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 BRIEF ON THE MERITS

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ISSUES ON REVIEW AND RESPONDENT'S CONTENTIONS

In granting Appellant DKN Holdings LLC's ("DKN") petition for review, this Court posed two specific questions:

(1) Can parties who are jointly and severally liable on an obligation be sued in separate actions?

In some circumstances, parties who are jointly and severally liable on an obligation may be sued in separate actions, but this rule is not absolute. Where the elements of res judicata are satisfied and important public policies underlying the equitable doctrine will be advanced, res judicata overrides the rule of nonjoinder to bar a second lawsuit on the same obligation.

(2) Does the opinion of the Court of Appeal in this case conflict with the opinion of this court in *Williams v. Reed* (1957) 48 Cal.2d 57?

No. *Williams* provides no guidance to the issue presented here, which concerns the circumstances under which res judicata bars a second action based on a joint and several liability claim. Because the issues involved and decided in *Williams* are neither relevant nor provide any precedential value, the Court of Appeal did not violate the doctrine of *stare decisis* in rendering its opinion.

INTRODUCTION

DKN, as a co-lessor, allegedly entered into a single lease with three separate individuals, Wade Faerber, Roy Caputo and Matthew Neel. In 2007, after Caputo sued DKN, DKN filed a cross-complaint for breach of the lease against all three individuals, then subsequently dismissed the claims against Faerber and Neel. Two years later, DKN filed an amended cross-complaint, again naming all three lessees, but never served Faerber or Neel, electing to proceed to judgment against only Caputo.

In 2011, apparently regretting its decision to single out Caputo, and instead of serving Faerber and Neel in the *Caputo* lawsuit, DKN filed a completely new lawsuit against Faerber and Neel making the exact same claims as the *Caputo* lawsuit. Both the Superior Court and the Court of Appeal correctly determined that DKN, having proceeded to judgment against Caputo only, was barred from filing a duplicative lawsuit on the exact same cause of action.

On appeal, DKN's primary argument has been an unwavering reliance on a single sound bite in the dicta of *Williams v. Reed* (1957) 48 Cal.2d 57, while ignoring fifty-seven years of relevant case law since *Williams*. The doctrine at issue here, res judicata, was never addressed in *Williams*. Notwithstanding DKN's reliance on "the venerability of the

General rule," "the product of centuries of common law," as "laid down" in a Seventeenth Century case (Merits Brief, p. 21), this Court should not accept DKN's stagnant and incorrect view of ancient rules, but rather examine and apply these rules within the context of Twenty-First Century case law, current societal conditions and relevant public policies. This case presents an opportunity to consider countervailing forces and conclude that res judicata may, under the circumstances presented here, be invoked to bar separate lawsuits on the same claim even though plaintiff alleges that defendants are jointly and severally liable.

DKN's argument that the judgment in the first lawsuit has no impact on its right to bring a second lawsuit against jointly and severally liable defendants is untenable. While DKN complains that the Superior Court and Appellate Court refused to apply existing law, the reality is that DKN is the one arguing for significant changes to the current law. The importance of finality of judgments and the burden on the courts caused by duplicative lawsuits outweigh DKN's desire for piecemeal litigation. That is the current state of the law, and this Court should not change the law to accommodate DKN's wasteful litigation tactics.

DKN's argument is not only contrary to existing law but bad public policy. The purpose of res judicata is to preserve the integrity of the

judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation. The waste and inefficiencies to the courts, parties and witnesses are obvious. Parties and witnesses that have already given deposition and trial testimony in the *Caputo* lawsuit, will have to be called on again in deposition and trial to testify on the same subject matter. Legal issues determined in the first lawsuit will have to be re-argued in a second proceeding with potentially conflicting results. Written discovery and document productions will need to re-done. A new jury will need to be empaneled to decide the same issues as the first jury. A Superior Court judge, staff and courtroom will be tied up for several weeks trying a case that has already been tried. Roy Caputo, who has already incurred the costs of one trial, will be forced into a second trial on indemnity and contribution claims. The likelihood of inconsistent judgments on the same claim is palpable. No meaningful public policy goal is served by allowing DKN to pursue multiple lawsuits on the same claim.

While there are circumstances where a plaintiff could file separate lawsuits against jointly and severally liable defendants, this is not one of those cases. There were no impediments to DKN bringing Faerber into the *Caputo* lawsuit. In fact, prior to the *Caputo* lawsuit, DKN had sued Faerber under the lease in at least two other lawsuits. The operative pleading in the

Caputo lawsuit, the first amended cross-complaint, expressly named Faerber as a co-lessee and contained the same allegations that DKN is trying to pursue in the present action. Despite naming Faerber as a defendant, DKN made the tactical decision not to serve him and to proceed to judgment against Caputo only.

As a result, both the Superior Court and Court of Appeal correctly applied the applicable law in concluding that the present action is barred by the doctrine of res judicata. That decision should be affirmed in its entirety.

STATEMENT OF FACTS

According to the complaint, in June 2004, Caputo, Faerber and Neel leased commercial property located at 39400 Murrieta Hot Springs Road in Murrieta for the purpose of building and operating an upscale fitness and training center, Evolution Elite Sports and Fitness Club. (1 Appellant's Appendix ("AA") 17.) On June 28, 2007, Caputo sued DKN and others asserting claims for fraud, breach of contract, unfair business practices, and breach of fiduciary duty. (2 AA 95-130.) In December 2007, Caputo amended his complaint to add a cause of action to rescind the lease. (2 AA 132-152.) Faerber was not named in Caputo's original or amended complaint.

On September 18, 2007, DKN filed a cross-complaint against Caputo, Faerber and Neel, seeking to recover common area maintenance (CAM) charges allegedly due under the lease. (2 AA 154-162.) On October 5, 2007 - only seventeen days after filing its cross-complaint – DKN voluntarily dismissed Faerber and Neel without prejudice. (2 AA 164-166.) DKN continued to litigate the case against Caputo.

On September 23, 2009, DKN amended its cross-complaint to assert claims against Caputo, Neel and Faerber based on their alleged failure to pay rent due beginning November 2007. (2 AA 170-250.) Although the First Amended Cross-Complaint ("FACC") re-named Faerber and Neel, DKN chose not to serve or dismiss them. DKN made the decision to continue pursuing its claims against Caputo only.

The litigation between Caputo and DKN continued into 2011 when a bench trial was held before the Honorable Lillian Y. Lim. On June 20, 2011, Judge Lim issued her Statement of Decision, rejecting Caputo's

affirmative claims and awarding DKN, and its co-lessor, CDFT, LP,[1] $2,829,571 in unpaid rent and other charges. (2 AA 342-354.)

Instead of serving Faerber so its claims against him could be litigated in the *Caputo* lawsuit, DKN filed the current lawsuit against Faerber and Neel on June 1, 2011, only nineteen days before Judge Lim issued her Statement of Decision. In the *Faerber* lawsuit, DKN asserted claims based on the same breach of the same lease as alleged against Faerber, Caputo and Neel in the *Caputo* lawsuit, seeking redress for the exact same injury, i.e., unpaid rent and CAM charges. (*Compare* 1 AA 17 at ¶¶ 20-25, *with* 2 AA 171-173 at ¶¶ 6-11.)

On November 22, 2011, Faerber demurred to all causes of action in the complaint on the grounds that DKN's claims were barred by the *Caputo* judgment. On December 28, 2011, the Superior Court, the Honorable John W. Vineyard presiding, sustained Faerber's demurrer without leave to amend and entered judgment in favor of Faerber on January 6, 2012. (4 AA

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[1] CDFT, LP, although a co-lessor under the lease is not a party to the *Faerber* lawsuit. Thus, in addition the present case, under DKN's theory, the parties should prepare themselves for a third lawsuit involving CDFT's claims against Faerber. The likelihood of additional lawsuits arising out of the same breach of the same lease underscores the need to litigate all claims for the breach of a contract in a single proceeding.

884-889.) DKN appealed, and on April 9, 2014, the Court of Appeal unanimously affirmed the judgment.

ARGUMENT

DKN CANNOT PURSUE MULTIPLE LAWSUITS ON THE SAME CAUSE OF ACTION

A. DKN's Second Lawsuit Is Barred by Res Judicata

"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).)

It is well established that 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.*)

The elements of res judicata are well settled. "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].) Thus, if each of these three elements apply, then DKN's claims against Faerber are barred by res judicata.

1. The Claims Against Faerber and Caputo Are on the Same Causes of Action

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. DKN attempts to distinguish this particular case arguing that, because Faerber and

Caputo were jointly and severally liable, the claims against them constitute separate causes of action. That argument is wrong, and not surprisingly, DKN does not cite a single case holding that identical claims against jointly and severally liable defendants constitute separate causes of action.

The well-established law is to the contrary, holding, quite simply: "*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).) The single injury here is the unpaid rent and CAM charges due under the lease. The fact that Faerber and Caputo are alleged to be jointly and severally liable for that one injury does not change the analysis. DKN has but one injury; and therefore, only one claim for relief.

Addressing the exact issue presented here, the court in *Richard B. Levine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 575, held:

> "Even when several defendants cause a single injury to plaintiff, the primary right is 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." (internal citation omitted)

Likewise, in *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382, the court confirmed that "[a] single cause of action may not be maintained against various defendants in separate suits as the plaintiff has suffered but one injury."

In *Prosurance Group, Inc. v. ACE Property & Cas. Ins. Co.* (N.D. Cal. May 12, 2010) 2010 U.S. Dist. LEXIS 46818, the federal court for the Northern District of California, relying on *Brinton v. Bankers Pension Svcs., Inc.* (1999) 76 Cal.App.4th 550, 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 alleging they were jointly and severally liable because they instructed the subsidiaries to commit the contractual breaches litigated in the arbitration. Defendants moved to dismiss the lawsuit on res judicata grounds claiming that "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.)

The *Prosurance* court rejected an attempt to distinguish *Brinton* on the basis that the defendants' liability in the second lawsuit was derivative of the defendants' liability in the first case. "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.) Regardless of whether liability was derivative, it would have been joint and several, which, under DKN's argument, would have prevented the application of *res judicata*. The *Brinton* and *ProSurance* courts found otherwise.

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.)

In this case, the first amended cross-complaint in the *Caputo* lawsuit confirms that both lawsuit are based on the same cause of action. In the first lawsuit, DKN alleged:

> "Cross-Defendant, WADE FAERBER, is, and at all times mentioned herein, an individual and principle [sic.] and/or officer of EVOLUTION FITNESS aka Evolution Fitness Elite Sports Club, Inc., a California corporation, who is residing in Riverside County, State of California." (FACC at ¶ 3) [2 AA 171.]

DKN further alleged in the first lawsuit:

> "[o]n or about April 1, 2007, Cross-Defendants breached the Lease Agreement by failing to pay Common Area Operating

Expenses ('CAM') pursuant to the terms of the Lease Agreement. In addition, Cross-Defendants failed to pay rent from November 1, 2007 through the end of the lease term." (FACC at ¶ 7) [2 AA 172.]

Each of the five causes of action in the *Caputo* lawsuit were asserted against "**All Cross-Defendants**." (FACC at p. 3:9-12, 4:2-4; 4:19-21, 5:13-15, 6:5-7 [2 AA 172-175.] The Prayer for Relief prayed for judgment and relief against "Cross-Defendants," including Faerber. (FACC at p. 7:19-20 [2 AA 176.]

DKN nevertheless contends that joint and several liability creates the legal fiction of having three separate and independent leases with each lessee. No statute creates this legal fiction and no California case law has acknowledged it. Here, even though there are three lessees, there is only a single promise (pay rent and other charges under the lease) which resulted in a single injury to DKN. Each time this Court has considered the primary right doctrine, the focus has always been on the injury to the plaintiff, not the legal theory invoked. (*See, e.g., Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 ["Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief."].) There is no reason to change the focus of primary right doctrine

to accommodate a legal fiction that three separate leases existed. To the extent antiquated case law and treatises support the existence of such a legal fiction, which is not supported by statute, this Court should make clear that such an illogical legal fiction has no place in modern jurisprudence.

DKN seeks the same damages and Faerber's alleged liability is based on the exact same set of facts alleged in the *Caputo* lawsuit. Accordingly, the Court of Appeal's conclusion that the two actions were based on the same primary right and therefore the same cause of action (Opn., p. 10) correctly applied existing law.

2. The *Caputo* Judgment Was A Final Judgment on the Merits

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. Nevertheless, DKN 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. DKN's contention the res judicata doctrine is inapplicable because it prevailed in the first lawsuit is simply wrong.

In *Mycogen*, 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.) Likewise, in both *ProSurance* and *Thibodeau, supra,* the plaintiff prevailed in the first proceeding but was still barred from bringing a second action against jointly and severally liable defendants on the same cause of action. The second element of res judicata is therefore satisfied.

Furthermore, when examined under the unique facts of this case, DKN's position is based on the incorrect premise that Faerber was not a party to the *Caputo* lawsuit. Although DKN dismissed him from the original cross-complaint, it never dismissed Faerber after reinstating the claims against him in the amended cross-complaint. (*Kuperman v. Great Republic Life Ins. Co* (1987) 195 Cal.App.3d 943, 947 ["We hold that the dismissal effected by plaintiffs when they failed to name Great Republic as a defendant in their second amended complaint was without prejudice, and that Great Republic was properly reinstated as a defendant when so named in plaintiffs' third amended complaint."].) Pursuant to Civil Procedure

Code § 581(d)[2], by failing to dismiss Faerber prior to trial in the *Caputo* lawsuit, DKN is deemed to have dismissed the first amended cross-complaint against Faerber with prejudice, which operates as a final judgment in favor of Faerber on the merits for res judicata purposes. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793 ["[F]or purposes of applying the doctrine of res judicata, however, a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action."].) For this additional reason, res judicata applies to bar DKN's second lawsuit against Faerber.

3. Res Judicata Applies Even Though Faerber Was Not Served In the Prior Lawsuit

Lastly, as to the third element, there is no dispute that DKN was a party to both the *Caputo* and *Faerber* actions. Furthermore, although Faerber was named in the first amended cross-complaint in the *Caputo* lawsuit and never dismissed, as this Court has repeatedly acknowledged, "[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; *see also Vandenberg v. Superior Court* (1999) 21

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[2] Code of Civil Procedure § 581(d) provides: "[T]he court shall dismiss the complaint, or any cause of action asserted in it, in its entirety or as to any defendant, with prejudice, when upon the trial and before the final submission of the case, the plaintiff abandons it."

Cal.4th 815, 828 ["Only the party against whom the doctrine is invoked must be bound by the prior proceeding."].) DKN attempts to distinguish *Arias* and *Vandenberg* on the grounds that those cases involved issue preclusion rather than claim preclusion. That is a distinction without a difference, as this Court has previously held that "[t]he prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same." (*People v. Barragan* (2004) 32 Cal.4th 236, 253.) The Court of Appeal rightly determined that it was irrelevant whether Faerber was a party to the *Caputo* lawsuit.

Having correctly determined that all three elements of *res judicata* are present, the Superior Court and Court of Appeal properly affirmed the judgment in favor of Faerber. To the extent application of res judicata conflicts with or limits a plaintiff's ability to file duplicative lawsuits, res judicata and its underlying policy goals should control.

B. Res Judicata and Joint and Several Liability Are Not Mutually Exclusive

Although each element of res judicata is met, DKN asks this Court to disregard the res judicata doctrine arguing that it "cannot rationally coexist" with the concept of joint and several liability. (Merits Brief, p. 21.) But many courts have noted the interplay between these doctrines and identified

instances where separate judgments may be entered without disregarding the doctrine of res judicata. For example, "[t]here are certain cases where default judgments were taken against defaulting defendants who were claimed to be jointly and severally liable with the answering defendants. There, however, they set up independent defenses not involving the defaulting defendants. Under such circumstances, the courts held that a separate judgment against such defaulting defendants may be entered before the issue is tried as to the appearing defendants." (*Mirabile v. Smith* (1953) 119 Cal.App.2d 685, 688.) Or, separate judgments may be entered where summary judgment is warranted against one party, but not another. (*Cuevas v. Truline Corp.* (2004) 118 Cal.App.4th 56, 61.) Separate actions may also be necessary where the court lacks jurisdiction over a joint and several defendant so the claims against that defendant could not have been tried. (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725 ["It is the general rule that a final judgment or order is res judicata even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties."].)

DKN tries to liken its case to a situation where a plaintiff may be prevented from bringing a lawsuit against a jointly and severally liable co-obligor because that person is an active member of the military (Merits

Brief, p. 30, fn.21.). The analogy fails. "Res judicata bars a cause of action that was or *could have* been litigated in a prior proceeding." (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1527.) Thus, if there was some legal impediment that meant a claim against a jointly and severally liable defendant could not be brought, there is no basis to apply res judicata. Likewise, even if the elements of res judicata are met, where there is some compelling public policy reason that prevents litigating all claims in a single lawsuit, the court can refuse to apply res judicata under the public policy exception. (*Kopp v. Fair Pol. Practices Com* (1995) 11 Cal.4th 607, 621 [acknowledging public policy exception to res judicata and collateral estoppel].)

Here, however, there was no contention that Faerber was an active military member or that there was some other impediment – jurisdictional or otherwise – preventing DKN from proceeding against Faerber in the first lawsuit. To the contrary, Faerber was named as a cross-defendant in both the original and first amended cross-complaints. DKN, however, chose not to serve Faerber and to proceed to judgment against only Caputo. Admittedly, in most instances, applying res judicata to jointly and severally liable defendants will force plaintiffs to litigate their entire claims in a

single lawsuit when it can be readily accomplished. That, however, is the entire purpose of res judicata and should be encouraged.

C. Public Policy Supports The Application of Res Judicata

Sound public policy also supports the Court of Appeal's conclusion. "A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.'" (*Mycogen Corp, supra*, 28 Cal.4th 888 at 897 [quoting 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820].) DKN could have pursued its claims against Faerber in the *Caputo* action, but made the strategic decision to pursue only one of three alleged co-lessees. DKN is not entitled to start the entire process anew by asserting the exact same claim based on the same primary right against the other alleged co-lessees.[3]

If DKN were allowed to proceed with the second lawsuit, all of the witnesses in the first case would need to be re-deposed and then called to court to testify at trial on the same issues they testified on in the first trial.

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[3] Because DKN never served Faerber in the *Caputo* lawsuit, none of the findings against Caputo are binding on Faerber. (*Meller & Snyder v. R & T Properties* (1998) 62 Cal.App.4th 1303, 1314-16 [citing *Tay, Brooks & Backus v. Hawley* (1870) 39 Cal.3d 93, 96-98].)

All written discovery and document production, including third-party subpoenas, would need to re-served and documents re-produced. All legal issues argued and decided in the first trial would need to be re-argued and re-decided before a new judge. Discovery disputes that arose in the first case will reappear in the second case. An already overburdened Superior Court judge, courtroom and staff will be tied up for weeks trying a case that has already been tried. A new jury will need to be empaneled to hear the same case that was tried three years ago.

Aside from being an unjustifiable waste of judicial resources, a second trial presents a very high risk of inconsistent judgments. In the first case, for example, the Court determined that Caputo was liable under the lease for more than $2 million. Suppose, on the trial of the current suit, a court or jury determines that the lease was unenforceable, or that DKN's damages were significantly more or less than what was determined in the first lawsuit. This would result in the exact type of inconsistent judgments that res judicata was designed to prevent. Furthermore, if this case proceeds, Faerber will assert third-party claims for indemnity and contribution against Caputo based on the same lease issues that Caputo tried in the first lawsuit. How would these inconsistent judgments impact

Caputo, who would be a party to both lawsuits? Caputo could easily find himself liable on two different and inconsistent judgments.

On the other hand, no public policy goal is advanced by allowing DKN to try duplicative lawsuits. To the contrary, allowing a plaintiff to single out defendants and file multiple lawsuits on the same claims would encourage abusive litigation tactics. For example, a plaintiff may elect to file separate lawsuits against individual defendants to prevent those defendants from pooling their resources to mount a well-funded and united defense. Where, as here, the applicable agreement contains an attorneys fees provision, plaintiffs or their attorneys may be tempted to file multiple lawsuits in order to increase their recoverable fees or use the threat of cumulative defenses costs to coerce a settlement. Separate lawsuits will encourage forum shopping, as plaintiffs may concurrently file multiple lawsuits in different venues, then proceed first to judgment on the one that appears most favorable. Or, a plaintiff could use the first lawsuit as a means to take discovery and depositions without the participation of the other defendants in order to fine tune its case for future lawsuits on the same claim. While the nefarious motives are unlimited, there is no good reason to permit separate lawsuits when all parties could be and should be sued in a single action.

D. The Court of Appeal Opinion Is Not Inconsistent With *Williams v. Reed*

As to the second issue on appeal, the Court of Appeal opinion is not inconsistent with *Williams v. Reed* (1957) 48 Cal.2d 57, which never considered the application of res judicata to joint and several liability. In that case, as set forth in the Court of Appeal opinion, 113 Cal.App.2d 195, Reed and three other defendants were jointly and severally liable under two promissory notes issued in favor of Williams. When defendants did not pay the notes, Williams entered into a separate agreement with Reed where, among other things, Reed agreed to pay a reduced amount to Williams. When Reed failed to perform, Williams obtained a consent judgment against Reed for the lesser amount set forth in the separate, subsequent agreement.

Williams then filed a lawsuit against the other three co-makers, who raised several defenses, none of which were res judicata. First, the co-makers argued that the subsequent agreement with Reed was a novation of the prior notes. Second, the co-makers argued that reducing the obligation on a separate agreement to a judgment estopped Williams from enforcing the notes. Third, the co-makers argued that Williams waived his right to enforce the security under the one action rule. The Court of Appeal

reversed judgment in favor of the co-makers and this Court affirmed. On appeal to the Supreme Court, this Court addressed a fourth defense, whether the co-makers were mere accommodation makers such that their liability was limited to that of a surety.

Williams' discussion regarding novation, accommodation making and the one-action rule are not relevant to this appeal. As to the estoppel argument, on which DKN relies to justify its duplicative lawsuits, although discussing the general differences between joint and joint and several obligations, the *Williams* court made clear that "plaintiff's former action was not brought upon the original notes. It was brought against Reed upon his separate agreement of October, 1950, to which none of the other note makers was a party." (113 Cal.App.2d at 205.) This distinction was quoted verbatim by the Supreme Court. (40 Cal.2d at 65.)

The issue in this case – the interplay between res judicata and joint and several liability – was never raised in *Williams* and the term "res judicata" does not appear anywhere in the *Williams* opinion. For this reason, *Williams* is not applicable to the instant case. "[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 more than fifty-seven years ago, there is not a single case that relies

on *Williams* as authority for a joint and several liability exception to the doctrine of res judicata.

Nor would res judicata have applied under the facts of *Williams*. Williams did not sue Reed and the other co-makers on the same primary right. The primary right at issue against the co-makers was the right to payment under the promissory notes, whereas the primary right at issue against Reed was the right to be paid under the separate settlement agreement to which the other co-makers were not parties. Further, the judgment against Reed was not a final judgment on the merits of the underlying promissory notes. It was a confessed judgment entered as part of the separate settlement agreement. (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services LLC* (2005) 127 Cal.App.4th 1311, 1324 ("[T]he ruling may not have been entitled to collateral estoppel effect because the parties settled before trial."); *Rice v. Crow* (2000) 81 Cal.App.4th 725, 736 ("A settlement which avoids trial generally does not constitute actually litigating any issues and thus prevents application of collateral estoppel."). Accordingly, the Court of Appeal's finding that res judicata barred DKN from filing duplicative lawsuits on the same cause of action does not contradict the inapposite holding in *Williams*.

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 opinions of its editors are not binding precedent. The Court of Appeal was under no obligation to follow a statement in Witkin that is inconsistent with the applicable case law.

DKN also relies on *Grundel v. Union Iron Works* (1900) 127 Cal. 438, for the proposition that res judicata can never apply to jointly and severally liable defendants. Like *Williams*, *Grundel* never discussed the interplay between res judicata and joint and several liability, and for this reason, is similarly inapplicable.

DKN's reliance on *Melander v. Western National Bank* (1913) 21 Cal.App. 462 is also misplaced as it also contains no discussion of res judicata and actually supports Faerber's position. The case discusses a court's ability to enter separate judgments in a single lawsuit pursuant to Cal. Civ. Proc. Code section 580, where a default judgment was obtained against some but not all of the named joint and several liability defendants. It did not, as DKN contends, endorse the practice of multiple lawsuits for the same breach of the same contract, but rather acknowledged that suing all of the parties in one action was the "proper practice" and "*ex necessitate*." (*Id.* at 471.)

E. Corporations Code § 16307 Is Not Applicable

Although this Court did not identify Corporations Code § 16307 as an issue to be addressed on appeal, DKN nevertheless argues that Corporation Code section 16307 stands for the proposition that the doctrine of res judicata does not apply to partnership disputes and that a plaintiff can sue partners in successive actions based on the same cause of action. Because DKN has alleged the lease imposes individual obligations on the individual lessee, rather than the existence of a partnership debt, its reliance on the Uniform Partnership Act is misplaced.[4] Regardless, DKN does not cite any case law interpreting section 16307 to exempt partnership disputes from res judicata. There is no such authority, and the Court of Appeal correctly noted that nothing in that statute suggests an intent to resurrect a claim already barred by res judicata. (Opn., p. 14.)

Additionally, Section 16307, which 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," is part of a larger statutory scheme. It is not a mere recitation of the common law on joint and several liability. Section 16306(a) expressly provides that "all partners are liable jointly and severally

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[4] As the Court declined to certify for review the issue of whether DKN should have been granted leave to amend its complaint to allege partnership claims, Faerber will not address this issue in his brief.

for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Thus, if DKN's interpretation of joint and several liability were correct, Section 16307(a), which allows for separate actions, would be unnecessary because under the general rules of joint and several liability, a plaintiff would already have been able to file as many separate lawsuits as there are partners in the partnership. Moreover, confirming that Section 16307 is not a mere recital of the common law on joint and several liability, the statute contains additional statutory limitations on pursuing a partner for a partnership debt which are inapplicable in ordinary cases of joint and several liability, such as limiting a plaintiff's ability to pursue the assets of the individual partners without first proceeding against the assets of the partnership. (*See* Cal. Corp. Code § 16307(d).)

Accordingly, Section 16307 which is part of a specific statutory scheme that provides for limited liability of partners for partnership debts, is inapplicable to the present case and the issues on appeal.

CONCLUSION

For the reasons set forth above, the judgment in favor of Faerber should be affirmed.

Respectfully submitted,

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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 Brief on the Merits consists of 6,334 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 and E056294
Supreme Court Case No. S218597
Riverside County Superior Court Case 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, Ninth Floor, Santa Ana, California 92707.

On **September 18, 2014**, I served the foregoing document(s) entitled:

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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 **September 18, 2014**, at Santa Ana, California.

Maria Martinez
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DKN Holding LLC, et al. v. Wade Faerber, et al.
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