NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1574

WILLIAM BERT KROPOG, II AND
TIMOTHY SHANE KROPOG

VERSUS

TRAVIS WHITE
AND GLORIA VIDRINE WHITE

Judgment Rendered: MAR 2 3 2012

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Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 117,862

The Honorable M. Douglas Hughes, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDonald, J. Concurs.

GAIDRY, J.

This is an appeal of a declaratory judgment and injunction against the appellants, William Bert Kropog II and Timothy Shane Kropog, and for the appellees, Travis White[1] and Gloria Vidrine White, over a real property dispute. The 21st Judicial District Court found the appellees to be the owners of the disputed tract of approximately six acres, that the previous declaratory judgment was not barred by res judicata, and that the Kropogs were liable for treble damages to the Whites for cutting down timber on the disputed tract. For the following reasons, we reverse the lower court on the issue of res judicata and affirm on all other issues.

FACTS AND PROCEDURAL HISTORY

The Kropogs and the Whites claim distinct chains of title to the disputed land.

Kropog Chain of Title:

On October 3, 1915, Joe C. Dick and Kattie Stall Dick purchased by credit deed from Thomas Hano the following property:

> The South-Half of the Southwest quarter of Northeast quarter of Section Three, in Township Seven South, of Range Six East, containing 20 acres, acquired by this vendor from Chas E Brakenridge, as per deed of record in Book NO. 11, page 300, of the Conveyance Records of the Parish of Livingston.

The heirs of Joe C. Dick[2] and his widow came into possession of his interest in this property by Judgment of Possession in the Succession of Joe C. Dick, dated September 14, 1973. Full ownership in the property came to heir Louis J. Dick, from the widow and the other heirs by cash deed on the same date. Louis J. Dick then sold the property by credit deed to William

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[1] Mr. White passed away on November 4, 2002, during the course of the litigation. His recognized heirs are Sharon Ann White Mickles and Ronald Travis White. These heirs subsequently became parties to the litigation; however, the styling of the case remained the same, showing the name of the deceased father. For the purpose of this opinion, both the original and added defendants will be referred to as "appellees" or as "the Whites."

[2] Joe Dick, Jr., Helen Dick Kropog, Louis J. Dick, and Lena Dick Racz.

Bert Kropog and Laura Petho Kropog on the same date. A seven acre portion of the Kropog property was seized by the Livingston Parish Sheriff and sold to Citizens National Bank by sheriff's sale on October 26, 1987. That portion is described as follows:

> A certain tract or parcel of land situated in Section 3, T7S, R6E, Livingston Parish, Louisiana, and being more particularly described as commencing at a point at the Southwest corner of the Southwest Quarter of the Northeast Quarter of Section 3, T7S, R6E for a point of beginning... containing 7 acres, as per survey by Ansil M. Bickford, C.E., dated January 14, 1986.

William Bert Kropog retained the remaining 13 acres of land after a divorce and community property settlement with Laura Petho Kropog. The property was described as follows:

> The Thirteen (13) acres more or less, being the remaining property in S ½ of SW ¼ of NE ¼ of NE ¼[[3]] SEC 3-7-6 acquired by vendor Louis J. Dick, by deed of record in COB 182 entry 96,920, records of Parish of Livingston, State of Louisiana, together with all the buildings and improvements thereon.

Through donation inter vivos, William Bert Kropog transferred the 13 acre tract to the appellants, William Bert Kropog II and Timothy Shane Kropog, on July 28, 2006. The appellants are the present holders of this title.

White Chain of Title:

On August 12, 1949, Mike Erdey, Sr., Barbara Maklary Erdey, Rose Nemeth Erdey, and Mike Erdey, Jr. purchased by cash deed from Andrew Szalayi the following property:

> The NW ¼ of the SE ¼ of Section 3 T 7 SR 6 E, containing 40 acres, ofland [sic], together with all the buildings and improvements thereon.

[3] The second "NE ¼ " is an erroneous duplication which is noted on Plaintiffs' exhibit 2 ("Chain of Title") and Defendants' exhibit 5 ("Murphy Abstract").

Rose Nemeth Erdey, widow of Mike Erdey, Jr., as well as the heirs of Mike Erdey, Jr.[4], received his half interest in the property through judgment of possession in the Succession of Mike Erdey, Jr., dated February 22, 1968. The heirs of Mike Erdey, Sr. and Barbara Maklary Erdey[5] received their half interest in the property by judgment of possession in the Succession of Barbara Maklary Erdey and Mike Erdey, Sr., dated December 1, 1970. The heirs of both successions sold their interests in the property by cash deed to Bernard A. Lehmann and Jo Ann Murr Lehmann on August 29, 1971.

The Lehmanns then sold portions of the 40 acre tract to various buyers. They first sold twelve acres to Kirby J. Chatelain by cash deed on August 29, 1974. They then sold 13 thirteen acres to Adolph P. LaPlace, Jr. by cash deed on May 22, 1975. 4.5 acres was sold by credit deed to Jeanette Clark Mooty on October 7, 1975. 4.23 acres were sold by credit deed to William and Patricia Nauck on October 16, 1975. The remaining northernmost 6.27 acres were sold to Travis B. White via tax sale on March 1, 1980. The description of the 6.27 acres in the tax sale is as follows:

> 6.27 acres in sec 3-7-6 being remaining property acq from Rose Erdey et als 161/175

Travis B. White has since died and his heirs have been put in possession of his interest in the 6.27 acres by judgment of possession in the Succession of Travis Burns White, dated January 12, 2003. The Whites have been holders in title of the 6.27 acre tract since that time.

Kropog Acts of Possession:

Through the Kropogs' own admission, the disputed six acre tract was probably never bought by Joe C. Dick in 1915 or by any subsequent buyer in

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[4] Gerald Alex Erdey and Joseph Stevens Erdey.

[5] The heirs of Mike erdey, Sr. and Barbara Maklary Erdy are Mike Erdey, Jr., John Erdey, Frank Erdey, Julius P. Erdey, Nicholas Louis Erdey, and Mary Erdey Anderson.

their chain of title; however, the Dick family and their successors in title allegedly farmed the tract from 1915 until some time in the 1960s, then again from 1975 until the present. The Dick property bordered the disputed tract to the north, and both properties were fenced together, seemingly into one contiguous tract. A portion of that original fence line allegedly remains along the southern boundary of the disputed property. By their own testimony and the testimony of a long-time neighbor, the fence around the property existed probably as early as 1953. When the Kropogs acquired the property from the Dicks in 1975, they also farmed and used the six-acre tract as theirs, just as the Dicks had done. The Kropogs claim in their brief that they have "farmed, raised animals, bush hogged, and hunted the property." The Kropogs allege that they believed at all times that the six acre tract was theirs and maintained it as such. William Bert Kropog claimed that an oil rig was erected on the property some time in the mid-1980s, which he believed was due to his executing a mineral lease.

The Kropogs claim they did not become aware of a competing claim of ownership to the six acres until 2001, when they were notified that a survey was being conducted on the disputed property on behalf of the Whites. On August 13, 2002, William Bert Kropog filed suit against the Whites seeking a declaratory judgment to declare him owner of the six acres, either by virtue of title or by acquisitive prescription of thirty years' uninterrupted possession. Kropog and the Whites reached a consent judgment which was signed by all parties on July 30, 2003. The judgment declared William Bert Kropog to be the owner of:

> The South Half of the South West Quarter of Northeast Quarter of Section Three (3), in Township Seven (7) South, of Range Six (6) East, containing twenty (20) acres, acquired by this vendor from Thomas Hano, as per deed of record in Conveyance Book No. 29, page 67 of the Conveyance Records

of the Parish of Livingston, State of Louisiana, together with all the buildings and improvements thereon.

LESS AND EXCEPT:

A CERTAIN PIECE OR PARCEL OF GROUND situated in Section 3, T7S, R6E, Livingston Parish, Louisiana, being more particularly described as follows, to-wit:

Commencing at a point which is the Southwest Corner of the Southwest Quarter of the Northeast Quarter of Sec. 3, T7S, R6E for a point of beginning... containing 7 acres, as per survey by Gilbert Sullivan, C.E.; dated April 27, 1990...

The Whites were declared to be the owners of the following property:

6.27 acres in Section 3, T7S, R6E, being the remaining property acquired from Rose Erdey, et al 161/795, being more particularly described as follows:

A CERTAIN TRACT OR PARCEL OF GROUND, containing 40 acres of land, more or less, together with all buildings and improvements thereon, situated in the Northwest Quarter of the southeast Quarter of Section 3, T7S, R6E, Livingston Parish, Louisiana...

LESS AND EXCEPT:

The South Half of the South west Quarter of Northeast Quarter of Section Three (3), in Township Seven (7) South, of Range Six (6) East, containing twenty (20) acres, acquired by this vendor from Thomas Hano, as per deed of record in Conveyance Book No. 29, page 67 of the Conveyance Records of the Parish of Livingston, State of Louisiana, together with all the buildings and improvements thereon.

This judgment, however did not end the land dispute. On November 2, 2007, the appellants of this appeal, now owners of the Kropog land via act of donation, filed the instant lawsuit against the Whites with the same property at issue. A trial on the merits was held April 20, 2011, the result being another declaratory judgment in favor of the Whites, recognizing them as owners of the following property:

A certain tract of land containing 6.10 acres, more or less, [deed referenced is 6.27 acres more or less] located in Section 3, T7S, R6E, Livingston Parish, Louisiana, more particularly described as follows:

> Commencing at a point at the Southwest corner of the Northwest quarter of the Southeast quarter of Section 3, T7S, R6E... as per survey of John D. Adams dated September 6, 2001...

Although the survey of John Adams rendered an acreage measurement slightly less than 6.27 acres, the reference in the judgment designates that land as the same which had been in dispute from the previous lawsuit filed by William Bert Kropog.

White Acts of Possession:

The Whites claim to have been in physical possession of the property they acquired on March 12, 1980 since the date of acquisition. At the April 20, 2011 trial, the Whites introduced evidence of their payment of property taxes for the 6.27 acres for several years between 1980 to 2010, drilling permits from 1985 for the property on behalf of Sierra Production Company for the well "Travis White No. 1," a Use Value Assessment signed by Travis B. White made in 2000 for timber located on the property, a geophysical permit granted by Travis White in 1997 to conduct a seismic survey on the 6.27 acres, and photographs of the rig "Travis White No. 1" located at Sec. 3, T7S, R6E in Livingston Parish for Sierra Production Company. During this time, the Whites were not aware of any acts of possession adverse to their own by the Kropogs or anyone else.

The Whites alleged that in July of 2008, timber had been felled from the property in dispute without their consent. They later learned that it was the Kropogs who were felling the timber, and the Whites notified the Kropogs that they considered the felling of timber an act of trespass and requested the Kropogs cease all activity on the property. In their reconventional demand of the instant lawsuit, the Whites prayed for injunctive relief against the Kropogs, as well as treble damages for the

unlawful felling of timber without their consent, pursuant to La.R.S. 3:4278.1. The trial court granted the injunction and awarded the Whites $15,000 in damages.

ASSIGNMENTS OF ERROR

The Kropogs allege four assignments of error:

The trial court erred in finding the appellees and not the appellants to be the owners of the disputed tract, as the appellants are owners by acquisitive prescription of thirty years.

The trial court erred in granting the judgment which is the subject of this appeal, when the consent judgment of 2003 is res judicata as to the issue of ownership.

The trial court erred in awarding treble damages to the appellees for the felling of trees on the disputed property, which the appellants claim to own.

The trial court erred in determining that the appellees had effectively interrupted the appellants' possession for the purpose of thirty years' acquisitive prescription.

STANDARD OF REVIEW

The proper standard of review for a permanent injunction is manifest error. See *State Machinery and Equipment Sales, Inc. v. Iberville Parish Council,* 2005-2240, p. 6 (La. App. 1 Cir. 12/28/06), 952 So.2d 77, 82, *Fern Creek Owners' Association, Inc., v. City of Mandeville,* 2008-1694, p. 9 (La. App. 1 Cir. 6/30/09), 21 So.3d 369, 376. The proper standard of review for a trial on the merits is also manifest error. *Morgan v. Bell,* 2010-0278, fn. 2 (La. App. 4 Cir. 7/28/10), 44 So.3d 851, 853. The res judicata effect of a prior judgment is a question of law that is reviewed de novo. *Fogleman v.*

Meaux Surface Protection, Inc., 2010-1210, p. 2 (La. App. 3 Cir. 3/9/11), 58 So.3d 1057, 1059.

DISCUSSION

Res Judicata

We will discuss the issue of res judicata first, as it bears heavily on all other assignments of error. The appellees filed a peremptory exception of res judicata in the present suit on February 19, 2008, claiming that the issue of ownership of the six-acre tract of land had already been litigated and a resulting consent judgment was signed on June 30, 2003, by William Bert Kropog, Anita Gloria Vidrine White, Sharon Ann White Mickels, and Ronald Travis White. The instant lawsuit, according to the appellees, should be barred. The trial court denied the exception on August 7, 2008, judgment signed August 28, 2008. In written reasons for judgment, the court stated that the 2003 consent judgment contained an ambiguity in that it created an overlap in ownership of the disputed property. The appellants claim they filed the instant lawsuit to have the court resolve this ambiguity. Curiously, the appellants now appeal this decision on the appellees' exception, apparently to resolve the overlap issue in their favor.

We, however, can find no overlap in ownership. The 2003 consent judgment contains clear property descriptions of the agreed boundaries of both the appellants' property and the appellees' property. As to William Bert Kropog, their property is located in "[t]he South Half of the South West Quarter of *Northeast Quarter* of Section Three (3) in Township Seven (7) South, of Range Six (6)." *Emphasis added.* The appellees' property is that remaining 6.27 acres of what was formerly Rose Erdey's land, which was "in the Northwest Quarter of the *Southeast Quarter* of Section 3, T7S, R6E…" *Emphasis added.* It is obvious from the descriptions that the

properties are in two wholly separate quarters of Sec. 3, T7S, R6E and can in no way overlap, and were written in such a way to avoid any confusion.

The appellants argue in their brief that the overlapping occurred due to an erroneous survey they relied upon, which put them in ownership of the same land with the appellees. The appellants then learned of the error from a subsequent survey and filed the second suit to correct the error. Whether there was an erroneous survey or not, the error does not lie with the 2003 consent judgment.

Louisiana Revised Statutes 13:4231 is the guiding statute on res judicata, which bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit. Thus, the chief inquiry 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. Its statutory requirements have been succinctly summarized as follows:

> The peremptory exception of res judicata bars a subsequent judgment when 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases. *Davis v. State, Dept. of Transp. And Development,* 2011-404, p. 4 (La. App. 3 Cir. 10/5/11), 75 So.3d 549.

Even though the 2003 consent judgment involved William Bert Kropog and the appellants in this case are William Bert Kropog II and Timothy Shane Kropog, William Bert Kropog donated his full ownership in the land to the appellants in 2006. The parties in both suits need not be the same physical parties for res judicata to apply. The parties have identity when they appear in the same quality or capacity in both suits. *Steckler v. Lafayette Cosol. Government,* 2011-427 (La. App. 3 Cir. 11/2/11), 76 So.3d 161, 166 *writs denied,* 2011-2639, 2011-2677 (La. 2/10/12). ___ So.3d ___. William Bert Kropog and the appellants both appear as the owner of the

same property in their respective suits. The 21st Judicial District Court for the Parish of Livingston is clearly a court of competent jurisdiction for this case, and its competency has not been called into question. It is well settled that a valid compromise can form the basis of a plea of res judicata because a compromise has the legal efficacy of a judgment. *Cason v. Cason,* 38,974, p. 6, 7 (La. App. 2 Cir. 10/27/04), 886 So.2d 628, 632. See also *Richardson v. Richardson,* 2002-2415, p. 4 (La. App. 1 Cir. 7/9/03), 859 So.2d 81, 85. The cause of action is the same in both suits, as it stems from the disagreement over who owns the six-acre tract. All four elements set forth in *Davis* are present in this case, and therefore we find that the trial court committed error and should have sustained the appellees' peremptory exception of res judicata, barring the present case from ever moving forward. We reverse the trial court on the issue of res judicata. The effect of res judicata would be to vacate the present declaratory judgment on appeal and enforce the consent judgment of 2003.

Our discussion of the case could essentially end here; yet, for the sake of thoroughness, we will address the appellants' other assignments of error.

Acquisitive Prescription

The appellants' first and final assignments of error deal with the issue of thirty years' acquisitive prescription. The appellants claim to have satisfied acquisitive prescription by well over thirty years by tacking the possession of all previous owners from 1915 in an uninterrupted chain to the present. A fence line encompassing the disputed property is also evident, and testimony introduced at trial suggests the fence was erected by the appellants' ancestor in title around 1953. The appellees leased the property to an oil field company which moved a rig onto the property around 1985, but the appellants claim they would have acquired the property before then;

the rig, therefore, would not have interrupted the appellants' acquisitive prescription.

While the appellants' argument seems valid on its face, we must once again turn to the consent judgment of 2003, where the land owners at the time all signed and agreed to the property they owned. This judgment was supposed to resolve all disputes to ownership, and it did.

The 2003 consent judgment judicially set the boundary between the appellants and the property owned by the appellees according to their titles, not their possession or ownership according to acquisitive prescription. Ownership may be determined strictly by title under La.C.C. Art. 793. Ownership could have been determined by proof of acquisitive prescription under La.C.C. Art. 794, but this was not done, and the 2003 consent judgment is not subject to this appeal. Therefore, whatever that judgment dictates must be followed as the law between the parties. The lower court was silent as to the issue of acquisitive prescription for the appellants, but as the assignment of error complains of the court's inaction on this issue, we affirm the court's ruling.

Injunctive Relief

The appellees assert in their petition for reconventional demand and injunctive relief that they first became aware of the felling of timber from the disputed property without their consent in July of 2008. The appellants had filed this lawsuit in November of 2007. The appellants therefore, without denial on their part, went to the disputed property and cut down timber while they knew its ownership was unresolved. They would have also been aware of the 2003 judgment, which stated that the 6 acre tract was the property of the appellees. Louisiana Revised Statutes 3:4278.1(C) states a taker of timber in good faith is liable to the owner for treble damages only

if circumstances prove that taker should have been aware that the taker's actions were without consent or direction of timber's owner or legal possessor. *Carroll v. International Paper Co.,* 1994-302 (La. App. 3 Cir. 11/2/94) 649 So.2d 474, 478 *writ denied,* 94-2924 (La. 2/17/95), 650 So.2d 259.

The appellants have admitted to taking the timber, and we will assume they did so in good faith. That being said, they still should have known that the appellees would not have consented to their action. We do not find it relevant here, that there was an inaccurate survey that the appellants may have relied upon. The appellants themselves filed the petition which forms the basis of the appeal because they still believed the issue of ownership was not resolved. They should have been aware that there was the chance that the court would rule against them, and by cutting down timber before the dispute was resolved, they were taking a considerable risk. We find the trial court was not wrong in its application of La.R.S. 3:4278.1 in this case and affirm the injunction and the award of treble damages.

CONCLUSION

The consent judgment of 2003 is binding since the subsequent 2007 lawsuit by the appellants as to ownership of the subject property is barred by res judicata. While we reverse the lower court's ruling on the appellee's exception of res judicata, we affirm the court's judgment for permanent injunction and the award of treble damages against the appellants.

DECREE

The 21st Judicial District Court's denial of the appellees' exception of res judicata is reversed. The court's judgment after trial on the merits, granting a permanent injunction and treble damages in favor of the appellees, Gloria Vidrine White, Sharon Ann White Mickles, and Ronald

Travis White, and against the appellants, William Bert Kropog II and Timothy Shane Kropog, is affirmed. Costs of this appeal are assessed to the appellants.

REVERSED IN PART, AFFIRMED IN PART.