DORIS GILMORE, INDIVIDUALLY AND AS TUTRIX ON BEHALF OF THE MINOR, TANYA GILMORE	*	**NO. 2004-CA-0287**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
LOMA LINDA BOUTNEY CRAIG, LEONARD BELTON, COMMERCIAL UNION INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA AND DOES ONE THROUGH TEN	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-14605, DIVISION "C-6"
Honorable Roland L. Belsome, Judge

* * * * * *

CHARLES R. JONES
JUDGE

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(Court composed of Judge Charles R. Jones, Judge James F. McKay III, and Judge Dennis R. Bagneris Sr.)

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AFFIRMED

The Appellant, Doris Gilmore, appeals the judgment of the district court granting two Exceptions of Res Judicata. We affirm.

On March 3, 1989, Ms. Gilmore, on behalf on her minor child, Tanya Gilmore, filed a Petition for Damages against the Orleans Parish School Board (OPSB). The petition alleged that a male student sexually molested Tanya while in the care, custody and control of the OPSB employees at Craig Elementary School. In August of 1999, Gilmore filed an Amended Petition seeking to add defendants Leonard Belton and Loma Linda Boutney, respectively, the principal and a teacher at Craig Elementary

School, and their insurers. The district court denied the Motion to Amend, stating that it was too late to amend the petition because the trial was set to begin in less than one month.

Ms. Gilmore thereafter filed the instant lawsuit on September 14, 1999, against Mr. Belton, Ms. Boutney, and their insurers. The cause of action stated in this proceeding is alleged to have arose out of the same occurrence as described in the previous action against the OPSB. Ms. Gilmore's attempt to consolidate the two lawsuits was denied by the district court. The original lawsuit against the OPSB proceeded to trial in October 1999. A judgment was rendered in favor of the OPSB, and Ms. Gilmore appealed. On April 10, 2002, this court affirmed the judgment of the district court. Writs to the Supreme Court were subsequently denied on November 8, 2002.

In the instant lawsuit, Ms. Boutney and her insurer filed an Exception of Res Judicata on January 28, 2003. On February 14, 2003, Mr. Belton and his insurer filed a similar exception. The exceptions were heard and maintained in a judgment dated September 10, 2003. Ms. Gilmore's appeal followed.

Ms. Gilmore assigns two errors on the part of the district court. First, that the district court erred in granting the Exceptions of Res Judicata where

the parties in this case are not the same as the parties in the previous case. Second, she argues that the district court erred in granting the Exceptions of Res Judicata when the cause of action in this matter is different from the cause of action in the first matter.

The res judicata statute, La. R.S. 13:4231, was amended effective January 1, 1991, to provide as follows:

> 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 the 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.

In Terrebonne Fuel & Lube, Inc. v. Placed Refining Co., 95-0654 (La.1/16/96), 666 So.2d 624, 631, the Louisiana Supreme Court discussed the scope of res judicata as follows:

> Res judicata is an issue preclusion device

> found both in federal law and in state law. Prior to the amendments to Louisiana res judicata law effective in 1991, Louisiana law on res judicata was substantially narrower than federal law. Louisiana's res judicata law was broadened by the 1990 amendment and is now in line with federal provisions. The purpose of both federal and state law on res judicata is essentially the same; [sic] to promote judicial efficiency and final resolution of disputes by preventing needless relitigation.

Judicial economy and fairness are served by requiring the plaintiff to seek all relief and assert all rights arising out of the same transaction or occurrence. La. R.S. 13:4231, Comments-1990; Hudson v. City of Bossier, 33,620 (La. App. 2 Cir. 08/25/2000), 766 So.2d 738, 743-44; Avenue Plaza , L.L.C. v. Falgoust, 96-0173 (La. 7/2/96), 676 So.2d 1077.

In Burguieres v. Pollingue, 2002-1385 (La.2/25/03), 843 So.2d 1049, 1053, the Louisiana Supreme Court set forth five criteria that must be met for a matter to be considered res judicata. They are: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

In the instant case, there is no dispute that the first two requirements of La. R.S. 13:4231 are met. The judgment rendered in the first litigation

against the OPSB was both valid and final.

The third requirement of res judicata is that the parties in both suits are the same. Ms. Gilmore argues that this element is lacking because the first suit named only the OPSB and the second suit named the individual principal and teacher.

It is well established that identity of parties does not mean that the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity. Duffy v. Si-Sifh Corp., 98-1400 (La. App. 4 Cir.01/09/99) 726 So.2d 438. Addressing the issue of identity of parties, the court in Burguieres stated that "[t]his requirement does not mean that the parties must have the same physical identity, but that the parties must appear in the same capacity in both suits." 843 So.2d at 1054. The court further recognized that identity of parties can also be satisfied when a privy of one of the parties is involved.

As noted in Terrebonne, Louisiana's res judicata law was broadened by the 1990 amendment and is now in line with federal provisions. Under federal law, the preclusive effect of a judgment binds the parties to the action and nonparties who are deemed the "privies" of the parties in these limited circumstances: (1) the nonparty is the successor in interest of a party; (2) the nonparty controlled the prior litigation; or (3) the nonparty's interests were

adequately represented by a party to the action who may be considered the "virtual representative" of the nonparty because the interests of the party and the nonparty are so closely aligned. Breaux v. Avondale Industries, Inc., 02-1713 (La. App. 4 Cir. 3/12/03), 842 So. 2d 1115; Hudson, citing Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir.1990).

In the present case, we find an identity or privity of parties in both lawsuits. It is abundantly clear that Mr. Belton and Ms. Boutney appeared in the first suit in their capacity as school board employees, representatives, or administrative staff. Paragraphs IV and V of the petition specifically allege the negligence of the OPSB employees in their failure to supervise. The court in that action was called on to determine if the OPSB was vicariously liable for the omissions or commissions of its personnel. A determination was made that the OPSB and therefore its employees were not guilty of negligence. The second lawsuit is now asking the district court to relitigate the negligence of these same OPSB employees.

Regarding the fourth and fifth element of res judicata requiring the same cause of action, the Louisiana Supreme Court in Terrebone stated:

> The central inquiry is not whether the second action is based on the same cause or cause of action (a concept which is difficult to define) but whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action. This serves the purpose of judicial

> economy and fairness by requiring the plaintiff to seek all relief and to assert all rights which arise out of the same transaction or occurrence.

Id. at 632; See Comments--1990, La. R.S. 13:4231.

In the instant case, after a thorough reading of both petitions, we find that the causes of action are identical. Unquestionably, both causes of action arose out of the same occurrence, i.e., Tanya's alleged molestation; and both are based on the OPSB employees' alleged negligent failure to supervise. In the second claim, Ms. Gilmore is attempting to raise the same issue that was addressed, litigated, and finalized in the initial claim.

The fourth and fifth elements of res judicata are satisfied. Judicial economy and fairness dictate that the doctrine of res judicata be applied in this matter; and, as such, we find that the district court did not err in granting the exceptions.

Decree

For the reasons stated herein, the judgment of the district court sustaining the Exceptions of Res Judicata on behalf of Mr. Belton, Ms. Boutney, and their insurers is affirmed.

AFFIRMED