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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

Lei Ke

Petitioner,

v.

Drexel University,

Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a legal doctrine, the dual proceedings waiver is an important component of due process and equal protection of the laws and is there to ward off any potential abuse of the "could-have-litigated" theory under res judicata so that justice can be meted out evenhandedly not to subject litigants to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894). The question presented is:

   Did the Superior Court of Pennsylvania violate the due process and equal protection clauses of the Fourteenth Amendment by refusing to recognize the dual proceedings waiver?

2. By refusing to recognize the dual proceedings waiver, the Superior Court of Pennsylvania virtually regulated petitioner's right to contract and "legislated," thereby violating his immunity as a citizen from unreasonable government rules and regulations as protected by the Due Process Clause of the Fourteenth Amendment. "[A]ny legislative deviation from a contract's obligations, however minute, or apparently immaterial, violates the Constitution. *Green* v. *Biddle*, 8 Wheat. 1, 84 (1823). All the commentators, and all the adjudicated cases upon Constitutional Law agree[d] in th[is] fundamental propositio[n]." *Winter* v. *Jones*, 10 Ga. 190, 195 (1851)." *Sveen v. Melin*, 584 U.S. ___ (2018) (Dissent (Gorsuch)) (internal citations omitted). The question presented is:

   Did the Superior Court of Pennsylvania violate the Contract Clause of the United States Constitution by refusing to recognize the dual proceedings waiver?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lei Ke respectfully petitions for a writ of certiorari to review the "order" of the Superior Court of Pennsylvania of November 26, 2018 that affirmed the Philadelphia Court of Common Pleas' dismissal of his breach-of-contract case by refusing to recognize the dual proceedings waiver. Petitioner's petition for allowance of appeal was discretionarily denied by the Pennsylvania Supreme Court on August 20, 2019, and that, as a result, let the order by the Superior Court of Pennsylvania stand and virtually affirmed it. Pennsylvania law did not allow petitioner to move for reconsideration as he lacked "grounds which are solely confined to intervening circumstances of substantial or controlling effect." 210 Pa. Code Rule 1123.

OPINIONS BELOW

On December 18, 2017, the Philadelphia Court of Common Pleas rejected petitioner's meritorious summary judgment motion but granted Drexel's cross summary judgment motion by signing Drexel's proposed order (A-28), based on res judicata and—in particular—Drexel's argument that petitioner could have litigated his state action in federal court under *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super 1983)—although none of the state claims repeated any claims in federal court that focused on race discrimination, as affirmed by a prior judge (29a-34a).

On appeal, petitioner argued that his state and federal actions were parallel to each other for a full thirty-three (33) months, during which Drexel never objected to the dual proceedings. He insisted that, because of that, res judicata should not apply, but the Superior Court of Pennsylvania refused to recognize the dual proceedings and reached the same argument that petitioner could have litigated his state action in federal court. Its opinion is attached as A-1-A-26. Petitioner

timely petitioned for allowance of appeal with the Pennsylvania Supreme Court, which, however, denied the petition on August 20, 2019. (A-27.) [1]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

While res judicata is valid case law, so is the dual proceedings waiver. To implement res judicata while ignoring the dual proceedings waiver is a violation of the due process and equal protection of the laws clauses of the Fourteenth Amendment. In the instant case, because the Superior Court of Pennsylvania refused to let petitioner pursue his breach-of-contract case under res judicata—despite the previous proceedings spanning five-plus years and covering preliminary objections, discovery, summary judgment motions, mandatory settlement conference, and scheduled pretrial conference—that court also violated the Contract Clause of the United States Constitution as petitioner's contract right was impaired when the Superior Court of Pennsylvania refused to recognize the dual proceedings waiver to let him pursue his case.

INTRODUCTION

Although pro se, petitioner is not filing this petition frivolously as the subject matter of the petition speaks of its serious nature worthy of the certiorari. After all, because of the contract breach, petitioner's medical career was torpedoed, his years of life were wasted, and he would not be able to pay off the student loan debt of $180,000. Legally, this petition is significant because it deals with the relationship between the theory of the dual proceedings waiver and the due process and equal protection of the laws as provided by the Fourteenth Amendment.

[1] It never notified petitioner of the denial, and petitioner learned about it on September 25, 2019 when he searched the docket.

In state court, petitioner has been litigating his breach of contract case for five-plus years, and it was simply unfair to dismiss it under the convenient technicality of res judicata in total disregard of manifest injustice.

STATEMENT OF THE CASE

Petitioner, a Pennsylvania citizen, was admitted to Drexel University's medical school in 2007 on its 2006 Student Handbook, which would grandfather him against later editions of the handbook and which promised an MD degree if petitioner followed it to the letter. In his third year, petitioner was assigned, in September 2010, to do a six-week family medicine rotation at a private business in Long Branch, New Jersey. He "offended" the owner by asking him a medical question at a patient's request in front of that patient. To punish him for "challenging" his medical authority, the owner failed petitioner's rotation although he had only just returned from vacationing in Europe and although the belated evaluation written only two and a half business days earlier by a different doctor was shining. Drexel's medical school then further punished him by pulling him back to Philadelphia and issuing him a harsh letter stating that if he received just a "Marginal Unsatisfactory" grade, he would be dismissed from medical school—a serious violation of the terms and conditions of the 2006 Student Handbook.

On the last day of his successful six-week OB/GYN rotation in March 2011, he was ordered to take the written rotation test when he had had no time to prepare for it as he had had to work fourteen hours a day at Hahnemann Hospital (one 24-hour shift) and to spend two hours daily commuting and to prepare his own meals. He asked for a postponement of the test, but Drexel's medical school refused. He failed the multiple-choice test (also due to his vision disability that the medical school refused to accommodate). The 2006 Student Handbook said that he could take the test again, but the medical school crossed out his name from the list of 100 or so students all scheduled to retake the various failed written rotation tests and dismissed him when he was still

academically in "Good Standing." The 2006 Student Handbook also specifically stated that if a student failed three or more core rotations (not just a written rotation test) in the third year, he would only be required to repeat the year. Petitioner took only two rotations in the third year, so he should never have been dismissed under the 2006 Student Handbook. Thus, Drexel blatantly violated the 2006 Student Handbook, a contract of adhesion, and torpedoed his medical career after taking $180,000 in tuition and fees from him that he had borrowed through student loans.

In November 2011, petitioner sued Drexel's medical school for race discrimination in the United States District Court for Eastern Pennsylvania, and in June 2013 he filed his state action on various contract violations in the Philadelphia Court of Common Pleas, seeking reinstatement and reimbursement of his tuition and fees. Drexel never objected to the dual proceedings either in federal court or in state court. A trial judge ruled on Drexel's preliminary objections in state court on March 31, 2014 and ordered Drexel to answer petitioner's Complaint within twenty (20) days. (A-34.) Seeing that its preliminary objections had failed to have petitioner's case dismissed, again Drexel did not object to the dual proceedings but moved to stay the state action pending the resolution of the federal suit. While petitioner was unaware of its true intention, Drexel knew that if it won in federal court it could use res judicata as laid out in *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. 1983) to exclude petitioner's entire state action as res judicata in Pennsylvania would also extend to the claims that could have been litigated in federal court but have not been. That was Drexel's mischief, which petitioner was unaware of at the time.

Petitioner vehemently objected to the stay, arguing that the federal and state actions had different causes of action,[2] but a different judge signed Drexel's proposed order to stay on April

[2] The stay order itself was erroneous because: "This Court has repeatedly held that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.

4, 2014. (A-35.) Should the case have moved forward instead of being stayed, a different course of legal proceedings would have been charted. Drexel conceded to that and proudly called it a strategy. The federal court issued summary judgment in favor of Drexel on September 4, 2015. In the wake of that, Drexel moved to have the stay in state court lifted on November 4, 2015, again not objecting to the dual proceedings.

On October 25, 2017, Drexel filed its summary judgment motion, relying on lis pendens, res judicata, and collateral estoppel, although there was no pending case in federal court anymore. A different trial court judge granted the motion because of res judicata, and the Superior Court of Pennsylvania affirmed, emphasizing that "res judicata will bar subsequent claims that could have been litigated in the prior action, but which actually were not[.]" (A-13.) That was technically erroneous because petitioner's state action was not "subsequent claims" but claims that paralleled federal action for thirty-three (33) months and that had only state claims. The trial court judge signed the proposed order prepared by Drexel and dismissed petitioner's entire case on December 19, 2018 without any opinion[3] when, simultaneously, the same state court ordered settlement and pretrial conferences.

In his appeal to the Superior Court of Pennsylvania, petitioner argued that the dual proceedings waiver would have overcome the "could-have-litigated" theory under res judicata. Drexel was blindsided by petitioner's duel proceeding waiver argument and insisted, in its response to petitioner's opening brief, that it was petitioner's responsibility to object to

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McClellan v. Carland, 217 U. S. 268, 282 (1910); accord Doran v. Salem Inn, Inc., 422 U. S. 922, 928 (1975); Atlantic Coast Line R. Co., 398 U. S., at 295." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 292 (2005) (internal citations omitted).

[3] Compelled by the Superior Court of Pennsylvania, the trial judge wrote an opinion four months later, basically copying the language of Drexel's summary judgment brief and even repeating Drexel's irrelevant argument of lis pendens.

the dual proceedings, not Drexel's. Petitioner argued that that was ludicrous because petitioner was the party that initiated the dual proceedings.

The Superior Court of Pennsylvania refused to recognize the dual proceedings waiver and affirmed the trial court's order to dismiss on November 26, 2018, relying solely on the "could-have-litigated" theory under res judicata.[4] Petitioner filed a motion for reconsideration on December 6, 2018, providing the evidence that the dual proceedings in federal and state courts lasted thirty-three (33) months and that that fact would have defeated the "could-have-litigated" theory.

Seeing that the Superior Court of Pennsylvania did not recognize the dual proceedings waiver, Drexel swiftly changed its position and responded differently in its answer to petitioner's motion for reconsideration/argument and also in its answer to petitioner's petition for allowance of appeal in the Pennsylvania Supreme Court, no longer arguing that the objection to the dual proceedings waiver was petitioner's responsibility but now insisting that the dual proceedings waiver "has never been recognized" in Pennsylvania and that "there is no legally cognizable dual proceedings theory" in Pennsylvania.

Petitioner petitioned the Pennsylvania Supreme Court for allowance of appeal on February 21, 2019, with the first question being: "Whether the Superior Court erred by refusing to recognize the dual proceedings waiver doctrine." The Pennsylvania Supreme Court denied the petition without a word of opinion on August 20, 2019 to let the Superior Court of Pennsylvania's refusal to recognize the dual proceedings waiver stand.

REASONS FOR GRANTING THE WRIT

[4] It was really a single judge's opinion, but the other two judges apparently agreed because of the panel effects. "[T]he evidence of panel effects is overwhelming." Emerson H. Tiller, *The Law and Positive Political Theory of Panel Effects,* 44 J. Legal Stud. S35, S56 (2015).

A. The Superior Court Of Pennsylvania Violated The Due Process And Equal Protection Clauses Of The Fourteenth Amendment By Refusing To Recognize The Dual Proceedings Waiver.

1. If Res Judicata As Case Law Is Recognized, The Dual Proceedings Waiver Must Be Recognized To Safeguard Due Process.

While res judicata is valid case law and is available to litigants for a purpose, so does the dual proceedings waiver. The underpin of the American legal system is due process, as provided by the Fourteenth Amendment to the United States Constitution, which, in pertinent part, dictates in § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The same § 1 recognizes both procedural due process and substantive due process, with procedural due process aiming at guaranteeing a litigant's right to a fair, impartial hearing. Although it tolerates variances "appropriate to the nature of the case," procedural due process is nonetheless capable of identifying its core goals and requirements as "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Given this, mechanically applying res judicata to trump the dual proceedings waiver would be a blatant deprivation of constitutionally protected due process rights.

As a legal doctrine, the dual proceedings waiver is an important component of due process. To have a fair and impartial hearing, the waiver is there to ward off any potential abuse of the "could-have-litigated" theory under res judicata so that justice can be meted out evenhandedly not to subject litigants to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894).

The doctrine takes effect when a defendant does not object to but rather allows parallel legal actions to proceed in both federal and state courts in order to take advantage of the "could - have-litigated" theory under res judicata later to prejudice a plaintiff. In that regard, the Superior

Court of Pennsylvania seriously erred by refusing to recognize the dual proceedings waiver doctrine. That court acknowledges that "the only surviving claims against Drexel were for breach of contract, a violation of the UTPCPL, and concerted tortious conduct," (A-6), but nevertheless it ruled that petitioner could not litigate his state action anymore because the case law from *Day v. Volkswagenwerk Aktiengesellschaft,* 464 A.2d 1313 (Pa. Super 1983) holds that "res judicata will bar subsequent claims that could have been litigated in the prior action, but which actually were not[.]" (A-13.) Specifically, petitioner argued that the violation of various contracts such as the 2006 Student Handbook, Drexel's Code of Conduct, Drexel's Academic Policies, Drexel's medical school's Family Medicine Clerkship Manual, Drexel's medical school's clinical manuals, Drexel's Disability Policy, and Drexel's Official Grading Policy were raised as factual allegations in federal court but were never litigated there. Nonetheless, Drexel insisted in their summary judgment motion that technically petitioner could have litigated all those claims in federal court.

The Superior Court of Pennsylvania agrees with Drexel that such violations could have been litigated in federal court under *Day*[5] and therefore are precluded in state court, but those violations were only factual allegations, not claims, in federal court, and that was why the federal district court never adjudicated them. This clearly demonstrates that the Superior Court of Pennsylvania does not recognize the dual proceedings waiver under which petitioner has his constitutionally protected due process right to pursue his state claims such as "Breach of Contract under Pennsylvania Law" and a host of other contractual violations under that umbrella. Petitioner filed a motion for reconsideration/reargument, pointing out the fatal error the Superior Court of Pennsylvania had made. In response to the motion, Drexel changed gears. While it had fallaciously argued that it was petitioner's responsibility to object to the dual proceedings in its response to the

[5] Specifically, the Superior Court of Pennsylvania states, "[W]e **reiterate** *res judicata* also bars subsequent claims that could have been litigated in the prior action, but which actually were not[.]" (emphasis original). (A-20.)

opening brief, now it adopted the Superior Court of Pennsylvania's position and argued that the dual proceedings waiver doctrine "has never been recognized" in Pennsylvania and that "there is no legally cognizable dual proceedings theory" in Pennsylvania.

By denying petitioner's petition for allowance of appeal, the Pennsylvania Supreme Court let the ruling of the Superior Court of Pennsylvania stand and silently endorsed it in contravention of its own public policy, which is, as shown in *In Re Stevenson*, 40 A.3d 1212 (Pa. 2012), that rulings of lower federal courts are binding on Pennsylvania courts. That would mean that the holdings of federal circuit courts on dual proceedings waiver ought to be binding. As a result of that, this Court should assume the supervisory role to determine if the dual proceedings waiver ought to be implemented in Pennsylvania and thereby bring it on a par with the national standard with respect to the dual proceedings waiver to guarantee due process, as "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

2. The Superior Court Of Pennsylvania Conflicts With Federal Circuit Courts With Respect To The Dual Proceedings Waiver.

Petitioner's federal and state suits were parallel to each other for a full thirty-three (33) months, during which Drexel never objected even once. Both the federal and state courts were aware of the dual proceedings, and a state court judge once even compared the state court complaint with petitioner's Third Amended Complaint in federal court. In responding to petitioner's opening brief in the Superior Court of Pennsylvania, Drexel only irrelevantly argued that objecting to the dual proceedings was petitioner's responsibility, but later it changed that to a

new argument that the dual proceedings waiver "has never been recognized" in Pennsylvania and that "there is no legally cognizable dual proceedings theory" in Pennsylvania.

The Superior Court of Pennsylvania agreed with Drexel through acquiescence, but its position conflicts with federal circuit courts including the Third Circuit Court of Appeals that has jurisdiction over Pennsylvania. In that court, the case *Bradley v. Pittsburgh Bd. of Educ, 913 F.2d 1064*, 1072 (3d Cir. *1990*) deals with the same circumstances. Plaintiff Earl Bradley initiated a civil rights action in federal court to appeal the termination of his employment through state prescribed procedures while explicitly reserving his federal claim. Both the defendant and the state tribunal acquiesce in the dual proceedings, and the federal action is stayed pending the outcome of the state proceeding. However, when the stay is lifted, the district court granted defendant school officials' summary judgment motion and ruled that Bradley's federal claims could have been litigated in state court and therefore barred by claim preclusion. In character, that case is identical with petitioner's. In that case, the Third Circuit Court states:

> [T]he federal action is stayed pending the outcome of the state proceeding, the reservation of plaintiff's federal claims for federal adjudication must be recognized. Therefore, the district court erred in holding that those federal claims which could have been litigated in state court but which were not were barred by claim preclusion.

Bradley at 1072 (emphasis added). This is a significant situation that petitioner's case can be dovetailed into:

> [T[he [state] action is stayed [by Drexel] pending the outcome of the [federal] proceeding, the reservation of plaintiff's [state] claims for [state] adjudication must be recognized. Therefore, the [state] court erred in holding that those [state] claims which could have been litigated in [federal] court but which were not were barred by claim preclusion.

In the same case, the Third Circuit Court goes on to lay the legal ground:

> The comment to section 26(a)(1) explains that "[a] main purpose of the general rule [against claim splitting] is to protect the defendant from being

> harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim." Restatement (Second) of Judgments § 26(1)(a) comment a (1982). The comment also notes that "[t]he failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim." Id....
>
> Moreover, section 86 of the Restatement (Second) of Judgments makes clear that the exceptions described in section 26 apply to the effect of a state court judgment in a subsequent federal action. The commentary to the note on section 86 describes the reservation of federal rights with the acquiescence of the opposing party as an exception to the general rule that a plaintiff in state court is ordinarily obliged to assert both its federal and state claims in state court or face claim preclusion:
>
> There are ... situations where the complainant may withhold the federal claim in the state action. For example, the opposing party may acquiesce in the federal claim being split off and reserved.... If the federal claim is effectively withheld, the result is permission to split the claim. Compare § 26, Comment b. Restatement (Second) of Judgments § 86, comment f. Similar reasoning has been applied by other courts of appeals. See Calderon Rosado v. General Electric, 805 F.2d 1085 (1st Cir.1986) (relying on section 26(1)(a)); Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir.1979) (because [federal] court dismissed [state] claims to allow later adjudication, no preclusion).

Id. at 1072-73. (Emphasis added).

Applying this legal standard to petitioner's case, his state action was "withheld [stayed]" in April 2014 after a state trial judge ruled on Drexel's preliminary objections and ordered it to answer the complaint in 20 days and another judge granted Drexel's sudden motion to stay the state action pending the resolution of his federal suit. The order of April 7, 2014, drafted by Drexel, reads in the relevant part:

> It is FURTHER ORDERED that proceedings in the above-captioned matter are stayed until resolution of the case pending in the United States District Court for the Eastern District of Pennsylvania, *Lei Ke v. Drexel University, et al.,* Civil Action No. 11-CV-6708.

(A-35.) It is common knowledge that the stay on a case can be lifted to allow later adjudication. When Drexel requested the stay, it was giving petitioner the greenlight to split the

claim and telling petitioner that he could come back to the suit later as it was preserved. For a full thirty-three (33) months, the dual proceedings coexisted, and Drexel never voiced any objection to them either in state court or federal court and finally reaped the fruit of "victory" in federal court before turning around to preclude the state action with the federal "victory." Because it never objected to but allowed the dual proceedings for thirty-three (33) months, Drexel waived its later argument that petitioner could have sued his state action in federal court.

Earlier than *Bradley*, the Ninth Circuit Court of Appeals had already ruled on the issue of the dual proceedings waiver and had provided this ruling:

> [T]he failure of the defendant to object to the prosecution of dual proceedings while both proceedings are pending also constitutes waiver.

Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 328 (9th Cir.1995). This is a case about how Douglas and Sue Clements, former employees of the Airport Authority of Washoe County in Nevada, filed a federal action under § 1983 in April 1991, alleging that their terminations violated due process and was retaliation for their whistle-blowing activity. Earlier, Douglas and Sue had filed individual grievances about their terminations with the Airport Authority's civil service system and had, in October 1989, petitioned the Nevada state district court for a judicial review. While the petition was pending, the Clementses commenced their federal action in April 1991. In December 1991, the Nevada state district court issued its decision, which the Clementses appealed to the Nevada Supreme Court in January 1992 through a petition. While the petition was pending, the federal district court granted summary judgment to all defendants in August 1993, and the Clementses then appealed to the Ninth Circuit Court. In their response brief, the defendants, for the first time, raised claim preclusion, but the circuit court decided that the dual proceedings had gone on for years and the defendants never objected to them and that

therefore the defendants waived the claim prelusion because "[a]llowing the defendants to assert claim preclusion at this late stage would work a substantial injustice on the plaintiffs." *Id.* at 329.

That court also relies on Restatement (Second) Judgments § 26(1)(a) (1982) and goes on to expound:

> Restatement (Second) Judgments § 26(1)(a) (1982).[5] A main purpose behind the rule preventing claim splitting is "to protect the defendant from being harassed by repetitive actions based on the same claim." Restatement (Second) Judgments, § 26 comment a. Many commentators reason that where a defendant acquiesces in the split, the rule should be inapplicable. *Id.*[6] We agree.

Even earlier, the First Circuit Court had already provided the similar guidelines for a similar situation in *Calderon Rosado v. General Electric*, 805 F.2d 1085 (1st Cir.1986), a case that presents the question whether the dismissal of an action plaintiff brought in a court of the Commonwealth of Puerto Rico contending that he had been wrongfully discharged acted as a bar, under res judicata principles, to a subsequent ADEA action brought in the federal district court. The First Circuit Court determined it did not. The reason is that a recognized exception to the general rule prohibiting claim splitting is that if the parties agree, or a defendant implicitly assents, to a plaintiff splitting his claim, then a judgment in an earlier action that normally would bar the subsequent action will not. In *Rosado*, the dual proceedings about the same wrongful termination claim proceeded parallel to each other for about a year, during which the defendant did not complain that the plaintiff was splitting his cause of action and forcing defendant to defend in two forums. The defendant never objected to the dual proceedings and waited until the plaintiff voluntarily dismissed his state action before raising a claim splitting objection. The First Circuit Court determined that that was too late and vacated the district court's judgement to dismiss plaintiff's complaint.

Specifically, the appeals court opined:

> Pointing to the dismissal [by the district court] with prejudice which defendant argued acted as an adjudication on the merits, noting that res judicata principles bar litigation of not only theories actually litigated, but also those which could have been litigated in the first action, and contending that plaintiff could have litigated his ADEA action in the Commonwealth court along with his section 185a action, defendant argued plaintiff's ADEA action was now barred. The district court agreed and dismissed the complaint....
>
> Nevertheless, we conclude that the ADEA action is not barred. This is because a recognized exception to the general rule prohibiting claim splitting is that if the parties agree, or a defendant implicitly assents, to a plaintiff splitting his claim, then a judgment in an earlier action which normally would bar the subsequent action will not....
>
> That is what happened here. While the two actions were pending against defendant, defendant did not complain that plaintiff was splitting his cause of action and forcing defendant to defend in two forums. And when plaintiff made it clear that he was voluntarily dismissing his section 185a action only because he intended to litigate his discharge in federal court, defendant did not object at all to this manner of proceeding.

Id. at 1086-87. The Superior Court of Pennsylvania never addressed the relationship between the "could-have-litigated" theory under res judicate and the dual proceedings waiver, and therefore the instant case would be an excellent vehicle for this Court to pursue the analysis and provide a cogent guideline.[6]

3. A Refusal To Recognize The Dual Proceedings Waiver Violates The Equal Protection Of The Laws Clause Of The Fourteenth Amendment As Not Objecting To Dual Proceedings Is A Mischief.

When Drexel stayed the state action on April 4, 2014 after it had failed to have the entire state court case dismissed with its preliminary objections, it legally permitted dual proceedings and told petitioner to resume the action later. Thus, the reservation of petitioner's state claims for

[6] Petitioner believes that this Court has never reviewed the Dual Proceedings Waiver Doctrine before, although it has dealt with dual proceedings in a different environment, which is the Colorado River Doctrine where this Court allows a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

state adjudication must be recognized. *Bradley* at 1072. Obviously, Drexel had the intention to win in federal court and then to surprisingly double back to preclude petitioner's state action under *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316 (Pa. Super. 1983). That was deceptive conduct, exactly the kind of "mischief" the above federal circuit courts have forbidden.

Regarding the instant case, in both federal and state courts, the dual proceedings of petitioner's cases lasted from June 2013 when petitioner filed his state action through March 2016 when a Third Circuit Court single judge ruled on his appeal, totaling thirty-three (33) months during which Drexel never ever objected even once to the dual proceedings that arose out of the same set of factual allegations.

Indeed, for thirty-three (33) month, Drexel never opposed but allowed the continuance of the dual proceedings in both federal and state courts. Both the federal judge and the state court trial judge were aware of the dual proceedings.[7] As for Drexel, it remained silent on the dual proceedings, obviously enjoying the notion that it could win in federal court because the judge's wife was a doctor practicing on two of Drexel's medical school's campuses and could then use res judicata to dismiss petitioner's entire state case later.

That was at least acquiescence, and acquiescence is willful permission of the dual proceedings. *See Bradley* at 1072-73 (3d Cir. 1990) (defendant acquiesced to reservation of federal claim in state proceedings by failing to object); *Calderon Rosado v. General Electric,* 805 F.2d 1085 (1st Cir. 1986) (court refused to apply claim preclusion because defendant acquiesced to splitting of claim when he failed to object to the dual proceedings while the two actions were pending).

[7] State court judge Marlene Lachman referenced petitioner's federal Third Amended Complaint in her ruling on Drexel's preliminary objections on March 31, 2014 (A-30).

By willfully not objecting to the dual proceedings but harboring the notion of taking advantage of res judicata in case it wins in one court first, Drexel has resorted to mischief. Such behavior is chastised by federal case law as demonstrated in *Rotec Industries, Inc. v. Mitsubishi Corporation, et al.*, 348 F.3d 1116 (9th Cir. 2003):

> There is no reason to allow litigants to delay objecting to dual proceedings until they receive a favorable judgment in one proceeding... permitting such conduct could only encourage mischief.

Id. at 1116. Of course, for Drexel, it was never a delay issue. It never objected to the dual proceedings. Drexel indeed "receive[d] favorable judgment in" federal court, and it then returned to state court only trying to exclude petitioner's state action in its entirety under *Day v. Volkswagenwerk Aktiengesellschaft,* 464 A.2d 1313 (Pa. Super. 1983). That would be a violation of the equal protections of the laws on the part of the Superior Court of Pennsylvania, as an evenhanded court should respect both res judicata and the dual proceedings waiver. Advocating res judicata to favor Drexel at the expense of petitioner by refusing to recognize the dual proceedings waiver is disparate treatment by the Superior Court of Pennsylvania, and that disparate treatment has harmed petitioner and resulted in manifest injustice. Petitioner was given the hope that he could litigate his state action, but after five-plus years his case was suddenly thrown out of the court when the Superior Court of Pennsylvania refused to recognize the dual proceedings waiver. That shocked him and made him feel cheated as he knew he would never get reinstated to medical school or be able to pay off his student debt to the tune of $180,000.

B. The Superior Court Of Pennsylvania Negates The Contract Clause Of The United States Constitution By Refusing To Recognize The Dual Proceedings Waiver.

The Superior Court of Pennsylvania negated the Contract Clause of the United States Constitution, Article I, section 10, clause 1 by refusing to recognize the dual proceedings

waiver. The clause prohibits a State from passing any law that "impairs the obligation of contracts." It states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

One of the few limitations on state power embedded directly in the text of the Constitution, the Contract Clause was designed to preclude states from enacting laws that abridge contracts as "contrary to the first principles of the social compact, and to every principle of sound legislation." (*The Federalist* No. 44 (Madison).) As a citizen of the United States of America, petitioner had his inalienable right to pursue his contractual rights under the due process clause of the Fourteenth Amendment. He took student loans to put $180,000 as tuition and fees into Drexel's coffer. Paying the tuition and fees was his fulfilling the contract, which was the 2006 Student Handbook on which petitioner was admitted in 2007, but Drexel failed to fulfil its part of the contract. That contract specifically stated that if a student failed three or more core rotations (both rotations and rotation written tests) in the third year, they would only be required to repeat the year. Petitioner took only two rotations in the third year, so he should never have been dismissed under the 2006 Student Handbook. [8]

The handbook was a contract, which no party could unilaterally change, particularly after petitioner duly paid his tuition and fees, but after the second rotation, Drexel dismissed him to retaliate against him for "offending" a business partner who had failed petitioner's family medicine rotation just because he erroneously believed that petitioner had challenged his medical authority

[8] As a contract, the 2006 Student Handbook states: "If a student receives a "Marginal Unsatisfactory" or "Unsatisfactory" grade in 3 or more of *required* third year clerkships, (Family Medicine, Internal Medicine, OB/GYN, Pediatrics, Surgery, Psychiatry) the student will be required to repeat the entire third year curriculum."

by asking him a medical question in front of a patient on behalf of him. But the dismissal on that count would be a blatant violation of the 2006 Student Handbook. In state court, petitioner was ready to litigate it and also the violations of other contracts such as Drexel's Code of Conduct, Drexel's Academic Policies, Drexel Medicine's Family Medicine Clerkship Manual, Drexel Medicine's clinical manuals, Drexel's Disability Policy, and Drexel's Official Grading Policy, none of which were even addressed by federal court.

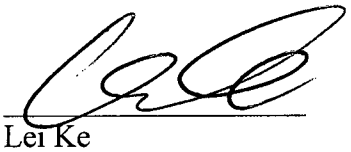
Petitioner was seeking justice through the legal system, but that system failed him when the Superior Court of Pennsylvania "impaired" the Contract Clause of the Constitution by not recognizing the dual proceedings waiver but only the res judicata with respect to the "could-have-litigated" theory. By refusing to recognize the dual proceedings waiver, the Superior Court of Pennsylvania virtually regulated petitioner's right to contract and "legislated," thereby violating his immunity as a citizen from unreasonable government rules and regulations as protected by the due process clause of the Fourteenth Amendment. *See Slaughter-house Cases*, 83 U.S. 36 (1873).[9] By regulating petitioner's right to contract, the Superior Court of Pennsylvania impaired the Contract Clause that imposes an absolute prohibition on state laws from impairing the obligations of contracts, as "any legislative deviation from a contract's obligations, however minute, or apparently immaterial, violates the Constitution. *Green* v. *Biddle*, 8 Wheat. 1, 84 (1823). All the commentators, and all the adjudicated cases upon Constitutional Law agree[d] in th[is] fundamental propositio[n]." *Winter* v. *Jones*, 10 Ga. 190, 195 (1851)." *Sveen v. Melin*, 584 U.S. ___ (2018) (Dissent (Gorsuch)) (internal citations omitted).

CONCLUSION

[9] This is the first indication that the United States Supreme Court might be sympathetic to such a right, as found in the dissents by Joseph Bradley and Stephen Field. Both dissents argued that the Fourteenth Amendment protects the right to pursue an occupation free from unreasonable government interference. By the same token, petitioner had his inalienable right to litigate a meritorious breach of contract claim from any unreasonable state court's interference.

For the foregoing reasons, petitioner respectfully requests this Court to invite Drexel to respond to this petition and to issue a writ of certiorari to the Pennsylvania Supreme Court.

Respectfully submitted,



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