

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000289-MR

GEORGE ISON

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 05-CI-00094

ANTHONY THOMAS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND STUMBO, JUDGES; AND KNOPF,<sup>1</sup> SENIOR JUDGE.

ABRAMSON, JUDGE: George Ison appeals from a January 30, 2006 summary judgment of the Pendleton Circuit Court dismissing his claim against Anthony Thomas for personal injury damages. Ison contends that the trial court misapplied the rule against splitting one's cause of action, an aspect of the doctrine of *res judicata*. We disagree and so affirm.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Ison alleges that in July 2003 Thomas injured him in an automobile accident on Kentucky Highway 9 near Foster in Pendleton County. Soon after the accident, in August 2003, Ison sued Thomas and Thomas's insurer for losses arising from the damage to Ison's vehicle and for statutory damages for what Ison alleged was the insurer's bad faith settlement of his property damage claim. A jury awarded him about \$5,000.00 for his property losses, but by judgment entered in October 2004, his bad-faith-settlement claim against the insurer was dismissed. Ison brought the present personal injury action against Thomas in April 2005. The trial court, noting the long standing rule in Kentucky that "one may not split up his cause of action and have it tried piecemeal," *Hays v. Sturgill*, 302 Ky. 31, 34, 193 S.W.2d 648, 650 (1946), ruled that Ison's personal injury claim was part of the same cause of action as his property damage claim and so had merged with the prior judgment. We agree.

As the Kentucky Court of Appeals, then the state's highest Court, stated in *Hays*:

when a matter is in litigation, parties are required to bring forward their whole case; and the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

*Id.* at 34, 650 (citation and internal quotation marks omitted). Applying this rule in *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985), a case, like this one, involving an automobile accident and successive suits for property and personal injury damages, our

Supreme Court ruled that “the law will not permit a party who has sued for a part of an entire demand to sue for the residue in another action.” *Id.* at 34. In *Kirchner*, the Court reaffirmed its adoption of *Restatement (Second), Judgments*, § 24 (1982), which provides in part that:

(1) [w]hen a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

As its first example illustrating this rule, the *Restatement* provides as follows:

A and B, driving their respective cars, have a collision injuring A and damaging his car. The occurrence is single, and so is A’s claim. If A obtains a judgment against B on the ground of negligence for the damage to the car, he is prevented by the doctrine of merger from subsequently maintaining an action for the harm to his person.

*Restatement (Second), Judgments*, Illustration 1, p. 200 (1982). Our Supreme Court so held in *Kirchner*, and the trial court did not err by so holding here.

Seeking to avoid this result, Ison relies on *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997), in which the Court observed that an exception to the doctrine of merger sometimes applies when the subsequent suit involves a claim that had not yet accrued at the time of the prior suit. Ison notes that under the Motor Vehicle Reparations Act, KRS Subtitle 304.39, personal injury claims in automobile accident cases do not accrue, with certain exceptions, until the plaintiff’s medical expenses have reached \$1,000.00. KRS 304.39-060. He argues that property damage claims brought before medical expenses

have reached that threshold ought not to bar a subsequent suit for personal injury damages, and, more generally, that the statutory scheme envisions separate suits for property losses and personal injuries.

We disagree with this more general proposition. A major purpose of the Reparations Act is to obviate motor vehicle accident litigation by requiring that drivers be adequately insured. The Act was not meant to multiply law suits and supersede settled law by permitting separate property and personal injury actions. If that had been the General Assembly's intent, it would surely have said so more plainly than by the tenuous implication Ison perceives.

Whatever the abstract merits of Ison's less general argument, moreover, the record in this case shows that his medical expenses had reached the \$1,000.00 threshold before he brought his initial suit. His personal injury claim thus could have been, and so should have been, brought as part of that suit. Any anticipated future medical expenses could have been sought at that time.

Ison's contention that the rule against splitting one's cause of action does not apply if the plaintiff prevails in the prior action is without merit, as the *Restatement* illustration above makes clear. If the plaintiff prevails on his initial claim, other claims arising from the same transaction are said to merge with his judgment, and if the plaintiff loses initially, that judgment is said to bar any such subsequent claim. *Restatement (Second), Judgments*, §§ 18, 19 (1982). In either case, the subsequent action is precluded.

Also without merit is Ison's argument that the real thrust of his initial suit was the bad faith claim against the insurer, and so that suit should not now bar his claim against a different defendant. While it is true that the doctrine of merger does not preclude a subsequent suit against a different defendant who contributed independently to the plaintiff's injury, *Watts v. K, S & H, supra*; *Restatement (Second), Judgments*, § 49 (1982), the simple fact in this case is that Ison's first suit, whatever else it may have sought, did seek negligence damages against Thomas. Ison was thus obliged to seek recovery for the full extent of Thomas's liability in a single suit.

Finally, Ison contends that Thomas waived the affirmative *res judicata* defense by failing to plead it in his answer to Ison's complaint. He notes, correctly, that CR 8.03 requires affirmative defenses such as *res judicata* to be "set forth affirmatively" in the answer, that is, that the pleading should give fair notice of the particular defense and a short statement of its grounds. *Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72 (Ky. 1967). *Cf. Shechter v. Comptroller of City of New York*, 79 F.3d 265 (2nd Cir. 1996) (construing the identical federal counterpart to CR 8.03); *Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc.*, 213 F.R.D. 307 (N.D.Ill. 2003) (same). We agree with Ison that Thomas's Answer, in which he pled merely "all affirmative defenses in accordance of Civil Rule 8.03 and any other defense that may constitute an affirmative defense," did not satisfy a notice standard for any particular affirmative defense. Nevertheless, CR 8.03 is not to be applied mechanically, and waiver need not be found where the affirmative defense is raised by timely motion that does not prejudice the

plaintiff. *Underwood v. Underwood*, 999 S.W.2d 716 (Ky.App. 1999). *Cf. Camarillo v. McCarthy*, 998 F.2d 638 (9th Cir. 1993) (defense not waived when raised in timely motion for summary judgment). *See generally, Wright & Miller, Federal Practice and Procedure: Civil 3d* §§ 1277, 1278 (2004).

In this case, Thomas raised the *res judicata* defense in a motion for summary judgment in September 2005, only about five months into the case and before either party had expended much on discovery. The motion gave Ison notice of Thomas's defense, and Ison was accorded ample opportunity to respond. Ison has not claimed any prejudice, nor does the record suggest any. In these circumstances, the trial court did not abuse its discretion by ruling that Thomas's inadequately pled defense need not be deemed waived.

In sum, our law requires that all claims against a single defendant arising from a single negligent incident be brought in a single action. Ison improperly split his claim for property damages from his claim for personal injury damages, where both claims arose against a single defendant as a result of a single automobile accident. The damages claims should have been brought together, and because they were not, the trial court correctly ruled that the subsequent action is barred. Accordingly, we affirm the January 30, 2006 order of the Pendleton Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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