10/30/19 Lockwood v. Cal. Horse Racing Bd. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DONALD LOCKWOOD, Plaintiff and Appellant, v. CALIFORNIA HORSE RACING BOARD, Defendant and Respondent.	B291002 (Los Angeles County Super. Ct. No. BC611601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

Carlo Fisco for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Chris A. Knudsen, Senior Assistant Attorney General, Elisabeth A. Frater, Supervising Deputy Attorney General, Bruce W. Reynolds, Deputy Attorney General, for Defendant and Respondent.

In 2016, plaintiff and appellant Donald Lockwood (Lockwood) filed a complaint against defendant and respondent California Horse Racing Board (CHRB) seeking damages allegedly caused by the CHRB's 2013 denial of Lockwood's request to renew his horse transporter license. The 2016 suit was the first time Lockwood had sought damages in connection with the denial of his license renewal, but he had previously litigated the denial twice—first in an administrative proceeding that was decided in the CHRB's favor and then in an administrative mandamus writ petition that was resolved in his favor. The trial court in this case sustained the CHRB's demurrer to Lockwood's first amended complaint, finding claim preclusion principles barred his damages action because he could have sought damages when he previously sought writ relief. We are asked to decide whether the trial court erred in so ruling.

I. BACKGROUND

A. Lockwood, the CHRB, and the Mandamus Action[1]

Lockwood is a horse transporter and the sole owner of Lockwood Horse Transportation, a horse transportation business that services racetracks in California. Lockwood also has a criminal history, which includes a 1992 felony conviction in Kentucky.

The CHRB first granted Lockwood a horse transporter license in 2006 and later renewed that license in 2009. The

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[1] Because this is an appeal from a demurrer, we recite the facts as alleged in the operative pleading, the exhibits attached to it, and documents subject to judicial notice. (*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 (*Yvanova*).)

CHRB was aware of Lockwood's criminal history when it issued the license and renewal.

When Lockwood's license expired, he sought renewal again in 2013. This time, the CHRB denied Lockwood's request at least partly because he had sustained the 1992 conviction. Lockwood appealed and he was granted an administrative hearing before the CHRB, which upheld the denial. Lockwood then filed a petition for writ of administrative mandamus in Los Angeles Superior Court.

Lockwood's mandamus petition asked the superior court to overturn the CHRB's decision to revoke and deny his license. The petition alleged, among other things, that the CHRB had denied his application based on "a Notice of Refusal (Conviction of Crime)" and had prejudicially abused its discretion by failing to proceed in the manner required by various laws, including certain provisions of the Business and Professions Code. The petition further alleged that if the CHRB was "allowed to impose the penalty of revocation and denial based on void and improper allegations . . . [Lockwood would] be irreparably harmed in that . . . he will be denied his right to engage in his livelihood . . . ." The trial court granted Lockwood's petition and ordered the CHRB to set aside the license denial, but it did not determine whether Lockwood was entitled to a renewed license. Approximately two months later, the CHRB issued Lockwood a license.

Lockwood then filed a claim for damages with the Victim Compensation and Government Claims Board. The claim was rejected in August 2015 and plaintiff filed the lawsuit giving rise to this appeal the following February.

B. This Action

1. Initial proceedings

In February 2016, Lockwood filed a civil action alleging five causes of action: violations of Business and Professions Code sections 481 and 482, violation of the Fourteenth Amendment, violations of 42 U.S.C. sections 1985(3) and 1986, and negligent hiring, training, and/or supervision. The complaint named the CHRB, as well as eight individuals (the executive director of the CHRB and its commissioners) as defendants. The defendants removed the complaint to federal court. The parties later stipulated Lockwood would dismiss his federal claims, his claim for negligent hiring, and all his claims against the individual defendants, and the case would be remanded to state court.

Back in superior court, the CHRB answered the complaint with a general denial and the assertion of eight affirmative defenses, including res judicata, i.e., claim preclusion. The CHRB then filed a motion for judgment on the pleadings arguing the complaint was barred by claim preclusion doctrine, Lockwood had failed to comply with the Government Claims Act, and the CHRB was immune from suit under certain sections of the Government Code.

The trial court denied the motion for judgment on the pleadings. As pertinent here, the court found the action for damages was not barred by claim preclusion principles because it "[wa]s not based on the same claim as the mandamus action."

2. The CHRB's petition for writ of mandate

The CHRB petitioned for writ of mandate in this court, chiefly arguing the trial court erred by not applying claim preclusion principles to bar the civil action for damages.

Tentatively concluding the CHRB was correct because Lockwood's prior mandate petition and the later civil case sought to vindicate the same primary right, we issued an alternative writ ordering the trial court to either vacate the order denying the motion for judgment on the pleadings and enter a new order granting the motion, with or without leave to amend, or show cause why a writ ordering the court to do so should not issue. The trial court heard from the parties and elected the former alternative, granting the CHRB's motion for judgment on the pleadings but giving Lockwood leave to amend.

3. Lockwood's amended complaint and the CHRB's demurrer

Accepting the invitation to amend, Lockwood filed a first amended complaint seeking "loss of livelihood" damages on the theory that the CHRB had violated mandatory duties under Business and Professions Code sections 481 and 482, which respectively require the CHRB to develop criteria for evaluating (1) whether a crime relates to the duties and functions of a licensee and (2) whether a person sustaining a prior conviction has been rehabilitated such that the conviction should not be a basis for denying a license.[2] Lockwood alleged the CHRB had no

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[2] The version of Business and Professions Code section 481 that was operative when Lockwood's license was denied in 2013 provided that the CHRB (and other boards) "shall develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates." The then-operative version of section 482 provided the CHRB (and other boards)

such criteria and therefore exercised unbridled discretion, which violated due process principles. Lockwood further alleged he could not have claimed the denial harmed him until the CHRB actually issued him the license in July 2015, which meant his damages claims were not ripe at the time he filed the earlier administrative mandamus action.

The CHRB demurred to the amended complaint, again contending Lockwood's causes of action were barred by claim preclusion doctrine. The trial court agreed.[3]

The trial court found, without argument to the contrary, that the decision in Lockwood's earlier mandamus action was final, on the merits, and involved the same parties. The only contested issue was whether the mandamus action and the present damages action were based on the same cause of action. The trial court found they were because both actions sought relief

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"shall develop criteria to evaluate the rehabilitation of a person when: (a) Considering the denial of a license by the board under Section 480; or (b) Considering suspension or revocation of a license under Section 490." Both statutes have since been amended but remain substantively similar to the earlier language we have quoted.

[3] The trial court granted the CHRB's request for judicial notice as to the table of exhibits and decision on hearing on the petition for writ of mandate, as well as the alternative writ of mandate. The court denied the request for judicial notice of Lockwood's letter brief in the writ proceeding. The court also granted Lockwood's request for judicial notice of his "Supplemental Brief re: Alternative Writ" and the "Order Denying Motion for Judgment on the Pleadings," but it denied the request to the extent that it generally requested judicial notice be taken of the entire court file.

from the same harm—the denial of Lockwood's license based on the absence of mandatory criteria pursuant to Business and Professions Code sections 481 and 482. The court found the issuance of the license after the mandamus action did not provide a new basis for Lockwood's claims because the harm Lockwood suffered occurred when he was denied his license and the cause of the harm was the CHRB's failure to have established criteria in place. The court also noted the prior mandamus action settled issues that might have been raised and litigated there, and found Lockwood could have asserted his claims for damages in that action.

II. DISCUSSION

The primary right Lockwood seeks to vindicate in this action is at bottom the asserted right to not be deprived of a horse transport license because the CHRB failed to develop mandatory criteria regarding the issuance of licenses to individuals with prior criminal convictions. The same primary right was at issue in Lockwood's prior mandamus action. The CHRB and Lockwood were both parties to that prior action, which resulted in a final judgment on the merits, and Lockwood could have pled the claims he pursues here in that earlier action. In particular, the damages Lockwood seeks could have been sought along with mandamus relief—even if his damages were to a degree uncertain when he filed the mandamus petition and even though the CHRB had not yet issued him a license at the time. (It was the CHRB's denial of his application, not its later issuance of a new license, that injured Lockwood.) Lockwood's suit is therefore barred by claim preclusion principles and his efforts to avoid this conclusion, including a contention that a public policy exception

to the claim preclusion bar should apply, are unpersuasive. We shall therefore affirm the judgment of dismissal.

A. Standard of Review

We review de novo an order sustaining a demurrer without leave to amend. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 537.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6[ ].)" (*Yvanova*, *supra*, 62 Cal.4th at p. 924, fn. omitted.)

On demurrer, "a complaint may be read as if it included matters judicially noticed. [Citations.] Such matters may show the complaint fails to state a cause of action though its bare allegations do not disclose the defect." (*Lazzarone v. Bank of Am.* (1986) 181 Cal.App.3d 581, 590 (*Lazzarone*); see also Code Civ. Proc., § 430.30, subd. (a).) This principle allows a defendant to demur to a complaint on the grounds of claim preclusion so long as the defense is apparent on the face of the complaint, when read with judicially noticeable documents. (*Lazzarone*, *supra*, at p. 590.)

Lockwood acknowledges this principle in passing, but he nevertheless argues sustaining the demurrer was improper because claim preclusion was not apparent from the face of the operative complaint. Neither we nor the trial court are limited to the allegations in the complaint, however, because the CHRB requested the trial court take judicial notice of, among other

things, exhibits filed in support of the petition for writ of mandate previously filed in this court (including Lockwood's 2014 petition for writ of administrative mandamus); the trial court properly took judicial notice of the records; and the claim preclusion defense appears on the face of the complaint when read with the judicially noticed documents. The claim preclusion defense was properly considered on demurrer under these circumstances.

B. Claim Preclusion

The doctrine of claim preclusion "describes the preclusive effect of a final judgment on the merits." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) It "acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (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." (*Ibid.*) "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." (*Mycogen*, *supra*, at p. 897.)

C. Lockwood's Complaint Is Barred by Claim Preclusion

There is no dispute this action and the prior mandamus action involved the same parties. Nor is there any real dispute that the prior mandamus action resulted in a final judgment on

the merits.[4] Rather, the key issue is whether the current action and the mandamus action implicate the same primary right.

Lockwood asserts claim preclusion principles should not apply for a host of overlapping reasons. His contentions can be divided into three categories: (1) the prior mandamus action and the current damages matter involve different primary rights; (2) his damages claims were not litigated and could not have been litigated in the mandamus action; and (3) even if claim preclusion applies, a public policy exception should save his claims. None of the contentions is persuasive.

1. The mandamus action and this action involve the same primary right

California courts apply the primary rights theory to determine if two proceedings involve the same cause of action.

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[4] Lockwood argues for the first time in reply that there was no final judgment on the merits because the court in the mandamus action found the CHRB's review of Lockwood's license application was procedurally, rather than substantively, defective. The argument is raised too late (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1477) and, in any event, the case Lockwood relies on does not establish a final judgment on the merits was lacking in Lockwood's mandamus action. In Lockwood's cited case, *Boyd v. Freeman* (2017) 18 Cal.App.5th 847, the first judgment was not "on the merits" because the trial court in the first matter ruled primarily that the plaintiff's claims were time-barred under the applicable statute of limitations. (*Id.* at p. 857.) The mandamus court's determination here, by contrast, was on the merits of Lockwood's claim that the CHRB violated its duty to evaluate his license application in light of mandatory criteria.

(*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*).) A "primary right is simply the plaintiff's right to be free from the particular injury suffered" regardless of the theory on which liability is premised or the remedy sought. (*Mycogen, supra,* 28 Cal.4th at p. 904.) "'[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.'" (*Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692, 699 (*Atwell*); see also *Boeken*, *supra*, 48 Cal.4th at p. 798 [the harm suffered is the "determinative factor" under the primary rights theory].)

Lockwood's mandamus action and his action here involve the same wrong by the CHRB, the same injury to Lockwood, and thus the same primary right. Lockwood's prior mandamus action challenged the CHRB's denial of his application for a license, arguing the CHRB had prejudicially abused its discretion without proceeding in the manner required by Business and Professions Code sections 481 and 482, along with other statutes. In his operative complaint in this matter, Lockwood alleges the CHRB violated the Government Code because it did not have in place "criteria to determine substantial relationship of a criminal conviction to the duties and functions of a license pursuant to Business and Professions Code section 481" and "criteria to determine rehabilitation of a license pursuant to Business and Professions code section 482."

Obviously, the asserted wrong the CHRB perpetrated in both cases was denying him a license in the absence of criteria to guide CHRB decisions on whether to give weight to prior criminal

convictions and how to make determinations of rehabilitation from such convictions. The injury in both cases was Lockwood's loss of his license under those conditions, and thus, once the CHRB denied the license, Lockwood began incurring damages. The mandamus action sought to overturn the CHRB's refusal to renew his license without proper criteria in place, and his current action seeks damages because he was denied a license without those same proper criteria being in place. Though the remedy Lockwood seeks here is different from the one he sought in the mandate action, that is immaterial. (*Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 734 ["pursuing or adding a different remedy for the same injury does not create a new primary right"]; *Bullock v. Phillip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557 ["The plaintiff's indivisible primary right must be distinguished from both the legal theory on which the plaintiff seeks relief and the remedy sought"].) Both actions concern the same primary right: the right not to be improperly deprived of a license due to the CHRB's failure to promulgate mandatory criteria.

Faced with this straightforward analysis, Lockwood argues the mandamus action and the present suit do not, in fact, relate to the same primary right. The thrust of his argument is that the right he pursued in the mandamus action was procedural (i.e., the "right to be free from an exercise of illegal and random discretion in violation of procedural due process caused by the absence of mandatory criteria") while the right he is pursuing in the current action is substantive (i.e., the "right to be free from illegal governmental infringement on [his] property rights"). The distinction is without a difference under controlling case law because the alleged wrong is the same, namely, the deprivation of

a license for the identical unlawful reason. Stated conversely, the primary right is the same in both cases.

2. Lockwood's claims for damages could have been litigated in the mandamus action

Because Lockwood's claim for mandamus relief and his current claims for damages seek to vindicate the same primary right, he could and should have pled them in the same suit. Lockwood argues he was unable to do so in light of the timing of the mandamus action and because he contends damages were unavailable in that action. He is wrong on both counts.

a. the claims for damages need not have been actually litigated

Lockwood suggests claim preclusion does not apply because the mandamus judgment "did not determine the issue of licensure or rehabilitation" and, he says, that issue "not only had to be adjudicated in the prior action but [also] granted [in that action] in order to be res judicata in the later action." Settled law is to the contrary. Claim preclusion "not only bars issues actually litigated but also bars issues that *could have been* litigated, as long as the later-raised issues constitute the same cause of action involved in the prior proceeding." (*Atwell*, *supra*, 27 Cal.App.5th at p. 698; see also *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 [claim preclusion applies to "matters which were raised or could have been raised, on matters litigated or litigable"].)

Lockwood also relies on *Stark v. Coker* (1942) 20 Cal.2d 839, 843 for the proposition that "[a] judgment is not an adjudication as to matters which the court expressly refrains from determining." That principle has no application here, where

the trial court did not expressly refrain from determining whether Lockwood was entitled to damages as a result of the CHRB's improper denial of his license. Indeed, the facts of *Stark* only underscore its inapplicability. In *Stark*, the trustee under a deed of trust securing her loan to a corporation was unsuccessful in an action to set aside her reconveyance of the property embraced in the trust deed. The court found her husband, a plaintiff in the action, had no notice or knowledge of the reconveyance, and therefore expressly stated the judgment was "'without prejudice'" to his right to pursue any rights he might have in the property "'in another action.'" (*Id.* at p. 842.) No similar statement was made by the court in the mandamus action in this case.

Lockwood also argues the issue of licensure could not have been adjudicated in the mandamus action because Code of Civil Procedure section 1094.5, subdivision (f) prohibited the mandamus court from restricting the CHRB's discretion.[5] This

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[5] Code of Civil Procedure section 1094.5, subdivision (f) states that "[w]here the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent." (Code Civ. Proc., § 1094.5, subd. (f).)

Lockwood cites three cases that he thinks describe how the "procedure should have ensued." All three cases stand for some variation of the proposition that where a party does not receive a fair hearing in an administrative proceeding, the appropriate remedy is to order a rehearing. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1159 [trial court erred by reinstating

argument, too, is unpersuasive. The pertinent question is not whether the issue of *licensure* was litigated but, as discussed *infra*, whether Lockwood's *claims for damages* could have been litigated in the mandamus action.

b. the claims for damages could have been litigated at the time of the mandamus action

"[A]ll claims based on the same cause of action must be decided in a single suit . . . ." (*Mycogen, supra,* 28 Cal.4th at p. 897.) This includes claims for damages even if "'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. [The party] 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*.'" (*Id*. at p. 907.) Such claims for damages must be pled

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decision overturned by city council where plaintiff did not receive fair hearing; rehearing was the proper remedy]; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159-160 [where civil service board based decision to terminate patrolman in police department on evidence taken outside of the hearing, the trial court should have remanded for proper proceedings rather than reinstating plaintiff]; *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050 [denial of procedural due process that resulted in termination of doctor's hospital privileges required remand for further proceedings].) While these cases may serve as examples of how other administrative mandamus cases—with factually distinct scenarios—unfolded, they do not control our analysis here.

"even if they are still speculative at the time of the suit" and "'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.'" (*Ibid.*)

These principles articulated by our Supreme Court are applicable here. Though the full extent of Lockwood's damages may have been to some degree uncertain at the time he filed his mandamus petition, they nevertheless stemmed from the same injury for which he sought redress there. He was therefore bound to plead a claim for damages in that same action. (*Id.* at pp. 905-905 [damages for delay in implementation of specific performance were barred by claim preclusion because they had not been sought in initial action seeking specific performance of contract].)

Lockwood nevertheless argues his damages claims could not have been litigated in the mandamus action because the CHRB issued him a new license after judgment was entered and claim preclusion does not apply to events that occur after the original action. Lockwood is right that claim preclusion generally does not bar *claims* that arise after a complaint in an initial action is filed, and thus "may not apply when 'there are changed conditions and new facts which were not in existence at the time the action was filed upon which the prior judgment is based. [Citations.]' [Citation.]" (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 227.) But the principle does not apply here because when two actions "involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff . . . adds new facts supporting recovery." (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174.) The "new fact" that the CHRB issued Lockwood a

license after judgment was entered in the mandamus action would merely *support* a claim for damages that stems from the same primary right at issue in the mandamus action.

Lockwood cites *Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 489 for the proposition that a cause of action in a subsequent lawsuit related to events that occur after the prior judgment is not barred by claim preclusion. *Daar* makes no such sweeping statement and the case is factually inapposite. In *Daar*, the court addressed whether a prior determination that the court lacked jurisdiction over the defendant in a personal injury matter barred the litigation of a claim between that defendant and the attorney who had represented the defendant in the personal injury matter where this second action arose out of the attorney's representation of the defendant. (*Id.* at p. 490.) On those facts, claim preclusion did not apply. While the issue of jurisdiction was again at stake in the later litigation, the issue was informed by a different legal claim and facts not before the court in the prior action. The circumstances before us are not comparable.

Lockwood also asserts he could not have sought damages in the mandamus action because his claims for damages did not accrue until the CHRB issued him a license. Though it is not entirely clear, this argument appears to be grounded in authority that addresses when a claim accrues for purposes of a statute of limitations analysis. We need not engage in any "accrual" analysis to reject this argument. Lockwood was harmed by the CHRB's denial of his license and began suffering damages when it occurred. As discussed above, Lockwood could, and should, have pled his claims for damages in the mandamus action. (*Mycogen*, *supra*, 28 Cal.4th at p. 907.)

In another attempt to avoid the application of claim preclusion, Lockwood argues he needed to exhaust "administrative remedies" "[i]n order to maintain a civil action for damages." We fail to see how administrative exhaustion principles could have barred adjudication of his damages claims in the mandamus action: Lockwood had completed the underlying administrative proceeding before filing his mandamus petition in superior court.[6]

Lockwood's additional arguments that seek to avoid claim preclusion also fail. He contends he could not have claimed damages in the prior writ proceeding because he could not have argued the denial was a substantial factor in causing him harm—an element of his cause of action—until the CHRB later issued him a license. Even assuming Lockwood's damages were not completely certain when he filed the mandamus petition, that does not mean he could not (and should not) have sought damages in that mandamus proceeding. (*Mycogen*, *supra*, 28 Cal.4th at p. 907.) Lockwood also argues the CHRB "surely

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[6] Lockwood also argues the trial court erred by "refus[ing] to draw the obvious inference from the FAC . . . that res judicata, on demurrer, does not apply to later occurring issues which were not exhausted in the mandamus action." While the trial court was required to accept all of Lockwood's factual allegations as true, it was not required to "assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) Lockwood admits the trial court properly accepted the alleged fact that he received his license after the mandamus judgment. It was not required to accept his legal conclusion that his claims were not ripe or exhausted until after the CHRB issued him a license.

would have demurred" if he had brought a claim for consequential damages in the mandamus proceeding or before receiving his license. Arguments the CHRB might or might not have asserted in the prior action have no bearing on whether the claim could have been litigated in the prior action.

c. Lockwood could have sought the "consequential" damages he seeks here in the mandamus action

Damages are available to a successful applicant in an administrative mandamus action. Code of Civil Procedure section 1095 provides that, in a writ of mandamus action, "[i]f judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without delay." (Code Civ. Proc., § 1095.) In other words, "[i]f the judgment is otherwise correct, there can be no doubt of the propriety of thus awarding a money judgment in a *mandamus* proceeding where other grounds for the issuance of a writ of mandate exist." (*Adams v. Wolff* (1948) 84 Cal.App.2d 435, 439.) Indeed, a court presiding over a writ of mandate is not only empowered to award compensatory damages along with writ relief, it may even continue the matter and retain continuing jurisdiction in order to afford complete relief—including additional damages incurred by delay in compliance with the court's order. (See *Gonzales v. International Ass'n. of Machinists* (1963) 213 Cal.App.2d 817, 820-821.)

Lockwood nevertheless argues the damages he seeks here were unavailable to him in the mandamus action because, he

says, the only damages available in mandamus are those which are incidental to an agency's breach of a mandatory duty and are ministerial in nature. Lockwood relies in this respect on *Pomona Police Officers' Ass'n v. City of Pomona* (1997) 58 Cal.App.4th 578 (*Pomona Police*), but that is not what the case holds. Though *Pomona Police* states a traditional writ of mandate is a method of "'"compelling the performance of a legal, usually ministerial duty,"'" it does not state damages awarded in a mandamus action must similarly be ministerial in nature. (*Id.* at pp. 583-584.) Lockwood's attempt to limit the damages available in a mandamus action to "incidental" damages and to argue "consequential" damages are unavailable finds no support in precedent.

Lockwood also argues *Daugherty v. Board of Trustees* (1952) 111 Cal.App.2d 519 (*Daugherty*) requires us to reverse the order sustaining the demurrer on claim preclusion grounds. *Daugherty*, however, says little about the availability of damages in mandamus proceedings and the little it does say must yield to our Supreme Court's later holding in *Mycogen*. Moreover, even assuming *Daugherty* remains good law, it is factually inapposite. The plaintiff in *Daugherty*, a teacher who was a permanent employee at a school district, in fact sought to vindicate two separate primary rights—her right to be classified as a permanent employee and have her salary fixed, and her right to have back salary paid. (*Id.* at pp. 520-521.) Here, in contrast, Lockwood has only one right in play. His only claims for damages arise from the same injury he complained of in the mandamus action.

3. The public policy exception does not save Lockwood's claims

Lockwood's final contention is that even if claim preclusion applies, we should apply a public policy exception to save his claims because not doing so would be a manifest injustice. Pertinent authority does recognize a public policy exception in limited circumstances. (*People v. Barragan* (2004) 32 Cal.4th 236, 256 [recognizing "that public policy considerations may warrant an exception to the claim preclusion aspect of res judicata, at least where the issue is a question of law rather than of fact"].) Lockwood, however, fails to articulate why application of the claim preclusion doctrine here would result in a manifest injustice and we cannot fathom any reason why it would. That Lockwood failed to plead his claims for damages in the mandamus action and is thus precluded from seeking them in this action is not a manifest injustice; it is merely the consequence of long-settled claim preclusion principles. If the public policy exception were to apply here, where the facts indicate nothing more than an inability to bring unpled claims that could have been litigated in a prior action, the exception would swallow the rule. That is an unacceptable result.[7]

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[7] We find it largely unnecessary to discuss Justice Rubin's dissenting ruminations. As to his arguments regarding application of settled law regarding the primary rights doctrine, for instance, they are refuted by what we have already written. But with respect to his hedged position that claim preclusion principles should not apply at all in mandate proceedings, two things can be said. First, the authority he musters in support of that view has been persuasively discredited in later precedent. (See, e.g., *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1204-1205.) Second, even

DISPOSITION

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

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BAKER, J.

I concur:

KIM, J.

Lockwood in this appeal has not taken the extreme position Justice Rubin seems to favor. If the Legislature or our Supreme Court is going to take the law in an entirely new direction, it may be wise to wait for a case in which the parties have presented the issue for decision.

LOCKWOOD v. CALIFORNIA HORSE RACING BOARD

B291002

RUBIN, P. J. - DISSENTING

I respectfully dissent.

I agree with the majority that this case turns on the determination of whether the same primary right was at issue in both proceedings (Lockwood's prior petition for administrative mandate and the current civil litigation). I further agree with the majority's explanation of the doctrine. A primary right is the plaintiff's right to be free from the particular injury suffered, regardless of theory of liability or remedy sought. (Maj. Opn., *ante,* at p. 11.) My disagreement is with the application of the primary right doctrine to the present case.

The majority relies heavily on *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888 (*Mycogen*), where the first proceeding sought declaratory relief and specific performance of a contract, and the second sought damages for breach of the same contract. (*Id*. at p. 893.) The Supreme Court applied the primary rights analysis to hold that when multiple lawsuits are founded on the same single breach of contract, declaratory relief and specific performance, on the one hand, and damages, on the other, are only different remedies for the one breach of the contract. That is not quite our case, and in my view case law arising out of fact patterns much more analogous to the present appeal is stronger precedent. Unlike *Mycogen*, these cases involve writ proceedings and consider the unique aspects of that procedure. I discuss each below.

1. *Daugherty*

My analysis begins with *Daugherty v. Board of Trustees* (1952) 111 Cal.App.2d 519. Daugherty was a permanent teacher

who resigned, then returned to work. When her contract was subsequently not renewed, the school district took the position that she was a probationary teacher, who lacked the procedural rights of a permanent teacher. Daugherty first sought, and obtained, a writ of mandate directing that she be classified as permanent, reinstated, and have her salary fixed. (*Id*. at pp. 520-521.) Daugherty returned to work, but was not compensated for the portion of the school year prior to her reinstatement. She filed a second writ petition to compel payment of the lost salary. This, too, was successful, despite the school district's res judicata argument. (*Id*. at p. 521.) On appeal, the school district again attempted to pursue res judicata. The Court of Appeal rejected the argument.

To be sure, *Daugherty* relied on res judicata authority which did not expressly discuss the doctrine in terms of primary rights. (*Daugherty, supra,* 111 Cal.App.2d at p. 522, citing *Title Guarantee & Trust Co. v. Monson* (1938) 11 Cal.2d 621.) Nonetheless, *Daugherty* provides guidance in considering the primary right doctrine. Specifically, the school district argued that Code of Civil Procedure section 1095 rendered the question of damages an integral part of a mandamus proceeding.[8] The *Daugherty* court rejected the application of section 1095 to the case "because the breach of official duty which was the foundation of the first petition and writ was separate and different from the breach of duty which formed the basis for the

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[8] Code of Civil Procedure section 1095 provides that, in a mandamus proceeding, the petitioner may recover damages in addition to writ relief.

present petition and writ." (*Daugherty,* at p. 523.) As later explained in *Henderson v. Newport-Mesa United School Dist.* (2013) 214 Cal.App.4th 478, *Daugherty* made clear that a teacher's "right to be properly classified . . . qualifies as a distinct primary right, and thus . . . a school district's alleged violation of that right can be litigated separately from other claims of alleged wrongdoing by the District." (*Henderson,* at p. 500.)

2. *Craig*

Even if *Daugherty's* force is diminished because it failed to discuss the extant primary right doctrine, the next case in this line, *Craig v. County of L.A.* (1990) 221 Cal.App.3d 1294, is not so easily disposed.[9] Craig wanted to be a harbor patrol officer, but the Sheriff's Department repeatedly opposed his appointment, for reasons which the Civil Service Commission found to be impermissibly retaliatory. (*Id*. at pp. 1297-1298.) After two writ petitions (the Sheriff's Department's petition for administrative writ challenging the Commission's decision and Craig's petition for traditional writ directing compliance with the Commission's decision) were resolved in Craig's favor, the Department appealed, lost again, declined to comply, and was directed by the Court of Appeal to immediately accept Craig as a harbor patrol officer without training or a probationary period. (*Id*. at p. 1298.) When Craig then brought a civil action for damages for employment discrimination, intentional infliction of emotional distress and fraud, the Department successfully demurred on res judicata grounds. (*Id*. at p. 1299.) The Court of Appeal reversed. Applying the primary right theory, it concluded, "the primary

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[9] The res judicata/collateral estoppel primary right doctrine first appeared in *McKee v. Dodd* (1908) 152 Cal 637, 641.

right in the mandate actions involved the right to be employed as a harbor patrol officer. The later action to recover damages because of the denial of that right involves a different primary right." (*Id*. at pp. 1301-1302 [noting *Daugherty* is illustrative].)

3. *Daugherty and Craig Compel a Finding that Lockwood's Writ Proceeding and his Civil Litigation Involve Different Primary Rights*

Taken together, *Daugherty* and *Craig* establish that the right to be employed in a particular job or classification is a single primary right, while the right to recover damages for denial of the job or classification is a second primary right. Lockwood's right to a horse transport license is a single primary right; his right to recover damages after the Board reinstated his license is a different primary right.

In Lockwood's writ proceeding, he did not seek (let alone obtain) reinstatement of his horse transport license; he challenged only its improper denial. The trial court could not have compelled the issuance of a license in the writ proceedings because the issuance of a license involved a discretionary act on behalf of the Board, far beyond the question of whether Lockwood's criminal conviction was an automatic bar to licensure.[10] I believe that makes his case even more compelling

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[10] Code of Civil Procedure section 1094.5, subdivision (f) provides:

"The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, *but the*

than *Daugherty* and *Craig*. If two different primary rights are at issue when a writ proceeding compels placement in a job classification and subsequently the plaintiff seeks damages for the lost salary, two different primary rights are certainly at issue when, in the writ proceeding, the plaintiff sought only a determination that a license denial was improper, and did not then seek to compel issuance of the license.

In this vein, Lockwood makes a slightly different argument which I find has some merit: he could not have known the amount of his damages until he was reinstated. In other words, his claim for damages was not yet ripe, and would not become ripe even if he obtained the writ relief he sought. The majority correctly points out that claims can be pursued even if a plaintiff is not able to determine damages with precision. But because the trial court in the writ proceeding was not permitted to order licensure (Code of Civ. Proc., § 1094.5, subd. (f)), a very realistic outcome was that the board would continue to deny Lockwood a license as a discretionary act. In that situation he would have had no damages at all. If the license denial was proper – even though initially for the wrong reason – Lockwood would have suffered no monetary harm.

In my view, the primary right to not have one's license denied for improper reasons is different from the primary right to be compensated for losses incurred when the license is subsequently granted.

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judgment shall not limit or control in any way the discretion legally vested in the respondent." (Italics added.)

4. *Hi-Desert Does Not Undermine this Analysis*

Daugherty and *Craig* were distinguished in *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, but our case is much closer to the former than the latter. *Hi-Desert* involved hospitals who first successfully invalidated (in mandate) a statute limiting their right to Medi-Cal reimbursement, then (through an impressively confusing set of procedures) sought a re-evaluation of their reimbursement calculation in light of the invalidation of the statute. While this later attempt was found to be barred by res judicata, the procedural morass suggests that *Hi-Desert* is *sui generis*.

The proceedings began with a traditional writ petition by which the hospitals challenged the statute as invalid. They lost and filed an appeal; those proceedings were referred to as *Mission I*. (*Hi-Desert, supra,* 239 Cal.App.4th at p. 721.)

While *Mission I* was pending, the Department of Health Care Services audited the hospitals' reimbursement figures for fiscal year 2004-2005, and the hospitals filed administrative actions challenging those reports as improperly limiting their reimbursement based on the statute they believed to be invalid. However, the hospitals advised the administrative law judges that the validity of the statute would be determined in the *Mission I* appeal, and asked to hold their administrative challenges in abeyance; the ALJs agreed. (*Hi-Desert, supra,* 239 Cal.App.4th at pp. 721-722.)

The *Mission I* appeal was then resolved in favor of the hospitals, invalidating the statute and prohibiting the Department from using it in fiscal year 2004-2005. (*Hi-Desert, supra,* 239 Cal.App.4th at p. 722.) At this point, the hospitals could have returned to the ALJs and obtained recalculation of

their reimbursement amounts for 2004-2005. (*Id*. at p. 735.) They did not do so.

Instead, on remand from the Court of Appeal in *Mission I*, the trial court issued a writ of mandate prohibiting the Department from using the illegal statute in connection with 2004-2005 reimbursement. The parties disputed whether this was retroactive; the hospitals won the argument, and obtained a trial court order that the Department recalculate reimbursements for fiscal year 2004-2005. (*Hi-Desert, supra,* 239 Cal.App.4th at p. 722.) The Department appealed, in a proceeding known as *Mission II*. (*Ibid.*) The *Mission II* appeal was resolved in favor of the Department, on the basis that hospitals had sought only declaratory and mandamus relief in their initial writ petition, not damages. As such, the trial court had been without jurisdiction to direct recalculation and reimbursement. (*Id*. at p. 723.) The Department then obtained dismissal of the administrative appeals, on the basis of res judicata, which ultimately led to the *Hi-Desert* opinion.

The *Hi-Desert* court held that the administrative actions were barred by res judicata. "As recognized in *Mission II*, the hospitals could have sought monetary damages in their original *Mission I* petition. They did not do so. Pursuant to the doctrine of res judicata and related policy considerations, they cannot do so now." (*Hi-Desert, supra,* 239 Cal.App.4th at p. 731.) While this language superficially suggests that the failure to seek damages in a writ petition constitutes a bar to ever seeking those damages, there is more to *Hi-Desert*'s rationale. In fact, *Hi-Desert* recognizes that the hospitals' fatal error was *not* in failing to seek damages in the original writ petition, but, upon successfully obtaining the writ in *Mission I*, choosing to belatedly seek those

damages on remand in the writ proceeding, rather than returning to the administrative appeals for them. "[A]fter their victory in *Mission I*, the hospitals' litigation strategies went astray. Once they prevailed in *Mission I*, the hospitals should have returned to the ALJs and asked that their administrative appeals recommence in light of the holding in *Mission I*. Then, if they did not obtain the monetary relief that they believed they were entitled to, they could have filed a petition for writ of mandate challenging each ALJ's decision." (*Id.* at p. 735.) It was the intervening Court of Appeal ruling in *Mission II* – holding that the hospitals could not receive reimbursement because they had not sought it in that action – which caused the administrative claims to merge into the writ litigation and defeat any right to further recovery. (*Id.* at pp. 734-735.)

Thus, when the hospitals attempted to rely on *Daugherty* and *Craig*, the *Hi-Desert* court distinguished them as arising in the different factual context of employment, and not having "an intervening Court of Appeal decision resolving the primary right at stake, like we have in this case (*Mission II*)." (*Hi-Desert, supra,* 239 Cal.App.4th at p. 736, fn. 11.)

In my view, the effort by the *Hi-Desert* court to distinguish *Daugherty* and *Craig* does not transfer to this case. Lockwood's license situation is much more akin to one of employment than to hospitals seeking Medi-Cal reimbursement. More importantly, though, is that there is no intervening Court of Appeal decision. Lockwood never belatedly sought damages in his writ proceeding as the hospitals did in *Hi-Desert*.

The fact remains that, in *Hi-Desert*, if the hospitals had simply obtained invalidation of the statute via writ (in *Mission I*) and then returned to the administrative proceedings to obtain

reimbursement, there would have been no res judicata bar. This is, in effect, what Lockwood has done.

5. *The Majority's Application of Primary Rights*

A primary right is the right to be free from the particular injury suffered. (*Mycogen, supra,* 28 Cal. 4th at p. 904.) As discussed above, I believe Lockwood's earlier administrative writ petition implicates one primary right – the right to not have his license renewal improperly denied – and the present lawsuit implicates a second – the right to be compensated for the period during which he was deprived of his license.

In its effort to uphold the bar of res judicata in this case, the majority states the primary right at issue in this action is "the asserted right to not be deprived of a horse transport license because the CHRB failed to develop mandatory criteria regarding the issuance of licenses to individuals with prior criminal convictions." (Maj. Opn. at p. 7.) I agree that this is a reasonable characterization of the right at issue in the mandamus proceeding, but disagree that it characterizes the right in the present civil action. Lockwood's claim for damages has nothing to do with the "right to not be deprived of a horse transport license"; Lockwood has now been awarded a horse transport license. He seeks a remedy only for CHRB's temporary refusal to allow him to pursue his chosen profession.

6. *A Comment on Lockwood's Public Policy Argument*

Lockwood's final argument in his opening brief – one repeated in his reply brief and at oral argument – was that this court should refrain from applying res judicata because of the so-called "public policy exception." The majority concedes the existence, although not the applicability, of a public policy

exception to the application of claim preclusion. (Maj. Opn. at p. 21.)

I share the majority's unwillingness to rest a decision in this case on the public policy exception, as Lockwood has not made a compelling showing of its application. But I am nonetheless concerned about the broader relationship among writ proceedings, subsequent damages actions, and primary rights. That was the setting presented in *Dougherty*, *Craig*, and *Hi-Desert*, but which was not at issue in the Supreme Court's decision in *Mycogen*. Is there something unique about writ proceedings that suggests that, although damages may be recoverable in some situations (Code Civ. Proc., § 1095), the traditional rules of primary rights should not routinely or inflexibly be applied in those proceedings?

There may be. A proceeding in mandate is a "special proceeding of a civil nature" (found in Part 3 of the Code of Civil Procedure, as to be distinguished from Part 2 governing "civil actions"). While petitioners for writs of administrative mandate may seek damages (Code Civ. Proc., § 1095), they may only do so because of this statutory authorization. As to the writ proceeding itself, the court can only command the administrative agency to set aside the challenged order, and reconsider it. (Code Civ. Proc., § 1094.5, subd. (f).)

The limited nature of an administrative writ proceeding is demonstrated by this very case. Lockwood challenged one basis on which the CHRB refused to renew his license. The court agreed that his challenge had validity, and directed revocation and reconsideration of the license refusal. That is all. The majority seems to be saying that Lockwood should have: (1) filed a claim under the Government Claims Act (Gov. Code, §§ 810, et

seq.), seeking compensation (in an unknown amount) for the (not yet established as improper) refusal to renew his license; (2) obtained denial of that government claim (because there was no legal basis for damages at that time); (3) filed his writ petition and also sought damages under Code of Civil Procedure section 1095; (4) obtained the writ (as he did), but no damages could have been awarded because he still had no license; (5) waited for the CHRB to hold further proceedings or voluntarily issue him a license; and (6) somehow argue that he *now* had a right to damages – and defeat what would surely be an argument that his claim for damages was barred by res judicata, due to the judgment denying them in the writ proceedings (as in *Hi-Desert*). This cannot be what the law requires.

While I believe proper resolution of the primary rights analysis favors Lockwood, the Legislature may wish to consider whether the statutory limitations on claim and issue preclusion principles in declaratory relief actions should apply equally to mandamus proceedings. (See Code Civ. Proc., § 1062 ["The remedies provided by this chapter [declaratory relief] 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*." [Italics added.]] See also *Mycogen, supra,* 28 Cal.App.4th at p. 903 [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."].)

Alternatively, perhaps now may be the time for our Supreme Court to tackle the issue that was not present in

Mycogen: the relationship between res judicata and writ of mandamus. The cases cited in this dissent and in the majority show at a minimum that res judicata does not always mesh nicely with a writ of mandamus, and courts appear to apply the doctrine inconsistently.

Mata v. City of Los Angeles (1993) 20 Cal.App.4th 141, 147, for example, concluded that a police officer who prevailed in a writ of mandate reinstatement action, could subsequently pursue a civil rights action for compensatory damages. *Mata* appears to rest its decision at least in part on the notion that a writ proceeding is not a civil action at all but a special proceeding. As I have observed this is true, but the *Mata* court's observation about the organization of the Code of Civil Procedure appears to have little significance on whether res judicata principles apply to mandamus actions. Division Three of this court has rejected such a broad suggestion in a case that did not involve damages (see *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1204-1205 [denial of writ in first case precludes relitigation of the writ in second case notwithstanding change in law]), and the distinction drawn by *Mata* seems at odds with Code of Civil Procedure, section 1098 which generally gives res judicata effect to special proceedings.

My comments about future legislation and further Supreme Court review of this issue aside, I would reverse the order sustaining the demurrer, and allow Lockwood to pursue his claim for damages.

RUBIN, P. J.