NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0329

IN RE: WILLIAM HENRY SANDERS
APPLICATION FOR AN ORDER TO PERPETUATE
THE TESTIMONY OF WILLIAM HENRY SANDERS

Judgment Rendered: FEB 10 2014

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 614,359
Honorable Timothy E. Kelley, Judge

* * * * * *

William Henry Sanders
Jena, LA

Plaintiff-Appellant
In Proper Person

Susan Louise Dunham
Office of General Counsel
Division of Administration
State of Louisiana
Baton Rouge, LA

Attorney for
Defendant-Appellee
State of Louisiana

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Parro, J., Dissents and assigns reasons.

GUIDRY, J.

A petitioner seeking an order to perpetuate testimony in anticipation of litigation appeals a judgment dismissing his petition pursuant to a peremptory exception raising the objection of *res judicata*. For the following reasons, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2012, William Henry Sanders, an attorney, filed a petition, pursuant to La. C.C.P. art. 1429, seeking a court order authorizing him to take his deposition for the purpose of perpetuating his testimony in anticipation of a boundary action he expected to file against the State of Louisiana (State). In the petition and in a supporting memorandum, Mr. Sanders claimed that he was the owner of riparian lands along the Little River, a navigable river that flows into or out of Catahoula Lake and is situated in the West one-half of Section 30, Township 7 North, Range 4 East and East one-half Lot No. 1 of Section 25, Township 7 North, Range 3 East in LaSalle Parish. Mr. Sanders also claimed that the State was the owner of the bed of the Little River. He further alleged that he was 81 years of age, in poor health, and was unable to bring a boundary action at that time. He asserted that the subject deposition testimony would include his personal knowledge regarding the location of the boundary, including the nature of surrounding swamplands, ownership interests in surrounding properties, as well as pertinent information regarding water levels and high water marks of the Little River and nearby Catahoula Lake. According to Mr. Sanders, a "failure of justice may or will occur" if his deposition testimony was not perpetuated.

The State filed an opposition to Mr. Sanders' petition, admitting ownership of the bed of the Little River, but seeking dismissal of the petition for Mr. Sanders' failure to adequately allege grounds under La. C.C.P. art. 1429 to entitle him to the

relief sought. Further, the State asserted a peremptory exception raising the objection of *res judicata*, claiming the lands identified in Mr. Sanders' petition were the same as those at issue in a prior action filed by him in Sanders v. State Department of Natural Resources, 07-821 (La. App. 3rd Cir. 12/19/07), 973 So. 2d 879, writ denied, 08-0438 (La. 4/18/08), 978 So. 2d 352, in which the Third Circuit Court of Appeal ruled adversely to Mr. Sanders (Sanders I).

In October 2012, the trial court held a hearing on the matter, first addressing the State's exception raising the objection of *res judicata*. At the hearing, the State introduced copies of: (1) the original and amended petitions Mr. Sanders filed in Sanders I; (2) Mr. Sanders' trial testimony from Sanders I; and (3) Mr. Sanders' responses to request for admissions in the current suit. After hearing argument from the State and from Mr. Sanders, the trial court orally granted the State's exception raising the objection of *res judicata*, concluding that the appellate court in Sanders I had already defined the boundary for which Mr. Sanders sought to perpetuate his deposition testimony. The trial court then denied Mr. Sanders' request to proffer evidence. On November 21, 2012, the trial court signed a judgment, granting the State's exception raising the objection of *res judicata* and dismissing with prejudice Mr. Sanders' petition to perpetuate testimony.

Mr. Sanders now appeals from the trial court's judgment.

DISCUSSION

Res judicata bars relitigation of a subject matter arising from the same transaction or occurrence of a previous suit. It promotes judicial efficiency and final resolution of disputes. Avenue Plaza, L.L.C. v. Falgoust, 96-0173, p. 4 (La. 7/2/96), 676 So. 2d 1077, 1079. The doctrine of *res judicata* is defined by La. R.S.

13:4231, which provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The chief inquiry in a *res judicata* analysis is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. Avenue Plaza, L.L.C., 96-0173, p. 6, 676 So. 2d at 1080. However, the Louisiana Supreme Court has also emphasized that all of the following elements must be satisfied in order for *res judicata* to preclude a second action: (1) the judgment in the first action is valid; (2) the judgment in the first action is final; (3) the parties in the first and second actions are the same; (4) the cause(s) of action asserted in the second suit existed at the time of final judgment[1] in the first litigation; and (5) the cause(s) of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. See Burguieres v. Pollingue, 02-1385, p. 8 (La. 2/25/03), 843 So. 2d 1049, 1053.

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[1] While the doctrine of *res judicata* is ordinarily premised on a final judgment on the merits, it also applies where the opposing parties have entered into a compromise or settlement of a disputed matter. See Ortego v. State, Department of Transportation and Development, 96-1322, p. 6 (La. 2/25/97), 689 So. 2d 1358, 1363.

The burden of proving the facts essential to sustaining the objection is on the party pleading the objection. Landry v. Town of Livingston Police Department, 10-0673, p. 5 (La. App. 1st Cir. 12/22/10), 54 So. 3d 772, 776. If any doubt exists as to its application, the exception raising the objection of *res judicata* must be overruled and the second suit maintained. Landry, 10-0673 at p. 5, 54 So. 3d at 776. When an objection of *res judicata* is raised before the case is submitted and evidence is received on the objection, the standard of review on appeal is traditionally manifest error. Landry, 10-0673 at p. 5, 54 So. 3d at 776. However, the *res judicata* effect of a prior judgment is a question of law that is reviewed *de novo*. Pierrotti v. Johnson, 11-1317, p. 9 (La. App. 1st Cir. 3/19/12), 91 So. 3d 1056, 1063.

In Sanders I, Mr. Sanders filed a possessory action, boundary action, petition for injunction, and petition for damages against the State, in which he sought to be recognized as possessor of certain land bordering on Catahoula Lake in LaSalle Parish described as the West one-half of Section 30, Township 7 North, Range 4 East and Lot No. 1 of Section 25, Township 7 North, Range 3 East. He also asked that a boundary be established between his property and the adjoining property owned by the State, comprised of the beds of Catahoula Lake and/or nearby Little River. Sanders I, 07-821 at p. 1, 973 So. 2d at 879. Based on evidence regarding the ordinary high water mark of Catahoula Lake in 1812,[2] the trial court in Sanders I set the boundary between the parties' respective properties at the 30.1-foot elevation above mean sea level. Sanders I, 07-821 at p. 1, 973 So. 2d at 879. On appeal, the Third Circuit determined the trial court manifestly erred in its

[2] In Sanders I, 07-821 at p. 4, 973 So. 2d at 881, the Third Circuit noted: "There is no dispute that, as to lakes, the State owns the land below the ordinary high-water mark[,]" citing State v. Placid Oil Co., 300 So. 2d 154 (La. 1973), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).

evaluation of the evidence regarding the ordinary high water mark of Catahoula Lake and reversed the trial court judgment. Sanders I, 07-821 at p. 14, 973 So. 2d at 887. In its decision, the Third Circuit stated that the evidence established that the proper ordinary high water mark of Catahoula Lake in 1812 was at the 36-foot elevation above mean sea level. Sanders I, 07-821 at p. 14, 973 So. 2d at 887.

Mr. Sanders' second action, the petition to perpetuate testimony, was filed pursuant to La. C.C.P. art. 1429. Under this article, a person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in a court in which the anticipated action might be brought. The primary purpose of a petition to perpetuate testimony is to preserve testimony that might otherwise be lost to a prospective litigant. In re Vermilion Parish School Board, 357 So. 2d 1295, 1297 (La. App. 3rd Cir. 1978). This filing of a petition for pre-litigation preservation of testimony envisions use of an extraordinary discovery method where resort to normal discovery is made impossible by the absence of pending litigation. See Gaines v. Bruscato, 30,340, p. 5 (La. App. 2nd Cir. 4/8/98), 712 So. 2d 552, 556, writ denied, 98-1272 (La. 6/26/98), 719 So. 2d 1059; Marine Shale Processors, Inc. v. State, Department of Health and Hospitals, 572 So. 2d 280, 283 (La. App. 1st Cir. 1990).

Pursuant to La. C.C.P. art. 1429, the petition to perpetuate testimony must show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and his interest therein; (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (5) the names and

addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each. Further, the petition shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined, as named in the petition, for the purpose of perpetuating their testimony. See La. C.C.P. art. 1429.

In this case, Mr. Sanders sought the perpetuation of his testimony in anticipation of a boundary action he expected to file against the State at some time in the future, which Mr. Sanders admitted involved the identical land at issue in the previous boundary action against the State. Mr. Sanders stated that his proposed testimony includes his personal knowledge regarding the location of the boundary, including the nature of surrounding swamplands, ownership interests in surrounding properties, as well as pertinent information regarding water levels and high water marks of the Little River and nearby Catahoula Lake. However, the Third Circuit, in Sanders I, reviewed extensive testimony, including that of Mr. Sanders, regarding these identical issues and fixed the boundary between the land owned by Mr. Sanders and that owned by the State by delineating the line of separation at a 36-foot elevation above mean sea level. Sanders I, 07-821 at p. 14, 973 So. 2d at 887; see also La. C.C.P. art. 3693 and La. C.C. art. 785 (stating that in a boundary action, a court shall render judgment "fixing" the boundary between contiguous lands and the "fixing of the boundary" may involve determination of the line of separation between contiguous lands). The Third Circuit's valid judgment is now final, as the delays for seeking a rehearing before the Third Circuit or seeking review by the Louisiana Supreme Court have lapsed.

Accordingly, because Mr. Sanders' cause of action to perpetuate testimony for a boundary action, involving the identical parties and identical land at issue in Sanders I, arises out of the same transaction or occurrence that was the subject

matter of the first litigation, we find no error in the trial court's judgment sustaining the State's peremptory exception raising the objection of *res judicata*.

Mr. Sanders also asserts that in ruling on the State's exception raising the objection of *res judicata*, the trial court denied Mr. Sanders' access to courts and denied his right to due process. However, from our review of the record, we find no merit to Mr. Sanders' assertion. After the State introduced its evidence and presented its argument, Mr. Sanders was given an opportunity to respond. Mr. Sanders disputed the validity and finality of the Third Circuit's decision in Sanders I, but admitted that his proposed boundary action, for which he sought to perpetuate his testimony, would seek to determine "where the line is" between his land and that owned by the State. The evidence before the court clearly established that this precise issue had already been determined in Sanders I and that the Third Circuit's judgment was a valid and final judgment. We do not find the trial court's rejection of Mr. Sanders' argument correlates to a deprivation of his right to access to courts or his right to due process.

Finally, Mr. Sanders asserts that the trial court erred by refusing to allow him to offer or proffer evidence at the hearing on the State's exception raising the objection of *res judicata*. After Mr. Sanders presented his argument, the trial court sustained the State's exception. Thereafter, Mr. Sanders requested to make a note of evidence, which the trial court denied, stating that it had already "accepted into evidence all the matters you've already provided." A trial court is required to allow a party to proffer evidence ruled inadmissible, either by allowing the party to make a complete record thereof or by permitting the party to make a statement setting forth the nature of the evidence. La. C.C.P. art. 1636. Accordingly, the trial court erred in failing to allow Mr. Sanders to proffer his evidence. However, we find under the circumstances of this case, considering the admissions of Mr.

Sanders and the entirety of the evidence in the record, that this minor error was harmless. See Citgo Petroleum Corp. v. Yeargin, Inc., 95-1574, p. 34 (La. App. 3rd Cir. 2/19/97), 690 So. 2d 154, 174, writs denied, 97-1223, 97-1245 (La. 9/19/97), 701 So. 2d 169, 170.

CONCLUSION

For the foregoing reasons, we affirm the November 21, 2012 judgment, sustaining the State of Louisiana's peremptory exception pleading the objection of *res judicata* and dismissing William Henry Sanders' petition to perpetuate testimony. All costs of the appeal are assessed against William H. Sanders.

AFFIRMED.

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IN RE: WILLIAM HENRY SANDERS
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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

RHP

PARRO, J., dissenting.

I respectfully dissent from the majority opinion, because I think the requirements of res judicata have not been met in this case.

The chief inquiry in a res judicata analysis is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. Avenue Plaza, L.L.C., 676 So.2d at 1080. Thus, the inquiry in this case is whether the cause of action asserted in Mr. Sanders' current petition to perpetuate testimony (the second action) arises out of the transaction or occurrence that was the subject matter of the litigation in Sanders I (the first action).

Mr. Sanders' second action, the petition to perpetuate testimony, was filed pursuant to LSA-C.C.P. art. 1429. For the purpose of a res judicata analysis, the cause of action asserted in an action filed pursuant to LSA-C.C.P. art. 1429 is the pre-litigation perpetuation of testimony when no pending litigation exists. In this case, Mr. Sanders' petition to perpetuate testimony stated such a cause of action – it sought the perpetuation of Mr. Sanders' testimony in anticipation of a boundary action he expected to file against the State at some time in the future. Having identified that cause of action, it is clear that it does not arise out of the transaction or occurrence that was the subject matter of the action in Sanders I. See Avenue Plaza, L.L.C., 676 So.2d at 1080.

In Sanders I, Mr. Sanders filed a possessory action, boundary action, petition for

injunction, and petition for damages against the State, in which he sought to be recognized as possessor of certain land bordering on Catahoula Lake in LaSalle Parish; he also asked that a boundary be established between his property and the adjoining property owned by the State, comprised of the beds of Catahoula Lake and/or nearby Little River. Sanders I, 973 So.2d at 879. In its decision reversing the trial court, the Third Circuit stated that the evidence established that the proper ordinary high water mark of Catahoula Lake in 1812 was at the 36-foot elevation above mean sea level. Id.

These facts regarding the action in Sanders I show that the transaction or occurrence that was the subject matter of that previous action involved the merits of a boundary dispute between Mr. Sanders and the State; the previous action clearly did not involve a request for pre-litigation perpetuation of testimony. Although a future boundary action filed by Mr. Sanders may be subject to challenge based on the alleged res judicata effect of Sanders I, it is my opinion that his current petition for the perpetuation of testimony is not. I think that the trial court prematurely reached the merits of the res judicata issue by determining that the anticipated boundary action, which Mr. Sanders had not yet even filed, was precluded by the res judicata effect of the Third Circuit's decision in Sanders I. Consequently, any judgment[1] rendered in Sanders I could not have a res judicata effect on Mr. Sanders' current action seeking perpetuation of testimony.

Thus, I would reverse the trial court's judgment, which sustained the State of Louisiana's peremptory exception pleading the objection of res judicata and dismissed Mr. Sanders' petition to perpetuate testimony, and remand this matter for further proceedings.

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[1] I question whether the Third Circuit's decision in Sanders I constitutes a valid final judgment in this case. Although a final judgment may be rendered by either a trial court or an appellate court, "all judgments and decrees which affect title to immovable property shall describe with particularity the immovable property affected." LSA-C.C.P. art. 2089; see also LSA-C.C.P. art. 1919; Tolis v. Bd. of Sup'rs. of LSU, 95-1529 (La. 10/16/95), 660 So.2d 1206 (per curiam). In Sanders I, the Third Circuit reversed the trial court's judgment setting the boundary between the parties' respective properties at the 30.1-foot elevation above mean sea level. Sanders I, 973 So.2d at 887. Although the court stated that the evidence "clearly established that the ordinary high water mark in 1812 was 36 feet MSL as surveyed by Heard and Daigre in 1942," the court did not then go on to render a definite judgment describing with particularity the immovable property affected or setting the boundary between the parties' respective properties at the 36-foot elevation above mean sea level. Id. However, because Mr. Sanders did not timely raise this issue before the Third Circuit or the Louisiana Supreme Court, no court has jurisdiction to modify, revise, or reverse the Third Circuit's "judgment," regardless of the magnitude of the error in that "judgment." See Tolis, 660 So.2d at 1206-07.