153, and further considering that Ferguson opposed Benne's amendment of her complaint to allege contract claims, Ferguson should be judicially estopped to contend that Benne's contract claims are barred by *res judicata* or on any other grounds.

In its Final Judgment, which dismissed¹ Ferguson from the Harrison County Court proceedings, the Honorable Gaston Hewes stated in the second paragraph under "FACTS" that "[Plaintiff] Benne filed a Complaint sounding in negligence only against Ferguson on April 11, 2006. There is no mention of the term contract in the original complaint."

Relying upon the fact that applicable case law precluded recovery against Ferguson based upon claims of negligence, and further considering that Judge Hewes determined that no contractual claims were alleged or pending in the

¹ Only Benne's negligence claims against Ferguson were at issue in its summary judgment motion before the Harrison County Court, and only the negligence issue was adjudicated by Judge Hewes in his Final Judgment.

Harrison County Court proceedings, Ferguson was dismissed as a party to those proceedings. Ferguson has not produce any judgment or other adjudication by the Harrison County Court that Benne was specifically given clear and unequivocal notice that she was barred by the Final Judgment from asserting any claims against Ferguson that were not pled in Harrison County Court Cause No. D2402-06-153 or that the dismissal of Ferguson was with prejudice as to all claims by Benne.

In her Complaint filed in the Jackson County Court, Benne asserted her claim that Ferguson breached the contract to repair her vehicle through its failure to complete the repairs as specified by the repair contract, in spite of and in contradiction to the fact that it accepted and retained payment for these repairs. As the Harrison County Court did not allow an amendment of Benne's complaint to allege a contractual claim against Ferguson and did not adjudicate any possible contractual claims against it, and further considering that Ferguson is estopped by admissions contained in its own pleadings to deny that Benne did not assert any contractual claims before the Harrison County Court, Benne stated a cognizable cause of action in her Jackson Count complaint against Ferguson that was not barred by the prior judgment of the Harrison County Court in Cause No. D2402-06-153.

Further, there was no election of remedies by Benne in the Harrison County Court proceedings. She initially filed suit against Ferguson for claims of negligence, which was a distinct cause of action and not the same claim asserted

before the Jackson County Court, as Benne subsequently pled claims against Ferguson that were based on a separate contractual cause of action and independent facts. As supported by authorities cited herein, Mississippi courts recognize that a claimant's unsuccessful prosecution of an improper remedy will not estop him from subsequently pursuing the correct remedy. Further, in those jurisdictions that adhere to a transactional analysis of *res judicata*, it is accepted that when a litigant is denied an adequate opportunity to assert a claim in prior proceedings, *res judicata* does not apply to any subsequent litigation.

Lastly, Ferguson has failed to submit the record of the Harrison County Court in order to sustain its affirmative defense of *res judicata*. For this reason, and those other reasons asserted herein, Ferguson's defense of *res judicata* is not adequately supported by evidence of prior adjudication, and therefore it must fail.

Issues Presented on Appeal

1. Has the Appellee sustained its burden of proof concerning its defense of *res judicata* in regard to the proceedings in Harrison County Court Cause No. D2402-06-153?
2. Did the Appellee establish all elements necessary to sustain its defense of *res judicata*?
3. Is the Appellee judicially estopped from raising a defense of *res judicata* to the Appellant's claims due to its opposition to her motion to amend her Harrison County Court complaint and allege the claims herein?
4. Did the Harrison County Court's failure to provide the Appellant an adequate opportunity to litigate the contractual claims preclude the Appellee's defense of *res judicata*?

Summary of the Argument

The Appellant Jacqueline Benne submits that the Appellee Ferguson Automotive has failed to sustained its burden of proof concerning is defense of *res judicata*.

Benne further submits that the defense of *res judicata* is inapplicable in this instance, as she was denied an adequate opportunity to assert her subsequently discovered contractual claims before the Harrison County Court.

Argument

1. Has the Appellee sustained its burden of proof concerning its defense of *res judicata* in regard to the proceedings in Harrison County Court Cause No. D2402-06-153?

The defense of *res judicata* is an affirmative plea, and the defendant has the burden of maintaining that defense. *Astro Transport, Inc. v. Montez*, 381 So.2d 601 (Miss. 1980); *Paine v. Wilemon*, 227 Miss. 185; 85 So.2d 790 (1956). It is generally held that the existence and contents of a judgment, sought to be made available as a basis for the application of the doctrine of *res judicata*, must be proven by offering the record into evidence.

"The existence and contents of a judgment, sought to be made available as a basis for the application of this doctrine [of *res judicata*], must be proved by offering in evidence the record, or a copy of it. Appellants did not do this. The reason for this requirement is that the plea must clearly show the issues and questions involved in the former proceedings, so as to demonstrate that those now presented existed in the former case and were adjudicated.

Pate v. Evans, 232 Miss. 6, 15, 97 So.2d 737 (1957), citing *Viator v. Stone*, 201 Miss. 487, 29 So.2d 274 (1947).

The general principle is that a party claiming benefit under a decree must produce the entire record of the suit. The presentation of the decree alone is not enough. *Dogan v. Brown*, 44 Miss. 235, 244 (1870). In its adjudication of a particular case, trial courts cannot take judicial notice of what was done in a prior case, and thereby use judicial notice to supply facts essential to the support the claims or defenses arising from the prior litigation that have been asserted in the pending case. *Bridgeman v. Bridgeman*, 192 Miss. 800, 807, 6 So.2d 608, 608 (1942); *Armstrong v. Jones*, 198 Miss. 627, 639; 22 So.2d 7, 11 (1945).

The sole test here is, is there enough before the trial court from which it could derive authority to sustain Ferguson's plea of *res judicata*? In other words, is the record alone sufficient to prove that the merits of the contract claim had been adjudicated in a court of competent jurisdiction? Unless prior adjudication of the contract claim is proven by Ferguson, the plea of *res judicata* cannot be sustained.

The record in this appeal provides no proof that Ferguson that the issue of Benne's contract claim was previously pled and litigated or otherwise adjudicated conclusively against Benne by the Harrison County Court. Additionally, Ferguson failed to provide the Jackson County Court the record of the prior proceedings in Harrison County Court Cause No. D2402-06-153. Without benefit of the complete

Harrison County Court record, it was error for the Jackson County Court to rule that Benne's contractual claims were subject to the defense of *res judicata*.

2. Did the Appellee establish all elements necessary to sustain its defense of *res judicata*?

Benne submits that the prior order of the Harrison County Court is not *res judicata* as to the non-adjudicated contractual claims. First, it is not disputed that Benne was not aware prior to the motion for summary judgment that a third-party insurer had paid for the repair of her vehicle before its destruction during Hurricane Katrina, and that when she discovered this fact, Benne requested leave of the Harrison County Court to amend her complaint in order to assert this claim. However, she was denied an adequate opportunity to prosecute this claim in the Harrison County Court.

Second, the final judgment in the Harrison County Court proceedings was an adjudication of only Ferguson's summary judgment motion as to Benne's negligence claims. No other claims were adjudicated by the Harrison County Court in its June 12, 2007 order. Therefore, the contractual claim was never adjudicated on its merits. *Res judicata* applies only to judgments that have been made on the merits. *Bowen v. Bowen*, 688 So. 2d 1374, 1384 (Miss. 1997).

Additionally, Ferguson has failed to establish the second of the four elements that are necessary in order to sustain a defense of *res judicata*, to-wit, it has failed to establish that Benne's negligence and contractual claims are in fact the same cause of action.

The requirement that there be an identity of the causes of action has proven to be difficult factor to apply, as it requires that the "cause of action" be the same in both cases. *Harrison v. Chandler-Sampson Insurance, Inc.*, 891 So. 2d 224, 233 (Miss. 2005). "In order for res judicata and the ban on claim-splitting to take effect, the litigation must involve the same claim premised upon the same body of operative fact as was previously adjudicated. As stated earlier, this distinction can be difficult to make..." *Id.* at 234.

The second requirement, an identity of the cause of action, is met when commonality is found in the underlying facts and circumstances for which the claim is asserted and relief is sought. *Riley v. Moreland*, 537 So.2d 1348, 1354 (Miss. 1989). The causes of action in Benne's cases are distinct. In her initial claim before the Harrison County Court, she sought damages based upon allegations that Ferguson was negligent in caring for her vehicle from the ravages of Hurricane Katrina; this claim was dismissed based upon Ferguson's "act of God" defense. Her claim before the Jackson County Court (which was not known to Benne until Ferguson submitted repair invoices in support of its motion for summary judgment before the Harrison County Court) alleged a breach of contract claim based upon the fact that Ferguson had been paid in full for the repairs to her vehicle, but it neither completed those repairs nor did it refund the unearned repair fees. These are distinct claims, and further the contract claim was unknown to Benne until Ferguson moved for summary judgment. The mere fact that the same relief is sought in two actions does not make the causes of

action identical within the meaning of the doctrine of *res judicata*. *Viator v. Stone*, 201 Miss. 487, 29 So.2d 274 (1947), error overruled, 201 Miss. 487, 29 So.2d 658 (1947).

A judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, even though each action relates to the same subject matter. 47 Am.Jur.2d Judgments, §480. The judgment rendered in the first action will not bar a subsequent action to recover on the omitted items, where it appears that the plaintiff had no knowledge or means of knowledge of such items. 47 Am.Jur.2d Judgments, §539. The doctrine of *res judicata* is also not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available. 47 Am.Jur.2d Judgments, §553. In such situation, the plaintiff is entitled to bring the proper proceeding to enforce his or her cause of action. *Id.*

One fundamental test applied for comparing causes of action, for the purpose of applying the principles of *res judicata*, is whether the primary right and duty and delict or wrong are the same in each action. *Palmer Exploration, Inc. v. Dennis*, 759 F. Supp. 332 (S.D. Miss. 1991). Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant involving that right. *Tomiyasu v. Golden*, 400 P.2d 415 (Nev. 1965).

In this instance, Benne had separate claims for the destruction of her car and the failure to complete the repairs to her car. Additionally, Ferguson's

obligation to care for Benne's vehicle was distinct from its obligation to fulfill the contract and complete the repairs to her vehicle for which it had been paid. Clearly, the primary right and duty asserted and the primary wrong complained of by Benne were not the same in her respective cases. Further, this is not an instance in which a subsequent claim for breach of contract is merely an attempt to retry an unsuccessful claim of professional negligence.² Benne's claim for breach of contract arises from Ferguson's failure to complete the repair contract for which it was paid, and it does not assert any claims that Ferguson failed to properly care for her vehicle during Hurricane Katrina (which was the only claim previously alleged and dismissed in the Harrison County Court). Accordingly, her respective claims do not meet the test for establishing an identity of the causes of action.

3. Is the Appellee judicially estopped from raising a defense of *res judicata* to the Plaintiff's claims due to its opposition to the Plaintiff's motion to amend her Harrison County Court complaint and allege the claims herein?

Benne's contractual claims were never at issue in the Harrison County Court proceedings. The final judgment in that case clearly shows that the contractual claims were never formally alleged by Benne nor were they adjudicated in any manner. When Benne attempted to amend her complaint and allege these claims, Ferguson opposed her attempt to assert these claims. When Benne alleged these non-adjudicated claims in Jackson County Court Cause No. CO2007-20998, Ferguson took a contradictory position and alleged that the

² See, *Walton v. Bourgeois*, 512 So.2d 698 (Miss. 1987).

contractual claims had been adjudicated by the Harrison County Court's final judgment.

The doctrine of judicial estoppel applies where there is multiple litigation between the same parties and one party knowingly asserts a position inconsistent with the position in the prior litigation. *See generally, In re Municipal Boundaries of City of Southaven*, 864 So.2d 912, 918 (Miss. 2003). "Judicial estoppel precludes a party from asserting a position, benefiting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003). "Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *Id.*

Ferguson took the position before the Harrison County Court that Benne had not alleged contractual claims and therefore she should not be allowed to amend her pleadings to assert those claims. After having received an adjudication by the Harrison County Court, which determined that only Benne's negligence claims against Ferguson were barred, Ferguson then asserted before the Jackson County Court that the entirety of Benne's claims against Ferguson were conclusively resolved by the Harrison County Court, although Ferguson's dismissal in the Harrison County proceedings was only to the claim of negligence. Due to the fact that the Ferguson's actions prevented the assertion of contractual claims by Benne before the Harrison County Court, it should be

estopped from subsequently asserting a contrary position that was calculated to deny the prosecution of the contractual claims under the theory of judicial estoppel.

4. Did the Harrison County Court's failure to provide the Appellant an adequate opportunity to litigate the contractual claims preclude the Appellee's defense of *res judicata*?

Benne submits that she was denied an adequate opportunity to assert the subsequently discovered contractual claim before the Harrison County Court. Accordingly, there can be no finding that the Harrison County proceedings was *res judicata* as to the contractual claims between these Parties regarding the repair of her vehicle during August 2005.

If a claimant has tried but was not allowed to assert a specific claim in prior litigation, *res judicata* cannot bar litigation of that claim in a subsequent action. *Thompson v. LaVere*, 895 So. 2d 828, 834 (Miss. 2004). Where matters are subsequently alleged that were not involved or embraced in a former suit, it is error to sustain a plea of *res judicata*. *Bush, et ux. v. City of Laurel*, 105 So. 2d 562, 566 (Miss. 1958). The mere fact that a claim might be propounded in a suit does not make it *res judicata*, if in fact it was not embraced in it. *Davis v. Davis*, 65 Miss. 498, 504; 4 So. 554, 555 (1888); *Hubbard v. Flynt*, 58 Miss. 266, 270 (1880).

The appeal in this instance represents a case in which a litigant was denied a meaningful opportunity to assert a claim, and therefore *res judicata* cannot be applied.

The appropriate inquiry with respect to claim preclusion is whether the party had an *adequate opportunity* to litigate the matter in the earlier proceeding. *Jackson v. R. G. Whipple, Inc.*, 627 A.2d 374, 380 (Conn. 1993) (emphasis in original).³ The Restatement's requirement that an issue be "actually litigated"⁴ embodies the important concern that the parties be cognizant of and interested in an issue before they are precluded from litigating it. *Id.* at 379. Section 28 of the Restatement further supports the requirement that a party have either an opportunity or incentive to obtain a full adjudication of all known claims in the initial proceedings.⁵ Section 28(5)(c) is particularly relevant to this appeal, as Ferguson actively opposed Benne's request to amend her complaint and allege the contract claim after it was discovered during the summary judgment proceedings that a third-party insurer had fully paid for the unfinished repairs to her vehicle.

It should also be considered that Mississippi has not accepted the doctrine of election of remedies in instances where a claimant is not cognizant of other claims or remedies during the pendency of prior litigation.

³ Connecticut jurisprudence, like Mississippi, uses a transactional test as a guide to determine whether an action involves the same claim as an earlier action.

⁴ See, Restatement (Second), Judgments § 27.

⁵ See, Restatement (Second), Judgments § 28. "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (5) There is a clear and convincing need for a new determination of the issue...(c) because the party sought to be precluded, **as a result of the conduct of his adversary** or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." (emphasis added)

"We are fully aware of the fact that our own Court has been slow to give effect to the doctrine, elsewhere widely accepted, that a person with an unredressed grievance, and with two inconsistent courses open to him, will be held to have finally abandoned one of these courses merely because he has entered upon another. The doctrine, so far as Mississippi is concerned, has been carefully limited and guarded. Perhaps the fullest consideration of the question to be found in our Reports is found in the opinion of Judge Campbell in response to the suggestion of error in *Madden v. Louisville, etc. R. Co.*, 66 Miss. 258, 8 South. 181. This opinion, while distinctly stating that while the doctrine of election is sound, and is to be recognized and applied by our courts in proper cases, yet it must not be applied when the party sought to be bound by the election acts without full knowledge of his legal rights as determined by the application of correct principles of law to a state of facts of which he has full knowledge."

Anaconda Aluminum Company v. Sharp, 243 Miss. 9, 19; 136 So.2d 585, 589 (1962), citing *Murphy v. Hutchinson*, 93 Miss. 643, 646, 48 So. 178, 179 (1908).

As recognized by the Mississippi Supreme Court in *Fireman's Fund Insurance Co. v. Gulf Transportation Co.*, 99 So. 515 (Miss. 1924), contractual and tort claims may be prosecuted in separate proceedings under facts similar to those in this matter. In *Fireman's Fund*, the plaintiff had sustained damage to one of its vessels. It prosecuted its tort claims for these damages and prevailed in separate litigation. Subsequently, the necessary repairs to the vessel were paid by the same defendant. However, the repairs were not completed per the terms of the contract and the plaintiff suffered a continuing loss from the same transaction. A second suit was filed by the plaintiff against the same defendant based upon a contractual claim instead of tort. The defendant raised the defense of *res judicata* to the contractual claims. The Mississippi Supreme Court held that a judgment in a former suit between the same parties has no effect upon

questions that were not open to inquiry or the subjects of litigation and ruled that the first suit in tort was not *res judicata* as to the contractual issues prosecuted in the second suit. *Id.* at 559.

"This is not a case of an election of remedies, but is simply a case where the transportation company in the first case made a mistake as to its remedy. It mistakenly thought it had a remedy upon the reinstated policy for the loss of its vessel in the second disaster. The court, however, decided that it did not...It is only where one has two or more remedies for a cause of action, upon either of which he may recover, that the pursuing of one of these constitutes an election." *Fireman's Fund*, 99 So. at 560.

"The fact that a party through mistake attempts to exercise a right to which he is not entitled, or has made choice of a supposed remedy that never existed, and pursued it until the court adjudged that it never existed, should not and does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled...But the fact that a party wrongfully supposed that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule." *Id.* at 560-561.

In *Simmons v. Thompson Machinery*, 631 So.2d 798 (Miss. 1994), the trial court denied an amendment of the complaint upon grounds that the amendment would have been untimely. In reversing the trial court's decision, the Mississippi

Supreme Court stated that proposed amendments have been liberally permitted throughout Mississippi legal history and are encouraged under Rule 15. The opinion further stated that as "[a]ttorneys sometimes fail to write perfect pleadings, it is necessary that courts permit liberal amendments of the pleadings in order to reach the actual merits of a controversy." *Id.* at 800-01, citing *William Iselin and Company, Inc. v. Delta Auction and Real Estate Company*, 433 So.2d 911, 913 (Miss. 1983).

Neither Ferguson nor the Harrison County Court identified any undue prejudice that would result in the event the motion to amend was granted. Explaining its determination in a similar situation, the Mississippi Supreme Court stated, "If the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits...In the final analysis, we hold that under the facts of this case, Simmons should have been granted leave to file his proposed amended response and counterclaim." *Id.* at 800-801.

The Harrison County Court determined that Benne had no cognizable negligence claim against Ferguson for the destruction of her vehicle through the effects of Hurricane Katrina. Therefore, she did not have multiple remedies for her recovery. She mistakenly asserted a negligence claim, which was not cognizable under the facts of the case, and thereafter she has asserted her proper remedy under a contract claim. There can be no estoppel where a party

has a good cause of action but attempts to pursue the wrong remedy. *Id.* at 562. This is what happened in the Harrison County Court suit.

The general rule that a judgment is conclusive as to matters that could have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated. *Allied Fire Protection v. Diede Construction, Inc.*, 127 Cal. App. 4th 150, 25 Cal. Rptr.3d 195 (3d Dist. 2005). To support a plea of *res judicata*, it must appear that the merits of the second action are identically the same as in the first. *Troy Lumber Co. v. Hunt*, 112 S.E.2d 132 (N.C. 1960). That is not the case in this instance.

Benne has a cognizable cause of action against Ferguson based upon allegations that it was paid for the repairs but never completed the repairs or refunded the money. Under these circumstances, Benne should have been allowed to amend her complaint in order to clearly assert these claims. Accordingly, it was error for the Harrison County Court to deny Benne's request for an amendment of her complaint. As the Harrison County Court neither adjudicated the contractual claims nor did it dismiss all claims against Ferguson with prejudice, Benne was not barred from asserting her non-adjudicated contractual claims before the Jackson County Court. As stated in *Thompson v. LaVere, supra*, if a claimant tries but is not allowed to assert a specific claim in prior litigation, *res judicata* cannot bar litigation of that claim in a subsequent action. Due to the Harrison County Court's denial of Benne's motion to amend

her complaint and assert contractual claims against Ferguson, *res judicata* does not bar these claims that were the sole subject of the Jackson County Court suit.

Res judicata applies to bar an action where the parties have previously litigated a legal claim to a final judgment. There was no final judgment as to the contract claim in the Harrison County proceedings. Although Benne sought to raise the contract claim before the Harrison County Court, she was barred from pleading this claim in those proceedings and the contract claim was never adjudicated on its merits. As Benne was denied the right to amend her complaint to assert this claim in the previous litigation, she could not raise it in the Harrison County Court.

Conclusion

Ferguson was required to prove the adjudication of Benne's contractual claims in prior litigation, but it failed to produce the entire record of the proceedings in the earlier litigation. The burden of proof is on Ferguson to sustain the defense of *res judicata*, and it failed to submit the required proof necessary to sustain this defense. For these reason alone, it was error for the Jackson County Court to rule that *res judicata* was applicable in this instance.

By opposing Benne's motion to amend her complaint before the Harrison County Court, Ferguson is judicially estopped to assert the entirety of her were either adjudicated or could have been adjudicated by the Harrison County Court.

Benne further asserts that additional facts confirm that the doctrine of *res judicata* is inapplicable in this instance. First, there was never an adjudication of Benne's contract claims on the merits in the prior proceedings, and further, she was denied an opportunity to prosecute those claims in the Harrison County Court. Additionally, there was no splitting of Benne's claims in the Harrison County Court, as the sole cause of action alleged against Ferguson in the prior case (i.e., negligence) was determined to be inapplicable to the claim against the Appellee. When a party mistakenly attempts to assert a claim to which he is not entitled, this does not preclude him from afterwards pursuing a claim for relief to which he is entitled.

Due to Ferguson's opposition to and the inability of Benne to try her contractual claims before the Harrison County Court, the doctrine of *res judicata* does not preclude her subsequent suit filed in Jackson County Court.

WHEREFORE, PREMISES CONSIDERED, the Appellant Jacqueline Benne asserts that this Court should overturn the decision of the Jackson County Circuit Court in dismissing this case on the grounds of *res judicata* in the Harrison County Court proceedings and remand this action for full trial on the merits of her complaint.

This the 17th day of September, 2009.



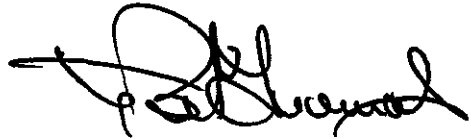
Blewett W. Thomas

CERTIFICATE OF SERVICE

I, BLEWETT W. THOMAS, do hereby certify that I have mailed/faxed this day true and correct copies of the foregoing Brief to the following counsel of record:

Thomas L. Carpenter, Jr., Esq.
Carr Allison
14231 Seaway Road
Building 2000, Suite 2001
Gulfport, MS 39503

This the 17th day of September, 2009.



BLEWETT W. THOMAS