IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S240918

RANA SAMARA, *Plaintiff and Appellant,* v. HAITHAM MATAR, *Defendant and Respondent.*	Court of Appeal of California Second District, Division Seven B265752 Superior Court of California Los Angeles County EC056720 Hon. William Stewart

Answer Brief on the Merits
On Review of the Published Decision of the Court of Appeal, Second District, Division Seven, Samara v. Matar (Feb 15, 2017) 8 Cal.App.5th 796 [Petition for Rehearing Denied March 7, 2017].
Appellate Case No. B265752

Alexis Galindo (SBN # 136643)
Tracy Labrusciano (SBN # 314300)
Curd, Galindo & Smith, LLP
301 E. Ocean Blvd #1700
Long Beach, CA 90802
(562) 624-1177
fax: (562) 624-1178
agalindo@cgsattys.com

Attorneys for Plaintiff and Respondent

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S240918

RANA SAMARA, *Plaintiff and Appellant,* v. HAITHAM MATAR, *Defendant and Respondent.*	Court of Appeal of California Second District, Division Seven B265752 Superior Court of California Los Angeles County EC056720 Hon. William Stewart

Answer Brief on the Merits
On Review of the Published Decision of the Court of Appeal, Second District, Division Seven, Samara v. Matar (Feb 15, 2017) 8 Cal.App.5th 796 [Petition for Rehearing Denied March 7, 2017].
Appellate Case No. B265752

Alexis Galindo (SBN # 136643)
Tracy Labrusciano (SBN # 314300)
Curd, Galindo & Smith, LLP
301 E. Ocean Blvd #1700
Long Beach, CA 90802
(562) 624-1177
fax: (562) 624-1178
agalindo@cgsattys.com

Attorneys for Plaintiff and Respondent

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S240918

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Plaintiff and Respondent Rana Samara in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: November 7, 2017 By: /s/ Tracy Labrusciano

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Constitutions:

Other:

ANSWER BRIEF ON THE MERITS

INTRODUCTION

Petitioner Haitham Matar, DDS, seeks to have this Court rewrite and ignore Restatement (Second) of Judgments, § 27, com. (o), finding that the ground(s) not relied upon by the intermediate court have no preclusive effect and ignore the body of law created by California Appellate Courts which uniformly follow Section 27, Com. (o). Petitioner seeks to have the timeworn case of Skidmore to trump Section 27 and the California courts of appeal that have rejected application of Skidmore in the collateral estoppel context, concluding an affirmance on an alternative ground operates as collateral estoppel/issue preclusion only on the ground reached by the appellate court.

STATEMENT OF ISSUES

The issues presented as specified in Petitioner's Opening Brief, rephrased for clarity are the following:

1. Does Claim Preclusion Bar Plaintiff's Action Against Petitioner Pursuant to People v. Skidmore?
2. Does Issue Preclusion Bar Plaintiff's Action Against Petitioner?
3. Does Article VI, Section 14 Mandate That the Court of Appeal Address Every Issue Before It In Writing For it to Be Considered on the Merits?
4. Was the Trial Court's Order An Appealable Order?

PROCEDURAL HISTORY

This Court granted review after a second appeal arising from a single lawsuit for personal injuries brought by Plaintiff/ Appellant, Rana Samara (hereinafter Samara) who sustained injuries after a dental implant procedure. The Petitioner is Defendant/Respondent, Haitham Matar, D.D.S. (hereinafter Dr. Matar) a dentist.

Samara's First Amended Complaint was originally brought against two parties: Dr. Nahigian, an oral surgeon, and Dr. Matar, a general dentist, for damages based on theories of professional negligence. [CT 000065–000072]. Samara alleged that Dr. Nahigian was the agent or employee of Dr. Matar and that Dr. Nahigian's negligence was imputed to Dr. Matar as Dr. Matar recommended Nahigian, Matar provided the office space, staff and equipment and Dr. Matar billed Samara's insurance company for the dental implant procedure performed by Nahigian. (See Plaintiff's SSUMF #18–27). [CT 000402–000403]. Both Dr. Nahigian and Dr. Matar filed Motions for Summary Judgment, Samara opposed the motions and Dr. Nahigian's Motion for Summary Judgment was granted. [CT 000503–000509]. Judgment was entered in favor of Dr. Nahigian on February 6, 2013. [CT 000061–000062]. The case against Dr. Matar was stayed pending the first appeal. Dr. Nahigian argued in his Motion, through the declaration of Bach Le, DDS, that his conduct did not fall below the standard of care and that he did not cause the injuries to Samara. [CT000054–000058]. Samara opposed the motion for summary judgment and submitted as evidence a declaration of her expert Dr. Doumanian. Dr.

Doumanian opined that Dr. Nahigian's treatment and care fell below the standard of care and that Dr. Nahigian's negligence was the cause of Samara's injury. Dr. Doumanian's declaration stated specific facts and basis for his opinions on standard of care and causation but it did not state the words "my opinions are within a reasonable degree of medical probability". Although the trial court found that triable issues were raised as to negligence, the trial judge ruled that there was no triable issue as to causation. [CT000507–000508] On February 6, 2013 the court granted judgment in favor of Stephen Nahigian, D.D.S., on both the statute of limitations and causation. Samara filed her first appeal and the Court of Appeal affirmed the judgment; however, it did so by confirming that Samara's case against Dr. Nahigian was time barred which was the first ground. The Court of Appeal in its ruling determined that it did not reach the trial court's alternative ground of lack of causation for granting summary judgment. [CT 000497–000500] The Court of Appeal issued its Remittitur. [CT 000356–000359]

On April 30, 2013 Defendant/Respondent, Haitham Matar, D.D.S. filed his second Motion for Summary Judgment. [CT 000009–000041] Samara filed her opposition on April 3, 2015. [CT 000360–000379] Mater argued in his motion that the negligence of Nahigian could not be imputed to him based on collateral estoppel and res judicata, as the trial court had already determined that there were no trialable issues of fact as to whether Nahigian's negligence caused Samara's injuries. However, the Court of Appeal in Samara I did not reach the trial court's alternative ground (causation) for granting summary judgment. The reviewing court relied on *Zevnik v. Superior Court*

(2008) 159 Cal.App.4th 76, 86–88, *Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1132. The cases provide that "[i]f 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. (Also see *Butcher v. Truck Ins. Exch.* (2000) 77 Cal.App.4th 1442.)

After the Remittitur and at the hearing on Dr. Matar's Motion for Summary Judgment, the trial court failed to follow the Court of Appeal's opinion on the Matar motion and instead ruled that the trial court had previously found that Nahigian was not negligent which was not a correct statement. [CT 000543–000547.] The trial court in Nahigian's Motion for Summary Judgment found that there were triable issues as to negligence but that causation could not be established. [CT000507–000508.] In Dr. Matar's second Motion for Summary Judgment, Samara submitted the revised declaration of Gregory Doumanian, D.D.S. which provided facts which would establish a triable issue of fact as to causation. [CT000408–000412.]

The trial court nevertheless did not even consider Dr. Doumanian's revised declaration. Rather, it rejected Samara's causation argument and concluded that the negligence and causation of Nahigian had already been decided, applying res judicata, or claim preclusion – a ground not asserted by Dr. Matar in his Motion for Summary Judgment. However, Nahigian's judgment was affirmed in Samara I on the basis of the

statute of limitations, an alternative ground, while the issues of negligence and causation were not conclusively determined. [CT 000497–000500].

STATEMENT OF FACTS

Samara alleged in her first amended complaint that Dr. Nahigian was acting as the agent and employee of Dr. Matar. [CT000066: 18–23] Samara contends that both Dr. Matar and Dr. Nahigian negligently and wrongfully failed to disclose to her that Dr. Nahigian was working under a restricted license and was on probation by the California Dental Board. [FAC ¶ ¶ 3, 7; CT 000066–000067] Dr. Nahigian performed a dental implant on August 16, 2010. [DSSUMF # 1, 2, 3] [CT 000027]

Dr. Matar had treated Ms. Samara since 1997. [PSSUMF # 18]. [CT 000402, 000415–000417] Many years before the implant procedure at issue, Dr. Matar extracted Samara's No. 18 tooth. [PSSUMF # 3] [CT 000398] Tooth No. 18 (subject tooth) is located in the mandibular portion of the mouth on the lower left side. Dr. Matar in mid- 2010 suggested that Ms. Samara have an implant placed in the No. 18 tooth space as the lack of a tooth could cause her to have complications in the upper tooth. [PSSUMF # 19] [CT 000402; 000483]

Dr. Nahigian had worked with Dr. Matar performing dental implants for three years before the subject procedure on Ms. Samara. [CT 000452:15–25] Dr. Matar and Dr. Nahigian had an arrangement where Dr. Matar provided the office space, equipment and staff for Dr. Nahigian to use in performing dental implants. [PSSUMF # 20]. [CT 000402; 000479–000483;

000450–000452 & 000454] Dr. Matar's office billed for and collected the fee for the dental implant. [PSSUMF # 22] [CT 000403; 000487–000488, 000491–000492] Dr. Matar would price the procedures, maintain the office, sell the procedure to the patients and Dr. Nahigian would perform the oral surgery procedure and the fees collected would be split 50–50. [PSSUMF # 20] [CT 000402, 000479–000483, 000493, 000450–000452, 000454]

Dr. Matar knew that the implant was removed and failed to provide Samara with a treatment plan. [PSSUMF # 25] [CT 000403; 000493–000496] Matar also failed to review other films after Samara complained of pain. [PSSUMF # 26] [CT 000403; 000493] Dr. Doumanian opined that Dr. Matar's treatment of Ms. Samara fell below the standard of care. [PSSUMF # 27] [CT 000403; 000408–000412] Dr. Matar's chart shows that he prescribed Amoxicillin 500mg to Ms. Samara. [PSSUMF # 21]. [CT 000402, 000489–000490] The insurance billing shows that Dr. Matar billed for the implant procedure. [PSSUMF # 22] [CT 000403,000487–000488, 000491–000492, 000510]

On the day of the procedure, Dr. Nahigian met with Ms. Samara, he had Dr. Matar's staff go over the informed consent; however, the risks and complications of the surgery were not explained to Ms. Samara and she was given the informed consent paperwork while under anesthesia in the operation chair. [PSSUMF # 1, & 2] [CT 000398, 000419–000427, 000443–000445; 000463–000464] Dr. Nahigian did not take a periapical x-ray but did order a panoramic x-ray. [PSSUMF # 8 & 9] [CT 000399, 000408–000411; 000455–000456, 000462, 000469- 000471] Based on the panoramic x-ray, Dr. Nahigian negligently diagnosed the

size of Samara's bone space at the No. 18 tooth. Dr. Nahigian determined that a 10mm implant would be appropriate to implant at the No. 18 space. [PSSUMF # 8, 9, 10, 11 &12] [CT 000399–000400; 000408–000411; 000465–000466; 000467, 000468, 000428–000430, 000442] Dr. Nahigian performed the boring and placed the 10mm implant. Dr. Nahigian believed the implant was properly placed and Samara was released and sent home. The following day, Ms. Samara complained of continuous pain and numbness in the implant area. [PSSUMF # 12] [CT 000400] Dr. Nahigian agreed to see Ms. Samara at his Malibu office. Ms. Samara drove to Dr. Nahigian's Malibu office on August 18, 2010, where she was to be examined. Dr. Nahigian performed a cone beam CT scan. Dr. Nahigian removed the implant at that time and prescribed medication to Samara. [PSSUMF # 13.] [CT 000400; 000453, 000467, 000468]

Both Dr. Matar and Dr. Nahigian failed to refund the money paid for the implant. Both doctors also failed to follow up with Ms. Samara and abandoned her treatment and care. The treatment and care provided by both Dr. Nahigian and Dr. Matar fell below the standard of care. [PSSUMF # 14, 15, 25, 26, 27] [CT 000401, 000403; 000408–000412; 000493–000496]

The dental implant which had been placed in Ms. Samara's mouth was placed and traversed and impacted Samara's nerve, causing permanent nerve damage. [PSSUMF # 5, 6, 7] [CT 000398–000399; 000408–000412; 000455–000456, 000458–000461; 000469–000473]

Dr. Nahigian's conduct fell below the standard of care when he failed to properly examine, care and treat Ms. Samara. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398–000400; 000458–000461,

000469, 000408–000412, 000472–000473, 000455–000456, 000428–000429, 000442, 000465–000466] Dr. Nahigian failed to properly inform Ms. Samara of the risks and complications associated with the surgery. [PSSUMF # 2, 17, 23] [CT 000408–000412, 000426–000427] Dr. Nahigian was negligent when he chose and prescribed a 10 mm implant for the No. 18 space when the bone area at that space was totally inadequate to support a 10mm implant. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398–000400; 000408–000412] Dr. Nahigian was negligent when he only relied on a panoramic x-ray and did not consider using a periapical film to accurately determine the spacing for the appropriate implant. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398–000400; 000408–000412] The 10mm implant placed at the No. 18 space perforated the inferior alveolar canal. The perforation of the inferior alveolar canal caused nerve damage. The perforation is visible on the cone beam CT scan that was taken August 18, 2010. [PSSUMF # 13, 14] [CT 000400–000401; 000408–000412]

The trial court previously denied Dr. Matar's first Motion for Summary Judgment as there was a question of fact whether Matar directly breached his duty of care to Ms. Samara. [PSSUMF # 29] [CT 000404; 000503–000506] The trial court in Dr. Nahigian's Motion for Summary Judgment ruled that a question of fact was presented as to Dr. Nahigian's negligence. [CT000506–000508]

Dr. Matar filed his second Notice of Motion for Summary Judgment on or about April 23, 2013, stating that the Motion was made pursuant to Code of Civil Procedure section 437c, subdivision (a). [CT 000009–000010]

Dr. Matar's Notice of Motion stated that he moved for Summary Judgment in his favor "as to Plaintiff's entire action" on three grounds:

1. As a result of this Court's Judgment dismissing STEPHEN NAHIGIAN, D.D.S. ("Dr. Nahigian") from this lawsuit, circumstances have changed: Plaintiff may no longer rely on a theory of vicarious liability against Dr. Matar for Dr. Nahigian's alleged negligence, or a theory of negligent referral of Plaintiff to Dr. Nahigian by Dr. Matar;
2. Dr. Matar met or exceeded the standard of care in the community as it relates to his dental care and treatment of Plaintiff; and
3. No negligence on Dr. Matar's part caused or contributed to the injuries and damages claimed by Plaintiff in this lawsuit.

[CT 000009–000010]

Dr. Matar's first Motion for Summary Judgment was denied by the trial court as to both the statute of limitations argument and the standard of care, with the trial court noting that the Plaintiff's expert "provided a number of grounds in his opinion to demonstrate that the Defendant's treatment [of Samara] fell below the standard of care, e.g., the Defendant failed to inform properly, the Defendant failed to provide sufficient post-procedure care, and the Defendant abandoned her treatment." [CT 000501–000509]

Plaintiff Samara filed a Notice of Motion and Motion to Stay the trial court hearing on Dr. Matar's second Motion for Summary Judgment pending the Court of Appeal ruling on Plaintiff's appeal of the judgment in favor of Dr. Nahigian. [CT

000349–000355] In this Motion to Stay, Plaintiff emphasized that despite the trial court granting judgment for Dr. Nahigian on other grounds, "what is relevant is the causation contention." [CT 000351]

Ms. Samara filed her Opposition to Dr. Matar's second Motion on or about April 3, 2015. In her brief, Plaintiff argued that the trial court had already found triable issues of fact regarding Dr. Matar's breach of the standard of care, alleging that collateral estoppel did apply to the trial court's previous ruling that Matar was individually negligent. Samara further asserted that both Nahigian and Matar were individually negligent, that the doctors engaged in a joint venture, and that causation on the part of Dr. Nahigian was no longer conclusively established after the Court of Appeal's opinion in Samara I. [CT 000360–000380]

In his reply brief, Dr. Matar acknowledged that "Plaintiff advances two distinct theories," referring to Samara's assertions of both direct and derivative liability. [CT 000525–000536]

Judgment in the instant action was entered in favor of Dr. Matar on or about July 9, 2015. Notice of Entry of Judgment was served upon the Plaintiff by mail on July 16, 2015. Plaintiff filed her Notice of Appeal on or about July 28, 2015. [CT 000539–000565]

LEGAL ARGUMENT

I. Standard of Review

A trial court's determination of a summary judgment motion is subject to de novo review, following the same analysis as required

of the trial court under Code of Civil Procedure section 437c. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716–717.) When a case comes before this Court after a trial court grants a motion for summary judgment and the appellate court reverses, this Court independently "takes the facts from the record that was before the trial court when it ruled on that motion." (*Ibid.*, quoting *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [internal citations omitted].) This Court "liberally construe[s] the evidence in support of the party opposing summary judgment and resolve[s] doubts concerning the evidence in favor of that party." (*Wilson v. 21st Century Ins. Co.*, *supra*, at p. 717, quoting *Yanowitz v. L'Oreal USA, Inc.*, *supra*, at p. 1037 [internal citations omitted].)

De novo review, therefore, applies in this case.

II. The Trial Court's Grant of Summary Judgment as to Dr. Matar was Appealable Pursuant to Code of Civil Procedure Section 904.1

According to Code of Civil Procedure section 904.1, which provides: (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

1. From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.F
2. rom an order made after a judgment made appealable by paragraph (1).

While the Court of Appeal found that the trial court's judgment in favor of Dr. Matar could not dispose of all causes of action due to Plaintiff's pleaded allegations and arguments opposing the motion indicated that her action against Dr. Matar involved both direct and derivative liability, the fact remains that the underlying judgment was entered in favor of Dr. Matar as to the entire case. Thus, because there was nothing left to adjudicate at the trial level, the trial court's judgment was a final, appealable order.

A summary judgment entered under section 437c is an appealable judgment. (Code Civ. Proc., § 437c, subd. (m)(1).) Judgment was entered by the trial court in favor of Dr. Matar and against Ms. Samara on July 9, 2015. [CT 000539–000540]. Notice of Entry was served July 16, 2015, authorized by Code of Civil Procedure section 904 and section 904.1, subdivision (a)(1), and section 906. [CT 000550–000551]

Petitioner argues for the first time in his Opening Brief that if the Court of Appeal was correct in asserting there were both direct and derivative causes of action against Dr. Matar, the judgment was not appealable. However, the Judgment entered on July 9, 2015 clearly states that Dr. Matar's Motion for Summary Judgment was granted "as to Plaintiff's entire action against Dr. Matar," and that Plaintiff was to take nothing by virtue of her First Amended Complaint. [CT 000552–000553] Given that the judgment effectively disposed of Plaintiff's entire FAC, including all causes of action alleged therein, the judgment was an appealable order.

III. Neither Claim Preclusion Nor Issue Preclusion Should Apply in the Instant Case

A. CLAIM PRECLUSION AND ISSUE PRECLUSION HAVE DISTINCT REQUIREMENTS WHICH WERE NOT MET BY PETITIONER.

While res judicata principles may have been historically used interchangeably, this Court recently and significantly clarified the separate and distinct requirements of "claim preclusion," also known as "res judicata," and "issue preclusion," also known as "collateral estoppel." (See generally *DKN Holdings v. Faerber* (2015) 61 Cal.4th 813.)

Claim preclusion, or res judicata, "prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*DKN Holdings v. Faerber*, *supra*, 61 Cal.4th at p. 824, quoting *Mycogen v. Monsanto* (2002) 28 Cal.4th 888, 896.) "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings v. Faerber*, *supra*, at p. 824.)

Issue preclusion, or collateral estoppel, "prohibits the re-litigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party." (*DKN Holdings v.*

Faerber, *supra*, 61 Cal.4th at p. 824 [internal citations omitted].) Issue preclusion only applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at p. 825; see also *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; *Teitelbaum Furs, Inc. v. Dominion* (1962) 58 Cal.2d 601, 604.)

Even where preclusive principles may lie, this Court has found that public policy principles may override preclusive application in some circumstances. (*Lucido v. Superior Court*, *supra*, 51 Cal.3d 335) As the court of appeal found in this case neither claim or issue preclusion applies. As detailed below the several other jurisdictions have found these strict requirements were not met in situations similar to the instant case.

B. SEVERAL STATES' HIGHEST COURTS AND FEDERAL CIRCUIT COURTS HAVE ALSO ADOPTED RESTATEMENT (SECOND) OF JUDGMENTS, § 27, COMMENT O, *AND THEIR REASONING IS INSTRUCTIVE*

When the highest courts of several states have considered whether issue and/or claim preclusion applies to alternative grounds, where an appellate court expressly declines to reach one or more of the other grounds, these courts have adopted the view expressed in the Restatement (Second) of Judgments, § 27, com. (o), finding that the ground(s) not relied upon by the intermediate court have no preclusive effect. (See generally *Stanton v. Schultz*

(Colo. 2010) 222 P.3d 303; *Beaver v. John Q. Hammons Hotels, L.P.* (2003) 355 Ark. 359; *Humana, Inc. v. Davis* (1991) 261 Ga. 514.)

The opinion by the Georgia Supreme Court in 1991 involved strikingly similar facts to the instant case. There, one medical malpractice action was filed against both a health clinic and its physicians as agents, and summary judgment was granted by the trial court for the physician defendants on alternative grounds: (1) statute of limitations, and (2) negligence. (*Humana, Inc. v. Davis*, *supra*, 261 Ga. at p. 514.) The trial court's judgment in favor of the physicians was affirmed by the Court of Appeals, "relying solely on the statute of limitation issue."(*Ibid.*) Thereafter, the remaining defendant health clinic moved for summary judgment on three grounds, the first of which was that res judicata barred the action against it because its liability was solely derivative; the health clinic also contended that even if non-negligence was not conclusively established by the prior judgment, the physicians were not negligent and further contended the physicians were not agents of the clinic. (*Id.* at pp. 514–515.)

In concluding that "the trial court's grant of summary judgment to the doctors did not conclusively establish the non-negligence of the doctors, and that res judicata [was] thus not a bar" to the action against the clinic, the Georgia Supreme Court noted that "when an appeal is taken, the ruling of the appellate court controls the res judicata effect of the judgment." (*Humana, Inc. v. Davis*, *supra*, 261 Ga. at p. 515; see also Restatement, Second, Judgments, §27, com. (o) (1982); 1B Moore's Federal Practice § 0.416[2] (2d ed. 1988); Wright, Miller & Cooper,

Federal Practice and Procedure: Jurisdiction, § § 441 and 4432 (1981).) The Georgia Court further opined that in the situation contemplated by the Restatement, §27, com. (o), "the ground omitted from the [appellate] decision is not considered to have been finally adjudicated" and is thus not conclusively established for purposes of res judicata. (*Humana, Inc. v. Davis*, *supra*, at p. 515 [emphasis added].)

When the Arkansas Supreme Court decided to adopt the Restatement (Second) of Judgments §27, com. (o) in *Beaver*, it considered not only the comment standing alone, but in conjunction with the whole of Section 27, entitled "Issue Preclusion," particularly comments i and h, and noting that it had previously adopted other aspects of Section 27. (*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at pp. 365–367.) In that case, the plaintiff, Mrs. Beaver, cited to numerous additional authorities "to support her contention that collateral estoppel is inappropriate with regard to an issue that is a ground for a judgment later affirmed by an appellate court on another ground without reaching the issue in question." (*Id.* at pp. 368–369; see also *Niagara v. Mohawk Power Corp v. Tonawanda Band of Seneca Indians* (2d Cir. 1996) 94 F.3d 747; *Borst v. Chevron Corp.* (5th Cir. 1994) 36 F.3d 1308; *Ash Creek Mining Co. v. Lujan* (10th Cir. 1992) 969 F.2d 868; *Dow Chem. v. U.S. EPA* (5th Cir. 1987) 832 F.2d 319; *Hicks v. Quaker Oats Co.* (5th Cir. 1981) 662 F.2d 1158; *State v. Stanford, 111 Or.App.509* (1992) 828 P.2d 459.)

The *Beaver* court emphasized the Seventh Circuit's reasoning in *Gray v. Locke* (7th Cir. 1989) 885 F.2d 399, 406, to support its adoption of comment o:

> "The policy underlying collateral estoppel is that a party is entitled only one fair opportunity to litigate an issue. In furtherance of this policy, courts will not apply collateral estoppel when the party against whom the prior decision is invoked did not have a 'full and fair opportunity to litigate' that issue in the prior case. As [the Seventh Circuit] has recognized on prior occasions, a 'full and fair opportunity to litigate' includes the right to appeal an adverse decision. [citations omitted in original.]"

(*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 368, quoting *Gray v. Locke*, *supra*, 885 F.2d at p. 406.)

As recognized by the *Beaver* court in its opinion, adoption of comment o would not apply in those instances where an intermediate court affirms all alternative grounds for judgment; rather, in those instances, preclusion would still be viable. (*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 367.)

Interestingly, the Beaver court devoted an entire paragraph of its opinion to discussing the "California position," concluding that *Bank of Am. v. McLaughlin Land & Livestock Co.* (1940) 40 Cal.App.2d 620, "decided decades before the Restatement (Second) of Judgments was written," had been effectively abrogated by California appellate courts. (*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 368.) No mention is made of *Skidmore*, however, the decision in *Beaver* involved issue preclusion only, not claim preclusion.

The Colorado Supreme Court expressly adopted comment o in *Stanton v. Schultz*, *supra*, 222 P.3d 303. In its opinion, the Colorado court cited to *Beaver* for the proposition that "[i]f the appellate court declines to consider certain grounds, those

grounds may be re-litigated in a future proceeding." (*Id.* at p. 309.) The *Stanton* court pointed out that comment o in the Second Restatement "remains essentially unchanged from the First Restatement of Judgments, and its reasoning has been applied consistently by the state and federal courts that have considered it." (*Ibid.*) In reaching its decision that the causation issue passed upon by the appellate court "was not necessarily adjudicated" and therefore "may be re-litigated," the Colorado court explained that "because other courts have consistently followed comment o, and because it is supported by sound reasoning and our own precedent, we apply it in the present case." (*Id.* at pp. 309–310.)

This court should unify the California Appellate Courts' prior decisions in *Zevnik v. Superior Court*, *supra*, 159 Cal.App.4th at pp. 86–88; *Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club*, *supra*, 140 Cal.App.4th at p. 1132 and *Samara v. Matar* (2017) 8 Cal App5th 796.

C. RES JUDICATA DOES NOT APPLY TO THIS ACTION BECAUSE THERE WERE NOT SUCCESSIVE LAWSUITS AND PETITIONER DID NOT ARGUE RES JUDICATA IN HIS MOTION

Procedural requirements intimate that a second suit is required in order for res judicata to apply. In order for a party to avail himself of the defense of res judicata, he must affirmatively allege the judgment in his pleading. (*Madruga v. Borden Co.* (1944) 63 Cal.App.2d 116, 146; see also *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1158 ["an objection based on the doctrine of

res judicata must be specially pleaded or it is waived."] If res judicata must be affirmatively pled, as in a complaint or answer, this requirement necessarily means that the claim a party seeks to preclude was already decided, or may subsequently be decided, in a separate suit.

In *Skidmore*, the defendants were originally sued by the People as plaintiffs in an action upon a recognizance entered into by defendant sureties to secure the appearance of a defendant offender who was charged with murder. (*People v. Skidmore* (1865) 27 Cal. 287, 289.) After judgment was entered against the People, the People again brought the same action against the same defendants, with the exception of leaving out the defendant against whom equitable relief was sought in the second suit. (Ibid.) Further, the defendants in the second suit affirmatively pled claim preclusion in their answer, which "set up a judgment in a former suit as a bar to the action." (*Ibid.*)

Here, however, both Dr. Nahigian and Dr. Matar were sued in the same lawsuit and no second suit was filed. In Skidmore, the judgment in the first suit was entered as to all defendants, whereas here, the summary judgment was entered in favor of Nahigian alone, with the remainder of the lawsuit against Dr. Matar intact as he had been denied summary judgment. Petitioner did not assert claim preclusion in his Notice of Motion and should not be able to do so now, even if this Court finds that separate lawsuits are not required.

D. SKIDMORE SHOULD NOT BE APPLIED IN THIS CASE, IF IT REMAINS VIABLE

In *Skidmore I*, the Supreme Court did review the judgment on the merits, whereas the Court of Appeal in this case expressly declined to do so. The Court in *Skidmore,* in the first affirmance of the referee's judgment, simply stated as the whole of its opinion: "We affirm the judgment upon the demurrer for this misjoinder. The effect of the judgment will not be to preclude the plaintiff from suing again when the cause of action can be more formally set out. Judgment is affirmed." (*People v. Skidmore* (1865) 27 Cal. 287, 292 (emphasis added).) The plain language of the underlying opinion does not indicate that the reviewing court either declined to or did not rule on the merits of the judgment. Rather, in impliedly stating the cause of action could plausibly be "more formally set out," the Court was indicating that the pleadings were indeed not – at that time – sufficient to overcome a demurrer or judgment on the pleadings, as the referee had previously ruled. This interpretation is consistent with the published Skidmore opinion, as it reasoned "[t]he 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 pp. 292–293.)

By contrast, in the instant case the Court of Appeal impliedly stated in its opinion in *Samara I* that preclusive effect should not be given to its affirmance of the judgment in favor of Dr. Nahigian. That opinion notes that Samara did not challenge the trial court's ruling that her action against Dr. Nahigian was time-barred, "expressly limiting her appeal to its alternate ruling

on the issue of causation." [CT 000499]. In affirming the trial court's judgment on the statute of limitations ground, the Court of Appeal in *Samara I* stated "[w]e need not, and do not, reach the court's alternative ground for granting summary judgment." [CT 000499]. Footnote 2 of the opinion states:

"[b]ecause the question is not before us, we also do not address whether collateral estoppel may be used with regard to an alternative ground for judgment not reviewed by the appellate court. (See generally *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 86–88; *Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1132.)" [CT 000499–000500.]

The Court of Appeal was aware that Nahigian was not the only defendant in the single suit brought by Samara. A closer look at the case law cited by the Court of Appeal in *Samara I* provides insight as to the intended effect of declining to rule on causation, affirming the judgment as to Nahigian on procedural grounds only.

Page 86 of the Zevnik opinion begins by stating: "We decline to follow the authorities suggesting that each of the alternative grounds relied upon by the trial court is collateral estoppel after an appellate court affirmed the decision on only one ground and declined to decide the others." *Zevnik* declined to follow *Skidmore* for issue preclusion, noting that "*Skidmore* involved only res judicata, or claim preclusion." (*Zevnik v. Superior Court*, supra, 159 Cal.App.4th at p. 88.) In a footnote, *Zevnik* highlighted the fact that the California Supreme Court "has never cited or relied upon Skidmore" and referred to *Martin v. Martin* (1970) 2 Cal.3d 752, 762–763, wherein the Supreme Court "expressly declined to

decide whether an alternative ground for an order by a bankruptcy referee that was affirmed by the district court on another ground was collateral estoppel, without mentioning Skidmore." (*Ibid.*)

The *Newport Beach* court also asserted that *Skidmore's* "traditional rule is inconsistent with an appellate court's duty under the California Constitution, article VI, section 14 to set forth its decisions in writing 'with reasons stated.'" *Newport Beach* goes on to reason that the "traditional rule" of *Skidmore* "thus results in judicial inefficiency" by requiring the appellate court to address "every ground recited in a judgment, even though a decision on one ground would resolve the dispute before the court" in order to avoid unintended collateral estoppel consequences. (*Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club*, supra, 140 Cal.App.4th 1120.) The court in *Newport Beach* believed that this Court would adopt the "modern rule" as expressed in comment o to the Restatement Second of Judgments, section 27, agreeing with the court in Butcher and holding that where a trial court 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." (Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club, supra, citing *Butcher v. Truck Ins. Exch.*, *supra*, 77 Cal.App.4th at p. 1460; see also Restatement Second of Judgments (1982) section 27, comment o.)

The Court of Appeal in *Samara I* therefore cited to two cases adopting the "modern rule" in the Restatement Second of Judgments, section 27, comment o, in expressly stating that it

"need not" and "do[es] not" reach the trial court's alternative ground for the judgment in favor of Dr. Nahigian only; in other words, it did not review the merits as urged by Samara upon appeal. The first reviewing court in *Skidmore*, by contrast, did provide a basis for the Supreme Court to find that it had actually considered the alternative grounds on the merits, by intimating in dicta that the government plaintiff could bring a subsequent suit against the defendants when it could properly amend the pleadings.

In *Samara II*, the Court of Appeal gave several reasons why *Skidmore* is not applicable to the instant case, and it is the Plaintiff's assertion that the Court of Appeal was correct.

IV. Article VI, Section 14 of the California Constitution Does Mandate That Opinions of the Courts of Appeal and Supreme Court Be In Writing When On the Merits

Decisions of the Supreme Court and courts of appeal that determine cases on the merits are required to be in writing with reasons stated. (Cal. Const., art. VI, § 14; see generally *People v. Kelly* (2006) 40 Cal.4th 106 *(Kelly).*) In order to comply, this Court has made clear that "[i]n order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263.) Thus, "[t]he constitutional requirement is satisfied as long as the opinion sets forth those reasons upon which the decision is based." (*Ibid.*)

In *Kelly*, this Court explained the history of the constitutional mandate of Article VI, § 14, originally derived from Article VI, § 2, as adopted in 1879, prior to an intermediate Court of Appeal existing in California. (*Kelly*, *supra*, 40 Cal.4th at pp. 115–116.) Almost twenty-five years later, in response to the Supreme Court's heavy workload, "the Legislature proposed a constitutional amendment to add an intermediate Court of Appeal comprised of three appellate districts, each with a three-justice District Court of Appeal." (*Id.* at p. 116.) When voters in this state approved the proposed amendment in 1904, it substantively contained a provision similar to the current Art. VI, § 14. (*Kelly*, *supra*, at p. 116; see also Cal. Const., former art. VI, § 24, as amended Nov. 8, 1904, repealed Nov. 8, 1966.)

Several purposes were recognized by this Court as historically being served by the constitutional mandate of Article VI, section 14, including: (1) establishing legal precedent, (2) providing guidance "to the parties and to the judiciary in subsequent litigation arising out of the same 'cause'," and (3) "[i]n all instances...promot[ing] a careful examination of the facts and the legal issues, and a result supported by law and reason." (*Kelly*, *supra*, 40 Cal.4th at p. 117.)

While *Kelly* was decided in connection with a Wende appeal by a criminal defendant, several of these purposes are also served in the context of a civil case, particularly where, as here, the intermediate court applies a de novo standard of review. Indeed, portions of this Court's reasoning in *Kelly* may be particularly applicable to the instant case, notably:

> "In order to serve the purpose of providing information sufficient to determine the scope of the contentions raised and resolved...the written decision must disclose whether the contentions failed on the merits or for some other specified reasons. In doing so, the opinion enables [a party] to learn, and the courts in subsequent proceedings to determine, whether particular contentions are subject to any procedural bar."

(*Kelly*, *supra*, 40 Cal.4th at p. 121.)

This Court went on to emphasize that "what constitutes an adequate written opinion" is "a subjective determination" by the Court of Appeal. (*Kelly*, *supra*, 40 Cal.4th at p. 124.) In writing an appellate opinion, the author "must follow his [or her] own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and as to the questions which are worthy of notice at all." (*Ibid.*, quoting *Lewis v. Superior Court*, *supra*, 19 Cal.4th at p. 1262.)

V. Petition for Rehearing under Government Code 68081 Was Properly Denied

While Petitioner asserts that the Court of Appeal should have granted leave to file supplemental briefing on "several issues," he concedes that the issue is "essentially moot." Should this Court be inclined to review whether Petitioner should have been given the opportunity to file supplemental briefing, it is the Plaintiff's position that the statutes and this Court have provided ample guidance as to when it is required.

A Petition for Rehearing should only be granted pursuant to Government Code section 68081 where a party did not have the

opportunity to brief every issue raised in the appeal, including any issues fairly included in those actually raised. This Court has held:

> "Section 68081 does not require that a party actually have briefed an issue; it requires only that the party had the opportunity to do so. By requiring the parties to file opening and responding briefs, the California Rules of Court automatically give the parties the opportunity to brief every issue that is raised in the appeal. Cal. Rules of Court, rule 8.200(a)(1). Further, we hold that this also gives the parties the opportunity to brief any issues that are fairly included within the issues actually raised."

(*People v. Alice* (2008) 41 Cal.4th 668, 677, emphasis added.)

In asserting that all of the elements of res judicata and/or collateral estoppel were met, then, Petitioner had ample opportunity to brief all of the elements of claim and/or issue preclusion principles, including whether the claims were asserted in separate or successive lawsuits, and whether the Petitioner should have been entitled to summary adjudication, despite the fact that he did not move for it in a noticed motion. All of these issues would be considered "fairly included" within the issues of res judicata and collateral estoppel. These issues could have been addressed by Petitioner's brief, as he acknowledged both direct and derivative liability were alleged against him by Ms. Samara.

Further, Code of Civil Procedure section 437c, subdivision (m)(2) provides additional guidance as to when supplemental briefing is required, specifically in the context of summary judgments: "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not

relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." (§ 437c, subd. (m)(2) [emphasis added].) The plain meaning of this language explicitly omits the instance where a reviewing court reverses a trial court order granting summary judgment. Hence, the Court of Appeal was not required under this statute to afford Petitioner supplemental briefing, either.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeal.

Curd, Galindo & Smith, LLP

Respectfully submitted,

Dated: November 7, 2017 By: /s/ Tracy Labrusciano

Attorney for Plaintiff and Respondent

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **6,700** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Curd, Galindo & Smith, LLP

Dated: November 7, 2017 By: /s/ Tracy Labrusciano

Attorney for Plaintiff and Respondent

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S240918

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 301 E. Ocean Blvd, 1700, Long Beach, CA 90802. I served document(s) described as Answer Brief on the Merits as follows:

By U.S. Mail

On November 7, 2017, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Los Angeles County Superior Court
Los Angeles Superior Court-Appeals
111 N. Hill St
Los Angeles, CA 90012

Katherine Marie Harwood
Ford Walker Haggerty and Behar
One World Trade Center, 27th Floor
Long Beach, CA 90831-2700
(for Haitham Matar)

Neil S. Tardiff
Ford Walker Haggerty and Behar
P.O. Box 1446
San Luis Obispo, CA
(for Haitham Matar)

Clerk of the Court of Appeals
Ronald Reagan Building
300 S. Spring St 2nd Fl North Tower
Los Angeles, CA 90013
(for Second Appellate District)

I am a resident of or employed in the county where the mailing occurred (Long Beach, CA).

By overnight delivery

On November 7, 2017, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope in a box or other facility regularly maintained by Fed Ex, with overnight delivery fees paid or provided for, addressed as follows:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I am a resident of or employed in the county where the mailing occurred (Long Beach, CA).

By e-submission

On November 7, 2017, I served via the Court's e-submit system, and no error was reported, a copy of the document(s) identified above on:

Supreme Court of California

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 7, 2017 By: /s/ Irene Duran