

NOT DESIGNATED FOR PUBLICATION

KIEU TRAN AND NHAN * **NO. 2008-CA-1149**
NGUYEN, INDIVIDUALLY *
AND THEIR CAPACITY AS *
NATURAL TUTORS OF * **COURT OF APPEAL**
MICHAEL TRAN * **FOURTH CIRCUIT**
VERSUS * **STATE OF LOUISIANA**
RICHARD MELILLO, * * * * *
AMERICAN ARMS, AND
"ABC" INSURANCE
COMPANY

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-667, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

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

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AND AMERICAN ARMS**

AFFIRMED

JANUARY 28, 2009

The appellants, Kieu Tran and Nhan Tran, appeal the judgment of the district court granting an exception of *res judicata* in favor of the appellees, Richard Melillo, American Arms and “ABC” Insurance Company. We affirm the judgment of the district court.

The Trans filed a Petition for Damages in the Civil District Court for the Parish of Orleans on behalf of their son Michael Tran. Michael committed suicide after purchasing a PT 140 .40 caliber pistol from American Arms. According to the Trans, Michael was a mentally ill, deaf-mute. Michael’s suicide gave rise to the instant litigation.

The Trans, in their first Petition for Damages, alleged that the defendants/appellees were liable for Michael’s suicide under the theory of wrongful death because they were at fault under the Gun Control Act of 1968 and for negligent entrustment under Louisiana Jurisprudence. In response, the defendants/appellees filed an exception of no cause of action that was granted by the district court on October 11, 2007, dismissing the Tran’s claims without prejudice. From there the Trans filed a Motion for New Trial that was also denied by the district court. The Trans appealed the district court’s ruling but entered into

a consent judgment dismissing their appeal *with prejudice*. While the appeal was pending, the Trans filed another petition in district court naming the same defendants and raising the same allegations. However, the defendants/appellees admit that “unlike in their first-filed lawsuit, plaintiffs here alleged that when the defendants sold the handgun, they knew or should have known that the plaintiffs’ son ‘had been adjudicated as a mental defective or had been committed to a mental institution.” In response, the defendants/appellees filed an exception of *res judicata* arguing that the Trans agreed to dismiss their case with prejudice. It is from the granting of the defendants’/appellees’ exception that the instant appeal arises.

Assignment of Error

In their sole assignment of error the Trans argue that the district court erred in granting the defendants’/appellees’ exception of *res judicata*.

The Law

The doctrine of *res judicata* precludes re-litigation of claims and issues arising out of the same factual circumstances when there is a valid final judgment. *Ansalve v. State Farm Mutual Automobile Ins. Co.*, 95-0211, p. 8 (La.App. 4 Cir. 2/15/96), 669 So.2d 1328, 1333. It promotes judicial efficiency and final resolution of disputes. *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173, pp. 4-5 (La.7/2/96), 676 So.2d 1077, 1079.

LSA-R.S. 13:4231 states:

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.

Benard v. Eagle, Inc. 2008 WL 5192204, 2008-0262, (La. App. 4 Cir. 12/3/08), -- So. 2d --.

Argument/Analysis

The Trans argue that the consent judgment entered into was only to dismiss the appeal with prejudice, not the entire claim and that the second suit was filed while the appeal was still pending.

The defendants/appellees argue that the Tran's procedural path caused them to be in the predicament in which they so find themselves today. The defendants/appellees suggest that the Trans should have simply filed a new lawsuit after the judge ruled in the defedants'/appellees' favor on the exception of no cause of action. That it was in error for the Trans to file a Motion for New Trial and then take an appeal. They also suggest that the Trans decided to dismiss the appeal when faced with costs.

While it is questionable whether the first suit dismissed *with prejudice* barred the second suit from being filed, that is not the question for this Court today. This Court must determine whether the district court erred in granting the exception of *res judicata* in favor of the defendants/appellees. We find that both parties' arguments as to why the district court was in error (or correct) in granting the exception of *res judicata* are incorrect.

There is no dispute that the instant suit was filed while the appeal was pending in the first suit and prior to the consent judgment being entered into.

La. Code of Civil Procedure Art. 531 reads:

When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

Clearly, the first case and the second case arose out of Michael's suicide. It was brought by the same plaintiffs, against defendants, in the same capacities. The filing of an exception of *res judicata* was the proper procedural mechanism. There was no error by the district court in granting the defendants'/appellees' exception. Unfortunately for the Trans, they are barred from pursuing their appeal or amending their petition in the first suit since they agreed to abandon the appeal *with prejudice*. A judgment of dismissal with prejudice shall have the effect of a final judgment of absolute dismissal after trial. A judgment of dismissal without prejudice shall not constitute a bar to another suit on the same cause of action.

LSA-C.C.P. Art. 1673

Decree

For the reasons set forth in the above opinion, we affirm the judgment of the district court granting the exception of *res judicata* in favor of the Appellees.

AFFIRMED