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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DOUG KISAKA, Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.	B284559 (Los Angeles County Super. Ct. No. BC650048)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Doug Kisaka, in pro. per., for Plaintiff and Appellant.

Freedman & Taitelman, Bryan J. Freeman, and Bradley H. Kreshek for Defendants and Respondents.

INTRODUCTION

Appellant Doug Kisaka, in propria persona, appeals the trial court's order sustaining respondents' demurrer and dismissing all causes of action without leave to amend. The trial court ruled that res judicata barred appellant's claims, which had previously been asserted in federal court, and dismissed the action with prejudice. The principal issue on appeal is whether the prior dismissal in federal court pursuant to Federal Rule of Civil Procedure (FRCP) rule 41, subdivision (b) was a "'final judgment on the merits'" that had res judicata effect in state court. The trial court ruled that the prior dismissal in federal court due to appellant's persistent failure to comply with court rules and discovery orders was a "judgment on the merits" under California law. Appellant was thus precluded from reasserting his claims in state court. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Federal Complaint and Dismissal*

On March 15, 2011, appellant Doug Kisaka, an African-American former graduate student at the University of Southern California (USC), filed a complaint in federal court against respondents USC and its employees Jay Young, Josh Voyda, Cesar Jimenez, Carey Drayton, and Carol Sukow, based on purported civil rights violations, racial discrimination and profiling that allegedly occurred between 2008 and 2010.[1] Appellant alleged 16 causes of action under federal and state law. In the three years following his complaint, appellant failed to

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[1] Young, Voyda and Jimenez were USC public safety officers, Drayton was the chief of the public safety department, and Sukow was a senior official in the school of engineering.

meet court deadlines and comply with court orders, failed to respond to discovery, and failed to appear for hearings and his own deposition.

On April 15, 2014, three years after appellant commenced his action, the federal court dismissed the case "due to [appellant's] repeated failures to comply with court orders," pursuant to FRCP rule 41, subdivision (b) and rule 37, subdivision (b).[2] The federal court noted that throughout the litigation, "[appellant] has failed to follow court orders or meet deadlines on multiple occasions." In a detailed order, the court found the following: appellant had failed to timely serve initial disclosures pursuant to the court's scheduling order; appellant had failed to respond to respondents' requests for admissions; appellant had failed to appear at the hearing on his own motion to amend the complaint; appellant had failed to appear at the hearing on his own ex parte application to withdraw the deemed admissions, for which he was sanctioned and warned of possible dismissal; appellant had twice failed to appear at his noticed deposition; appellant had failed to appear at the hearing on respondents' motion to compel the deposition, for which he was

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[2] FRCP rule 41, subdivision (b) provides: "Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits."

FRCP rule 37, subdivision (b) provides that a court "may issue . . . just orders" if a party "fails to obey an order to provide or permit discovery," including "dismissing the action or proceeding in whole or in part."

sanctioned a second time; and appellant had failed to appear for his compelled deposition, despite the court's "'extraordinary step'" of confirming his attendance in advance.

In weighing the "'harsh penalty'" of dismissal, the federal court considered the three-year delay in the proceedings, attributable largely to appellant's "failure to comply with court orders and discovery requests." Respondents were unable to take appellant's deposition – discovery to which they were entitled and without which they could not properly defend the action. The court noted that it had "accommodated [appellant's] failures on multiple occasions," and "given [appellant] substantial benefits and leeway in his prosecution of this action, including allowing him to withdraw his deemed admissions and in not dismissing this case at an earlier point." But despite the imposition of sanctions on two separate occasions, "no change in behavior ha[d] ensued." Appellant had also been warned that "dismissal was a possibility should he continue to fail to follow court orders." The court did not find appellant's proffered medical excuses credible, and was skeptical that he was "truly incapacitated" when he repeatedly missed hearings, deadlines and depositions without satisfactory explanation. The court concluded that "a decision on the merits has become nearly impossible to achieve in this action due to [appellant's] repeated failure to follow the rules."

In August 2016, the Ninth Circuit Court of Appeals affirmed the dismissal for appellant's "repeated[] fail[ure] to comply with court orders, meet deadlines, or appear at hearings, despite being warned that failure to do so would result in dismissal." In January 2017, the Ninth Circuit rejected his untimely petition for rehearing and ordered that "[n]o further filings will be entertained in this closed case."

B. *State Complaint and Contentions*

In February 2017, appellant filed a complaint in state court, alleging 18 causes of action under federal and state law.[3] Respondents removed the action, invoking the district court's federal question jurisdiction, and also moved to dismiss. In response, appellant filed a first amended complaint (FAC) on April 13, 2017, which eliminated the federal claims, leaving 11 causes of action arising under California law: (1) violation of Government Code sections 11135 and 11139 (discrimination from a program or activity conducted, funded by, or receiving state financial assistance); (2) violation of article I, section 7, subdivision (a) of the California Constitution (denial of due process or equal protection of the law); (3) violation of article I, section 13 of the California Constitution (unreasonable search and seizure); (4) violation of Civil Code section 52.1, subdivision (b) (interference with exercise and enjoyment of constitutional rights); (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; (7) negligent and intentional infliction of emotional distress; (8) negligent employment/supervision; (9) violation of Education Code section 66252 (denial of equal educational opportunity); (10) violation of

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[3] Though the complaint is not part of the record, it appears that three new causes of action – violation of Education Code section 66252, violation of Penal Code section 135, and violation of Civil Code section 3294 – were added in state court. Appellant also added defendants Kelly Goulis, Wallis Annenberg, Michael L. Jackson and Jody Shipper. Goulis was associate dean of the School of Engineering, Annenberg was chairman of the board of trustees, Jackson was vice-president of Student Affairs, and Shipper was executive director of the Office of Equity and Diversity.

Penal Code section 135 (destruction or concealment of evidence); and (11) violation of Civil Code section 3294 (punitive damages for acts of oppression, fraud or malice). The district court granted appellant's motion to remand the action to state court.

The FAC, like appellant's original complaint, alleged that throughout the period 2008-2010, he was discriminated against, harassed, and profiled because of his race. Most notably, appellant alleged that on March 26, 2010, he was falsely arrested and imprisoned for trespassing while attending a recruiting event on campus to which he was invited. He alleged that USC confiscated his student ID and concealed it from the police to support his charge of trespassing. This incident was the culmination of an alleged history of surveillance and intimidation by USC's Department of Public Safety, in which appellant was unfairly targeted because of his race. Appellant learned after the arrest that a seven-year stay-away order had been issued, barring him from being on campus, communicating with his department, contacting USC doctors regarding his disability, enrolling in courses, communicating with the alumni association and contacting librarians or other USC staff. As a result of respondents' conduct, appellant alleged, he suffered a stress-related stroke in 2012, which precipitated blindness in one eye. He also was diagnosed with posttraumatic stress disorder.

C. *Demurrer and Order Sustaining the Demurrer*

Respondents demurred to the FAC, arguing that the first through ninth causes of action were barred under the doctrine of res judicata, and all causes of action were also barred by the applicable statutes of limitation. Respondents contended that under FRCP rule 41, subdivision (b), an involuntary dismissal acts as a judgment on the merits for purposes of res judicata.

Appellant opposed the demurrer, arguing that the res judicata doctrine did not apply because the federal action was not adjudicated on the merits. He also contended that respondents had committed a continuing violation, and that the applicable statutes of limitations were subject to equitable tolling.

The trial court sustained the demurrer, ruling that "claim preclusion bars [appellant's] claims." It found undisputed "that the federal court involuntarily dismissed [appellant's] action [under FRCP rule 41, subdivision (b)], citing numerous occasions where [appellant] failed to respond to written discovery and appear for deposition and failed to appear in court in violation of court orders and rules." The trial court identified the key disputed issue as "whether the involuntary dismissal was a 'final judgment on the merits' for the purposes of claim preclusion." Appellant relied on *Semtek Int'l. Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497 (*Semtek*), which held that the preclusive effect of a federal court's dismissal in a diversity action is determined under California law. The trial court cited *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795 (*Hardy*), which applied *Semtek*'s holding to an action that began with federal question jurisdiction, as in the instant case. As the trial court explained, under California law, a dismissal for failure to prosecute under FRCP rule 41, subdivision (b) is not a final judgment on the merits for res judicata purposes. The court further noted, however, that under California law, "dismissals pursuant to a terminating sanction for violation of discovery orders are indeed res judicata." (*Franklin Capital Corp v. Wilson* (2007) 148 Cal.App.4th 187, 216 (*Franklin*), citing *Kahn v. Kahn* (1977) 68 Cal.App.3d 372 (*Kahn*).) Because the federal court's dismissal of appellant's action was not for failure to prosecute,

"but rather as a sanction for violating court orders and court rules" relating to discovery, the trial court held that claim preclusion barred appellant's claims in state court. Because the defect could not be remedied by amendment, the court dismissed the complaint with prejudice.

DISCUSSION

A. *Standard of Review*

Because a demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion, we employ two separate standards of review on appeal. First, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. "In reviewing an order sustaining a demurrer, we assume well-pleaded factual allegations to be true and examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action on any legal theory. [Citation.]" (*Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288, 1292.) Second, where the demurrer is sustained without leave to amend, we must determine whether the trial court abused its discretion in doing so. "It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment." (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854.) The burden falls on the plaintiff to "show what facts he or she could plead to cure the existing defects in the complaint." (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853-854.) A trial court's exercise of discretion will not be disturbed on appeal unless "the court exercised it in an arbitrary, capricious, or patently absurd

manner resulting in a manifest miscarriage of justice." (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1434.)

B. *Appellant's Brief Fails to Comply with Court Rules.*

Appellant, as a self-represented litigant, is not exempt from compliance with the rules of appellate procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543 ["Pro. per. litigants are held to the same standards as attorneys."].) Appellant's brief fails to conform to basic court rules regarding the content and format of briefs. His arguments are largely unintelligible, and the text is excerpted from secondary sources without cogent analysis. It is missing key citations, and lacks coherent sequential headings. (Cal. Rules of Court, rule 8.204(a)(1) [requiring briefs to "[s]tate each point under a separate heading or subheading," to "support each point by argument and, if possible, by citation of authority" and "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record"]; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4 ["'requiring the litigants to present their cause systematically and so arranged that [the appellate court] may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass'"].)

Arguments not properly presented may be treated as forfeited. (See *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201; *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 ["we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument"]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument or

citation to authority allows this court to treat the contentions as waived."].) Nevertheless, we address appellant's arguments, as best we can discern them.[4]

C. *Appellant's Claims are Barred by Res Judicata.*

1. *Elements of Res Judicata*

Our Supreme Court has used the term "res judicata" to encompass both claim preclusion and issue preclusion – primary and secondary aspects of res judicata – but recently endorsed the use of the terms "'res judicata'" to refer to claim preclusion, and "'collateral estoppel'" to refer to issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*).) We focus on res judicata, or claim preclusion, the main theory respondents advanced on appeal and which the trial court relied on to sustain the demurrer.

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings, supra*, 61 Cal.4th at p. 824, italics omitted; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th

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[4] Appellant has requested judicial notice of "Additional Declarations" A, B and C, as well as appellant's declaration, which does not appear to have been previously filed in court. As these documents pertain to proceedings in the district court and are irrelevant to our disposition of this appeal, we deny appellant's request for judicial notice. Furthermore, judicial notice of a declaration not previously filed in court is not appropriate under Evidence Code section 452.

888, 896.) "[R]es judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.'" (*Mycogen, supra,* at p. 897, italics omitted.)

California applies the "'primary rights'" theory in defining the cause of action. Under this theory, the invasion of one "'primary right'" gives rise to a single cause of action, even if there are several remedies available to protect that primary right. (*Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299-1300.) A cause of action consists of "(1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right." (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589.) "'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] . . . "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." [Citations.]' . . . When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. [Citation.]" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.)

2. *The Prior Dismissal Was a Final Judgment on the Merits.*

The trial court identified the key disputed issue as "whether the involuntary dismissal was a 'final judgment on the merits' for the purposes of claim preclusion." Appellant does not contest respondents' assertions that the actions in federal court

and state court involved the same parties, or those in privity with them, and arose out of the same primary rights.[5] Thus, the dispositive issue before us is whether the district court's ruling dismissing appellant's action under FRCP rule 41, subdivision (b) was a final judgment on the merits.

"The preclusive effect of a federal court judgment is determined by federal common law." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 891, citing *Semtek, supra*, 531 U.S at pp. 507-508.) In the context of a state action filed after a federal court judgment, our Supreme Court has stated: "Full faith and credit must be given to a final order or judgment of a federal court. [Citations.] Such an order or judgment has the same effect in the courts of this state as it would have in a federal court. [Citations.] In the federal jurisdiction, the doctrine of res judicata prevents the readjudication of all matters (including

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[5] The four newly added defendants in the state court action were high-level administrators at USC, clearly in privity with the original defendants, which included USC. (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069 ["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]'"].)

Appellant asserted three new causes of action in state court in 2017: violation of Education Code section 66252 (denial of equal educational opportunity), violation of Penal Code section 135 (destruction or concealment of evidence, for the alleged concealment of his student ID during the false arrest) and violation of Civil Code section 3294 (punitive damages for acts of oppression, fraud or malice). All these causes of action arose out of the same alleged incidents that occurred between 2008 and 2010, implicating the same harms and primary rights already asserted in the federal action.

jurisdiction) which were, or might have been, litigated in a prior proceeding between the same parties." (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173; see also *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1453; *In re Schimmels* (9th Cir. 1997) 127 F.3d 875, 884 ["involuntary dismissal generally acts as a judgment on the merits for the purposes of res judicata"].)

Whether a federal court's dismissal has claim-preclusive effect on a subsequent state action under FCRP rule 41, subdivision (b) is a more complicated question. The language of the statute plainly states that a dismissal for failure to prosecute or comply with court rules or orders "operates as an adjudication on the merits." (Fed. Rules Civ. Proc., rule 41(b).) However, in *Semtek* – the primary case appellant relies on – the United States Supreme Court limited the preclusive reach of FRCP rule 41, subdivision (b). The *Semtek* plaintiff filed a complaint in California state court, which the defendant removed to federal court on the basis of diversity of citizenship. The federal court granted defendant's motion to dismiss, on the ground that the case was barred under the California statute of limitations. Plaintiff also brought suit on the same causes of action in Maryland state court, where the claims were timely, but the case was dismissed under res judicata. The appellate court affirmed, applying federal law and finding the earlier dismissal in California was on the merits and with prejudice. (*Semtek, supra*, 531 U.S. at pp. 499-500.)

The Supreme Court reversed the dismissal. The court established the federal rule that the preclusive effect of a prior dismissal from a federal diversity action is to be determined under the law of the state in which the federal court sits. (*Semtek, supra*, 531 U.S. at p. 508 ["This is, it seems to us, a

classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."].) The Supreme Court explained that FRCP rule 41, subdivision (b), which states that an involuntary dismissal "operates as an adjudication on the merits," prevents re-filing of the same claim in the same federal court, but does not necessarily have preclusive effect in state courts or other federal courts. (*Semtek*, at pp. 505-506.) Thus, the Maryland appellate court had erred in holding that the California dismissal precluded the bringing of the action in Maryland courts. (*Id.* at p. 509.)

As respondents point out, *Semtek*'s holding has been applied to prior federal court dismissals of cases based on diversity jurisdiction. (See, e.g., *Taylor v. Sturgell, supra,* 553 U.S. at p. 891, fn. 4 ["For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits"]; *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507 ["because the district court was exercising diversity jurisdiction, California law determines their preclusive effect"]; *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1553-1554, italics omitted ["where a prior federal judgment was based on *federal question* jurisdiction, the preclusive effect of the prior judgment of a federal court is determined by federal law"; "[w]here a prior federal judgment was based on *diversity* jurisdiction, the preclusive effect is subject to federal common law – meaning the law of the state in which the federal court sits – if the state law is compatible with federal interests"].)

As the trial court observed, however, at least one California court has applied *Semtek*'s holding to a prior federal court's

dismissal of a case arising under federal question jurisdiction. (See, e.g., *Hardy, supra,* 232 Cal.App.4th at p. 806 [where prior case was based on federal question jurisdiction but, after dismissal, the subsequent state action involved only state law claims, "the district court's dismissal of the state law claims is similar to a federal court's dismissal in a diversity action. Accordingly, under *Semtek*, the preclusive effect of the district court's dismissal is determined under California law."].) Although *Hardy* is distinguishable because it did not involve a dismissal for violation of discovery orders, it upheld well-settled California law that a dismissal for failure to prosecute is not a final judgment on the merits. (*Id.* at p. 803; see also *Franklin, supra,* 148 Cal.App.4th at p. 215, fn. 33.)

In light of *Semtek* and *Hardy*, which did not preclude appellant's claims for failure to prosecute in federal court, the trial court identified an alternative basis for claim preclusion: appellant's persistent failure to comply with court-ordered discovery. (See *Franklin, supra,* 148 Cal.App.4th at p. 207, italics omitted ["dismissals pursuant to terminating sanctions for discovery disobedience are with prejudice and res judicata"]; accord, *Kahn, supra,* 68 Cal.App.3d at pp. 382, 383 ["dismissal for failure to comply with discovery orders constitutes an adjudication on the merits"; "persistent refusal of a party to make discovery results in a presumption, as a matter of law, that the asserted causes of action are without merit"]; *Bernstein v. Allstate Insurance Co*. (1981) 119 Cal.App.3d 449, 451 [dismissal for "willful failure to furnish answers to certain interrogatories," as ordered by the court, "has the effect of a judgment on the merits against a plaintiff"]; *Warkentin v. Countrywide Home Loans, N.A.*, (E.D. Cal. Sept. 2, 2011, No. 1:11-CV-1433 AWI GSA) 2011

U.S. Dist. LEXIS 99459, *4-5 [citing *Kahn* with approval].) As *Kahn* observed, even if a dismissal ordered as a discovery sanction was not a judgment "'on the merits'" under FRCP rule 41, subdivision (b), "'it would seem necessary as a matter of sound judicial administration[,]'" which "applies equally to cases pending in state courts."[6] (*Kahn*, *supra*, 68 Cal.App.3d at p. 387.)

We agree with the trial court that the prior dismissal in federal court based on appellant's persistent refusal to comply with court rules and discovery orders effects a "final judgment on the merits" for purposes of res judicata under established California law. It is undisputed that appellant failed to serve initial discovery pursuant to the federal court's scheduling order. He failed to timely respond to requests for admissions, and then failed to appear at the hearing on his ex parte application to withdraw the deemed admissions. He twice failed to appear at his noticed deposition, and even after the federal court went so far as to compel his deposition, order that it be held in the courtroom, and confirm his attendance the day before, appellant again failed to appear without satisfactory explanation. The

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[6] Appellant argues that the trial court erred in relying on an "obscure caveat" under California law to sustain the demurrer. His assertion that "[t]he state court has no jurisdiction to construe the circumstances of an adjudication or render its opinion on a violation of discovery in [f]ederal [c]ourt" is misplaced. The federal court's order dismissing appellant's claims for violation of its discovery orders does not require construing or interpretation by this court. As previously discussed, a final order or judgment of a federal court "has the same effect in the courts of this state as it would have in a federal court." (*Levy v. Cohen, supra,* 19 Cal.3d at p. 173; see also *Butcher v. Truck Ins. Exchange, supra,* 77 Cal.App.4th at p. 1453.)

record is clear that despite being sanctioned twice and warned multiple times of the possibility of dismissal, appellant continued to disregard the court's discovery orders. The record is equally clear that the federal court did not find appellant's claim of medical incapacitation credible. On this record, there can be no doubt that the dismissal was not merely for appellant's lack of enthusiasm in prosecuting his case, but for his "repeated failures to comply with court orders" in the course of discovery. As California courts have long recognized, "dismissal for failure to comply with discovery orders constitutes an adjudication on the merits," and to hold otherwise would unfairly reward appellant for his dilatory conduct.[7] (*Kahn, supra*, 68 Cal.App.3d at p. 382.) Thus, the trial court did not err in sustaining the demurrer on grounds of res judicata.[8]

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[7] Appellant points out that the federal court's 2017 remand order states that the federal court "never reached the merits of any of [appellant's] claims" in his 2011 action. This statement addressed respondents' opposition to the motion to remand, which argued that because the court had presided over the 2011 action and "[appellant's] claims are without merit," judicial economy weighed against remand. The federal court did not address the dispositive issue before the trial court below: whether the prior dismissal in federal court was effective as a final judgment on the merits under California law.

[8] Although the trial court did not reach the parties' other contentions, it dismissed all claims without leave to amend. Appellant filed his claims in state court in 2017, nearly seven years after their accrual, based on alleged incidents that occurred between 2008 and 2010. While it appears likely appellant's claims are time-barred (see Code Civ. Proc., §§ 335.1 [two-year limitation for personal injury actions], 338, subd. (a) [three-year

D. *The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend.*

"An order sustaining a demurrer without leave to amend will constitute an abuse of discretion if there is any reasonable possibility that the defect can be cured by an amendment." (*Careau & Co. v. Security Pacific Business Credit, Inc. (*1990) 222 Cal.App.3d 1371, 1387, italics omitted.) "The burden is on the plaintiff[] to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of [the] pleadings." (*Id.* at p. 1388.) Appellant does not establish, or attempt to establish, that an amendment would cure the fatal defect presented by the res judicata effect of the prior dismissal. (See *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1429 [leave to amend properly denied where claims were "subject to demurrer as being barred either by res judicata or various applicable limitations statutes"].) Accordingly, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

DISPOSITION

The judgment of the trial court is affirmed. Respondents

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limitation for liability created by statute]), nothing in the record below suggests the trial court ruled on that issue. In light of our holding, we need not do so.

are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.