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

REPLY TO ANSWER BRIEF ON THE MERITS

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Petitioner, HAITHAM MATAR DDS, (hereinafter "Petitioner"), submits the following REPLY TO ANSWER BRIEF ON THE MERITS submitted by Plaintiff and Appellant RANA SAMARA (hereinafter "Plaintiff").

I. INTRODUCTION

Plaintiff and Appellant essentially reasserts nothing different than was originally asserted at the trial level with the exception that Plaintiff attempts to incorporate new facts into the case that were not part of the Court of Appeal analysis and makes arguments that have been held waived by the Court of Appeal.

Even so, Plaintiff agrees in his Answer that the core issues in this case are the viability of *People v. Skidmore* (1865) 27 Cal. 287 (*Skidmore II*) from a claim preclusion standpoint and issue preclusion standpoint and whether this Court should adopt the proposed rule set forth in Restatement of Judgments 2nd, section 27, Comment o for issue preclusion purposes.

Petitioner contends *Skidmore II* is still good law from a claims preclusion standpoint and on that basis the Judgment should be affirmed and that it is unnecessary for this Court to even address the cases dealing with issue preclusion. On the other hand, if this Court addresses the viability of *Skidmore II* from an issue preclusion standpoint, the holding in *Skidmore II* supports the public policies favoring preclusion in a much better way than Comment o.

II. PROCEDURAL HISTORY

Plaintiff makes some misrepresentations as to the true Procedural History.

In her Answer, Plaintiff states that the Operative Complaint alleges the negligence of Dr. Nahigian is imputed to Petitioner Matar because Dr. Matar provided "office space, staff and equipment and billed Samara's insurance company for the work performed by Dr. Nahigian. [AOM (Answer on Merits) Page 9] The operative complaint makes no such allegation. [1CT:65-73] The First Amended Complaint alleges one cause of action against both Dr. Nahigian and Dr. Matar and alleges nothing more than Dr. Nahigian was the employee or agent of Dr. Mater [1CT:66] and that Dr. Matar failed to disclose to Plaintiff that Dr. Nahigian was working under a restricted license. [1CT:3]

In her Answer, Plaintiff correctly points out that the Court of Appeal in *Samara I*[1] did not address the alternative ground of causation. [AOM 10] However, she fails to point out that the reason the Court of Appeal did not address the issue is because on appeal the Plaintiff conceded the judgment was correctly entered in favor of Nahigian. The Court of Appeal reviews only the propriety of the *judgment* and not the trial court's stated reasons and thus had no reason to address the other issues. (*Id.*) The Judgment was affirmed in all respects and was not revised or modified in any way. (*Id.*)

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[1] *Samara v. Estate of Stephen Nahigian D.D.S.* (Nov. 10, 2014, B248553) [nonpub. opn.] (*Samara I*).)

In her Answer, Plaintiff contends the trial court "failed to follow the Court of Appeal opinion" and instead ruled that Dr. Nahigian was not negligent. [AOM 11] First, the Court of Appeal in *Samara I* affirmed the Judgment in all respects and thus under *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, the trial court was bound to find claim preclusion applied to Plaintiff's cause of action against Petitioner because it was the same cause of action and Dr. Matar is clearly in privity with Dr. Nahigian. (*People v. Skidmore* (1861) 17 Cal. 260 (*Skidmore I*); *People v. Skidmore* (1865) 27 Cal. 287 (*Skidmore II*); *DiRuzza v. County of Tehama* (2003) 323 F.3d 1147 at 1153 *(DiRuzza)*). Second, at a minimum, on remand, the finding of no negligence on the part of Dr. Nahigian did not just disappear because the Court of Appeal did not address the issue in writing but would still be law of the case and was never set aside and thus the trial court could rely on it notwithstanding the Court of Appeal's decision not to address the issue in *Samara I*. (See *Martin v Henley* (1971 - 9th Cir.) 455 F.2d 295, 299).

Plaintiff claims Petitioner failed to address claims preclusion in its motion for summary judgment which is accurate. [AOM 11] However, Plaintiff fails to point out that Plaintiff waived this argument. (*Samara II* at p.803 fn.2)

III. STATEMENT OF FACTS

Plaintiff attempts to inject multiple factual allegations of post-surgical care into her Statement of Facts. However, it is undisputed that Plaintiff failed to introduce any evidence of negligent referral on the part of Dr. Matar or any evidence that any post-surgical care caused Plaintiff injury. (See *Samara II* at 802)

IV. ARGUMENT

A. PLAINTIFF'S CLAIM AGAINST DR. MATAR IS BARRED BY THE PRINCIPLE OF CLAIMS PRECLUSION

In Plaintiff's Answer on the merits, she asserts that claim preclusion does not apply because 1) for claims preclusion to apply, two separate and distinct lawsuits must be filed; and 2) Petitioner waived his right to assert claims preclusion. [AOM 25-26] Again, this latter argument has clearly been waived as held in *Samara II* and Plaintiff brought no Petition for Rehearing to reverse that decision. (*Samara II* at p.803 fn.2) As to the former argument, Plaintiff cites no case law at all to support the argument that two separate and distinct lawsuits are required in order for claims preclusion to apply. Obviously, Plaintiff merely relies on the *Samara II* Court's decision and nothing more. Petitioner has already addressed the Samara Court's reasoning in his Opening Brief. Petitioner Matar asserts two separate and distinct lawsuits are not required. Petitioner argues that all that is required is a ***prior proceeding***. Petitioner previously addressed in his Opening Brief on the Merits all the cases relied upon by the *Samara II* Court in its ruling that claim preclusion does not apply because there were not two separate lawsuits to show that none of those cases stand for such a proposition. [OBM (Opening Brief on Merits) 17-23].

In Plaintiff's Answer, she seems to be saying that even if two lawsuits are not required, claim preclusion still does not apply because the Court of Appeal in *Samara I*, unlike this Court in *Skidmore I*, did not address the "judgment on the merits" and therefore claim

preclusion does not apply. [AOM 27-30]. Plaintiff's argument seems to confuse issue preclusion with claims preclusion.

As stated in Petitioner's Opening Brief, 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).

It is undisputed the same cause of action was litigated in the prior proceeding addressing the trial court's rulings on Dr. Nahigian's motion for summary judgment and that Dr. Nahigian and Dr. Matar are in privity with each other with respect to the vicarious liability claim. The question is whether the final judgment is "on its merits" in light of the *Samara I* court not addressing the causation issue because it was not necessary to do so to affirm the judgment. The *Samara I* Court recognized that its duty is to address the validity of the judgment not necessarily its reasonings. (*Samara I* at 4) It is undisputed the judgment in *Samara I* was affirmed in its entirety which included the finding that Dr. Nahigian did not cause Plaintiff injury.

What makes this case unique is that a Judgment based ***solely*** upon a statute of limitation defense has been traditionally treated as a

Judgment not on the merits because it is a technical defect as opposed to substantive defect. (*Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 776-777). However, it is also well established that whether the prior judgment was on the merits depends upon the facts of the case and the reason for the ruling. (*Kanarek v. Bugliosi* (1980) 108 Cal.App.3d 327, 330-334).

In the instant case, the trial court did in fact rule on the merits in favor of Dr. Nahigian as well as finding the statute of limitations barred the claim. (*Samara I* at 2-3) However, the Court of Appeal in *Samara I* did not address the trial court's ruling on the merits on appeal because Plaintiff conceded the judgment was correct on statute of limitations ground. The judgment in favor of Dr. Nahigian was affirmed in its entirety and the remittitur issued and thus a Judgment on the merits because it included a litigated court finding that Dr. Nahigian did not cause Plaintiff injury. This ruling on the merits does not just disappear for claims preclusion purposes because the appellate court did not address the issue on appeal because it did not need to do so to affirm the judgment. (*Skidmore II* at 293-294. See also *Martin v Henley, supra*, 455 F.2d 295, 299).

At the end of the day, after the *Samara I* affirmance of the Nahigian Judgment became final and the remittitur issued, for claims preclusion purposes, there was a Judgment in favor of Dr. Nahigian on ***all*** issues embraced within the First Amended Complaint. That is, the judgment affirmed in *Samara I*, ***for claim preclusion purposes***, encompassed all matters which were raised or could have been raised, on matters litigated or litigable. The claim preclusion reach has nothing to do with whether the Court of Appeal addressed one or

more of the trial court's reasons supporting the judgment. As this Court pointed out in *Skidmore II*, *supra*, at Page 293, if the trial court ruling had been limited to just the procedural defect, claims preclusion would not apply. However, because the trial court also ruled on the merits, even though not addressed on appeal because it was unnecessary, the judgment in favor of Dr. Nahigian is now a final judgment on the merits and claim preclusion applies. (*Id.*)

After the Judgment in *Samara I* became final, assuming several years later the statute of limitations was extended by the legislature retroactively similar to the *Mid-Century Ins. Co.* case, *supra*, if the Plaintiff sued Dr. Nahigian several years later in a second lawsuit, notwithstanding the teachings of *Skidmore II*, Plaintiff could not argue the Judgment was not final or was not on the merits as to whether Dr. Nahigian caused Plaintiff injury and would clearly be barred from suing Dr. Nahigian under claim preclusion principles. (*Henry v. Clifford* (1995) 32 Cal.App.4th 315, 321). The same should apply to Plaintiff's claim against Dr. Matar because Plaintiff is asserting the same primary right under a vicarious liability theory under a single cause of action pled against both Dr. Nahigian and Dr. Matar. (*Id.*) The 2d Restatement of Judgments, section 27, comment o has no applicability because that section applies only to issue preclusion.

B. PEOPLE V. SKIDMORE IS STILL GOOD LAW AND MAKES JUDICIAL SENSE FROM BOTH A CLAIMS PRECLUSION STANDPOINT AND ISSUE PRECLUSION STANDPOINT

As the Court of Appeal in *Samara II* pointed out, if two separate lawsuits are not required for claims preclusion purposes and *Skidmore II* is still good law, the trial court's ruling that Plaintiff's claim against Dr. Matar is barred by claim preclusion principles should be affirmed. (*Samara II* at 806)

There is no question *Skidmore II* is still good law. There has been no case from this Court expressly or even impliedly overruling *Skidmore II* and there has been no legislation overruling *Skidmore II*. (*DiRuzza, supra* at 1153). It also seems clear that two separate *lawsuits* are not necessary under these particular facts. Two separate *proceedings* in a court of competent jurisdiction are sufficient. (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 462).

Plaintiff in his Answer asserts *Skidmore II* does not apply because this Court actually addressed the merits in *Skidmore I* and therefore the cases following the 2nd Restatement of Judgment, section 27, comment o are distinguishable from *Skidmore II*. [AOM 27-30] Again, Plaintiff seems to confuse claim preclusion with issue preclusion. On the other hand, the courts in the "old days" had a tendency to blur the distinction between claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-824). However, it is clear from the reading of *Skidmore I* that this Court affirmed the judgment on misjoinder grounds and did not address the referee's rulings on the merits. What is not clear is

whether in *Skidmore II* this Court affirmed the second judgment on claim preclusion grounds ***and*** issue preclusion grounds or just claim preclusion grounds. One appellate court has interpreted *Skidmore II* as being strictly a "claim preclusion" case. (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 86-88 ("*Zevnik II*"). On the other hand, the 9th Circuit Court in *DiRuzza, supra*, has interpreted *Skidmore II* as being an *issue preclusion* controlling case addressing the affect when an appellate court affirms a judgment but does not address all issues in the first appeal. (*Id.* at Page 88, fn. 9)

Petitioner contends *Skidmore* needs to be addressed both as a claim preclusion case and an issue preclusion case.

From a claims preclusion standpoint, the analysis by this Court today requires the exact analysis taken by this Court in *Skidmore II* in 1865. Nothing has changed in the law from a claims preclusion perspective over the past century. Confirming the viability of *Skidmore II* from a claims preclusion standpoint would support all the public policy reasons why claim preclusion has developed: 1) it would preserve the integrity of the judicial system; 2) it would promote judicial economy; and 3) it would protect litigants from harassment by vexatious litigation. Confirming the viability of *Skidmore II* and reversing the decision in *Samara II* and affirming the Judgment in favor of Dr. Matar in its entirety preserves the integrity of the judicial system in several ways. First, it gives credibility and recognition to the incredibly difficult job a superior court judge has in ruling on complex summary judgment motions. Obviously, the trial court was correct in its decision as to Dr. Nahigian's motion because the judgment was affirmed on appeal in its entirety. To say that the trial

court's alternative grounds on the merits is meaningless because the appellate court did not address all the trial court's alternative grounds because the Plaintiff admitted the judgment was valid based on the statute of limitations, ignores the presumption that all judgments are correct, makes no judicial sense and would have the opposite effect of preserving the integrity of the judicial system. In addition, by confirming the viability of *Skidmore II* from a claims preclusion perspective preserves the integrity of the appellate court because the role of the appellate court is to determine if a judgment rendered in the lower court should be affirmed in total, affirmed in part or reversed in total or reversed in part notwithstanding the reasons given by the trial court. [*Samara I* at 4] Once that is done, the Judgment, whatever that may come to be after appellate review is many times a combination of the lower court rulings and appellate rulings put into final form for claim preclusion purposes. *Skidmore* is a good example. In *Skidmore I*, the parties stipulated to having a referee hear the entire case to determine all issues of fact and law. Testimony and documentary evidence was given at the trial level and the referee made his decision on the law and facts which included an alternative finding of misjoinder. On appeal, the judgment was affirmed only on the misjoinder issue which is all that was needed from the appellate level. It would make no judicial sense to say that the referee's extensive work performed by stipulation of the parties as to the merits of the case had absolutely no meaning within the framework of the final judgment from a claims preclusion standpoint and thus the People get another bite at the apple because they failed to properly join parties! The same with the present case. The trial court utilized

extensive judicial resources to analyze Dr. Nahigian's summary judgment motion and rule on both the merits and statute of limitation issues. Now, because the court in *Samara I* did not address the merits ruling because it did not have to do so, Plaintiff gets another bite at the apple against Dr. Matar because he did not file his complaint in a timely manner against Dr. Nahigian? Such a ruling does not preserve the integrity of the judicial system but instead brings the definition of a fair opportunity to be heard to unreasonable heights.

Confirming the viability of *Skidmore II* from a claims preclusion standpoint also promotes judicial economy. If *Skidmore II* is still good law, the trial court will not be required on remand to once again do a complete reanalysis of the same exact issues it already did twice in deciding both summary judgment motions.[2] A more extreme example is: Petitioner could easily envision a situation where Plaintiff executes a tolling agreement with Petitioner while Plaintiff tries her case against Dr. Nahigian for a variety of trial tactic reasons. A jury trial is held and the jury finds the Plaintiff did not file her case in a timely manner against Dr. Nahigian ***and*** that Dr. Nahigian did not cause Plaintiff injury. Plaintiff appeals and the same occurs as occurred in *Samara I*. Does it make judicial sense that Plaintiff can have another jury trial on the same exact issue against Dr. Matar merely because the Plaintiff admitted on appeal that the action against Dr. Nahigian was barred by the statute of limitation? Such a ruling would not promote judicial economy and would not protect litigants

[2] And probably even a fourth time in a cross-complaint for indemnity by Dr. Matar if the judgment in favor of Dr. Nahigian is not on the merits.

from multiple lawsuits arising out of the same set of facts and circumstances.

Skidmore II makes judicial sense from a claims preclusion standpoint which is why it has withstood the test of time. It should be confirmed by this Court as the law of the land from a claims preclusion standpoint.

From an issue preclusion standpoint, the analysis is a little more complex because of the development of case law contrary to *Skidmore II* from an issue preclusion standpoint in this state. (See *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442 ("*Butcher*"); Newport *Beach Country Club, Inc v. Founding Members of Newport Beach Country Club* (2006) 140 Cal App.4th 1120, 1132 ("*Newport Beach II*"); *Zevnik II, supra*) However, the 2d Restatement of Judgments, section 27, Comment o is not something new. The same comment was in place in the 1942 First Restatement. (*Stanton v. Schultz* (2010) 222 P.3d 303, 309) No California case followed Comment o until *Butcher, supra*. In *Butcher*, the Court of Appeal did not even cite *Skidmore*. In *Zevnik II*, the court merely ignored *Skidmore* by stating it was a claims preclusion case. In *Newport Beach II*, the court merely stated *Skidmore* has not withstood the passing of time with virtually no explanation why. At the end of the day, the "traditional" rule makes more judicial sense than the "modern" rule for essentially the same reasons *Skidmore II* should remain viable from a claims preclusion standpoint.

C. PLAINTIFF'S CLAIM AGAINST DR. MATAR IS BARRED BY THE PRINCIPLE OF ISSUE PRECLUSION

As stated in Petitioner's Opening Brief, the decision reached by the trial court 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 v. Superior Court* (1990) 51 Cal.3d 335, 341 ("*Lucido*".) It is undisputed the Nahigian Judgment was final; that the causation issue is identical and that Dr. Matar is in privity with Dr. Nahigian. The only issue before the court in *Samara II* was whether the matter was "actually litigated and necessarily decided" in the prior proceeding. It is undisputed the matter was litigated. The dispute is whether, because the Court in *Samara I* had no need to address the causation issue because Plaintiff conceded the statute of limitation issue, the causation issue was "necessarily decided" or not.

If *Skidmore II* applies to issue preclusion, notwithstanding the fact the appellate court did not address the causation issue, Plaintiff is estopped from asserting the causation issue against Petitioner Matar.

If *Skidmore II* only applies to claim preclusion, the core issue before this Court is whether it is going to adopt comment o to section 27 of the Restatement of Judgments 2nd for issue preclusion purposes.

In Plaintiff's Answer, she points out that several states and the federal courts have adopted Comment o to section 27 of the 2nd Restatement of Judgments. This is true. However, this does not mean California should.

There are good arguments in favor of adoption of comment o but better arguments in favor of giving finality to all issues embraced within an appeal whether ultimately addressed by the appellate court or not. (See Note, *Alternative Grounds in Collateral Estoppel* (1984) 17 Loyola L.A. L. Rev. 1085).

After reviewing all the out of state cases, the federal cases and the California cases following comment o, the common thread with these cases as the basis for supporting Comment o seems to be the misconception that to hold otherwise would deprive the litigant of the opportunity to appellate review of the issues not addressed by the appellate court even though they had been fully litigated in the trial court. However, in reality this is just not the case. Using this case as an example, in *Samara I*, the entire record of the proceedings on all issues decided by the trial court was obviously designated and before the Court of Appeal. There is no doubt the Court of Appeal reviewed the entire record and all the decisions made by the trial court and bases for those decisions. In Plaintiff's Opening Appellant's Brief, she conceded the action was barred by the statute of limitations. There is no doubt the case was conferenced by the justices in detail. It would make no judicial sense for the Court of Appeal to address the causation issue because of Plaintiff's concession but that does not mean Plaintiff was deprived of appellate review of her case. In *Samara I*, Plaintiff was given a right to appeal all issues. After a complete appellate review, the judgment was affirmed in total and was not revised in any way. Plaintiff was not deprived of her right to appeal all issues.

Because Judgments are presumed correct, and because the Court of Appeal affirmed the Judgment in full with no modification, the causation issue was completely litigated and decided in the prior proceeding by the trial court and then by the Court of Appeal and thus Plaintiff should be barred from asserting this same exact finally litigated on the merits issue against Dr. Matar.

D. 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

In Plaintiff's Answer on the Merits, she does not seem to disagree with Petitioner's position that the appellate courts need not address every issue presented to it in writing for those issues to have finality on the merits. Plaintiff merely cites to *People v. Kelly* (2006) 40 Cal.4th 106 which says nothing different from this Court's decision in *Lewis v. Superior Court* (1999) 19 Cal.4th 1232 which was cited in Petitioner's Opening Brief. Even though the *Kelly* decision is limited to criminal appeals where a *Wende* Brief has been submitted, nowhere in the *Kelly* decision does this Court state for an issue on appeal to have finality on the merits, it must be in writing even though it is not necessary for that issue to be addressed. As a matter of fact, this Court in *Kelly* citing to the *Lewis* case reaffirmed that the written opinion under the constitutional mandate need only include "essential facts" and the "essential legal issues" decided. (*Kelly, supra*, 40 Cal.4th 106 at 121). As this Court points out in *Kelly*, the main purpose of the constitutional mandate is to require the appellate courts to adequately explain its decision and to give guidance to other litigants in the

future. This does not mean the appellate court must address every contention on appeal in order for it to be final on its merits when it is unnecessary to address in order to affirm or reverse the judgment.

In light of the fact appellate courts are not mandated under the constitution to address every issue before it in order to be final on the merits if it is unnecessary to address those issues, the *Samara II* court's basis for following comment o is misplaced and should be rejected.

E. 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 LOST JURISDICTION TO ISSUE THEIR PUBLISHED OPINION BECAUSE THE TRIAL COURT ORDER BECAME A NON-APPEALABLE ORDER BECAUSE IT DID NOT DISPOSE OF ALL CAUSES OF ACTION

Plaintiff argues in her Answer "once an appealable judgment, always an appealable judgment". [AOM 18-19] There is no doubt this is not accurate because many appealable judgments can become moot during the pendency of an appeal thus divesting the appellate court with jurisdiction to continue with the appeal except under limited circumstances. (For example, see *In re M.M.* (2007) 154 Cal.App.4th 897, 913). However, Petitioner has found no California case where because the Court of Appeal concluded on appeal that a part of the trial court "judgment" was interlocutory, it no longer had jurisdiction to hear the remaining issues on appeal.

The point of Petitioner's contention is to show why the Court of Appeal should have treated the motion for summary judgment as both a motion for summary judgment or in the alternative a motion for summary adjudication in light of there being no objection by Plaintiff to the trial court's ruling from a procedural standpoint and in light of Plaintiff not even opposing that aspect of the motion! It is hornbook law that appellate courts do not have jurisdiction to entertain an appeal taken from a nonappealable order. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696). Once on appeal, the appellate courts must consider the issue sua sponte even if not brought to the attention of the court by the parties. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126). Once the Court of Appeal decided the Judgment was defective because it included two separate causes of action (even though alleged in one) and in the eyes of the Court of Appeal Petitioner failed to bring a separate motion for summary adjudication as to the "post-surgical" cause of action, it should have dismissed the remaining portion of the appeal for lack of jurisdiction.

On the other hand, it makes no judicial sense from a judicial economy standpoint to dismiss the entire appeal and published opinion. As requested in his Petition for Rehearing, it makes much more sense to treat the motion for summary judgment as to the "second cause of action" as a motion for summary adjudication to "save" the appeal.

V. CONCLUSION

Skidmore II should be confirmed as still good law and applied to this case for claims preclusion purposes and the Judgment in favor of Dr. Matar should be affirmed.

Skidmore II should be confirmed as still good law and applied to this case for issue preclusion purposes and the Judgment in favor of Dr. Matar should be affirmed.

The proposed "rule" set forth in Restatement of Judgments 2nd, section 27, Comment o, should not be adopted by this Court for issue preclusion purposes because it causes more problems than it solves. For issue preclusion purposes, if a trial court enters judgment on two alternative grounds, both of which are sufficient to support the judgment, and on appeal the judgment is affirmed on only one of the grounds because that was all that was necessary to affirm the judgment, the judgment and all issues embraced within the Complaint should be determined to have been litigated and finally decided on the merits.

In the instant case, the Court of Appeal decision to reverse the trial court's grant of summary judgment as to the alleged post-surgical acts in favor of Petitioner should be reversed and merely treated as a ruling on a motion for summary adjudication in order to allow the Court of Appeal jurisdiction to complete its decision on appeal.

Dated: January 5, 2018

Respectfully submitted,
FORD, WALKER,
HAGGERTY & BEHAR

_____

NEIL S. TARDIFF,
Attorneys for Petitioner,
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 Reply to Answer Brief on the Merits by Petitioner HAITHAM MATAR D.D.S. is produced using 14-point Roman type and contains approximately 4,775 words.

Dated: January 5, 2018

Neil S. Tardiff

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Document: REPLY TO ANSWER BRIEF ON THE MERITS

Caption: Rana Samara,
Plaintiff and Appellant,

v.

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 FEDEX OVERNIGHT MAIL – See Attachment to Proof of Service.

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed January 5, 2018, at San Luis Obispo, California.

_____
Julia Small

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant:	*Attorney for Petitioner:*
Alexis Galindo Curd, Galindo & Smith, LLP 301 E. Ocean Blvd., Suite 1700 Long Beach, CA 90802 Facsimile: (562) 624-1178 *Via U.S. Mail*	Katherine M. Harwood Ford, Walker, Haggerty & Behar One World Trade Center, 27th Floor Long Beach, CA 90831-2700 Facsimile: (562) 983-2555 *Via U.S. Mail*
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