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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

DKN HOLDINGS LLC,

Plaintiff and Appellant,

v.

WADE FAERBER,

Defendant and Respondent.

On Review From The Court Of Appeal For the Fourth Appellate District,
Division Two, 4th Civil No. E055732, E056294

After An Appeal From the Superior Court For The State of California,
County of Riverside, Case Number RIC1109512, Hon. John Vineyard

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PETITION FOR REVIEW

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I.

INTRODUCTION AND SUMMARY OF RULING[1]

Both the trial court and the Court of Appeal in the underlying case refused to apply controlling Supreme Court precedent. Affirmed by the Court of Appeal, the trial court pronounced that the Supreme Court's holding in *Williams 2* was "wrong" with respect to the proposition that *joint and several* obligors can be sued either jointly in a single lawsuit, or severally in separate lawsuits. Both the trial court and the Court of Appeal announced that commentary in Witkin consistent with the *Williams 2* opinion was a "classic example" of Witkin mischaracterizing the law. Finally, the Court of Appeal refused to apply the clear language and legislative intent of Corporations Code §16307(b), which expressly permits partners to be sued jointly in a single lawsuit, or severally in separate lawsuits. A petition for rehearing was not filed in the Court of Appeal.

DKN submits that review by this court is not only appropriate, but essential. The underlying Opinion creates a material conflict in published law, refuses to comply with *stare decisis*, and judicially legislates a material exception to Corporations Code §16307(b) which is manifestly contrary to the plain language and legislative intent of that section.

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[1] The "Opinion" is appended as exhibit "A" pursuant to Cal. Rules Ct. 8.504(b)(4).

A. Summary Of Issues

Petitioner DKN Holdings, LLC, ("Lessor" or "DKN") was one of two Lessors under a commercial lease in which there were three individual tenants. ("Lessees.") The individual Lessees were Caputo, Faerber, and Neel. The term of the lease was ten years. The lease expressly stated that the Lessees were jointly *and severally* liable under the lease.

Lessee Caputo, but not the other two Lessees, sued Lessors for rescission, breach of contract and tort damages. ("*Caputo Action.*") As cross-complainants in the *Caputo Action*, commercial Lessors DKN and CDFT obtained a judgment for unpaid rent and damages for breach of the ten year lease against Caputo. After having prevailed at trial on its claims against Caputo, but before entry of judgment, DKN initiated a separate action against the co-Lessees Faerber and Neel seeking to hold them severally liable for breach of the lease and related damages. ("*Faerber Action.*")

The trial court in the *Faerber Action* held the judgment in the *Caputo Action* precluded the *Faerber Action* as a matter of law under the *claim preclusion* arm of *res judicata.* The three principal issues presented here are: (1) Whether the Court of Appeal, in holding that joint *and several* obligors cannot be sued in separate actions, exceeded its jurisdiction by ignoring the compulsory mandate of *stare decisis*; (2) Whether the Opinion creates an untenable conflict in published law by rejecting Supreme Court precedent; and (3) Whether the Court of Appeal exceeded its jurisdiction by refusing to apply

the clear legislative mandate in Corporations Code §16307(b), and by judicially legislating a *New Rule* of law which eviscerates the plain meaning of the statute.

B. Background

In 2007 Lessee Caputo brought his action for rescission and damages against the Lessors. The Lessors cross-complained for money damages for breach of the ten year lease. Though the Lessors initially cross-complained against all three Lessees, they proceeded against only the single Lessee Caputo. This was a result of contentions made on behalf of the Lessees Faerber and Neel that they were not in fact intended Lessees under the lease. The documentation of the Lease was not well done, and there was at least room for some uncertainty as to the identity of the intended Lessees at the outset of the action.

The *Caputo Action* proceeded to trial. Caputo lost on his affirmative claims. The Lessors prevailed on their claim for breach of lease. Judgment was entered in favor of the Lessors against Caputo on November 11, 2011, in the amount of three million one hundred fifteen thousand eight hundred eighty-six dollars [$3,115,886.00].

On June 1, 2011, several months prior to the entry of Judgment against Lessee Caputo, Lessor DKN initiated an action against the Lessees Faerber and Neel. During the trial it had become clear that, contrary to the contentions

earlier made on behalf of Lessees Faerber and Neel, they were indeed Lessees, and "partners" with Caputo.

Faerber was served and filed a demurrer. Neel was served and failed to respond, and default was entered. Faerber's demurrer contended that DKN's action constituted an improper "splitting" of a cause of action, and was barred, *inter alia*, by the doctrine of *res judicata*.

C. DKN Cited Three Primary Sources In Support Of The Assertion That Jointly *And Severally* Liable Co-Obligors May Be Sued *Severally* In Separate Suits

DKN opposed the Faerber demurrer, citing *Williams v. Reed* (1957) 48 Cal.2d 57, 64-65, ("*Williams 2*")[2] for the proposition that where the liability of co-obligors on a contract is both *joint and several*,[3] it is permissible to sue the obligors either *jointly* in a single lawsuit, or *severally* in separate lawsuits. DKN also cited 4 Witkin, *California Procedure* (5th ed. 2008) Pleading, 365, p. 124 in support of this legal principle. Finally, DKN cited Corporations Code §16307(b), which provides, *inter alia*, that "an action may be brought against the partnership and any or all of the partners in the same action **or in separate actions**." (Emphasis added.)

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[2] *Williams 2* followed the previously published appellate level opinion in *Williams v. Reed* (1952) 113 Cal. App. 2d 195. ("*Williams 1*")

[3] It is undisputed that a written provision of the standard form Commercial Lease employed in this case provided that the contractual liability of the lessees was joint and several.

Faerber's demurrer was granted **without leave to amend**. The court opined, *inter alia*, that this court's holding in *Williams 2* was "wrong." It further concluded that the consistent discussion in Witkin was "one of those classic examples of Witkin referring to and relying on a case that doesn't support the theory published in Witkin." The Opinion includes this pejorative reference to Witkin at footnote 5.

The trial court subsequently ordered on its own motion that the defaulted Lessee Neel also have judgment entered in his favor.

DKN appealed the judgment.

D. The Appeals Court Agreed That The Supreme Court Is "Wrong" In *Williams 2*

Relying on *Williams 2*, DKN argued on appeal that a judgment against one joint and several obligor does not foreclose a later action against another joint and several obligor on the same obligation. In rejecting DKN's argument the Court of Appeal quoted the following passage from *Williams 2*:

> It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensible parties. They may not be sued separately [citations]. If judgment is obtained in a separate action against one, it bars an action against the others. [Citation.] **When the obligation is *joint and several*, it is not nonjoinder to sue one alone** [citations]. The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort feasors. In such a case the judgment obtained against one is not a bar to an action against the remaining joint and several

> obligors. '*Nothing short of satisfaction in some form constitutes a bar . . . .*'" (*Ibid.*, quoting *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 442.) [4]

Opinion 11 (bold added, italics original).

Noting that, based on this passage from *Williams 2*, DKN argued that because Caputo, Faerber, and Neel "are jointly *and severally* liable for the unpaid rents and other monies due under the lease, the judgment against Caputo does not bar DKN's identical claims against Faerber and Neel in the present action. . .", *(id.)* the Court of Appeal stated its disagreement with the following explanation:

> As the trial court noted in sustaining the demurrer, **the passage from *Williams* is "wrong" and incorrectly states the law**—to the extent it may be construed as allowing an obligee, such as DKN, to obtain separate judgments *in separate actions* against joint and several obligors, based on the same claims.

Opinion 11 (emphasis added).

The Court of Appeal attempted to distinguish [5] the holding in *Williams 2*:

> *Williams* did not address the issue presented here: whether a final judgment on the merits against *one* joint and several obligor bars a subsequent

---

[4] The Opinion conflicts not only with this Court's holding in *Williams 1*, but also with this Court's opinion in *Grundel*, *supra*.

[5] DKN will argue below why it believes *Williams 2* is not materially distinguishable from the facts here.

> action and judgment against *additional* joint and several obligors, on the same obligation, by the same claimant.

Opinion 11-12.

Noting that "cases are not authority for propositions not considered. . .," the Court concluded that "*Williams* does not support DKN's position." Opinion, 12.

Confusingly, the court proceeded to acknowledge the *General Rule* relating to the permissibility of separate actions against joint and several obligors. As argued below, the Court's acknowledgement of the *General Rule* appears directly inconsistent with the rule established by its holding (the "*New Rule*") that, though jointly and severally liable on the Lease, Faerber and Neel had to have been included in the judgment in the *Caputo Action*, or they were exonerated from their several liability. Ironically, the court emphasized the contrary *General Rule* in establishing the *New Rule*:

> **To be sure, courts are generally authorized to render separate judgments**, in the same action ***or in separate actions***, against joint and several obligors. (*Melander v. Western Nat. Bank* (1913) 21 Cal. App. 462, 474-78 [6] [construing former § 414, now § 410.70 & §§ 578, 579, as authoring (sic) courts to enter separate judgments in separate actions against joint and several obligors]; (fn. omitted) see also *Grundel v. Union Iron Works, supra*, 127 Cal. at p. 442[joint and

[6] As discussed below, the holding in *Melander*, relied upon by the appellate court, is antithetical to the ruling affirmed by the court.

> several tort feasors may be sued in separate actions].)

Opinion 12 (bold added, italics in original).

Notwithstanding this recognition of the *General Rule*, the appellate court divined the *New Rule* exception to the *General Rule*:

> But even when joint and several obligors are not required to be sued in the same action (see §§ 410.70, 379, 389)[7] **when, as here, a final judgment on the merits has been rendered in one action against a joint and several obligor, res judicata will bar the assertion of identical claims against other joint and several obligors, in a subsequent action, by parties bound by the judgment** in the prior action.

Opinion 12-13 (emphasis).

As argued below, the *New Rule* necessarily eviscerates the *General Rule* acknowledged in the Opinion. They cannot coexist or withstand logical analysis. Inevitably, whether the *separate actions* against severally liable co-obligors are simultaneously pending separate actions, or successively pending separate actions, there will always be a first judgment in time, which will be obtained prior to any second judgment in time. The *New Rule* necessitates the result that, in every situation where the *General Rule* putatively applies, once a judgment on the merits is obtained against one jointly and severally liable obligor, all remaining jointly and severally liable obligors not subject to that

[7] The Opinion acknowledges that these current sections of the Code of Civil Procedure are consistent with the *General Rule*.

judgment will be simultaneously exonerated of the obligation for which they were supposedly severally liable.

Under the *New Rule*, the statutes discussed in *Melander* and their successors referenced in the Opinion, as well as the case law expressly permitting the filing of separate actions against several obligors, would constitute nothing more than a dangerous mirage and a trap for the unwary lawyer and his or her client. The *New Rule* would necessarily require the re-writing of these statutes, and the reversal of the holdings in all cases such as *Williams 1* and *2, Grundel* and *Melander*, and a clear declaration from this Court that the *General Rule* is officially defunct.

E. The Opinion Disparagingly Rejected A Passage From Witkin, Consistent With *Williams 2*, As A "Classic Example" Of Witkin Mischaracterizing The Law

Following its rejection of the *General* Rule, the court dealt a blow to Witkin. Quoted by the Court of Appeal, the Witkin passage relied upon by DKN states, consistent with the holdings in the *Williams* cases, *Melander, Grundel,* and the provisions in Code of Civil Procedure §§ 410.70, 379 and 389:

> If defendants are both jointly and severally liable, **joinder is not mandatory but permissive,** and **the plaintiff,** although he or she has but one cause of action, **may sue one defendant first and another later**. Despite the theoretical incongruity, the **plaintiff is not barred in the second action** because the defense of res judicata

> is available only *when both the cause of action and the parties are the same.*" (4 Witkin, Cal. Procedure (5th Ed. 2008) Pleading §65 p.124, italics added.)

Opinion 13.

In rejecting this accurate statement of the *General Rule* ironically recognized in its Opinion, the Court noted:

> Like the passage from *Williams, supra*, 48 Cal.2d at page 65, the trial court rejected this passage from Witkin as an incorrect statement of the law, [fn.] and **we agree it is incorrect**. The passage from Witkin mistakenly indicates that defendants in the current proceeding must have been parties to the prior proceeding, in which a final judgment on the merits was obtained on the same claims, in order to invoke res judicata in the current proceeding, but this is not the law.

Id.

Relying on the holdings in, *inter alia, Arias, Vandenberg* and *Lippert, infra,* the Court concluded that the successful establishment of the liability of one joint and severally liable obligor in the *Caputo Action* barred DKN from seeking to establish the legal responsibility of the severally liable co-obligors in a separate action.

F. The Opinion Next Rejected The Plain Language And Legislative Intent Of Corporations Code §16307(B)

The Court of Appeal proceeded to reject DKN's contention that Faerber's alleged "partnership liability" under the Lease "creates an independent basis" for holding him responsible on the Lease. DKN argued

that since Corp. Code §16307(b) provides that an action on a partnership obligation may be brought against the partnership "and any or all of the partners in the same action ***or in separate actions***. . ." (emphasis), it was permissible for DKN to sue the alleged partner Faerber in an action separate from the cross-complaint against Faerber's co-Lessee in the *Caputo Action*.

The Court of Appeal swept this contention aside in less than a full sentence, without any citation of authority. It peremptorily held that "this statutory authorization to sue partners in separate actions does not apply when, as here, the claims asserted in the subsequent action are barred by res judicata principles." Opinion 14.

In rejecting the partnership claim, the Court of Appeal contested DKN's assertion that the trial court had "found that Faerber, along with Caputo and Neel, were "partners" on the lease." *Id.* The Court of Appeal did recognize, however, that the trial court in the *Caputo Action* had "loosely referred to Caputo, Faerber and Neel, as "partners" who "wanted to lease and build out premises for a fitness club . . . ." *Id.*

Whether or not the trial court in the *Caputo Action* actually ruled a partnership relationship existed is immaterial here. DKN could certainly have alleged, had it been allowed to amend its complaint, that Faerber and Neel were partners with Caputo. It was therefore necessary for the Court of Appeal to make the formal finding that Corporations Code §16307(b) did not permit separate actions against the putative partners, even if they were assumed to

have been partners, because under the liberal rules permitting amendment of pleadings, the supposition necessarily had to be made that DKN could have alleged the partnership relationship in an amended complaint.

II.

ARGUMENT

A. Grounds For Review

Supreme Court review of a Court of Appeal decision will be ordered "[w]hen necessary to secure *uniformity of decision* or to *settle an important question of law*..., [or] [w]hen the Court of Appeal lacked jurisdiction." California Rules of Court, Rule 8.500(b)(1) and (2) (emphasis added).

The Opinion's rejection of the California Supreme Court's holding in *Williams 2* as "wrong" both creates a material conflict in published law, and exceeds the jurisdiction of the court under the doctrine of *stare decisis.* It effectively disposes of a *General Rule* of law, extant for well over a century, by conflating the separate and distinct legal concepts of *joint* liability, on the one hand, and *joint and several* liability on the other hand. The *New Rule* in the Opinion is plainly untenable if courts, attorneys and parties litigant are to be able to proceed rationally, relying on the integrity of precedential authority, in the conduct of their important decision making and other responsibilities. If the Opinion is allowed to stand, the concept of *stare decisis* must officially be recognized as defunct.

The same is true with respect to the Opinion's refusal to follow the clearly stated legislative intent of Corporations Code §16307(b). The judicially legislated *New Rule* exception to the clear language of the statute is both beyond the jurisdiction of the Court and creates a material conflict in the law, which renders a key issue of law completely unpredictable and a matter of chance.

B. The Appellate Court Exceeded Its Jurisdiction By Ignoring Its Duty Under *Stare Decisis*

By publishing and endorsing the formal trial position that the holding of this Court in *Williams 2* is "wrong," the Court of Appeal both created a material conflict in published California law, and violated *stare decisis*. *Stare decisis* is "based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 503-04.

As it applies to the responsibility of a lower court to adhere to governing legal precedent issued by a higher court, the principle of *stare decisis* has been declared by this court to be jurisdictional. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 430, 454-55.

> Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision,

> **express statutory declaration,**[8] or rules developed by the courts and followed under the doctrine of stare decisis **are in excess of jurisdiction,** in so far as that terms is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. Court's exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

Auto Equity Sales, supra, at 455.

As noted by the Supreme Court, it would ". . . create **chaos in our legal system** if . . . courts were not bound by higher court decisions." *Id.* at 456 (emphasis).

C. The Facts Of *Williams 2* Render Its Holding Controlling Here

Though it agreed with the trial court's express statement that the passage from *Williams 2* is "wrong," the Opinion attempted to mitigate this violation of *stare decisis* by suggesting that *Williams 2* did "not support DKN's position" because "cases are not authority for propositions not considered." Opinion, 12.

The suggestion is that *Williams 2* did not rule upon the legal issue integral to this case.

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[8] This rule applies equally to the Court of Appeal's refusal to comply with the clear legislative intent of Corporations Code §16307(b). The court does not have 'jurisdiction,' in this sense, to refuse to comply with clear legislative intent reflected in unambiguous statutory language.

Contrary to the inference in the Opinion, the holding in *Williams 2* was focused directly upon whether or not a creditor could maintain successive actions against joint and several co-obligors, on the same obligation, after a judgment had been obtained against one but not others. *Williams 2* involved four co-obligors on a promissory note. As here, it was uncontested that the co-obligors were jointly and severally liable on the note. The creditors first settled with one co-maker of the note and obtained a judgment against him, which was not paid. Subsequent to obtaining the judgment against the first co-obligor, the creditor sued the three other co-obligors. Just as Faerber successfully argued here, the successively-sued co-obligors in *Williams 2* argued that the initial judgment against the first co-obligor barred the later suit against the remaining three co-obligors:

> [The] co-makers claim that in such a case the bringing of an action against one of the makers . . . without joining the others, and obtaining judgment against him alone, bars the plaintiff from later suing any of the others in respect to that obligation.

Williams 2, supra, at 64-65.

The Supreme Court, quoting with approval the earlier published *Williams 1* opinion, rejected that argument:

> When the obligation is joint and several it is not non-joinder to sue one alone (Citations.) The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort-feasors. In such a case **the judgment obtained against one is not a bar**

> **to an action against the remaining joint and several obligors.** 'Nothing short of satisfaction in some form constitutes a bar . . . [A] mere judgment against [the first co-maker] in a separate action against him **upon the original notes** would not preclude [the creditor] from bringing subsequent actions against [the] co-makers.'

Williams 2, supra at 65 (emphasis).

The clear legal principle reflected in *Williams 2* is that joint and several obligors may be sued jointly in a single suit, or severally in separate suits. It appears beyond rational argument to the contrary that this legal principle applies directly in this case. Indeed, as noted above, the Court below emphasized and acknowledged the *General Rule*: "**To be sure,** courts are generally authorized to render separate judgments, in the same action *or in separate actions*, against joint and several obligors." Opinion, 12, citing *Melander* (1913) *and Grundel* (1900), *supra* (emphasis added).

D. <u>There Is No Material Factual Distinction Between This Case And The *Williams* Cases That Would Preclude The Application Of The Controlling Principle Of Law In *Williams 2* To This Case</u>

There is only one factual distinction upon which one might attempt to mount an argument that the holding in *Williams 2* does not govern the facts of the current case. In *Williams 2* the co-obligor against whom the first judgment was obtained agreed to settle with the creditor, who then obtained a judgment against that co-obligor on the settlement agreement. One could therefore

argue, as the appellate court appears to infer, that the facts are, to that extent, distinguishable from the current case.

It is *distinction without any material difference*. It does not change the fact that the longstanding fundamental legal principle relied upon in *Williams 2*, emanating from *Grundel* and *Melander, infra*,[9] is that joint and several contractual obligors can be sued either jointly in a single action, or severally in separate actions. That is the very essence of the difference between merely "joint" and "*joint and several.*"

E. The Appellate Court's Reliance Upon *Melander, Grundel,* And Code of Civil Procedure §§410.70, 578, and 579 As An Accurate Statement Of The *General Rule* Necessarily Defeats The *New Rule*

The extensive discussion in *Melander, supra*, at 476, clearly reflects that the *General Rule* cannot coexist with the *New Rule*. This 1913 decision provided a thorough analysis of the difference between merely *joint*, and *joint and several* liability. Concisely put, it states the *General Rule* as follows:

> Where the contract or obligation is joint and several, it is not merged in the judgment against one of the contractors, and **such judgment remaining unsatisfied will not bar an action against another of the debtors.**

Melander, supra at 476 (emphasis).

[9] Each of these holdings is over one hundred years old.

Melander provides an in depth analysis of several jurisdictions, including old English cases, and an 1839 case from Kentucky, *Sayre v. Coleman* (1839) 9 Dana 173, 1839 WL 2623 (Ky. App.). In adopting the *General Rule* as the basis for its holding, *Melander* discussed *Sayre* as follows:

> [W]here the action was upon a joint and several obligation, one of the defendants was not served with process, and judgment was taken against the others who were served.[10] Judgment was thereafter obtained against the obligor not originally served, and the contention on his appeal was that the debt or obligation had been extinguished by the judgment against the others."[11] The Kentucky Supreme Court, refusing to accept that view said: "But conceding, . . . that according to the principles of the common law, such a judgment would be a bar in the case of **joint obligors, it is so because of the unity or entirety of the obligation, the consequence of which is that whatever releases or extinguishes the cause of action as to one has the same effect as to the other, there being no power to discriminate between them in this respect. ..But in the case of a joint and several obligation** the fundamental principle on which these consequences rest is wanting. **There is a several obligation and liability resting on each obligor, independent that which rests upon the others.** The **release of one without satisfaction does not necessarily release the others** . . .

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[10] This factual construct is directly on point with the facts here.

[11] This is akin to the Faerber contention validated by the Court of Appeal in adopting the *New Rule,* while purporting to recognize the *General Rule* of *Melander* as controlling law.

Melander, supra at 477-78. (Emphasis added.)

Simply put, the *General Rule* enunciated with clarity in *Melander* is that, where the liability of more than one obligor is merely joint, then the creditor must pursue all obligors in a single action, or accept that any obligors not bound by the result in that single action are necessarily exonerated. This is because the merely joint obligation is a single unified obligation giving rise to but one right of action. The material distinction between that and a *joint and several* obligation is that the "several" nature of the obligation gives rise to multiple separate causes of action which may be pursued jointly or severally in separate actions.

The Opinion failed to abide by this *General Rule*, instead creating the manifestly contrary *New Rule* despite acknowledging *Melander* as reflecting governing law.

If the *General Rule* is applied to the joint and severally liable obligors in the current case, it necessarily follows that a judgment in the *Caputo Action* does not preclude DKN's pursuit of the jointly and severally liable co-obligors Faerber and Neel in the *Faerber Action*.

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F. The Appellate Court's Reliance On *Lippert* To Support Its *Res Judicata* Holding Is Misplaced, As *Lippert* Is Not A *Res Judicata* Case

The Opinion held that the claim preclusion element of *res judicata* applied in the current case to prohibit the *Faerber Action.* In this regard the Court held:

> DKN argues that the because joint and several obligors are jointly *and severally, or individually,* liable on an obligation, a claim against each of them constitutes a *separate claim.* DKN is mistaken. Under the primary rights theory, and for purposes of applying the res judicata doctrine,[12] the claims are identical. (*Lippert v. Bailey* (1966) 241 Cal. App. 2d 376, 382. . . .)

Opinion 10.

It is here, in failing to recognize that the precise basis for the *Melander* holding was that the claims are **not** "identical" where the liability is joint and several, that the Opinion failed to apply the *General Rule* it nonetheless acknowledged is the law.

The holding in *Lippert* is distinguishable in several respects. First, though the Opinion relies upon *Lippert* "for purposes of applying the res judicata doctrine . . ." (*id.*), the holding in *Lippert* had nothing to do with *res judicata. Lippert* involved a claim by a plaintiff-insured against the insurance

[12] *Lippert* is clearly not a *res judicata* holding.

company, and the company's sales agents, in connection with an alleged failure to provide sufficient insurance to the insured. Prior to trial against the agents, the insured settled with the insurance company. The insured provided the insurance company a general release, reserving the right to proceed against the sales agents.

After trial on the merits, the court held that the insured's general release of the insurer barred further action against the agents. This conclusion was not based in any way upon the principle of *res judicata*. It was based upon the trial court's conclusion, based on *substantial evidence*, that the nature of the defendants' agency was such that they were the agents of the insurance company only, and not agents of the plaintiff insured. Relying on that fact-based conclusion as to the nature of the agency, the trial court applied the principle of law that an agent does not bear liability for the breaches of its principal, if the nature of the agency relationship is properly disclosed at the time of the transaction between the third party and the principal, through its disclosed and authorized agent. In this regard the court provided the following rationale:

> While an insurance agent may be personally liable to the insured for damages which are the result of the agent's negligent failure to insure property as contracted, the **agent's personal liability is dependent upon the extent of the disclosure of the agency. . . .** '(L)iability to the applicant or insured for acts or contracts of an insurance agent within the scope of his agency, with a full disclosure of the principal, **rests on**

> **the company**. . .' 'Where an agent is duly constituted and names his principal and contracts in his [principal's] name and does not exceed his authority, **the principal is responsible and not the agent**'

Lippert, supra, at 382. (Emphasis added.)

The holding in *Lippert* has nothing to do with the material facts or legal principles in this case. Unlike here, there was no expressly stated contractual *joint and several* liability in the insurance company and its agent. There was no allegation that the insurance company and the agents were partners, subject to joint and several partnership liability, which a statute provided could be pursued in a single, or several lawsuits. On the contrary, the basis for the Court of Appeal upholding the trial court's fact-based conclusion, under the *substantial evidence* standard of review wholly inapplicable here, was the law which provides that a disclosed agent acting within the scope of his agency does not bear liability for the obligations of his or her principal.

Ironically, if the ruling in *Lippert* applied in the present case, as suggested in the Opinion, it would simply give rise to another example of the Opinion being irreconcilably at odds with the *General Rule* it concedes. *Lippert* does not support the proposition for which it is submitted in the Opinion.

G. Neither *Arias* Nor *Vandenberg* Supports The *New Rule*

The Opinion holds that Lessees Faerber and Neel were entitled to "invoke res judicata against DKN in the present action based on the final

judgment in Caputo action, even though Faerber and Neel were not parties to the Caputo action." Opinion 8-9. The Opinion cited *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 985 and *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 828, for this proposition. Neither of these holdings extends to the facts of this case, nor do they justify the creation of the *New Rule.*

As explained in *Vandenberg*:

> Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form res judicata "'precludes parties or their privies from re-litigating a *cause of action* [finally resolved in a prior proceeding].'" (Citations.) But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an *issue* " 'necessarily decided in [prior] litigation [may be] conclusively determined *as [against] the parties [thereto] or their privies* . . . in a subsequent lawsuit on a *different* cause of action]'" (Citations.)

Vandenberg, supra at 828.

The text above reflects an essential element for the application of the "claim preclusion" arm of *res judicata.* Where, as here, a non-party to the initial litigation seeks to apply claim preclusion or collateral estoppel against a party plaintiff in a second litigation, the ruling from the first litigation must have been "against" the party plaintiff in the second litigation. The party plaintiff in the second litigation must be seeking a *second bite at the apple* whereby it hopes to obtain a beneficial ruling in the second action, notwithstanding a negative ruling in the same issue in the first action.

> Accordingly, the collateral estoppel doctrine may allow one who was not a party to prior litigation to take advantage, in a later unrelated matter, of a finding[13] **made against his current adversary in the earlier proceeding**. This means that the loss of a particular dispute against a particular opponent in a particular forum may impose adverse unforeseeable litigation consequences far beyond the parameters of the original case.

Vandenberg, supra at 828-29.

It is through this prohibition against a party seeking different results on the same issue in a subsequent litigation, that collateral estoppel and claim preclusion assist in maintaining the integrity of the legal system.

> Collateral estoppel (like the narrower "claim preclusion" aspect of *res judicata*) is intended to preserve the integrity of the judicial system, promote judicially commonly, and protect litigants from harassment of vexatious litigation.

Vandenberg, supra at 829.

Neither *Vandenberg* nor *Arias*, which relies upon *Vandenberg*, supports the *New Rule* holdings. Faerber does not seek to hold any "finding" in the *Caputo Action* against DKN. DKN does not seek a *second bite at the apple* in the *Faerber Action*. On the contrary, the judgment in the *Caputo Action* was entirely in favor of DKN. This renders both collateral estoppel and claim preclusion inapplicable in the *Faerber Action*.

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[13] There was no finding in the *Caputo Action* of which Faerber sought to take advantage.

H. The Appellate Court Exceeded Its Jurisdiction By Ignoring The Clear Legislative Intent Of Corporations Code §16307(B), And By Judicially Legislating An Exception Which Eviscerates The Rule Of The Statute

The unequivocal mandate of Corporations Code §16307(b) is that a creditor may pursue legal action against "any or all of the partners in the same action **or in separate actions**." (Emphasis.) This mandate is unambiguous.

It is fundamental that the judiciary is obliged to carry out the intent of the Legislature. From a constitutional standpoint, the Court does not have jurisdiction to legislate or to ignore a constitutional legislative mandate.[14] ["When the Legislature has spoken, the court is not free to substitute its judgment as to the better policy. We are obliged to carry out the intent of the Legislature if it can be ascertained." *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 121; "[W]e follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act." *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632. (Internal quotations omitted.)]

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[14] There is no basis for suggesting that Corporations Code §16307(b) is in any way unconstitutional.

The *New Rule* has transformed the legislatively mandated right to bring "separate actions" against partners with a judicially legislated caveat not even hinted at by the Legislature. The import of the *New Rule* is that, in order for §16307(b) to be correctly understood, the express statutory authorization to bring "separate actions" against partners needs to be supplemented with words to the effect of: "...but if a creditor complies with the 'separate actions' language of this statute, and then obtains a judgment against any one or more partners in one of those permissible separate actions, then, though the judgment may remain completely unsatisfied, all other partners not subject to the first judgment are exonerated by that judgment, and the permissible 'separate actions' must therefore be immediately dismissed."

One wonders in this context, are the partners in the "must be dismissed" actions the prevailing parties? Are they entitled to an award of costs, or attorney's fees where the contract at issue so provides? These are just some of the many questions and issues born of the *New Rule*.

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I. It Is Important That Review Be Granted In Order To Eliminate The Current Material Conflict In Published Law Created By The Opinion

With the Court of Appeal's published statement of the *New Rule*, there are now extant materially conflicting holdings on the commonly-faced [15] issue which long ago gave rise to the *General Rule*.

This conflict of law has created a collateral conflict of law in the doctrine of *stare decisis*. The *New Rule*, issued by a subordinate court, treats the Supreme Court's governing precedent, as well as statutory law with respect to the governing *General Rule*, as "wrong." Worse than just treating the Supreme Court's governing precedent as "wrong" on a principle of law which is venerable, the Opinion broadcasts to the world that the trial court acted correctly when it held that the Supreme Court was "wrong," and when it disparaged Witkin's concurring discussion as a "classic example" of that respected treatise mischaracterizing the law.

J. Is *Stare Decisis* Still Applicable In California?

If the Opinion stands, it presents a brave new world for litigators, their clients, and the judiciary. Where trial courts are openly affirmed on appeal for

[15] Lenders and lessors are just two types of creditors to which this legal principle is critical in innumerable commercial and non-commercial transactions.

having held the Supreme Court "wrong," without so much as a nod to the compulsory doctrine of *stare decisis*, is the new standard of care among litigating attorneys the obligation to urge trial courts of inferior jurisdiction to reject prior holdings of courts of superior jurisdiction? Will lawyers be held to have failed to honor their profound professional responsibilities if they do not urge trial and appellate courts to reject controlling superior precedent?

The same questions arise in connection with the statutory law. Lawyers will be obliged to encourage courts to disregard the plain literal meaning of the language of statutes, because the Opinion here rejected the plain meaning of Corp. Code. §16307(b) and judicially legislated an exception to the statute that vitiates its obvious intent.

A collateral aspect of this issue is the manner in which the trial court gave the metaphorical back of its hand to a highly respected legal treatise commonly cited by lawyers and courts alike.[16] While it is true that the pronouncements of Witkin are not controlling on any court, it is no less true that principles stated in Witkin in this instance are consistent with this Court's holding in *Williams 2, Grundel, Melander,* and centuries of common law.

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[16] While Witkin may not **always** *get it right*, a Westlaw search for "Witkin" in "West's California Reported Cases" library turned up ten thousand (10,000) results. Plainly, Witkin is well respected and commonly relied upon by the courts of California.

One must also ask the question of how the *New Rule* can be squared with its own citation and approbation of the *General Rule*. The *General Rule* simply cannot be squared with the *New Rule*. Directly contrary to the intended effect of the long-standing *General Rule* that separately sued, jointly and severally liable co-obligors are susceptible to separate judgment and enforcement, the *New Rule* compels the opposite result. Under the *New Rule*, the issuance of a first judgment triggers the claim preclusion arm of *res judicata* and thereby necessarily precludes the *General Rule* from having any meaning. The purported *exception* of the *New Rule* necessarily consumes and eliminates the *General Rule*.

K. It Is Important Not To Depublish The Opinion

There is a genuine need for clarification of the *General Rule* as it relates to principles of *res judicata,* collateral estoppel, and claim preclusion. In agreeing with the trial court's observation that *Williams 2* was "wrong," the Opinion observed that *Williams 2* was fifty-six years old. The *Grundel* and *Melander (infra)* decisions are over a hundred years old. Thus, the principles at issue, though they should be *black letter law*, have not been enunciated in clear and current law in a manner which would have allowed the courts below to avoid the errors reflected in the Opinion. As reflected by the Opinion, the state of published law is such that there can be genuine confusion as to whether or not principles emanating from the doctrine of *res judicata* trump the essence of the *General Rule.*

The issue of whether or not the *General Rule* applies does and will arise frequently as a common element of substantial commerce in California. Using only promissory notes (commercial and private lenders) and property leases as two common examples, where many others undoubtedly exist, there are innumerable transactions which have already occurred, and innumerable transactions which are occurring daily, and which will regularly continue to occur in the future, wherein the issue of whether or not joint and severally liable obligors can be sued in separate actions will arise. This is a area of law and commerce where clear instruction is essential. Both the courts and legal practitioners require clear direction from this Court in the discharge of their important fiduciary obligations to clients, and their no less important obligations as officers of the court.

From a purely practical standpoint, the interests of justice call for a published opinion in this case. The Opinion observed that the attorneys representing DKN could not have reasonably relied upon the misleading arguments that Faerber and Neel were not intended lessees when they chose to proceed against Caputo alone in the *Caputo Action*. Plainly, that observation gives rise to malpractice implications for both those attorneys and DKN. These implications could well affect the court system with additional litigation, avoidable if this Court publishes an opinion. Since the judgment was for over three million dollars ($3,000,000.00), it is of material financial significance to both DKN, a husband and wife owned business entity, and to

the attorneys who counseled them not to be able to proceed against Faerber and Neel.

For the foregoing reasons, DKN respectfully submits that this case rises to a sufficient level of importance to preclude depublication. Depublication would leave the interests of justice and the need for clarification in the law wanting.

L. If The Opinion Is Not Reversed, It Is Important For This Court To Instruct The Bench And Bar As To Unreliable Prior Precedent

If this Opinion is not reversed, then it is critical for this Court to publish an instructive opinion advising the bench, the bar, and legal commentators such as Witkin that prior authorities of *Williams 1* and *2*, *Grundel*, and *Melander*, *supra*, as well as the plain language of Corporations Code §16307(b), and Code of Civ. Proc. §§420.70, 578 and 579 are unreliable and misleading authority. A bright-line rule must be stated answering the question: Is it permissible, or not, for a contractual obligee to sue jointly and severally liable contractual obligors in separate lawsuits without the risk that a judgment in one, though unsatisfied, will bar any further action against other co-obligors?

III.

CONCLUSION

DKN submits that the holding of the Court of Appeal Opinion is clearly wrong. More than just being wrong, the Opinion promulgates a *New Rule* which is well beyond the jurisdiction of the issuing court, and which conflicts with controlling precedent from this Court[17] and controlling statutory law. The Court of Appeal has clearly violated *stare decisis.* In an almost revolutionary move, it has given open approbation to a trial court that, for some inexplicable reason, construed itself as having the authority to expressly hold controlling precedent of the Supreme Court as "wrong," while demeaning consistent commentary in Witkin as a "classic example" of Witkin mischaracterizing the law.

Hopefully it does not amount to hyperbole to suggest that the effect of the Opinion represents an assault, surely unintended, on the integrity of common law jurisprudence and fundamental principles upon which that system is based. As noted in *Auto Equity, supra* at 455, legal "chaos" will ensue if the principle of *stare decisis* is ignored. It has been ignored in this case.

[17] The Opinion not only holds *Williams 1* and *2* "wrong," it also ignores its jurisdictional limitations under *Auto Equity, supra.*

DATED: May 15, 2014

Respectfully submitted,

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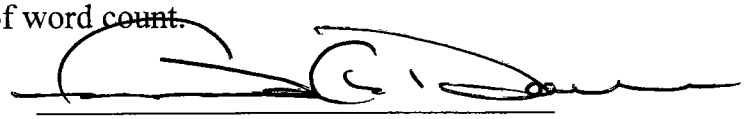
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)1))

The text of this brief consists of 7,465 words as counted by the Microsoft Word version 7 Professional word-processing program used to generate the brief, exclusive of the cover, table of contents, table of authorities, and this certificate of word count.

Dated: **May 15, 2014**



MICHAEL G. DAWE

EXHIBIT A

Filed 4/9/14: pub. order 4/25/14 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DKN HOLDINGS LLC, Plaintiff and Appellant, v. WADE FAERBER, Defendant and Respondent.	E055732, E056294 (Super.Ct.No. RIC1109512) O P I N I O N

APPEAL from the Superior Court of Riverside County. John Vineyard, Judge. Affirmed.

Prenovost, Normandin, Bergh & Dawe, Michael G. Dawe and Paula M. Harrelson for Plaintiff and Appellant.

Callahan & Blaine, Edward Susolik and Michael S. LeBoff for Defendant and Respondent.

I. INTRODUCTION

Plaintiff DKN Holdings LLC (DKN) appeals from a judgment of dismissal after the trial court sustained, without leave to amend, defendant Wade Faerber's demurrer to DKN's complaint for monies due under a commercial lease. (Code Civ. Proc., § 430.10 subd. (e).)[1] DKN also appeals from a postjudgment order awarding Faerber $54,817.50 in attorney fees as the prevailing party in the action on the lease, claiming the fee award is unreasonable. The two appeals have been consolidated for oral argument and decision.

In this appeal, we affirm the judgment of dismissal and the attorney fee award. In case No. E056497, DKN appeals a postjudgment order dismissing another defendant, Matthew Neel, whose default was entered after he was served with the complaint but failed to appear. In that appeal, we affirm the order dismissing Neel.

II. BACKGROUND

A. *Synopsis*

By its complaint in the present action, DKN, a lessor on a commercial lease, sued Faerber and Neel, two of three colessees, for unpaid rents and other monies due under the lease. In a prior action, DKN obtained a money judgment for over $3 million against the third colessee, Roy Caputo, following a court trial on the merits for monies due under the lease. The lease provides that colessees shall be "jointly and severally responsible" to comply with its terms. Although DKN sued Faerber and Neel in the prior action, along

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

with Caputo, DKN dismissed them without prejudice before trial and judgment. The judgment against Caputo is apparently unsatisfied.

The question on the present appeal from the judgment of dismissal is whether the judgment against Caputo in the Caputo action bars DKN's claims against Faerber and Neel in the present action. The trial court concluded that the judgment against Caputo bars DKN's claims in the present action, and we agree. We conclude that the complaint does not and cannot state a cause of action against Faerber and Neel for monies due under the lease, because DKN's claims against Faerber and Neel in the present action are barred by the claim preclusion aspect of the res judicata doctrine.

B. *The Lease Agreement*

In June 2004, Faerber, Neel, and Caputo agreed to lease retail space in a Murrieta shopping center known as Margarita Square from the center's co-owners and lessees, DKN and CDFT Limited Partnership (CDFT). The parties signed a "Standard Retail/Multi-Tenant Lease-Net" lease with a 10-year term. Section 48 of the lease provides that "multiple parties" signing the lease as lessors or lessees "shall have *joint and several responsibility*" to comply with its terms. (Italics added.) For purposes of the present demurrer, Faerber and DKN do not dispute that Caputo, Faerber, and Neel were jointly and severally liable to DKN under the lease.

Faerber is an orthopedic surgeon, and Caputo is also a physician. Faerber, Caputo, and Neel intended to use the leasehold to build and operate an "upscale" fitness and training center under the trade name Evolution Elite Sports and Fitness Club. In

September 2004, the lease was amended to increase the size of the leasehold from approximately 15,000 square feet to approximately 22,000 square feet, and the rent was increased. Around March 2007, Faerber and Caputo acquired Neel's interest in the business and orally agreed to indemnify Neel for any liability he may incur for monies due under the lease.

C. *The First Action on the Lease*

In June 2007, Caputo sued DKN, seeking to rescind or cancel the lease and for money damages based on fraud, breach of fiduciary duty, and other grounds or causes of action (the Caputo action).[2] In a nutshell, Caputo alleged that DKN failed to make material disclosures concerning the leasehold and breached its obligations under the lease, resulting in the failure of the fitness club. Among other things, Caputo claimed DKN failed to disclose that (1) a streambed near the shopping center was required by law to be planted with native vegetation that could not be trimmed and that would block views to the leasehold, and (2) a center median would have to be constructed on Murrieta Hot Springs Road, reducing and inhibiting access to the shopping center.

In the Caputo action, DKN and CDFT cross-complained against Caputo, Faerber, and Neel for monies due under the lease. Caputo was served with DKN's first amended cross-complaint, but Faerber and Neel were not served. Following a June 2011 court trial and statement of decision on the complaint and first amended cross-complaint, Caputo

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[2] The Caputo action, *Roy Caputo, M.D. v. DKN Holdings LLC et al.*, was filed in the Riverside County Superior Court and was assigned case No. RIC474609.

was denied any relief on his complaint, and DKN/CDFT was awarded over $2.8 million in money damages on its cross-complaint against Caputo. Faerber and Neel were dismissed as (unserved) cross-defendants following the entry of the judgment against Caputo. Thereafter, DKN/CDFT did not move to add Faerber or Neel to the judgment against Caputo as additional judgment debtors. (§ 989.)

D. *The Present Complaint Against Faerber and Neel*

On June 1, 2011, shortly before the statement of decision was issued in the Caputo action, DKN filed the present action against Faerber and Neel, asserting two cause of action. The first cause of action, for breach of the lease, names both Faerber and Neel and seeks the same money damages that DKN was awarded against Caputo in the Caputo action. The second cause of action, for breach of an oral indemnity agreement against Faerber, alleges DKN is entitled to the benefit of Faerber's March 2007 oral agreement to indemnify Neel for any liability Neel may incur under the lease. The claim alleges Faerber "is now obligated to DKN for Neel's non-payment of rent on the oral contract for indemnity."

E. *Faerber's General Demurrer*

Faerber demurred to the complaint on the ground it failed to state a cause of action because the judgment against Caputo barred DKN's claims against Faerber and Neel for monies due under the lease. (§ 430.10, subd. (e).) Faerber claimed that DKN was improperly splitting its single cause of action or primary right for monies due under the lease into two separate suits, the first against Caputo in the Caputo action and the second

against Farber and Neel in the present action. In opposing the demurrer, DKN claimed that joint and several obligors, such as Caputo, Faerber, and Neel, may be sued in separate actions under California law.

The trial court sustained Faerber's demurrer, without leave to amend, and entered judgment in favor of Faerber. In a postjudgment order, Faerber was awarded $54,817.50 in attorney fees.

III. DISCUSSION/FAERBER'S GENERAL DEMURRER

A. *Standard of Review on Demurrer*

We independently review the court's order sustaining, without leave to amend, Faerber's general demurrer to DKN's complaint in the present action. (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1526.) "We first review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory. [Citation.] '"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]"' [Citation.] 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]' [Citation.]" (*Estate of Dito* (2011) 198 Cal.App.4th 791, 800.)

B. *The Judgment Against Caputo in the Caputo Action Bars DKN's Claims Against Faerber and Neel in the Present Action*

DKN claims Faerber's demurrer was erroneously granted and the complaint states a cause of action. DKN argues that, under California law, joint and several obligors, such as Faerber, Neel, and Caputo, may be sued in separate actions. As we explain, DKN is mistaken. Joint and several obligors may not be sued in separate actions when, as here, the claim or claims against them are barred by a prior judgment under the claim preclusion aspect of the res judicata doctrine.

"'As generally understood, "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" [Citation.]'" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.)

The purpose of the doctrine of res judicata is "'to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation.' [Citations.]" (*Brinton v. Bankers Pension Services, Inc.* (1999) 76

Cal.App.4th 550, 556.) "'"The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]"' [Citation.]" (*Boeken v. Philip Morris USA, Inc., supra,* 48 Cal.4th at p. 797.) The party asserting the preclusive effect of a prior judgment bears the burden of establishing it. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 529.)

The present case concerns the claim preclusion aspect of res judicata, not the issue preclusion or collateral estoppel aspect. We independently conclude that all three elements of the res judicata doctrine apply, and that the judgment in the Caputo action bars DKN's claims against Faerber in the present action.

First, it is undisputed, and the judicially noticed records from the Caputo action show, that DKN was a party to the Caputo action and the action resulted in a final judgment on the merits against Caputo. As a party to the Caputo action, DKN is bound by the judgment in that action, and res judicata may be invoked against DKN based on the final judgment. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985 [res judicata operates "only against those who were parties, or in privity with parties, to that prior litigation and who are thus bound by the resulting judgment."].)

Furthermore, Faerber and Neel may invoke res judicata against DKN in the present action based on the final judgment in the Caputo action, even though Faerber and

Neel were not parties to the Caputo action. "The party seeking the benefit of the [res judicata] doctrine . . . need not have been a party to the earlier lawsuit." (*Arias v. Superior Court, supra,* 46 Cal.4th at p. 985.) "Only the party *against whom* the doctrine [of res judicata] is invoked must be bound by the prior proceeding." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.)

In addition, the present action against Faerber and Neel is based on the same claims that DKN asserted against Caputo in the Caputo action. In California, the primary rights theory applies in determining whether two proceedings involve identical causes of action, for purposes of claim preclusion. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) Under the primary rights theory of code pleading, which has long been followed in California, "'a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] . . .

"'As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a

single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." [Citation.]'" (*Mycogen Corp. v Monsanto Co., supra,* 28 Cal.4th at p. 904.)

DKN's claims against Faerber and Neel are based on the same primary right—the right to recover monies due under the lease—that DKN asserted against Caputo in the Caputo action. The first cause of action against both Faerber and Neel for their failure to pay monies due under the lease is based squarely on DKN's right to recover monies due under the lease. Similarly, DKN's second cause of action against Faerber (only) seeks the benefit of Faerber's oral agreement to indemnify Neel for any liability Neel may incur under the lease. As such, the second cause of action is based on DKN's primary right to recover monies due under the lease, even though it seeks to vindicate that right by the alternative remedy of obtaining the benefit of Faerber's agreement to indemnify Neel. (*Boeken v. Philip Morris USA, Inc., supra,* 48 Cal.4th at p. 798 ["under the primary rights theory, the determinative factor is the harm suffered."].)

DKN argues that because joint and several obligors are jointly *and severally, or individually*, liable on an obligation, a claim against each of them constitutes a *separate claim.* DKN is mistaken. Under the primary rights theory, and for purposes of applying the res judicata doctrine, the claims are identical. (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382 [Fourth Dist., Div. Two] ["A single cause of action may not be maintained against various defendants in separate suits as the plaintiff has suffered but one injury."].)

Relying on a passage from the California Supreme Court's 56-year-old decision in *Williams v. Reed* (1957) 48 Cal.2d 57, 65 (*Williams*), DKN argues that a judgment against one joint and several obligor does not foreclose a later action against another joint and several obligor on the same obligation. The *Williams* court observed: "It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensible parties. They may not be sued separately [citations]. If judgment is obtained in a separate action against one, it bars an action against the others. [Citation.] When the obligation is *joint and several*, it is not nonjoinder to sue one alone [citations]. The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort feasors. In such a case the judgment obtained against one is not a bar to an action against the remaining joint and several obligors. '*Nothing short of satisfaction in some form constitutes a bar . . . .*'" (*Ibid.*, quoting *Grundel v. Union Iron Works* (1900) 127 Cal. 438, 442.)

Based on this passage from *Williams*, DKN argues that because Caputo, Faerber, and Neel are jointly *and severally* liable for the unpaid rents and other monies due under the lease, the judgment against Caputo does not bar DKN's identical claims against Faerber and Neel in the present action. We disagree. As the trial court noted in sustaining the demurrer, the passage from *Williams* is "wrong" and incorrectly states the law—to the extent it may be construed as allowing an obligee, such as DKN, to obtain separate judgments *in separate actions* against joint and several obligors, based on the same claims. *Williams* did not address the issue presented here: whether a final

judgment on the merits against *one* joint and several obligor bars a subsequent action and judgment against *additional* joint and several obligors, on the same obligation, by the same claimant. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["cases are not authority for propositions not considered."].) Thus, *Williams* does not support DKN's position.[3]

To be sure, courts are generally authorized to render separate judgments, in the same action *or in separate actions*, against joint and several obligors. (*Melander v. Western Nat. Bank* (1913) 21 Cal.App. 462, 474-478 [construing former § 414, now § 410.70 & §§ 578, 579, as authoring courts to enter separate judgments in separate actions against joint and several obligors];[4] see also *Grundel v. Union Iron Works, supra,* 127 Cal. at p. 442 [joint and several tort feasors may be sued in separate actions].) But even when joint and several obligors are not required to be sued in the same action (see §§ 410.70, 379, 389) when, as here, a final judgment on the merits has been rendered in

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[3] DKN similarly relies on a 1918 Georgia appellate court case which, like *Williams*, did not address the effect of the res judicata doctrine of a prior judgment on successive actions on the same claims against joint and several obligors. (*Johnson v. Georgia Fertilizer & Oil Co.* (1918) 21 Ga.App. 530 [94 S.E. 850].)

[4] Section 410.70 provides: "In an action against two or more persons who are jointly, jointly and severally, or severally liable on a contract, the court in which the action is pending has jurisdiction to proceed against such of the defendants as are served as if they were the only defendants."

Section 578 provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

Section 579 provides: "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

one action against a joint and several obligor, res judicata will bar the assertion of identical claims against other joint and several obligors, in a subsequent action, by parties bound by the judgment in the prior action.

DKN also relies on the following passage from Witkin: "If the defendants are both jointly and severally liable, joinder is not mandatory but permissive, and the plaintiff, although he or she has but one cause of action, may sue one defendant first and another later. Despite the theoretical incongruity, the plaintiff is not barred in the second action because the defense of res judicata is available only *when both the cause of action and the parties are the same*." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 65, p. 124, italics added.) Like the passage from *Williams, supra,* 48 Cal.2d at page 65, the trial court rejected this passage from Witkin as an incorrect statement of the law,[5] and we agree it is incorrect. The passage from Witkin mistakenly indicates that defendants in the current proceeding must have been parties to the prior proceeding, in which a final judgment on the merits was obtained on the same claims, in order to invoke res judicata in the current proceeding, but this is not the law. As discussed, only the party *against whom* res judicata is invoked must have been a party to the prior action and bound by the judgment in that action. (*Arias v. Superior Court, supra,* 46 Cal.4th at p. 985.) It is not necessary that the party invoking the doctrine in the prior proceeding have been a party to the prior proceeding, or bound by the judgment in that proceeding. (*Ibid.*)

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[5] The trial court commented that the quoted passage from Witkin was "one of those classic examples of Witkin referring to and relying on a case that doesn't support the theory published in Witkin." (Underlining omitted.)

C. *DKN's Partnership Claim is Unavailing*

DKN further claims its complaint states a cause of action because the trial court in the Caputo action found that Faerber, along with Caputo and Neel, were "partners" on the lease. DKN is mistaken. In its statement of decision in the Caputo action, the trial court did not find that Caputo, Faerber, and Neel were partners, and even if it had, the finding would not be binding on Faerber or Neel because they were not parties to the Caputo action. In generally describing the lease, the trial court in the Caputo action loosely referred to Caputo, Faerber, and Neel as "partners" who "wanted to lease and build out premises for a fitness club . . . ."

In any event, DKN argues Faerber's "partnership liability" under the lease "creates an independent basis" for holding him responsible in the present action on the lease, apart from his joint and several liability as a colessee. DKN reasons that California's Uniform Partnership Act of 1994 (Corp. Code, § 16100 et seq.) permits a plaintiff to sue partners in separate actions. Though the Uniform Partnership Act of 1994 provides that "an action" may be brought against the partnership "and any or all of the partners in the same action *or in separate actions*" (Corp. Code, § 16307, subd. (b), italics added), this statutory authorization to sue partners in separate actions does not apply when, as here, the claims asserted in the subsequent action are barred by res judicata principles.

D. *DKN's Misrepresentation Claim is Unavailing*

Based on facts neither alleged in the complaint nor judicially noticed, DKN claims Faerber misled and deceived DKN to dismiss Faerber from the Caputo action, without

prejudice. DKN argues that Faerber has "unclean hands" because, near the outset of the Caputo action, the attorney representing Caputo, Faerber, and Neel falsely represented to DKN that, shortly after the lease was signed in June 2004, the three colessees, together with DKN's representative, Bill Dendy, amended the lease to exclude Faerber and Neel as colessees and to provide that Caputo was the sole lessee. Dendy was the managing partner of CDFT, the co-owner of the shopping center, and DKN's colessor on the lease with Caputo, Faerber, and Neel.

DKN represents that Dendy, who died in 2005, was the only person on DKN's side of the transaction who had personal knowledge of whether the lease was amended to exclude Faerber and Neel as lessees, as Faerber claimed. The lease was not well documented, and there were ambiguities and omissions in the documents constituting the lease. DKN claims it did not serve Faerber or Neel with its amended cross-complaint in the Caputo action and instead dismissed Faerber and Neel, without prejudice, based on their attorney's representation that the lease was amended to exclude them. Now, however, DKN argues that the evidence presented at trial in the Caputo action, including Faerber's testimony, shows Faerber's counsel misrepresented the facts, and that Faerber and Neel were in fact intended to be bound by the lease.

DKN's argument is unavailing. Even if the complaint were amended to allege that Faerber negligently or intentionally misled DKN regarding his and Neel's status as colessees under the lease, the complaint would not state a cause of action against Faerber or Neel. (*Estate of Dito, supra,* 198 Cal.App.4th at pp. 800-801 [when the facts pleaded

do not state a cause of action, we determine whether the plaintiff has demonstrated a reasonable possibility that the defect can be cured by amendment].) DKN does not argue that Faerber is equitably estopped from asserting that the present action against him is barred by res judicata principles, and even if it did, it could not state facts sufficient to support the *reasonable reliance* element of equitable estoppel. (See *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187-188 [reasonable reliance element of equitable estoppel is question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence].)[6]

DKN was represented by counsel in the Caputo action, and DKN dismissed Faerber and Neel from that action before discovery was completed and the matter proceeded to trial. In the absence of documentation showing the lease had been amended to exclude Faerber and Neel as colessees, DKN did not reasonably rely on any oral misrepresentation by Faerber or his counsel that the lease had been amended, shortly after it was signed, to exclude Faerber and Neel as colessees.

IV. DISCUSSION/THE ATTORNEY FEE AWARD

The trial court awarded Faerber $54,817.50 in attorney fees as the prevailing party on DKN's complaint pursuant to a fee provision in the lease. (Civ. Code, § 1717.) The award was around 30 percent less than the $78,177.50 sum Faerber sought for defending

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[6] In the trial court, DKN argued Faerber was judicially estopped from arguing in the present action that he should have been a party to the Caputo action, because in the Caputo action he took the inconsistent position of claiming he was not intended to be a lessee and had to be dismissed from the Caputo action.

the complaint. DKN claims the $54,817.50 award is unreasonably high, and constitutes an abuse of the trial court's discretion. We find no abuse of discretion.

A. *Background*

In support of the $78,177.50 attorney fee motion, Faerber's lead counsel, Edward Susolik, submitted a declaration, together with invoices to Faerber, showing the hours billed and the hourly rates charged to Faerber in connection with representing him in the present action. The hours billed were recorded contemporaneously with the hours worked. Susolik had over 20 years of experience as a litigator and trial lawyer, had handled "numerous complex real estate litigation matters," and charged $525 an hour. Two attorneys who assisted Susolik had 12 and 13 years of experience, and were billed at $395 an hour. A paralegal's time was charged at $155 per hour.

In Susolik's experience, the hourly rates charged were consistent with the hourly rates charged by other attorneys and paralegals "in the community" with similar skill and experience. Susolik's law firm, Callahan & Blaine, was located in Orange County. The law firm representing DKN, Prenovost, Normandin, Bergh & Dawe, was also located in Orange County.

The total number of hours billed was 167.2. The invoices show the attorneys billed for time incurred in preparing the demurrer and the attorney fee motion, attending the hearings on the motions, reviewing and analyzing the complaint and the rulings in the Caputo action, arranging for and attending a one-day mediation at Judicial Arbitration and Mediation Services, preparing "a comprehensive mediation brief," engaging in

further settlement discussions, conducting "factual investigation and legal research relevant to the claims and defenses" in the present action, and preparing and serving a motion for sanctions (§ 128.7), which was not filed. The attorneys also prepared and presented a demand letter to DKN's counsel, with case citations, demanding the dismissal of the complaint because its claims were barred by "the rule against splitting causes of action." The letter warned that DKN and its attorneys would be subject to sanctions if the complaint was not dismissed. By its complaint, DKN was seeking over $5.2 million from Faerber for monies due under the lease.

In opposing the attorney fee motion, DKN argued the amount sought was "grossly excessive for the filing of a single demurrer" based on a simple, straightforward legal theory. In addition, the community for determining counsel's compensable hourly rates was "the Riverside County Area," and the rates charged, an average of $460 an hour, was excessive for Riverside County.

Further, there was "no need" for Faerber to hire new counsel in the present action, and the fees counsel billed in order to "get up to speed" on the Caputo action were unnecessary and duplicative of the work performed by the attorney who represented Faerber, Neel, and Caputo in the Caputo action. DKN also asked the court to subtract 16.55 hours billed for preparing the sanctions motion because the motion was not filed and was prepared and served "for the purpose of intimidation and gamesmanship." DKN also objected to various hours billed in connection with preparing intra-firm memoranda, the demand letter, the mediation brief, and the demurrer. For example, DKN noted that

1.55 hours in paralegal time was billed for making copies of the demurrer and placing them in a binder. More generally, DKN complained there were "multiple attorneys billing to perform the same task, sometimes more than once, throughout the invoices."

At the hearing on the motion, the trial court awarded Faerber $54,817.50 as a reasonable fee, which was $23,360, or approximately 30 percent, less than the $78,177.50 amount Faerber requested. The court said: "The billing rate is borderline, but I have not reduced it. I think it's a little high, but not so high I can say it's unreasonable." The court did not identify each billing entry it excluded, but said it was excluding the 16.5 hours billed for the unfiled sanctions motion, and what "appeared to be inflated a number of hours for an internal memo," as well as two letters to opposing counsel demanding dismissal of the complaint, and other time entries that appeared to be unrelated to the action.

B. *Applicable Law and Analysis*

An order granting or denying attorney fees is reviewed for an abuse of discretion. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148.) Civil Code section 1717, the basis for the attorney fee award to Faerber, provides that "[r]easonable attorney's fees shall be fixed by the court . . . ." A trial court has broad authority to fix the amount of a reasonable fee. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The amount awarded is governed by equitable principles and will not be disturbed on appeal unless it is "'clearly wrong'" (*ibid.*) or "'manifestly excessive in the circumstances.'" (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 210.)

A trial court's fee setting inquiry "ordinarily begins with the "'lodestar,'" i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1095.) "'[A] computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' [Citation.]" (*Ibid.*) The reasonable hourly rate is "that prevailing in the community for similar work." (*Ibid.*; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 [lodestar rate is the "prevailing rate for private attorneys in the community conducting *noncontingent* litigation of the same type."].)

Once the lodestar figure is fixed, the court may adjust it based on a consideration of factors specific to the case, in order to arrive at an amount representing the fair market value of the legal services provided. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 870.) As relevant here, these factors include the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, and the success or failure of the representation. (*PLCM Group, Inc. v. Drexler, supra*, at p. 1096.) The court may also reduce or deny a fee request that appears unreasonably inflated or duplicative. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 & fn. 21.)

DKN claims the court abused its discretion in failing to calculate the lodestar and use it as "the starting point" in determining the $54,817.50 fee award, and that the court instead used "the excessive fee totals" submitted by Faerber as a starting point in its analysis, resulting in an excessive fee award. We disagree.

Counsel's time records are ordinarily the proper starting point in determining the lodestar. (See *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 397.) Here, the court calculated the lodestar and determined a reasonable fee by examining counsel's detailed time records and considering whether the hours billed were reasonable and the particular services rendered were reasonably related to the case. The court also determined that counsel's hourly rates were "borderline" and "a little high," but not unreasonable. The court then reduced the $78,177.50 fee request by $23,360, by striking the 16.5 hours billed for the unfiled sanctions motion and other items the court deemed "inflated," duplicative, or not reasonably related to the case. After eliminating these items, the court arrived at $54,817.50 as a reasonable fee. This was proper.

DKN claims the hourly rates billed by Faerber's Orange County-based attorneys—from $395 to $525 an hour—were higher than the hourly rates charged by attorneys performing comparable work in Riverside County. (*Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, 979 ["Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits."].) DKN claims it adduced "uncontroverted evidence," based on the "Laffey Matrix" that the hourly rates for lawyers in Riverside County was $355.26. Not so.

The Laffey matrix is "an inflation-adjusted grid of hourly rates for lawyers of varying levels [i.e., years] of experience in Washington D.C." published by the Department of Justice. (*Prison Legal News v. Schwarzenegger* (9th Cir. 2010) 608 F.3d

446, 454.) As Faerber points out, the Ninth Circuit has questioned whether the Laffey matrix is a reliable indicator of hourly rates for lawyers practicing outside Washington D.C. (*Ibid.* ["[J]ust because the Laffey matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere"]; but see *Nemecek & Cole v. Horn* (2012) 208 Cal.App.4th 641, 651-652 [affirming attorney fee award based on $419.43 hourly rate calculated under the Laffey matrix as reasonable, even though that hourly rate was higher than the hourly rates billed to the client and resulted in a fee award higher than the fee actually incurred].)

The Laffey matrix assumes that the only relevant consideration in establishing an attorney's reasonable hourly rate is the number of years an attorney has been practicing. (See *In re HPL Techs., Inc., Secs. Litig.* (2005) 366 F.Supp.2d 912, 921-922.) Under the Laffey matrix for 2011-2012, Susolik, with over 20 years of experience, would have an hourly rate of $734, if he were working in Washington D.C. The two attorneys who worked under Susolik had 11 to 19 years of experience, and on that basis would have an hourly rate of $609 in Washington D.C. But rather than applying these rates, DKN argued that a $355.26 blended hourly rate should have been applied. DKN calculated this rate by applying a "local quotient" of .484 to Susolik's $734 hourly rate ($734 x .484 = $355.26). The local quotient was taken from the May 2010 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates for the Riverside-San Bernardino-Ontario area, published by the Bureau of Labor Statistics.

The court was by no means required to use the Laffey matrix in calculating the reasonable hourly rates chargeable to DKN in the Faerber matter. Instead, the court was entitled to rely upon its own experience, and on the representations of Faerber's counsel, in determining those rates. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49 ["The 'experienced trial judge is the best judge of the value of professional services rendered in his court . . . .'"]; *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902-904 [trial court may rely on representations of counsel in determining counsel's reasonable hourly rate].) As noted, the court determined that the $395 to $525 hourly rates charged by Faerber's attorneys were "a little high," but not unreasonable. This was not an abuse of discretion, given the attorneys' experience, the complexity of the issues involved, the $5.2 million amount at stake, and the result obtained.

DKN further argues Faerber failed to establish the reasonableness of his attorney's $395 to $525 hourly rates because he did not explain why he needed to hire attorneys based in Orange County, rather than attorneys based in Riverside County. DKN points out that when local counsel is available to perform the same work at lower rates than counsel from outside the area, "[a] plaintiff must at least make '"a good-faith effort to find local counsel."'" (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1241.) This is because, in calculating the lodestar, "[t]he reasonable hourly rate is that prevailing in the community for similar work." (*PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1095.)

Here, however, DKN presented no evidence that the rates charged by Faerber's Orange County attorneys were higher than the rates Riverside County attorneys would have charged for comparable work. It is by no means a given that Riverside County attorneys would have charged lower hourly rates than Faerber's attorneys charged for the work they performed, as DKN assumes. (See *Perrin v. Goodrich* (C.D. Cal. May 14, 2012, ED CV 08-00595 LLP) 2012 U.S. Dist. LEXIS 67933 [at pp. *16-17] [in awarding attorney fees in civil rights litigation, hourly rate of $600 would not be unreasonable "[e]ven if the Court were to consider Riverside the relevant community for establishing hourly rates"].) Further, nothing in the record suggests the trial court did not consider or was not aware of the rates Riverside County attorneys would have charged in determining that the rates charged by Faerber's Orange County attorneys were reasonable, and comparable, to Riverside County rates.

Lastly, DKN complains that the 167.2 in hours billed was "grossly unreasonable," for various reasons, including because the time spent getting "up to speed" on the Caputo action was unnecessary; the time spent preparing the unfiled sanctions motion was unnecessary; there was no need for Faerber to hire new counsel; the present case only involved a "simple demurrer"; and other time billed by the attorneys was overlapping or duplicative. But as indicated, the court reduced Faerber's fee request by $23,360, and in doing so specifically eliminated the 16.5 hours billed for the unfiled sanctions motion and numerous items the court deemed "inflated," duplicative, or not reasonably related to the litigation. Faerber fails to point to any hours billed that were not eliminated but should

have been eliminated from the fee award. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564 [party challenging attorney fees as excessive because too many hours are claimed has burden of pointing to specific items challenged; general arguments that fees are excessive, duplicative, or unrelated do not suffice].)

V. DISPOSITION

The judgment dismissing DKN's complaint and the postjudgment order awarding Faerber $54,817.50 in attorney fees are affirmed. Faerber shall recover his costs on each appeal. (Cal. Rules of Court, rule 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.

Filed 4/25/14

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH DISTRICT

DIVISION TWO

ORDER

DKN HOLDINGS LLC, Plaintiff and Appellant, v. WADE FAERBER, Defendant and Appellant.	E055732, E056294 (Super.Ct.No. RIC1109512) The County of Riverside

THE COURT

Requests having been made to this Court pursuant to California Rules of Court, rule 8.1120(a), for publication of a nonpublished opinion heretofore filed in the above entitled matter on April 9, 2014, and it appearing that the opinion meets the standard for publication as specified in California Rules of Court, rule 8.1105(c),

IT IS ORDERED that said opinion be certified for partial publication, with the exception of part IV, pursuant to California Rules of Court, rule 8.1105(b).

KING
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 2122 North Broadway, Suite 200, Santa Ana, CA 92706-2614.

On **May 15, 2014**, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

Edward Susolik, Esq.
Callahan & Blaine
3 Hutton Centre Drive, Ninth Floor
Santa Ana, CA 92707
Telephone: (714) 241-4444

Attorneys for: Defendant and Respondent Wade Faerber

Riverside County Superior Court
4050 Main Street,
Riverside, CA 92501
(Hon. John Vineyard)

Court of Appeal
Fourth Appellate District
3389 12th Street
Riverside, CA 92501

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Prenovost, Normandin, Bergh & Dawe's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Santa Ana, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **May 15, 2014**, at Santa Ana, California.

Yvette Gradias