

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 0122

DEIDRA CLAYTON, INDIVIDUALLY AND ON BEHALF OF HER
DECEASED SON, JONATHAN CLAYTON, AND ANGELA BURKE

VERSUS

COLUMBIA CASUALTY COMPANY, DAVID JOHNSON, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS A LIVINGSTON PARISH SHERIFF'S DEPUTY,
AND WILLIE GRAVES, INDIVIDUALLY AND IN HIS FORMER OFFICIAL
CAPACITY AS LIVINGSTON PARISH SHERIFF

Judgment rendered **DEC 14 2016**



Appealed from the
21st Judicial District Court
in and for the Parish of Livingston, Louisiana
Trial Court No. 147737
Honorable Jeffrey S. Johnson, Judge

KEARNEY S. LOUGHLIN
NEW ORLEANS, LA

ATTORNEY FOR
PLAINTIFFS-APPELLANTS
DEIDRA CLAYTON, INDIVIDUALLY
AND ON BEHALF OF HER DECEASED
SON, JONATHAN CLAYTON, AND
ANGELA BURKE

STEPHEN R. WHALEN
DRUIT G. GREMILLION, JR.
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANTS-APPELLEES
DEPUTY DAVID JOHNSON
AND SHERIFF WILLIE GRAVES

BEFORE: PETTIGREW AND McDONALD, JJ., AND CALLOWAY,¹ J., Pro Tem.

McC, concurs

¹ Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

McDonald, J. concurs. I believe Strook v. Pomete is wrong. If a federal court finds the officer's actions were reasonable, that should be res judicata even in a state court.

PETTIGREW, J.

The plaintiffs appeal a judgment that sustained the defendants' exception of res judicata, based on the district court's finding that the claims asserted in the plaintiffs' civil suit in state court previously had been adjudicated in an identical suit filed in federal court, the United States District Court for the Middle District of Louisiana, where plaintiffs' claims were dismissed pursuant to a grant of summary judgment in favor of the defendants. Plaintiffs appeal that judgment asserting the state claims had not been adjudicated in the federal court proceeding; therefore, the district court erred in finding res judicata applicable.

UNDERLYING WRONGFUL DEATH AND SURVIVAL CLAIMS

This is a wrongful death action filed by the plaintiffs, Deidra Clayton and Angela Burke, the mother and sister, respectively, of the decedent, Jonathan Clayton. The suit arose from the shooting death of the decedent, Clayton, by Deputy David Johnson, on April 4, 2011, while Johnson was responding to a 911 call regarding domestic violence by Clayton. The suit, filed first in federal court, and subsequently in state court, named as defendants, David Johnson, individually, and in his capacity as a Livingston Parish Sheriff's Deputy; and Willie Graves, individually, and in his capacity as the former Livingston Parish Sheriff, and as the employer of Johnson with the responsibility for the hiring, training, and supervision of his employees, as well as the implementation of the Livingston Parish Sheriff Department's customs, policies, and procedures. The Sheriff Department's liability insurer, Columbia Casualty Company, was also named as a defendant.²

In both suits³, the plaintiffs alleged that, to the extent that the use of any force was necessary and/or justified, Johnson acted "unreasonably, negligently, maliciously, and recklessly" in killing Clayton by firing a gun at him from a distance of five to ten yards away, without first attempting to use any other nonlethal methods of restraint or

² The state court petition was filed originally in the Nineteenth Judicial District Court; but, following the granting of an exception raising the objection of improper venue filed by the defendant Johnson, the matter was transferred to the court of proper venue, the Twenty-First Judicial District Court.

³ The federal court suit was instituted by the filing of a "complaint" and the state court filing was a "petition." For the ease of discussion when referring to both suits, the pleadings will be referred to as "petitions."

incapacitation. Plaintiffs further alleged that the shooting death was a result of Johnson's negligent use of excessive and unreasonable deadly force, battery, assault, intentional infliction of emotional distress, fright and outrage, cruel treatment, failure to provide adequate or timely medical attention, violations of the laws and Constitution of the State of Louisiana, and deliberate indifference to the rights, safety, and dignity of the decedent. Plaintiffs assert Johnson is liable to them for damages arising out of his negligent acts, and further assert that Sheriff Graves is vicariously liable to them for the negligent acts of Johnson pursuant to the application of *respondeat superior*, and liable for his department's own failure to adequately train and equip Johnson. The petitions alleged that at the time of the incident, Johnson was not even equipped with any other nonlethal methods of restraint, such as a Taser or a pepper ball gun, nor was he trained in the use of less-than-lethal instruments, asserting liability on the part of Sheriff Graves and the Sheriff's Department for the alleged failure to properly train and equip their employees, as well as inadequate and reckless pre-employment screening and assessment of Johnson.

In both suits, plaintiffs also alleged that Johnson violated the Sheriff's Use of Force policy, a policy that is designed to ensure that a deputy use the least amount of force effective under the circumstances and to prevent the use of excessive force, as he was armed with only a gun, and no other nonlethal forms of force, with which to subdue Clayton. Further, they alleged that Johnson violated the Livingston Parish Policy and Procedure Manual, specifically, Operations Order Number 705⁴, by initiating tactical action against Clayton without waiting for the arrival of the Special Response Team (SPT). Pursuant to the Manual, the SPT is responsible for resolving "tactical situations," for which they receive special training to handle high risk situations that cannot be handled by regular patrol deputies. Additionally, plaintiffs set forth allegations concerning

⁴ That provision, applicable specifically to regular patrol deputies such as Johnson, states that all patrol officers that are confronted with incidents requiring emergency responses are prohibited from initiating tactical actions other than those necessary to protect the lives and safety of themselves or others consistent with the office's use of force policy. The provision further details requisite steps that must be taken prior to the use of tactical force.

the Sheriff Department's "practice and custom" of violating, and of ignoring prior violations by Johnson, of Operations Order Number 705.

Finally, the petitions asserted a survival action on behalf of Angela Burke, who witnessed the entire incident, for serious, debilitating, and ongoing mental anguish and emotional distress she alleged she suffered, as a result of watching Johnson shoot and kill her brother. Further, plaintiffs alleged that Sheriff Graves refused to disclose, and affirmatively concealed from them, the identity of the deputy involved in the shooting. Thus, the petition alleged Sheriff Graves was further liable in fraud, intentional or negligent misrepresentation, impairment of a civil action, or other "fault", and sought additional damages for the severe emotional distress, upset, and outrage they suffered as a result of the Sheriff's actions for his failure to disclose, and active concealment of Johnson's identity.

FEDERAL COURT PROCEEDINGS

Plaintiffs initially filed their complaint in the federal court (the Middle District of Louisiana) on December 20, 2011, setting forth a civil rights claim pursuant to 42 U.S.C. § 1983, in addition to the aforementioned state law claims that were asserted in both suits. (In federal court, the allegations concerning the violations by Johnson and Sheriff Graves, of Operations Order Number 705 of their internal manual, were asserted in an amended complaint filed July 24, 2012; in the state suit, the allegations were all made in the initial petition.) The entire record of the proceedings in federal court has not been made a part of the record; however, the pleadings relevant and necessary to our review of the issues raised here, including the two aforementioned complaints, are included in the record before us as attachments to the defendants' memorandum in support of their exception. Included as one of those attachments is the Order and Reasons issued by the federal court on November 16, 2012, granting a motion for summary judgment that had been filed by the defendants, dismissing plaintiffs' civil rights claim against all defendants, *with prejudice*, and dismissing plaintiffs' remaining state law claims *without prejudice*. The Order and Reasons reveal that a hearing was held during which documentary and

testimonial evidence from several witnesses was presented concerning the facts and circumstances surrounding the incident upon which plaintiffs' wrongful death claims are based. The testimonial evidence, including deposition testimony, considered by the federal court is detailed throughout the federal court's Order and Reasons. This thirty-nine page document reveals in great detail the federal court's analysis of the evidence presented and the findings made by it in resolving the issues before it. Thus, we have sufficient documentation in the record before us from which to determine the propriety of the res judicata issue presented herein.⁵

FEDERAL COURT ADJUDICATION

The federal court had before it two separate motions for summary judgment filed by Johnson and Sheriff Graves. The primary issue before the court on those motions was whether Johnson was entitled to qualified immunity for acts committed by him during the incident. In cases alleging constitutional rights violations, the actions of a government official performing discretionary functions are generally shielded from liability as long as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. **Harlow v. Fitzgerald**, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). When conducting the qualified immunity analysis in cases involving allegations of the use of excessive force, the officer's conduct must first meet the Fourth Amendment's reasonableness requirement, i.e., whether the law was sufficiently clear that a reasonable officer would have known that the conduct violated the constitution. If so, then the actions of the officer are reviewed further to determine if the force used was excessive to the need and/or whether the force used was objectively unreasonable. This determination balances the amount of force used against the need for force, with careful attention being placed on the facts and circumstances of each particular case. See Flores v. City of Palacios, 381 F.3d 391, 396, 399 (5th Cir. 2004). Moreover, when the use of force is deadly, immunity applies

⁵ See also our discussion later in this opinion concerning the first basis for plaintiffs' contention that the exception was erroneously sustained.

only if the officer has a reasonable belief that the suspect poses a serious harm to the officer or others, and the threat of harm must be immediate. **Ramirez v. Knoulton**, 542 F.3d 124, 129 (5th Cir. 2008); **Reyes v. Bridgwater**, 362 Fed.Appx. 403, 408 (5th Cir. 2010).

After reviewing the evidence, the federal court found that there was a confrontation between Johnson and the decedent suspect when Johnson arrived, responding to a dangerous crime scene where a suspect was reported to have attacked a female with a weapon. When he arrived, Johnson observed the suspect had already broken windows and slashed tires. The court found that the incident rapidly escalated to a point where Johnson "clearly" had reason to believe that the suspect posed a serious threat to the deputy and others: "the objective facts indicated that he [Johnson] was being confronted by a suicidal and non-compliant suspect with dangerous and violent propensities that presented 'a heightened possibility of threat to the officers or others.'" Based thereon, the court concluded that Johnson's conduct did not violate the Fourth Amendment and that his use of deadly force was not excessive under the circumstances and; therefore, he was entitled to qualified immunity and shielded from any liability.

The federal court also concluded that plaintiffs failed to present sufficient evidence to establish their federal claims against Johnson for failure to provide adequate or timely medical attention. In light of those findings, the federal court also declared that the claims in *respondeat superior* asserted against Sheriff Graves were rendered moot. Accordingly, both motions for summary judgment were granted, dismissing all federal claims with prejudice.

With regard to the remaining state law claims, the federal court declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367(c)(3), which allows the district court to decline to exercise jurisdiction over a remaining claim if it has dismissed all claims over which it had original jurisdiction. In so doing, the federal court cited the following applicable law: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between parties, by procuring for them a surer-footed reading of applicable law." **United Mine Workers of Am. v. Gibbs**, 383 U.S.

715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). "However, the dismissal of the ... claims should expressly be *without* prejudice so that the plaintiff may refile his claims in the appropriate state court." **Bass v. Parkwood Hosp.**, 180 F.3d 234, 246 (5th Cir. 1999) (emphasis in original). Accordingly, the federal court granted both motions for summary judgment and dismissed the plaintiffs' state law claims *without prejudice*.

Plaintiffs appealed that judgment to the U.S. Fifth Circuit Court of Appeal; the judgment was affirmed in an unpublished opinion. **Clayton v. Columbia Cas. Co.**, 547 Fed.Appx. 645 (5th Cir. 2013).

RES JUDICATA

In Louisiana law, res judicata is governed by La. R.S. 13:4231, which provides, in pertinent part, that a valid and final judgment is conclusive between the same parties, to the following extent:

(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.

Res judicata bars relitigation of a subject matter arising from the same transaction or occurrence of a previous suit. **Avenue Plaza, L.L.C. v. Falgoust**, 96-0173 (La. 7/2/96), 676 So.2d 1077, 1079. The burden of proving facts essential to sustaining the objection is on the party pleading the objection. If any doubt exists as to its application, the exception raising the objection of res judicata must be overruled and the second lawsuit maintained. The concept should be rejected when doubt exists as to whether a plaintiff's substantive rights actually have been previously addressed and finally resolved. **Pierrotti v. Johnson**, 2011-1317 (La. App. 1 Cir. 3/19/12), 91 So.3d 1056, 1063. When a district court sustains an exception of res judicata as a matter of law, this court's review is de novo. *Id.*

When a state court is required to determine the preclusive effect of a judgment rendered by a federal court, exercising federal question jurisdiction, it is federal law of res judicata that must be applied. **Terrebonne Fuel & Lube, Inc. v. Placid Refining Company**, 95-0654 (La. 1/16/96), 666 So.2d 624, 633, n.6. Federal law on res judicata includes the notions of issue preclusion and claim preclusion and imposes a four-part test

analysis that must be satisfied before a judgment is held to preclude relitigation of an issue adjudicated in federal court. However, as also noted by the court in **Terrebonne Fuel & Lube, Inc.**, 666 So.2d at 633, n.6, the four-part test analysis is not required when under the facts of the case, an exception to the application of res judicata exists, which then precludes the application of the res judicata test. (As noted later herein, we find such an exception exists; therefore, the four-step test analysis employed by federal courts in resolving the issue of the preclusive effect a federal court judgment may have on subsequently filed state law claims, becomes unnecessary.)

STATE LAW CLAIMS

On March 28, 2013, plaintiffs filed the petition for damages in state court detailed earlier in this opinion, setting forth the same state law claims that were presented to the federal court. In response to the petition, Johnson and Sheriff Graves each filed separate exceptions raising the objection of res judicata and they filed a joint memorandum in support thereof. The defendants assert that the viability of the remaining state law claims hinge on a finding that Johnson's conduct was actionable under the circumstances, i.e., that he used excessive and unnecessary force under the circumstances. They maintain that although the issue resolved by the federal court pertained to the application of qualified immunity, the resolution of that issue necessarily required litigation and adjudication of findings regarding the reasonableness of Johnson's actions, which is an essential element of each of the state law claims. Defendants assert that res judicata prohibits re-litigation of any issue that has been previously adjudicated, the prior finding having conclusive effect on the issue. Accordingly, they maintain that since the federal district court already adjudicated the reasonableness of Johnson's behavior, and since that finding is critical to the viability of plaintiffs' state law claims, the application of the res judicata doctrine is warranted, and precludes any re-litigation as to whether Johnson used excessive or unreasonable force under the same facts and circumstances.

Final Judgment Requirement

Plaintiffs contest the application of res judicata on several bases. First, they maintain that defendants did not prove the res judicata doctrine is applicable because

they failed to include the final judgment rendered by the federal court, which they claim is res judicata herein. Plaintiffs' argument is based on the statutory requirement that res judicata is applicable only when a final judgment has been rendered. In light of the fact that the parties do not dispute that a final judgment was rendered by the federal court in conjunction with its thoroughly detailed "Order and Reasons" that is included in the record, the mere physical absence of that final judgment from the record now before us does not prohibit our review of whether it constitutes res judicata as to the state law claims raised in this appeal.

The Issue Of The Reasonableness Of Defendants' Conduct Underlying State Law Claims - Fully Adjudicated By Federal Court Such That Res Judicata Applies?

Plaintiffs additionally assert that the federal court did not adjudicate the issue of the reasonableness of Johnson's actions *under Louisiana law*. Moreover, they maintain that the application of Louisiana law, regarding the reasonableness of an officer's actions under these same facts and circumstances that were presented to the federal court, mandates a different result. The basis for this contention is an alleged significant difference between federal jurisdiction ("clearly established Fourth Amendment precedent") when compared with state jurisprudence in "fatal police shooting" cases. Specifically, plaintiffs claim that federal law allows the federal district court to ignore the presence of genuine issues of material fact and render judgment on the basis of what clearly established federal jurisprudence provided was reasonable. Because Louisiana law does not recognize the doctrine of qualified immunity, plaintiffs claim there is no clearly established state law regarding what conduct is reasonable in an emergency response case, contrary to well established federal law concerning reasonableness in the context of the application of the qualified immunity. Therefore, they maintain that res judicata does not apply, and the determination of the reasonableness of Johnson's conduct under Louisiana law has yet to be adjudicated.

We disagree with the plaintiffs; a careful reading of the federal district court's written reasons for its order belies plaintiffs' allegations regarding the manner in which the court reached its ultimate conclusion that Johnson's actions were protected by

qualified immunity. Very clearly, the reasons reflect the court's careful consideration of all of the undisputed, established facts, and its ruling that, even if the victim was not armed with a knife (i.e., the only relevant fact in dispute), that it found Johnson's actions to be reasonable and, on the basis of that finding, it held qualified immunity shielded his actions from liability under the federal claim asserted. The federal court specifically found that the use of deadly force by Johnson was justified by the immediate threat of serious harm of death. And in determining that even if the decedent suspect was not in possession of a knife at the time (the only relevant fact in dispute), the court also specifically found that "[a] reasonable officer in this situation would have reason to believe that [the suspect] was only steps away from being in a position to wrestle the gun from the officer and to hurt or kill others on the premises." Finally, the federal court concluded:

Moreover, with [the suspect] coming towards the officer in close proximity, throwing his hands in the air and yelling, "I'm going to make you shoot me motherfucker," Deputy Johnson was not facing a mere "latent threat" that had yet to "materialize" into a risk of harm." ... [The suspect] was actively resisting and threatening imminent harm when Deputy Johnson made a split-second decision during a situation that was "tense, uncertain, and rapidly evolving. ... Deputy Johnson was not required to wait until [the suspect] was on top of him and attempting to physically overcome him before taking action to protect himself and others.

We note also that on appeal to the U.S. Fifth Circuit Court of Appeal, that court, in affirming the summary judgment in favor of the defendants, also expressly noted that "[t]here is no genuine issue of material fact" that the deputy was confronted with a noncompliant subject with dangerous and violent propensities who posed "a threat of serious physical harm" to himself and others around him. **Clayton**, 547 Fed.Appx. at 653.

For these reasons, we find no merit to plaintiffs' contention that the federal court only analyzed the facts in terms of whether qualified immunity applied to Johnson's actions and did not fully analyze the facts and circumstances under the standard of reasonableness that would apply under state law. Clearly, in order to determine the applicability of qualified immunity, the federal court was required to, and did, fully adjudicate the reasonableness of Johnson's actions, as such a finding is a prerequisite to the application of immunity.

That same finding is an essential element of the causes of action set forth in the plaintiffs' state court petition. Although plaintiffs contend that *res judicata* is inapplicable, because the reasonableness standard contained in the federal law defense of qualified immunity involves a different standard of reasonableness under Louisiana law, they fail to specify how that analysis would differ. Our review of the federal district court's lengthy and thorough reasons for ruling reveals that every fact and circumstance (the very same that would apply under state law) was considered in detail by that court before rendering its decision that, notwithstanding the one disputed fact, whether the decedent suspect was armed, Johnson's actions were reasonable under the particular undisputed facts and circumstances as reflected by the testimony and evidence before that court. The same evidence would reveal the same undisputed facts and circumstances against which the reasonableness of Johnson's conduct would be analyzed in state court. Thus, we find no merit to the plaintiffs' claim that the reasonableness of Johnson's conduct has not been adjudicated according to state law principles.⁶

Federal Court's Dismissal Without Prejudice of Plaintiffs' State Law Claims, and Express Reservation of Plaintiffs' Right to Pursue State Law Claims - Does This Preclude The Application Of Res Judicata?

Plaintiffs also claim the district court erred by ignoring the ruling by the federal court that dismissed their claims *without prejudice* and with the express intent to preserve plaintiffs' state law claims for resolution in a state court. After finding Johnson's action reasonable, thus, warranting the application of qualified immunity, Order and Reasons reflect the federal court declined to exercise supplemental jurisdiction over plaintiffs' remaining state law claims, stating, "[h]owever the dismissal of the claims should expressly be *without prejudice* so that the plaintiff[s] may refile [their] claims in the appropriate state court."

⁶ We except from this finding a couple of claims asserted by the plaintiffs that were not adjudicated by the federal district court and over which the federal court order (judgment) does not have *res judicata* effect. Plaintiffs alleged that Sheriff Graves and the Sheriff Department are liable under *respondeat superior* for their own failure to properly train and equip Johnson. Additionally, they assert a claim against all the defendants for the failure to follow the Sheriff Department's own policies and procedures, specifically, Operations Order Number 705. However, because for other reasons we ultimately reverse the entire judgment before us today, the entire judgment is effected thereby, including these claims. Accordingly, there is no need to single out these two claims; however, we note for the record that we do find that *res judicata* inapplicable to them.

The plaintiffs claim the state district court erred herein in failing to find that the federal court's express intent to preserve the state law claims, and dismissing those claims without prejudice, was sufficient to preserve those claims or to prohibit the application of res judicata.

Plaintiffs also rely on the following jurisprudence for their assertion that the district court erred in ignoring the federal court's express reservation of rights to the plaintiffs to file their remaining state law claims in state court. Although rarely mentioned, exceptions exist to the common law theory of res judicata, as noted in the Restatement (Second) of Judgments, § 26 (1982). These exceptions involve "exceptional circumstances" as where (a) the parties have agreed that the plaintiff may split his claim, or the defendant has acquiesced therein; (b) *the court in the first action has expressly reserved the plaintiff's right to maintain the second action*; (c) there are restrictions on the subject matter jurisdiction of the courts; (d) the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme; (e) for policy reasons; or (f) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. Restatement (Second) of Judgments, § 26 (1982), pgs. 233-234; **Terrebonne Fuel & Lube, Inc.**, 666 So.2d at 632. For purposes of res judicata, when the court in the first action expressly reserved the plaintiff's right to maintain the second action, the first action fails to acquire the authority of the thing adjudged as to the second action. **Stroik v. Ponseti**, 96-2897 (La. 10/9/97), 699 So.2d 1072, 1077; (a very similar case where a hostage was wounded by a police officer while responding to a car hijacking and subsequent armed robbery incident; plaintiff filed a §1983 civil rights action in federal court; however, an attempt to file an amended petition to add state law claims two weeks before the scheduled trial was denied as untimely, with the district court stating there was no prejudice in the denial because plaintiff had already filed a state court suit alleging those claims. *Id.* at 1075. The federal case proceeded to trial, following which, on appeal, the U.S. Fifth Circuit Court of Appeal found that the officer was justified in using deadly force. **Stroik v. Ponseti**, 35 F.3d 155, 159, (5th Cir. 1994), cert. denied, 514 U.S. 1064,

115 S.Ct. 1692, 131 L.Ed.2d 556 (1995). When plaintiff proceeded with the state court claims, defendant raised the issue of res judicata, arguing that the issue underlying all of the state law claims, whether the officer's conduct was an unreasonable use of deadly force, had been fully adjudicated by the federal court. On review, the Supreme Court held that the federal court's statements, when it was denying plaintiff's motion to amend, regarding plaintiff's pending state court claims, constituted an "expressed reservation" of plaintiff's right to adjudicate the state court claims subsequent to the federal action. **Stroik**, 699 So.2d at 1077, *citing Terrebonne Fuel & Lube, Inc.*, 666 So.2d at 632; see also Lagnion v. State, 2002-1853 (La. App. 1 Cir. 6/27/03), 858 So.2d 524, 526, (where the federal court dismissed the state claims without prejudice, stating that the plaintiff could assert his state claims in state court; this court found that, "[c]learly, by these actions, the federal court reserved the plaintiff's right to maintain a suit in state court." Thus, the court held the doctrine of res judicata did not preclude the instant state action.)

The exception to the application of res judicata applied in the foregoing jurisprudence is also codified Louisiana law. When Louisiana law on res judicata was amended by enacting La. R.S. 13:4231, effective January 1, 1991, a companion statute, La. R.S. 13:4232, was also enacted to include similar exceptions, stating in pertinent part:

- A. A judgment does not bar another action by the plaintiff:
 - (1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
 - (2) When the judgment dismissed the first action without prejudice; or
 - (3) When the judgment reserved the right of the plaintiff to bring another action.

Notwithstanding the foregoing seemingly applicable and well-established law, the defendants in the case before us rely on, and successfully argued to the district court, the application of the holding in **Samour v. Louisiana Casino Cruises, Inc.**, 2001-0831 (La. App. 1 Cir. 2/27/02), 818 So.2d 171, that the federal district court's expressed decision not to exercise pendant jurisdiction over the plaintiff's state law tort claims did not preclude, under federal res judicata law, the filing by the plaintiff of those state law

claims in state court, but, because the issue of whether an employer acted reasonably in ordering and conducting drug test was previously litigated in the federal court proceeding, employee was precluded (under federal law related to collateral estoppel) from bringing the state tort law claims in state court.

As pointed out in **Lycon, Inc. v. Weatherford Artificial Lift Systems**, 2002-318 (La. App. 3 Cir. 10/2/02), 827 So.2d 1283, 1285, writ denied, 2002-2722 (La. 1/10/03), 834 So.2d 441, in refusing to apply **Samour** to prohibit plaintiff's state law case from proceeding as requested in an exception of res judicata, in **Samour** there was no express reservation of the parties' rights to pursue the state law claims in state court. On this basis, the **Lycon** court held **Samour** inapplicable, and found reversible error in the district court's granting summary judgment in favor of the defendant under res judicata. Instead, the court cited **Stroik**, 699 So.2d 1072, and reversed and remanded to allow plaintiff to proceed with the state law claims in state court.

In this matter, the federal court dismissed the plaintiffs' state law claims without prejudice and further expressly stated that it was reserving the plaintiffs' rights to proceed to state court to adjudicate the state law claims. As did the court in **Lycon, Inc.**, we find **Samour** sufficiently distinguishable on that significant factor, and also find the district court erred in rendering judgment based on that case alone. We note also that **Samour** is factually distinguishable in that the issue was not the reasonableness of a police officer's actions against the allegation of use of excessive force, rather the "reasonableness" issue raised therein concerned the employer's actions in ordering an employee to submit to a drug test. We also find significant that the **Samour** court, faced with a very similar issue regarding the res judicata effect of a federal court judgment on a subsequent state court suit, albeit under different facts and circumstances, resolved the issue without any mention of the Louisiana law regarding res judicata (i.e., La. R.S. 13:4231, 4232) or of the seemingly controlling Louisiana jurisprudence detailed above.

Notwithstanding all of the foregoing, at the hearing on the exception of res judicata herein, there was no mention of La. R.S. 13:4232 or of the **Terrebonne Fuel & Lube, Inc.** and **Stroik** line of jurisprudence. Instead, the district court found **Samour**

was controlling precedent, and sustained the exception of res judicata on that basis alone. Thus, we find merit in plaintiffs' assertion on appeal that the district court erred in relying on and applying **Samour** to the facts of this case. As noted, we find **Samour** distinguishable on significant factors and there is an existing line of jurisprudence factually and procedurally more similar to the case presented herein, namely, the **Terrebonne Fuel & Lube, Inc.** and **Stroik** cases discussed herein. Those cases hold, unequivocally, that when the first judgment includes an express intent by the federal court specifically to preserve the plaintiffs' rights to pursue the state law claims in state court, res judicata is inapplicable as a matter of law, and the plaintiff is entitled to adjudicate those claims in state court. The federal court's written order provides: "[h]owever, the dismissal of the [remaining state law claims] should expressly be *without prejudice so that the plaintiff may refile [those] claims in the appropriate state court.*" (Emphasis added.) We find under the applicable jurisprudence that the application of res judicata is unwarranted in this case. The plaintiffs are entitled to have their state law claims adjudicated by the state court.

CONCLUSION

For the foregoing reasons, we find the district court erred as a matter of law. Res judicata is inapplicable to the plaintiffs' state law claims, given the federal court's specific order preserving the plaintiffs' state law causes of action for adjudication in the proper state court. Accordingly, we reverse the August 5, 2015 judgment that dismissed with prejudice all of plaintiffs' claims. We remand the matter for further proceedings consistent herewith. Costs of this appeal, in the amount of \$1,489.50 are assessed to the defendants, Columbia Casualty Company, David Johnson, and Willie Graves, Livingston Parish Sheriff.

REVERSED AND REMANDED.