Supreme Court No. S240918

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Rana Samara,
Plaintiff and Appellant,

v.

Haitham Matar D.D.S.
Petitioner, Respondent and Defendant.

After a Decision Certified for Publication by the Court of Appeal
Second Appellate District, Division Seven, Case No. B265752
LOS ANGELES SUPERIOR COURT – NORTH CENTRAL
Case No. EC056720
The Honorable William D. Stewart, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED FOR REVIEW

1. Is Plaintiff's/Appellant's derivative liability action against Defendant/Petitioner based upon the negligence of Petitioner's alleged agent, Dr. Nahigian, who was found not liable by the trial court in a previous summary judgment motion and affirmed on appeal, barred by the doctrines of claim preclusion and/or issue preclusion?
2. Does Article VI, section 14 of the California Constitution require appellate courts, including this Court, to address in writing their reasons for affirming a judgment as to every ground asserted on appeal by Appellant, even if it is unnecessary for affirmance, to give finality to those grounds not necessary to address?
3. If the Court of Appeal opinion is correct as to the direct negligence of Petitioner, arguendo, did it lose jurisdiction to issue its opinion on the claim preclusion and issue preclusion issues when it ruled in such a way that the "judgement" was no longer an appealable order?
4. Should the Court of Appeal have granted Petitioner leave to file Supplemental Briefing pursuant to Government Code, section 68081 because the Court of Appeal decision was based upon grounds not addressed in any of the briefing?

II. INTRODUCTION AND STATEMENT OF THE CASE

This is a dental malpractice action filed by Plaintiff (Samara) against two dentists, an oral surgeon (Nahigian) and a general dentist (Petitioner) in one complaint alleged as one cause of action. Plaintiff alleged Nahigian negligently performed surgery causing Plaintiff injury. Plaintiff alleged Petitioner was Nahigian's agent and

employee and did the operation in the course and scope of his employment with Petitioner. [1CT:66]

Nahigian filed a motion for summary judgment against Plaintiff arguing her action against Nahigian was barred by the statute of limitation and that Nahigian as a matter of law did not cause Plaintiff injury. Plaintiff vigorously opposed the motion. The trial court granted the summary judgment on both grounds asserted by Nahigian in a detailed decision. [3CT503-509] Judgment was entered in favor of Nahigian. [1CT60-63]

Plaintiff appealed the judgment in favor of Nahigian conceding that the statute of limitations barred the action but asked the Court of Appeal to address the causation issue. The Court of Appeal declined to address the causation issue because it was not necessary and affirmed the Judgment in its entirety. [*Samara v. Estate of Nahigian* (2014) 2014 Cal.App. Unpub. LEXIS 8052 ("*Samara I*")]

After the Judgment became final in *Samara I*, Petitioner then brought a motion for summary judgment arguing that issue and/or claim preclusion barred Plaintiff's action against Petitioner because Plaintiff's claim against Petitioner was based upon the liability of Nahigian which had been previously adjudicated in favor of Nahigian. Petitioner also argued that there existed no triable issue of fact that Petitioner was negligent for any post-operation acts or omissions.[1]

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[1] 1CT:9-10 (Notice of Motion); 1CT:11-25 (Memorandum of Points and Authorities); 1CT:26-38 (Separate Statement of Undisputed Material Facts); 1CT:39-190, 2CT:191-346 (Evidence in Support of Motion for Summary Judgment - Declaration of Barton Kubelka

Plaintiff opposed the motion as to the derivative liability issue arguing because the Court of Appeal in *Samara I* did not address the issue of whether Nahigian caused Plaintiff injury, the action was not barred by issue preclusion. Plaintiff did not oppose the post-operation arguments made by Petitioner.[2] The trial court granted Petitioner's summary

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DDS (1CT:43-48); Declaration of Katherine Harwood (1CT:50-52); Declaration of Bach Le, DDS, MD (1CT:54-58); Judgment in favor of Defendant Nahigian (1CT:60-63); First Amended Complaint (1CT:65-73); Plaintiff's Deposition Excerpts Vol. 1 (1CT:75-115); Plaintiff's Deposition Excerpts Vol. 2 (1CT:117-130); Defendant Matar's Deposition Excerpts (1CT:132-151); Defendant Nahigian's Deposition Excerpts (1CT:153-178); Defendant Matar's dental records (1CT:180-190, 2CT:191-204); Monty Wilson DDS Dental Records (2CT:206-225) Rivera Family Dental Records (2CT:227-246); Raffi Mesrobian MD medical records (2CT:248-263) Douglas Daws DDS dental records (2CT:265-289); Edith Gevorkian DDS dental records (2CT:291-322); Hillside Dental Group dental records (2CT:324-345)

[2] 2CT:360-380, 3CT:381-513; Memorandum of Points and Authorities (2CT:360-380); Response to Separate Statement of Undisputed Material Facts (3CT:381-396); Plaintiff's Supplemental Separate Statement of Undisputed Material Facts (3CT:397-405)[2]; Declaration of Alexis Galindo and Evidence in Opposition (3CT:406-511 - Declaration of Gregory Doumanian DDS (3CT:408-413); Plaintiff's Deposition Excerpts (3CT:414-447); Defendant Nahagian Deposition

judgment motion on claim preclusion grounds and ruled there existed no triable issue of fact as to post-operation acts or omissions. [3CT537-549] Judgment was entered in favor of Petitioner accordingly. Plaintiff appealed.

Even though it was never argued by the Appellant, the Second District Court of Appeal, by way of a published opinion, reversed the judgment in favor of Petitioner holding that claim preclusion does not apply because there were not successive lawsuits because to do so would be "splitting a cause of action". (*Samara vs. Matar* (2017) 8 Cal.App.5th 796, 804-806 – "*Samara II*".) The Court of Appeal in *Samara II* was of the opinion that the operative issue before it was strictly "issue preclusion". It held that issue preclusion does not bar Plaintiff's claim against Petitioner because *Samara I* did not result in a final judgment on the issue because the Court in *Samara I* had declined to address the issue. The Court of Appeal followed the principles set forth in *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 87-88 ("*Zevnik II*"); *Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1132 ("*Newport Beach II*"); *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1459–1460 ("*Butcher*") and

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Excerpts (3CT:448-476); Defendant Matar Deposition Excerpts (3CT:477-496); Court of Appeal Opinion in Samara I – B248553 (3CT:497-500); Trial Court's Ruling on First Summary Judgment Motion (3CT:501-509); Excerpt of Defendant Matar Dental Record (3CT:510); Request for Judicial Notice (3CT:512-513)

Restatement Second of Judgments, section 27, comment o. (*Samara II* at 807-810)

The Court of Appeal also opined that, as a policy matter, for the Judgment to be final, the causation issue had to be addressed by the Court of Appeal in writing pursuant to Article VI, section 14 of the California Constitution. (*Samara II* at 809)

With respect to the post-operation direct negligence asserted by Plaintiff, the Court of Appeal held that because the post-operation allegations constituted a separate cause of action, Petitioner was required to seek a motion for summary adjudication as to those issues even though Plaintiff did not object to the manner in which the issue was brought before the trial court and did not oppose those issues. The Court of Appeal reversed that portion of the judgment as well. (*Samara II* at 810-812)

Petitioner asserts that the law of claim preclusion does not require two successive lawsuits when a single cause of action is asserted against two separate defendants that can result in two separate appealable judgments as to each Defendant as it did in the present case. (*Freeman v. Churchill* (1947) 30 Cal.2d 462 (*Freeman*).)

Petitioner further asserts that claim preclusion bars plaintiff's action against Petitioner because the judgment in favor of Petitioner's alleged agent involved 1) the same cause of action; 2) between parties in privity and 3) a final judgment on the merits in the first proceeding because it was affirmed in whole by the Court of Appeal in *Samara I* with no modifications. (*People v. Skidmore* (1865) 27 Cal. 287 (*Skidmore II*).)

Petitioner further asserts that issue preclusion bars Plaintiff's action against Petitioner because 1) there was a final adjudication of the issue of Nahigian's liability by the time Petitioner's second summary judgment motion was heard; 2) the issue of Petitioner's liability in the second summary judgment motion and Nahigian's liability in the first summary judgment motion are identical; 3) the issue was actually litigated and necessarily decided in the first summary judgment motion; 4) which was asserted against the Plaintiff in the first summary judgment and vigorously defended by Plaintiff in the first summary judgment motion. (*Skidmore II*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335,341 ("*Lucido*"). The fact that the Court of Appeal in *Samara I* did not address the issue because it was not necessary does not preclude finality pursuant to the express terms of Article VI, section 14 of the Constitution requiring appellate courts to issue their decisions that determine causes in writing with reasons stated. The Court of Appeal in *Samara I.* complied with Section 14 as to all grounds found by the trial court.

With respect to Plaintiff's claim that Petitioner was directly liable, Petitioner asserts that because Plaintiff submitted no evidence in opposition, it was the same cause of action but merely a different theory of liability and Plaintiff never objected to the procedure utilized by Petitioner, the Judgment relating to this theory of liability should be affirmed. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 818 fn 1)

Last, with respect to the Court of Appeal's refusal to allow supplemental briefing pursuant to Government Code, section 68081,

Petitioner asserts that the issue is moot because this Court has accepted review to address the unbriefed issues.

III. STANDARD OF REVIEW

This Court's task, like any other appellate court after the trial court has granted a summary judgment, is to review the matter de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)

The question of the applicability of claim preclusion or issue preclusion is one of law which this Court is to apply de novo review. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507.)

With respect to constitutional interpretation, the proper interpretation of constitutional provisions is a question of law subject to de novo review. (*Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74: *Mart v. Severson* (2002) 95 Cal.App.4th 521,530.)

With respect to pure questions of law, this Court should give no deference to the lower courts' ruling or the reasons for its ruling but instead decide the matter anew. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185,1191)

IV. ARGUMENT

A. CLAIM PRECLUSION BARS PLAINTIFF'S ACTION AGAINST PETITIONER PURSUANT TO PEOPLE VERSUS SKIDMORE

Claim preclusion prevents relitigation of the same cause of action in a prior proceeding by a court of competent jurisdiction between the same parties or parties in privity with them. Claim preclusion arises if a second proceeding involves 1) the same cause of action litigated in the prior proceeding (2) between the same parties or their privity (3) after a final judgment on the merits in the first proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798 ("*Philip Morris*").) Its purpose is to preserve the integrity of the judicial system, promote judicial economy and protect litigants from harassment by vexatious litigation. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829 ("*Vandenberg*"). See also Note, *Alternative Grounds in Collateral Estoppel* (1984) 17 Loyola L.A. L. Rev. 1085)

There is no dispute that the second motion for summary judgment by Petitioner involves the same cause of action as the cause of action asserted by Plaintiff against Nahigian and there is no dispute that Petitioner is in privity with Nahigian. (*Samara II* at 804.) The core issue on review is whether there was a final judgment on the merits in the first summary judgment proceeding as to both grounds found by the trial court. The Court of Appeal never reached the issue because it held that for claim preclusion to apply, there must be two separate lawsuits. (*Samara II* at 804-806.) As will be discussed below, it is Petitioner's contention two separate lawsuits are not necessary for

claim preclusion to apply. Assuming separate lawsuits are not required, the third element, whether there is a final judgment on the merits in the prior proceeding, has been met. (*Skidmore II* at 293-294; *Bank of America v. McLaughlin etc. Co.* (1940) 40 Cal.App.2d 620, 628-629 ("*McLaughlin*"); *DiRuzza v. County of Tehama* (2003) 323 F.3d 1147, 1153 ("*DiRuzza*".)

In *Skidmore II*, this Court held that even if an appellate court refrains from considering one of the grounds upon which the trial court's decision is based, an affirmance of the judgment extends finality on the merits to the whole of the trial court's determination for purposes of claim preclusion and/or issue preclusion. (*Skidmore II* at 293-294) The Court of Appeal concedes that if separate lawsuits are not required and *Skidmore II* is still good law, at a minimum, claim preclusion would apply to Plaintiff's claim against Petitioner. (*Samara II* at 353-354.) The question remains whether this Court's decision in *Skidmore II* is still good law as it applies to claims preclusion and/or issue preclusion principles and whether it should be followed in light of modern changes to the law of issue preclusion under the Second Restatement of Judgments.

1. THE TRIAL COURT DID NOT SPLIT A CAUSE OF ACTION

There is no doubt that when reviewing the multitude of appellate cases addressing claim preclusion and issue preclusion, one could come to the conclusion that separate *lawsuits* must exist for claim preclusion or issue preclusion to apply. However, a close reading of these cases that state that one of the elements of claim or issue preclusion is the same issue or claim that was previously

litigated in a "prior *lawsuit*" is because there was in fact a previous *lawsuit* that had been filed in the factual background of the case. Other than the opinion in *Samara II*, no other appellate court has held that there must be "successive ***lawsuits***" as opposed to "successive ***proceedings***" resulting in a judgment or the adjudication of a claim. (See for example, *Philip Morris* at 797 – "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue ***litigated in a prior proceeding***; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]".) There is no requirement that the "former proceeding" be in a different lawsuit. A summary judgment in favor of a party defendant where multiple defendants are named in a lawsuit is considered to be a separate trial on the merits as between that party Defendant and the Plaintiff. (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 462) The ruling on Nahigian's summary judgment motion carried with it a right to a motion for new trial by the Plaintiff (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,858) and was treated as a separate appealable order. (Code of Civil Procedure, section 904.1(a)(1); *Justus v. Atchison* (1977) 19 Cal.3d 546, 567-568; *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425,430). In the instant case, the motion for summary judgment by Nahigian was a former proceeding, resulting in a separate judgment against Plaintiff which was separately appealable and thus clearly a "former proceeding" for purposes of claim or issue preclusion.

The Court of Appeal in *Samara II* relied on *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 827-828 ("*DKN Holdings*"); *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 ("*Mycogen*"); *Clark v. Lesher* (1956) 46 Cal.2d 874, 880 ("*Clark*"); *Brinton v. Bankers Pension, Inc.* (1999) 76 Cal.App.4th 550, 557-558 ("*Brinton*") and *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749,757 ("*Thibodeau*") for the proposition that in order to invoke the defense of claims preclusion there must be two separate lawsuits. None of these cases mandate such a requirement and such a requirement in a case based upon derivative or vicarious liability, where the plaintiff has the option of suing the agent and principal in the same action or separately, makes no judicial sense.

In *DKN Holdings*, the creditor elected to sue joint and several obligors in two separate lawsuits. In the first lawsuit against one of the obligors, the creditor DKN prevailed. When the judgment was not paid, DKN filed a separate action against the remaining obligors. This Court held that claim preclusion does not prevent a creditor from filing separate actions against joint and several obligors – nothing more. As this Court pointed out, DKN could have filed one action against all obligors in one action or elected to file separate actions. More importantly, this Court in *DKN Holdings* held that the co-obligors were not the same party or in privity with each other so this case has no applicability to a case based upon derivative liability. (*DKN Holdings* at 826)

Nor does *Mycogen* mandate separate lawsuits to set up a claim preclusion defense – separate actions were merely part of the factual background. Mycogen sued Monsanto for declaratory relief and

specific performance of seed technology licenses in its first suit and prevailed. When the relief awarded in the first action did not make Mycogen whole, Mycogen filed a second lawsuit for money damages. This Court correctly held that Mycogen had one cause of action against Monsanto and it should have sought damages in the first action and thus is precluded from seeking damages in the second action because to do so would be splitting a cause of action. *Mycogen* has no applicability to an action based on derivative liability where the plaintiff is not mandated to sue both the principal and agent in the same lawsuit.

Clark is no different. A judgment was rendered against Clark in a lawsuit by the administrator of her father's estate arising out of the operation of a newspaper business. Clark filed a separate lawsuit against Lesher, who purchased the business, for conspiracy and fraud. Lesher asserted the defense of claim preclusion arising from the judgment in favor of the administrator in the first lawsuit. This Court held claim preclusion did not apply because it was a completely different cause of action and Lesher was not a party to the first lawsuit. Interestingly, this Court held in dicta that Clark could have easily set up the second claim by way of a cross-complaint against Lesher in the first lawsuit but his election not to do so did not preclude the second lawsuit. Again, Clark does not stand for the proposition that to assert the defense of claim preclusion, two separate lawsuits must be brought.

Brinton actually supports Petitioner's position. In *Brinton*, plaintiff filed a claim against the agents of defendant Bankers Pension through the National Association of Securities Dealers (NASD). The

matter was submitted to binding arbitration and an award was rendered against plaintiff and in favor of defendant's agents. A judgment was entered in favor of the agents. Defendant Bankers Pension refused to participate in the arbitration because there was no arbitration clause between plaintiff and defendant. Plaintiff filed a second action against defendant - the alleged principal of the agents. The trial court held that relitigation of matters which have been resolved in a "prior proceeding" are precluded under the doctrine of claims preclusion. (*Brinton* at 556) The Court of Appeal affirmed stating that claims preclusion applies to a "previously litigated cause of action". (*Brinton* at 556) The appellate court went on to state that even though defendant was not a party to the arbitration proceeding, since defendant's liability is derivative, it is unnecessary for defendant to have been a party to the prior proceeding to assert claim preclusion as a defense. (*Id.* at 557-558) Nowhere in this case does the court require a separate lawsuit as a condition precedent to asserting the defense - merely a "prior proceeding" that can lead to a final adjudication of the claim as in this case.

Thibodeau is no different. Plaintiff sued a concrete subcontractor in a separate lawsuit after plaintiff concluded an arbitration with the general contractor which included concrete issues. The arbitrator awarded $2,261 to plaintiff for the concrete work against the general contractor. However, after the award, the concrete allegedly worsened and the estimated repair was $26,194 and the plaintiff sued the concrete subcontractor in a separate lawsuit. The subcontractor asserted the defense of claim preclusion based upon the arbitration award. The trial court rejected the defense. The Court of

Appeal reversed stating that the doctrine of res judicata precluded plaintiff from relitigating a cause of action that has been "finally determined by a court of competent jurisdiction". (*Thibodeau* at 754) The Court of Appeal, even though the award was never confirmed into an appealable judgment because the general contractor filed bankruptcy, held plaintiff should have litigated all concrete issues in the arbitration against the general contractor and thus the award was sufficient as a prior adjudication to give rise to the use to the defense of claim preclusion.

More similar to this case, this Court held in *Freeman v. Churchill* (1947) 30 Cal.2d 453, that claim preclusion applies in the same lawsuit against the agent's principal by way of an instructed directed verdict by the trial court wherein the agent was held not liable by the jury. In *Freeman*, Plaintiffs sued the operator of a truck and his employer for wrongful death and personal injuries arising out of an automobile accident between the Plaintiff mother and the driver of the truck. The matter went to trial. The jury returned a verdict in favor of the truck operator and pursuant to the trial court's instruction apparently rendered a directed verdict in favor of the employer. In its analysis of the case, this Court held that if the employee is found not liable, as a matter of law the employer is not liable. This Court further held that for purposes of issue preclusion or claim preclusion, "***the rule is the same whether the actions are separate or the employee and employer are joined in the same action***." (*Id.* at 460-462. Emphasis added.)

In short, all that is required for the application of claim preclusion or issue preclusion is a "prior proceeding" – not a separate lawsuit.

2. SKIDMORE II IS STILL THE LAW FOR PURPOSES OF CLAIM PRECLUSION AND SHOULD NOT BE REVERSED

As this Court stated in *DNK Holdings*, it is important to distinguish between the concept of claims preclusion and issue preclusion. (*DKN Holdings* at 824) Claim preclusion prevents the relitigation of the same cause of action in a second proceeding between the same parties or parties in privity with them. *(Id.)* Issue preclusion prohibits the relitigation of issues argued and decided in a previous proceeding, even if the second proceeding raises different causes of action. *(Id.)* "Issue preclusion" differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privity in the first suit." *(Id.)*

In this particular case, it is difficult to distinguish between the two concepts because the sole determination at the end of the day is the finality of the trial court's finding that Dr. Nahigian did not cause Plaintiff injury. For purposes of claim preclusion, the determination is whether the "causation issue" was subsumed into the final judgment in favor of Dr. Nahigian even though the Court of Appeal did not address the issue in *Samara I* thus precluding relitigation of the same cause of action in the proceeding against Petitioner, Nahigian's alleged principal. For purposes of issue preclusion, the determination is whether the issue of causation was previously finally adjudicated

and necessarily decided in a court of competent jurisdiction. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335,341 ("*Lucido*".) The Restatement of Judgments 2nd provides no guidance with respect to claims preclusion, only issue preclusion. In the opinion of Petitioner, even though a case could not be found on point, in claim preclusion, the focus is on the operative complaint and the first judgment itself notwithstanding the reasoning of the trial court. In issue preclusion, the focus should be on the trial court's proceeding to determined what was actually litigated and vigorously defended in the first proceeding.

A judgment, affirmed on appeal, is a final judgment on the merits, even if the Court of Appeal refuses to address all the issues on appeal because it is unnecessary to do so. (*Skidmore II* at 292-293)

In *Skidmore*, the Plaintiff in the first action sued Defendants on a recognizance alleging various equitable and legal claims. The Defendants demurred on the grounds of improper joinder which was sustained. Even so, by stipulation, the parties agreed to refer the matter to a referee to decide all legal and factual issues. The referee found in favor of the Defendants on all claims. On appeal to the California Supreme Court in the first action, the Supreme Court addressed only the misjoinder issue and affirmed the judgment. (*People v Skidmore* (1861) 17 Cal. 261 "Skidmore I").) In the second action, the Plaintiff attempted to remedy procedurally the misjoinder problems and filed the same claims against the defendants. The Defendants argued the first action was res judicata as to *all issues embraced within the complaint* at the trial level but did not prevail. On appeal, the California Supreme Court reversed ruling that even though it had addressed only the misjoinder issue in the first appeal, it

had "affirmed the judgment" in full and since the issues not addressed in the first appeal were fully litigated, res judicata principles barred Plaintiff's second action. The Court stated:

> The judgment below was not reversed, either in whole or in part, by the Supreme Court, nor was it modified in any particular; and it follows, if the Court dealt with the judgment at all, it must have affirmed it to the whole extent of its terms. But the nature and scope of the Court's final action is clearly indicated by the words "judgment affirmed," as they occur in the published report of the case. (17 Cal. 260 at 261 -*Skidmore I*) We have examined the record, now remaining in this Court, and find an unqualified entry to the effect that the judgment was affirmed.
>
> The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression. (*Id.* at 292-293)

Skidmore II is still good law and has not been reversed by this Court. (*DiRuzza v. County of Tehama* (2003) 323 F.3d 1147, 1153 "DiRuzza").)

Since *Skidmore II*, no other court has addressed the same issue from strictly a "claim preclusion" standpoint, only issue preclusion. (See *DiRuzza* at 1153-1156 analyzing case law since *Skidmore II*) There is no need to reverse *Skidmore II* because its teachings promote the purposes of claim preclusion – preservation of the integrity of the judicial system, promoting judicial economy and even protecting litigants from harassment by vexatious litigation.

Applying *Skidmore II* to this case forms reasoning in and of itself to preserve *Skidmore II* from a claims preclusion standpoint. There is a judgment in favor of Dr. Nahigian and against Plaintiff as to all the issues embraced within the Complaint. The judgment was affirmed by the Court of Appeal with no modifications. Once the remittitur was issued, Plaintiff did nothing to set aside the causation ruling or amend the judgment entered by the trial court in favor of Dr. Nahigian. Judgments embrace the issues in the Complaint that were litigated or could have been litigated. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821; *Alpha Mechanical Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1328.) Giving finality to the judgment preserves the integrity of the court system by avoiding inconsistent findings on the derivative liability issue. Giving finality to the judgment in this case promotes judicial economy because it avoids requiring the trial court to hear the same exact causation issues twice when in the first instance the Plaintiff had every opportunity to fully

litigate the issue and did in fact fully litigate the issue. A summary judgment should be treated no different than a jury verdict with respect to the application of claims preclusion. By making the strategic move to concede the statute of limitation issue, Plaintiff took the risk that the Court of Appeal might not address the causation issue on appeal but that should not work to her benefit. "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 605 ("*Teitelbaum Furs*").)

B. ISSUE PRECLUSION BARS PLAINTIFF'S ACTION AGAINST PETITIONER

The result should be no different when applying issue preclusion to this case. Issue preclusion applies (1) after final adjudication in a prior proceeding (2) of an identical issue (3) actually litigated and necessarily decided in the prior proceeding and (4) asserted against one who was a party in the first proceeding or one in privity with that party. (*Lucido* at 341; *Vandenberg* at 828; *Teitelbaum Furs* at 604.

In the instant case, the only issue addressed on appeal in *Samara II* was whether the trial court's ruling on Dr. Nahigian's motion for summary judgment resulting in a judgment in favor of Dr. Nahigian was actually litigated and decided in light of the Court of Appeal's decision not to address the causation issue on appeal in *Samara I.* (*Samara II* at 807-810). The Court of Appeal in *Samara II* held an issue was not actually litigated and decided in the first proceeding if an appellate court reviewing the judgment expressly declines to address the issue. (*Id.* at 808.) The Court of Appeal in *Samara II* articulated

essentially four reasons for determining the trial court's ruling was not actually litigated and decided for purposes of issue preclusion: 1) *Skidmore II* is a claims preclusion case, not an issue preclusion case, and thus is inapplicable to the rules of stare decisis under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450; 2) because the appellate court in *Samara I* expressly declined to address the causation issue, it was not actually litigated and decided; 3) even if *Skidmore II* includes issue preclusion, modern courts and the 1982 Restatement of Judgments 2d, section 27, comment o, reject the teachings of *Skidmore II*; and 4) giving preclusive effect to an issue expressly not decided in the appellate opinion would conflict with the appellate court's duty under Article VI, section 14 of the *California Constitution* to set forth its decision in writing with reasons stated.

First, it is difficult to determine if *Skidmore II* was limited to just a claims preclusion analysis. In *Skidmore I*, the matter was referred to a referee and all matters of law and fact were decided so the substantive factual issues were actually litigated and necessarily decided in the first proceeding. Probably in 1865, the five-member California Supreme Court blurred the issue of claims preclusion and issue preclusion. (See *DKN Holdings* at 823-824) Petitioner asserts that *Skidmore II* is equally applicable to both types of preclusion. If this Court reaffirms its holding in *Skidmore II,* either or both types of preclusion will bar Plaintiff's action against Petitioner.

The Court of Appeal in *Samara II* relied upon *Zevnik v. Superior Court,* (2008) 159 Cal App.4th 76, 86-88 ("*Zevnik II*") and *Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club* (2006) 140 Cal App.4th 1120, 1132 ("*Newport Beach*

II") These cases are distinguishable or decided incorrectly or should not be followed because the traditional rule of issue preclusion promotes the public policies behind issue preclusion much more than the modern rule and the modern rule poses additional problems that undermine the integrity of the judicial system. (See Note, *Alternative Grounds in Collateral Estoppel* (1984) 17 Loyola L.A. L. Rev. 1085)

In *Zevnik*, a law firm represented four plaintiffs in a complex insurance litigation for many years. Two of the plaintiffs developed divergent interests and in the insurance case brought a motion to disqualify the law firm on the grounds that the law firm violated its ethical duties by representing all plaintiffs wherein a conflict of interest existed. The law firm opposed the motion on the grounds that no conflict existed and the motion should be denied on the grounds of laches. The trial court denied the motion on the grounds of laches and ruled the law firm did not violate any ethical duties. On appeal, because the ruling on a motion to disqualify is an "interlocutory" appealable order[3], the Court of Appeal affirmed the denial on the ground of laches and did not address the issue as to whether the law firm violated its ethical duties. ((*ITT Industries, Inc. v Pacific Employers Ins. Co.* (Jan. 29, 2007, B187238 [nonpub. opn.] ("*Zevnik I*")). See *Zevnik II* at 80.) The divergent plaintiffs then filed a legal malpractice lawsuit against the law firm claiming it fell below the standard of care by representing the plaintiffs when a conflict of interest existed. The law firm brought a "motion" in the malpractice action arguing the findings in the motion to disqualify in the insurance

[3] Machado v. Superior Court (2007) 148 Cal.App.4th 875, 882

case were "conclusively established" and affirmed on appeal and thus the plaintiffs were collaterally estopped from asserting that the law firm violated its ethical duties. The trial court denied the motion and submitted the following issues for appellate interlocutory review pursuant to Code of Civil Procedure, section 166 to be 1) whether issues decided on a motion to disqualify counsel can be collaterally estoppel in a malpractice case; and 2) whether collateral estoppel applies to each alternative ground supporting a trial court decision in these circumstances, or only to the ground which the appellate court based its affirmance. The Court of Appeal affirmed the denial of the motion on the ground that with respect to the first appellate decision in the insurance case, collateral estoppel of that decision can only be used as to the issue addressed by the appellate court, not the alternative ground not addressed by the appellate court. Interestingly, the Second District refused to express an opinion whether issues decided on a motion to disqualify counsel can be used as collateral estoppel in a malpractice case. (*Zevnik II* at Page 81 Fn. 2)[4] First, the ruling in *Zevnik I* was interlocutory and resulted in no final judgment and arose from a motion to disqualify which hardly qualifies as a trial on the merits. Second, in *Zevnik II*, the Court of Appeal held that its decision does not apply to claims preclusion principles and therefore *Skidmore II* had no applicability. Even so, the Court of Appeal

[4] It is interesting because if the issue as to whether collateral estoppel effect could be given to a motion to disqualify, was answered in the negative by the Court of Appeal, the finality issue would have been moot. On remand, the determination of whether collateral estoppel effect could be given to a motion to disqualify became meaningless as opposed to moot.

reviewed the cases following the teaching of *Skidmore II* and/or applying the "traditional rule" when alternative grounds are found by the trial court to support the judgment. (Bank of America v. *McLaughlin etc. Co.* (1940) 40 Cal.App.2d 620 ("*McLaughin*") and *Natural Soda Products Co. v. City of L.A.* (1952) 109 Cal.App.2d 440 ("*Natural Soda*"); *Evans v. Hortin* (1953) 115 Cal.App.2d 281, 286; *Braye v. Jones* (1954) 129 Cal.App.2d 827, 830; *Jackson v. Jackson* (1967) 253 Cal.App.2d 1026, 1038)) with the cases following the modern rule set forth in Restatement of Judgments 2d, section 27, comment o (*Newport Beach II*; *Moran Towing & T. Co. v. Navigazione Libera Triestina S.A.* (2nd Cir. 1937) 92 F.2d 37,40 ("*Moran Towing*"); *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442 ("*Butcher*")) and decided to follow the *Newport Beach II* case on the grounds 1) lack of appellate review on the issue precludes assurances the finding is reliable; 2) the appellate court not addressing the issue is akin to the appellant having no right to appellate review; and 3) giving finality would put pressure on appellate courts to address all alternative grounds. (*Zevnik II* at 85.) Petitioner contends the Court's reasoning in *Zevnik II* ignores reality and ignores the public policy behind preclusion. First, judgments are presumed correct without appellate review. (*Denham v. Superior Court* (1970) 2 Cal.3d 557,564.) Second, the Appellant in *Zevnik II* as in the present case definitely had the right to an appeal. The fact the appellate court utilized judicial economy to address only the issues necessary to affirm the judgment is not akin to no right to appeal. A clearer example is in the instant case. The Plaintiff herself strategically elected to frame the issue before the Court of Appeal by

conceding the statute of limitation decision by the trial court was correct and asking the appellate court to just look at the causation issue. This is far from no right to an appeal. Last, giving finality to issues not addressed by the Court of Appeal because it is unnecessary for purposes of affirming the judgment does not over burden the appellate courts to address every issue. It is up to the litigants to frame the issues before the appellate courts, not the appellate courts. If the Appellant, such as in this case, concedes one of the alternative grounds is correct, she takes the risk that the appellate court will not address the second issue because it has no need to do so.

Newport Beach II is not readily distinguishable but should be rejected. The Court of Appeal expressly rejected this Court's decision in *Skidmore II* and elected to follow the "modern rule" of issue preclusion when an appellate court declines to address an issue on appeal when there are alternative grounds supporting the judgment. *Newport Beach II* involves a dispute between the owner of a country club and its members arising out of a written "right of first offer" between the two. In the first action, the members sued the owner Newport Beach Country Club (NBCC) to enforce a written agreement which allegedly entitled the members to notice of any offer to buy the club by a third party and the opportunity to purchase under the same terms. NBCC had received an offer to purchase the stock of NBCC's parent company IBC, Inc. from a third party. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944 ("*Newport Beach I*") The trial court granted summary judgment in favor of NBCC on the grounds that 1) pursuant to the written agreement before the members were entitled to

exercise the right of first refusal, they had to be a "member organization" at the time of the offer and they were not, and 2) the type of offer that was made to the owner (sale of stock of parent company) did not trigger the right of first refusal in any event. On appeal in *Newport Beach I*, the Fourth District Court of Appeal, affirmed on the grounds the members failed to set up a member organization but did not address whether the offer triggered the right of first refusal because it was unnecessary to do so. The judgment in favor of NBCC was affirmed. After the decision in *Newport Beach I*, the members created and registered a member organization with the NBCC. NBCC acknowledged the validity of the member organization and the right to exercise the right of first offer but confirmed that the organization had no right of first offer as to the proposed sale of the stock of NBCC's parent company IBC. The members refused to acknowledge the lack of that right. In *Newport Beach II*, NBCC then filed its own action for declaratory relief to declare the members had no right of first offer as to the offer to purchase the IBC stock based upon the previous judgment in *Newport Beach I.* The trial court granted summary judgment in favor of NBCC. The trial court ruled:

> "In granting this summary judgment, the Court has examined the competing lines of authority on the scope of res judicata/collateral estoppel effect to be accorded orders and judgments of trial courts, including the California appellate court decision cited by Founding Members of *Butcher v. Truck Ins. Exchange*, 77 Cal.App.4th 1442... (2000). However, this Court ultimately concludes that *Auto*

> *Equity Sales v. Superior Court*, 57 Cal.2d 450...1962), *People v. Skidmore*, [*supra*,] 27 Cal. 287 ... and the persuasive discussion of California law in *Di[R]uzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003) establish that, under California law, the affirmance of a decision at the trial court level by an appellate court extends binding and legal effect to the whole of the trial court's determination, with attendant collateral estoppel effect." (*Id.* at 1125)

The members appealed. The Court of Appeal reversed. The Court of Appeal refused to follow the "traditional rule" set forth in *Skidmore II* and *McLaughlin* because in the Court's opinion, *Skidmore II* and the "traditional rule" had not withstood the test of time because Section 27 of the Restatement Second of Judgments, Comment o was adopted in 1982 which in the Court's opinion effectively overruled *Skidmore II*. Comment o states: "If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other [determination] is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination." The Court of Appeal stated:

> We believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second of Judgments, section 27. We therefore adopt the modern/Restatement Second rule and, agreeing with *Butcher*, hold that "if a court of first instance makes

its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established." (*Butcher*, *supra*, 77 Cal.App.4th at p. 1460.)

The Court of Appeal also held that the traditional rule is inconsistent with the appellate court's duty under Article VI, section 14 of the *California Constitution* but cited no case authority for such an interpretation. On its face, the *Newport Beach II* opinion violates the jurisdictional mandates of stare decisis and should be ignored. (*Auto Equity Sales v. Superior Court*, *supra*, 57 Cal.2d 450, 455-456) Even so, it sets the stage for this Court to determine which rule is the better rule or a combination of the two. The traditional rule promotes all the purposes behind claims preclusion and issue preclusion. On the other hand, the modern rule poses more problems than it solves. The modern rule fails to give presumptive correctness to judgments, it promotes relitigation of matters even after they have already been fully litigated and fully considered by the trial court in the first instance thus putting an unreasonable burden on the already overburdened court system and it gives an unrebuttable presumption that the alternative ground not addressed was not properly considered by the trial court which undermines the integrity of the judicial system. (See Note, *Alternative Grounds in Collateral Estoppel* (1984) 17 Loyola L.A. L. Rev. 1085)

The present case shows the weakness of the modern rule. When a trial court rules on alternative grounds, the modern rule takes the position that possibly the trial court did not put sufficient

reasoning into one of the alternative grounds and thus under the new Restatement, none of the grounds has conclusive effect unless the Court of Appeal addresses one or both of those issue to arguably determine the "real" issue determined by the trial court. *(Id.)* However, in the instant case, the Plaintiff herself manipulated the appeal to determine the real issue on her own without appellate assistance by electing to concede the statute of limitations in order to preserve the causation issue for later relitigation. In other words, the Plaintiff manipulated the appeal for the sole purpose of hoping the appellate court would not address the causation issue because it was unnecessary to address in light of Plaintiff's concession. This makes no judicial sense and is the "height of unreason" and promotes relitigation of issues already fully litigated by the parties and decided by a court of competent jurisdiction with well-reasoned grounds.

Zevnik II and *Newport Beach II* should be rejected.

C. ARTICLE VI, SECTION 14 DOES NOT MANDATE THAT THE COURT OF APPEAL ADDRESS EVERY ISSUE BEFORE IT IN WRITING FOR IT TO BE CONSIDERED ON THE MERITS

The appellate courts in *Newport Beach II* and *Samara II* justified the application of the modern rule by opining that the traditional rule is inconsistent with the appellate court's duty under Article VI, section 14 of the *California Constitution* to put all of its decisions in writing even those unnecessary for affirmance in order to give it finality. Neither Court cites any authority for such a proposition. Such a proposition makes no judicial sense, would place an incredible burden on appellate courts and is not consistent with the

clear and unambiguous reading of the constitutional provision. Article VI, section 14 states, in pertinent part:

> ***Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.*** (Emphasis added.)

In *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263-1264, this Court made it clear that the unambiguous wording of Section 27 does not require appellate courts to address in writing every ground asserted by the parties even though it is unnecessary for the final outcome to give it finality. The ***only*** requirement is that the appellate court set forth in writing its reason for its final decision and nothing more. In *Samara I*, the Court of Appeal put its decision in writing that it was affirming based upon the statute of limitations. It had no duty to address the causation issue in order to give it finality. *(Id.)*

D. IF THE COURT OF APPEAL DECISION REGARDING THE ASSERTION OF A SECOND CAUSE OF ACTION FOR POST-SURGICAL ACTS OR OMISSIONS OF PETITIONER IS CORRECT, ARGUENDO, IT DID NOT HAVE JURISDICTION TO ISSUE THEIR PUBLISHED OPINION BECAUSE THE TRIAL COURT ORDER WAS NOT AN APPEALABLE ORDER BECAUSE IT DID NOT DISPOSE OF ALL CAUSES OF ACTION.

The Court of Appeal's rejection of the trial court's decision that there existed no triable issue of fact that Petitioner committed any post-surgical act that caused Plaintiff injury is nothing but "form over substance". The Plaintiff submitted no evidence in rebuttal to

Petitioner's evidence of lack of post-surgical negligence or causation and did not object to the procedural manner in which the issue was decided by the trial court. If in fact the post-surgical care allegations by the Plaintiff is a separate cause of action, *arguendo*, the Court of Appeal should have affirmed these findings by treating that portion of the defense's motion for summary judgment as a motion for summary adjudication based upon Plaintiff's waiver of those issues. (*Rosecrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1089)

On the other hand, if the Court of Appeal's treatment of the trial court's ruling on the post-surgical care as if it never occurred is correct, *arguendo*, the effect of the decision is to make the judgment a non-appealable order because the judgment did not dispose of all causes of action. It is hornbook law that a trial court judgment that does not dispose of all pending causes of action is not appealable. Under the "one final judgment rule', the appeal must await final judgment in the entire action. (*Angell v. Superior Court* (1999) 73 Cal.App.4th 697) If the judgment is a non-appealable order, the appeal should have been dismissed and remanded back to the trial court as Petitioner contended in his Petition for Rehearing. However, such a dismissal and remand would be a substantial waste of judicial resources. As such, the trial court's decision as to the post-surgical care should have been affirmed at a minimum to be treated as law of the case on remand.

E. THE COURT OF APPEAL SHOULD HAVE GRANTED PETITIONER LEAVE TO FILE SUPPLEMENTAL BRIEFING PURSUANT TO GOVERNMENT CODE, SECTION 68081

Government Code, section 68081 mandates that supplemental briefing be allowed by the parties requesting such when the Court of Appeal decision is based upon issues "not proposed or briefed by any party". No party briefed or proposed several issues decided by the Court of Appeal. The Court of Appeal denied Petitioner's request for supplemental briefing. The issue is essentially moot since this Court granted review on all issues asserted by Petitioner. However, guidance by this Court as to when supplemental briefing should be allowed would provide guidance to the lower courts and appellate counsels.

V. CONCLUSION

The traditional rule of claim and issue preclusion which provides that when an appellate court affirms a judgment based upon alternative grounds but only addresses one of the alternative grounds and expressly decides not to address the other grounds because it is unnecessary to its decision is final on the merits as to all the grounds is the more logical and flexible rule. The traditional rule preserves the integrity of the judicial system by avoiding inconsistent findings and giving presumptive correctness to judgments. The traditional rule promotes judicial economy by preventing relitigation of issues that were already fully litigated by the parties and fully considered by the trier of fact in the first instance. The modern rule on the other hand

does the opposite and should not be adopted by this Court. Even though *Skidmore II* is over a century old, that does not mean it is not correct. Sometimes old is good.

Dated: August 6, 2017

FORD, WALKER,
HAGGERTY & BEHAR

_____

NEIL S. TARDIFF,
Attorneys for Respondent,
Haitham Matar D.D.S.

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed PETITIONER'S OPENING BRIEF ON THE MERITS by Petitioner HAITHAM MATAR D.D.S. is produced using 14-point Roman type and contains approximately 8,334 words.

Dated: August 6, 2017

_____

Neil S. Tardiff

PROOF OF SERVICE BY MAIL

Document: PETITIONER'S OPENING BRIEF ON THE MERITS

Caption: Rana Samara,
Plaintiff and Appellant,

vs.

Haitham Matar D.D.S.,
Defendant and Respondent.

Court of Appeal Case No.: B265752

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN LUIS OBISPO)

I am a citizen of the United States and a resident of or employed in the County of San Luis Obispo; I am over the age of eighteen years and not a party to the within action; my business address is: PO Box 1446 San Luis Obispo CA 93406. On this date, I served the persons interested in said action by placing one copy of the above-entitled document as follows:

_X_ By OVERNIGHT MAIL – See Attachment to Proof of Service.

_____ By U.S. MAIL – See Attachment to Proof of Service.

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed August 7, 2017 at San Luis Obispo, California.

Julia Small

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant:	*Attorney for Respondent:*
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Clerk of the Court of Appeal Second Appellate District, Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 *Via U.S. Mail*	Los Angeles County Superior Court North Central P.O. Box 750 Burbank, CA 91502 *Via U.S. Mail*
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