

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2004 CA 0871

UNION PLANTERS BANK, NATIONAL ASSOCIATION

VERSUS

COMMERCIAL CAPITAL HOLDING CORPORATION,  
PATRICK M. HANEY, MARK M. BYOUK,  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA AND AMERICAN INTERNATIONAL  
SPECIALTY LINES INSURANCE COMPANY

Judgment Rendered: March 24, 2005.

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On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 488,057

Honorable Wilson Fields, Judge Presiding

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*Pettigrew J. concurs and Assigns Reason*

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BEFORE: CARTER, C.J., PETTIGREW, AND MCDONALD, JJ.

CARTER, C.J.

This is an appeal of a trial court judgment sustaining a peremptory exception raising the objection of *res judicata* urged by State Farm Indemnity Company and State Farm Mutual Automobile Insurance Company (State Farm) in response to a third party demand brought by Commercial Capital Holding Corporation. The basis of the *res judicata* objection is a judgment rendered by a New Jersey court.

On the trial of the peremptory exception raising the objection of *res judicata*, the burden of proving the facts essential to sustaining the objection is on the party pleading the objection. **Diamond B Const. Co., Inc. v. Department of Transp. and Development**, 02-0573 (La. App. 1 Cir. 2/14/03), 845 So.2d 429, 435. When a party raises an objection of *res judicata*, the court must examine not only the pleadings but also the entire record in the first suit, to determine whether the second suit is, in fact, barred by *res judicata*. See **Sewell v. Argonaut Southwest Ins. Co.**, 362 So.2d 758, 760 (La. 1978).

Various parties, including State Farm, filed portions of the New Jersey suit record into the record as attachments to memoranda. However, the memoranda and attached exhibits were not introduced into evidence at the hearing on the objection.<sup>1</sup> This court cannot consider exhibits filed into the record as an attachment to a memorandum in determining the issues on appeal. They are not evidence and are not properly part of the record on appeal. **McKnight v. D&W Health Services, Inc.**, 02-2552 (La. App. 1 Cir. 11/7/03), 873 So.2d 18, 24 n.3. We note too that there is no provision in

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<sup>1</sup> Several parties participated in the hearing on the issue of *res judicata*. None of the parties introduced the New Jersey suit record, or any portion thereof, into evidence.

the law for this court to take judicial notice of a suit record from another court. See Louisiana Business College v. Crump, 474 So.2d 1366, 1369 (La. App. 2 Cir. 1985).

It was incumbent on State Farm, as the party pleading the objection of *res judicata*, to introduce the New Jersey suit record into evidence at the trial court juncture of these proceedings. **Louisiana Business College**, 474 So.2d at 1369. Without any documentary evidence, State Farm could not meet its burden of proof on the objection. **Bond v. Bond**, 35,971 (La. App. 2 Cir. 4/3/02), 813 So.2d 1148, 1150.

The record before this court contains no evidence showing that this matter has been adjudicated. Accordingly, the trial court judgment sustaining the peremptory exception raising the objection of *res judicata* brought by State Farm must be reversed. Appellant's motion to allow exhibits to be attached to its reply brief, which was referred to the panel of this court reviewing the merits of this appeal, is dismissed as moot. Costs of this appeal are assessed to State Farm.

**JUDGMENT REVERSED; MOTION DISMISSED AS MOOT.**

UNION PLANTERS BANK,  
NATIONAL ASSOCIATION

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BEFORE: CARTER, C.J., PETTIGREW AND McDONALD, JJ.

PETTIGREW, J., CONCURS.

PETTIGREW, J., concurring.

 I respectfully concur with the majority in the lack of evidence on the res judicata issue. However, I have serious concerns as to whether Commercial Capital Holding Corporation has stated a right of action against State Farm pursuant to LA. Code Civ. P. art. 927; but I will leave this issue for another day.