THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2009-HICIL-44**
Proof of Claim Number:	**CLMN711647**
Policy or Contract Number:	**GL-1692617**
Claimant Name:	**Abedowale O. Osijo**
Insured or Reinsured Name:	**Housing Resources Management**
Date of Loss:	**October 7, 1988**

COMPENDIUM OF NON-NEW HAMPSHIRE AUTHORITIES CITED IN LIQUIDATOR'S SECTION 15 SUBMISSION

Authority **Tab**

Burdette v. Carrier Corp., 71 Cal. Rptr. 3d 185 (Cal. Ct. App. 2008) 1

Consumer Advocacy Group v. ExxonMobil Corp., 86 Cal. Rptr. 3d 39 (Cal. Ct. App. 2008) 2

Hernandez v. City of Pomona, 207 P.3d 506 (Cal. 2009) 3

Mycogen Corp. v. Monsanto Co., 51 P.3d 297 (Cal. 2002) 4

Nein v. HostPro Inc., 95 Cal. Rptr. 3d 34 (Cal. Ct. App. 2009) 5

Roos v. Red, 30 Cal. Rptr. 3d 446 (Cal. Ct. App. 2005) 6

Slater v. Blackwood, 543 P.2d 593 (Cal. 1975) 7

Cal. Rules of Court, 8.1115 8

JOHN J. BURDETTE, Plaintiff and Respondent, v. CARRIER CORPORATION et al., Defendants and Appellants.

C050299

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

158 Cal. App. 4th 1668; 71 Cal. Rptr. 3d 185; 2008 Cal. App. LEXIS 76; 27 I.E.R. Cas. (BNA) 54; 27 I.E.R. Cas. (BNA) 446

January 17, 2008, Filed

SUBSEQUENT HISTORY: Modified and rehearing denied by Burdette v. Carrier Corp., 2008 Cal. App. LEXIS 236 (Cal. App. 3d Dist., Feb. 14, 2008)

PRIOR HISTORY: [***1]

Superior Court of Sacramento County, No. 02AS07941, Lloyd A. Phillips, Jr., Judge.

DISPOSITION: Reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A jury awarded damages against a corporation and one of its managers for slanderous statements regarding the circumstances surrounding a former employee's resignation. The corporation previously had brought a diversity action against the former employee in federal district court, seeking to recover money that it claimed the former employee owed to it. The former employee filed a cross-claim alleging that the corporation, through its employees and agents, had made slanderous statements accusing him of dishonesty. The cross-claim was dismissed on the ground that the alleged statements were privileged. No appeal was filed. The former employee then brought a state action for slander. The case was tried over the corporation's objection that the action was barred by res judicata and the statute of limitations. (Superior Court of Sacramento County, No. 02AS07941, Lloyd Allan Phillips, Jr., Judge.*)

* Retired judge of the Sacramento Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Court of Appeal reversed, holding that under state law, claim preclusion operated to bar the claim against the corporation based upon the statements made during the period covered by the federal claim because they were raised or could have been raised in the federal action. In addition, issue preclusion barred the claim against the manager because the issue of defamatory remarks by other unnamed employees was tendered by the pleading in the federal action and was resolved against the former employee. Moreover, limitations had run as to all but one of the statements. (Opinion by Blease, J., with Scotland, P. J., and Cantil-Sakauye, J., concurring.) [*1669]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Judgments § 69--Res Judicata--Identity of Issues--Claim Preclusion and Issue Preclusion.--Res judicata consists of the limitations on the opportunity in a second action to litigate claims or issues that were litigated, or could have been litigated, in a prior action. The limitations fall into the categories of claim preclusion and issue preclusion. The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A

related but narrower principle--that one who has actually litigated an issue should not be allowed to relitigate it--underlies the rule of issue preclusion.

(2) Judgments § 80--Res Judicata--Judgment as Merger or Bar--Matters Concluded--Defenses--Limitations--Federal Judgment--Subsequent State Action.--The claim-preclusive effect of a federal judgment dismissing a diversity action on statute of limitations grounds is determined by the law of the state in which the federal court sits. Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. Since state rather than federal substantive law is at issue, there is no need for a uniform federal rule. Thus, the dismissal on the merits is governed by a federal rule that in turn incorporates the state law of claim preclusion.

(3) Judgments § 67--Res Judicata--Complete Bar.--The California Supreme Court has defined the doctrine of claim preclusion as a final judgment, rendered upon the merits by a court having jurisdiction of the cause, which is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between them on the same cause of action. This is the general doctrine of res judicata.

(4) Judgments § 70--Res Judicata--Judgment as Merger or Bar--Federal Rule.--It is the federal rule that a judgment once rendered is final for purposes of res judicata until reversed on appeal, modified or set aside in the court of rendition.

(5) Judgments § 68--Res Judicata--Identity of Parties--Privity.--If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other. (1) A judgment against the injured person that bars him [*1670] or her from reasserting the claim against the defendant in the first action extinguishes any claim he or she has against the other person responsible for the conduct unless: (a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

(6) Judgments § 69--Res Judicata--Identity of Issues--Primary Rights Theory.--California adheres to a primary rights theory in determining whether claims or causes of action are the same. The significant factor is whether the claim or cause of action is for invasion of a single primary right. Whether the same facts are involved in both suits is not conclusive. Moreover, more than one act may constitute a single cause of action. A cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. Thus, two actions constitute a single cause of action if they both affect the same primary right. More than one wrongful act may constitute a single cause of action.

(7) Judgments § 69--Res Judicata--Identity of Issues--Primary Rights Theory.--The cause of action is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.

(8) Libel and Slander § 33--Statement--Separate Causes of Action.--The rule that each defamatory statement may constitute a separate cause of action is not applicable where a single cause of action is predicated upon multiple statements.

(9) Judgments § 69--Res Judicata--Identity of Issues--Different Ground for Relief.--A plaintiff may not maintain a subsequent action on the same cause of action, even though the plaintiff presents a different ground for relief in the second action, unless the defendant's fraud or misrepresentation prevented the plaintiff from presenting such ground in the original action.

(10) Judgments § 69--Res Judicata--Identity of Issues--Defamation.--Res judicata precluded relitigation against a corporation as to any alleged defamatory statements made by the corporation's employees [*1671] prior to the filing of a cross-claim in a federal action. Any such statements were subsumed in the federal court's determination that no employee of the corporation made an unprivileged defamatory statement as alleged in the cross-claim.

[Cal. Forms of Pleading and Practice (2007) ch. 491,

Res Judicata, § 491.14; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §§ 355, 411; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 550.]

(11) Judgments § 81--Res Judicata--Collateral Estoppel--California and Federal Law.--Under California law, a party is collaterally estopped from relitigating an issue if (1) the issue decided in a prior adjudication is identical with that presented in the action in question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. The federal law of issue preclusion adds the requirement that the resolution of the issue of law or fact must be essential to the judgment. The doctrine of collateral estoppel applies on issues litigated even though some factual matters or legal arguments which could have been raised were not.

(12) Judgments § 81--Res Judicata--Collateral Estoppel--Defensive Use.--Both California and federal law allow the defensive use of issue preclusion by a party who was a stranger to the first action.

(13) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues--Determining Issues.--Determining the issue foreclosed by the prior judgment is one of the most difficult problems in applying the rule of issue preclusion. In making this determination, a court considers several factors: Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

(14) Corporations § 40--Corporate Powers.--A corporation may act only through its officers, agents, and employees.

(15) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues.--The prior determination of an issue is conclusive in a subse- [*1672] quent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. In other words, a party may not be permitted to introduce new or different evidence to relitigate a factual issue which was presented and determined in a former action. However, the particular legal or factual issue must have been presented and determined in the former action in order for the doctrine to apply. This is a matter of pleading. If the issue is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment.

(16) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues.--When a plaintiff elects to try a case on one theory of liability, he or she is barred from again trying it upon another ground.

(17) Limitation of Actions § 43--Commencement of Period--Torts--Defamation--Discovery Rule.--In some cases, the accrual of a cause of action in tort is delayed until the plaintiff discovers, or should have discovered, the factual basis for the claim. The discovery rule has been applied in cases of libel where the defamatory statement is hidden from view and the plaintiff has no access to or cause to seek access to the statement, such as where a statement is hidden in a personnel file that cannot be inspected by the plaintiff.

(18) Limitation of Actions § 43--Commencement of Period--Torts--Discovery Rule.--The discovery rule means that the statute of limitations begins to run when the plaintiff suspects or should suspect that his or her injury was caused by wrongdoing, that someone has done something wrong to him or her. It is not necessary that the plaintiff know the exact manner in which the injuries were effected.

(19) Limitation of Actions § 43--Commencement of Period--Torts--Discovery Rule--Identity of Defendants.--The fact that a plaintiff does not know the identity of each and every defendant who has caused the harm does not toll the running of the statute of limitations. The identity of the defendant is not an element of the cause of action. Once a plaintiff is aware of the injury, the limitations period is presumed to afford sufficient opportunity to discover the identity of all the defendants. [*1673]

(20) Libel and Slander § 8--Actionable Words--Per Se--Injury to Business.--A slander is slander per se when it tends directly to injure a plaintiff in respect to his or her business by imputing something that has a natural tendency to lessen its profits. Damages are presumed so that a cause of action is conclusively established from the

false and unprivileged utterance constituting slander per se.

COUNSEL: Tucker, Ellis & West, Irene C. Keyse-Walker, Lawrence A. Callaghan; Lewis Brisbois Bisgaard & Smith and Claudia J. Robinson for Defendants and Appellants.

Kenyon Yeates, Riegels Campos & Kenyon, Charity Kenyon; and Anthony J. Poidmore for Plaintiff and Respondent.

JUDGES: Opinion by Blease, J., with Scotland, P. J., and Cantil-Sakauye, J., concurring.

OPINION BY: Blease

OPINION

[**189] **BLEASE, J.**--In this defamation action, plaintiff John J. Burdette sued his former employer, Carrier Corporation, and several of Carrier's employees for slanderous statements made by the employees regarding the circumstances surrounding Burdette's resignation from Carrier.

Prior to this action, Carrier brought a diversity action against Burdette in the federal district court seeking to recover money it claimed Burdette owed the company. Burdette filed a cross-claim on July [**190] 31, 2000, naming Carrier and Anthony Guzzi, its vice-president of sales, as defendants, alleging inter alia that "[o]n or about December of 1999 through the present [Carrier]," "through GUZZI *and* other unknown employees and agents" disseminated false, slanderous information that Burdette had stolen [***2] money from Carrier and had conspired to and wrongfully taken money from Carrier and was generally dishonest in his employment dealings with Carrier, and that such statements injured his reputation and prevented him from maximizing his employment potential. (Italics added.)

The cross-claim was dismissed after the court granted Carrier's motion for summary judgment because "the actual statements at issue were made by Carrier management-level employees in the employment context and are privileged." The day after the date set for the hearing on the motion, Burdette filed documents (the depositions of employees Carnago and Fitzpatrick) he characterized as a supplemental opposition to the submitted summary judgment motion. He stated that "[t]his new evidence clearly shows that rumor [*1674] and gossip to the effect that Burdette was stealing was rampant in both the Sacramento and Reno offices of CARRIER." The court denied the request because "[t]o allow Burdette to file additional documents in opposition to summary judgment after the movants filed their reply brief could deny" them "a fair opportunity" to contest the documents. The judgment of dismissal became final on filing and Burdette did not [***3] file an appeal.

Burdette filed this action on December 27, 2002, alleging that "on or about December of 1999 through the present," including the period alleged in the dismissed federal action, Carrier Corporation and several of Carrier's employees, including Carnago and Fitzpatrick, disseminated slanderous information essentially tracking the claim in the federal action.

The case was tried before a jury over Carrier's objection that the action was barred by res judicata and the one-year statute of limitations. All but one of the statements tendered in the state action, the statement made to Mike Lotspeich by Fitzpatrick (Fitzpatrick statement), were shown to have been made during the period encompassed by the federal action. The damages evidenced at trial were collectively attributed not only to the Fitzpatrick statement but also to the statements at issue in the federal action. The jury awarded Burdette $ 1,065,750 in compensatory damages, $ 3.5 million in punitive damages against Carrier, and $ 9,000 in punitive damages against Carrier's employee, Edward Fitzpatrick.

At issue is the preclusive effect of a federal judgment in a state court based upon the granting of a summary judgment [***4] in the federal action. That tenders two aspects of res judicata, claim preclusion and issue preclusion. They are subject to being confused because the cross-claim against Carrier and the issue decided in the federal action are both predicated upon statements made by Carrier employees during the period covered by the federal cross-claim.

Burdette argues that res judicata does not bar the state action against Carrier, Carnago and Fitzpatrick because the claim, based upon late discovery of the defamatory material, "constitute[s] separate or distinct causes of action that were not placed in issue in the former case." We disagree.

Claim preclusion bars a second action upon the same claim against the same parties litigated to a final

judgment in a prior action. A diversity claim resolved in a federal action is subject to the [**191] law of res judicata of the state in which the federal court sits. (See *Semtek Int'l Inc. v. Lockheed Martin Corp*. (2001) 531 U.S. 497 [149 L. Ed. 2d 32, 121 S. Ct. 1021] (*Semtek*).) In this case it is California. The test of the claim is the cause tendered by the pleadings and resolved on the merits.

A trial on the merits includes a trial in which the plaintiff fails to provide evidence [***5] in support of the claim. Res judicata bars the relitigation not only of [*1675] claims that were conclusively determined in the first action, but also matter that was within the scope of the action, related to the subject matter, and relevant to the issues so that it could have been raised. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 [99 P.2d 652]; *Merry v. Coast Community College Dist.* (1979) 97 Cal. App. 3d 214, 222 [158 Cal. Rptr. 603].) "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." (*Sutphin v. Speik, supra*, at p. 202.)

The claim tendered in the federal action against Carrier was that it was liable for defamatory statements made by Guzzi and other "unknown" employees during the period stated in the pleading. The court ruled on the merits of the claim as tendered. The federal court denied Burdette the right to produce new evidence of information provided by Carnago and Fitzpatrick during the period covered by the claim and the court found the remaining statements by Guzzi to be privileged.

Thus, claim preclusion operates to bar [***6] the claim against Carrier in this action based upon the Carnago and Fitzpatrick statements made during the period covered by the federal claim because they were raised or could have been raised in the federal action. In addition, issue preclusion bars the claim against Fitzpatrick because the issue of defamatory remarks by "other unnamed employees" was tendered by the pleading in the federal action and resolved against Burdette in the summary judgment proceeding. (See *Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 874 [151 Cal. Rptr. 285, 587 P.2d 1098].)

However, this does not extend to the Fitzpatrick statement to Lotspeich made *after* the period covered in the federal action. Each new defamatory statement may be made the basis of a separate cause of action and hence Carrier and Fitzpatrick may be made liable for the statement because it was not within the claim or issue adjudicated in the federal action. However, the damages assessed in this action were cumulatively attributed not only to the Fitzpatrick statement to Lotspeich but also to the Carnago and Fitzpatrick statements made during the period covered in the federal action. Accordingly, the judgment against Carrier and Fitzpatrick arising from the Fitzpatrick [***7] statement to Lotspeich must be reversed because the trial court failed to limit the damages to those caused by Fitzpatrick's statement alone.

We shall reverse the judgment. [*1676]

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Principal Players*

Burdette was hired by Carrier upon his graduation from college in 1995. He was a sales engineer in Salt Lake City for about a year and one-half before relocating to Sacramento in 1997.

Edward Fitzpatrick was one of the owners of an air conditioning business in Reno, Nevada. After the business was acquired by [**192] Carrier, Fitzpatrick became the manager of Carrier's Reno office. Fitzpatrick left Carrier in August 2004.

Joan Carnago was the human resource coordinator out of Carrier's Sacramento office. She left Carrier in 2002.

Phil Williams was Burdette's supervisor. Williams began working for Carrier after graduating from college in 1980. He was the area general manager for Northern California and Nevada. Williams left Carrier in September 1999.

At the regional level were James Jensen and Bernie Halterbeck. Jensen was the regional finance manager for the western region. Jensen was hired to fill that position in May 1999, and was still in the position at the time of trial. [***8] Halterbeck was Carrier's regional general manager for the western region. He was Williams's supervisor. Carrier fired Halterbeck in January 2000.

Anthony Guzzi was the vice-president and general manager of commercial sales and service in North America for Carrier from June 1998 to December 2000.

B. *The Events Surrounding the Defamation Claim*

An apparent misunderstanding over Burdette's entitlement to sales commissions coming out of Carrier's Reno branch sparked the defamatory statements at issue. Williams and Halterbeck recruited Burdette to work in Carrier's Sacramento office in 1997. Burdette testified his understanding was that all of the accounts in the Sacramento and Reno territory would be assigned to him. After Burdette found out that Carrier was acquiring Fitzpatrick's Reno company, he became concerned that he would no longer be assigned to all of the Reno accounts. He spoke to Williams about his concerns, and Williams told him not to worry because the Reno branch would be a service branch with no "incentivized" salespeople. An "incentivized" salesperson was one who earned a base salary plus commissions, pursuant to the company formula. [*1677]

Williams testified that he never told Burdette [***9] he was to receive credit for jobs sold through the Reno branch simply because it was his territory. He would receive credit only for specific projects in which he had specific involvement. Williams claimed he never promised Burdette he would be given 100 percent credit on all jobs out of the Reno branch. Williams's understanding was that Burdette would not receive a commission unless he had physically performed some work to help Carrier achieve the sale.

When leads from the Reno area did not go through Burdette for handling, he first tried talking to the people in Reno. When this did not change anything, he got Williams involved, who agreed to discuss the matter with Fitzpatrick in Reno. In 1999, Burdette started keeping track of a number of accounts out of the Reno office to see if they had been credited to him. He discovered they were not, so using a regional password he had learned about when he was in Salt Lake City, he started to enter his identification number on the accounts. However, Carrier's policy was that only the regional finance manager (Jensen) and his assistant had access to the regional password.

In November 1999, Burdette was questioned as to why he was getting all [***10] the commissions in the Reno area. Carrier demanded that he pay back the credit he received from the Reno accounts, amounting to over $ 100,000. In January 2000, Carrier placed Burdette on paid indefinite suspension, meaning he would receive his base salary, but he was not to sell for or represent Carrier in any way. Burdette resigned shortly afterward.

[**193] After a couple of months, Burdette was hired by Advanced Microtherm. He worked for Advanced Microtherm for six or seven months before taking a better offer with Norman Wright.

C. *The Defamatory Statements*

Burdette asserts that the defamatory statements were made by Fitzpatrick and Carnago. Carnago admitted discussing with Fitzpatrick on one occasion that Burdette had put his sales identification on jobs for which he was not entitled to receive sales credit. They exchanged the opinion that they thought what Burdette had done was dishonest. This occurred sometime after Burdette left Carrier in January 2000. There was evidence that prior to the discussion with Fitzpatrick, Carnago had expressed these views to other Carrier employees as well.

Burdette testified to the effect these slanderous statements had on him. He offered the testimony of James [***11] Lazor, the chief executive officer of the Edward B. Ward Company (EB Ward). EB Ward is an independent distributor for Carrier. In December 1999, Carrier announced it would eliminate all of [*1678] the commissioned salespeople in the western region, and that EB Ward would be giving job offers to the Carrier salespeople. However, Lazor told Burdette he would not be receiving a job offer until his issue with Carrier was resolved. Burdette testified that when he was at Advanced Microtherm he was less confident because he was confronted by customers who had heard about what had happened at Carrier.

Burdette presented evidence of one incident he alleged to be slanderous, which occurred after the other statements. Fitzpatrick and Mike Lotspeich were on a business lunch in July 2002, when Fitzpatrick called Burdette a thief and a crook and said that he stole from Carrier. Lotspeich was the vice-president of Norman S. Wright Mechanical Equipment, and Burdette's boss at the time. Lotspeich immediately called Burdette and the company president to tell them about the conversation.

D. *The Federal Action*

On June 8, 2000, Carrier filed an action in federal court, alleging Burdette had wrongfully used the regional password to [***12] give himself full credit for jobs in which he had limited or no involvement, and seeking the

return of $ 163,351 in wrongfully obtained commissions.

Burdette filed a cross-claim on July 31, 2000, alleging, inter alia, that "[o]n or about December of 1999 through the present," Guzzi, vice-president of sales for Carrier, and Carrier, "through GUZZI *and* other unknown employees and agents," defamed him by claiming he had stolen from Carrier, had wrongfully taken money from Carrier, had conspired with his superiors to wrongfully take money from Carrier, had paid kickbacks to his superiors, and was generally dishonest in his employment dealings with Carrier. (Italics added.)

On January 7, 2002, Carrier filed a motion for summary judgment and a statement of undisputed facts on Burdette's cross-claim, to be heard on February 4, 2002, and points and authorities claiming that Guzzi's statements were entitled to a conditional privilege because they were made to "key co-employees and management of the company itself."

On January 22, 2002, Burdette filed a separate statement of undisputed facts and points and authorities in opposition to summary judgment claiming that Carrier and Guzzi were not [***13] entitled to a conditional privilege because their statements were made with malice.

[**194] On the day set for the hearing on the motion for summary judgment, February 4, 2002, Burdette filed a motion to continue the hearing to permit [*1679] consideration of supplemental evidence on the ground that he had just received the transcript of the depositions of Joan Carnago and Edward Fitzpatrick, which disclosed that Carnago had admitted that she and numerous Carrier employees had exchanged discussions that Burdette was a thief and had improperly taken sales credits from Carrier. The day after the date set for the hearing on the motion, Burdette filed documents he characterized as a supplemental opposition to the submitted summary judgment motion. The supplemental documents indicated that the depositions of Fitzpatrick and Carnago had been set for late November 2001, during the time that discovery was still open. However, because Carrier's attorney was unavailable, Burdette's attorney agreed to postpone the depositions, which were then taken on January 23, 2002. The documents claim that in her deposition, Carnago admitted that she and numerous Carrier employees had discussed that Burdette was allegedly a thief [***14] and had improperly taken sales credits from Carrier. Burdette requested the court grant a continuance in ruling on the summary judgment motion so that the deposition testimony of Fitzpatrick and Carnago could be considered by the court in ruling on the motion. The court denied the continuance.

The federal district court granted Carrier's summary judgment motion of Burdette's cross-claim. As to the defamation cross-claim, the court found that "the actual statements at issue were made by Carrier management-level employees in the employment context and are privileged. ... Furthermore, Burdette failed to produce evidence of malice." Burdette took no appeal from the federal judgment.

E. *This Proceeding*

Burdette filed this action for defamation on December 27, 2002. He alleged that "on or about December of 1999 through the present," including the period alleged in the federal action, defendants Carnago, Amy Adams, Chris Countryman, Fitzpatrick and Doe defendants had made statements claiming he had stolen from Carrier, had wrongfully taken money from Carrier, had conspired with his superiors to wrongfully take money from Carrier, and that he was generally dishonest in his employment dealings [***15] with Carrier. He alleged Carrier had approved and ratified these statements. [1]

1 Burdette dismissed all of the individual defendants except Fitzpatrick at trial.

Defendants demurred to the complaint on several grounds, including res judicata and the statute of limitations. With respect to the statute of limitations, defendants argued that plaintiff's complaint had been filed a year and one-half after his cross-claim in the federal case, and that the statute of limitations for a defamation cause of action is one year. (Code Civ. Proc., [*1680] § 340, subd. (c).) Burdette countered that each publication is a separate injury and separate tort, and that he was unaware of the publications alleged in this case until January 23, 2002, the date of the Fitzpatrick and Carnago depositions in the federal case.

The trial court overruled the demurrer, stating: "[T]he action is not barred by res judicata. The federal court ... specifically found that Civil Code 47 applied because 'the actual statements at issue were made by Carrier management-level employees in the employment context and are privileged.' Although the named

defendants [**195] in both cases are alleged to be employees of defendant Carrier Corporation, [***16] defendants offer no basis on which the court might find that the named defendants here are the 'management-level employees' in the federal action. ... [T]he action is not barred by the one-year statute of limitations of CCP 340. Plaintiff filed his complaint on December 27, 2002. He alleges that he did not learn of the defamation until approximately January 23, 2002. The fact that plaintiff knew Guzzi made statements in 2000 does not mean that plaintiff learned of defendants' statements at that time."

Defendants raised these arguments again in a motion for summary judgment. The trial court denied the motion, finding:

"[Defendants] have not established that the claim for defamation is barred by res judicata. Although [the federal court] found for Carrier on Burdette's defamation claim which was based on the same type of statements alleged herein, Defendant has not established that the federal action based on statements of [Guzzi] and 'other employees' were the same claims that are the subject of this action or that the claims were against the same parties. Plaintiff has submitted evidence that he did not discover the acts of these particular defendants until after his opposition to [***17] the federal summary judgment motion was due. ... Thus, Burdette has submitted evidence that the claims alleged herein are not the same claims that were the subject of the Federal action and that he did not have the opportunity to litigate these claims against Carrier or the individual defendants in the federal action. ...

"... [T]here is a triable issue of fact as to the statute of limitations on the claim against Carrier since plaintiff has submitted evidence that the defamatory statements were discovered after defendant's motion for summary judgment in the federal action was filed, which was within one year of the filing of this action."

The jury rendered a verdict in Burdette's favor, awarding him $ 1,065,750 in compensatory damages, plus $ 3.5 million in punitive damages against Carrier and $ 9,000 in punitive damages against Fitzpatrick. [*1681]

DISCUSSION

Carrier argues on appeal, as it did at trial, that Burdette's claims are barred by the statute of limitations. We agree that the statute of limitations bars all claims of defamation except Fitzpatrick's statement to Lotspeich, but we find that these claims suffer more fundamentally from the bar of res judicata. Although Carrier raised [***18] this issue on demurrer, summary judgment, and motion for judgment notwithstanding the verdict, it did not raise the issue on appeal. We therefore requested supplemental briefing from the parties on this issue.

I

Res Judicata

(1) The Restatement Second of Judgments describes res judicata as the "limitations on the opportunity in a second action to litigate claims or issues that were litigated, or could have been litigated, in a prior action." (Rest.2d Judgments, ch. 1, Introduction, p. 1.) The limitations fall into the categories of claim preclusion and issue preclusion. (*Ibid*.) "The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle-- [**196] that one who has actually litigated an issue should not be allowed to relitigate it--underlies the rule of issue preclusion." (*Id*. at p. 6.) Both aspects of res judicata are at play in this action.

A. *Claim Preclusion*

(2) The claim-preclusive effect of the prior federal judgment is determined by California law. In *Semtek, supra,* 531 U.S. at page 499 [149 L. Ed. 2d at p. 37], the Supreme Court addressed [***19] the question "whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits." (*Ibid*.) The court said that federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity, and that since state rather than federal substantive law is at issue, there was no need for a uniform federal rule. (*Id*. at p. 508 [149 L.Ed.2d at pp. 42-43].) Thus, the court held the dismissal on the merits was governed by a federal rule that in turn incorporates the state law of claim preclusion. (*Ibid*.)

(3) The California Supreme Court has defined the doctrine of claim preclusion as follows: " 'a final judgment, rendered upon the merits by a [*1682] court

having jurisdiction of the cause, is conclusive of the rights of the parties and those in privity with them, and is a complete bar to a new suit between them on the same cause of action. This is the general doctrine of *res judicata*.' " (*Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 51 [92 P.2d 804].)

1. *Final Judgment*

(4) It is the federal rule that "a judgment once rendered is final for purposes of res judicata [***20] until reversed on appeal, modified or set aside in the court of rendition []. [*Calhoun* v. *Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887 [143 Cal. Rptr. 692, 574 P.2d 763].]" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954, fn. 11 [160 Cal. Rptr. 141, 603 P.2d 58], disapproved on another ground in *White v. Ultramar* (1999) 21 Cal.4th 563, 575 [88 Cal. Rptr. 2d 19, 981 P.2d 944].) Thus, the federal judgment in Carrier's favor was a final judgment for purposes of claim preclusion until reversed on appeal and Burdette did not take an appeal.

2. *On the Merits*

The judgment in the federal case was on the merits because the substance of the claim (whether any Carrier employee, including Guzzi, defamed Burdette during the designated time period) was tried and determined by way of summary judgment. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77 [99 Cal. Rptr. 2d 316, 5 P.3d 874].)

3. *Parties and Those in Privity*

Carrier was a party to both actions, thus Burdette's claim for defamation against Carrier based upon statements by Carrier employees during the time period alleged in the federal action is barred. However, the individual employees named as defendants in this action were not parties to the federal action, nor were they in privity with Carrier, as we shall explain. Therefore, the action is not barred against them under [***21] the doctrine of claim preclusion, although we shall conclude the issue of their having made defamatory statements was decided in the prior action, and Burdette is collaterally estopped from raising the issue again.

(5) The Restatement Second of Judgments, section 51, describes the instances in which a party may be in privity where one is vicariously [**197] responsible for the conduct of the other:

"If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the [*1683] injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

"(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

"(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

"(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action."

A [***22] Maryland Court of Appeals case illustrates the applicability of this rule, and why the application here results in a finding that claim preclusion does not bar the action against the individual employees, other than Guzzi. In *deLeon v. Slear* (1992) 328 Md. 569 [616 A.2d 380], a doctor filed a diversity action in federal court against a hospital and the hospital's head of surgery, alleging defamatory complaints were made against him. (*Id.*, 616 A.2d at p. 382.) The doctor learned during discovery in the federal action that two nurses were the source of the complaints against him, but he did not name either of the nurses in the federal action. [2] (616 A.2d at p. 383.) The federal court granted the defendants' summary judgment motion on the ground, inter alia, that the statements were privileged. (*Ibid.*)

2 Although Burdette's federal cross-claim named "Roe" defendants, Burdette never attempted to amend the cross-claim to name the Carrier employees, or if he did it is not a part of this record. There are no charging allegations against the Roe defendants in Burdette's cross-claim, as would be required under California law. While the federal rules do not specifically prohibit the naming of Doe defendants, the [***23] use of fictitious defendants is disfavored in federal court. (*Sigurdson v. Del Guerico* (9th Cir. 1956) 241 F.2d 480, 482; *Craig v. United States* (9th Cir. 1969) 413 F.2d 854, 856.)

The doctor then brought an action for defamation in

state court against the nurses. (*deLeon v. Slear, supra*, 616 A.2d at p. 383.) The nurses defended on the grounds of res judicata, collateral estoppel, and the statute of limitations. (*Id*. at p. 384.) The issue before the Maryland Court of Appeals was whether the doctor's claims were barred by the claim preclusion aspect of res judicata. (*Id*. at p. 385.)

Citing section 51 of the Restatement Second of Judgments, the court held that neither of the exceptions set forth in that section applied. The court held that exception (a) (the claim could not have been asserted in the first action) did not apply because it contemplated allowing a second action only when [*1684] there was actually an independent claim that could not have been asserted in the first action. (*deLeon v. Slear, supra*, 616 A.2d at pp. 387-388.)

The court further held that exception (b) (the judgment was based on a defense that was personal to the first defendant) was inapplicable, even though the judgment in federal [***24] court was based on the defense of privilege. (*deLeon v. Slear, supra*, 616 A.2d at p. 388.) This was because the federal court alternatively based the judgment on other grounds, and because the conditional privilege was applicable to the nurses, as well as the hospital. (*Ibid*.)

In the case before us, the only defense identified by the federal court was privilege, [**198] and the privilege arguably would not apply to employee statements if there was not a sufficient common interest in the communications. Thus, the privilege was one Carrier could assert, but its lower level employees might not. Therefore, the doctrine of claim preclusion prevents Burdette from reasserting a claim for defamation against Carrier, but does not prevent the assertion of a defamation claim against Carnago or Fitzpatrick.

4. *Same Cause of Action*

Since under *Semtek, supra*, 531 U.S. 497, the measure whether a judgment in a federal diversity action is to be given preclusive effect is determined by the law of the state in which the federal court sits it is the California law that measures the nature of the claim to be given preclusive effect.

(6) California adheres to a " 'primary rights' " theory in determining whether the claims or causes of action [***25] are the same. (*Agarwal v. Johnson, supra*, 25 Cal.3d at p. 954.) The significant factor is whether the claim or cause of action is for invasion of a single primary right. (*Ibid*.) Whether the same facts are involved in both suits is not conclusive. (*Id*. at pp. 954-955.)

Moreover, more than one act may constitute a single cause of action. Under Pomeroy's primary rights theory, "... a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. [Citation.] Thus, two actions constitute a single cause of action if they both affect the same primary right." (*Gamble v. General Foods Corp*. (1991) 229 Cal. App. 3d 893, 898 [280 Cal. Rptr. 457]; accord, *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1246 [65 Cal. Rptr. 2d 25].) [*1685]

In Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co. (1993) 5 Cal.4th 854 [21 Cal. Rptr. 2d 691, 855 P.2d 1263], the Supreme Court explained that more than one wrongful act may constitute a single cause of action. A contractor filed suit against its attorney because the attorney's failure to file a stop notice and failure to file a complaint [***26] to foreclose its mechanic's lien resulted in the contractor's inability to collect the amount it was owed on a construction project. (*Id*. at p. 857.) The contractor argued that each of the attorney's omissions was a separate claim or cause of action. The Supreme Court disagreed, explaining:

"Bay Cities had a single injury and thus a single cause of action against its attorney. 'California has consistently applied the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action.' [Citations.] Bay Cities had one primary right--the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained. He allegedly breached that right in two ways, but it nevertheless remained a single right.

(7) "Similarly, '[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. ... Even where there are multiple legal theories upon which recovery might be predicated, *one injury* gives rise to only one claim for relief.' [Citation.] Bay Cities suffered a single injury as a result of its attorney's omissions--the inability to collect the amount [***27] owed to Bay Cities for its work on the

construction project." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co., supra*, 5 Cal.4th at p. 860, fn. omitted.)

[**199] Defamation is an injury to reputation. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1242 [7 Cal. Rptr. 3d 576, 80 P.3d 676].) The primary right litigated in both the federal action and this action is the right to be free from injury to reputation. The single claim asserted in the federal action, based on the doctrine of respondeat superior, was that Carrier, "through [its vice-president of sales] and other unknown employees and agents," disseminated defamatory statements about Burdette, "[o]n or about December of 1999 through the [date of the cross-claim, July 31, 2000] ... ." The claim is in the nature of a continuing course of action. [3]

> 3 At oral argument Burdette's attorney characterized the claim at issue here as "a course of conduct that continued after the federal judgment was entered."

The allegations of the cross-claim and the complaint show the commonality of interest to be protected. Burdette's federal cross-claim was against [*1686] named cross-defendants Carrier and Anthony Guzzi, Carrier's vice-president of sales. It also named 20 "Roe" defendants. Burdette's defamation claim alleged the defamatory statements were made by [***28] Guzzi and by Carrier "through GUZZI and other unknown employees and agents ... ." The statements were made from December 1999 through the present. The defamatory statements alleged were that Burdette stole from Carrier, wrongfully took money from Carrier, and conspired with his superiors to wrongfully obtain money from Carrier, wrongfully paid kickbacks to his superiors in return for their assigning certain commissions to him, and that he was generally dishonest in his employment dealings with Carrier. Burdette alleged he suffered loss of reputation, shame, mortification, and hurt feelings as a result of the statements, and that he had been prevented from maximizing his employment potential.

The named defendants in this action are Carrier, Carnago, Fitzpatrick, Amy Coker Adams, and Chris Countryman. [4] The complaint alleges each defendant is the agent and employee of the other, and that they acted within the course of such agency and employment. The statements are alleged to have been made by the named Carrier employees. The statements alleged are that Burdette improperly credited himself for sales commissions to which he was not entitled, stole from Carrier, conspired with his superiors [***29] to wrongfully obtain money, falsified expense reports, was dishonest in his employment dealings with Carrier, and was incompetent in his job. The complaint alleged Burdette suffered loss of reputation, shame, mortification, hurt feelings, and has been prevented from maximizing his employment potential.

> 4 See footnote 1, *ante*.

As stated in *Agarwal*, the significant factor in determining whether the cause of action in the two proceedings is the same is the harm suffered. (*Agarwal v. Johnson, supra*, 25 Cal.3d at p. 954.) As demonstrated by the allegations of damage in the two actions, Burdette alleged he suffered the same harm in both actions. The defamatory statements were about the same incident, Burdette's receipt of commissions to which Carrier claimed he was not entitled. Burdette's claim to recover for this harm was adjudicated in the federal action.

(8) The defamatory statements Burdette alleges in this complaint (with the exception of the Fitzpatrick statement to Lotspeich) against Carrier were also alleged in the federal cross-claim, namely the statements of unknown employees made during the [**200] period covered by the cross-claim. That Burdette named several lower level Carrier employees as [***30] defendants in this action, but [*1687] not in the prior action, did not create more than one cause of action for purposes of res judicata. The gravamen of the single claim against Carrier was liability in respondeat superior for the statements made by Carrier's employees in the relevant time period. The rule that each defamatory statement may constitute a separate cause of action is not applicable where a single cause of action is predicated upon multiple statements.

(9) Section 63 of the Restatement of Judgments explains that a plaintiff may not maintain a subsequent action on the same cause of action, even though the plaintiff presents a different ground for relief in the second action, unless the defendant's fraud or misrepresentation prevented the plaintiff from presenting such ground in the original action. " 'Where an action is brought to recover damages for injury to the person or property of the plaintiff caused by the defendant, and the plaintiff in his complaint alleges certain negligent acts of the defendant, and at the trial he is unable to prove these negligent acts and a verdict and judgment are given for

the defendant, the plaintiff is precluded from maintaining a subsequent action [***31] based upon the same injury, although in that action he alleges other acts of negligence. There is in such a case a single cause of action, based upon the primary right of the plaintiff to be free from injury to his person or property and a violation by the defendant of that right through his failure to use proper care. The plaintiff is not permitted to maintain successive actions for the same injury by alleging different acts of negligence on the part of the defendant. It is immaterial that in a subsequent action he alleges acts of negligence which he was not permitted to prove in the prior action because they were not alleged in his complaint in that action.' " (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 639 [134 P.2d 242], quoting Rest., Judgments, § 63, com. b, p. 259.)

As an example, the Restatement poses the case of A, who sues his employer, B, alleging injury as the result of B supplying defective appliances. A verdict is rendered in B's favor, after which A brings a second action against B for the same injury, alleging the negligence of B's officers and employees in operating the appliances. In such case the first judgment is a bar to the second action. (Rest., Judgments, § 63, com. b, illus. 4, [***32] pp. 260-261.)

(10) Res judicata precludes Burdette from relitigating against Carrier any alleged defamatory statements made by Carrier employees prior to the filing [*1688] of the cross-claim in the federal action. Any such statements were subsumed in the federal court's determination that no Carrier employee made an unprivileged defamatory statement as alleged in the cross-claim.

B. *Issue Preclusion*

In this action, employees of Carrier were named as defendants who were alluded to only as "unknown employees" in the federal action. As noted above, the action against them is not barred by the doctrine of claim preclusion.

Semtek, *supra*, 531 U.S. 497, did not expressly determine if state or federal laws of issue preclusion apply to an issue decided by a federal court sitting in diversity when the issue is raised again in state court. However, the result under either the California or federal law of issue preclusion would be the same in this case.

(11) Under California law, a party is collaterally estopped from relitigating an issue if: "(1) the issue decided in a prior adjudication is identical with that presented [**201] in the action in question; *and* (2) there was a final judgment on the merits; *and* (3) the party against whom [***33] the plea is asserted was a party or in privity with a party to the prior adjudication." (*Clemmer v. Hartford Insurance Co*., *supra*, 22 Cal.3d at p. 874.) The federal law of issue preclusion adds the requirement that the resolution of the issue of law or fact must be essential to the judgment. (*Monarch Life Ins. Co. v. Ropes & Gray* (1st Cir. 1995) 65 F.3d 973, 978.) "The doctrine of collateral estoppel applies on issues litigated even though some factual matters or legal arguments which could have been raised were not." (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 286 [54 Cal. Rptr. 2d 655].)

1. *Party or in Privity*

(12) Burdette was the cross-complainant in the federal action, and is the party against whom Carrier asserts the bar in this action. Both California and federal law allow the defensive use of issue preclusion by a party who was a stranger to the first action. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812-813 [122 P.2d 892]; *Green v. Ancora-Citronelle Corp*. (9th Cir. 1978) 577 F.2d 1380, 1383-1384.) [*1689]

2. *Final Judgment on the Merits*

As previously explained, the prior proceeding resulted in a final judgment on the merits when the federal trial court ruled that the statements [***34] tendered in the summary judgment proceeding were privileged pursuant to Civil Code section 47, subdivision (c), [5] judgment was entered on the cross-claim, and no appeal was taken.

> 5 Civil Code section 47, subdivision (c) makes privileged, "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

3. *Issue Decided*

(13) Determining the issue foreclosed by the prior judgment is one of the most difficult problems in applying the rule of issue preclusion. (Rest.2d Judgments, § 27, com. c, p. 252.) In making this determination, we consider several factors: "Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected [***35] to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?" (*Ibid.*)

The issue in the prior action was whether Carrier, through "unknown employees and agents" made unprivileged defamatory statements during the period covered that harmed Burdette's reputation. This action differs in that the complaint now names the employees and agents who were previously "unknown." We know that the employees named in this action were the same "unknown" employees alleged to have made defamatory statements in the prior action because Burdette requested a continuance of the summary judgment hearing in the prior action to allow the court to consider the deposition testimony of Carnago and Fitzpatrick, and particularly the fact that Carnago "admit[ted] that she and numerous [**202] CARRIER employees, including other salespersons, and filing clerks, exchanged discussions regarding the fact that defendant/cross-complainant Burdette was allegedly a thief and had improperly taken sales credits from CARRIER."

(14) As a practical matter, Carrier, a corporation, is incapable of committing slander, except through one of its employees. "[A] corporation ... [***36] may act only through its officers, agents, and employees." (*Norman v. Department of Real Estate* (1979) 93 Cal. App. 3d 768, 774 [155 Cal. Rptr. 715].) Thus, [*1690] even without the inclusion of the unknown employees as Roe defendants, the federal cross-complaint necessarily included the claim that individual employees were responsible for the defamation. Both actions alleged that employees of Carrier defamed Burdette, and both sought to hold Carrier responsible for the defamatory statements.

The pretrial preparation and discovery in the first action reasonably could have been expected to have embraced the matter Burdette seeks to present in this action. The claims against the various employees in this action were raised by the pleadings in the federal action. The federal action named "Roe" defendants, indicating Burdette would seek to hold unknown defamers liable when their identities were discovered. Additionally, the federal action alleged the defamatory statements were made by unknown employees of Carrier. In fact, the identities of the individuals named as defendants in this action were discovered in the prior action, but Burdette did not amend his cross-claim to add those employees as cross-defendants.

(15) " '[T]he [***37] prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination.' [Citations.] [¶] ... In other words, a party may not be permitted to introduce new or different evidence to relitigate a factual issue which was presented and determined in a former action. However, the particular legal or factual issue must have been presented and determined in the former action in order for the doctrine to apply." (*Bleeck v. State Board of Optometry* (1971) 18 Cal. App. 3d 415, 428 [95 Cal. Rptr. 860].)

This is a matter of pleading. "[I]f [the issue] is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment." (*Sutphin v. Speik, supra*, 15 Cal.2d at p. 202.)

In a motion for summary judgment, the issues are framed by the pleadings and the other material offered by the parties on the motion. (*Flint ex rel. Flint v. KY Dept. of Corrections* (6th Cir. 2001) 270 F.3d 340, 348; for Cal. see *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 381-383 [282 Cal. Rptr. 508].) The parties have not provided this court with all of the materials [***38] offered in the federal summary judgment. However, we know that the cross-claim alleged that, "[o]n or about December of 1999 through the present, cross-defendant GUZZI and cross-defendant CARRIER CORPORATION, through GUZZI and other unknown employees and agents, disseminated information to others ... ." Carrier's motion for summary judgment set forth facts in support of its defense that only Guzzi made statements to other management-level employees about Burdette, and that these statements were either absolutely or qualifiedly privileged. In response to this, Burdette did not [*1691] present evidence that someone other than Guzzi made defamatory statements, but argued Guzzi's

statements were not privileged because they either had no objective relationship [**203] to litigation or because they were made with malice.

4. *Essential to the Judgment*

(16) The federal court ruled that any statements were privileged because they were made by Carrier management-level employees in the employment context and there was no evidence of malice. This brings us to the federal requirement that the issue be necessary to the judgment. In the federal case, the court necessarily found no evidence of defamation by Fitzpatrick [***39] or Carnago, because such statements were not made by management-level employees in the employment context and were not privileged. The federal court found these were the only types of statements made by Carrier employees. Thus, one issue decided in the federal case was that no Carrier employee disseminated unprivileged defamatory statements about Burdette, "[o]n or about December of 1999 through the [date of the cross-complaint, July 31, 2000] ... ." Burdette now seeks to relitigate this issue by presenting evidence that other employees not covered by a privilege also disseminated defamatory statements. However, the issue preclusion aspect of res judicata prevents him from doing so. "[W]hen plaintiff 'elected to try his case on one theory of liability, he was barred from again trying it upon another ground.'" (*Panos v. Great Western Packing Co.*, *supra*, 21 Cal.2d at p. 639.) Burdette, having tried his federal claim on the ground of a continuing course of defamations, cannot now piece off the individual defamatory statements as individual claims of defamation.

II

Statute of Limitations

As a preliminary matter, we reject Burdette's claim that defendants abandoned their statute of limitations [***40] defense when they pursued a theory that the defamation never happened and Burdette was actually a thief.

Defendants raised the defense of the statute of limitations on demurrer, in a summary judgment motion, in a motion for nonsuit, and by way of a proposed jury instruction that was not given. Each time, the trial court ruled against defendants.

The statute of limitations defense was not inconsistent with the other defenses, and the issue having been raised numerous times below it has been preserved for appeal. (*Boyle v. CertainTeed Corp*. (2006) 137 Cal.App.4th 645, 649 [40 Cal. Rptr. 3d 501].) [*1692]

A. *Statements More than One Year Before Complaint*

The trial court's rationale, asserted by Burdette on appeal, was that Burdette's discovery in January 2002 of the statements made by Fitzpatrick and Carnago delayed the accrual of Burdette's cause of action against those defendants until the date of the discovery. Burdette also argues that his cause of action did not accrue until he suffered injury, and he alleged the defamation was ongoing.

(17) In some cases, the accrual of a cause of action in tort is delayed until the plaintiff discovers, or should have discovered, the factual basis for the claim. (*Shively v. Bozanich*, *supra*, 31 Cal.4th at p. 1248.) [***41] The discovery rule has been applied in cases of libel where the defamatory statement is hidden from view and the plaintiff has no access to or cause to seek access to the statement, such as where a statement is hidden in a personnel file that cannot be inspected by the plaintiff. (*Id*. at p. 1249.)

[**204] The statements at issue here, made in casual conversation, do not appear to fall within the discovery exception. Our research revealed only one case, *McNair v. Worldwide Church of God* (1987) 197 Cal. App. 3d 363, 379-380 [242 Cal. Rptr. 823], in which the court associated a slanderous statement (as opposed to libel) with the discovery rule, and in that case the court merely assumed the discovery rule would apply to the slander in question without analysis.

(18) However, assuming the discovery rule applies to cases of slander, we nevertheless conclude that under the discovery rule, Burdette's claim for the defamatory comments made prior to the commencement of his federal action accrued as of the time he filed the federal action. The discovery rule would delay the accrual of the cause of action not to the date Burdette found out about the statements Fitzpatrick and Carnago made about him, but to the date he discovered [***42] or should have discovered a factual basis for his defamation claim. (*Shively v. Bozanich*, *supra*, 31 Cal.4th at p. 1248.) This means, "'the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was

caused by wrongdoing, that someone has done something wrong to her.' [Citation.]" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal. Rptr. 2d 440, 873 P.2d 613].) It is not necessary that the plaintiff know the exact manner in which the injuries were effected. (*Ibid*.)

Discovery of the cause of action for defamation must have occurred by the time Burdette filed the cross-claim in his federal action alleging that Carrier, through "unknown employees and agents, disseminated information to others claiming that [Burdette] had stolen from [Carrier], had wrongfully taken [*1693] money from [Carrier], and conspired with his superiors to wrongfully obtain money from [Carrier], had wrongfully paid 'kick-backs' to his superiors in return for their assigning to him certain commissions and incentive payments and that [Burdette] was generally dishonest in his employment dealings with [Carrier]."

(19) The fact that a plaintiff does not know the identity of each and every defendant who has [***43] caused the harm, does not toll the running of the statute of limitations. (*Bernson v. Browning-Ferris Industries*, *supra*, 7 Cal.4th at p. 932.) The identity of the defendant is not an element of the cause of action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399 [87 Cal. Rptr. 2d 453, 981 P.2d 79].) Once a plaintiff is aware of the injury, the limitations period is presumed to afford sufficient opportunity to discover the identity of all the defendants. (*Bernson v. Browning-Ferris Industries*, *supra*, 7 Cal.4th at p. 932.)

Accordingly, the statute of limitations is an alternative ground for our holding as to those defamatory statements made prior to the filing of the federal cross-claim in January. Burdette had "discovered" such causes of action as of the date the cross-claim was filed on July 31, 2000. Since the evidence presented indicated the defamatory statements discovered during the federal case actually occurred two to three years after Burdette started working for the Sacramento office in March 1997, those statements occurred prior to the filing of the cross-claim on July 31, 2000. Any action for recovery based on such statements is time-barred.

(20) Burdette's [***44] arguments that his cause of action did not accrue until he suffered injury and he alleged ongoing defamation do not alter our conclusion. The type of [**205] slander alleged here was slander per se because it tended directly to injure plaintiff in respect to his business by imputing something that has a natural tendency to lessen its profits. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106-107 [15 Cal. Rptr. 3d 215].) Damages are presumed so that a cause of action is conclusively established from the false and unprivileged utterance constituting slander per se. (*Clark v. McClurg* (1932) 215 Cal. 279, 284 [9 P.2d 505].) Additionally, Burdette testified he became aware of the harm when he began working for Advanced Microtherm in the spring of 2000, before he filed his federal cross-claim in July of that year.

B. *Statements Made Within One Year of the Complaint*

The trial court allowed Burdette to present evidence of one defamatory statement that Burdette could not have raised in the federal action because it did not occur until after the trial in the federal case. This was the statement Fitzpatrick made to Lotspeich on July 23, 2002. Carrier argues this defamatory statement was not included within the scope [***45] of Burdette's complaint. We disagree.

The complaint alleged that "on or after December of 1999 through the present," named defendants, including Fitzpatrick "disseminated and published" false and unprivileged statements. It also alleged the statute of limitations had not run on Burdette's claims because he had no knowledge of "the publications of said false information by these named individual defendants until on or about January 23, 2002 ... ."

The Fitzpatrick statement to Lotspeich [*1694] did not occur until July 2002, and necessarily could not have been included in the allegations regarding late discovery. However, the allegations regarding discovery are directed to the statute of limitations, and did not limit the otherwise broad allegation that the complaint included all statements made until the filing of the complaint. Thus, the statement to Lotspeich, which occurred within one year of the filing of the complaint, was not barred by the statute of limitations.

III

Admission of Lotspeich Testimony

Carrier argues Lotspeich's testimony nevertheless should not have been allowed because Burdette did not disclose Lotspeich as a witness. Carrier made an Evidence Code section 402 motion after [***46] Burdette informed Carrier it intended to call Lotspeich as

a witness. The trial court allowed Carrier to examine Lotspeich to discover his intended testimony. Following Lotspeich's testimony, Carrier objected, contending Lotspeich's name had not been disclosed in Burdette's interrogatory answers as a witness. The trial court treated Carrier's motion as a motion to exclude Lotspeich's testimony, and denied it.

We will not disturb the trial court's determination that there has been no willful failure to disclose a witness's identity unless it was arbitrary or lacking in evidentiary support. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 782 [174 Cal. Rptr. 348]; *Rangel v. Graybar Electric Co.* (1977) 70 Cal. App. 3d 943, 948 [139 Cal. Rptr. 191].)

Even though Burdette did not include Lotspeich's name in his interrogatory response, he did give Lotspeich's name during his deposition as a person who heard defamatory statements. Carrier did not ask any followup questions [*1695] regarding Lotspeich. On this record the court did not abuse its discretion in allowing Lotspeich to testify.

[**206] IV

Prejudice

Reversal is required both because the jury may have based its verdict of liability on statements that were not actionable, and because of the [***47] prejudicial effect of the evidence admitted regarding claims that were barred by res judicata and the statute of limitations. [6]

> 6 Because we reverse the judgment, we do not consider Carrier's additional arguments that there was insufficient evidence Carrier ratified Fitzpatrick's statements, that the jury instructions and verdict forms regarding ratification were erroneous, or that the litigation privilege protected the statements between Fitzpatrick and Carnago.

The only actionable statement is Fitzpatrick's statement to Lotspeich, which occurred in July 2002. However, most of Burdette's evidence regarding damages related to the effect the rumors had on him before and during the time he worked for Advanced Microtherm. Burdette left Advanced Microtherm in 2000, well before the Fitzpatrick statement in 2002.

Burdette testified that he lost confidence when some of his customers confronted him about the incident with Carrier. His trial counsel argued this loss of confidence affected his ability as a salesman. The customers Burdette named were Steve Humeson, Clint Studebaker, Bob Gardener, and Bill Petty. The incidents occurred between March and September of 2000, before the actionable Fitzpatrick [***48] statement in 2002. Burdette also mentioned having to defend himself to people he worked for at Advanced Microtherm. These were Steve Thomas, John Karamanos, and Bill Carmody. Lotspeich testified the comments Fitzpatrick made to him had not negatively affected his relationship with Burdette, that he was not aware of any adverse action taken against Burdette as a result of the statements, and that he was not aware of any sales Burdette had lost because of the statements.

Burdette testified that he suffered from depression during the federal trial, but although he felt some anxiety, he felt no depression after he heard about the statement to Lotspeich. Since the Fitzpatrick statement could not have caused most of the damages that the trial court allowed into evidence, reversal is required.[7]

> 7 Certain questions have been tendered regarding the admissibility of evidence for the purposes of obtaining punitive damages. We leave that question to the determination of the trial court on retrial.

[***49] [*1696]

DISPOSITION

The judgment is reversed. Defendants shall recover their costs on appeal.

Scotland, P. J., and Cantil-Kakauye, J., concurred.

A petition for a rehearing was denied February 14, 2008, and the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied April 9, 2008, S161225.

LEXSEE 86 CAL.RPTR.3D 39

CONSUMER ADVOCACY GROUP, INC., Plaintiff and Appellant, v. EXXONMOBIL CORPORATION, Defendant and Respondent.

B201245

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

168 Cal. App. 4th 675; 86 Cal. Rptr. 3d 39; 2008 Cal. App. LEXIS 2279

November 20, 2008, Filed

PRIOR HISTORY: [***1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC240465, Wendell Mortimer, Jr., Judge.

DISPOSITION: Reversed and remanded.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A consumer group sued an oil company under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.) (Prop. 65), alleging that the oil company knowingly and intentionally allowed benzene, toluene, and lead to leak into drinking water sources. The trial granted summary judgment to the oil company, finding that the elements of res judicata were satisfied by a settlement, approved by another trial court, of a similar suit brought by a different group. (Superior Court of Los Angeles County, No. BC240465, Wendell Mortimer, Jr., Judge.)

The Court of Appeal reversed the judgment and remanded the matter to the trial court for further proceedings. The court found that the oil company was not entitled to full summary judgment or to summary adjudication on the basis that the entire action was barred by res judicata. Claim preclusion applies to private enforcement actions under Health & Saf. Code, § 25249.7, as long as due process and the traditional elements of res judicata are satisfied, but the primary right in the current action differed from the primary right in the settled action: the current complaint alleged violations based on benzene, toluene, and lead, while the prior complaint and settlement concerned benzene and toluene, but not lead. For the guidance of the trial court, the court concluded that the settling group provided constitutionally adequate representation to satisfy the privity element of res judicata. Although the agreement did not mention the public as a party to be bound, it involved remedial measures, not payments of penalties to the settling group, indicating, together with the settling group's stated intent to act as a private attorney general, that it was representing the interests of the general public, not just its own interests. The current consumer group did not have an individual property right at stake, even though Prop. 65 allows private enforcers to recover 25 percent of all penalties. (Opinion by Epstein, P. J., with Willhite and Suzukawa, JJ., concurring.) [*676]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Courts § 25--Jurisdiction--Exclusive and Concurrent--Nature--Collateral Attack.--Under the rule of exclusive concurrent jurisdiction, when two California superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related

matters have been resolved. Jurisdiction in this context refers to a mandatory procedural rule, not to authority over the subject matter or parties in a fundamental sense. The rule of exclusive concurrent jurisdiction is not jurisdictional in the sense that failure to comply renders subsequent proceedings void. The rule is established and enforced not so much to protect the rights of parties as to protect the rights of courts of coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice. Furthermore, when a court has fundamental jurisdiction over the subject matter and parties, but acts in excess of a jurisdictional rule, its judgment should be challenged directly and is generally not subject to collateral attack.

(2) Judgments § 67--Res Judicata--Definition.--"Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.

(3) Judgments § 67--Res Judicata--Concurrent Jurisdiction--Priority--First Final Judgment.--Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue res judicata in the other court. When two successive actions dealing with the same controversy are filed in courts of concurrent jurisdiction and the exclusive jurisdiction of the first court is not invoked before a final judgment is reached in either case, the priority of jurisdiction loses its significance; the first final judgment becomes conclusive, even though it is rendered in the action that was filed later in time.

(4) Judgments § 69--Res Judicata--Identity of Issues--Action Under Safe Drinking Water and Toxic Enforcement Act--Claims Concerning Toxic Substance Leakage.--Res judicata principles precluded a portion of a consumer group's action against an oil company under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. [*677] Code, § 25249.5 et seq.) (Prop. 65), because another group acting in the public interest had settled similar claims with the company, although the settled action concerned the leakage of benzene and toluene into drinking water, but did not include lead, as the current action did. However, the other elements of res judicata were satisfied. Claim preclusion applies to private enforcement actions under Prop. 65, as long as due process and the traditional elements of res judicata are satisfied.

[Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2008) ch. 33, § 33.04; Cal. Forms of Pleading and Practice (2008) ch. 418, Pollution and Environmental Matters, § 418.50; Cal. Forms of Pleading and Practice (2008) ch. 491, Res Judicata, § 491.42; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §§ 366, 409, 469.]

(5) Judgments § 67--Res Judicata--Elements?Public Interest Exception.--A prior judgment is not res judicata on a subsequent action unless three elements are satisfied: (1) the issues decided in the prior adjudication are identical with those presented in the later action; (2) there was a final judgment on the merits in the prior action; and (3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. Even if these threshold requirements are established, res judicata will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. The public interest exception is an extremely narrow one. It is the exception, not the rule, and is only to be applied in exceptional circumstances.

(6) Judgments § 69--Res Judicata--Identity of Issues--Primary Right.--Unless the issue or cause of action in two actions is identical, the first judgment does not stand as a bar to the second suit. To define a cause of action, California follows the primary right theory. The primary right theory provides that 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. 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. The primary right at issue must 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. 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 [*678] other. An erroneous judgment is as conclusive as

a correct one for the purpose of claim preclusion.

(7) Limitation of Actions § 65--Waiver.--The statute of limitations is an affirmative defense that a defendant may opt to raise or waive.

(8) Judgments § 68--Res Judicata--Identity of Parties--Privity.--In order for res judicata to apply, the party against whom the defense is asserted must have been a party or in privity with a party to the prior adjudication. In the context of a res judicata determination, "privity" refers to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is sufficiently close so as to justify application of the doctrine of collateral estoppel. The determination of privity depends upon the fairness of binding an appellant with the result obtained in earlier proceedings in which it did not participate. Whether someone is in privity with the actual parties requires close examination of the circumstances of each case. This requirement of identity of parties or privity is a requirement of due process of law.

(9) Judgments § 68--Res Judicata--Identity of Parties--Comprehensive Settlements--Due Process.--The doctrine of res judicata reflects a balancing of interests when applied in the context of the effect of public interest litigation settlement. On the one hand, defendants who enter into a public interest comprehensive settlement for the benefit of the public have an interest in finality and in being free from a series of additional suits from members of the public, the same class that was represented in the first suit. On the other hand, the opportunity to be heard is an essential requisite of due process of law and the party bringing suit may not be deprived of this right. Due process does not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is privity between a party to the second case and a party who is bound by an earlier judgment. Moreover, although there are clearly constitutional limits on the privity exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. The United States Supreme Court has recognized an exception to the general rule when, in [*679] certain limited circumstances, a person, although not a party, has his or her interests adequately represented by someone with the same interests who is a party.

(10) Pollution and Conservation Laws § 5--Water--Individual Suing in Representative Capacity--Public Rights.--The interest in suing in a representative capacity has been determined not to be a property right in the context of certain types of actions. The statutory framework governing an action under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.) affirms the representative nature of an individual's role. An individual may sue under the act only in the public interest; there is no provision for an individual to sue on his or her own behalf (Health & Saf. Code, § 25249.7, subd. (d)). An individual must notify various public prosecutors at least 60 days before commencing the action, and may not bring the action if one of the public prosecutors commences and is prosecuting an action against the same violation before the individual's action is commenced (§ 25249.7, subd. (d)(1), (2)). An individual must provide the Attorney General any settlement agreement being submitted for court approval, and the Attorney General may participate in court proceedings regarding approval (§ 25249.7, subd. (f)(5)). Taken together, these provisions reveal a statutory scheme intended to create a mechanism for vindicating public rights. This purpose is not altered by the potential for an individual to share in any penalties recovered.

(11) Judgments § 67--Res Judicata--Effect of Settlement.--A court-approved settlement acts as a final judgment on the merits for the purposes of res judicata. A judgment entered by consent or stipulation is as conclusive a bar as a judgment rendered after trial.

(12) Appellate Review § 109--Briefs--Requisites.--An appellate brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, a reviewing court may treat it as waived, and pass it without consideration.

COUNSEL: Yeroushalmi & Associates, Reuben Yeroushalmi, Daniel D. Cho and Ben Yeroushalmi for Plaintiff and Appellant.

Hunton & Williams, Chris M. Amantea and James K. Kawahito for Defendant and Respondent.

JUDGES: Opinion by Epstein, P. J., with Willhite and Suzukawa, JJ., concurring.

OPINION BY: Epstein

OPINION
[*680]

[**43] **EPSTEIN, P. J.**--This appeal arises from a private enforcement action under an initiative measure, the Safe Drinking Water and Toxic Enforcement Act of 1986 (the Act), commonly referred to as "Proposition 65." The Act is codified in Health and Safety Code section 25249.5 et seq. [1] Plaintiff and appellant Consumer Advocacy Group, Inc. (CAG), appeals from the entry of summary judgment in favor of defendant and respondent ExxonMobil Corporation. [2] The trial court based its judgment on the doctrine of res judicata. Because the issues in this action are not identical to those resolved in the prior action, we conclude the trial court erred in granting full summary judgment based on res judicata. We reverse the judgment and remand the matter to the trial court for further proceedings.

1 All further statutory references [***2] are to the Health and Safety Code unless otherwise indicated.

2 In the early stages of this litigation, respondent was identified as Mobil Corporation. Respondent now identifies itself as "ExxonMobil Corporation, the successor by merger to Mobil Corporation." Respondent's identity is not at issue in this appeal. The parties refer to respondent as ExxonMobil in their briefing, so we shall do the same.

FACTUAL AND PROCEDURAL SUMMARY

CAG is a private nonprofit organization. It describes its mission as protecting the public from, and educating the public about, harmful products and business practices. In order to promote its goals, CAG acts as a private enforcer of the Act, bringing lawsuits against businesses it believes to be in violation of sections 25249.5 and 25249.6. The statutory scheme allows enforcement actions to be brought by private persons acting in the public interest. (§ 25249.7, subd. (d).)

In January 1999, Consumer Cause, Inc., an organization CAG refers to as its predecessor, filed suit in Los Angeles Superior Court against several oil companies, including ExxonMobil, purportedly on behalf [**44] of the public. The complaint alleged that ExxonMobil [*681] violated the Act by knowingly and [***3] intentionally allowing benzene, toluene, and lead to leak into drinking water sources. The complaint included a list of California sites where this contamination allegedly occurred, and the relief requested was specific to these sites.

Shortly after the Consumer Cause complaint was filed, a similar complaint was filed in the San Francisco Superior Court by Communities for a Better Environment and Nicole McAdam (collectively, CBE), also purporting to act on behalf of the public. The CBE complaint also alleged that ExxonMobil violated the Act by knowingly and intentionally allowing benzene and toluene to leak into drinking water sources. The CBE complaint did not allege any violations based on leaks of lead. The CBE complaint's list of alleged contamination sites included some of the same sites listed in the CAG complaint (overlapping sites). In May 1999, the court directed CBE to amend its complaint to remove the overlapping sites. CBE complied with this order. In August 1999, Consumer Cause voluntarily dismissed its complaint. The same day, CAG filed an almost identical complaint against the same defendants, including ExxonMobil. The list of sites allegedly contaminated by ExxonMobil [***4] was similar to the list submitted by Consumer Cause. CAG filed this complaint in the San Francisco Superior Court; the case was transferred to the Los Angeles Superior Court in 2000.

CBE and ExxonMobil reached a tentative settlement agreement in 2003. In order to ensure uniform treatment of all its facilities, ExxonMobil agreed to the proposed settlement with the expectation that CBE would amend its complaint to include all alleged sites of contamination in California, including those being litigated by CAG. CBE was permitted to file an amended complaint adding all of the contested California sites. The Attorney General reviewed the terms of the settlement. The court approved the settlement in March 2004 and commented on the record that it believed the settlement to be beneficial to the people of California.

With respect to the CAG action, ExxonMobil filed a motion in November 2006 for summary judgment, or alternatively, summary adjudication on the issue of whether "CAG's prosecution of this action--an action which asserts the same claims as a virtually identical case already resolved by a settlement and final judgment

entered in San Francisco Superior Court--is barred by the doctrine [***5] of *res judicata*." The trial court granted ExxonMobil's motion for full summary judgment, finding that all of the elements of res judicata were satisfied by the CBE settlement. CAG timely appeals from the ensuing judgment.

DISCUSSION

CAG contends summary judgment in favor of ExxonMobil was erroneous for two reasons. First, CAG argues the settlement between CBE and ExxonMobil is invalid, at least as to the overlapping sites, because the San Francisco court lacked jurisdiction to approve the settlement. Second, CAG argues the elements necessary for application of res judicata were not satisfied as to its claims against ExxonMobil. "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter [*682] of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348 [1 Cal. Rptr. 3d 32, 71 P.3d 296]; see Code Civ. Proc., § 437c.)

I

CAG claims, "The rule of exclusive concurrent jurisdiction precludes CBE [**45] from settling as to the sites covered by CAG's complaint." It declares it is "not attacking the settlement between [CBE and ExxonMobil]" and that it "does [***6] not ask this Court to overturn effectively the CBE settlement and judgment." But the essence of CAG's claim is that the San Francisco court lacked jurisdiction over the overlapping sites, and for that reason could not approve a settlement with regard to them.

(1) "'Under the rule of exclusive concurrent jurisdiction, "when two [California] superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved."'? (*People ex rel. Garamendi v. American Autoplan, Inc*. (1993) 20 Cal.App.4th 760, 769-770 [25 Cal. Rptr. 2d 192].) "Jurisdiction" in this context refers to a mandatory procedural rule, not to authority over the subject matter or parties in a fundamental sense. (*Ibid*.; see also *County of Los Angeles v. Harco National Ins. Co*. (2006) 144 Cal.App.4th 656, 661-662 [50 Cal. Rptr. 3d 573] [contrasting possible meanings of the term "jurisdiction"].)

The basis for CAG's claim is the 1999 order in the suit between CBE and ExxonMobil, directing CBE to delete the overlapping sites. ExxonMobil raised exclusive [***7] concurrent jurisdiction as an affirmative defense in its demurrer to CBE's first amended complaint. It argued the Los Angeles court had exclusive jurisdiction and asked that the San Francisco court either sustain its demurrer or stay the CBE action until the CAG suit was resolved. The San Francisco court overruled ExxonMobil's demurrer, but ordered CBE to amend its complaint to remove all overlapping sites. The court reasoned that the CBE action was not barred by the doctrine of exclusive concurrent jurisdiction as long as the sites being litigated in the two actions did not overlap. CAG now relies on this ruling as evidence that, had the overlapping sites not been amended out of CBE's complaint, CBE's suit would have been barred by the doctrine of exclusive concurrent jurisdiction. Thus, according to CAG, when the CBE complaint was later amended to add the overlapping sites in accordance with the settlement agreement, CBE was in violation of the earlier order and the San Francisco court was acting in excess of its jurisdiction. [*683]

CAG's argument is dependent on its implicit assumption that a court may not modify an earlier ruling. In its briefs, CAG accuses CBE and ExxonMobil of violating [***8] a court order by reaching a settlement that included the overlapping sites. This accusation ignores the fact that the San Francisco court approved the settlement agreement that included the overlapping sites. The San Francisco court also allowed CBE to amend its complaint to include the overlapping sites once the settlement agreement was reached. These actions, undertaken with the approval of the court, were not violations of a court order.

Because the Los Angeles court assumed jurisdiction over claims concerning the overlapping sites first, CAG asserts that the San Francisco court lacked the authority to subsequently assume jurisdiction and approve the settlement. This assertion reflects a misunderstanding of the doctrine of exclusive concurrent jurisdiction. "The rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void.? (*People ex rel. Garamendi v. American Autoplan, Inc*., *supra*, 20 Cal.App.4th at p.

772.) [**46] "The rule is established and enforced not 'so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay [***9] in the administration of justice.'" (*Plant Insulation Co. v. Fibreboard Corp*. (1990) 224 Cal.App.3d 781, 787 [274 Cal. Rptr. 147].) Furthermore, when a court has fundamental jurisdiction over the subject matter and parties, but acts in excess of a jurisdictional rule, its judgment should be challenged directly and is generally not subject to collateral attack. (*County of Los Angeles v. Harco National Ins. Co*., *supra*, 144 Cal.App.4th at p. 662.) CAG's argument invites this court to perform collateral review of the decision of the San Francisco court. We decline to do so. The final judgment in the lawsuit between CBE and ExxonMobil is beyond the scope of the appeal before this court.

II

(2) "'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896 [123 Cal. Rptr. 2d 432, 51 P.3d 297].) "A [***10] 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.'" (*Id*. at p. 897, italics omitted.)

(3) As a preliminary matter, CAG contends that the CBE settlement cannot have preclusive effect on the CAG suit under the res judicata doctrine. The reason, it argues, is that "a subsequent action cannot bar a prior action." [*684] While this is generally true, CAG incorrectly assumes that the determination of which action is prior and which is subsequent is based on the order in which the suits were filed. """Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but *the first final judgment*, although it may be rendered in the second suit, that renders the issue *res judicata* in the other court."" (*Busick v. Workmen's Comp. Appeals Bd*. (1972) 7 Cal.3d 967, 977 [104 Cal. Rptr. 42, 500 P.2d 1386]; see also 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 366, p. 989.) When two successive actions dealing with the same controversy are filed in courts of concurrent jurisdiction and the exclusive jurisdiction [***11] of the first court is not invoked before a final judgment is reached in either case, "'the priority of jurisdiction loses its significance; *the first final judgment* becomes conclusive, even though it is rendered in the action which was filed later in time.'" (*Busick*, *supra*, 7 Cal.3d at p. 977.) The San Francisco court's judgment approving the CBE settlement became final while CAG's action in the Los Angeles court was still pending. Thus, the CBE suit was the first to reach a final judgment.

CAG also asserts that settlements in cases brought by private enforcers under Proposition 65 lack res judicata effect on future private enforcement actions. The contrary is true. The application of res judicata to one private enforcer based on a settlement reached by another may present due process concerns under certain circumstances. As long as the requirements of due process are met, however, there are strong indications that the Legislature intended res judicata principles to apply to citizen suits brought pursuant to Proposition 65. In 2001, it [**47] amended the Act to add a number of new provisions. (Legis. Counsel's Dig., Sen. Bill No. 471 (2001-2002 Reg. Sess.) Stats. 2001, ch. 578.) These provisions [***12] included section 25249.7, subdivision (f)(6), which now provides: "Neither this subdivision nor the procedures provided in subdivision (e) and subdivisions (g) to (j), inclusive, shall affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether claims raised by any person or public prosecutor not a party to the action are precluded by a settlement approved by the court." We have examined the legislative history of this amendment and given the parties an opportunity to do so as well. While we did not find legislative history speaking specifically to subdivision (f)(6), the larger context of the 2001 amendments is instructive. The Legislature recognized that the private enforcement mechanism of Proposition 65 had led to a number of frivolous lawsuits and collusive settlements. (Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. on Sen. Bill No. 471 (2001-2002 Reg. Sess.) Sept. 26, 2001.) The purpose of the 2001 amendments was to "address[] abusive actions brought by private persons containing little or no supporting evidence by barring such actions from proceeding, or shifting the burden of proof provided by the statute." (Sen. Rules [***13] Com., Off. of Sen. Floor Analysis, [*685] Rep. on Sen. Bill No. 471 (2001-2002 Reg. Sess.) Sept. 26, 2001, p. 2.) Allowing defendants to assert claim preclusion as a defense in appropriate cases is consistent with the Legislature's

desire to minimize frivolous and duplicative lawsuits by private enforcers.

(4) CAG argues that allowing a settlement by one private enforcer to preclude claims by a different private enforcer will encourage collusive settlements. The Legislature has expressed concern about such settlements, in which a defendant attempts to insulate itself against future litigation by entering into a comprehensive settlement with a private enforcer on terms that enrich the private enforcer but do little to benefit the public. (Sen. Rules Com., Off. of Sen. Floor Analysis, Rep. on Sen. Bill No. 471 (2001-2002 Reg. Sess.) Sept. 26, 2001.) In response to this concern, the Legislature did not strip Proposition 65 settlements of preclusive effect, but instead increased oversight of settlements involving private enforcers. The 2001 amendments included the addition of section 25249.7, subdivision (f)(4), which mandates court review and factual findings before approval of any settlement in a private [***14] enforcement action, and subdivision (f)(5), which requires that these settlements be submitted to the Attorney General, who may then participate in the settlement approval process. [3] (Legis. Counsel's Dig., Sen. Bill No. 471 (2001-2002 Reg. Sess.) Stats. 2001, ch. 578.) At oral argument, CAG questioned whether oversight by a court and the Attorney General is sufficient to prevent collusive [**48] settlements, particularly if third parties who will be affected by the settlement are not given notice and an opportunity to intervene. This is a concern the Legislature is best suited to address, given the statutory scheme it has enacted. Accordingly, we conclude claim preclusion applies to private enforcement actions, as long as due process and the traditional elements of res judicata are satisfied.

> 3 "(4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings: [¶] (A) Any warning that [***15] is required by the settlement complies with this chapter. [¶] (B) Any award of attorney's fees is reasonable under California law. [¶] (C) Any penalty amount is reasonable based on the criteria set forth in paragraph (2) of subdivision (b).
>
> "(5) The plaintiff subject to paragraph (4) has the burden of producing evidence sufficient to sustain each required finding. The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case." (§ 25249.7, subd. (f)(4), (5).)

(5) We turn to the merits of CAG's contention that the trial court incorrectly found the elements of res judicata to be satisfied by the CBE settlement. Our review is de novo since the issue is a question of law. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10 [73 Cal. Rptr. 3d 3].) A prior judgment is not res judicata on a subsequent action unless three elements are satisfied: [*686] "1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication. [***16] [Citation.] Even if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.'" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065 [71 Cal. Rptr. 2d 77] (*Citizens for Open Access*).) CAG contends that the CBE settlement satisfies none of these elements, and that even if it did, injustice would result from the application of res judicata.

A

(6) CAG asserts that the issues decided by the CBE settlement differ from those presented in the present action. "Unless the issue or cause of action in the two actions is identical, the first judgment does not stand as a bar to the second suit. [Citations.] To define a cause of action, California follows the primary right theory." (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1067.) The primary right theory "'provides that 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 [***17] of a single primary right gives rise to but a single cause of action.'" (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 904.) The primary right at issue must 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."'" (*Ibid*.)

CAG first seeks to distinguish the primary right in this case by arguing that "[t]he CAG action included 63 sites of violations distinct from those cited in the CBE action." This assertion is premised on CBE's settlement having been invalid as to the overlapping sites. As we explained in our discussion of exclusive concurrent jurisdiction, this court does not intend to perform a collateral review of the final judgment in the suit between CBE [**49] and [*687] ExxonMobil. [4] In any [***18] event, "'[a]n erroneous judgment is as conclusive as a correct one'" for the purpose of claim preclusion. (*Busick v. Workmen's Comp. Appeals Bd*., *supra*, 7 Cal.3d at p. 975.) The settlement approved by the San Francisco court resolved CBE's claims as to all of the sites in CBE's eighth amended complaint. CAG admits that CBE's final complaint incorporated all of the sites at issue in the CAG action. We conclude that the primary right at issue in this case cannot be distinguished from the primary right at issue in the CBE action on the basis of the sites being litigated.

> 4 In addition to its argument based on exclusive concurrent jurisdiction, CAG also argues that the settlement is invalid as to the overlapping sites because CBE's intent to sue notices for those sites did not comply with the requirements of Proposition 65. The notice requirements under Proposition 65 are intended to give notice to potential defendants, as well as giving public prosecutors such as the Attorney General the opportunity to file suit themselves. (§ 25249.7, subd. (d)(1).) CAG is neither a defendant nor a public prosecutor and is not entitled to notice under this provision. Thus, even if the Proposition 65 notice [***19] requirements were violated, a question on which we express no opinion, CAG has not shown that it has standing to complain of the violation. These questions should have been raised before the judgment in the CBE action became final; we decline to address them on collateral review.

(7) CAG next tries to distinguish the primary right in this case by arguing that its claim covers a period of time not covered by the CBE action because CAG sued over the overlapping sites earlier than CBE. The overlapping sites were amended into CBE's complaint in 2003, while they appeared in CAG's complaint as early as 1999. Thus, CAG argues that the statute of limitations on its complaint allows it to litigate violations going back years further than CBE. Because the Act allows penalties to be calculated on a daily basis, CAG contends that the primary right is related to when the statute of limitations expires. CAG acknowledges that ExxonMobil waived its statute of limitations defense as part of the settlement with CBE, but argues we should disregard this waiver as contrary to public policy. CAG frames the issue as though ExxonMobil "ignore[d] the law." This is a mischaracterization of the role of the statute [***20] of limitations, an affirmative defense which a defendant may opt to raise or waive. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 962, p. 375.) CAG's attempt to show ExxonMobil's waiver harms the public also fails. CAG offers generalizations about the purpose of Proposition 65 and the role of private enforcers, but does not demonstrate that it is inconsistent with the goals of Proposition 65 to allow a settlement to encompass more violations than could be redressed if the statute of limitations was raised. We find no basis to conclude that ExxonMobil's waiver of the statute of limitations is contrary to public policy. Since the CAG and CBE claims are not distinguishable on the basis of time covered, we need not reach the question whether the application of the statute of limitations, if not waived, would have affected the primary rights at issue. [*688]

Finally, CAG distinguishes the primary right at issue by pointing out that its complaint alleged violations based on benzene, toluene, and lead, while CBE's complaint and settlement concerned benzene and toluene, but not lead. ExxonMobil responds by asserting that the primary right at issue is the leaking of petroleum products into [***21] water sources, rather than the leaking of any particular gasoline constituent. But the settlement is specific in covering only benzene and toluene; it does not contain language permitting a broader application. [**50] In the section titled "Claims Covered," the settlement agreement states: "This Settlement Agreement is a final and binding resolution between the Plaintiffs

and ExxonMobil of the following causes of action: [¶] ... Any and all Proposition 65 claims that could have been asserted in this action arising out of any alleged discharge or release of *benzene and/or toluene* ... including, without limitation, all claims with respect to the continued presence or migration of such *benzene and/or toluene* in soil or water; [¶] ... Any and all Unfair Competition Act claims pursuant to Proposition 65 that could have been asserted in this action arising out of any alleged discharge or release of *benzene and/or toluene* ... including, without limitation, all claims with respect to the continued presence or migration of such *benzene and/or toluene* in soil or water; and [¶] ... Any and all Unfair Competition Act claims pursuant to Fish and Game Code section 5650 that could have been asserted [***22] in this action arising out of any alleged discharge or release of *benzene and/or toluene* ... including, without limitation, all claims with respect to the continued presence or migration of such *benzene and/or toluene* in soil or water." (Italics added.)

ExxonMobil argues, "[T]he Settlement Agreement in the CBE Action specifically encompasses the release of all gasoline constituents, which includes lead." It cites to paragraph No. 5.4.5 of the agreement to support this argument. In fact, paragraph No. 5.4.5 of the settlement agreement is a general commitment to perform corrective action as required by law in cooperation with the appropriate regulatory agencies. [5] This general language, read in conjunction with the agreement's description of claims covered, does not specifically encompass "all gasoline constituents." We are not persuaded [*689] by ExxonMobil's related argument that corrective action taken to address benzene and toluene contamination will necessarily address lead contamination, if any exists. Whether or not this is an accurate assessment, it is not supported by the record before us. Rather, it presents a question of fact for the trial court. ExxonMobil further claims that "the [***23] use of leaded gasoline was phased out in the 1970's (well outside the statute of limitations for either suit) and is no longer a significant component of gasoline." This, too, is a question of fact for the trial court. No findings regarding lead appear in the record.

> 5 In pertinent part, paragraph No. 5.4.5 of the settlement agreement provides, "At service station sites in California where ExxonMobil has responsibility for and performs corrective action, ExxonMobil will perform such corrective action consistent with Chapter 6.7 and Chapter 6.75 of the California Health and Safety Code and Sections 2720-2728 of Article 11, of Title 23 of the California Code of Regulations and any different or more stringent requirement as authorized by Section 25299.2(a) of the California Health and Safety Code. In performing corrective action consistent with Chapter 6.7 and Chapter 6.75 of the California Health and Safety Code and Sections 2720?2728 of Article 11, of Title 23 of the California Code of Regulations and any different or more stringent requirement as authorized by Section 25299.2(a) of the California Health and Safety Code, ExxonMobil will work with the Appropriate Regulatory Agency." (Fn. [***24] omitted.) The remainder of paragraph No. 5.4.5 of the agreement defines "Appropriate Regulatory Agency."

ExxonMobil argues that if we find CAG's claim regarding lead is not barred by res judicata, we open the door for a plaintiff to "effectively undermine any settlement agreement under Proposition 65 by simply alleging the additional existence of one of the more than 700 chemicals comprising the list of toxins that was not specifically delineated in the pleadings of a case." To the contrary, we are not holding that a single settlement agreement cannot resolve claims relating to all gasoline constituents. [**51] Instead, we conclude that this settlement does not do so.

While ExxonMobil is not entitled to full summary judgment or to summary adjudication that CAG's entire action is barred by res judicata, this is only because the CBE action did not resolve claims relating to lead. As we shall explain for the guidance of the trial court, the other elements of res judicata are satisfied.

B

(8) CAG argues that res judicata does not preclude its claim because it was not a party to the CBE settlement, nor in privity with CBE. In order for res judicata to apply, the party against whom the defense is asserted [***25] must have been "a party or was in privity with a party to the prior adjudication." (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1065.)

In the context of a res judicata determination, privity "'refers "to a mutual or successive relationship to the same rights of property, or to such an identification in

interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." ' " (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90-91 [38 Cal. Rptr. 3d 528].) " '[T]he determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate. [Citation.] " 'Whether someone is in privity with the actual parties requires close [*690] examination of the circumstances of each case.' " ' " (*Id*. at p. 91.) "This requirement of identity of parties or privity is a requirement of due process of law." (*Clemmer v. Hartford Insurance Co*. (1978) 22 Cal.3d 865, 874 [151 Cal. Rptr. 285, 587 P.2d 1098].)

CAG was not a party to the settlement [***26] between ExxonMobil and CBE. Nevertheless, ExxonMobil argues that CAG and CBE are in privity for the purpose of res judicata because both purport to be acting as enforcers of the public interest, on behalf of the people of California. In reaching this conclusion, ExxonMobil cites to *Citizens for Open Access*, *supra*, 60 Cal.App.4th 1053, which examined whether privity can exist between two unrelated parties when both purport to represent the public interest. The dispute concerned public access to privately owned beachfront land. (*Id*. at p. 1058.) The first suit was brought by various state agencies and the Attorney General and resulted in a settlement granting the public limited access to the disputed parcel. (*Id*. at pp. 1060-1061.) The second suit was brought by a nonprofit organization purporting to act on behalf of the public seeking similar, though not identical, relief. (*Id*. at p. 1062.) The court found the doctrine of res judicata imposed a bar to the second suit. (*Id*. at p. 1075.) With respect to the issue of privity, the court explained, "The members of appellant were also members, although unnamed, of the class of public citizens adequately represented by the state agencies in [***27] the [prior] actions. Appellant, even if not named or active as a party, would be bound by judgments in the same prior actions brought pursuant to statutory authority by a different *citizens* group acting in a representative capacity for the benefit of the public, or at least those members of it similarly situated, to determine the same matter of public interest. ... Where, as here, authority to pursue public rights or [**52] interests in litigation has been given to a public entity by statute, a judgment rendered is res judicata as to all members of the class represented." (*Id*. at p. 1073.)

(9) The doctrine of res judicata reflects a balancing of interests when applied in the context of the effect of litigation settlement. One the one hand, defendants who enter into a comprehensive settlement for the benefit of the public have an interest in finality and in being free from a series of additional suits from members of the public, the same class that was represented in the first suit. On the other hand, "[t]he opportunity to be heard is an essential requisite of due process of law" and the party bringing suit may not be deprived of this right. (*Richards v. Jefferson County* (1996) 517 U.S. 793, 797, fn. 4 [135 L. Ed. 2d 76, 116 S. Ct. 1761] [***28] (*Richards*).)

The United States Supreme Court has expressed concern about "extreme applications of the doctrine of res judicata" that are "inconsistent with a federal right that is 'fundamental in character.'" (*Richards*, *supra*, 517 U.S. at [*691] p. 797.) In *Richards*, the Alabama courts had concluded that a lawsuit challenging the constitutionality of a county tax brought by a city within the county and three taxpayers precluded a subsequent suit in which a class of employees subject to the tax raised similar claims. (*Id*. at pp. 795-796.) One of the reasons the Alabama Supreme Court gave for upholding this ruling was that the taxpayers in the first suit adequately represented the taxpayers in the second suit because their respective interests were "'essentially identical.'" (*Id*. at p. 796.) The United States Supreme Court reversed, concluding that the application of res judicata against the second group of taxpayers deprived them of due process. (*Id*. at p. 797.) The court acknowledged that due process "[does] not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to [***29] the second case and a party who is bound by an earlier judgment. ... Moreover, although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. See generally Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments). [¶] ... 'We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.'" (*Id*. at p. 798.) The

Alabama Supreme Court had concluded that the parties bringing the second suit were "adequately represented" by the first suit. (*Id*. at p. 799.) The United States Supreme Court disagreed.

One of the critical facts underlying the court's decision was the failure of the parties to the first suit to provide any notice to the parties who brought the second suit that a suit was pending that would conclusively resolve their legal rights. (*Richards*, *supra*, 517 U.S. at p. 799.) Other critical facts were that "the three county [***30] taxpayers who were parties in [the first suit] did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties." (*Id*. at p. 801.) On these facts, the court concluded, "[T]here is no reason to suppose that the [first suit's] court took [**53] care to protect the interests of petitioners in the manner suggested in [*Hansberry v. Lee* (1940) 311 U.S. 32 [85 L. Ed. 22, 61 S. Ct. 115]]. Nor is there any reason to suppose that the individual taxpayers in [the first suit] understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in [the first suit] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.' [Citation.] [¶] Because petitioners and the [first suit's] litigants are best described as mere 'strangers' to one another, [citation], we are unable to conclude that the [first suit's] plaintiffs [*692] provided representation sufficient to make up for the fact that petitioners neither participated [***31] in, [citation], nor had the opportunity to participate in, the [first] action. Accordingly, due process prevents the former from being bound by the latter's judgment." (*Id*. at p. 802.)

If privity exists in the present case, it would be due to "adequate representation" of CAG's interests by CBE. We consider the facts of our case in light of *Richards*. Some distinctions are apparent. CBE did sue on behalf of a class--the public--because it sued under the citizen enforcement provision of Proposition 65. CBE's pleadings purported to assert claims on behalf of nonparties, stating the action was on behalf of "[CBE's] over 20,000 members and the general public of California ... as a private attorney general." The complaint explicitly stated that CBE was not suing in an individual capacity and was not claiming any individual injury "separate and apart from all other residents of the state." Because CBE considered itself to be suing in a representative capacity, the concerns that the *Richards* court expressed about whether care was taken to protect the interests of absent class members are diminished in this case. The settlement agreement states only that it is binding upon "the Plaintiffs and [***32] ExxonMobil, and ExxonMobil's successors and assigns." The agreement is silent as to its intended effect on nonparties. In the context of a case brought on behalf of the public, however, the settlement agreement's failure to mention the public as a party to be bound is not sufficient to show that CBE abandoned its intention to represent the interests of the general public. Furthermore, the settlement agreement itself involved remedial measures to be taken by ExxonMobil at alleged violation sites, not payments of penalties to CBE. This resolution of the suit, combined with CBE's stated intent to act as a private attorney general, indicates that CBE was representing the interests of the general public, not just its own interests. Thus, it appears that CBE provided constitutionally adequate representation of CAG's interests.

(10) According to its complaint, CAG also "brings this action in the public interest." This is significant to the due process inquiry, not only because it supports our conclusion that CBE adequately represented CAG's interests, but also because it leads us to conclude that CAG does not have an individual property right in pursuing this action. The interest in suing in a [***33] representative capacity has been determined not to be a property right in the context of other types of actions. (See, e.g., *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 [46 Cal. Rptr. 3d 57, 138 P.3d 207] [unfair competition suit]; *Hogan v. Ingold* (1952) 38 Cal.2d 802 [243 P.2d 1] [shareholder derivative suit]; *Alvarez v. May Dept. Stores Co*. (2006) 143 Cal.App.4th 1223 [49 Cal. Rptr. 3d 892] [class action].) CAG contends that it has an individual property right at stake in a Proposition 65 action because [**54] private enforcers are entitled to 25 percent of all penalties. (§ 25249.12, subd. (d).) To the contrary, the statutory framework governing a [*693] Proposition 65 action affirms the representative nature of the individual's role. An individual may sue under the Act only in the public interest; there is no provision for an individual to sue on his or her own behalf. (§ 25249.7, subd. (d).) An individual must notify various public prosecutors at least 60 days before commencing the action, and may not bring the action if one of the public prosecutors

commences and is prosecuting an action against the same violation before the individual's action is commenced. (§ 25249.7, subd. (d)(1), (2).) An individual must provide the Attorney [***34] General any settlement agreement being submitted for court approval, and the Attorney General may participate in court proceedings regarding approval. (§ 25249.7, subd. (f)(5).) Taken together, these provisions reveal a statutory scheme intended to create a mechanism for vindicating public rights. This purpose is not altered by the potential for an individual to share in any penalties recovered.

There remains a question about notice of the impending settlement between ExxonMobil and CBE. The *Richards* court made clear that lack of notice to any nonparties who will be bound raises questions about whether those parties are denied due process when res judicata is applied to preclude their claims. In this case, there appears to be a factual dispute as to whether CAG was given notice of CBE's impending settlement. ExxonMobil alleges actual notice was given to CAG, while CAG alleges it was not given notice. We note that the settlement agreement contains a confidentiality clause intended to restrict disclosure of the agreement until it became public through either the Attorney General or the court. The trial court did not make any findings regarding notice to CAG when granting summary judgment. [***35] Whether or not we should remand for resolution of this disputed fact depends on whether the fact in question is material. (See *Rodgers v. Sargent Controls & Aerospace*, *supra*, 136 Cal.App.4th at p. 88.) *Richards* assumed, without deciding, that adequate representation might cure a lack of notice. (*Richards*, *supra*, 517 U.S. at p. 801.) Ultimately, the court did not have to reach that question, because it found there was not adequate representation. (*Ibid*.) In this case, however, we find there was adequate representation of CAG's interests by CBE, and we find this representation cured any lack of notice. Thus, the factual dispute over whether CAG had notice is not material to the resolution of the case and does not provide a basis for reversing the grant of summary judgment.

We conclude that CAG is in privity with CBE for the purposes of res judicata. We further find that application of the privity doctrine to preclude CAG's claim does not violate CAG's due process rights under the circumstances of this case. [*694]

C

(11) CAG argues that the settlement between CBE and ExxonMobil is not a final judgment on the merits. A court-approved settlement acts as a final judgment on the merits for the purposes [***36] of res judicata. """A judgment entered ... by consent or stipulation, is as conclusive a ... bar as a judgment rendered after trial." (4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 170, p. 3312 ... .)'" (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1065, citation omitted.) CAG does not dispute this basic principle, but argues that settlement without discovery lacks the factual basis to be a judgment on the merits. CAG cites no authority in support of this argument. **(12)** '"[A]n [**55] appellate brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration."'" (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545 [35 Cal. Rptr. 2d 574].) Accordingly, we consider this argument waived.

CAG's briefing on whether this case falls within the injustice or public interest exceptions to the doctrine of res judicata also lacks citation to legal authority. Other than citing the general principle that res judicata will not be applied """if injustice would result or if the public interest requires that relitigation not be foreclosed""" (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 257 [5 Cal. Rptr. 2d 545, 825 P.2d 438]), [***37] CAG fails to reference any authority to support its argument that either of the exceptions applies in this case. Our Supreme Court has cautioned that "[t]he public interest exception is an extremely narrow one ... it is the exception, not the rule, and is only to be applied in exceptional circumstances." (*Id*. at p. 259; see also *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796 [126 Cal. Rptr. 225, 543 P.2d 593] [questioning the continued validity of the "injustice" exception].) CAG's argument fails to explain how the circumstances of this case are sufficiently exceptional to warrant the application of the exception. Neither does it compare the facts of this case to any other case in which the injustice or public interest exceptions were found to be appropriate. CAG argues that it could have, and would have, pushed for more extensive remedies to benefit the public than were agreed to in the CBE settlement, but it does not allege that the settlement was collusive or in bad faith on CBE's part. Nor does ExxonMobil's desire to reach a comprehensive settlement as to all of its California sites, rather than litigating them piecemeal, show bad faith on its part. CAG has not shown that injustice would result or that the

public [***38] interest would be harmed if res judicata was applied to preclude its claim against ExxonMobil. [*695]

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

Willhite, J., and Suzukawa, J., concurred.

LEXSEE 207 P.3D 506

BONNIE HERNANDEZ, as Administrator, etc., et al., Plaintiffs and Appellants, v. CITY OF POMONA et al., Defendants and Respondents.

S149499

SUPREME COURT OF CALIFORNIA

46 Cal. 4th 501; 207 P.3d 506; 94 Cal. Rptr. 3d 1; 2009 Cal. LEXIS 4630

May 28, 2009, Filed

SUBSEQUENT HISTORY: Reported at Hernandez (Bonnie) v. City of Pomona, 2009 Cal. LEXIS 5501 (Cal., May 28, 2009)

PRIOR HISTORY:

Court of Appeal Second Appellate District, Division Seven, No. B182437. Superior Court of Los Angeles County, No. KC043657, R. Bruce Minto, Judge.

Hernandez v. City of Pomona, 145 Cal. App. 4th 701, 51 Cal. Rptr. 3d 846, 2006 Cal. App. LEXIS 1925 (Cal. App. 2d Dist., 2006)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiffs, the family of an unarmed suspect who was shot and killed during a police chase, sought damages from defendants, the officers and their employers, based on the use of deadly and constitutionally excessive force. A federal court entered judgment for defendants following trial on plaintiffs' claim under 42 U.S.C. § 1983, and dismissed a supplemental state law wrongful death claim arising out of the same incident. The state trial court entered judgment for defendants based on the preclusive effect of the federal judgment. (Superior Court of Los Angeles County, No. KC043657, R. Bruce Minto, Judge.) The Court of Appeal, Second Dist., Div. Seven, No. B182437, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter with directions to reinstate the trial court's judgment. The court agreed with the Court of Appeal that the federal proceedings collaterally estopped plaintiffs from recovering on the theory that the officers acted negligently in using deadly force. In resolving plaintiffs' § 1983 claim, the issue of whether the officers exercised reasonable care in using deadly force was raised, submitted for decision, and actually decided against plaintiffs. The negligence issue in the wrongful death claim--whether the officers acted with reasonable care in shooting the suspect--was precisely the issue resolved by the conclusion in federal court that the officers' conduct was objectively reasonable. The court rejected the argument that the federal and state standards of reasonableness differed, either with regard to the requisite mental state or with regard to whether a balancing of competing interests was required. Contrary to the opinion of the Court of Appeal, the court held that liability also could not be based on the officers' alleged preshooting negligence. An officer had probable cause to arrest the suspect because, after the car he occupied was properly detained, he moved into the driver's seat and drove off. California law expressly authorized the officer to pursue the suspect and to use reasonable force to make an arrest. Liability could not be based on the execution of the pursuit decision. The shooting occurred well after the police stopped and exited their cars and chased the suspect on foot. [*502] Accordingly, neither the individual officers nor their employers could be held civilly liable based on the manner in which the officers conducted the vehicular pursuit. Plaintiffs also could not base negligence liability on the police chasing the suspect into a darkened parking

lot, on the use and release of a vicious dog, or on the theory that an officer unreasonably believed that the suspect posed an immediate threat to safety, given the federal jury's contrary ruling. (Opinion by Chin, J., with George, C. J., Kennard, Baxter, and Corrigan, JJ., concurring. Concurring opinion by Moreno, J., with Werdegar, J., concurring (see p. 522). Concurring opinion by Corrigan, J., with Baxter, J., concurring (see p. 523).)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Judgments § 86--Collateral Estoppel--Threshold Requirements.--Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. Traditionally, the court has applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

(2) Judgments § 89--Collateral Estoppel--Issue Actually Litigated.--For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts. The identical issue requirement addresses whether identical factual allegations are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.

(3) Government Tort Liability § 11--Seizure--Reasonableness--Balance of Interests--Totality of Circumstances--Claims--Federal Constitution--Negligence.--The United States Supreme Court has never suggested that a fact finder, in determining whether a particular seizure was reasonable, should conduct a balancing of governmental and private [*503] interests. Instead, the high court has itself conducted this balancing in (1) concluding that police may not use deadly force to prevent the escape of all felony suspects, whatever the circumstances, (2) announcing the applicable standard of reasonableness, i.e., whether police had probable cause to believe the suspect posed a threat of serious physical harm to themselves or to others, and (3) enumerating the factors that must be considered in determining whether a challenged seizure was reasonable. The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. The jury's duty in a negligence action is to determine whether under all the facts and surrounding circumstances, the conduct in question was that of persons of ordinary prudence and discretion. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the United States Supreme Court has identified.

(4) Government Tort Liability § 11--Seizure--Reasonableness--Claims--Federal Constitution--Excessive Force.--The reasonableness inquiry in an excessive force case under 42 U.S.C. § 1983 is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

(5) Searches and Seizures § 78--Traffic Stop--Probable Cause.--A car stop is reasonable where officers have probable cause to believe driver violated the vehicle code. The officer making a traffic stop may, without violating U.S. Const., 4th Amend., order the driver and passengers to exit a car.

(6) Arrest § 55--Use of Force--Retreat.--An officer with probable cause to make an arrest is not bound to put off the arrest until a more favorable time and is under no obligation to retire in order to avoid a conflict. Instead, an officer may press forward and make the arrest, using all the force reasonably necessary to accomplish that purpose. A police officer has a duty to the community to carry out his or her obligation to promote law-abiding, orderly conduct, including, where necessary, to detain and arrest suspected perpetrators of offenses. Consistent

with [*504] these principles, Pen. Code, § 835a, provides that a peace officer with reasonable cause to make an arrest may use reasonable force to effect the arrest and need not retreat or desist from his or her efforts to make an arrest by reason of the resistance or threatened resistance of the person being arrested.

(7) Government Tort Liability § 8?Operation of Motor Vehicles--Individual Officers--Chases.--Under Veh. Code, § 17004, individual officers may not be held civilly liable for a suspect's death based on the manner in which they operated their vehicles during a chase, even assuming they acted without due care.

(8) Government Tort Liability § 8--Operation of Motor Vehicles--Employers--Chases--Exception to Rule of Derivative Immunity--Requirements.--Under Gov. Code, § 815.2, subd. (b), where individual officers are immune, their employer is also immune unless some statute provides otherwise. With respect to police vehicular chases, an exception to the general rule of a public employer's derivative immunity exists under Veh. Code, § 17001, which provides: A public entity is liable for death or injury to person proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity within the scope of his employment. However, as a matter of law, this section is inapplicable where a death was not caused by a negligent or wrongful act in the operation of a motor vehicle as the court has construed that phrase. To meet this statutory requirement, it is not sufficient that a motor vehicle somehow be involved in the series of events that results in the injury. Instead, the vehicle must be in a state of being at work or in the exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted.

(9) Negligence § 1--Determination--Question of Law.--The question of a defendant's negligence may be determined as a matter of law where reasonable jurors can draw but one conclusion from the evidence presented.

(10) Government Tort Liability § 11.6--Law Enforcement Activities--Pursuit--Deadly Force--Preshooting Conduct--Collateral Estoppel--Federal Judgment.--In an action arising from a police pursuit that ended in the fatal shooting of an unarmed suspect, the suspect's surviving family was collaterally estopped from pursuing a state wrongful death claim by a federal judgment on the family's claim under 42 U.S.C. [*505] § 1983 claim. The family could not go forward either on a theory that the officers failed to exercise reasonable care in using deadly force or on a theory that the officers' preshooting conduct was negligent. Therefore, the trial court did not err in entering judgment for the officers and their employer.

[Cal. Forms of Pleading and Practice (2009) ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14; Levy et al., Cal. Torts (2009) ch. 61, § 61.10.]

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JUDGES: Opinion by Chin, J., with George, C. J., Kennard, Baxter, and Corrigan, JJ., concurring. Concurring opinion by Moreno, J., with Werdegar, J., concurring. Concurring opinion by Corrigan, J., with Baxter, J., concurring.

OPINION BY: Chin

OPINION

[**510] [***5] **CHIN, J.**--We granted review in this case to consider the following question: When a federal court enters judgment in favor of the defendants on a civil rights claim brought under 42 United States Code section 1983 (section 1983), in which the plaintiffs seek damages for police use of deadly and constitutionally excessive force in pursuing a suspect, and the court then dismisses a supplemental state law wrongful death claim arising out of the same incident, what, if any, preclusive effect does the judgment have in a subsequent state court wrongful death action? Based on principles of issue preclusion (collateral estoppel), the Court of Appeal held in this case that the federal

judgment precludes plaintiffs from recovering on the theory that the police officers failed to exercise reasonable care in using deadly force, but does not preclude plaintiffs from recovering on the theory that the officers failed to exercise reasonable care in creating, through their preshooting [*506] conduct, a situation in which it was reasonable for them to use deadly force. The Court of Appeal therefore reversed the judgment that the trial court entered for the officers and their employer based on the federal judgment. As explained below, we hold that on the record and conceded facts here, the federal judgment collaterally estops plaintiffs from pursuing their wrongful death claim, even on the theory that the officers' preshooting conduct was negligent. We therefore reverse the Court of Appeal's judgment.

FACTUAL AND PROCEDURAL BACKGROUND [1]

1 Because this appeal arises in connection with a demurrer, we look to the "properly pleaded factual allegations" of the operative complaint "read in light of" any "judicially noticeable facts" and "factual concessions" of the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 21 [40 Cal. Rptr. 3d 205, 129 P.3d 394].) Plaintiffs' complaint sets forth virtually no facts regarding the events giving rise to this lawsuit. However, plaintiffs have detailed the relevant facts at both oral argument and in the briefs they submitted to us and to the Court of Appeal, and plaintiffs' counsel conceded at oral argument that the evidence plaintiffs would present if permitted to go to trial would be the same as the evidence they presented in federal court. On this record, we may properly treat plaintiffs' representations regarding the facts as factual concessions, and we base both our statement of facts and our substantive analysis on these conceded facts. (See *Evans, supra*, at pp. 20-22; see also *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 [281 Cal. Rptr. 827] [treating facts stated in brief as admissions for purposes of determining whether leave to amend should have been granted]; *Moore v. Powell* (1977) 70 Cal.App.3d 583, 586, fn. 2 [138 Cal. Rptr. 914] ["factual statement in a brief may be treated as an admission or stipulation when adverse to the party making it"].)

Before dawn on January 16, 2001, City of Pomona (Pomona) Police Officer [***6] Dennis Cooper was patrolling a neighborhood in a marked black-and-white police vehicle when he saw a gray Ford Thunderbird approach from the other direction with its headlights unilluminated. The Thunderbird abruptly pulled over to the curb and stopped with its engine running. Cooper engaged his overhead lights and pulled his car to within about 10 feet of the stopped Thunderbird, facing it. He saw two individuals inside the Thunderbird and ordered them to exit. The driver complied, putting up his hands, opening his door, and exiting. The passenger, decedent George Hernandez, did not comply. Instead, he slid into the vacant driver's seat and, with the headlights unilluminated, drove off in the direction from which the Thunderbird had come.

Cooper began pursuing Hernandez in the car. Officers Humberto Sanchez, Anthony Luna, Robert Devee and Edgar Padilla joined the pursuit in other police vehicles, including a K-9 unit driven by Luna. Hernandez led the officers on a high-speed chase through city streets that lasted about 18 minutes and ended when Hernandez crashed and the car came to rest in the middle of the street. [*507]

After crashing, Hernandez exited his car and started running away. Cooper, followed closely by Sanchez, pursued Hernandez on foot. Eventually, Hernandez slowed down and stopped. According to one witness, Hernandez, with his back to Cooper, lifted his shirt to expose his waistline and, while turning around, yelled that he did not have a gun. According to Cooper, Hernandez, after [**511] reaching toward his front right pocket, spun towards him yelling, "I got a gun, I got a gun." Startled, Cooper reached for his weapon, but discovered he had lost it. He spun around, covered his head, and ran away screaming to Sanchez: "Shoot him. Shoot him, Bert. He's got a gun. He's going to kill me." As Cooper ran, he broadcast over his radio that Hernandez had brandished a firearm. Hearing Cooper, Luna released the police dog and, with Devee and Padilla, joined the foot pursuit.

Hernandez spun around and started running away again. Sanchez, who was now leading the chase, had an open shot at Hernandez, but decided not to take it because Hernandez was facing away and did not pose an immediate threat. Instead, Sanchez chased Hernandez, yelling at him to stop. He was followed by the other officers, including Cooper, who had rejoined the pursuit after finding his weapon.

Ignoring Sanchez's order to stop, Hernandez kept running and fled around the corner of a building. The police dog passed Sanchez as they rounded the corner of the building, caught up to Hernandez, [***7] struck him in the shoulder, and spun him around. According to Sanchez, as the dog was striking Hernandez, Hernandez reached towards his waistband, yelling either "I got a gun" or "Gun." In response, Sanchez fired his weapon at Hernandez. As the other officers rounded the corner of the building, they heard shots and assumed Sanchez was in a gun battle with Hernandez. All but Padilla fired at Hernandez. The officers fired 37 shots in all, hitting Hernandez 22 times and killing him. Hernandez was unarmed. [2]

> 2 In setting forth these facts in their Court of Appeal brief, plaintiffs cited to the federal court's order granting Sanchez's posttrial motion for judgment as a matter of law. At defendants' request, the trial court took judicial notice of this order, and the order is part of the appellate record. It sets forth the following additional facts of interest: An autopsy revealed that Hernandez had methamphetamine in his system. During the vehicle pursuit, the Thunderbird fishtailed as it weaved in and out of traffic at speeds estimated to be in excess of 100 miles per hour, struck a curb and another vehicle, ran several red lights and nearly hit a pedestrian. The vehicle chase ended when Hernandez tried to make a high-speed turn, lost control of his car, and crashed into a newsstand and then a bus stop. We set forth these additional facts merely to fill out the evidentiary presentation during the federal trial; we do not rely on them in our analysis. We note, however, that plaintiffs have never disputed any of them.

In September 2001, Hernandez's parents, both individually and as administrators of his estate, and his seven minor children, by and through their guardians ad litem (collectively, plaintiffs), filed a complaint in federal court [*508] seeking damages in connection with his death. As here relevant, the complaint asserted a section 1983 claim against the officers, alleging they had violated Hernandez's rights under "the Fourth and Fourteenth Amendments of the United States Constitution[] to be free from unreasonable seizures and excessive force by police officers." The complaint also asserted a section 1983 claim against Pomona, alleging in part that it was liable for the officers' actions because it (1) "maintained a system of grossly inadequate training pertaining to the use of firearms" and "the proper tactics for managing scenarios involving mentally unstable, emotionally distraught and otherwise psychologically incapacitated persons," and (2) "[a]t the time of the shooting ... had in place, and had ratified, policies, procedures, customs and practices of" its police department that "permitted and encouraged their officers and officials to unjustifiably, unreasonably and in violation of the Fourth Amendment[], shoot unarmed suspects and specifically individuals of Mexican ancestry, Hispanics, Latinos, as well as members of other minority groups." The complaint also included a wrongful death claim under California law, which alleged that the officers had acted "negligently, violently and without due care," "cause or provocation" in killing Hernandez; that the shooting had "occurred as a result of the absence of due care for the safety of others and constituted an unreasonable, unwarranted, and excessive use of force"; and that Pomona had "failed to adequately train, supervise, discipline or in any other way control" the officers "in the exercise of their unlawful use of excessive and lethal force" and, by "knowingly and negligently fail[ing] to enforce [California] laws" and police "regulations," had "creat[ed]" in the police department [**512] "an atmosphere of lawlessness in which [p]olice officers employ excessive and illegal force and violence ... in the belief that such acts will be condoned and justified by their supervisors." [3]

> 3 The federal complaint indicates that plaintiffs asserted the wrongful death claim only "as to Defendants City of Pomona, and Does 6 through 10."

[***8] The federal district court bifurcated the state and federal claims and only the latter went to trial. By special verdict, the jury found that Cooper, Devee and Luna had not "violate[d]" Hernandez's "Fourth and Fourteenth Amendment rights by using excessive force against him." The jury could not reach a verdict regarding Sanchez. [4] Sanchez then moved for judgment as a matter of law, based on qualified immunity. The court granted the motion, finding that because Sanchez's "use of deadly force was reasonable under the circumstances," he "did not violate Hernandez's Fourth Amendment rights." The court reasoned: "Faced with a fleeing suspect that he reasonably believed to be armed and likely to fight back, given Cooper's screams that Hernandez [*509] was about to shoot him and that he had bran[d]ished a

firearm, Officer Sanchez found himself in a situation that he reasonably believed would threaten his life if he did not act immediately. ... To hold [that his use of deadly force was not reasonable under the circumstances] would force Officer Sanchez to risk looking down the muzzle of a barrel before he could act to protect himself." The court alternatively held that "even assuming Officer Sanchez had violated Hernandez's Fourth Amendment rights," he "is entitled to qualified immunity" because he "was not plainly incompetent," he did not "knowingly violate the law," and he "reasonably could have believed that his conduct was lawful under the circumstances." [5]

4 According to the parties' briefs in the Court of Appeal, plaintiffs dismissed all claims against Padilla before the federal trial.

5 At the time of the federal trial, high court precedent *required* the trial court *first* to decide whether Sanchez had violated Hernandez's constitutional rights, and then to decide the immunity question. (*Saucier v. Katz* (2001) 533 U.S. 194, 201 [150 L. Ed. 2d 272, 121 S. Ct. 2151] (*Saucier*).) The high court recently changed this rule, holding that trial courts may decide the immunity question before (or without) determining whether there was a constitutional violation. (*Pearson v. Callahan* (2009) 555 U.S. ___, ___-___ [172 L. Ed. 2d 565, 129 S.Ct. 808, 815-822].)

Based on its order granting Sanchez's motion and the jury's verdict in favor of the other officers, the federal court ordered that all "[d]efendants shall have judgment on their claims for excessive force under the Fourth and Fourteenth Amendments." A few days later, it "dismisse[d] without prejudice all of Plaintiffs' remaining state law claims," explaining that it was "declin[ing] to exercise supplemental jurisdiction over" those claims inasmuch as "the [federal] claims over which it ha[d] original jurisdiction [had been] dismissed."

Plaintiffs then filed this action in the superior court against the same defendants. As here relevant, the complaint included a wrongful death claim based on the same allegations plaintiffs had set forth in the wrongful death claim of their federal complaint. [6]

6 Like the federal complaint, the complaint plaintiffs filed in state court indicates that they are asserting the wrongful death claim only "as to Defendants City of Pomona, and Does 6 through 10."

Defendants demurred to the complaint, arguing in relevant part that the federal proceedings "bar the instant action on the grounds of collateral estoppel." They asserted that in the federal action, the issue of excessive and unreasonable force had been determined in their favor, and that this determination "collaterally estop[s]" plaintiffs "from raising" their wrongful death claim. In opposing the demurrer, plaintiffs argued that collateral estoppel does not apply because "reasonableness" for purposes of a section 1983 claim is not the same as "reasonableness" under state negligence law. [*510]

[***9] The trial court agreed with defendants in part, explaining: "[D]efendants have had a factual finding by [j]udge or [j]ury in their favor that excessive force was not used in the shooting, i.e., [t]hat the deadly force used was 'objectively reasonable' under the circumstances. [**513] Therefore, this issue is res judicata, and collateral estoppel precludes relitigation of this same issue in this action." The court overruled the demurrer, however, because it concluded that the federal court judgment did not preclude plaintiffs from recovering on the theory that defendants failed to summon medical aid and prevented aid from being rendered once available. The court explained: "Although such allegations were contained in those causes of action tried in [f]ederal [c]ourt, no specific findings were made on such issues, and the [federal judgment is] not res judicata."

Plaintiffs, to expedite their appeal from the trial court's ruling that the federal judgment precluded them from proceeding on their allegations that defendants acted unreasonably in shooting Hernandez, agreed to "strike and dismiss, with prejudice," their wrongful death claim insofar as it was based on allegations that defendants failed to summon, and prevented the rendering of, medical aid. Based on this agreement, the parties asked the court to enter final judgment. The court granted the request, dismissed the wrongful death claim with prejudice, and entered judgment in favor of all defendants. [7]

7 Plaintiffs' state court complaint identified Padilla as a defendant. However, because of plaintiffs' stated intent to dismiss Padilla, the trial court limited its ruling on the demurrer to the other officers and Pomona. The parties' subsequently disposed of the claim against Padilla by stipulation and the trial court, based on that

stipulation, ordered entry of final judgment in favor of all defendants, including Padilla. The Court of Appeal's opinion did not mention Padilla, and stated that the only individual defendants are "the four officers involved in the shooting." It thus appears that Padilla is no longer a party to these proceedings.

The Court of Appeal reversed the judgment. Based on principles of collateral estoppel, it first held that the federal judgment precludes plaintiffs from recovering on the theory that the officers failed to exercise reasonable care in using deadly force, explaining that "[w]hether the officers acted with reasonable care is precisely the issue resolved by the federal jury and the trial court when each specifically concluded from the perspective of a reasonable officer on the scene, taking into account the facts and circumstances confronting them, the officers' conduct was objectively reasonable." It then held, however, that plaintiffs could proceed on the theory that the officers failed to use reasonable care in creating, through their preshooting conduct, a situation in which it was reasonable for them to use deadly force. The court reasoned that neither the jury's special verdict nor the federal court's posttrial ruling regarding Sanchez addressed this issue. After expressing "doubt" that plaintiffs' complaint adequately alleged a preseizure negligence theory of liability, [*511] the Court of Appeal reversed the trial court's judgment and remanded the cause to permit plaintiffs to file an amended complaint alleging that theory. [8]

8 Before discussing issue preclusion, the Court of Appeal considered whether principles of claim preclusion bar plaintiffs' claim. In light of our conclusion, we need not consider that question.

We then granted defendants' petition for review.

DISCUSSION

(1) "Collateral estoppel precludes relitigation of issues argued and decided in [***10] prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]" (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223], fn. omitted (*Lucido*).)

Of these elements, the only one here in dispute is the first: whether the issues as to which defendants assert preclusion are identical to issues decided in the earlier federal court proceeding involving plaintiffs' section 1983 claim. As previously noted, the Court of Appeal found this requirement satisfied insofar as plaintiffs now allege that the officers failed to exercise reasonable care in using deadly force, but not insofar as plaintiffs might allege that the officers failed to exercise reasonable care in creating, through their preshooting conduct, a situation in which it was reasonable for them to use deadly force. Plaintiffs challenge the former finding and defendants challenge the latter.

(2) For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. (*People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal. Rptr. 77, 651 P.2d 321].) In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts. (*Turner v. Arkansas* (1972) 407 U.S. 366, 368-369 [32 L. Ed. 2d 798, 92 S. Ct. 2096]; *Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881 [299 P.2d 865]; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 400-401 [78 Cal. Rptr. 3d 784]; *U.S. v. Cala* (2d Cir. 1975) 521 F.2d 605, 607-608; *In re Henicheck* (Bankr. E.D.Va. 1995) 186 B.R. 211, 215.) "The [*512] 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [Citation.]" (*Lucido, supra*, 51 Cal.3d at p. 342.)

1. *Whether the Officers Used Reasonable Care in Using Deadly Force.*

The record here demonstrates that in plaintiffs' federal action, the issue of whether the officers exercised reasonable care in using deadly force was raised, submitted for decision, and actually decided against plaintiffs in resolving their section 1983 claim. The section 1983 claim in plaintiffs' federal court complaint alleged in part that the officers "shot and killed"

Hernandez "without reasonable cause," and that the shooting was "unreasonable" and "entirely unjustified by" Hernandez's "actions." During the federal trial, the officers testified at length about the circumstances leading up to and surrounding the shooting. In relevant part, the jury instructions regarding the section 1983 claim stated the following: (1) "[a] law enforcement officer has the right to use such force as is reasonably necessary under the circumstances to make a lawful arrest," and "[a]n unreasonable seizure occurs when a law enforcement officer uses excessive force in making a lawful arrest"; (2) "[t]he use of deadly force is only justified when a reasonable law enforcement officer would reasonably [***11] believe that there was an immediate threat to the safety of the officer or others at the time the force was used"; (3) "[w]hether force is reasonably necessary or excessive is measured by the force a reasonable and prudent law enforcement officer would use under the circumstances"; (4) "[t]he reasonableness inquiry ... is an objective one," and "[t]he reasonableness of the use of force should be judged" "in light of the facts and circumstances confronting" the police "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"; (5) "[s]ome of the things you may want to consider in determining whether the defendant used excessive force are the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape"; and (6) "[i]n deciding whether excessive force was used, you should consider the totality of the circumstances at the time." As noted above, based on these instructions, the jury, by special verdict, found that Cooper, Devee and Luna had not "violate[d]" Hernandez's "Fourth and Fourteenth Amendment rights by using excessive force against him." As also noted above, in later granting Sanchez's posttrial motion for judgment, the federal court found that Sanchez's "use of deadly force was reasonable under the circumstances," because he "found himself in a situation that he reasonably believed would threaten his life if he did not act immediately." [*513]

In the wrongful death claim now at issue, plaintiffs allege that the officers acted "without due care," "cause or provocation" in killing Hernandez, that "[t]he shooting ... occurred as a result of the absence of due care for the safety of others and constituted an unreasonable, unwarranted, and excessive use of force," and that the officers "unreasonably and unjustifiably killed ... Hernandez without cause or provocation." On this record, the Court of Appeal correctly concluded that with respect to the actual shooting, the negligence issue in plaintiffs' wrongful death claim--"whether the officers acted with reasonable care" in shooting Hernandez--"is precisely the issue resolved [against plaintiffs] by the federal jury and the trial court when each specifically concluded from the perspective of a reasonable officer on the scene, taking into account the facts and circumstances confronting them, the officers' conduct was objectively reasonable."

In arguing otherwise, plaintiffs assert that the standard of reasonableness applicable in a section 1983 action based on excessive force "is not the same" as the standard of reasonableness applicable in a negligence action under California law. According to plaintiffs, the Fourth Amendment standard "focuses the analysis on balancing the concerns of the government with the extent of the intrusion," whereas the California standard involves no such balancing and "focuses" only "on the reasonably prudent person." Moreover, plaintiffs assert, quoting *Harris v. Grimes* (2002) 104 Cal.App.4th 180 [127 Cal. Rptr. 2d 791] (*Harris*), *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277 [54 Cal. Rptr. 2d 655] (*Lucas*), and *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441 [164 Cal. Rptr. 913] (*Mattson*), reasonableness under section 1983 and reasonableness under state negligence law "'are not the same'" in that a section 1983 violation requires "'a state of mind more blameworthy'" than that required for negligence; "'[t]o be entitled to relief under section 1983, [a] plaintiff must ... show intentional conduct in circumstances in which the offending governmental employees were legally bound to know that their [***12] conduct would deprive the plaintiff of civil rights.'"

(3) Plaintiffs' arguments are unpersuasive. Contrary to plaintiffs' assertion, the United States Supreme Court has never suggested that a fact finder, in determining whether a particular seizure was reasonable, should conduct a balancing of governmental and private interests. Instead, the high court has itself conducted this balancing in (1) concluding that police may not "use ... deadly force to prevent the escape of all felony suspects, whatever the circumstances," (2) announcing the applicable standard of reasonableness, i.e., whether police had probable cause to believe the suspect posed a threat of serious physical harm to themselves or to others, and (3) enumerating *the factors* that must be considered in determining whether a challenged seizure was

reasonable. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11-12 [85 L. Ed. 2d 1, [*514] 105 S. Ct. 1694]; see also *Scott v. Harris* (2007) 550 U.S. 372 [167 L. Ed. 2d 686, 127 S.Ct. 1769, 1778-1779]; *Graham v. Connor* (1989) 490 U.S. 386, 396-397 [104 L. Ed. 2d 443, 109 S. Ct. 1865] (*Graham*).) Consistent with these principles and the factors the high court has identified, the federal court in this case did *not* instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of "the totality of the circumstances at the time," including "the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape." The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. (See *Commercial U. A. Co. v. Pacific G. & E. Co.* (1934) 220 Cal. 515, 522 [31 P.2d 793] [jury's "duty" in a negligence action is to "determin[e] whether under all the facts and surrounding circumstances," the conduct in question "was that of persons of ordinary prudence and discretion"].) Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests.

[**514] **(4)** Plaintiffs' effort to differentiate the two standards also fails insofar as it rests on an asserted difference between the requisite mental states. As to plaintiffs' section 1983 action, the federal court's instructions explained that the standard of reasonableness is "an objective one" and directed the jury to determine the reasonableness of the officers' actions "objectively" and "without regard to their underlying intent or motivation." These instructions were consistent with binding high court precedent, which states: "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*. [Citations.] An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. [Citation.]" (*Graham, supra*, 490 U.S. at p. 397, italics added.) On this [***13] record, plaintiffs are incorrect in asserting that, because the reasonableness standard at issue in the section 1983 action involved "'a [*515] state of mind more blameworthy'" than the reasonableness standard under California negligence law, issue preclusion does not apply. [9]

9 It is true that there may be liability under section 1983 only if the acts constituting the seizure were "willful" in the sense that they were not "unknowing" or "accidental." (*Brower v. County of Inyo* (1989) 489 U.S. 593, 596 [103 L. Ed. 2d 628, 109 S. Ct. 1378] (*Brower*).) In other words, "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control" (*ibid.*), i.e., "a governmental termination of freedom of movement through means intentionally applied" (*id.* at p. 597, italics omitted). Consistent with these principles, the federal court here instructed the jury that it was plaintiffs' burden to prove, among other things, that "the acts or omissions of the defendant[s] were intentional." In the federal action, plaintiffs never alleged or argued that the officers' acts were not intentional or willful in this sense. On the contrary, in their section 1983 claim, they alleged that the shooting was "willful." Nothing indicates there was any evidence presented in the federal trial to suggest that the shooting was accidental. And, in granting Sanchez's posttrial motion for judgment, the federal court expressly found that Sanchez fired because he saw Hernandez reaching toward his waistband and yelling either "I got a gun" or "Gun," and the other officers fired because they heard the shots as they approached and assumed Sanchez was involved in a gun battle with Hernandez. Thus, the federal judgment clearly rested on findings that the officers acted reasonably, not on findings that they fired unknowingly or accidentally.

The decisions plaintiffs cite--*Lucas*, *Mattson*, and *Harris*--do not require a different conclusion. The court in *Lucas* did not, as plaintiffs assert, broadly hold that "[r]easonable conduct under a [federal] civil rights violation is different from a negligence action because a

civil rights violation 'describes a state of mind more blameworthy.'" Rather, the *Lucas* court reached the far narrower conclusion that *the particular constitutional violation there alleged* as the basis for the section 1983 claim--failing to render medical care to an inmate--required proof of "deliberate indifference," and that "this standard ... describes a state of mind more blameworthy" than "[m]ere negligence." (*Lucas, supra*, 47 Cal.App.4th at p. 287.) The constitutional violation plaintiffs alleged here in their section 1983 claim was different and involved a standard of reasonableness, not deliberate indifference.

In *Mattson*, which involved an excessive force claim, the court, in holding that a prior federal judgment did not have preclusive effect as to "the issues of lack of probable cause and excessive force," reasoned: "From the record before us it appears possible that the federal jury determined no more than that defendants ... lacked the requisite mens rea." (*Mattson, supra*, 106 Cal.App.3d at pp. 445-446.) The record before us does not leave open this possibility because, as explained above, the federal court followed high court precedent and instructed the jury to determine reasonableness "without regard to [the officers'] underlying intent or motivation." [10]

10 Because the *Mattson* court, applying claim preclusion principles, held that an earlier federal judgment barred the plaintiff's state law claims (*Mattson, supra*, 106 Cal.App.3d at pp. 446-456), its discussion of issue preclusion, including the "mens rea" required for recovery under section 1983, was dictum. Moreover, in its opinion, the court nowhere mentioned the jury instructions in the federal case or otherwise identified the legal principles the federal court actually instructed the jury to apply. Instead, it appears to have based its "mens rea" standard on an abstract reading of case law. (*Mattson, supra*, 106 Cal.App.3d at p. 446.) In setting forth that standard--"intentional conduct in circumstances in which the [police] were legally bound to know that their conduct would deprive the plaintiff of civil rights" (*ibid*.)--the court seemingly combined two distinct inquiries relevant to recovery: (1) whether a constitutional violation occurred, because the force used was not objectively reasonable; and (2) whether the officer, though committing a constitutional violation by using excessive force, is nevertheless immune from liability. (See *Saucier, supra*, 533 U.S. at pp. 202-206.) As already explained, regarding the first inquiry--reasonableness--although an officer's actions must have been intentional in the sense they were not "unknowing" or "accidental" (*Brower, supra*, 489 U.S. at p. 596), the officer's underlying intent and motivation are not determinative (*Saucier, supra*, 533 U.S. at p. 210). The second inquiry--immunity--focuses directly on whether the police were, to quote *Mattson*, "legally bound to know that their conduct would deprive the plaintiff of civil rights." (*Mattson, supra*, at p. 446; see *Saucier, supra*, 533 U.S. at p. 202 [officer immune unless "the law ... put [him] on notice that his conduct would be clearly unlawful," i.e., "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"].) The record here demonstrates that the federal jury was not asked to consider immunity, and that its verdict rested only on a finding of reasonableness. Regarding Sanchez, in granting his posttrial motion for judgment, the trial court expressly addressed both issues, first finding that no constitutional violation occurred because Sanchez's conduct was objectively reasonable, and then finding alternatively that even assuming a violation, Sanchez was immune because he did not "knowingly violate the law" and he "reasonably could have believed that his conduct was lawful under the circumstances." As previously noted, at the time of the federal proceedings, high court precedent required the federal court to determine whether there was a constitutional violation *before* determining the immunity question. (*Saucier, supra*, at pp. 200-201.)

[*516]

[***14] [**515] In *Harris*, which also involved an excessive force claim, the court declined to apply collateral estoppel as to the issue of reasonableness, reasoning that because the plaintiff asserted the officer had accidentally fired his gun and "the federal jury rendered a general verdict [against the plaintiff] without any special findings," "the jury could have reached its verdict for any number of reasons other than finding the shooting was a reasonable use of force." (*Harris, supra*, 104 Cal.App.4th at p. 187.) Here, plaintiffs do not claim, and there is no evidence, that the officers fired

accidentally, and the instructions and special verdict foreclose the possibility that the jury reached its verdict for reasons other than the reasonableness of the officers' actions. Because of these distinctions, *Lucas*, *Mattson*, and *Harris* are inapposite. [11] We therefore [*517] agree with the Court of Appeal that the federal proceedings collaterally estop plaintiffs from recovering on the theory that the officers acted negligently in using deadly force.

> 11 As a second reason for refusing to apply collateral estoppel, the *Harris* court, citing only *Lucas* and *Mattson*, stated that reasonableness "in civil rights law does not always mean reasonable conduct under negligence law. The two concepts are not the same. [Citations.]" (*Harris*, *supra*, 104 Cal.App.4th at p. 187.) As already explained, *Lucas* compared the reasonableness standard under state negligence law to the "deliberate indifference" standard applicable to constitutional claims based on a failure to render medical care to an inmate, not to the reasonableness standard applicable to Fourth Amendment excessive force claims. (*Lucas*, *supra*, 47 Cal.App.4th at pp. 287-288.) As also already explained, *Mattson* is illuminating regarding reasonableness, as opposed to immunity, only insofar as it indicates that the officer's conduct must be intentional, as opposed to accidental or unknowing.

2. *Negligence Liability for the Officers' Preshooting Conduct*.

As noted above, although applying collateral estoppel to the issue of the officers' alleged negligence in using deadly force, the Court of Appeal held that plaintiffs [***15] could pursue a negligence claim "on the theory that [the officers'] conduct leading up to the shooting, including the high-speed pursuit, foot chase, and release of a pursuit dog created an unreasonable risk of harm to themselves and Hernandez." It reasoned that "neither the jury's special verdict nor the trial court's [posttrial] finding [regarding Sanchez] addressed the question whether the officers were negligent in *creating* a situation in which it was reasonable for them to use deadly force."

[**516] Plaintiffs agree with the Court of Appeal, arguing (1) evidence that the officers acted negligently in their conduct leading up to the shooting was not relevant to the determination in the federal proceeding that the shooting was reasonable, and (2) the officers' alleged preshooting negligence was not adjudicated in the federal proceedings. Defendants, of course, argue otherwise; they contend that, because the federal court and jury applied a totality-of-circumstances test, their findings that the use of deadly force was reasonable "necessarily" included the officers' preshooting conduct. In other words, defendants claim, the federal court and jury found that the officers "acted reasonably from the initial contact with" Hernandez "through the ultimate use of deadly force." Defendants also argue that, under California statutes and case law, there is no separate "negligence-type" duty arising from tactical decisions leading up to the use of force and a peace officer's objectively reasonable use of force is a bar to tort liability.

Based on the record, we cannot agree with defendants' claim that the federal court and jury made a finding as to the reasonableness of all of the officers' preshooting conduct. Although the federal court broadly instructed the jury to consider the totality of the circumstances--and thus, the jury necessarily considered *the evidence* regarding the officers' preshooting conduct--the court also instructed that plaintiffs' claim involved "deadly force" and that "[t]he use of deadly force is only justified when a reasonable law enforcement officer would reasonably believe that there was an immediate threat to the safety of the officer or others at the time the force was used." Based on this instruction, the jury's finding that the officers (other than Sanchez) did not violate Hernandez's Fourth Amendment rights by using excessive force implies no more than a finding that the shooting itself was reasonable because, under the circumstances, the officers reasonably believed [*518] Hernandez presented an immediate threat to either their own or someone else's safety. Likewise, in granting Sanchez's posttrial motion, the federal court found only that his use of deadly force was reasonable because he had an objectively reasonable belief Hernandez posed a threat of serious harm. Thus, as the Court of Appeal correctly held, neither the jury nor the federal court made a finding as to whether all of the officers preshooting conduct was itself independently reasonable, i.e., not negligent. [12]

> 12 Moreover, given the law as declared by the Ninth Circuit Court of Appeals, which governed in the federal trial, any such finding would have been unnecessary to deciding plaintiffs' section 1983 claim. Under Ninth Circuit law, if an officer's use of deadly force is reasonable in light

> of the circumstances confronting the officer at the time of the shooting, liability under section 1983 may not be based on a finding that the officer negligently created a situation in which it was reasonable to use deadly force. (*Billington v. Smith* (9th Cir. 2002) 292 F.3d 1177, 1190.)

(5) Nevertheless, we agree with defendants that, in light of the finding that the shooting was reasonable, liability in this case may not be based on the officers' [***16] alleged preshooting negligence. The starting point for our conclusion is the validity of the initial detention. Based on the conceded fact that the Thunderbird was being illegally operated at night without lights (Veh. Code, §§ 280, 24250, 24400), Officer Cooper was legally justified in attempting to detain both of the car's occupants and asking them to exit the car. (See *Whren v. United States* (1996) 517 U.S. 806, 819 [135 L. Ed. 2d 89, 116 S. Ct. 1769] [car stop is reasonable where officers have probable cause to believe driver violated the vehicle code]; *People v. Hoyos* (2007) 41 Cal.4th 872, 892 [63 Cal. Rptr. 3d 1, 162 P.3d 528] ["officer making a traffic stop may, without violating the Fourth Amendment, order the driver and passengers to exit a car"].) When Hernandez, in response to Cooper's request that he exit the car, moved into the driver's seat and drove off with the headlights unilluminated, Cooper had reasonable cause to believe Hernandez had committed two public offenses: (1) driving during darkness without lighted headlamps (Veh. Code, §§ 280, 24250, 24400); and (2) willfully resisting, delaying, or obstructing a peace officer "in the discharge or attempt to discharge any duty of his or her office" (Pen. Code, § 148, subd. (a)(1); see *People v. Allen* (1980) 109 Cal.App.3d 981, 985-987 [167 Cal. Rptr. 502]).

(6) Because Cooper had probable cause to arrest Hernandez, under both statutes and [**517] case law, Cooper was not obliged simply to let Hernandez go. Long ago, we explained that an officer with probable cause to make an arrest ""is not bound to put off the arrest until a more favorable time"" and is " 'under no obligation to retire in order to avoid a conflict.' " (*People v. Hardwick* (1928) 204 Cal. 582, 587 [269 P. 427] (*Hardwick*).) Instead, an officer may " 'press forward and make the arrest, using all the force [reasonably] necessary to accomplish that purpose.' " (*Id*. at p. 588; see also *Hooper v. City of Chula Vista* (1989) 212 Cal.App.3d 442, 453 [260 Cal. Rptr. [*519] 495] ["police officer has a duty to the community to carry out his or her obligation to promote law-abiding, orderly conduct, including, where necessary, to detain and arrest suspected perpetrators of offenses"].) Consistent with these principles, Penal Code section 835a provides that a peace officer with reasonable cause to make an arrest "may use reasonable force to effect the arrest" and "need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested." Thus, California law expressly authorized Cooper to pursue Hernandez and to use reasonable force to make an arrest.

Indeed, in their brief, plaintiffs concede that they may not base negligence liability on the officers' *decision* to engage in the pursuit. [13] They argue, however, that they may base liability on the officer's subsequent execution of their decision, i.e., the actual "*operation*" of the pursuit, "including the use of high-speed automobile maneuvering."

> 13 Plaintiffs base their concession on Government Code section 820.2, which states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Plaintiffs' concession is consistent with a long line of Court of Appeal decisions. (E.g., *City of Sacramento v. Superior Court* (1982) 131 Cal.App.3d 395, 404 [182 Cal. Rptr. 443]; *Gibson v. City of Pasadena* (1978) 83 Cal.App.3d 651, 661 [148 Cal. Rptr. 68]; *Sparks v. City of Compton* (1976) 64 Cal.App.3d 592, 596 [134 Cal. Rptr. 684]; *Bratt v. City and County of San Francisco* (1975) 50 Cal.App.3d 550, 553 [123 Cal. Rptr. 774].) We have never ruled on the question, and find it unnecessary to do so here.

[***17] **(7)** However, on the conceded facts here, California law provides otherwise. Under Vehicle Code section 17004, *the individual officers* may not be held civilly liable for Hernandez's death based on the manner in which they operated their vehicles during the chase, even assuming they acted without due care. [14] (See *Cruz v. Briseno* (2000) 22 Cal.4th 568, 572-573 [93 Cal. Rptr. 2d 715, 994 P.2d 986].) **(8)** Under Government Code section 815.2, subdivision (b), because the individual officers are immune, Pomona, as their employer, is also immune unless some statute provides otherwise. [15] In *Brummett v. County of Sacramento* (1978) 21 Cal.3d 880,

883-886 [148 Cal. Rptr. 361, 582 P.2d 952], we held that, with respect to police vehicular chases, an exception to the general rule of a public employer's derivative immunity exists under Vehicle Code section 17001, which provides: "A public entity is liable for death or injury to person ... proximately caused by [*520] a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." However, as a matter of law, this section is inapplicable on the conceded facts here, because Hernandez's death was not caused by a negligent or wrongful act "in the operation of [a] motor vehicle" (*ibid.*) as we have construed that phrase. To meet this statutory requirement, "it is not sufficient that a motor vehicle somehow be involved in the series of events that results in the injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 923 [50 Cal. Rptr. 2d 309, 911 P.2d 496].) Instead, "the vehicle must be in a 'state of being at work' or 'in the ... exercise [**518] of some specific function' by performing work or producing effects *at the time and place the injury is inflicted*." (*Chilcote v. San Bernardino County* (1933) 218 Cal. 444, 445 [23 P.2d 748], italics added [construing predecessor of Veh. Code, § 17001, Civ. Code, former § 1714 1/2].) As a matter of law, that statutory requirement has not been met in the case now before us, because the conceded facts are that the shooting occurred well *after* the police stopped and exited their cars and chased Hernandez on foot. Accordingly, neither the individual officers nor Pomona may be held civilly liable for Hernandez's death based on the manner in which the officers conducted the vehicular pursuit.

14 In relevant part, Vehicle Code section 17004 provides that "[a] public employee is not liable for civil damages on account of personal injury to or death of any person ... resulting from the operation, in the line of duty, of an authorized emergency vehicle ... when in the immediate pursuit of an actual or suspected violator of the law ... ."

15 Government Code section 815.2, subdivision (b), states in full: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

Insofar as plaintiffs rely on the officers' conduct during the foot pursuit, plaintiffs have not demonstrated that, notwithstanding the findings in federal court, they can amend their complaint to state a negligence claim. [16] During oral argument, in explaining the basis for the preshooting negligence claim, plaintiffs' counsel placed [***18] primary emphasis on the following circumstances: (1) Cooper, without seeing a weapon, screamed that Hernandez had a gun and told Sanchez to shoot Hernandez; and (2) according to one witness, Hernandez raised up his shirt to expose his waistline and yelled to Cooper that he was unarmed. However, the federal jury's verdict in Cooper's favor collaterally estops plaintiffs from pursuing this theory of negligence. The jurors who returned that verdict knew of these circumstances and nevertheless necessarily found (given the jury instructions) that, in light of the facts known to Cooper, his belief that Hernandez posed an immediate threat to safety was reasonable. Given this finding, plaintiffs are estopped from premising negligence liability on the theory that Cooper's belief was unreasonable.

16 Where a complaint's allegations are insufficient as a matter of law, the burden of proving a reasonable possibility that an amendment can cure the defect "is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].) Thus, plaintiffs must identify some legal theory or state of facts they wish to add by way of amendment that would change the legal effect of their pleading. (*HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3 [125 Cal. Rptr. 365, 542 P.2d 237].)

Nor may plaintiffs base negligence liability on the preshooting acts they identify in their brief: "chasing [Hernandez] into a darkened parking lot" and "the use and release of a vicious dog." Regarding the former, it was, of [*521] course, Hernandez, as part of his illegal flight from the officers, who chose where to run; the officers merely followed his chosen path of attempted escape. As we have already explained, the officers were not obliged simply to let Hernandez go; they were authorized to press forward in an attempt to make an arrest, using reasonably necessary force. (*Hardwick, supra*, 204 Cal. at p. 587; Pen. Code, § 835a.) Plaintiffs therefore may not premise negligence liability on the fact that the officers followed Hernandez as he ran into a darkened parking lot.

(9) Regarding the use and release of a police dog, given the conceded facts here, we find no basis for negligence liability as a matter of law. Those conceded facts are that Officer Luna, in the K-9 unit, participated in the vehicle pursuit as Hernandez led the officers on the high-speed chase, and released the dog during the subsequent foot pursuit only in response to Cooper's report that Hernandez had brandished a firearm. In other words, when Luna released the dog, he had personal knowledge that Hernandez was determined to escape, he had personal knowledge that Hernandez was willing to endanger his own life and the lives of the officers and the public in order to achieve this end, and he had reason to believe that Hernandez was threatening the officers with a firearm. On these conceded facts, no reasonable juror could find that Luna acted unreasonably in releasing the dog. (Cf. *People v. Rivera* (1992) 8 Cal.App.4th 1000, 1007-1008 [10 Cal. Rptr. 2d 785] (*Rivera*) [release and use of police dog reasonable where officer knew suspect was fleeing and, based on report that suspect was armed, reasonably feared for his safety].) Therefore, as a matter of law, Luna was not negligent in releasing the dog. [17] (Cf. *Gray v. Brinkerhoff* [**519] (1953) 41 Cal.2d 180, 183 [258 P.2d 834] [question of defendant's negligence may be determined as a matter [***19] of law where reasonable jurors "can draw but one conclusion from the evidence presented"].) Thus, on the conceded facts here, we find no basis for a preshooting negligence claim. [18]

17 Plaintiffs identify nothing in the use, as opposed to the release, of the dog they claim was negligent. There was testimony during the federal trial that Luna made an announcement about his release of the dog. Plaintiffs have neither pointed to contrary evidence in the record from the federal trial nor asserted otherwise, and as already noted, their counsel stated during oral argument that the evidence that would be introduced at the trial plaintiffs now seek would be the same as the evidence introduced at the federal trial. In any event, given the conceded facts here, as set forth above, our conclusion would be the same even if Luna did not make an announcement. (Cf. *Rivera, supra,* 8 Cal.App.4th at pp. 1004-1008 [release and use of dog were reasonable notwithstanding officer's decision, based on his belief the suspect was armed and his consequent desire to have the element of surprise, not to make an announcement].)

18 In light of our analysis and conclusion, we do not address defendants' claims that they owed no duty of care regarding their preshooting conduct and that they are immune under Penal Code section 196. We also do not consider the other immunity statutes discussed by amici curiae.

According to Justice Moreno's concurring opinion, to reject plaintiffs' preshooting negligence argument, we should say no more than that "plaintiffs have not shown in this court how they would amend the complaint to allege preshooting negligence." (Conc. opn. of Moreno, J., *post,* at p. 523.) However, as already explained, plaintiffs assert in their brief that the officers were negligent in "the use of high speed automobile maneuvering," in "the use and release of a vicious dog," and in "chasing [Hernandez] into a darkened parking lot," and plaintiffs' counsel asserted during oral argument that Officer Cooper was negligent in screaming that Hernandez had a gun and telling Officer Sanchez to shoot Hernandez even though Cooper never saw a weapon. On this record, unlike Justice Moreno, we find that plaintiffs have adequately shown how they would amend their complaint to allege a preshooting negligence claim, and that we must determine whether any of the preshooting acts plaintiffs have identified can support negligence liability.

[*522]

DISPOSITION

(10) For the reasons stated above, we hold that the trial court did not err in entering judgment for defendants. We therefore reverse the Court of Appeal's judgment and remand the matter with directions to reinstate the trial court's judgment.

George, C. J., Kennard, J., Baxter, J., and Corrigan, J., concurred.

CONCUR BY: MORENO; CORRIGAN

CONCUR

MORENO J., Concurring.--I agree with the majority that the Court of Appeal was correct that the federal judgment precluded plaintiffs from relitigating in the present state action whether defendants were negligent in their use of deadly force. Accordingly, I

concur in part 1. of the majority opinion. (Maj. opn., *ante*, at pp. 512-517.)

I disagree with the Court of Appeal's conclusion that this does not resolve the case because plaintiffs are entitled to amend their complaint to allege preshooting negligence. "'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]" ' [Citations.] This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971 [9 Cal. Rptr. 2d 92, 831 P.2d 317].) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58].) "'Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citation.]' [Citation.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [134 Cal. Rptr. 375, 556 P.2d 737].)

Plaintiffs did not attempt to amend their complaint in the superior court to allege preshooting negligence. The superior court in [**520] the present case did not [*523] sustain the demurrer without leave to amend. [***20] The superior court held that the federal court judgment precluded plaintiffs from relitigating in state court whether defendants' use of deadly force was reasonable, but overruled the demurrer because it concluded the federal judgment did not preclude plaintiffs from recovering on the theory that defendants failed to summon medical aid and prevented such aid from being administered. Rather than seek to amend their complaint to allege preshooting negligence, plaintiffs asked the superior court to strike their allegations regarding medical aid and enter a final judgment in favor of defendants.

The Court of Appeal initially concluded that plaintiffs' allegation in their complaint in the present case that "'[t]he shooting of [Hernandez] occurred as a result of the absence of due care for the safety of others'" "is sufficient to plead negligence on the part of the officers based on the theory their conduct leading up to the shooting, including the high-speed pursuit, foot chase, and release of a pursuit dog created an unreasonable risk of harm to themselves and Hernandez." But the Court of Appeal later stated that it had "some doubt the plaintiffs' complaint adequately pleads their pre-seizure negligence theory" and concluded "the appropriate disposition is to ... remand the cause to permit the plaintiffs to file a 'clean' amended complaint alleging negligence based on their pre-seizure theory."

The allegation in plaintiffs' complaint that "'[t]he shooting of [Hernandez] occurred as a result of the absence of due care for the safety of others'" cannot reasonably be read to allege that defendants engaged in preshooting negligence. Plaintiffs, therefore, never have alleged that defendants' conduct prior to the shooting negligently created a situation in which it was reasonable to use deadly force. Despite the Court of Appeal's invitation to amend the complaint to do so, plaintiffs have not shown in this court how they would amend the complaint to allege preshooting negligence. Accordingly, plaintiffs have not met their burden of proving that it is reasonably possible that they can amend their complaint to allege a cause of action for preshooting negligence.

In my view, we need say no more to resolve this case. We can and should wait for a case in which the plaintiff actually has alleged a cause of action for preshooting negligence to consider that cause of action.

Werdegar, J., concurred.

CORRIGAN, J., Concurring.--I concur, but write separately to express misgivings about the path the litigation has taken in this case. I agree that plaintiffs' state claims here are foreclosed by a combination of issue preclusion and the application of law to conceded facts. However, I do not believe [*524] that defendants and state courts should be required to relitigate the facts and parse the federal record for precluded issues in every case where a federal court retains supplemental jurisdiction of state claims, then dismisses them after trying a claim under 42 United States Code section 1983 (section 1983). In such cases, litigation in state court should be barred by principles of claim preclusion, for reasons well stated by Justice Kaufman in *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441 [164 Cal. Rptr. 913] (*Mattson*), another case involving claims under both state tort law and section 1983:

"Once it is known that the federal court will not exercise pendent jurisdiction over the state claim, plaintiff's proceeding to trial in the federal court on the federal claim alone will necessarily result in splitting the plaintiff's cause of action, and that fact should be apparent to the plaintiff.

[***21] "In such circumstances the rule that would best accommodate the rights of the plaintiff to fully litigate his claim and to invoke the jurisdiction of the federal court and the right of the defendant, the courts and the public to be free of multiple litigation of the same cause of action, is that once the federal court has declined to exercise pendent jurisdiction over the state claim, if the plaintiff then elects to proceed to trial and judgment in the federal court, his entire cause of action is either merged in or barred by the federal court judgment so that he may not thereafter [**521] maintain a second suit on the same cause of action in a state court.

"A contrary rule would invite manipulation. It would permit a plaintiff halfheartedly to request the federal court to exercise pendent jurisdiction, offer little resistance to any argument by the defendant against its exercise, and hope that the federal court would decline to exercise pendent jurisdiction and thereby reserve to the plaintiff a second chance to prevail in a state court action should he be [un]successful in the federal court. Judicious utilization of judicial and litigant resources become[s] ever more essential in the wake of the law explosion. The efficient administration of justice would not be advanced by a rule resulting in or encouraging multiple litigation of a single cause of action." (*Mattson, supra*, 106 Cal.App.3d at p. 455.)

Mattson is not precisely on point, because there the federal court had refused to exercise pendent jurisdiction over the plaintiff's state claim, whereas here the court retained jurisdiction and dismissed the state claims only after plaintiffs were unsuccessful at trial. [1] However, once the federal court bifurcated the state claims and limited the scope of trial to the section 1983 claim, plaintiffs were in essentially the same position as the plaintiff in [*525] *Mattson*. The chances that the court would take up the state claims, once it decided not to present them to the jury, were slim to none. Furthermore, as noted in *Mattson*, if their state claims are preserved, plaintiffs have no reason to press for resolution of those claims in the federal action, because they are permitted to relitigate the underlying facts in state court. (*Mattson, supra,* 106 Cal.App.3d at p. 455.)

1 In 1990, after *Mattson* was decided, Congress codified the judicial doctrines of pendent and ancillary jurisdiction, under the name "supplemental jurisdiction." (28 U.S.C. § 1367; see 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 73, p. 639.)

The Court of Appeal in this case relied on *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277 [54 Cal. Rptr. 2d 655] (*Lucas*), and *Harris v. Grimes* (2002) 104 Cal.App.4th 180 [127 Cal. Rptr. 2d 791] (*Harris*), to hold that claim preclusion does not apply when a federal court waits until after entering judgment on the federal claim to dismiss a state claim. *Lucas*, however, was a very different case. There, the federal court dismissed the state claims after granting summary judgment on the section 1983 claims. (*Lucas*, at p. 283; for a similar case, see *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1298 [271 Cal. Rptr. 82] (*Craig*).) [2] There was, evidently, no severance [***22] or bifurcation, and certainly there was no election by the plaintiffs to proceed to trial on their federal claims alone, as in this case and in *Mattson*.

2 The *Lucas* and *Craig* courts followed the reasoning of *Merry v. Coast Community College Dist*. (1979) 97 Cal.App.3d 214 [158 Cal. Rptr. 603], another case involving refusal to exercise pendent jurisdiction over state claims following *pretrial* dismissal of federal claims. (*Lucas, supra*, 47 Cal.App.4th at p. 286; *Craig, supra*, 221 Cal.App.3d at pp. 1299-1300; *Merry*, at p. 228.) *Merry* was decided by the same court as *Mattson*. In *Mattson*, the court noted that *Merry* was not controlling when a plaintiff takes a cause of action to trial on a federal theory alone, because (1) "the decision in *Merry* was greatly influenced by the summary nature of the federal court judgment," and (2) "it is by no means clear that in *Merry* the cause of action asserted by plaintiff in the federal court action was the same cause of action as that asserted in the state court action . ..." (*Mattson, supra*, 106 Cal.App.3d at pp. 453-454; see *Merry*, at pp. 227-228.)

Harris was a malpractice action arising from counsel's failure to timely litigate state law claims that were dismissed after a federal trial of the plaintiff's section 1983 claim. The *Harris* court disagreed with

Mattson and followed *Lucas*. Noting what it deemed to be controlling principles from the Restatement Second of Judgments, the court reasoned that there was no concern about multiple litigation in the case before it. (*Harris, supra*, 104 Cal.App.4th at pp. 188-189.) *Harris* is unpersuasive. *Lucas* is materially distinguishable, as noted above. The *Mattson* court carefully considered the applicable Restatement principles, and its reasoning was sound. (*Mattson, supra*, 106 Cal.App.3d at pp. 450-453, discussing Rest., Judgments, §§ 61, 61.1 & 67, [**522] and comments; see Rest.2d Judgments, § 26, com. d, p. 238, § 24, com. g, p. 204 & § 25, com. e, p. 213.) While malpractice may have foreclosed multiple litigation in *Harris*, that peculiarity provides no support for the court's claim preclusion analysis. [*526]

The *Mattson* rule adheres to the primary rights theory long followed by California courts. "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. (*Slater* v. *Blackwood* (1975) 15 Cal.3d 791, 795 [126 Cal. Rptr. 225, 543 P.2d 593].)" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681 [34 Cal. Rptr. 2d 386, 881 P.2d 1083].) "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. (*Slater*[, at p.] 795.) 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.' (*Ibid*.) 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.' (*Wulfjen* v. *Dolton* [(1944)] 24 Cal.2d 891, 895-896 [151 P.2d 846], italics deleted.)" (*Crowley*, at pp. 681-682.)

Here, despite the contrary view of the Court of Appeal majority, plaintiffs' section 1983 claim and their state law claims presented alternate theories of relief for the same injury, the shooting of the decedent. As recognized by the concurring opinion above, settled principles of law compel the conclusion that the state and federal claims in this case involve the same primary right. (*Mattson, supra*, 106 Cal.App.3d at pp. 447-448; see also, e.g., *Harris, supra*, 104 Cal.App.4th at p. 187; *Lucas, supra*, 47 Cal.App.4th at p. 286; *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 908 [5 Cal. Rptr. 2d 64].)

If primary rights were truly indivisible, then plaintiffs' state law claims would be [***23] precluded by the federal judgment whether it was plaintiffs or the federal court that split their cause of action. However, I do not suggest that the rule against splitting a cause of action admits no exceptions. Clearly, there are some situations in which the plaintiff cannot avoid a split, as where the defendant succeeds in removing the case from state to federal court and the federal court thereafter declines to hear state claims. Furthermore, like the *Mattson* court, I have no quarrel with the rule that, when state claims are dismissed by a federal court after a summary disposition of federal claims, claim preclusion does not apply. (*Mattson, supra*, 106 Cal.App.3d at p. 453.) In that circumstance, the plaintiff has had no occasion to realize that the court would not try the state claims, and cannot fairly be held responsible for failing to present all theories of recovery in one forum. In such limited circumstances, primary rights theory must bend in the interests of justice. (See *Slater v. Blackwood, supra*, 15 Cal.3d at p. 796.) However, an exception [*527] to the rule of claim preclusion is not appropriate when a federal court declines to reach state law claims after *trying* federal claims based on the same primary right.

Mattson provides a clear, effective rule in this situation. It strikes the appropriate balance between the interests of the plaintiff in choosing a forum, the defendant in avoiding the vexation of relitigation, and the courts in the efficient administration of justice. The *Mattson* court recognized that it would be inappropriate to preclude a subsequent state court action *whenever* a federal court declines to exercise its supplemental jurisdiction over state claims. Such a rule "would have an unwarranted and unnecessary chilling effect upon the invocation of the jurisdiction of the federal courts in civil rights actions." (*Mattson, supra*, 106 Cal.App.3d at p. 454.) "However, when the federal court has been requested to and has declined to exercise pendent jurisdiction [**523] over the nonfederal claim, the plaintiff is presented with a new choice. He may proceed to trial on the federal claim or, usually, he may elect to dismiss the federal claim without prejudice (see Fed. Rules Civ.Proc., rule 41(a)(1)) and litigate both claims in the state court [citations]." (*Mattson*, at pp. 454-455, fn. omitted.)

If the federal court bifurcates state claims and proceeds to trial on a section 1983 claim alone, plaintiffs are a similar situation. They may seek voluntary dismissal, and their state claims are preserved under the tolling provisions of 28 United States Code section 1367(d). [3] While the federal rules allow voluntary dismissal only by stipulation or court order after the answer is served (Fed. Rules Civ.Proc., rule 41(a), 28 U.S.C.), plaintiffs should be required to explore those alternatives in order to preserve their state claims. It would be particularly appropriate for the plaintiff to seek a stipulated dismissal in this situation. A defendant refusing to so stipulate should be barred from relying on the *Mattson* rule in subsequent state litigation.

> 3 "The period of limitations for any claim asserted under subsection (a) [i.e., claims under the federal court's supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." (28 U.S.C. § 1367(d).)

If, instead, plaintiffs choose to go forward with only their section 1983 claim, they have opted for a trial on all the [***24] relevant facts, including "the events leading up to the shooting as well as the shooting." (*Billington v. Smith* (9th Cir. 2002) 292 F.3d 1177, 1190.) They should not be entitled to a second opportunity to litigate those facts simply because the federal court waited until after trial to dismiss the state claims. The procedure adopted by the federal court in this case invites the manipulation and multiplication of [*528] litigation that the *Mattson* court rightly feared. As a general rule, the principle of res judicata ought to foreclose state court litigation of a cause of action that has already been tried in federal court. No reason to depart from that rule appears in this case.

Baxter, J., concurred.

LEXSEE 51 P.3D 297

MYCOGEN CORPORATION et al., Plaintiffs and Appellants, v. MONSANTO COMPANY, Defendant and Respondent. MYCOGEN PLANT SCIENCE, INC., Plaintiff and Appellant, v. MONSANTO COMPANY, Defendant and Respondent.

No. S090337.

SUPREME COURT OF CALIFORNIA

28 Cal. 4th 888; 51 P.3d 297; 123 Cal. Rptr. 2d 432; 2002 Cal. LEXIS 5025; 2002 Cal. Daily Op. Service 7179; 2002 Daily Journal DAR 8988

August 8, 2002, Decided
August 8, 2002, Filed

PRIOR HISTORY: Superior Court of San Diego County No. 699882, 671896, Herbert B. Hoffman, Judge.

DISPOSITION: We conclude that both *Mycogen I* and *Mycogen II* were based on the violation of the same primary right, Monsanto's breach of contract.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered judgment on a jury verdict awarding damages to plaintiff, a plant science company, in its action against a developer of transgenic plant seed technology for breach of a contract to license to plaintiff its technology to produce genetically altered plant seeds. In an earlier action arising form the same licensing agreement, plaintiff sought and obtained a declaration that defendant had a contractual duty to license its technology to plaintiff and an order for specific performance requiring defendant to do so. (Superior Court of San Diego County, Nos. 671896 and 699882, Herbert B. Hoffman, Judge.) The Court of Appeal, Fourth Dist., Div. One, Nos. D031046,D031336 and D032171, reversed the judgment, concluding that res judicata barred the second action.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that the second action was barred under the doctrine of res judicata. The court held that the exemption from res judicata for declaratory judgments applies only when the first action is purely for declaratory relief, and not when a party, such as in this case, also seeks other, coercive relief arising from the same cause of action. The court further held plaintiff's second action arose from the same cause of action, and therefore plaintiff should have brought its claim for damages in that action. The two actions alleged the same breach of contract and differed only in the requested remedy. (Opinion by Moreno, J., with George, C. J., Kennard, Werdegar, Chin, and Brown, JJ., and O'Leary, * concurring.)

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Judgments § 70--Res Judicata--Judgment as Merger or Bar. --Res judicata describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue

preclusion, precludes relitigation of issues argued and decided in prior proceedings. Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action. 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 prevents piecemeal litigation caused by splitting a single cause of action or relitigating the same cause of action on a different legal theory or for different relief.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280.]

(2a) (2b) (2c) (2d) (2e) (2f) (2g) (2h) (2i) (2j) Judgments § 70--Res Judicata--Judgment as Merger or Bar--Exemption for Declaratory Relief Judgment--Where First Action Sought Declaratory Plus Coercive Relief. --Res Judicata barred a company's action for damages against a corporation for breach of a contract to license to plaintiff its technology to produce genetically altered plant seeds, where, in an earlier action arising form the same licensing agreement, plaintiff successfully sought a declaration that defendant had a contractual duty to license its technology to plaintiff and an order for specific performance. The exemption from res judicata for declaratory judgments (Code Civ. Proc., § 1062) applies only when the first action is purely for declaratory relief, and not when a party also seeks other, coercive relief arising from the same cause of action. Section 1062, which refers to "remedies provided by this chapter," is included in the chapter governing declaratory relief, thereby denoting purely declaratory judgments. Thus, the exemption is a narrow one, meant to provide parties with a quick way of resolving disputes without the need to assert all claims based on the same cause of action. Furthermore, plaintiff's two actions arose from the same cause of action as they alleged the same breach of contract and differed only in the requested remedy; defendant's nonperformance and repudiation of the agreement constituted a total breach. Even if plaintiff could have obtained both specific performance and damages caused by defendant's delayed performance, a plaintiff is bound to obtain all relief caused by a breach in one action and may not recover part in one and part in another.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 316.]

(3) Declaratory Relief § 3--Nature and Purpose. --A declaratory judgment action provides litigants with a quick, efficient means of resolving a disputed issue. Under Code Civ. Proc., § 1060 et seq., a party may ask the court for a declaration of rights or duties and the court may make a binding declaration of these rights. Unlike coercive relief (such as damages, specific performance, or an injunction) in which the court orders a party to do or to refrain from doing something, a declaratory judgment merely declares the legal relationship between the parties. Under the provisions of § 1060 et seq., a declaratory judgment action may be brought to establish rights once a conflict has arisen, or a party may request declaratory relief as a prophylactic measure before a breach occurs. To further the purpose of providing a rapid means of resolving a dispute or a potential dispute, declaratory actions are given precedence in setting trial dates. Like the doctrine of res judicata, action provides parties with an efficient means of adjudicating a disputed issue. Often, a declaratory remedy will end the controversy between the parties.

(4) Judgments § 70--Res Judicata--Judgment as Merger or Bar--Exemption for Declaratory Relief Judgment. --While declaratory judgments are issue preclusive, they are not necessarily claim preclusive. Thus, Code Civ. Proc., § 1062, provides an exemption from the bar of res judicata for declaratory judgments.

(5) Declaratory Relief § 8--Jurisdiction--Other Remedies. --A court, in granting declaratory relief, has the power to award additional relief.

(6) Declaratory Relief § 12--Trial--Order Granting Declaratory and Requiring Performance by Parties. --Even if a party brings a request for purely declaratory relief and the court's declaration contains a phrase such as "and the parties are ordered to perform thereunder," such a judgment is not converted into one for specific performance. If a plaintiff's case if filed and tried on the theory that the action is one for declaratory relief, and the complaint is so captioned and the prayer is for a judgment declaring the rights of the parties, the addition of such words in the court's order does not convert the judgment to one for specific performance rather than declaratory relief. Therefore, a judgment is such a case would be one for purely declaratory relief and would fall under the res judicata exception provided by Code Civ. Proc., § 1062.

(7) Pleading § 1--Primary Right Theory: Judgmetns § 67--Res Judicata: Words, Phrases, and Maxims--Primary Right Theory. --The doctrine of res judicata is based upon the primary right theory, which is a theory of code pleading that provides that 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. The primary right is indivisible; the violation of a single primary right gives rise to but a single cause of action. The primary right 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. 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. The primary right theory is invoked when a plaintiff attempts to divide a primary right and enforce it in tow suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata.

(8) Contracts § 45--Actions--For Damages and Specific Performance. --A judgment in an action for breach of contract bars a subsequent action for additional relief based on the same breach. Additionally, a party may not obtain both specific performance and damages for the same breach of contract, either in single or multiple actions. A plaintiff may not be awarded both specific performance and damages for breach of contract to the extent such an award would constitute a double recovery.

(9) Damages § 3--Compensatory--Delay in Performance of Contract. --Damages for delay in the performance of a contract must be requested in the initial action for breach of contract, even if they are still speculative at the time of the suit. The plaintiff is bound to prove in the first action not only the damages actually suffered, but also prospective damages to which he or she may be legally entitles, for the judgment the plaintiff recovers will be a conclusive adjudication as to the total damage caused by the breach. This rule is generally applicable with respect to any subsequent litigation even though the plaintiff was not aware of the particular elements of damage therein sought at the time of the pendency of the prior action.

(10) Judgments § 79--Res Judicata--Subsequent Causes of Actions--Consolidation. --The trial court properly denied a company's motion to consolidate its action, seeking damages against a developer of transgenic plant seed technology for breach of a contract to license to plaintiff its technology to produce genetically altered plant seeds, with its earlier action seeking declaratory relief and specific performance arising from the same breach of the agreement. Any damages necessary to make plaintiff whole should have been requested at the outset of the first action, even if these damages were speculative at the time of suit. Plaintiff could not cure its failure to request damages in the initial suit and evade the res judicata bar by filing a motion for consolidation of the two actions.

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JUDGES: (Opinion by Moreno, J., with George, C. J., Kennard, Werdegar, Chin, and Brown, JJ., and O'Leary, J., * concurring.)

* Associate Justice of the Court of Appeal,

Fourth Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: MORENO

OPINION

[***434] [*893] [**299] **MORENO, J.**

This consolidated matter arises out of three appeals from two related actions involving continuing litigation over a license agreement between Mycogen Plant Science, Inc. (MPS) and Monsanto Company (Monsanto) concerning technology to produce genetically altered plant seeds. In the initial action, MPS sought, and was granted, declaratory relief finding that Monsanto had a contractual duty to license its technology to MPS, as well as an order for specific performance requiring Monsanto to do so. MPS later unsuccessfully sought to have Monsanto held in contempt for failure to comply with that order. MPS subsequently filed a second lawsuit seeking damages for breach of the same [***435] license agreement. We granted review to decide whether the second action was barred under the doctrine of res judicata. We conclude that it was barred. Accordingly, we affirm the judgment of the Court of Appeal.

I

Monsanto develops transgenic plant seed technology, in which genes for specific desirable qualities, such as resistance to pests and herbicides, are transplanted from the seeds of one species to the seeds of another. Developing commercially marketable seeds with these qualities is a complex, lengthy, and costly process. After a new gene with the desirable characteristics is developed in the laboratory, it must be inserted into a cell; the transformed cell of plant material is called "germplasm." It then can be developed into a fertile plant, which can be cross-bred, field-tested, and, finally, seeds can be produced in commercial quantities for marketing.

In 1989, Monsanto entered a license agreement with Lubrizol Genetics, Inc. (LGI), the predecessor of MPS, providing, among other things, that LGI had an option to negotiate licenses for Monsanto's reengineered genes in corn, cotton, and canola. The agreement did not specify the licensing terms, providing only that the license shall "have terms as favorable [to LGI] as any other third party licensee." At that time, the technology for producing commercially viable crop seed from these genes was in its early stages. [1]

1 Monsanto did not create the first commercially viable insect-resistant corn (Bt corn) until 1995-1996, bringing the seed to market in 1997. It took eight and 10 years, respectively, for Monsanto to succeed in creating herbicide-resistant canola and cotton; it has not succeeded in producing a commercially viable herbicide-resistant corn.

In 1992, Mycogen Corporation acquired control of LGI, which it renamed Mycogen Plant Science, Inc. In 1993, MPS, as the successor in interest to LGI, sought to exercise an option under the license agreement for Monsanto's gene technology. It warned that any delay in obtaining Monsanto gene [*894] [**300] technology would "result in substantial damages" and urged that "[t]ime is of the essence for us." Monsanto refused to negotiate licenses, asserting that the agreement was nontransferable.

In 1993, MPS commenced an action (hereinafter *Mycogen I*) for declaratory relief and specific performance of the license agreement. Notably, MPS did not seek monetary damages. After the parties brought cross-motions for summary judgment, the superior court granted summary judgment for Monsanto; MPS appealed. In 1996, the Court of Appeal reversed the summary judgment in favor of Monsanto and remanded the matter with directions to enter summary judgment in favor of MPS. (D021481 [nonpub. opn.].) The resulting judgment declared, among other things, that MPS was entitled to the benefits of LGI's license agreement and had validly exercised the option under that agreement. The judgment further ordered Monsanto to "specifically perform the relevant terms of the Agreement" by licensing Monsanto's gene technology to MPS and by disclosing the terms of any third party license agreements. The superior court retained jurisdiction to grant MPS "any further relief" against Monsanto "as may be necessary and appropriate to actuate the Court's declaration."

Monsanto and MPS failed to agree on what technology MPS was entitled to under the terms of the license agreement. Although Monsanto provided MPS with genes in solution, MPS asserted that Monsanto was obligated to provide MPS not only with genes, but also

with germplasm, [***436] which would have accelerated its efforts to produce commercially viable seeds. In 1997, Monsanto tendered draft licenses for the same genes in solution; MPS refused to negotiate and the parties did not reach agreement on licensing.

In 1997, hoping to obtain germplasm pursuant to the order for specific performance, MPS initiated contempt proceedings in *Mycogen I*. MPS alleged that the judgment required Monsanto to deliver germplasm rather than genes alone. In July of 1997, the superior court ruled that Monsanto was not in contempt of the judgment in *Mycogen I* because the judgment did not clearly and unambiguously obligate Monsanto to provide germplasm. A postjudgment order imposed sanctions against MPS pursuant to Code of Civil Procedure section 128.5, [2] ruling that the contempt action was frivolous. MPS appealed this ruling. (D032171.) [3]

2 All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

3 The Court of Appeal agreed that the contempt proceedings were meritless but reversed the order for sanctions. The issue is not before us.

In 1996, after the Court of Appeal issued its decision in *Mycogen I* but before the superior court entered the final judgment, MPS and two of its [*895] affiliates commenced a second action in superior court against Monsanto (San Diego County Super. Ct. No. 699882; hereinafter *Mycogen II*). In *Mycogen II*, MPS sued Monsanto for breach of the same license agreement that was the subject of *Mycogen I*. The suit alleged, among other things, that Monsanto breached the licensing agreement by refusing to allow MPS to exercise its option rights. In contrast to the earlier action, MPS now sought money damages, including lost profits from its inability to compete in the market for transgenic seed as a result of Monsanto's breach. Monsanto successfully demurred to the initial complaint on a theory of res judicata. [4] MPS then filed an amended complaint, which withstood further demurrer, adding new allegations of a continuing breach of the licensing agreement. [5]

4 Monsanto's demurrer to MPS's original complaint in *Mycogen II* was proper under Code of Civil Procedure section 430.10, subdivision (c), since there was another action pending between the same parties on the same cause of action. MPS was granted leave to amend; the final judgment in *Mycogen I* had been entered by the time MPS filed its first amended complaint.

5 MPS affiliates Mycogen Corporation and Agrigenetics, Inc., were the other plaintiffs in *Mycogen II*. The trial court sustained Monsanto's motion for judgment on the pleadings as to the affiliates and judgment of dismissal was entered against them. Claims in *Mycogen II* other than MPS's breach of contract claim against Monsanto, including causes of action for tortious interference with prospective business advantage, were also dismissed. Mycogen Corporation and Agrigenetics, Inc., appealed the order dismissing them from the action (D031046). The Court of Appeal affirmed on this point and they did not seek review in this court.

[**301] Subsequently, the contempt proceedings under *Mycogen I* and MPS's breach of contract action in *Mycogen II* were coordinated by the superior court. [6] The court first held a hearing to determine whether MPS was entitled to genes or germplasm under the 1989 license agreement. Following that hearing, the court ruled in favor of Monsanto, finding that under the terms of the license agreement, Monsanto was obliged only to license genes and improvements [***437] to genes, as opposed to licensing the germplasm desired by MPS.

6 MPS had filed a motion in superior court, pursuant to Code of Civil Procedure section 1048, subdivision (a), to consolidate the proceedings in *Mycogen I* and *Mycogen II*. This motion was denied.

Finally, in 1998, a jury trial commenced in *Mycogen II*. MPS sought damages for losses from Monsanto's breach, beginning in 1993 and including lost future profits from certain seed sales every year "to perpetuity." After the trial judge entered a directed verdict on the issue of breach of contract, the jury awarded MPS $ 174.9 million in damages. Monsanto appealed. (D031336.)

In appealing the verdict, Monsanto argued that the doctrine of res judicata precluded MPS from recovering damages in *Mycogen II* after obtaining specific performance in *Mycogen I*. According to Monsanto, its contract with MPS was totally breached when Monsanto refused to perform and repudiated the license agreement in 1993 after MPS first attempted to exercise its [*896] option, giving rise to a single cause of action. MPS therefore could not recover money damages in a second

lawsuit on the identical single cause of action. In response, MPS contended that res judicata did not apply because Monsanto was under a continuing duty to tender licenses for gene technology after MPS sought to exercise its option in 1993, but repeatedly refused to do so. The Court of Appeal rejected MPS's argument, concluding that "[i]t is not a fair characterization of this record to contend that several hypothetical, successive breaches [after Monsanto repudiated the license agreement] occurred on a continuing basis. The definitive breach was in 1993, giving rise to any rights to relief at that time."

The Court of Appeal reversed the judgment of the superior court in *Mycogen II*, holding that this action was barred by the doctrine of res judicata. The court reasoned that in *Mycogen I*, MPS had elected the equitable remedy of specific performance, as opposed to the legal remedy of damages, for Monsanto's breach of contract. Although a plaintiff may also obtain an award in equity of monetary relief incidental to a decree of specific performance--for example to fully vindicate its contractual rights--MPS did not seek such relief in its first action. Instead, it brought a second action seeking the legal remedy of damages based on the same breach of contract. This it could not do; the cause of action in *Mycogen I* must be deemed merged into the judgment, and the judgment serves as a bar to any subsequent lawsuit containing the same cause of action for breach of contract, i.e., "as to those issues litigated or that could have been litigated regarding the delivery of the requested Monsanto technology." The Court of Appeal concluded: "That MPS chose initially to seek only specific performance is not a reason to excuse it from its duty to pursue all appropriate remedies at the time that would have been available for the claimed breach of contract."

We granted review; we now affirm the judgment of the Court of Appeal.

II

(1) "Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223].) [7] [***438] Under the doctrine of res [**302] judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in [*897] a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.

> 7 While the term "res judicata" has been used to encompass both claim preclusion and issue preclusion, we here use the term "res judicata" only to refer to claim preclusion. As we have noted, "The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings." (*Lucido v. Superior Court, supra*, 51 Cal.3d at p. 341, fn. 3.)

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.' " (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245 [65 Cal. Rptr. 2d 25].) 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*." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.)

(2a)

MPS argues that the judgment in *Mycogen I* granting declaratory relief and specific performance of the contract did not preclude, under the doctrine of res judicata, its subsequent suit for damages for breach of that same contract. MPS contends that its suit in *Mycogen II* was not barred by res judicata because the action in *Mycogen I* was brought under the declaratory judgment act (§ 1060 et seq.), which provides that "no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." (§ 1062.) Since the relief awarded in *Mycogen I* was primarily declaratory, MPS maintains that the judgment in this first action did not preclude MPS from bringing a second action for damages. We disagree. As we explain below, the declaratory judgment act carves out an exception to the bar of res judicata only where a plaintiff's initial action seeks *purely* declaratory relief. Here, MPS sought

and received both declaratory and coercive relief in *Mycogen I*. Consequently, res judicata precludes MPS from seeking additional relief based on the same cause of action.

(3)

A declaratory judgment action provides litigants with a quick, efficient means of resolving a disputed issue. In 1921, the California Legislature passed the declaratory judgment act (the Act). (§ 1060 et seq.) Under the Act, a party may ask the court for a declaration of rights or duties and the court may make a binding declaration of these rights. Section 1060 provides in pertinent part: "Any person interested under a . . . contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court . . . for a declaration of his or her rights and duties . . ., including a determination [*898] of any question of construction or validity arising under the . . . contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. . . . [T]he declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

Unlike coercive relief (such as damages, specific performance, or an injunction) in which a party is ordered by the court to do or to refrain from doing [***439] something, a declaratory judgment merely declares the legal relationship between the parties. Under the provisions of the Act, a declaratory judgment action may be brought to establish rights once a conflict has arisen, or a party may request declaratory relief as a prophylactic measure before a breach occurs. To further the purpose of providing a rapid means of resolving a dispute or a potential dispute, declaratory actions are given precedence in setting trial dates. (§ 1062.3.)

Like the doctrine of res judicata, declaratory relief promotes judicial economy. A declaratory judgment action provides parties with an efficient means of adjudicating a [**303] disputed issue. Often, a declaratory remedy will end the controversy between the parties. If a court finds that a plaintiff has no rights under a contract, the dispute is resolved and no further litigation is likely. If, on the other hand, the court determines that a defendant is in breach of a contract, it is likely that the defendant will comply with the contract rather than risk a subsequent suit for damages or specific performance, since the prior declaratory judgment will serve as a conclusive determination of defendant's breach. (§ 1060.) As the Court of Appeal explained in *Lortz v. Connell* (1969) 273 Cal. App. 2d 286, 301 [78 Cal. Rptr. 6], "[t]he salutary purpose of the declaratory relief provisions is to permit a prompt adjudication of the respective rights and obligations of the parties in order to relieve them from uncertainty and insecurity with respect to rights, status and other legal relations. . . . It enables a party to get a prompt adjudication without a dispute over the damages suffered."

(4)

While declaratory judgments are issue preclusive, they are not necessarily claim preclusive. The Act provides an exemption from the bar of res judicata for declaratory judgments, stating: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." (§ 1062.) **(2b)**

The question raised by the present case is the extent to which this [*899] section exempts declaratory judgments from traditional rules of claim preclusion. MPS argues that this section of the Act provides an exemption from res judicata for judgments awarding *both* declaratory *and* coercive relief. Monsanto counters that only *purely* declaratory judgments are exempt from the res judicata bar under this section. The Court of Appeal in this case agreed with Monsanto, holding that claim preclusion does apply to bar the suit in *Mycogen II* because in *Mycogen I* MPS sought both declaratory relief and specific performance.

The Court of Appeal cited *Lortz v. Connell, supra*, 273 Cal. App. 2d 286 (*Lortz*), for the proposition that an action for purely declaratory relief does not bar a later action for damages. In *Lortz*, the Court of Appeal described the preclusive effect of an action brought under the Act, articulating "[t]he general rule . . . which does not bar the right to subsequent coercive relief *if it is not sought or litigated in the earlier action*." (Lortz, 273 Cal.App.2d. at p. 301, italics added.) Under this rule, the *Lortz* court "concluded that the present action for damages is not barred by the earlier action for declaratory

relief." (*Ibid.*)

The Court of Appeal found the present case distinguishable from *Lortz* because MPS had sought, and was granted, not only a declaratory judgment but also specific performance of the contractual duty to convey Monsanto technology. Since both declaratory relief *and* coercive relief were awarded in the first suit, MPS was [***440] barred, under the doctrine of res judicata, from bringing a subsequent suit for damages.

The conclusion of the *Lortz* court and of the Court of Appeal in the present case, that only purely declaratory judgments are exempt from the bar of res judicata, is consistent with the view espoused by the Restatement Second of Judgments and the majority of courts that have considered this issue. (See, e.g., *Stericycle, Inc. v. City of Delavan* (7th Cir. 1997) 120 F.3d 657, 659-660 [applying Wis. law]; *Cimasi v. City of Fenton* (8th Cir. 1988) 838 F.2d 298, 299 [applying Miss. law]; *Minneapolis Auto Parts Co. v. City of Minneapolis* (8th Cir. 1984) 739 F.2d 408, 410 [applying Minn. law]; *Mandarino v. Pollard* (7th Cir. 1983) 718 F.2d 845, 847-849 [applying Ill. law]; *State v. Smith* (Alaska 1986) 720 P.2d 40, 41, fn. 2.)

The Restatement Second of Judgments, section 33, discusses the preclusive effect of a declaratory judgment. [8] Comment c to the [**304] Restatement, under the heading "Effects as to matters not declared," states, "When a plaintiff [*900] seeks *solely* declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action." (Rest.2d Judgments, § 33, com. c, p. 335, italics added.) The Restatement distinguishes these actions in which a plaintiff seeks *solely* declaratory relief from cases where "[p]leaders sometimes interpolate declaratory prayers redundantly in standard actions." In the latter actions, "[f]or res judicata purposes the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of merger, bar, and issue preclusion." (Rest.2d Judgments, § 33 , com. d, p. 337.)

> 8 This section states, "[a] valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action." (Rest.2d Judgments, § 33.)

As the federal district court recently explained in *Criste v. City of Steamboat Springs* (D.Colo. 2000) 122 F. Supp. 2d 1183, 1187: "[T]he great weight of authority holds that where a party seeks declaratory as well as coercive relief, the declaratory judgment exception to res judicata does not apply." In *Criste*, the plaintiff was barred by res judicata from bringing a second action for damages under federal law, after obtaining both a declaratory judgment and injunctive relief in a prior state action against the same defendant. (*Id.* at p. 1190.) The court followed Colorado law, which, like California law, applies the rule that a declaratory judgment does not constitute an absolute bar to subsequent proceedings. (*Id.* at p. 1187, citing *Atchison v. City of Englewood* (1973) 180 Colo. 407, 414 [506 P.2d 140].)

Articulating the policy reasons underlying the rule, the *Criste* court stated: "First, to allow the exception to extend beyond purely declaratory relief would run counter to the purpose of declaratory actions, which is 'to provide a remedy that is simpler and less harsh than coercive relief.' [Citation.] Perhaps more importantly, to permit some but not other coercive actions to accompany a request for declaratory [***441] relief would open the door to uncertainty and potential claim splitting. The Court sees no justification, for example, for applying ordinary claim preclusion rules to cases where the plaintiff seeks declaratory and damage relief, but a different set of rules to cases where the plaintiff seeks declaratory and injunctive relief. Moreover, if courts were to apply a more lenient set of rules to the latter situation, this would encourage parties to split their causes of action to gain a second bite at the apple if not successful in the first lawsuit. To avoid uncertainty, application of preclusion rules must be clear. Once a party seeks and obtains [*901] coercive relief, the basis for applying the declaratory judgment exception evaporates, and ordinary rules of claim preclusion must apply." (*Criste v. City of Steamboat Springs*, *supra*, 122 F. Supp. 2d at p. 1189.)

Notwithstanding the above precedent and the policy considerations in favor of exempting actions from the bar

of res judicata only when they seek solely declaratory relief, MPS argues that under section 1062, when the relief provided in an initial action is *primarily* declaratory, res judicata does not operate to bar a second suit for coercive relief. When relief incidental to a declaratory judgment is awarded, MPS contends that claim preclusion should not apply.

(5) A court, in granting declaratory relief, has the power to award additional relief. (See, e.g., *Record Mach. & Tool Co. v. Pageman Holding Corp.* (1954) 42 Cal.2d 227, 234 [266 P.2d 1]; *Bertero v. National General Corp.* (1967) 254 Cal. App. 2d 126, 147 [62 Cal. Rptr. 714] (*Bertero*).) **(2c)**

MPS argues that once equitable jurisdiction is exercised by a court and a declaratory judgment is awarded, the section 1062 res judicata exception applies to the subject matter covered by the declaration, even though additional relief is awarded.

To support its argument, MPS contends that the language in section 1062, providing that no judgment "under this chapter" shall [**305] preclude any party from obtaining additional relief based upon the same facts, includes judgments awarding both declaratory and coercive relief. Because a court may award additional relief along with a declaratory judgment, such a judgment is one that falls "under this chapter" and is therefore exempt from the ordinary rules of claim preclusion.

We do not agree with MPS's proposed interpretation of the Act. Under section 1062, a judgment "under this chapter" refers to a judgment awarding solely declaratory relief, not to one awarding both declaratory and coercive relief. The "chapter" referred to in section 1062 is chapter 8, entitled Declaratory Relief. Under section 1060 of this chapter, while a party may *request* additional relief along with a prayer for declaratory relief, the only relief that is *awarded* "under this chapter" is declaratory relief. We therefore read the reference in section 1062 to a judgment "under this chapter" as denoting a purely declaratory judgment.

Further, additional language in the Act demonstrates that the reference to a judgment "under this chapter" in section 1062 designates a judgment awarding solely declaratory relief. Actions seeking only declaratory relief are granted trial-setting preference under section 1062.3. These purely declaratory actions are referred to as "actions brought under the provisions of this chapter" (*ibid.*), mirroring the language used in section 1062. Actions [*902] requesting both declaratory and additional coercive relief do not receive the same trial-setting preference, however. These hybrid actions are referred to in the Act as "[a]ny action brought under the provisions of this chapter in which the plaintiff seeks [***442] any relief, in addition to a declaration of rights and duties." (§ 1062.3, subd. (b).) Thus, the Act refers to actions for purely declaratory relief in general terms as actions "brought under the provisions of this chapter," whereas the Act specifically defines when it is referring to actions seeking both declaratory and coercive relief. The general reference in section 1062 to a judgment "under this chapter," then, provides an exemption from the bar of res judicata only for actions that are purely declaratory in nature.

While MPS would have us believe that section 1062 provides an exemption from res judicata for some actions seeking both declaratory and coercive relief, MPS does not contend that all such actions should be exempt from the bar of res judicata. For example, MPS does not argue that an action seeking declaratory relief and monetary damages should be exempt from the res judicata bar. Instead, MPS attempts to carve out a middle ground, stating that actions that are *primarily* declaratory in nature should also be exempt.

Under MPS's interpretation of the language of section 1062, however, the reference to judgments "under this chapter" would seem to include all remedies that can be awarded by a court along with declaratory relief, including damages. This reading of the statute would provide parties with an easy way to escape the res judicata bar. By attaching a prayer for declaratory relief in the complaint, a party could evade the effect of res judicata in virtually every lawsuit. Clearly, this is not what the Legislature intended. The res judicata exception afforded by section 1062 is a narrow one, meant to provide parties with a quick way of resolving disputes without the need to assert all claims based on the same cause of action. Any broader reading of this exception would swallow the rule of res judicata at the expense of judicial economy and fairness to the parties.

MPS additionally argues that limiting the application of section 1062 to actions that are purely declaratory would penalize parties in cases where a court on its own initiative decides to exercise its equitable jurisdiction and grant relief in addition to a declaratory judgment. In the

present case, however, the *Mycogen I* trial court did not grant specific performance on its own initiative. It was MPS that requested both declaratory relief and specific performance. In its prayer for relief, MPS requested a declaration of rights under the license agreement *and* an "order that defendant Monsanto specifically perform the relevant terms of the Agreement and fulfill its obligations to MPS under paragraph 2.3(c) of the Agreement. " This request for specific [*903] performance included detailed descriptions of the obligations Monsanto was to [**306] be ordered to fulfill. Therefore, this is not a case where coercive relief was awarded on a court's own initiative; instead, MPS stated a cause of action for specific performance, and was awarded this relief by the court's judgment. **(6)**

Accordingly, we decline to address this issue in the abstract and will await to address it when, and if, it arises. [9]

9 Additionally, we note that even if a party brings a request for purely declaratory relief and a court's declaration contains a phrase such as " 'and the parties are ordered to perform thereunder,' " such a judgment is not converted into one for specific performance. (*Bertero, supra*, 254 Cal. App. 2d at p. 138.) If a plaintiff's case is "filed and tried on the theory that the action [is] one for declaratory relief," and "[t]he complaint is so captioned and the prayer is for a judgment declaring the rights of the parties," the addition of such words in the court's order does not convert the judgment to one for specific performance rather than declaratory relief. (*Id*. at p. 135.) Therefore, a judgment in such a case would be one for purely declaratory relief and would fall under the res judicata exception provided by section 1062.

[***443] **(2d)**

We are not convinced that parties will be penalized by such a rule limiting section 1062 to cases in which a party seeks only a declaratory judgment. A party may easily avoid the preclusive effect of a judgment by bringing an initial suit requesting purely declaratory relief. If necessary, the party may subsequently bring a suit for coercive relief.

Further, we find unpersuasive the view of the minority of courts that extend the declaratory judgment exception to cases involving *both* declaratory *and* coercive relief. (See, e.g., *Edward B. Marks M. Corp. v. Charles K. Harris M.P. Co.* (2d Cir. 1958) 255 F.2d 518, 522 [judgment for declaratory and injunctive relief did not preclude further relief in a separate action]; *Buckeye Com. Hope Found. v. City of Cuyahoga Falls* (N.D. Ohio 1997) 970 F. Supp. 1289, 1301-1302 ["Ohio law presumes that some sort of injunctive relief may be required in order to give meaning to a declaratory judgment"]; *Pacemaker Food Stores, Inc. v. Seventh Mont Corp.* (1986) 143 Ill. App. 3d 781 [97 Ill. Dec. 727, 493 N.E.2d 390, 393-394] [same].) Such an exception to res judicata principles would create uncertain preclusion rules and would threaten to swallow the rule against claim splitting, permitting a party to evade a res judicata bar merely by appending a request for declaratory relief to a claim for specific performance or other coercive relief.

The broad exception to res judicata preclusion advocated by MPS would either provide a claim preclusion exemption for any action containing a request for declaratory relief, or it would require courts to engage in a case-by-case analysis to determine whether an initial action was *primarily* declaratory. We reject this proposed approach as inconsistent both with the statutory language and with the purpose of the doctrine of res judicata, to [*904] provide parties with consistent and predicable claim preclusion rules. Therefore, we conclude that since the first action did not seek purely declaratory relief, any subsequent suit based on the same cause of action is barred.

III

Given our determination that the judgment in *Mycogen I*, having awarded both declaratory and coercive relief, has a preclusive effect, we now consider whether the claims brought in *Mycogen II* are based on the same cause of action. We conclude that both suits are based on the same cause of action, and therefore the suit in *Mycogen II* is barred by res judicata.

(7) California's res judicata doctrine is based upon the primary right theory. As we explained in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682 [34 Cal. Rptr. 2d 386, 881 P.2d 1083]:

"The primary right theory is a theory of code pleading that has long been followed in California. It provides that 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 [**307] suffered. [Citation.] It must therefore be distinguished from the *legal* [***444] *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.]

"The primary right theory . . . is invoked . . . when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata."

(2e) The judgment in *Mycogen I* bars the action brought in *Mycogen II* if both suits seek to vindicate the same primary right. The Court of Appeal in [*905] this case found that the proceedings in *Mycogen I* and *Mycogen II* arose from the same injury, and therefore concluded that the proceeding in *Mycogen II* was barred. We agree.

In both *Mycogen I* and *Mycogen II*, MPS alleged a breach of the same contract, differing only in the requested remedy. In *Mycogen I*, MPS sought, and was awarded, specific performance. In *Mycogen II*, MPS sought damages. Arguing that the res judicata bar does not apply to its suit for damages, MPS offers various grounds for claiming that this second suit vindicated a separate primary right. At the pleading stage, after Monsanto successfully demurred to the initial *Mycogen II* complaint on res judicata grounds, MPS overcame another demurrer by arguing in its amended complaint that the rule against splitting a cause of action does not bar "sequential breach of contract suits in the instance of continuing breach." At trial, however, MPS premised its damages claim on the argument that Monsanto had committed a *single* breach in 1993 by not delivering the genes to MPS.

In the Court of Appeal, MPS resurrected its continuing breach theory, arguing that its second action for contract damages was based on continuous or successive breaches of the license agreement. The Court of Appeal rejected this argument, finding that instead of continuing breaches, "there was a single option . . . that was repudiated conclusively." Finally, in its appeal to this court, MPS has again abandoned its continuing breach theory, arguing here that the damages requested in *Mycogen II* were "for the delay in the implementation of specific performance relief," based on Monsanto's initial breach of the contract in 1993. MPS contends that this second action, for damages caused by delay in implementing the decree of specific performance, is a separate cause of action under California law. [10]

10 MPS does not contend in this appeal that Monsanto committed successive or continuous breaches of the license agreement. Having reviewed the record, we agree with the Court of Appeal that Monsanto's nonperformance and conclusive repudiation of the license agreement in 1993 constituted a total breach of contract.

(8) It is well established that a judgment in an action for breach of contract bars a subsequent action for additional relief based on the same breach. (*Holmes v. David H. Bricker, Inc.* (1969) 70 Cal. 2d 786, 790 [76 Cal. Rptr. 431, 452 P.2d 647]; see [***445] *Abbott v. The 76 Land and Water Co.* (1911) 161 Cal. 42, 46-51 [118 P. 425]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770 [31 Cal. Rptr. 2d 224].) Additionally, a party may not obtain both specific performance and damages for the same breach of contract, either in single or multiple actions. "A plaintiff . . . may not be awarded both [specific performance and damages for breach of contract] to the extent such an award would constitute a double recovery." (*Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1220 [34 Cal. Rptr. 2d 716].) [*906])

(2f) MPS argues that despite the rule barring such double recovery, a plaintiff may [**308] recover both

specific performance and damages for delay in the commencement of the defendant's performance. While this may be true, a plaintiff requesting both specific performance and delay damages must request both remedies in the initial proceeding. As we made clear in *Abbott v. The 76 Land and Water Co., supra,* 161 Cal. at p. 47 (*Abbott*), a decree for specific performance bars a subsequent action for monetary relief based on the same breach of contract, even if this subsequent action seeks to recover for delay in performance occasioned by the litigation. [11] A plaintiff is "bound to obtain all his relief on account of the breach in one action, and could not recover part in one and part in another." (*Abbott, supra,* at p. 47.)

> 11 We note that MPS now alleges that the damages it received in *Mycogen II* were to compensate it for delay in the implementation of specific performance relief. Monsanto counters, however, that it did not delay in complying with the judgment in *Mycogen I* once it was entered in 1996. In fact, the trial court found that Monsanto was not in contempt of the judgment in *Mycogen I* and determined that, under the licensing agreement, Monsanto was required only to license genes, and not the germplasm desired by MPS. In any event, in its complaint in *Mycogen II*, MPS sought relief only for breach of contract.

In *Abbott*, the plaintiff's assignor, a buyer of land, had sued to obtain specific performance of a contract to convey property. The buyer eventually prevailed, obtaining a judgment confirming the existence of the buyer's contractual right and directing the defendant to execute a deed for the property. (See *Abbott, supra,* 161 Cal. at pp. 45-46.) The buyer assigned his claim to the plaintiff, who subsequently brought a second action to obtain damages for depreciation in the value of the property during the delay in delivery of the property after the decree of specific performance. We held that the second action for delay damages was barred: "[A] decree of specific performance of the contract . . . is a bar to any further relief based on the claim of the breach, for . . . an action for specific performance necessarily involves not only the question of such performance, but also all claims for compensation and damage on account of the delay in performance." (*Id.* at p. 49.)

In *Abbott*, we made clear that a breach of contract gives rise to a single cause of action in which all remedies based on that breach must be requested. As we noted, "[i]t is true that [plaintiff] had an election of remedies. He might have brought an action to recover such damages as were caused him by the breach, or he might, as he did, bring his action for specific enforcement of the contract, and in such action obtain not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to, for it is thoroughly settled that a court of equity taking jurisdiction for the purpose of specifically enforcing a contract takes full jurisdiction [*907] of all the rights of the parties, whether legal or equitable, and may award such legal damages as the [plaintiff] may have suffered by reason of the delay in performance. [Citation.] But, under elementary [***446] principles, he was bound to obtain all his relief on account of the breach in one action, and could not recover part in one and part in another." (*Abbott, supra,* 161 Cal. at p. 47.)

(9) Delay damages must be requested in the initial action for breach of contract, even if they are still speculative at the time of the suit. We stated in *Abbott* that "it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered. He is bound to prove in the first action not only such damage as has been actually suffered, but also such prospective damage by reason of the breach as he may be legally entitled to, for the judgment he recovers in such action will be a *conclusive adjudication as to the total damage on account of the breach*." (*Abbott, supra,* at p. 48, italics added; see also *Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305] [stating that a second action for damages based on same breach of contract "would be successfully opposed by the plea of res judicata"]; *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal. App. 3d 410, 416 [100 Cal. Rptr. 826] [finding that the reasoning in *Abbott* also applies when the first action was for injunctive relief rather than specific performance].) [**309] As *McFaddin v. H.S. Crocker Co.* (1963) 219 Cal. App. 2d 585, 589 [33 Cal. Rptr. 389], explained: "This rule is generally applicable with respect to the subsequent litigation even though the plaintiff was not aware of the particular elements of damage therein sought to be recovered at the time of the pendency of the prior action."

(2g)

Thus, we reject MPS's argument that it should be permitted to bring a second suit for delay damages because of the speculative nature of damages at the time of Monsanto's breach. Additionally, we note that at the time of Monsanto's breach in 1993, MPS was aware of the prospect of damages based on delay in performance. **(10)**

In attempting to enforce the contract, MPS had repeatedly warned Monsanto that any delay in performance would cause substantial damages. Any of these incidental damages for delay should have been sought by MPS as part of the action for specific performance. [12]

> 12 Further, we reject MPS's argument that the trial court erred in denying MPS's 1997 motion for consolidation of the proceedings in *Mycogen I* and *Mycogen II*. Any damages necessary to make MPS whole should have been requested at the outset of *Mycogen I*, even if such damages were speculative at the time of suit. MPS cannot cure its failure to request damages in the initial suit and evade the res judicata bar by filing a motion for consolidation of the two actions.

(2h)

In an attempt to circumvent the well-settled principles set forth in *Abbott*, MPS argues, relying on [*908] *Title Guarantee & Trust Co. v. Monson* (1938) 11 Cal.2d 621 [81 P.2d 944] (*Title Guarantee*), that the damages it sought in *Mycogen II* involved a primary right distinct from the primary right vindicated by the specific performance judgment in *Mycogen I*. We are unconvinced and find *Title Guarantee* inapplicable to the present case.

Unlike *Abbott*, *Title Guarantee* involved two suits seeking to vindicate separate and distinct rights. In the first action, the plaintiff sued the defendants for specific performance to obtain possession of real property after a default on a secured debt. In the second action, the plaintiff requested damages based on a separate wrong: rental income withheld by the defendants when the property was unlawfully possessed, after the judgment of specific performance but before the delivery of the [***447] property to the plaintiffs. (See *Title Guarantee*, *supra*, 11 Cal.2d at p. 624.) In *Title Guarantee*, we found that under the specific facts of the case, the second suit for wrongfully withheld rents "may be considered as constituting a *separate and distinct cause of action.*" (*Id.* at p. 633, italics added.) We concluded that the two actions vindicated different rights. The suit for rents was not "necessary or indispensable" to the action for possession of the property. (*Ibid.*) Each action was based on a breach of a separate covenant at different times, and so the judgment in the first action did not bar the plaintiff from bringing the second action. *Title Guarantee* is therefore inapplicable because the plaintiff was not seeking delay damages based on the same breach, as in *Abbott* and the present case, but instead was seeking damages based on the separate breach of an independent right.

In the present case, there were no separate and distinct covenants breached at different times. Instead, there was a single breach of contract when Monsanto refused to negotiate licenses and repudiated the agreement. All remedies requested by virtue of this breach must be requested in a single action or be forfeited. MPS could have sought alternate remedies, such as requesting either total damages or specific performance plus delay damages, but they must have been pled in the same suit. (See *Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 682 ["[t]he primary right must . . . be distinguished from the *remedy* sought"]; *Steele v. Litton Industries, Inc.* (1968) 260 Cal. App. 2d 157, 172 [68 Cal. Rptr. 680] ["if the trial proceeds to judgment on one alternative remedy such judgment would constitute a bar to the trial in a subsequent action on the obligation which plaintiff seeks to enforce, but on a different theory."].)

[*909] We conclude that both *Mycogen I* and *Mycogen II* were based on the violation of the same primary right, Monsanto's breach of contract. [13] Therefore, MPS's second action [**310] in *Mycogen II* is barred under the doctrine of res judicata. The judgment of the Court of Appeal is affirmed.

> 13 Amici curiae urge this court to abandon the primary right theory and adopt the transactional approach of the Restatement Second of Judgments. As the result in this case would be the same under either theory, we decline to reconsider our long-standing approach to res judicata.

George, C. J., Kennard, J., Werdegar, J., Chin, J., Brown, J., and O'Leary, J., * concurred.

> * Associate Justice of the Court of Appeal,

Fourth Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

LEXSEE 174 CAL.APP.4TH 833

RANDY NEIN, Plaintiff and Appellant, v. HOSTPRO, INC., et al., Defendants and Respondents.

B199497

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

174 Cal. App. 4th 833; 95 Cal. Rptr. 3d 34; 2009 Cal. App. LEXIS 892

June 3, 2009, Filed

PRIOR HISTORY: [***1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC346190, Haley J. Fromholz, Judge.

Salazar v. Interland, Inc., 152 Cal. App. 4th 1031, 62 Cal. Rptr. 3d 24, 2007 Cal. App. LEXIS 1047 (Cal. App. 2d Dist., 2007)

DISPOSITION: Affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

On summary judgment, the trial court ruled that a salesperson was not entitled to recover commissions that he claimed were due to him from his former employer. The parties' agreement provided for the salesperson to receive commission pay as long as he was employed in his position. He was terminated while the employer was negotiating with a company whose agent he had contacted. He received no commissions in connection with the employer's subsequent purchase of assets from that company. In a separate action, the agent could not recover commissions because the agent had no broker's license. (Superior Court of Los Angeles County, No. BC346190, Haley J. Fromholz, Judge.)

The Court of Appeal affirmed, stating that the ruling as to the agent had no collateral estoppel effect because the salesperson and the agent were not in privity. The salesperson's lack of a business opportunity broker's license did not bar recovery as a matter of law under Bus. & Prof. Code, §§ 10131, 10136, absent proof that he had solicited the specific transaction that occurred. The written employment agreement clearly established that he was not entitled to receive commission pay after his termination, however, and he failed to plead an oral employment agreement or an unlawful basis for his termination. Accordingly, he could not maintain wage claims under Lab. Code, §§ 206, subd. (a), 2926, or an unfair business practice claim under Bus. & Prof. Code, § 17200. (Opinion by Suzukawa, J., with Epstein, P. J., and Willhite, J., concurring.) [*834]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Brokers § 16--Compensation--License as Necessity for Action--Real Estate or Business Opportunity Broker.--Bus. & Prof. Code, §§ 10131, 10136, provide that no person engaged in the business or acting in the capacity of a real estate or business opportunity broker may bring or maintain any action in the courts of the State of California for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he or she was a duly licensed real estate or business opportunity broker at the time the alleged cause of action arose.

(2) Judgments § 81--Res Judicata--Collateral Estoppel--Factors.--Issue preclusion by collateral

estoppel prevents relitigation of issues argued and decided in prior proceedings. The doctrine rests upon the ground that the party to be affected, or some other with whom he or she is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his or her opponent. Public policy and the interest of litigants alike require that there be an end to litigation. Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding if (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. In addition to these factors, the courts consider whether the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue. Collateral estoppel will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed.

(3) Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity.--The concept of privity for the purposes of collateral estoppel refers to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is sufficiently close so as to justify application of the doctrine of collateral estoppel. This requirement of identity of parties or privity is a requirement of due process of law.

(4) Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity--Reasonable Expectation of Being Bound.--Collateral estoppel may be applied only if due process requirements are satisfied. In the [*835] context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. The reasonable expectation requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped. Furthermore, due process requires that the party to be estopped must have had a fair opportunity to pursue his or her claim the first time. In deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need to minimize repetitive litigation and prevent inconsistent judgments.

(5) Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity--Reasonable Expectation of Being Bound.--A nonparty should reasonably be expected to be bound, in the context of collateral estoppel, if he or she had in reality contested a prior action even if he or she did not make a formal appearance, for example, by controlling it. Furthermore, privity appertains against one who did not actually appear in the prior action where the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for a nonparty. A party who through his or her attorney was aware of the prior litigation, but did not stand in a close relationship with the other plaintiffs and had no control over the proceedings in the other cases, cannot be charged with notice that he or she avoided the prior proceedings at his or her peril.

(6) Brokers § 16--Compensation of Brokers--License as Necessity for Action--Business Opportunity Broker.--The relevant question in determining whether Bus. & Prof. Code, §§ 10131, 10136, bar an unlicensed person's recovery of a commission is not whether the transaction met the statutory definition of a business opportunity, but rather whether the plaintiff bought or offered to buy, solicited prospective sellers of, or negotiated the purchase of a business opportunity. In other words, the focus of the inquiry should be the plaintiff's actions in attempting to create a business relationship, not the form that the business relationship ultimately took. Under this analysis, a plaintiff would come within the statute only if he or she solicited or negotiated the purchase or sale of a business opportunity. If, on the other hand, the plaintiff solicited or negotiated a different kind of transaction, he or she would not come within the statute--even if the transaction ultimately was consummated as the purchase or sale of a business opportunity, rather than in the form the plaintiff proposed. [*836]

(7) Employer and Employee § 6--Employment Relationship--Compensation--Commissions--Governed by Employment Agreement.--The language of an employment agreement was reasonably susceptible to only one interpretation--that once a salesperson ceased to be employed by his employer, he would no longer be eligible for commission pay. While the salesperson could have relied on extrinsic evidence (if there were such evidence) to suggest an alternative meaning of this provision, he did not do so. Accordingly, as a matter of law, the written employment agreement precluded him from collecting additional commissions posttermination.

[Cal. Forms of Pleading and Practice (2009) ch. 140, Contracts, § 140.44; 2 Crompton et al., Matthew Bender Practice Guide: Cal. Contract Litigation (2009) § 22.67.]

(8) Summary Judgment § 22--Hearing and Determination--Issues Not Precluding Judgment--Unpleaded Issues.--The pleadings set the boundaries of the issues to be resolved at summary judgment. Accordingly, a plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. A summary judgment or summary adjudication motion that is otherwise sufficient cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings. Thus, a plaintiff wishing to rely upon unpleaded theories to defeat summary judgment must move to amend the complaint before the hearing.

(9) Contracts § 23.1--Construction and Interpretation--Good Faith and Fair Dealing--Consistency of Obligations.--The implied covenant of good faith and fair dealing is designed to effectuate the intentions and reasonable expectations of parties reflected by mutual promises within the contract. For this reason, an implied covenant cannot create an obligation inconsistent with an express term of the agreement.

(10) Labor § 11--Regulation of Working Conditions--Wages--Requirements as to Payments--Commissions--Governed by Employment Agreement.--Commissions are wages, and thus a claim for commissions falls within the terms of Lab. Code, §§ 2926, 206 (Lab. Code, § 200, subd. (a)). However, for purposes of enforcing the provisions of the California Labor Code, the right of a salesperson or any other person to a commission depends on the terms of the contract for compensation. Accordingly, a plaintiff's right to commissions must be governed by the provisions of the employment agreement. [*837]

(11) Unfair Competition § 4--Acts Constituting Unfair Competition--Lawful Conduct.--A business practice that might otherwise be considered unfair or deceptive cannot be the basis of a Bus. & Prof. Code, § 17200, cause of action if the conduct has been deemed lawful.

(12) Appellate Review § 109--Briefs--Requisites--Forfeiture.--When a party fails to make a legal argument or to cite any legal authority in support of a contention, it is forfeited on appeal.

COUNSEL: Randy Nein, in pro. per.; and John Jahrmarkt for Plaintiff and Appellant.

Graves Law Office, Philip J. Graves and Fredricka Ung for Defendants and Respondents.

JUDGES: Opinion by Suzukawa, J., with Epstein, P. J., and Willhite, J., concurring.

OPINION BY: Suzukawa

OPINION

[**38] **SUZUKAWA, J.**--

INTRODUCTION

Plaintiff Randy Nein was employed by defendants HostPro, Inc., and Interland, Inc. (collectively, defendant), as a salesperson between October 1999 and December 2001. In December 2000, plaintiff approached AT&T Corporation (AT&T) and suggested that defendant provide Web-hosting services to some of AT&T's business customers. Such a transaction was still being negotiated when defendant terminated plaintiff in December 2001, and it was consummated the following month.

Plaintiff seeks through the present action to recover commissions he claims are due him in connection with the AT&T transaction. The trial court granted summary judgment for defendant, concluding that the entire action is barred because plaintiff was not a licensed business opportunity [**39] broker. Additionally, the court found that plaintiff's termination [***2] cut off his right to any additional commissions under the plain language of

plaintiff's written employment agreement.

We do not agree with the trial court that plaintiff's action is barred by his failure to procure a broker's license. In this regard, we reject defendant's claim that plaintiff is collaterally estopped by the Court of Appeal's opinion [*838] in a related case from raising the broker's license issue. (*Salazar v. Interland, Inc*. (2007) 152 Cal.App.4th 1031, 1033-1034 [62 Cal. Rptr. 3d 24] (*Salazar*).) Like the trial court, however, we conclude that under the plain language of the written employment agreement, plaintiff was not permitted to recover additional commissions after his termination. Accordingly, we affirm the grant of summary judgment.

FACTUAL AND PROCEDURAL HISTORY

I. *Plaintiff's Employment and the AT&T Transaction* [1]

> 1 We state the facts in the light most favorable to the nonmoving party in accordance with the standard of review. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832 [31 Cal. Rptr. 3d 565, 115 P.3d 1212] [review of summary judgment].)

Defendant hired plaintiff as a sales representative on October 4, 1999. On that date, the parties entered a written employment agreement, which provided (among other things) [***3] that (1) plaintiff was responsible for Web-hosting sales; (2) plaintiff's starting salary was $ 24,000 per year, plus commissions of 4 percent "on all direct initial sales"; (3) defendant "will be eligible for commission pay as set forth in this [document], so long as [plaintiff] remains employed with the Company as a Sales Representative"; and (4) the employment agreement "may be amended only by a written agreement executed by each of the parties hereto."

In April 2001, defendant promoted plaintiff to "Channel Manager." The parties entered a new oral agreement that provided (among other things) that (1) plaintiff's salary was increased to $ 75,000 per year, and (2) plaintiff would receive commissions of "'20% of the up front costs' revenues on all accounts brought in by [plaintiff] or through [plaintiff's] contacts or efforts."

In December 2000, plaintiff introduced himself to Vincent Salazar, then an agent for AT&T, at a networking event. Subsequent to that introduction, Salazar proposed to defendant and AT&T that defendant acquire all of AT&T's small- to medium-sized Web-hosting clients. Plaintiff "was not involved in the 'nuts and bolt' negotiations" concerning defendant's acquisition [***4] of AT&T's Web-hosting clients, but he "was responsible for procuring and advising HostPro of the potential to consummate a lucrative deal with AT&T." Further, he did not "at anytime solicit AT&T regarding the deal," but he "was responsible for engineering the getting together of AT&T and HostPro which ultimately led to the acquisition of AT&T's web hosting business by HostPro following months of extended negotiation by higher ups at HostPro."

Defendant terminated plaintiff on December 6, 2001. Subsequently, on January 14, 2002, defendant and AT&T executed an asset purchase agreement [*839] pursuant to which defendant purchased all of AT&T's contractual rights relating to its small- and medium-sized Web-hosting customer accounts and the equipment used to service those customers.

After defendant and AT&T executed the asset purchase agreement, plaintiff sought compensation for his role in the [**40] transaction. Defendant has never paid plaintiff any commission in connection with the AT&T transaction.

II. *The Present Action*

Plaintiff filed the present action on January 20, 2006. The operative second amended complaint, filed December 29, 2006, asserts four causes of action: (1) breach of contract; (2) breach [***5] of the implied covenant of good faith and fair dealing; (3) violation of Labor Code sections 206 and 2926; and (4) unfair business practices in violation of Business and Professions Code section 17200. It alleges that plaintiff entered an employment contract with defendant in 1999. The employment contract provided that plaintiff would market defendant's Web-hosting services and would be compensated by a salary and commissions of 4 percent. Later, plaintiff was promoted to manager and his commissions were increased to 20 percent. In this capacity, plaintiff initiated a deal with AT&T, valued at more than $ 12 million, pursuant to which defendant acquired all of AT&T's small- to medium-sized Web-hosting clients. However, approximately 30 days before the AT&T deal closed, defendant summarily terminated plaintiff and withheld his commissions.

Defendant moved for summary judgment. The trial

court granted summary judgment on March 28, 2007, finding as follows:

1. *The entire action is barred because plaintiff was not a licensed broker at the time of the AT&T transaction*. Under the plain language of Business and Professions Code section 10030, the AT&T deal must be considered a "business opportunity" [***6] because it is indisputable that the sale of customers and assets constitutes a sale of AT&T's "business." [2] Thus, "[t]he analysis is straightforward: (1) a license is required to solicit prospective sellers of business opportunities; (2) the AT&T deal was a business opportunity; (3) Plaintiff solicited the AT&T deal; (4) Plaintiff did not have a license. Thus, Plaintiff's entire action for commission is barred under Bus. & Prof. Code §§ 10131 and 10136. The motion for summary judgment is granted on this basis."

2 All future statutory references are to the Business and Professions Code unless otherwise indicated.

2. *There is a triable issue of fact as to whether plaintiff is entitled to a commission under the terms of his employment contract*. "Defendant first [*840] argues that Plaintiff's Employment Agreement does not provide for Plaintiff to receive any commission for the AT&T transaction. Defendant argues that although Plaintiff alleges that the Employment Agreement was modified to provide him with a 20% commission on sales of new business brought in by him, no written agreement, modification, or addendum was ever executed. Furthermore, Defendant argues that the Employment Agreement by its [***7] terms provides that it may be amended or modified only by a writing signed by both parties. [Citations.] Plaintiff presents his declaration, in which he states the initial Employment Agreement was not amended, but that he entered into a new agreement when he was promoted to Channel Manager and that this agreement provided for a commission of 20%. ... Plaintiff here argues that Defendant has redacted information from relevant pay records that would show that he was paid a 20% commission under the later agreement. There appears to be a triable issue of material fact as to whether Plaintiff entered into a new oral agreement. However, as stated [**41] above, the motion is nevertheless granted because Plaintiff did not possess a broker's license."

3. *Plaintiff was not entitled to any further commissions after his employment was terminated*. "[T]he Employment Agreement clearly states that Plaintiff will only be eligible for commission pay while he is employed as a Sales Representative. Plaintiff has not provided any authority showing that where an employment agreement is clear that commission payments cease upon termination, an employee is nevertheless entitled to commissions for transactions that [***8] he might have initiated as an employee but which were consummated after his termination."

4. *Plaintiff's claims are not barred by the statute of limitations*. "Defendants argue that all of Plaintiff's contract-related causes of action accrued on January 14, 2002, the date on which the AT&T transaction closed. ... [¶] Plaintiff argues that his cause of action did not accrue until he received a letter from Defendant's counsel Michael French on April 28, 2004, which constituted an anticipatory repudiation. [Citation.] Plaintiff argues that prior to that date, Defendants had not given him any indication that he would not eventually receive a 20% commission on the AT&T deal. Defendants have not presented any evidence to the contrary. Since the action was filed on January 20, 2006, it is timely ... ."

5. *Second cause of action: breach of the implied covenant of good faith and fair dealing*. "Defendants' arguments as to this cause of action are substantially identical to their arguments as to the first cause of action. Essentially, Defendants argue that Plaintiff did not have a contract entitling him to a 20% commission, and that the cause of action is time-barred. The above discussion applies [***9] equally to these arguments." [*841]

6. *Third cause of action: violation of the Labor Code*. "Defendant's arguments as to this cause of action are again substantially identical to those discussed above. Defendant argues that although commissions are wages under the Labor Code, contractual terms authorizing the commissions must be established before the wages are due. Defendant argues that the express terms of the contract prevent Plaintiff from obtaining commissions after he was terminated. As discussed above, the Court agrees."

7. *Fourth cause of action: unfair business practices*. "Where a UCL [unfair competition law] claim is derivative of another claim that fails as a matter of law, the UCL claim must similarly fail. [Citation.] As discussed above, Plaintiff's first three causes of action fail as a matter of law." "Plaintiff also argues that 'Defendants have not raised any credible challenge to plaintiff's UCL

claim that defendant's practice of terminating its employees in order to avoid the payment of earned commission is a fraudulent business practice and thus prohibited by the UCL.' [Citation.] The Court is unable to find any allegation in the [second amended complaint] that Defendant had a practice of terminating [***10] its employees to avoid payment of commission. The pleadings serve as the 'outer measure of materiality' in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. [Citation.]"

Judgment was entered on June 22, 2007, and notice of entry of judgment was served on June 27, 2007. Plaintiff timely appealed. [3]

3 Defendant cross-appealed on June 26, 2007, but dismissed the cross-appeal on October 22, 2007.

[**42] III. *The* Salazar *Litigation*

Meanwhile, in a separate action, Vincent Salazar (plaintiff's contact at AT&T) sued defendant for breach of contract and fraud on March 8, 2004. Salazar alleged that he was an agent of AT&T and was authorized to market Internet and Web-hosting services to small- and medium-sized businesses. In 2001, he advised defendant, which also provided Web-hosting services to small- and medium-sized businesses, that AT&T no longer wished to provide these services. Defendant expressed an interest in acquiring AT&T's small- and medium-sized business clients. On February 13, 2001, Salazar entered a written contract with defendant to market defendant's Web-hosting services to small- and medium-sized business customers and to arrange [***11] the acquisition of AT&T's small- and medium-sized business customers. Defendant represented to Salazar that he would receive a 10 percent commission on all monthly recurring fees received by defendant up to $ 10,000, a 20 percent commission on monthly recurring fees over $ 10,000, and a 5 percent commission [*842] payment as a one-time setup fee for each customer acquired due to his efforts. However, defendant subsequently refused to pay Salazar the commissions allegedly due him. (*Salazar, supra*, 152 Cal.App.4th 1031, 1033-1034.)

Defendant moved for summary judgment, contending that Salazar could not recover the claimed commissions because he did not have a broker's license. On December 13, 2005, the trial court granted the motion.

Salazar appealed the grant of summary judgment, contending that the trial court erred in finding that the transaction between AT&T and defendant constituted the purchase and sale of a "business opportunity" under section 10131, subdivision (a). Specifically, Salazar argued that because only a small portion of AT&T's assets were sold, the sale did not constitute the sale of a business opportunity. (*Salazar, supra*, 152 Cal.App.4th at pp. 1035-1036.) On June 26, 2007, [***12] Division Two of this court disagreed and affirmed. It explained that although "business opportunity" under section 10030 includes the sale of an existing business enterprise, "there is no requirement that the sale include every business in which a corporation is engaged. Moreover, by using the term 'include' the definition is not necessarily limited to the inclusions. (*People v. Arnold* (2006) 145 Cal.App.4th 1408, 1414 [52 Cal. Rptr. 3d 545], citing *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774 [117 Cal. Rptr. 2d 574, 41 P.3d 575].) The plain language of the statute, therefore, does not support Salazar's contention that nothing short of the transfer of all the stock or assets of AT&T, or of one of its subsidiaries or divisions, could constitute the sale of a business opportunity." (*Salazar*, at p. 1037.)

Further, the court said, the transfer of a business opportunity as defined in section 10030 includes the transfer of those assets so essential that a business cannot continue without them and the transfer of future patronage or customers. It found undisputed proof of those attributes in the transaction between AT&T and Interland. (*Salazar, supra*, 152 Cal.App.4th at p. 1038.) The court concluded: "Given that AT&T, Interland and Salazar all characterize [***13] the transaction as the transfer of a business and a business opportunity, it is immaterial that the transaction involved less than 2 percent of AT&T's total base of its small business customers, or that AT&T continued to provide Web-hosting services to large clients, or that AT&T continued to provide other types of services to the small [**43] and medium clients. AT&T sold and Interland purchased the customer contracts, supporting equipment and pledge of nonsolicitation for six months that comprised AT&T's Web-hosting business for small to medium-sized clients. The undisputed evidence supports the conclusion that the transaction constituted the sale of a business opportunity." (*Id.* at p. 1040.) [*843]

Finally, the court rejected Salazar's contention that he was not seeking a commission for the transaction between Interland and AT&T but rather his share of the monthly fees paid by each customer as he is entitled to under his contract with Interland. "[T]he statute prohibits 'the collection of compensation' for acting as an unlicensed business opportunity broker regardless of how that compensation is characterized. (§ 10136; see also § 10131 [broker defined as one who 'for a compensation or in expectation [***14] of a compensation, regardless of the form or time of payment ... .'].)" (*Salazar, supra*, 152 Cal.App.4th at p. 1041.)

STANDARD OF REVIEW

The standard of review for summary judgment is well established. "A defendant may move for summary judgment 'if it is contended that the action has no merit ... .' ([Code Civ. Proc.,] § 437c, subd. (a).) 'A defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' ([Code Civ. Proc.,] § 437c, subd. (p)(2).) 'The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' ([Code Civ. Proc.,] § 437c, subd. (c).)" (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 993 [70 Cal. Rptr. 3d 519].)

"On appeal, we review the trial [***15] court's decision to grant or deny the summary judgment motion de novo, on the basis of an examination of the evidence before the trial court and our independent determination of its effect as a matter of law. [Citations.] We are not bound by the trial court's stated reasons or rationale. Instead, we review the summary judgment without deference to the trial court's determination of questions of law." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [80 Cal. Rptr. 2d 66].)

DISCUSSION

I. *There Are Triable Issues of Fact as to Whether Plaintiff Is Precluded From Recovering a Commission Because He Was Not a Licensed Business Opportunity Broker*

(1) Defendant's principal argument in support of summary judgment is that plaintiff is precluded from recovering a commission on the AT&T transaction because he was not a licensed business opportunity broker as [*844] defined by sections 10131 and 10136. These sections provide that no person "engaged in the business or acting in the capacity of" (§ 10136) a real estate or business opportunity broker may "bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article" (*ibid.*) without alleging and proving [***16] that he or she was a duly licensed real estate or business opportunity broker at [**44] the time the alleged cause of action arose. [4] Because it is undisputed that plaintiff was not a licensed broker at the time he allegedly participated in the AT&T transaction, defendant contends that he cannot recover a commission for that participation.

> 4 Although section 10136 refers to "real estate broker[s]," it also applies to persons who buy, sell, or solicit business opportunities unrelated to real property transactions. (See § 10131, subd. (a).)

Plaintiff disagrees. He contends that (1) he acted as a "finder," not a broker; (2) sections 10131 and 10136 should not apply to employees acting within the scope of their employment; (3) the AT&T transaction was not the sale of a "business opportunity" within the meaning of the statute; and (4) plaintiff did not "solicit[] prospective sellers or purchasers of" a business opportunity within the meaning of sections 10131 and 10136.

We begin by considering whether plaintiff is collaterally estopped by the Court of Appeal's opinion in *Salazar* from litigating whether the AT&T transaction constituted the sale of a business opportunity. We then consider on the merits [***17] whether sections 10131 and 10136 bar plaintiff's recovery.

A. *Plaintiff Is Not Collaterally Estopped by the Court of Appeal's Opinion in* Salazar *From Litigating Whether the AT&T Transaction Constituted the Sale of a Business Opportunity*

Defendant asserts that plaintiff is collaterally estopped by the Court of Appeal's opinion in *Salazar* from litigating whether the AT&T transaction constituted the sale of a business opportunity within the meaning of section 10030. For the reasons that follow, we disagree.

(2) "Issue preclusion by collateral estoppel 'prevents "relitigation of issues argued and decided in prior proceedings." [Citation.]' (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481 [111 Cal. Rptr. 2d 870]; see also *Bob Baker Enterprises, Inc. v. Chrysler Corp*. (1994) 30 Cal.App.4th 678, 686 [36 Cal. Rptr. 2d 12].) The doctrine 'rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of [*845] litigants alike require that there be an end to [***18] litigation.' (*Panos v. Great Western Packing Co*. (1943) 21 Cal.2d 636, 637 [134 P.2d 242]; see also *Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn*. (1998) 60 Cal.App.4th 1053, 1065 [71 Cal. Rptr. 2d 77].)" (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 89-90 [38 Cal. Rptr. 3d 528] (*Rodgers*).)

" ' "Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].' ..." [Citations.]' (*People v. Carter* (2005) 36 Cal.4th 1215, 1240 [32 Cal. Rptr. 3d 838, 117 P.3d 544]; see also *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015 [48 Cal. Rptr. 2d 174].) 'In addition to these factors, ... the courts consider whether the party against whom the earlier decision is asserted had a "full and [**45] fair" opportunity to litigate the issue.' (*Roos v. Red* (2005) 130 Cal.App.4th 870, 880 [30 Cal. Rptr. 3d 446].) Collateral estoppel will not be applied 'if injustice would result or if the public interest requires that relitigation [***19] not be foreclosed.' (*Consumers Lobby Against Monopolies v. Public Utilities Com*. (1979) 25 Cal.3d 891, 902 [160 Cal. Rptr. 124, 603 P.2d 41].)" (*Rodgers, supra*, 136 Cal.App.4th at p. 90.)

(3) " 'The concept of privity for the purposes of ... collateral estoppel refers "to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel. [Citations.]" [Citations.] "'This requirement of identity of parties or privity is a requirement of due process of law.' [Citation.] ..." [Citations.]' (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn., supra*, 60 Cal.App.4th 1053, 1069-1070; see also *Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 399 [134 Cal. Rptr. 2d 689].)" (*Rodgers, supra*, 136 Cal.App.4th at pp. 90-91.)

(4) We have no quarrel with the proposition that plaintiff and Salazar had a common interest in establishing that the AT&T transaction was not the sale of a business opportunity. Further, that common [***20] interest seems to have been represented adequately in the *Salazar* case. However, """[c]ollateral estoppel may be applied only if due process requirements are satisfied. [Citations.] In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that [*846] the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.'" (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist*. (1998) 68 Cal.App.4th 1149, 1155 [81 Cal. Rptr. 2d 155] ... ; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 826 [128 Cal. Rptr. 2d 586].) "'The [***21] 'reasonable expectation' requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped. [Citations.] Furthermore, due process requires that the party to be estopped must have had a fair opportunity to pursue his claim the first time. [Citation.]" [Citation.]' (*Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 154 [77 Cal. Rptr. 2d 642].) 'In deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need to minimize repetitive litigation and prevent inconsistent judgments.' (*Children's Hospital v. Sedgwick* (1996) 45 Cal.App.4th 1780, 1788 [53 Cal. Rptr. 2d 725]; see also *Sutton v. Golden Gate Bridge, Highway & Transportation Dist., supra*, at p. 1155.)" (*Rodgers, supra*, 136 Cal.App.4th at p. 92, citation omitted.)

(5) In *Rodgers*, the Court of Appeal applied these principles to conclude that the plaintiff, who alleged that he had been exposed to asbestos in the course of his employment, was not collaterally estopped from litigating issues decided adversely to other workers in asbestos [***22] litigation against the same defendant. Specifically, the court found that the plaintiff was not bound by findings [**46] against workers in prior cases that the defendant Sargent was not the successor-in-interest to other named defendants, even though those workers and the current plaintiff were represented by the same counsel. (*Rodgers, supra*, 136 Cal.App.4th at p. 86.) The court explained: "Appellant did not have any proprietary interest in the [prior] cases. While he had a theoretical 'interest' in the resolution of the successor liability issue in the prior cases--in that an outcome favorable to the plaintiffs would have been binding upon Sargent--he had neither incentive to intervene in those actions nor reason to expect he would be bound by decisions in which he did not participate. (*Old Republic Ins. Co. v. Superior Court, supra*, 66 Cal.App.4th 128, 154-155; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 949-950 [119 Cal. Rptr. 139].) '"A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance," for example, by controlling it. [Citations.] Furthermore, privity appertains "against one who did not actually appear in the prior action ... where the [***23] unsuccessful party in the first action might fairly be treated as acting in a representative capacity for a nonparty." [Citation.]' (*Victa v. Merle Norman Cosmetics, Inc.* [(1993)] 19 Cal.App.4th 454, 464 [24 Cal. Rptr. 2d [*847] 117].) The plaintiffs in the [prior] cases did not act as appellant's representatives, and appellant certainly had no control over or even impact upon the litigation that produced the decisions in favor of respondent. (*Old Republic Ins. Co. v. Superior Court, supra*, at p. 155; *Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1052 [268 Cal. Rptr. 866].) Although appellant, at least through his attorney, must have been aware of the prior litigation, he did not stand in a close relationship with the other two plaintiffs, had no control over the proceedings in the other cases, and cannot be charged with notice that he avoided the prior proceedings at his peril. (*Lynch v. Glass, supra*, at pp. 949-950.)" (*Rodgers*, at pp. 92-93.)

We reach the same conclusion here. There is no evidence that plaintiff had a proprietary interest in the *Salazar* litigation. While he may have had a theoretical interest in the resolution of common issues, he did not have an incentive to intervene in that action or a reason to expect that he [***24] would be bound by the decision there. There is no evidence that Salazar acted as plaintiff's representative or that plaintiff had any control over the *Salazar* litigation. Accordingly, plaintiff cannot be bound by the decision in *Salazar*.

B. *There Are Triable Issues Regarding Whether Plaintiff Was Required to Have a Broker's License to Receive Commissions*

As we have said, section 10136 provides that no person "engaged in the business or acting in the capacity of" a real estate broker may "bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article" without alleging and proving that he or she was a duly licensed real estate broker at the time the alleged cause of action arose. Pursuant to section 10131, subdivision (a), a "real estate broker" includes a person who "[s]ells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of ... a business opportunity."

The *Salazar* court concluded that Salazar could not recover a commission as a matter of law because the AT&T transaction indisputably [***25] was the sale of a business opportunity. In other words, in determining [**47] whether sections 10131 and 10136 barred Salazar's recovery, the court focused on the nature of the transaction, rather than on Salazar's role in that transaction. (E.g., *Salazar, supra*, 152 Cal.App.4th at pp. 1033-1034 ["The trial court correctly found that the transaction was the sale of a business opportunity and that under Business and Professions Code section 10131, subdivision (a), Salazar was required to be licensed as a broker in order to recover compensation for arranging the sale or acquisition of this business."].) The trial court's analysis in the present case was similar. According to the court, "[t]he analysis is [*848] straightforward: (1) a license is required to solicit prospective sellers of business opportunities; (2) the AT&T deal was a business opportunity; (3) Plaintiff solicited the AT&T deal; (4) Plaintiff did not have a license. Thus, Plaintiff's entire action for commission is barred under Bus. & Prof. Code §§ 10131 and 10136."

(6) We read the statute somewhat differently. In our view, the relevant question is not whether the transaction

met the statutory definition of a business opportunity, but rather [***26] whether plaintiff "[bought] or offer[ed] to buy," "solicit[ed] prospective sellers ... of," or "negotiate[d] the purchase ... of" a business opportunity. In other words, the focus of the inquiry should be *plaintiff's actions* in attempting to create a business relationship, not the form that the business relationship ultimately took. Under this analysis, plaintiff would come within the statute only if he "solicited" or "negotiated" the purchase or sale of a business opportunity. If, on the other hand, he "solicited" or "negotiated" a different kind of transaction, he would *not* come within the statute--even if the transaction ultimately was consummated as the purchase or sale of a business opportunity, rather than in the form plaintiff proposed.

In the present case, there was evidence that plaintiff solicited only the sale of defendant's Web-hosting services to AT&T, not the purchase of customer accounts from AT&T. Plaintiff testified that the initial concept he brought to AT&T was an "outsourcing relationship whereby HostPro would provide web hosting services to AT&T's small and medium business customers." The idea was "for HostPro to manage these accounts for AT&T ... [v]ersus [***27] them managing it themselves and having all the overhead expenses." Plaintiff testified that after he made the initial contact with Vince Salazar, he was involved in two meetings with AT&T personnel. During the first meeting, "I just remember everyone sitting at our big conference table, and going around the room, introducing ourselves, and talking about--more about HostPro's services, and introducing them to the concept of, 'Hey, we would love to be the company that manages and maintains and hosts and provides the service to your customers[.]' [¶] ... [¶] ... [O]ur purpose was to build the relationship, create the excitement of allowing AT&T to see the vision of bringing their stuff to us versus them managing all of it themselves." The second meeting "was pretty much the same as the first meeting, but they got more serious about talking about the acquisition of their servers over to our servers. And I think it was more of a technical meeting. And it was a meeting that allowed HostPro to understand what AT&T's needs were. And we made it more clear what our goal was and what services and love and support we could offer them in the process." The discussion still was "for an outsourcing [***28] relationship." [*849]

Plaintiff also testified that in his dealings with AT&T, he never heard that AT&T [**48] was interested in selling its small- and medium-sized accounts:

"Q In the various meetings and teleconferences that you participated in between AT&T and HostPro, did the parties ever discuss AT&T putting their customer accounts up for bid?

"A No, I never--that's what was surprising when I saw the headlines, I never heard that at all.

"Q Did you ever hear that AT&T was interested in selling all those customer accounts?

"A That was a surprise to me, as well.

"Q So that's not something that was discussed in these meetings or conference calls?

"A Not in the preliminary meetings, no.

"Q Not in any of the meetings, correct?

"A Not in any of the meetings I was in, no. [¶] ... [¶]

"Q [T]he concept was for AT&T to keep their customers and for HostPro--

"A Yeah, that was the understanding, sure."

Plaintiff's testimony, although disputed by defendant, is sufficient to create a triable issue as to whether plaintiff "offer[ed] to buy," "solicit[ed] prospective sellers ... of," or "negotiate[d] the purchase ... of" a business opportunity within the meaning of section 10131. On the basis of this testimony, a trier [***29] of fact reasonably could conclude that although the deal ultimately struck between defendant and AT&T was the purchase and sale of a business opportunity, that was not the deal plaintiff solicited or negotiated. Accordingly, the trial court erred by concluding that plaintiff's failure to procure a broker's license barred his recovery as a matter of law.

II. *There Are No Triable Issues of Fact as to the First Cause of Action for Breach of Contract*

The first cause of action asserts breach of the employment agreement. Defendant asserts that it is entitled to judgment on this cause of action as a matter of law because (1) the employment agreement provided that plaintiff [*850] was entitled to a commission only while he was employed by the company, and it is undisputed that plaintiff's employment was terminated before

defendant and AT&T finalized the asset purchase agreement; (2) by its plain language, the agreement did not entitle plaintiff to a commission when the company acquired new customers through an asset purchase agreement, rather than through the direct sale of the company's Web-hosting services; and (3) the breach of contract claim is barred by the statute of limitation. Plaintiff disputes [***30] defendant's interpretation of the employment agreement and asserts that his claim is not time-barred.

We begin by considering whether, as a matter of law, plaintiff's claims are barred because the AT&T transaction on which he bases his claim for additional commissions was consummated after plaintiff's termination. Defendant relies in support of this contention on the language of the parties' October 4, 1999 employment agreement. That agreement provided that plaintiff would receive a commission "with respect to all direct initial sales for which Employee is responsible." It further provided that plaintiff "will be eligible for commission pay ... *so long as* [*he*] *remains employed with the Company as a Sales Representative*." (Italics added.)

(7) We agree with defendant that, on its face, the italicized language is reasonably [**49] susceptible to only one interpretation--that once plaintiff ceased to be employed by defendant, he would no longer be eligible for commission pay. While plaintiff could have relied on extrinsic evidence (if there were such evidence) to suggest an alternative meaning of this provision, he did not do so. (Cf. *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1358 [8 Cal. Rptr. 3d 649] ["[T]his [***31] extrinsic evidence of trade usage exposed a latent ambiguity in the contract language and presented an alter[n]ative interpretation to which the term 'gross receipts' was reasonably susceptible in the circumstances."].) Accordingly, we conclude as a matter of law that the written employment agreement precludes plaintiff from collecting additional commissions posttermination.

We also reject plaintiff's contention that summary judgment must be denied because there are triable issues as to the existence of an April 2001 oral employment agreement that did not include a termination clause. In support, plaintiff relies on his own declaration, in which he states that "[s]ubsequent to the initial Employment Agreement that I signed with HostPro, Inc., in 1999 for a four percent (4%) commission, I was promoted to Channel Manager and given a new agreement for '20% of the up front costs' revenues on all accounts brought in by me or through my contacts or efforts. [¶] ... The 4% commission agreement was not amended. During the month of April 2001, a new agreement was entered into when I was promoted to Channel Manager and I was provided a new commission agreement of 20%, [*851] new office, other amenities [***32] and new salary of $ 75,000.00." Further, plaintiff says, "Regarding the employment agreement and during the Premier Partner Program, it was never discussed or detailed by the Defendants[] in any of the meetings or bulletins that an earned commission would not be paid by terminating the employee."

(8) Plaintiff's declaration arguably raises a triable issue as to the existence of an oral employment agreement. However, it is well established that "the pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 [32 Cal. Rptr. 3d 266].) Accordingly, "[a] 'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]' [Citations.] A summary judgment or summary adjudication motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings.' [Citation.] Thus, a plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Ibid*.)

In the present case, plaintiff's summary [***33] judgment contention that he and defendant entered an oral employment agreement in April 2001 was beyond the scope of the pleadings. Nowhere in the operative second amended complaint does plaintiff allege that the terms of his employment relationship with defendant were dictated by an oral agreement. To the contrary, plaintiff specifically alleges that modifications to his employment agreement were made in April 2001 in an addendum that was "*written*." Moreover, while plaintiff could have sought to amend his pleading to conform to proof even as late as the date of the summary judgment hearing, he never did so. (E.g., *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257 [78 Cal. Rptr. 3d 372] ["[I]f a plaintiff wishes to introduce issues not encompassed in the original pleadings, the plaintiff

must seek leave to amend the [**50] complaint at or prior to the hearing on the motion for summary judgment."].) Accordingly, he may not avoid summary judgment by raising triable issues as to an oral employment agreement. (See, e.g., *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201, fn. 5 [37 Cal. Rptr. 3d 863] ["For the first time on appeal, Lackner argues that Mammoth failed to properly post signs in the area where the incident occurred, [***34] warning that the area is a rest stop where slowing should occur. Mammoth does not respond to this argument and we decline to address it because Lackner's complaint does not allege that Mammoth failed to post warning signs in the area of the collision. ... Because Lackner's complaint fails to allege facts that give rise to a duty to post such signs, she may not assert Mammoth's breach of that duty."]; *Oakland Raiders v. National Football League, supra*, 131 Cal.App.4th at pp. 648-649 ["[T]he Additional Claims were beyond the scope of the second [*852] cause of action of the complaint. ... Therefore, any facts presented in the Raiders' opposition concerning the Additional Claims were properly disregarded in the court's ruling on the summary adjudication motion."].) [5]

> 5 Because we have concluded that there are no triable issues of fact concerning the meaning of the written employment agreement, we do not reach defendant's alternative contentions regarding its entitlement to summary adjudication of this cause of action.

III. *There Are No Triable Issues of Fact as to the Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing*

The second cause of action alleges [***35] breach of the implied covenant of good faith and fair dealing. Although this cause of action is not entirely clear, we understand plaintiff to allege that defendant breached the implied covenant by failing to pay commissions due him as a result of the AT&T transaction.

(9) There are no triable issues of fact with regard to this cause of action. The implied covenant "is designed to effectuate the intentions and reasonable expectations of parties reflected by mutual promises within the contract." (*Slivinsky v. Watkins-Johnson Co*. (1990) 221 Cal.App.3d 799, 806 [270 Cal. Rptr. 585], citing *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 683-684 [254 Cal. Rptr. 211, 765 P.2d 373].) For this reason, it is well established that an implied covenant cannot create an obligation inconsistent with an express term of the agreement. (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1688 [60 Cal. Rptr. 2d 195]; *Slivinsky v. Watkins-Johnson Co*., at pp. 806-807.) We have already concluded that the express terms of the written employment agreement barred plaintiff from recovering commissions after his termination as a matter of law. Because the express terms of the agreement thus permitted defendant to deny plaintiff further commissions after his termination, doing [***36] so cannot violate the implied covenant.

Plaintiff also contends that defendant violated the implied covenant by "str[inging him] along for years" and "in a classic bait and switch[,] condition[ing] any payment on a resolution of [Salazar's] lawsuit." As we have concluded that failing to pay plaintiff additional commissions did not violate the express or implied terms of the employment contract, failing promptly to tell plaintiff that it would not do also does not violate the implied covenant.

At oral argument, plaintiff asserted that defendant terminated him in order [**51] to avoid paying his commission and argued this act frustrated the purpose of the contract. Because plaintiff neither alleged an unlawful basis for his termination nor advanced such an argument in the trial court, we do not address his claim. [*853]

IV. *There Are No Triable Issues of Fact as to the Third Cause of Action for Labor Code Violations*

The third cause of action alleges that defendant's failure to pay plaintiff additional commissions due him violates provisions of the Labor Code. Specifically, plaintiff alleges that "By refusing and/or neglecting to pay Plaintiff Nein the owed wages, defendants are in violation of Labor Code Section 2926 [***37] which provides that 'An employee who is not employed for a specified term and who is dismissed by his employer is entitled to compensation for services rendered up to the time of such dismissal.'" Plaintiff further alleges that "Defendants have continued to refuse to pay Plaintiff Nein the monies owed [that are] not in dispute, in violation of Labor Code Section 206(a) which provides inter alia that 'In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed.'" (Boldface omitted.)

(10) It is undisputed that commissions are "wages," and thus that plaintiff's claim for commissions falls within the terms of Labor Code sections 2926 and 206. (Lab. Code, § 200, subd. (a) [wages "includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation"]; *Steinhebel v. Los Angeles Times Communications, LLC* (2005) 126 Cal.App.4th 696, 705 [24 Cal. Rptr. 3d 351] ["commissions are 'wages'"].) [***38] However, for purposes of enforcing the provisions of the Labor Code, "[t]he right of a salesperson or any other person to a commission depends on the terms of the contract for compensation." (*Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1330 [48 Cal. Rptr. 3d 749]; see also *Steinhebel*, at p. 705 ["contractual terms must be met before an employee is entitled to a commission"].) Accordingly, plaintiff's right to commissions "must be governed by the provisions of the [employment agreement]." (*Steinhebel*, at p. 705.) We have already concluded that, pursuant to the plain language of the written employment agreement, plaintiff was not entitled to any further commissions after he was terminated. Accordingly, defendant's failure to pay such commissions cannot constitute a violation of the Labor Code. [6]

6 There is an exception to this principle when a contract provision is unconscionable. (*Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal.App.4th 1796, 1800, 1806 [23 Cal. Rptr. 2d 80] [term of employment agreement providing that advertising salesman forfeited his right to a commission if he terminated his employment before his employer received payment for advertising was unconscionable and unenforceable: "[T]he issue is simply a matter [***39] of when KUSI received payment for the advertising, which appears to turn on KUSI's billing cycle and the advertiser[']s payment practices instead of on anything [the salesman] did or did not do."]; compare *American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1388, 1393 [54 Cal. Rptr. 2d 477] [provision of plaintiff's employment contract that terminates her right to receive commissions on payments received on her accounts 30 days after severance of her employment held not unconscionable: "Our survey of case law indicates that the contract provision challenged here is commonplace in employment contracts with sales representatives, such as [plaintiff], who have ongoing responsibilities to 'service' the account once the sale is made."].) However, because plaintiff did not plead that his employment agreement was unconscionable, we do not reach the issue.

[*854]

[**52] Plaintiff asserts that even if he was not entitled to a commission under the terms of his contract, he has a valid quantum meruit claim. However, the sole case he cites in support, *Willson v. Turner Resilient Floors* (1949) 89 Cal.App.2d 589 [201 P.2d 406], does not address quantum meruit at all. It thus does not support his contention.

V. *There Are No Triable Issues of* [***40] *Fact as to the Fourth Cause of Action for Unfair Business Practices*

(11) The fourth cause of action alleges that defendant engaged in unfair business practices in violation of section 17200. Like the other causes of action, it too is based on defendant's conceded failure to pay him a commission in connection with the AT&T transaction. Because we have concluded that no commission was owed as a matter of law, defendant's failure to pay a commission cannot constitute an unfair business practice. (E.g., *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1147 [135 Cal. Rptr. 2d 796] ["A business practice that might otherwise be considered unfair or deceptive cannot be the basis of a Section 17200 cause of action if the conduct has been deemed lawful."].)

Plaintiff also asserts that defendant violated section 17200 through its "practice of terminating its employees in order to avoid the payment of earned commission." However, because plaintiff did not assert that claim in his complaint, it cannot form the basis for a denial of summary judgment. (*Oakland Raiders v. National Football League, supra*, 131 Cal.App.4th at p. 648 ["A summary judgment or summary adjudication motion that is otherwise sufficient 'cannot [***41] be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings; counterdeclarations are no substitute for amended pleadings.'"].)

VI. *The Trial Court Did Not Abuse Its Discretion by Awarding Attorney Fees to Defendant*

Plaintiff contends that because the grant of summary

judgment was erroneous, the award of attorney fees was an abuse of discretion. We have concluded that the trial court did not err in granting summary judgment, and thus the award of attorney fees is not subject to reversal on this basis. [*855]

(12) Plaintiff also contends that the amount of the award should be significantly reduced as a matter of fairness. However, plaintiff fails to make a legal argument or to cite any legal authority in support of this contention. Therefore, it is forfeited on appeal. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007 [27 Cal. Rptr. 3d 583] [argument forfeited where parties "fail[ed] to make a coherent argument or cite any authority to support their contention"]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [37 Cal. Rptr. 2d 126] ["[P]arties are required to include argument and citation to authority in their briefs, and the absence [***42] of these necessary elements allows this court to treat appellant[s'] [contentions] as waived."].)

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

LEXSEE 130 CAL.APP.4TH 880

NILDA ROOS et al., Plaintiffs and Respondents, v. ERIC RED, Defendant and Appellant.

B173506

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

130 Cal. App. 4th 870; 30 Cal. Rptr. 3d 446; 2005 Cal. App. LEXIS 1029; 2005 Cal. Daily Op. Service 5743; 2005 Daily Journal DAR 7899

June 28, 2005, Filed

SUBSEQUENT HISTORY: Review denied by Roos v. Red, 2005 Cal. LEXIS 10353 (Cal., Sept. 21, 2005)
US Supreme Court certiorari denied by Red v. Roos, 546 U.S. 1174, 126 S. Ct. 1341, 164 L. Ed. 2d 55, 2006 U.S. LEXIS 1207 (2006)
Related proceeding at Red v. Doherty, 2007 Tex. App. LEXIS 5699 (Tex. App. Austin, July 20, 2007)

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, No. SC066841, Lorna Parnell, Judge.
Red v. Baum (In re Red), 96 Fed. Appx. 229, 2004 U.S. App. LEXIS 8625 (5th Cir. Tex., 2004)

DISPOSITION: .

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a wrongful death action arising from a motor vehicle collision, a jury awarded damages to the survivors. Before trial, the survivors filed a motion in limine requesting that the trial court apply the doctrine of collateral estoppel to factual findings made by a federal bankruptcy court in a discharge proceeding instituted by the driver. The bankruptcy court specifically found that the survivors' wrongful death claims were not discharged by the driver's petition for bankruptcy because the claims were the result of the driver's willful and malicious conduct. The trial court granted the motion in limine, precluding the driver from contesting liability on the wrongful death claims. (Superior Court of Los Angeles County, No. SC066841, Lorna Parnell, Judge.)

The Court of Appeal affirmed the judgment of the trial court, holding that 28 U.S.C. § 1411(a) did not preclude the application of the doctrine of collateral estoppel and that the trial court's application of the doctrine was not unfair or unsound. Section 1411 recognized that any right to a jury trial arose from non-bankruptcy law. The driver's jury trial rights under U.S. Const., 7th Amend., under Cal. Const., art. I, § 16, and under Code Civ. Proc., § 592, were not offended by the application of collateral estoppel. There was no denial of a full and fair opportunity to litigate in the bankruptcy proceedings. (Opinion by Woods, J., with Perluss, P. J., and Johnson, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Judgments § 99--Res Judicata--Collateral Estoppel--Procedure--Scope of Review.--Where the facts determining whether the trial court properly applied collateral estoppel are uncontested, application of the doctrine is a question of law to which the appellate court applies an independent standard of review. [*871]

(2) Judgments § 67--Res Judicata--Preventing

Relitigation of Cause of Action.--The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. The doctrine precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. This aspect of res judicata has traditionally been referred to as "res judicata" or "claim preclusion."

(3) Judgments § 83--Res Judicata--Collateral Estoppel--Identity of Issues--Estoppel Need Not Be Mutual.--Res judicata includes a broader principle commonly referred to as "collateral estoppel" or "issue preclusion." Under this principle an issue necessarily decided in prior litigation may be conclusively determined as against the parties or their privies in a subsequent lawsuit on a different cause of action. Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing issues therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding.

(4) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Proceedings--Full and Fair Opportunity to Litigate.--Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action, and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated. In addition to these factors, and especially where collateral estoppel is applied offensively to preclude a defendant from relitigating an issue the defendant previously litigated and lost, the courts consider whether the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue.

(5) Judgments § 86--Res Judicata--Collateral Estoppel --Nature of Proceedings--Full and Fair Opportunity to Litigate.--Certain [*872] circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be unfair to the defendant as a matter of law. Such unfair circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action, particularly if the second action is not foreseeable. Another such circumstance occurs when the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter. Finally, application of collateral estoppel is unfair where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Proceedings--Full and Fair Opportunity to Litigate.--An additional procedural opportunity is meaningful, for collateral estoppel purposes, only where it could readily cause a different result in the action.

(7) Jury § 7--Right to Jury Trial and Waiver--Civil Cases--Application of Collateral Estoppel Not Precluded.--The right to a jury trial poses no insurmountable barrier to applying collateral estoppel. The application of offensive collateral estoppel does not violate the right to a jury trial under U.S. Const., 7th Amend., Thus, the unavailability of a jury trial in the first proceeding does not preclude the application of collateral estoppel in the second action. Notwithstanding the California state constitutional jury trial guarantee, the lack of a jury trial on contested factual issues in one proceeding does not preclude application of collateral estoppel in a subsequent proceeding. Any right to a jury trial is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved against a party in a prior action, application of collateral estoppel to take those issues from the jury does not violate the right to a trial by jury.

(8) Jury § 7--Right to Jury Trial and Waiver--Civil Cases--Wrongful Death--Bankruptcy Considerations.--28 U.S.C. § 1411(a), does not create any additional procedural or substantive rights to a jury trial. The statute preserves the right to a jury trial in a wrongful death action only to the extent that the right to a jury trial existed under the applicable nonbankruptcy law, that is, under the Constitution or relevant statute.

(9) Judgments § 85--Res Judicata--Collateral Estoppel--Character of Tribunal--Bankruptcy Court.--Nothing in the case law, legislative [*873] history, or statutory scheme indicates that 28 U.S.C. § 1411, operates to supplant the well-established doctrine of collateral estoppel.

(10) Judgments § 101--Enforcement--Foreign Judgments--Federal Court--Full Faith and Credit.--Full faith and credit must be given to an order of a federal court and such an order has the same effect in the courts of California as it would have in a federal court.

(11) Judgments § 85--Res Judicata--Collateral Estoppel--Character of Tribunal--Bankruptcy Court--Wrongful Death Action--Right to Jury Trial.--A trial court's order giving a bankruptcy court's findings preclusive effect on the issue of liability in a wrongful death action did not violate 28 U.S.C. § 1411. The bankruptcy code did not provide any additional right to a jury trial that could block the application of the doctrine of collateral estoppel in state court. Section 1411 recognized that any right to a jury trial arose from nonbankruptcy law, and such jury trial rights were not offended by the application of collateral estoppel. There was no denial of a full and fair opportunity to litigate in the bankruptcy proceedings. As a result, the trial court properly found the threshold requirements for collateral estoppel.

[7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 298, 361, 381, 418.]

(12) Judgments § 81--Res Judicata--Collateral Estoppel--Public Policy Considerations.--Even where minimum requirements for collateral estoppel are established, the doctrine will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. Thus the court must also consider whether the application of collateral estoppel in a particular case will advance the public policies which underlie the doctrine. The purposes of the doctrine are to promote judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system and to protect against vexatious litigation.

(13) Judgments § 94--Res Judicata--Collateral Estoppel--Erroneous and Invalid Judgments--Conclusive Effect.--Collateral estoppel may apply even where the issue was wrongly decided in the first action. An erroneous judgment is as conclusive as a correct one.

(14) Judgments § 81--Res Judicata--Collateral Estoppel--Effect of New Evidence.--The existence of new evidence normally does not bar the application of collateral estoppel. An exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence. Otherwise there would be no end to litigation. [*874]

COUNSEL: Horvitz & Levy, David M. Axelrad, David S. Ettinger; Doherty & Catlow and John Doherty for Defendant and Appellant

Brandon Baum and Carlos A. Lloreda, Jr., for Plaintiffs and Respondents.

JUDGES: Woods, J., with Perluss, P. J., and Johnson, J., concurring.

OPINION BY: WOODS

OPINION

[**448] **WOODS, J.**--Eric Red appeals from a judgment entered upon a verdict in favor of respondents, Nilda Roos and Wilma Baum, on their respective complaints against Red for wrongful death. Before trial respondents filed a motion in limine requesting the court apply the doctrine of collateral estoppel to factual findings made by the federal bankruptcy court in a discharge proceeding involving the parties. The bankruptcy court specifically found respondents' wrongful death claims were not discharged by Red's petition for bankruptcy because the claims were the result of Red's willful and malicious conduct. The trial court here granted the motion in limine, and thus, precluded Red from contesting the issue of liability on the wrongful death claims in front of the jury. On appeal Red claims the trial [***2] court erred in giving the bankruptcy court's findings collateral estoppel effect because doing so: (1) violated a federal bankruptcy statute (28 U.S.C. § 1411), which preserved his right to a jury trial on wrongful death claims; and (2) did not comport with fairness and sound public policy. We disagree. Red has not convinced us 28 United States Code section 1411 precludes the application of the well-established doctrine of collateral estoppel in this context or that the application of the doctrine was unfair or unsound.

Consequently, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Wrongful Death Claims. About 6:00 p.m. on May 31, 2000, Red was driving his sport utility vehicle (SUV) and struck another vehicle stopped at a red light on Wilshire Boulevard in Santa Monica. [1] After pushing the car in front of his into the intersection, Red's SUV crossed opposing lanes of traffic, [*875] veered off the road and crashed through the front doors of a billiards pub. The SUV came to a stop when it hit the bar inside the pub. Two patrons [**449] of the pub, the adult sons of respondents Nilda Roos and Willa Baum, died as a result of the collision. Immediately [***3] after the collision, Red picked up a piece of broken glass and attempted to cut his throat.

1 The facts concerning the collision are taken from the memorandum opinion of the bankruptcy court.

In June 2000, respondent Roos filed a wrongful death action against Red. Respondent Baum filed her claim in May 2001 and both actions were consolidated in July 2001.

In October 2001, Red, who had briefly relocated to Texas, [2] filed for bankruptcy protection in the United States Bankruptcy Court for the Western District of Texas. Red sought to discharge all of his debts (including the claims filed in the tort actions stemming from the collision) by operation of law. Red also sought and received a stay of the state court wrongful death actions. Respondents appeared in the bankruptcy proceedings and asked the bankruptcy court to lift the stay so that the wrongful death actions could proceed in the California state court. Red opposed the request arguing to the bankruptcy court: "[T]here will be a presentation [***4] of evidence apparently that this [bankruptcy] Court will be asked to weigh regarding whether there was any intent here... [¶] So it's on that basis, Your Honor, we--that we ask you to use the equitable discretion the Court has to deny the request for relief from stay. And if there is a petition filed to establish a non-dischargeable debt, let the facts be presented here, let this Court hear whether there's a basis for anything."

2 Red "moved" to Texas shortly before he filed for bankruptcy, and within three months after filing for bankruptcy protection, returned to California. The bankruptcy court suspected Red's brief relocation to Texas was for the purpose of filing bankruptcy in a forum inconvenient to the plaintiffs in the state court action.

The bankruptcy court denied the respondents' request. In turn, respondents filed complaints in the bankruptcy proceedings to determine the dischargeability of their claims against Red and to object to the discharge. Specifically they alleged their claims [***5] were debts "for willful and malicious injury by the debtor" and were thus not subject to discharge in bankruptcy pursuant to 11 United States Code section 523(a)(6).

The parties conducted discovery in preparation for a trial in the bankruptcy court on respondents' complaints. [3] In Red's pretrial brief, among the issues he listed for the court's determination were whether: (1) the May 31, 2000, [*876] collision was the result of a voluntary and intentional act on Red's part; (2) Red intended to cause harm to the patrons of the pub; and (3) respondents had met their burden of proof and shown by a preponderance of the evidence Red acted willfully and maliciously in causing the collision.

3 The parties took a total of eight depositions and exchanged written discovery.

In November 2002, the matter proceeded to a one-day bench trial in the bankruptcy court. During the trial evidence from percipient and expert witnesses was presented. Red introduced evidence from seven witnesses, offered [***6] 32 exhibits, and testified on his own behalf.

The contest in the trial court centered on the cause of the collision. Red contended the collision was the result of his unintentional and involuntary acts. He claimed he suffered from an episode of syncope (i.e., a brief loss of consciousness caused by a temporary loss of oxygen to the brain) and therefore he was unconscious from the moment his SUV hit the car on Wilshire Boulevard until it came to rest inside the pub. He stated he had [**450] suffered from several prior incidents of loss of consciousness, though he admitted that he did not tell anyone about them at the time they occurred.

Respondents claimed the accident, which occurred on the one-year anniversary of Red's failed marriage, was the result of his depressed mental state caused by distress over his personal and financial problems. They also

presented a medical expert witness who testified Red's behavior and circumstances surrounding the collision did not support a finding of syncope.

The parties presented inconsistent eyewitness testimony; some witnesses stated that they saw Red upright, awake and alert during the incident. Two witness supported Red's version, testifying Red's [***7] eyes were closed and that he was leaning towards the right. At the end of the presentation of evidence, the parties submitted written closing arguments to the court and the matter was taken under submission.

On February 4, 2003, the bankruptcy court issued its opinion. The court concluded respondents' claims were not discharged under 11 United States Code section 523(a)(6). The court determined the collision was the result of Red's voluntary and intentional actions; Red intended to harm the patrons of the pub; and respondents had met their burden to prove that the injuries resulted from Red's intentional and malicious conduct. The bankruptcy court found Red's defense of loss of consciousness incredible and unproved. The bankruptcy court concluded: "Mr. Red was conscious and alert and intentionally [*877] jammed his foot onto the accelerator ... crashed through the front doors of the billiards pub at a speed approaching 35 mph, [and] killed two people--and that all of this occurred because of a fit of uncontrollable rage on the part of Mr. Red ... ."

Red filed an appeal of the bankruptcy court's decision in the federal district court. [4] While the [***8] appeal was pending, Red filed a motion in the bankruptcy court requesting a stay pending the appeal. The court denied the stay. But during the hearing on the stay, the court made comments indicating a belief that the state court wrongful death action would proceed to trial and that Red would "have an opportunity to convince a jury in the state of California that he was right ... ." [5]

> 4 The district court affirmed the bankruptcy court's decision. The Fifth Circuit Court of Appeals also affirmed, and Red's request for en banc review was denied. (*In re Red* (5th Cir. 2004) 96 Fed. Appx. 229.)
>
> 5 Respondent Roos's bankruptcy counsel make a similar comment: "If Red has to proceed in the state court action, he will be provided in that setting an opportunity to present evidence in his defense. [¶] In fact, the net result of the [bankruptcy] court's order is merely to state what action may continue. Due process will be served, and the Debtor [Red] will have his day in court."

In April 2003, [***9] this case was returned to the active calendar in the superior court. Prior to trial, respondents filed a motion in limine requesting the trial court give the bankruptcy court's findings in the dischargeability proceeding collateral estoppel effect in the wrongful death actions. Specifically they requested that in view of the bankruptcy court's conclusion Red had acted willfully and maliciously in causing the accident, Red should not be allowed to relitigate his liability for the injuries.

Red opposed the motion arguing collateral estoppel should not apply because: (1) the issues in the bankruptcy proceeding were not identical to those at issue in the wrongful death action; (2) the matter was not "fully and fairly" litigated in the bankruptcy court because respondents' medical [**451] expert was not qualified to give his opinion, the bankruptcy judge was biased against him, and Red had located a new witness who did not provide evidence in the bankruptcy trial; (3) he had no right to a jury trial in the bankruptcy trial and thus application of collateral estoppel would deprive him of his constitutional right to a jury trial; and (4) application of collateral estoppel would be unfair, contrary [***10] to public policy and would not further the purposes of the doctrine.

The trial court granted the motion in limine, ruling Red could not contest the issue of liability and ordered that the jury trial be limited to the issue of [*878] damages. After a brief trial, [6] the jury returned verdicts of $ 512,328.69 for respondent Roos and $ 500,000 for respondent Baum.

> 6 Red indicated he would waive his right to a jury trial on damages. However, respondents requested the damage issue be heard by a jury.

Red filed a motion for a new trial, requesting a new trial and stay pending the outcome of (then still pending) appeals of the bankruptcy court order in the federal court. The court denied the motion.

Red timely appealed from the underlying judgment.

DISCUSSION

I. *Standard of Review*

(1) Among the several points of contention in this appeal is whether the standard of appellate review governing a decision to apply collateral estoppel is de novo or an abuse of discretion. Some case law discusses [***11] the trial court's exercise of *discretion* in deciding to allow the "offensive" use of collateral estoppel. (E.g., *Sandoval v. Superior Court* (1983) 140 Cal. App. 3d 932, 942 [190 Cal. Rptr. 29].) Such authority suggests the appellate court should give deference to the lower court's decision. The predominate view, however, is the trial court's application of collateral estoppel is reviewed de novo. (See *Groves v. Peterson* (2002) 100 Cal. App. 4th 659, 667 [123 Cal. Rptr. 2d 164]; *Campbell v. Scripps Bank* (2000) 78 Cal. App. 4th 1328, 1333.) Here the facts determining whether the trial court properly applied collateral estoppel are uncontested, and thus application of the doctrine is a question of law to which we apply an independent standard of review. [7]

> 7 In any event, the appropriate standard of review is not dispositive in this appeal. We reviewed the lower court's actions (and affirmed them) under the least deferential standard of review; thus even if we had applied the more deferential abuse of discretion standard, the result would not have changed.

[***12] **II. *The Trial Court Did Not Err in Applying Collateral Estoppel***

On appeal Red asserts the trial court erred in giving the bankruptcy court's dischargeability factual findings collateral estoppel effect to preclude him from contesting liability on the wrongful death claims. First, Red points out collateral estoppel applies only where the parties had a "full and fair" opportunity to litigate in the prior action. He claims he did not have a full or fair chance to litigate because the factual findings in the bankruptcy court were made by a judge rather than a jury--a circumstance, according to Red, that directly contravenes 28 United States Code section 1411(a), which expressly preserves the right to a jury trial in state court on the wrongful [*879] death claims (the Right to a Jury Trial and 28 United States Code section 1411(a) Contention). Second, Red claims application of the collateral estoppel was unfair and did not satisfy the public policy reasons [**452] underlying the doctrine (the Fairness Exception). Our analysis of these contentions begins with a review of the legal principles governing collateral estoppel and the related concept [***13] of res judicata.

(2) "The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." (*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal. App. 4th 1053, 1065 [71 Cal. Rptr. 2d 77].) The doctrine precludes parties or their privies from relitigating a *cause of action* that has been finally determined by a court of competent jurisdiction. This aspect of res judicata has traditionally been referred to as "res judicata" or "claim preclusion."

(3) Res judicata also includes a broader principle relevant here and commonly referred to as "collateral estoppel" or "issue preclusion." Under this principle an *issue* necessarily decided in prior litigation may be conclusively determined as against the parties or their privies in a subsequent lawsuit on a different cause of action. (*Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 828-829 [88 Cal. Rptr. 2d 366, 982 P.2d 229].) [***14] "Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding." (*Ibid*.)

(4) Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal. 4th 1194, 1201 [108 Cal. Rptr. 2d 471, 25 P.3d 670].)

[*880] In addition to these factors, and especially where collateral estoppel is applied "offensively" to preclude a defendant from relitigating an issue the defendant previously litigated and lost, the [***15] courts consider whether the party against whom the

earlier decision is asserted had a "full and fair" opportunity to litigate the issue. (*Parklane Hosiery Company, Inc. v. Shore* (1979) 439 U.S. 322, 332-333 [58 L. Ed. 2d 552, 99 S. Ct. 645]; *Kremer v. Chemical Construction Corporation* (1982) 456 U.S. 461, 480-481 [72 L. Ed. 2d 262, 102 S. Ct. 1883]; *Sutton v. Golden Gate Bridge, Highway and Transportation District* (1998) 68 Cal. App. 4th 1149, 1157 [81 Cal. Rptr. 2d 155].)

(5) To that end, the courts have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be "unfair" to the defendant as a matter of law. (*Kremer v. Chemical Construction Corporation*, supra, 456 U.S. at p. 481 [" 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation' "].) Such "unfair" circumstances include a situation where the defendant had no incentive to [**453] vigorously litigate the issue in the prior action, "particularly if the second action is not foreseeable." (*Securities Exchange Commission v. Monarch Funding Corporation* (2d Cir. 1999) 192 F.3d 295, 304; [***16] see *Parklane Hosiery Company, Inc. v. Shore*, *supra*, 439 U.S. at p. 330.) Another such circumstance occurs when the judgment in the prior action is inconsistent with previous judgments for the defendant on the matter. (*Parklane Hosiery Company, Inc. v. Shore*, *supra*, 439 U.S. at pp. 330-331.) Finally, application of collateral estoppel is unfair where the second action "affords the defendant procedural opportunities [8] unavailable in the first action that could readily cause a different result." (*Id.* at p. 331.) With these legal principles in mind, we turn to Red's contentions on appeal.

8 The only examples of "procedural opportunities" cited in *Parklane* were: (1) where the defendant was forced to defend the first action in an inconvenient forum not of the defendant's choosing; or (2) where in the first action the defendant was "unable to engage in full scale discovery or call witnesses." (*Parklane Hosiery Company, Inc. v. Shore*, *supra*, 439 U.S. at p. 331, fn. 15.)

A. *Right to a* [*17] Jury Trial and 28 United States Code Section 1411(a)**

Preliminarily we note Red *does not* contest that he was a party in the bankruptcy proceedings, that the bankruptcy court order was final on the merits, or that the issue necessarily decided in the bankruptcy proceeding was identical to the one he sought to relitigate in the wrongful death action. [9] [*881] Instead he claims that he was denied a "full and fair" opportunity to litigate the issue in the bankruptcy court. He argues that applying collateral estoppel was improper because the state court wrongful death action afforded him a "procedural opportunity," that is, a right to a jury trial, unavailable in the federal bankruptcy court discharge proceeding.

9 As respondents correctly point out, to prevail in the bankruptcy discharge proceeding they were required to prove Red acted "willfully and maliciously" in causing the injuries. (See 11 U.S.C., § 523(a)(6) ["A discharge under ... this title does not discharge an individual debtor from any debt ... for willful and malicious injury by the debtor to another ..."].) Proof of "willful and malicious injury" requires (1) a wrongful action, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. (*In re Jercich* (9th Cir. 2001) 238 F.3d 1202, 1208-1209.) In contrast, California's wrongful death statute required a showing that Red acted with a less culpable mental state--negligence. (See Code Civ. Proc., § 377.60.)

[***18] **(6)** This argument fails for several reasons. First, an additional procedural opportunity is meaningful only where it "could readily cause a different result" in the action. (*Parklane Hosiery Company, Inc. v. Shore*, *supra*, 439 U.S. at p. 331.) We are not convinced that a jury acting as the trier of fact on the liability issues would readily have reached a different result than the judge in the bankruptcy proceeding. As the Supreme Court observed in *Parklane Hosiery*, "the presence or absence of a jury as factfinder is basically a neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum." (*Id.* at p. 332, fn. 19.) The jury hearing the same facts and essentially the same evidence and arguments concerning Red's mental state and causation, should reach the same conclusion as a judge assessing those matters.

(7) This notwithstanding, the more fundamental failing in Red's argument is that the right to a jury trial "poses no insurmountable barrier to applying collateral

estoppel." (*Securities Exchange Commission* [**454] *v. Monarch Funding Corporation*, *supra*, 192 F.3d at p. 304.) Notably absent from [***19] *Parklane Hoisery*'s list of "procedural opportunities" (missing from first action which would undermine the application of collateral estoppel in a subsequent action) is the right to a jury trial. Indeed, the Supreme Court in *Parklane Hoisery* expressly held that the application of offensive collateral estoppel did not violate the Seventh Amendment right to a jury trial. (*Parklane Hosiery Company, Inc. v. Shore*, *supra*, 439 U.S. at pp. 336-338.) Thus, the *Parklane Hosiery* court concluded the unavailability of a jury trial in the first proceeding did not preclude the application of collateral estoppel in the second action. (*Ibid*.) The California State Supreme Court has likewise concluded that notwithstanding the state constitutional jury trial guarantee, the lack of a jury trial on contested factual issues in one proceeding does not preclude application of collateral estoppel in a subsequent proceeding. (*People v. Sims* (1982) 32 Cal. 3d 468, 484, fn. 13 [186 Cal. Rptr. 77, 651 P.2d 321] ["any right to a jury trial ... is only a right to submit to a jury issues of fact which are triable. When issues of fact have been conclusively resolved [*882] against [***20] [a party in a prior action], application of collateral estoppel to take those issues from the jury does not violate the ... right to a trial by jury"]; *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 344 [272 Cal. Rptr. 767, 795 P.2d 1223].)

Red recognizes *Parklane Hosiery* and *Sims* [10] resolve the question of whether the right to a jury precludes the application of collateral estoppel against him. Red, nonetheless, asserts application of collateral estoppel in this case violated 28 United States Code section 1411(a) [11]--a statute which he asserts guarantees his right to a jury trial in the wrongful death action irrespective of the bankruptcy court's findings in the discharge proceedings or the doctrine of collateral estoppel. [12]

10 While recognizing this court is bound by it, Red disagrees with the principle announced in *Sims*, citing instead to a Texas Court of Appeals decision (*Trapnell v. Sysco Food Services, Inc.* (Tex. App. 1992) 850 S.W.2d 529, 543-546) as authority for the proposition "application of collateral estoppel here violates California Constitution's jury trial right."

[***21]

11 Hereinafter referred to as section 1411.

12 Red failed to raise the application of section 1411(a) in the trial court. While this results in a waiver of the argument on appeal, we nonetheless address the merits because they concern only legal issues.

Section 1411(a) provides, in pertinent part: "[T]his chapter and title 11 do not affect any right to a trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." (§ 1411(a).)

Red construes section 1411(a) as providing that no bankruptcy court order or finding can be used to deny a party a right to a jury trial in a wrongful death action. He concludes that when the court applied collateral estoppel here and thus precluded him from contesting liability in the wrongful death action, the court effectively used the bankruptcy court's findings to deprive him of his right to a jury trial in direct contravention of section 1411(a). Red concludes the trial court should have denied respondents' [***22] motion in limine because section 1411(a) is an insurmountable barrier to collateral estoppel in this case.

While at first glance Red's interpretation of section 1411 and its implication on the doctrine of collateral estoppel appears to follow logically from the language of the statute, closer scrutiny of the provision [**455] does not support his view. Red cites no legal authority for his reading of section 1411(a). Nor does a review of the legislative history of the section, or relevant bankruptcy legal authority serve to legitimize his interpretation.

[*883] **Background of Section 1411.** In 1978 Congress extensively revised the federal bankruptcy laws and expanded the jurisdiction of the bankruptcy courts. Under the 1978 Bankruptcy Act disputes tangentially related to bankruptcy that previously could only be adjudicated in state or federal district courts, now could be heard in bankruptcy court. To ensure litigants' (nonbankruptcy law) rights to a jury trial would not be lost in such cases, Congress provided for the preservation of jury trial rights by allowing bankruptcy courts to conduct such trials. (See 28 U.S.C. §§ 1471 & 1480 [***23] [repealed 1984]; Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment* (1988) 72 Minn. L.Rev. 967, 983 (Gibson).) [13]

13 Title 28 United States Code section 1480 (hereinafter section 1480) as enacted in 1987,

provided in pertinent part: "[T]his chapter and title 11 do not affect any right to a trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979." The legislative history of section 1480 suggests Congress enacted the jury trial provision to ensure that notwithstanding the expansion of the bankruptcy court's jurisdiction, the 1978 act would not infringe on the parties' preexisting rights to a jury trial prior to the effective date of the law. Nothing in the language of section 1480 or its legislative history indicates Congress intended to expand the right to a jury trial or create new jury trial rights. (See Gibson, *supra*, 72 Minn. L.Rev. at pp. 983-984.)

[***24] When the United States Supreme Court in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* (1982) 458 U.S. 50, 84-87 [73 L. Ed. 2d 598, 102 S. Ct. 2858], held unconstitutional the jurisdictional grant of authority to the bankruptcy courts under the 1978 act, it did so on the basis that article III powers were unconstitutionally conferred on non-article-III bankruptcy judges. The *Marathon* court reasoned the broad grant of jurisdiction violated article III because it permitted bankruptcy judges who lacked tenure and salary protections mandated by article III, to hear and decide state common law actions without the parties' consent. (*Northern Pipeline Const. Co., supra*, at p. 87.) While *Marathon* did not expressly hold that the bankruptcy judge's authority under the 1978 act to conduct jury trials rendered the jurisdictional provisions of the 1978 act unconstitutional, the decision cast doubt on the authority of bankruptcy judges to conduct such trials. [14] Courts subsequently have interpreted *Marathon* to mean that it is unconstitutional for bankruptcy judges to conduct jury trials. (See, e.g., *In re American Energy* (Bankr. D.N.D. 1985) 50 B.R. 175, 181.)

14 With regard to such jury trials at least one bankrupcty court has concluded: "[b]ut for *Marathon*, there would be no question but that the bankruptcy court had the necessary statutory authority to conduct jury trials." (*In re Adams, Browning & Bates Ltd.* (Bankr. E.D.N.Y. 1987) 70 B.R. 490, 496.)

[***25] In response to *Marathon*, Congress quickly passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 Amendments). The 1984 Amendments retained the non-article-III stature of bankruptcy judges but reduced their authority over judicial proceedings to comply with [*884] article III's apparent requirement that the essential functions and attributes of judicial power be vested in article III courts. (Gibson, *supra*, 72 Minn. L.Rev. at p. 992.)

Among various alterations to the law, Congress eliminated the 1978 act's broad jury trial provision, section 1480 and replaced [**456] it with section 1411, which limited jury trial rights to wrongful death and personal injury actions. The legislative history of section 1411 shows its drafters, like their predecessors who drafted section 1480, intended merely to preserve the right to a jury trial only insofar as it existed under nonbankruptcy law; they did not intend to expand or create a new source of jury trial rights. (See 130 Cong. Rec. S7618-19 (daily ed. June 19, 1984) [Senator Heflin explained the intent of jury trial provision as: "[W]here a ... party would have a right to a jury trial on an issue of fact pursuant to Federal or State law absent the [***26] application of bankruptcy laws, this [jury trial provision] ensures that such rights remain intact" and that the provision was intended "to maintain the status quo" and "not to alter rights to jury trials which might have existed under State or Federal law prior to 1978"].)

Furthermore, Congress preserved jury trial rights in the 1984 Amendments for personal injury and wrongful death actions not because it was constitutionally mandated under *Marathon* or the Seventh Amendment but because of the strong lobbying efforts of the personal injury tort bar. (See *In re Ice Cream Liquidation, Inc.* (Bankr. D.Conn. 2002) 281 B.R. 154, 161.) Congress also recognized that personal injury and wrongful death tort claimants, unlike most other creditors in bankruptcy proceedings, had not voluntarily associated with the debtor. (See Braugh, *Personal Injury and Wrongful Death Claims in Bankrupcty: The Case for Abstention* (1995) 47 Baylor L.Rev. 151, 159.) Thus, section 1411 was designed with the protection and interests of tort claimants/creditors rights, rather than debtors, in mind. "The objective of [section 1411] is to prevent a debtor from [***27] taking away the protections provided under state law from creditors who depend on them the most." (Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings* (1987) 61 Am. Bankr. L.J. 145, 179.) According to Senator Heflin: "Congress never

intended that the filing of a bankruptcy petition by a debtor act as an escape hatch from jury trials." (130 Cong. Rec. S7619 (daily ed. June 19, 1984).) [15]

15 Congress further safeguarded the interests of personal injury and wrongful death creditors by providing that bankruptcy courts have no jurisdiction to liquidate (or to conduct proceedings affecting liquidation) of personal injury or wrongful death claims. (See 28 U.S.C. § 157(b)(2)(B) and (O). The 1984 Amendments also deprive bankruptcy courts of jurisdiction to conduct wrongful death or personal injury trials. (See 28 U.S.C. § 157(b)(5) [requiring personal injury tort claims to be tried in the district court].)

[***28] [*885] Finally, this court found no evidence in the legislative history that Congress intended section 1411 to guarantee a jury trial in every wrongful death or person injury tort case, even where the doctrine of collateral estoppel would otherwise (under nonbankruptcy law) preempt the right to a jury trial.

(8) Our detour into bankruptcy law clarifies several matters that inform our interpretation of section 1411(a). First, it is apparent from the legislative history section 1411(a) does not create any additional procedural or substantive rights to a jury trial. Thus, Red's interpretation of section 1411(a) is too expansive. The statute preserves the right to a jury trial in a wrongful death action *only* to the extent that the right to a jury trial existed under the applicable nonbankruptcy law (i.e., under the Constitution or relevant statute). [16] [**457] And as discussed elsewhere above, the Federal and California state constitutional jury trial guarantees give way to the application of collateral estoppel. [17]

16 The right to a jury trial in a wrongful death action stems from the California Constitution, article I, section 16, and Code of Civil Procedure section 592 (in a civil action for "injuries" an "issue of fact must be tried by a jury"). (See *DeCastro v. Rowe* (1963) 223 Cal. App. 2d 547, 552 [36 Cal.Rptr. 53].)

[***29]

17 In our view, the statutory right to a jury trial in Code of Civil Procedure section 592 does not foreclose the application of collateral estoppel here. Section 592 guarantees a jury trial only for "issues of fact." Where, however, a competent trier of fact in a prior proceeding has conclusively determined the factual issues, then no "triable" issue of fact remains for jury's resolution. (See *Dixon v. Superior Court* (1994) 30 Cal. App. 4th 733, 746 [36 Cal. Rptr. 2d 687] [in absence of triable question of fact, no right to a jury trial exists].)

(9) Second, nothing in the case law, legislative history or statutory scheme indicates that section 1411 operates to supplant the well-established doctrine of collateral estoppel. As Red points out, the bankruptcy court had no authority to conduct a jury trial in the discharge proceeding (e.g., *In re Hashemi* (9th Cir. 1997) 104 F.3d 1122, 1124). Similarly the bankruptcy court would not have had jurisdiction to liquidate the wrongful death claim or conduct a trial in the action. (28 U.S.C. § 157 [***30] (b)(2) & (5); see *Grogan v. Garner* (1991) 498 U.S. 279, 283-284 [112 L. Ed. 2d 755, 111 S. Ct. 654]; *In re Santos* (Bankr. D.N.J. 2004) 304 B.R. 639, 647.) [18] But the limitations imposed upon the bankruptcy court's authority and jurisdiction and the inherent distinctions between bankruptcy discharge proceedings and wrongful death claims are simply beside the point.

18 Nonetheless, bankruptcy courts sometimes make determinations that relate to the underlying merits of tort claims. (See *In re Chateaugay* (Bankr. S.D.N.Y. 1990) 111 B.R. 67, 78; *In re Aquaslide N' Dive Corp.* (Bankr. 9th Cir. 1987) 85 B.R. 545, 548.) Both *Aquaslide* and *Chateaugay* construed 28 United States Code section 157 to allow the bankruptcy court to make dispositive rulings on personal injury claims as part of its jurisdiction over allowance and disallowance of claims.

[*886] **(10)** Red has not shown that section 1411 or any other bankruptcy provision precludes a state [***31] court presiding over a wrongful death action from giving preclusive effect to bankruptcy findings on issues identical to those raised in a state wrongful death case and actually litigated and determined in the bankruptcy proceeding. (See *Martin v. Martin* (1970) 2 Cal. 3d 752, 759, 765 [87 Cal. Rptr. 526, 470 P.2d 662] [bankruptcy court's interpretation of parties' property settlement agreement as well as the order the debt was not subject to discharge given collateral estoppel effect in subsequent state court action between the parties]; *Levy v. Cohen* (1977) 19 Cal. 3d 165, 172-174 [137 Cal. Rptr. 162, 561 P.2d 252] [bankruptcy court order releasing the

defendants from liability for certain obligations of limited partnership was res judicata in state court action concerning the defendants' liability partnership debts].) Full faith and credit must be given to an order of the federal court and such an order has the same effect in the courts of this state as it would have in a federal court. (See *Lumpkin v. Jordan* (1996) 49 Cal. App. 4th 1223, 1232 [57 Cal. Rptr. 2d 303] ["Where dispositive factual issues are actually litigated and resolved in the federal action, the losing party is estopped [***32] to relitigate those issues in a subsequent state action"]; *Levy v. Cohen*, *supra*, 19 Cal. 3d at pp. 172-173.)

(11) In sum, we are not convinced the trial court's order giving the bankruptcy court's findings preclusive effect on the issue of liability in the wrongful death actions violated section 1411. The bankruptcy code did not provide Red with any additional [**458] right to a jury trial that could block the application of the doctrine of collateral estoppel in state court. Section 1411 recognizes that any right to a jury trial arose from nonbankruptcy law, and Red has failed to demonstrate that such jury trial rights were offended by the application of collateral estoppel. Furthermore Red offers no other argument to show he was denied a "full and fair" opportunity to litigate in the bankruptcy proceedings. [19] As a result we conclude the trial court properly found the threshold requirements for collateral estoppel.

> 19 Red does not deny he had a full and fair opportunity to conduct discovery and present his evidence and arguments in the bankruptcy proceeding. Moreover because he chose the venue he cannot complain that he had to defend the action in an inconvenient forum.

[***33] **B. *Fairness Exception.***

Notwithstanding Red's arguments with respect to section 1411, he also claims the application of collateral estoppel was unfair and did not satisfy the public policy purposes underlying the doctrine. We do not agree.

(12) Even where minimum requirements for collateral estoppel are established, the doctrine will not be applied "if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]" [*887] (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal. 3d 891, 902,[160 Cal. Rptr. 124, 603 P.2d 41].) Thus the court must also consider whether the application of collateral estoppel in a particular case will advance the public policies which underlie the doctrine. (*Younan v. Caruso* (1996) 51 Cal. App. 4th 401, 407 [59 Cal. Rptr. 2d 103].) "The purposes of the doctrine are to promote judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system and to protect against vexatious litigation." (*Ibid.*)

Red asserts these purposes were not served in this case. First, he claims it is unfair to apply the doctrine when the bankruptcy [***34] judge and Roos's bankruptcy counsel both made comments in the bankruptcy proceeding which indicated a belief that Red would have an opportunity to contest liability in the wrongful death action. In view of these comments, Red asserts that maintaining the "integrity of the judicial system" required the trial court to reject the application of collateral estoppel.

(13) We are not persuaded such remarks undermine the policy objectives of the doctrine. The bankruptcy court's comments were made *after* it issued the opinion in the dischargeability proceeding. There is no evidence the bankruptcy court considered such matters when it issued the dischargeability findings or that if it did, that those beliefs played any role in the court's findings. In any event, even if the bankruptcy court based its findings on the assumption Red would have the chance to relitigate intent and causation in the state court action, that assumption, as this opinion concludes is erroneous. Collateral estoppel may apply even where the issue was wrongly decided in the first action. "'An erroneous judgment is as conclusive as a correct one.'" (*Martin v. Martin*, *supra*, 2 Cal. 3d at p. 763, quoting [***35] *Panos v. Great Western Packing Co.* (1943) 21 Cal. 2d 636, 640 [134 P.2d 242].)

Red also argues it is unfair to apply collateral estoppel because it did not avoid "vexatious or repetitive litigation." He maintains the wrongful death trial would have been significantly different than the bankruptcy proceedings, not only because [**459] of the jury's presence, but also because he had an "important new witness" who did not testify in the bankruptcy proceedings. Red asserts that after the bankruptcy proceeding he was finally able to locate and depose the driver of the car he rear-ended in the intersection. He claims that if called to testify, the other driver would provide evidence consistent with Red's theory of the case

(i.e., that Red was unconscious and acted involuntarily.)

[*888] **(14)** The problem with this contention is the existence of "new evidence" normally does not bar the application of collateral estoppel. (See *Robert J. v. Leslie M.* (1997) 51 Cal. App. 4th 1642, 1647-1648 [59 Cal. Rptr. 2d 905] [court denied relitigation of same claim notwithstanding fact that new evidence was unavailable in earlier proceeding].) In any event, Red has not demonstrated that this evidence is "new" or was "previously [***36] unavailable." [20] Moreover, the other driver's testimony goes to the weight of the evidence supporting Red's version of the case; it does not establish a previously undiscovered defense theory nor does it result in a change in the parties legal rights. "An exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence. Otherwise there would be no end to litigation." (*Evans v. Celotex Corp.* (1987) 194 Cal. App. 3d 741, 748 [238 Cal. Rptr. 259].)

20 It appears the other driver was known to Red before the bankruptcy proceedings. As a result of the collision the other driver filed an action and obtained a default judgment against Red.

In sum, in our view the integrity of the judicial system was served, judicial economy was promoted and vexatious litigation was avoided by the trial court's decision. Application of collateral estoppel in this case gave credit to factual findings made by a competent court, acting within the scope of its jurisdiction, and in a [***37] forum where the parties were afforded a fair and full opportunity to present their evidence and arguments and appellate review of adverse rulings was available.

Finally, we observe Red may have obtained a jury trial in state court on the liability issues, if he had joined in, rather than opposed the respondents' request for relief from the bankruptcy stay. If the case had gone that procedural route, Red would have been no worse off. To that end, had Red prevailed in the wrongful death action (i.e., convinced the jury he lacked the requisite "negligent" mental state to be liable on wrongful death claims) the bankruptcy discharge proceeding would have been unnecessary. If on the other hand, he had lost in the state court, he nonetheless would have been able to litigate the dischargeability of the claims in the bankruptcy court. Instead Red vigorously opposed the request for a relief from stay and the case took a different route. Red asked the bankruptcy court to "determine the facts." The bankruptcy court did just that. Although Red was disappointed with the result, neither his disappointment nor any other argument he has presented to this court, convinces us that the trial court's [***38] decision to give the facts as determined by the bankruptcy court collateral estoppel effect was unfair or contrary to the law.

[*889] ***DISPOSITION***

The judgment is affirmed. Costs on appeal are awarded to respondents.

Perluss, P. J., and Johnson, J., concurred.

A petition for rehearing was denied July 26, 2005, and appellant's petition for review by the Supreme Court was denied September 21, 2005. George, C. J., did not participate therein.

LEXSEE 543 P.2D 593

RAYMONDE ALETA SLATER, a Minor, etc. Plaintiff and Appellant, v. JOHN ROBERT BLACKWOOD et al., Defendants and Respondents

L.A. No. 30490

Supreme Court of California

15 Cal. 3d 791; 543 P.2d 593; 126 Cal. Rptr. 225; 1975 Cal. LEXIS 270

December 24, 1975

SUBSEQUENT HISTORY: Appellant's petition for a rehearing was denied January 21, 1976.

PRIOR HISTORY: Superior Court of San Diego County, No. 3265N, Fiorenzo V. Lopardo, Judge.

DISPOSITION: We therefore conclude that the order of the trial court sustaining defendants' demurrer on the grounds of res judicata must be sustained. The judgment is affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action by a minor seeking to recover damages on the theory of negligence for injuries sustained while riding as a guest in an automobile driven by one of the defendants and owned by another, the trial court sustained defendants' demurrer without leave to amend on the ground the action was barred by the doctrine of res judicata. The complaint in a prior action had been framed in contemplation of the then existing guest statute, later declared unconstitutional, and, following plaintiff's opening statement, the trial court had granted defendants' motion for nonsuit on the ground that plaintiffs evidence would not support recovery under that statute. Plaintiff's argument, on appeal from the judgment in the prior action, that the guest statute was unconstitutional and that recovery should be permitted on a showing of negligence alone, was rejected by the Court of Appeal and the judgment was affirmed. (Superior Court of San Diego County, No. 3265N, Fiorenzo V. Lopardo, Judge.)

The Supreme Court affirmed, holding that the complaint in the action before it was based on violation of the same "primary right" (plaintiff's right to be free from injury to her person) as the prior action. Even where there are multiple legal theories on which recovery might be predicated, the court held, one injury gives rise to only one claim for relief. In answer to plaintiff's contention that the trial court should have exercised its discretion to reject the doctrine of res judicata as a defense, the court held that the proposition that, in particular circumstances, courts may refuse to apply res judicata when to do so would constitute a manifest injustice, is inapplicable where the only possible basis for its implementation is founded on a change in law following the original judgment. Finally, the court rejected plaintiff's argument that defendants, by moving for a nonsuit in the first action, were estopped from asserting the judgment in that action as a bar. In that connection, the court pointed out that defendants had not attempted to assert inconsistent positions in the successive litigations, that there had been no conduct on their part which could be characterized as constituting a consent, express or implied, that the issue of their negligence was to be reserved for determination in a second lawsuit, and that they had consistently argued that under the substantive law in effect at the time the original complaint was filed, plaintiff had no legal theory on which recovery for her injuries could be predicated, and that a subsequent change in the law could not be a basis for reviving a dead claim. (Opinion by Richardson, J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
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(1) Judgments § 77--Res Judicata--Judgment as Merger or Bar--Matters Concluded. --A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action.

(2a) (2b) (2c) Judgments § 69--Res Judicata--Identity of Issues--What Constitutes Different Cause of Action. --In sustaining demurrers to a complaint seeking recovery on the theory of negligence for injuries suffered by plaintiff in an automobile accident while she was riding as a guest in a car driven by one of the defendants and owned by another, the trial court properly applied the doctrine of res judicata, where a final judgment had been entered in defendants' favor in a prior action brought by plaintiff seeking recovery for the same injuries under a complaint framed in contemplation of the then existing "guest statute" (Veh. Code, § 17158). Though a different legal theory was asserted in the second action, recovery was sought in both cases for violation of plaintiff's right to be free from injury to her person, and the second complaint therefore did not state a new cause of action.

(3a) (3b) Judgments § 69--Res Judicata--Identity of Issues--What Constitutes Different Cause of Action. --There is only one cause of action for one personal injury which is incurred by reason of one wrongful act. The "cause of action" is based on the harm suffered, as opposed to the particular theory asserted by the litigant, and even where there are multiple legal theories on which recovery might be predicated, one injury gives rise to only one claim for relief. Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.

(4) Judgments § 67--Res Judicata--Application of Doctrine--Effect of Resulting Injustice. --The proposition that, in particular circumstances, courts may refuse to apply res judicata when to do so would constitute a manifest injustice, is inapplicable where the only possible basis for its implementation is founded on a change in law following the original judgment.

(5) Judgments § 67--Res Judicata--Right to Rely on Doctrine--Estoppel. --In an action in which plaintiff sought recovery on the theory of negligence for injuries suffered in an automobile accident while she was riding as a guest in a car driven by one of the defendants and owned by another defendant, the fact that defendants had moved for and been granted a nonsuit in a prior action in which plaintiff had sought recovery for the same injuries in a complaint framed in contemplation of the then existing "guest statute," did not estop them from asserting the prior judgment as a bar, where they did not attempt to assert inconsistent positions in the successive litigations, where there was no conduct on their part constituting a consent, express or implied, that the issue of their negligence was to be reserved for determination in a second lawsuit, and where they consistently argued that under the substantive law in effect at the time the original complaint was filed plaintiff had no legal theory on which recovery for her injuries could be predicated, and that a subsequent change in the law could not be a basis for reviving a dead claim.

COUNSEL: Walter P. Christensen for Plaintiff and Appellant.

Luce, Forward, Hamilton & Scripps and Robert G. Steiner for Defendants and Respondents.

JUDGES: In Bank. Opinion by Richardson, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Sullivan, J., and Clark, J., concurred.

OPINION BY: RICHARDSON

OPINION

[*794] [**593] [***225] We consider, and will reject, the contention that the unconstitutionality of the guest statute enunciated by us in *Brown* v. *Merlo* (1973) 8 Cal.3d 855 [106 Cal.Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505] should be given retroactive effect.

Plaintiff, a minor, was injured in an automobile accident in 1969 while riding as a guest in a car driven by defendant John Blackwood and owned by the defendant Escondido Tire Supply Co., Inc. In March 1970 she filed an action for damages, the complaint being framed in contemplation [**594] [***226] of the provisions of California's then existing "guest statute" (Veh. Code, § 17158), which limited recovery to death or injuries resulting from intoxication or wilful misconduct. At trial,

following plaintiff's opening statement, the court granted defendants' motion for nonsuit on the ground that plaintiff's evidence would not support recovery under section 17158. Judgment for defendant was entered pursuant to Code of Civil Procedure section 581c.

Plaintiff appealed contending that the guest statute was unconstitutional and that recovery should be permitted upon a showing of negligence alone. The Court of Appeal rejected this argument and affirmed the trial court's decision. We denied a hearing in June 1972.

In February 1973 we held the guest statute unconstitutional as applied to an injured nonowner guest. (*Brown* v. *Merlo*, *supra*, 8 Cal.3d 855.) In May of that year plaintiff, still a minor, filed a new complaint, based on the same accident and naming the same parties as defendants. Her claim was not barred by the statute of limitations. (See Code Civ. Proc., § 352.) In the second action plaintiff sought recovery on a negligence theory, arguing that our decision in *Brown* should be applied retroactively. Defendants demurred to the new complaint on the ground that the original 1970 judgment was res judicata and constituted a bar to the second suit. The trial court agreed, and demurrers to the new complaint were sustained without leave to amend.

Plaintiff appeals, contending that the doctrine of res judicata is not applicable. Specifically, she argues (1) that the first judgment is not a bar to the new complaint because the judgment is based upon separate and distinct causes of action; (2) that the trial court should have exercised its discretionary power to reject the defense of res judicata in the interest of [*795] justice and fairness; and (3) that defendants are estopped from relying on res judicata in this action because they prevented plaintiff from litigating the issue in the prior proceedings. We conclude that these arguments lack merit, and that the judgment should be affirmed.

(1) A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action. (*Busick* v. *Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 973 [104 Cal.Rptr. 42, 500 P.2d 1386]; *Panos* v. *Great Western Packing Co.* (1943) 21 Cal.2d 636, 639 [134 P.2d 242]; 4 Witkin, Cal. Procedure (2d ed. 1971) Judgment, § 192, p. 3332; Rest., Judgments, § 48.) **(2a)** Plaintiff in the matter before us, however, argues that the second complaint states a new "cause of action." In doing so however, she misconstrues the meaning of that term. California has consistently applied the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action. (*Busick*, *supra*, at p. 975; *Wulfjen* v. *Dolton* (1944) 24 Cal.2d 891, 895-896 [151 P.2d 846].) The "primary right" alleged to have been violated in the instant case is plaintiff's right to be free from injury to her person. (See *Panos*, *supra*, at p. 639; Rest., Judgments, § 63, com. a.) **(3a)** It is clearly established that ". . . there is but one cause of action for one personal injury [which is incurred] by reason of one wrongful act." (*Busick*, *supra*, at p. 975; see *Panos*, *supra*, at p. 638; 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 34, p. 1717.)

(2b) Our consideration of plaintiff's argument involves a significant conceptual matter. It is true that plaintiff has asserted different legal theories in the instant case and in her 1970 complaint. **(3b)** However, the "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. (*Peiser* v. *Mettler* (1958) 50 Cal.2d 594, 605 [328 P.2d 953, 74 A.L.R.2d 1].) Even where there are multiple legal theories upon which recovery might be [**595] [***227] predicated, one injury gives rise to only one claim for relief. "Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief." (3 Witkin, *supra*, Pleading, § 24, p. 1709; and see *Panos* v. *Great Western Packing Co.*, *supra*, 21 Cal.2d at pp. 638-639; *Ford Motor Co.* v. *Superior Court* (1973) 35 Cal.App.3d 676, 679 [110 Cal.Rptr. 59].) **(2c)** We therefore cannot accept plaintiff's first contention.

Plaintiff, however, points to certain language in *Brown* v. *Merlo*, *supra*, 8 Cal.3d 855 at pp. 860, 863, in which we refer to the "cause of action" [*796] for negligence and the "cause of action" for violation of the former guest statute. It is argued that by use of such language we have implicitly agreed that a case such as this one gives rise to multiple causes of action. However, the phrase "cause of action" is "often used indiscriminately to mean what it says and to mean *counts* which state differently the same cause of action, . . ." (*Eichler Homes of San Mateo, Inc.* v. *Superior Court* (1961) 55 Cal.2d 845, 847 [13 Cal.Rptr. 194, 361 P.2d 914]; and see *Kaufman & Broad Bldg. Co.* v. *City & Suburban Mortg. Co.* (1970) 10 Cal.App.3d 206, 215 [88 Cal.Rptr. 858].) When read in context it is clear that our use of the term "cause of action" in *Brown*, noted by plaintiff, refers to the "counts" asserted by the plaintiff in

her complaint.

(4) Assuming that res judicata is available to defendants in the instant matter, plaintiff argues that the trial court, nonetheless, should have exercised its discretionary power to reject the doctrine as a defense. There is some authority for the proposition that, in particular circumstances, courts may refuse to apply res judicata when to do so would constitute a manifest injustice. (See *Greenfield* v. *Mather* (1948) 32 Cal.2d 23, 35 [194 P.2d 1]; *Jackson* v. *Jackson* (1967) 253 Cal.App.2d 1026, 1040 [62 Cal.Rptr. 121]; *McGaffey* v. *Sudowitz* (1961) 189 Cal.App.2d 215, 216-218 [10 Cal.Rptr. 862].) We consider the *Greenfield* doctrine of doubtful validity and it has been severely criticized. (See 4 Witkin, *supra*, Judgment, § 150, p. 3295, et seq.) While we find it is unnecessary for our present purposes to reach the question of whether *Greenfield* itself should be directly overruled, we expressly hold that the rule of that case is inapplicable where, as here, the only possible basis for its implementation is founded on a change in law following the original judgment.

Previous appellate decisions of this state are in accord. For example, in *Zeppi* v. *State of California* (1962) 203 Cal.App.2d 386 [21 Cal.Rptr. 534], plaintiffs sued the state for personal injuries. A demurrer on the ground of governmental immunity was sustained and judgment entered for defendant. The judgment was affirmed on appeal and we denied a petition for hearing. Subsequently, in *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], we held that governmental entities were no longer immune from liability for the torts of their agents. Plaintiffs in the original *Zeppi* action thereupon made a motion in the trial court to vacate the judgment on the grounds that the previous rulings sustaining the demurrer were the result of mistakes. The trial court granted this motion. In reversing, the appellate court agreed with defendant's contention that res judicata was applicable stating: "In every instance where a rule established by case law is changed by a later [*797] case the earlier rule may be said to be 'mistaken' . . . . Such 'mistakes' or 'injustices' are not a ground for equity's intervention. So to hold would be to emasculate, if not wipe out, the doctrine of res judicata because *the doctrine is most frequently applied to block relitigation based upon contentions that a law has been changed. Our courts have repeatedly refused to treat the self-evident hardship occasioned by a change in the law as a reason to revive dead actions* [**596] [***228] . . . ." (*Zeppi*, *supra*, at pp. 388-389, italics added.) The court held that under the circumstances, where the only "mistake" made in the earlier proceedings was in assuming that the law would remain unchanged, there is no discretion to reject the defense of res judicata. (*Id*., at p. 389.)

In *Bank of America* v. *Department of Mental Hygiene* (1966) 246 Cal.App.2d 578 at page 585 [54 Cal.Rptr. 899], it was said "[the] rule appears clear in California that a judgment which was contrary to the Constitution because it was based upon a statute later held invalid, is nevertheless res judicata in a subsequent suit."

We agree with the positions taken by the Courts of Appeal in *Zeppi* and *Bank of America*. It cannot be denied that judicial or legislative action which results in the overturning of established legal principles often leads to seemingly arbitrary and unwarranted distinctions in the treatment accorded similarly situated parties. However, "[public] policy and the interest of litigants alike require that there be an end to litigation." (*Panos* v. *Great Western Packing Co., supra*, 21 Cal.2d 636 at p. 637.) The result urged by plaintiff, to borrow the language of Justice Traynor's dissent in *Greenfield*, would call ". . . into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case." (*Greenfield* v. *Mather*, *supra*, 32 Cal.2d at p. 36.) The consistent application of the traditional principle that final judgments, even erroneous ones (*Busick* v. *Workmen's Comp. Appeals Bd., supra*, 7 Cal.3d 967 at p. 975; Rest., Judgments, § 47, com. b), are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case.

(5) Finally, we reject plaintiff's argument that defendants, because they moved for a nonsuit in the first action, are now estopped from asserting that judgment as a bar to the instant action. It is true that a very few cases have held that the defendant in a second action is precluded [*798] from asserting res judicata as a defense because of his conduct in prior proceedings. (See *Lunsford* v. *Kosanke* (1956) 140 Cal.App.2d 623, 628-631 [295 P.2d 432] and the decisions discussed therein; 4 Witkin, *supra*, Judgment, § 151, p. 3298.) In

these cases, the courts have properly noted that defendants cannot inconsistently argue that a claim is not cognizable in the first action and then, in a subsequent proceeding, contend that the same issue should have been raised in the prior litigation. Such a rule is appropriate where "the course pursued by the trial court and by counsel in an earlier action was tantamount to an express determination on the part of the court with the consent of opposing counsel that certain issues should be reserved for future adjudication, and that the doctrine of res judicata did not apply." (*Hall* v. *Coyle* (1952) 38 Cal.2d 543, 546 [241 P.2d 236].)

The foregoing principle, however, is not applicable to the case before us. Defendants have not attempted to assert inconsistent positions in successive litigations. There has been no conduct on their part which can be characterized as constituting a consent, express or implied, that the issue of their negligence was to be reserved for determination in a second lawsuit. Rather, they have consistently argued that under the substantive law in effect at the time the original complaint was filed, plaintiff had no legal theory upon which recovery for her injuries could be predicated, and that a subsequent change in the law cannot be a basis for reviving a dead claim.

The theories urged by plaintiff would cast doubt on the finality of any judgment [**597] [***229] dependent upon a then valid substantive defense later held to be unavailable. The general uncertainty induced in our judicial system by such a result cannot be justified by occasional apparent inequities.

We therefore conclude that the order of the trial court sustaining defendants' demurrer on the grounds of res judicata must be sustained. The judgment is affirmed.

LEXSTAT CAL. RULES OF COURT, 8.1115

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CALIFORNIA RULES OF COURT
Title 8. Appellate Rules
Division 5. Publication of Appellate Opinions

Cal Rules of Court, Rule 8.1115 (2009)

Rule 8.1115. Citation of opinions

(a) Unpublished opinion Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(Subd (b) amended effective January 1, 2007.)

(c) Citation procedure A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

HISTORY:

Rule 8.1115 amended and renumbered effective January 1, 2007; repealed and adopted as rule 977 effective January 1, 2005.