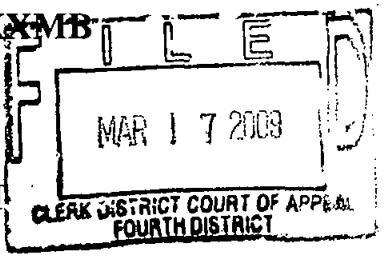
ORIGINAL

IN THE DISTRICT COURT OF APPEAL
FOURTH APPELLATE DIVISION

CASE NO. 4D08-4057
L.T. CASE NO. 502006CA005626XXXXMB



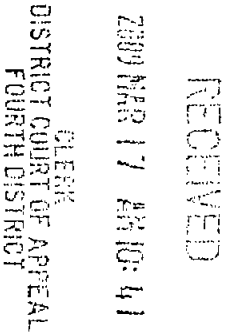
ALAN I. KARTEN, TRUSTEE
of the ALAN I. KARTEN TRUST
U/A DTD 1/5/85

Appellant,

vs.

ROBERT I. WOLTIN and CARL KARMIN

Appellees.



APPELLANT'S REPLY BRIEF

LAW OFFICES OF
NORMAN MALINSKI, P.A.
2875 Northeast 191st Street
Suite 508
Aventura, Florida 33180
Telephone: (305) 937-4242

CERTIFICATE OF INTERESTED PERSONS

Counsel for Plaintiff/Appellant, ALAN I. KARTEN, Trustee, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Alan I. Karten
   (Plaintiff/Appellant)

2. Norman Malinski, Esquire
   (Counsel for Plaintiff/Appellant)

3. James K. Pedley, Esquire
   (Counsel for Defendants/Appellees)

4. The Honorable Diana Lewis
   (Circuit Court Trial Judge)

5. Larry M. Mesches, Esquire
   (Counsel for Defendants)

6. Robert I. Woltin
   (Defendant/Appellee)

7. Carl Karmin
   (Defendant/Appellee)

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ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE PLAINTIFF=S COMPLAINT COULD ONLY PROPERLY PROCEED AS A SHAREHOLDERS DERIVATIVE ACTION

The essence of the Appellees argument is that the Appellant "seeks to change the law in the State of Florida" Appellant does not seek to change the law Appellant seeks to apply the law correctly pursuant to the facts of the case.

It is already well established that the tort of breach of a fiduciary duty is available to Appellant.

First, Appellants right to sue the Appellees for breaching their duty owed to Appellant does not belong to the corporation. There are two separate duties owed. One to the corporation and one to the Appellant.

Second, a shareholder can sue individually for a tort committed against him or for a breach of contract. Could an individual not sue for battery by a another shareholder or negligence?

Third, the exception allowing a shareholder to sue under these circumstances has been adopted, with approval, by the Third District Court of Appeals: "Where the wrongful acts are not only wrongs against the corporation but are also

violations by the wrongdoer of a duty arising from contract **or otherwise**, and owing directly to the shareholders, individual shareholders can sue in their own right." *Harrington v. Batchelor,* 781 So.2d 1133 (Fla. 3DCA 2001) citing with approval 128 *William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5911, at 458 (perm ed., rev. vol. 2000; American Law Institute,* Principles of Corporate Governance § 7.01 & cmt. F. (1994).

Most important, the court in *Harrinton, supra,* **specifically cited, with approval, § 7.01 of the American Law Institute, the same provision Appellant, in his brief, ask this court to adopt when determining whether an action may be maintained as a direct action.** See, Appellant's initial brief at page 16.

When it comes to a closely held corporation the analysis favors a direct action.

In the context of closely held corporations, the American Law Institute (ALI), as well as most courts, has promulgated a different approach.

'the court in its discretion may treat an action raising a derivative claim as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery if it finds that to do so will not (I) unfairly expose the corporation to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution

of the recovery among all interested parties.@ A.L.I. Principles of Corporate Governance: Analysis and Recommendations Sec. 7.01(d).

This exception has been adopted by a number of courts and has, by virtue of the fact that Florida allows direct actions, been adopted by Florida. See, *Harrington, supra.*

Applying the ALI Standard to this case, there is no rational basis to treat the lawsuit as a derivative action and the result would be contrary to the underlying policy and unjust.

1) There cannot be a multiplicity of lawsuits by shareholders because there is only a single shareholder (the plaintiff) who was damaged. The two other shareholders are defendants and are the wrongdoers;

2) there are no corporate creditors;

3) All of the shareholders are a party to the suit; and

4) the injured shareholder cannot be adequately compensated for the breach of fiduciary duty by the wrongdoers, since awarding damages to the corporation would amount to returning the money to the parties who stole it to begin with.

POINT II

WHETHER THE APPELLEES HAVE WAIVED THE ISSUE OF RES JUDICATA AND IF, NOT, WHETHER THE APPELLEES HAVE FAILED TO MEET THEIR BURDEN THAT RES JUDICATA APPLIES IN THE INSTANT APPEAL

The appellees contend, for the first time in their answer brief, that the instant appeal is barred by the doctrine of *res judicata.* Their contention is without merit.

The Appellees are seeking to raise, for the first time on appeal, the affirmative defense of *res judicata* which the appellees have waived. *Res Judicata* is an affirmative defense that must be plead or is waived. *Tesher & Tesher P.A. v. Cook,* 386 So.2d 1305 (Fla. 4 DCA 1980); *Hudson v. Keene Corporation,* 445 So.2d 1151 (Fla. 1 DCA 1984) citing *Variety Children's Hospital v. Perkins,* 445 So.2d 1010 (Fla. 1983). A party relying on a former judgment as res judicata of an issue must plead and prove the judgment. The mere reference to a prior controversy is insufficient to raise the res judicata issue. Betts v. Betts, 63 So.2d 302 (Fla.1953);Thomas v. Ashley, 170 So.2d 332 (Fla. 2d DCA 1964); McClean v. *McClean*, 460 So.2d 1031 (Fla. 2 DCA 1985); and *Moorhead v. Moorehead,* 31 So.2d 867 (Fla. 1947). Florida Rule of Civil Procedure 1.110 (d) "a party shall set forth affirmatively... estoppel...res judicata....." As stated in the Appellees brief (R91-93) the Appellees attempted to raise the affirmative defense of *res judicata*

but legally failed to sufficiently plead said defense and therefore waived the defense. The Appellees' stated: "Res judicata, judicial estoppel and/or doctrine of issue preclusion, collateral estoppel and/or prohibition against splitting causes of action by virtue of the actions raised which could have been raised in Palm Beach Case No. 502002-CA007004XXX0CAF and/or the final judgment entered by the court in that action".

The "affirmative defense" attempted to be raised by the Appellees was nothing more than a legally insufficient reference to a prior controversy. The pleading failed to allege any of the elements of *res judicata,* therefore the issue has been waived in the trial court and on appeal.

Assuming, *arguendo,* that the Appellees have not waived the defense of *res judicata* the prior lawsuit is not *res judicata* to the instant lawsuit

The instant appeal is from the granting of a summary final judgment, the trial court having found that the Appellant did not state a cause of action for the tort of breach of a fiduciary duty by Appellees Karmin and Woltin. The prior lawsuit was not based upon the ***same cause of action.*** The prior lawsuit, to which the Appellees refer, was founded upon a cause of action for an accounting and for statutory dissolution of a corporation, i.e. 201 East Atlantic Investments, Inc. of

which there were three shareholders, two of who were the Defendants/tortfeasors.

Although the appellees state that the prior litigation was for the tort of breach of a fiduciary duty by Woltin and Karmin, it was not. (page 4 of the answer brief. The Trial judge, in fact, in the corporate dissolution action ***refused*** to consider any argument regarding breach of a fiduciary duty as it related to the corporate dissolution case specifically stating that it was not plead. (See, transcript dated June 21, 2006 pages 180-181 which is part of the record on appeal in 4D06-4334). The court also rejected the contention that dissolution of a corporation action necessarily recognizes breach of a fiduciary duty. (at page 191 of the June 21, 2006 transcript.

In order to raise res judicata there must be: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the person for or against whom the claim is made. *Seaboard Coast Line Railroad Company v. Industrial Contracting Company, Inc.*, 260 So.2d 860 (Fla. 4th DCA 1972).

The first lawsuit sought dissolution of the corporation, not a party to the instant lawsuit and for an accounting of the corporations activities. The instant lawsuit does not involve the corporation and seeks damages for a tort committed by Woltin and Karmin. There is no identity in the thing sued for or identity in the

cause of action. Therefore, the Appellees argument must fail. See, *Gold v. Bankier,* 840 So.2d 395 (Fla.4 DCA 2003) (The facts required to maintain both lawsuits must be identical to have identity of the causes of action). The required showing for statutory dissolution of a corporation is not identical to those required to maintain a breach of a fiduciary duty tort action.

The fact that two causes of action may in fact be predicated on the same set of facts does not afford a sufficient test of the identity of the cause of action. Separate causes of action may arise out of the same incident or occurrences. *Mathis v. Board of Public Institution for Bay County,* 195 So.2d 140 (Fla. 1940); *Shearn v. Orlando Funeral Homes, Inc.,* 88 So.2d 591 (Fla. 1956).

In the instant cause there is no identity of the thing sued for. Where the relief sought in a later action is not identical to the relief sought in the previous action the prior action is not *res judicata* even if there is an identity of cause of action and parties. *Donahue v. Davis,* 60 So.2d 163 (Fla. 1953); *Accardi v.Hillsboro Shores Imp Ass'n, Inc.,* 944 So.2d 1008 (Fla.4 DCA 2005). For example, when a suit is founded on tort and the second suit on contract, the essence of the thing sued for is essentially different even if it arises from the same factual situation. *Seaboard Coast Line R. Co. v. Industrial Contracting Co.,* 260 So.2d 860 (Fla. 4 DCA 1972).

The same is true where one suit was in equity and the other action at law seeking damages. *Fell v. Jonas,* 183 So.2d 135 (Fla. 3 DCA 1966).

Successive appeals ***in the same case*** may involve *res judicata* because the same suit, not a different one is involved. *Florida Department of Transportation v. Juliano,* 801 So.2d 101 (Fla. 2001). The Appellees argument fails because this is not a successive appeal in the same case.

Appellees are also incorrect that the doctrine of law of the case applies. Law of the case cannot apply were the prior appeal resulted in a *per curium* opinion. The doctrine is limited to rulings on questions of law actually presented and considered on a former appeal. *Julianio, supra.* Further a *per curium* opinion has no precedential value. See, *Department of Legal Affairs, infra.*

Appellees cited three cases of authority for the proposition that the instant case is barred by *res judicata.* Those cases are not applicable to the case at bar.

The first case cited is *Florida Farm Bureau Mutual Insurance Company v. Florida Fruit and Vegetable Association,* 436 So.2d 1052 (Fla. 4 DCA 1983). *Florida Farm* involved an appeal by another plaintiff in privity with the original plaintiff suing on the identical cause of action. In the case the assignor filed the same lawsuit after the assignee had lost its case.

As such, the issue raised was *res judicata* as the parties were in privity and the cause of action was identical.

The second case cited is *Department of Legal Affairs v. Fifth District Court of Appeal,* 434 So.2d 310 (Fla. 1983). The case stands for the proposition that a *per curium* appellate court decision with no written opinion has no precedential value. the court noted that the reason(s) for a *per curiun* opinion are limitless. They did, however, noted that a *per curium* opinion may be relied on as a basis of *res judicata* in the same cause of action. The question, of course, is whether the four requite elements of *res judicata* were established.

Lastly the Appellees cite *McDaniel v. Musgrove,* 427 So.2d 1091 (Fla. 1 DCA 1983). The *McDaniel* court held that its prior *per curium* opinion in a prior case was *res judicata* as to an issue raised the prior lawsuit. Both lawsuits were, however, probate. In the first case the trial judge entered an order that "all controversies in this Estate and between all of the parties to this action are hereby settled ant the Will contest action filed by William Monroe McDaniel is hereby dismissed with prejudice". McDaniel then filed a second lawsuit concerning the same estate. The court correctly held that the appeal from the probate court in the first case was res judicata to the issues raised in the second lawsuit as they were barred.

The Appellees are incorrect that *res judicata* applies to the case at bar. There was no identity in the thing sued for and no identity of the cause of action, therefore reviewing the allegations *de novo res judicata* does not apply. Most important the Trial Court did not grant Summary Judgment in favor of the Appellees based upon *res judicata.* The Trial Court's gratuities referenced in the prior case was just that, a gratuitious reference. The Trial Court held that the cause of action alleged in each case could not be brought as the only cause of action available to the Appellant was a shareholder derivative action.

CONCLUSION

Based on the foregoing, KARTEN respectfully requests the Court to reverse the Order Granting Defendants Motion For Partial Summary Judgment on the Second Amended Complaint for Breach of Fiduciary Duty and to reverse the Final Judgment in this cause and remand the cause for trial.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Reply Brief is 14-Point times New Roman, in compliance with Florida Rules of Appellate Procedure 0.210.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 16th day of March, 2009 to: James K. Pedley, Esquire, 727 N.W. 3rd Avenue, Suite 301, Fort Lauderdale, Florida 33304.

LAW OFFICES OF
NORMAN MALINSKI, P.A.
2875 Northeast 191st Street.
Suite 508
Aventura, Florida 33180
Telephone: (305) 937-4242
E-Mail: nmpa@att.net

By: _____
Norman Malinski
Florida Bar ID# 182344