S218597

In the
SUPREME COURT
of the
STATE OF CALIFORNIA

DKN HOLDINGS LLC,

Plaintiff-Appellant
v.

WADE FAERBER,

Defendant-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 of Riverside County
Case Number RIC 1109512, Hon. John W. Vineyard

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Appellant DKN Holdings LLC ("DKN") erroneously claims that both the Superior Court and Court of Appeal ignored binding Supreme Court precedent directly on point and that their holdings, should they stand, mark the end of *stare decises* in California. Melodrama aside, this is simply a case where both the Superior Court and Court of Appeal disagreed with DKN's interpretation and application of prior case law. There is nothing new in the Court of Appeal opinion: no change of the law; no conflict with other appellate decisions; and no issues impacting any significant public policy. This case involves nothing more than the routine and proper application of existing law to the specific facts of this case. As a result, there is no basis to grant review and the Petition should be denied.

COMBINED STATEMENT OF THE CASE AND FACTS

A. The *Caputo* Lawsuit

According to DKN, in June 2004, Caputo, Faerber and Neel, in their individual capacities, leased commercial property located in Murrieta from DKN. On June 28, 2007, Caputo sued DKN and others asserting claims for fraud, breach of contract, unfair business practices, and breach of fiduciary duty. Caputo amended his complaint to add a cause of action to rescind the lease. Faerber was not a party to the original or amended complaint.

On September 18, 2007, DKN filed a cross-complaint against Caputo, Faerber and Neel seeking to recover CAM charges allegedly due under the lease. On October 5, 2007 - only seventeen days after filing the cross-complaint – DKN voluntarily dismissed Faerber and Neel without prejudice. In 2009, DKN amended its cross-complaint to assert claims based on Caputo's, Neel's and Faerber's alleged failure to pay rent due beginning November 2007. Although the First Amended Cross-Complaint named Faerber and Neel as cross-defendants and co-lessees, DKN never served them, choosing instead to pursue its claims against only Caputo.

The lawsuit between Caputo and DKN went to a bench trial before the Honorable Lillian Y. Lim. On June 20, 2011, Judge Lim issued her Statement of Decision, rejecting Caputo's claims entirely and awarding DKN $2,829,571 in unpaid rent and other charges.

B. The Current Lawsuit

On June 1, 2011, only nineteen days before Judge Lim issued her Statement of Decision, DKN filed the current lawsuit against Faerber and Neel, asserting claims based on the same breach of the same lease as the *Caputo* lawsuit, and seeking redress for the exact same injury, i.e., unpaid rent and CAM charges. Faerber demurred on the grounds that DKN's claims were barred by the judgment it obtained in the *Caputo* lawsuit. The

Superior Court agreed, sustaining Faerber's demurrer without leave to amend. The Fourth Appellate District, Division Two affirmed judgment in favor of Faerber. In so holding, the Court of Appeal applied the long-standing and uncontroversial elements of res judicata to the facts of the instant case, and concluded, as did the Superior Court, that DKN's claims were barred as a matter of law.

ARGUMENT

THE COURT OF APPEAL CORRECTLY AFFIRMED THE DEMURRER WITHOUT LEAVE TO AMEND

A. DKN's Claims Are Barred By The *Caputo* Judgment

"A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (citations omitted).)

Res judicata applies not only to claims actually litigated, but also to those claims that could have and should have been litigated in a prior action. "If the matter was within the scope of the action, related to the

subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755 (citation omitted).) "The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (*Ibid.*)

"Res judicata, or claim preclusion, precludes the relitigation of a cause of action that was litigated in a prior proceeding if three requirements are satisfied: (1) the present action is on the same cause of action as the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding." (*Bullock v. Philip Morris USA, Inc.* (2011)198 Cal.App. 4th 543, 557; see also *San Diego Police Officers' Assn v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 734 [holding same].) In applying these three elements, the Court of Appeal correctly concluded that DKN's claims against Faerber were barred by res judicata.

As to the first element, a "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the plaintiff. Even where there are multiple legal theories, "*one injury gives rise to only one claim for relief.*" (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1246-47, citing *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 (emphasis added).) Where, as here, it is alleged that several defendants caused a single injury, the primary right is still determinative. "So, if there is only one primary right violated there is only one cause of action, even though there may be two or more wrongdoers, each doing a wrongful act and each individually liable for it." (*Richard B. Levine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 575 (citation omitted).) "A single cause of action may not be maintained against various defendants in separate suits as the plaintiff has suffered but one injury." (*Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382.)

Relying on *Brinton v. Bankers Pension Svcs., Inc.* (1999) 76 Cal.App.4th 550, the federal court for the Northern District of California, in *Prosurance Group, Inc. v. ACE Property & Cas. Ins. Co.* (N.D. Cal. May 12, 2010) 2010 U.S. Dist. LEXIS 46818, applied California law in a very similar situation. There, the plaintiff initiated arbitration proceedings against numerous subsidiary companies for breach of contract. After

prevailing in the arbitration, plaintiff filed a separate lawsuit against the subsidiaries' parent companies, who were not parties to the arbitration, for tort claims arising from the same events and seeking the same damages as in the arbitration. Defendants moved to dismiss the lawsuit on res judicata grounds claiming that the "a valid final judgment on the merits of a claim precludes a second action on that claim or any part of it." (*Id.* at p. *11.) The Court agreed, holding "the instant action is based upon alleged violations of the same primary right as was litigated previously before the arbitrators." (*Id.* at p. *20.)

DKN attempts to distinguish *Brinton* on the basis that there, the defendants' liability in the second lawsuit was derivative of the defendants' liability in the first case. But, the *Prosurance* court rejected this same argument, holding that derivative liability was not a dispostive factor. "Although both *Brinton* and *Thibodeau* were based at least in part on findings that the liability of one of the parties was derivative only, Defendants are correct that neither case-nor any other case cited by Plaintiff-holds that application of the res judicata doctrine requires a derivative liability connection between defendants." (*ProSurance Group, Inc., supra*, 2010 U.S. Dist. LEXIS 46818 at p. *18.)

The other case cited by *Prosurance*, *Thibodeau*, *supra*, 4 Cal.App.4th 749, is also instructive. There, plaintiffs, after experiencing numerous construction defects on their new home, including radiating cracks in their concrete driveway, commenced arbitration against the general contractor. The arbitrator awarded plaintiffs damages for poor workmanship. Subsequently, the driveway cracks worsened and plaintiffs filed a separate lawsuit against the concrete subcontractor. The subcontractor, who was not a party to the arbitration, moved to dismiss the lawsuit claiming the driveway issues were or could have been raised in the arbitration. The court agreed, holding that "if the radiating cracks in the driveway were not encompassed within the Thibodeau/Eller arbitration, they most certainly should have been. . . . The fact that the Thibodeaus' attention was drawn to more egregious construction deficiencies does not excuse their failure to seek damages for the cracks through the arbitration proceeding. Nor does it exempt them from application of the doctrine of res judicata." (*Id.* at p. 756.)

The above cases are directly on point. Here, DKN is seeking the exact same relief that it sought in the *Caputo* action. Both lawsuits were based upon the same injury, seek the same damages, and are based on the exact same set of facts. DKN could and should have litigated its claims

against Faerber in the *Caputo* lawsuit. Faerber was even named in the *Caputo* lawsuit, but never served. Accordingly, the Court of Appeal's conclusion that the two actions were based on the same primary right and "cause of action" (Opn., at 10) was correct and did not alter existing law.

As to the second element of res judicata, the Court of Appeal properly concluded the judgment in the *Caputo* action was a final judgment on the merits. DKN nevertheless argues for a drastic revision to the doctrine of res judicata, claiming it only applies where the judgment on the merits is adverse to the party pursuing duplicative lawsuits. But that is not the law. In both *ProSurance* and *Thibodeau, supra,* the plaintiff prevailed in the first proceeding but was still barred from brining a second action on the same cause of action. Similarly, in *Mycogen, supra*, 28 Cal.4th at 893, this Court held a plaintiff's complaint for damages was barred by res judicata even though that plaintiff prevailed in an earlier action for declaratory and injunctive relief against the same defendant on the same "cause of action." In so ruling, this Court relied upon the well-established principle that "a judgment in an action for breach of contract bars a subsequent action for additional relief on the same breach." (*Id.* at 905.) Thus, DKN's contention the res judicata doctrine is inapplicable because it prevailed in the first lawsuit is simply wrong.

Lastly, as to the third element, there is no dispute that DKN was a party to both the *Caputo* and *Faerber* actions. As the Court of Appeal rightly determined, it is irrelevant whether Faerber was a party to the *Caputo* lawsuit. It is well-established s that "[t]he party seeking the benefits of the [res judicata] doctrine ... need not have been a party to the earlier lawsuit." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985.)

Given the Court's proper application of these well-established principles and the absence of any conflict of authority, there is no basis to grant review.

B. *Williams v. Reed* Is Not Controlling

DKN erroneously argues the Court of Appeal disregarded California Supreme Court authority directly on point. DKN cites *Williams v. Reed* (1957) 48 Cal.2d 57, 64-65, for the proposition that, where parties are jointly and severally liable under a note, a judgment against one of the co-makers does not bar a subsequent action against the other co-makers.

In *Williams*, four defendants were co-makers of a note in favor of plaintiff, who subsequently entered *into a separate contract* with one of the co-makers, Reed, regarding his obligations under the note. When Reed defaulted, plaintiff sued Reed for breach of that *separate contract.* This Honorable Court held that plaintiff's judgment on the *separate contract*

with Reed did not preclude a subsequent judgment against the other defendants on the original note. (*Id.* at p. 65.) Here, unlike *Williams,* DKN did not sue Faerber on a separate agreement. The present action was based on the *same* breach of the *same* lease as the *prior Caputo* action.

DKN neglects to mention that *Williams* never addressed res judicata or the doctrine against splitting causes of action. Indeed, the term "res judicata" is nowhere in the *Williams* opinion. "[I]t is axiomatic that [*Williams* is] not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176). Moreover, although *Williams* was issued some fifty-seven years ago, there is not a single published case that has relied on *it* to sanction wasteful, inefficient litigation strategies as DKN employed in this case.

DKN, nevertheless, pins its Petition on an isolated sound-bite taken from a block quote of the underlying appellate court opinion in *Williams.* That isolated statement, however, was not necessary to the Court's decision. "Black's Law Dictionary defines 'obiter dictum' as '[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).'" (*People v. Vang* (2011) 52 Cal.4th 1038, 1047, citing Black's Law Dict. (9th ed. 2009) p. 1177, col. 2).) Therefore, the

portion of *Williams* that DKN relies upon is *dicta,* not binding authority. "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'" (*Santisas v. Goodin* (1998) 17 Cal. 4th 599, 620, citing *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61; *People v. Cardwell* (2012) 203 Cal.App.4th 876, 883 ["[O]bservations by an appellate court are dicta and not precedent, unless a statement of law was necessary to the decision, and therefore binding precedent."] (citation omitted).)

DKN also argues that the Court of Appeals' disagreement with Witkin is grounds for reversal. Though a popular and useful treatise, Witkin is not law and the legal opinions of its editors are not binding precedent. Accordingly, the court was under no obligation to follow a statement of law in Witkin that is inconsistent with the applicable case law.

C. The Court Did Not Nullify Corporations Code § 16307

Lastly, DKN argues that the Court obliterated long-standing partnership law by refusing to grant DKN leave to amend to plead claims under California partnership law. DKN relies on Corporation Code section 16307 for the proposition that a plaintiff can sue partners in successive actions based on the same cause of action. DKN's argument is inapplicable

because, as the Court of Appeal correctly noted, that statute does not resurrect a claim already barred by res judicata. (Opn., p. 14.)

Furthermore, the statute allows a creditor to sue a partnership and/or the individual partners to recover on a partnership liability or obligation. (*See* Cal. Corp. Code §§ 16306(a); 16307(e).) DKN did not and could not allege the existence of a partnership debt because it already alleged that Caputo, Faerber and Neel were individually liable on the lease. As a result, section 16307 does not apply because there is no partnership liability or obligation on which to hold the individual partners liable.

D. Public Policy Dictates That The Judgment Should Stand

Finally, common sense and sound public policy confirm the Court of Appeal reached the correct conclusion. DKN had ample opportunity to pursue its claims against Faerber in the *Caputo* action, but made the intentional strategic decision to pursue only one of three alleged co-lessees. Because DKN never served Faerber in the *Caputo* lawsuit, none of the findings against Caputo are binding on him. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 985 ["Collateral estoppel precludes relitigation of issues that were necessarily decided in prior litigation, but it 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."].) DKN

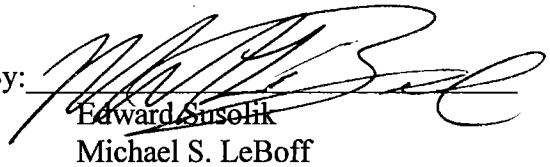
should not be allowed to re-start the entire process anew by asserting the exact same claims, based on the same primary right, against the other two alleged co-lessees. Aside from being an unjustifiable waste of judicial resources, a second trial presents a very high risk of inconsistent judgments and potentially exposes Caputo to further litigation on Faerber's claims for contractual indemnity and other claims on the exact same facts. This is exactly what the doctrine of res judicata was designed to prevent.

CONCLUSION

Accordingly, for the reasons set forth above, DKN's Petition for Review should be denied.

Respectfully submitted,

CALLAHAN & BLAINE, APLC

By: 

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CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULE OF COURT 8.204(c)(1)

The text of Wade Faerber's Answer to Petition for Review consists of 2,729 words as counted by the WordPerfect for Windows, Version 12, word processing program used to generate the brief, exclusive of the cover, table of contents, table of authorities, and this certificate of word count.

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PROOF OF SERVICE

DKN Holding LLC, et al., v. Wade Faerber, et al.
Court of Appeal Case No. E055732 & E056294
Supreme Court Case No. S218597
Riverside County Superior Court Case No. RIC1109512

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3 Hutton Centre Drive, Ninth Floor, Santa Ana, California 92707.

On **June 16, 2014,** I served the foregoing document(s) entitled:

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

on the interested parties in this action by placing [ ] the original **[X]** a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 16, 2014**, at Santa Ana, California.

Maria Martinez
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