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

APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF KENNETH BARTON IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR

Patrick C. McGarrigle, Esq. (SBN 149008)
Email: patrickm@mkzlaw.com
Michael J. Kenney, Esq. (SBN 192775)
Email: patrickm@mkzlaw.com
MCGARRIGLE KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
T: (818) 998-3300; F: (818) 998-3344

APPLICATION OF KENNETH BARTON FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, Applicant Kenneth Barton (**"Applicant"** or **"Barton"**) respectfully requests permission to file the *amicus curiae* brief that is combined with this Application. Applicant is an individual who has a substantial interest in the issue in this case regarding the Court's interpretation of, and interplay between, *People v. Skidmore* (1865) 27 Cal. 287 ("*Skidmore*") and *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76 ("*Zevnik*") (among other appellate decisions derived from *Zevnik*). Specifically, Applicant desires to address within his *amicus* brief *Skidmore's* continuing vitality and that courts and litigants are bound by the longstanding rule that the affirmance of a judgment is an affirmance of the *entire* judgment (except (a) where the reviewing court explicitly reverses the judgment or (b) where the matter appealed from is an interlocutory motion and not a judgment on the merits of a cause(s) of action). Applicant further submits that this Honorable Court's consideration of this amicus brief will also advance the necessary discussion of the ramifications and unintended consequences of an effective overruling of *Skidmore.* Specifically, the substantial and far-reaching negative impact upon the administration of justice, and the expectation of courts and litigants alike that a judgment affirmed is a final judgment not subject to re-litigation or collateral attack except under extraordinary circumstances.

For the reasons addressed more fully in the *amicus* brief appended hereto, Applicant respectfully requests that this Honorable Court affirm *Skidmore* and articulate a bright-line statement to guide the courts, to wit:

1) In the case of an underlying judgment on several causes of

action, in the event that the reviewing court affirms the judgment but discusses only one of the causes of action (while stating that it chooses not to consider the underlying determination of the remaining causes of action), the affirmance of the judgment is a final judgment on the merits for purposes of res judicata and collateral estoppel;

2) The circumstance (discussed in subparagraph (1) above) – where the reviewing court discusses only one of the causes of action (while stating that it chooses not to consider the underlying determination of the remaining causes of action) and the reviewing court affirms the underlying judgment – (a) is not an implied or actual reversal of the underlying judgment on the causes of action not "considered" by the reviewing court (unless the reviewing court explicitly states that the underlying adjudication of the "not considered" causes of action (or the Judgment) is reversed, and (b) and the "judgment affirmed" satisfies the requirements for *res judicata* and claim and issue preclusion (collateral estoppel) as a final adjudication on the merits on all of the causes of action;

3) As long as the appellant has had the opportunity to present their arguments on appeal (and there is no applicable narrow exception akin to fraud on the court or extreme injustice (e.g., *coram nobis*)), the appellant's due process rights have not been abridged and it is, therefore, not relevant - for purposes of res judicata and collateral estoppel – whether the reviewing court commented on each of the appellant's specific assertions or evidence citations or chose, after commenting on and upholding one cause of action determination, to affirm the judgment and not otherwise consider or comment on the remaining underlying successful causes of

> action. The determination that the judgment is affirmed satisfies the due process protections and the appellant cannot avoid the effect of the affirmance by complaining that the reviewing court's opinion did not comment or consider all of the causes of action in the affirmed judgment.

Applicant's attorneys have examined the briefs on file in this case and are familiar with the issues involved regarding the dispute as between *Skidmore* and *Zevnik*, and the current state of the law on finality of judgments as stated therein. Applicant respectfully submits that a need for this brief exists to more fully address the impact (beyond the instant action) of a decision by this Court assessing the continued wisdom of *Skidmore*, including the near limitless litigation that would necessarily follow if *Skidmore* was abandoned and the unintended consequences of decisions such as *Zevnik* were permitted to be propped up as a "modern rule." Further, Applicant respectfully contends that an explicit pronouncement by this Court of bright-line standards for the reviewing courts (and, thereafter, trial courts) to be guided by will significantly curtail if not eliminate litigation (like that which Applicant has endured) where litigants have used the existence of *Zevnik* and its limited progeny to undermine the effect of the reviewing court's "judgment affirmed" opinion and collaterally attack an underlying judgment in favor of, in Applicant's case, a plaintiff on several causes of action.

For the reasons stated in this Application and more fully developed within the attached proposed brief, Barton respectfully requests leave to file the *amicus curiae* brief that is combined with this application.

The *amicus curiae* brief was authored by Patrick C. McGarrigle, Esq. and Michael J. Kenney, Esq. of McGarrigle, Kenney & Zampiello, APC. No party, person or entity made a monetary contribution to fund the preparation of this brief.

Dated: February 7, 2018

Respectfully submitted:

McGARRIGLE KENNEY &
ZAMPIELLO, APC

By: s/ Michael J. Kenney
Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorney for Kenneth Barton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES(S)**

Federal:

U.S. Supreme Court:

Federal Appeals:

State:

Supreme Court:

Appellate:

TABLE OF AUTHORITIES *(Cont.)*

CASES **PAGES(S)**

SECONDARY SOURCES **PAGES(S)**

I. INTRODUCTION AND INTEREST OF AMICUS.

In *People v. Skidmore* (1865) 27 Cal. 287 ("*Skidmore*"), the California Supreme Court laid the foundation for a fundamental tenet of California jurisprudence: that the affirmance of a judgment is an affirmance of the *entire* judgment (in the absence of an appellate court's explicit reversal of any portion thereof). However, for approximately ten years, that 140 year-plus principle has been not simply under attack but illogically so and without the benefit of this Court's guidance for reviewing and trial courts to follow. Beginning with *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76 ("*Zevnik*"), several appellate courts have asserted, each on unique factual circumstances, with little substantive analysis and discussion of the impact of deviating from *Skidmore* and the finality of judgments rule in other factual circumstances, that *Skidmore* is no longer good law and that courts and litigants are no longer bound by the rule that the affirmance of a judgment is an affirmance of the *entire* judgment.

The net result of *Zevnik* and its progeny has been to needlessly foment uncertainty in state and federal courts as to what an affirmed California judgment really means, while leaving the reasoning undergirding *Skidmore* and the finality of judgments principles largely unaddressed and left to speculation, while some reach to conclude – also without a deep discussion of the impact on litigants and the courts, of the talked up "modern approach." Under *Skidmore* and the rules governing *res judicata* and collateral estoppel, if an appellate court affirms a judgment in favor of a plaintiff (for example), where the judgment found in that plaintiff's favor on three causes of action, but the appellate court determines that it need not consider two of the causes of action because it determined its decision upholding one of the causes of action was sufficient to warrant affirmance of the judgment, the entirety of the underlying judgment (not just the single cause of action addressed) is considered affirmed for *res judicata* and

collateral estoppel (issue and claim preclusion) purposes.

Yet, the "rule" advanced by Appellant Samara here (and others seeking to expand *Zevnik* and its progeny to effectively overrule *Skidmore*) is that, where a reviewing court affirms a judgment but chooses not to discuss or consider one of the underlying successful claims, for res judicata and issue/claim preclusion purposes, the "Judgment affirmed" is, in fact, effectively and implicitly a "judgment affirmed in part and reversed in part" because (the argument goes) the reviewing court has not adjudicated the undiscussed or not considered cause(s) of action and, therefore, no claim or issue preclusion can apply and the parties must continue to litigate the claim or issues (even though the claim or issue was actually litigated in the underlying court and presented and argued in the reviewing court).

As discussed more fully herein (Section V), Applicant has faced just such a scenario. Specifically, a litigant using *Zevnik* and its progeny to argue that, despite the fact that after a full trial that resulted in a judgment against him on several causes of action, and that judgment was later affirmed on appeal, the affirmed judgment did not have a preclusive effect because the reviewing court judgment affirmance only addressed one of the causes of action and chose not to consider the remaining causes of action that the trial court had determined in the Applicant's favor (Ex. 7 at p. 2:7-12). In addition to the uncertainty and prolonged litigation Applicant has sustained, not to mention the additional workload for the Bankruptcy Court and the 9th Circuit's Bankruptcy Appellate Panel, neither in Samara's brief or in the *Zevnik* decision or its progeny or in Barton's instant 9th circuit judgment being appealed by the underlying state court judgment debtor-defendant, have any of the parties addressed how the effect of a new rule effectively overruling *Skidmore* and the meaning of "judgment affirmed" could be retroactively applied where (as is the case for applicant) the reviewing court would not have had the benefit of this Court's guidance

and, therefore, the ability to either provide a further (beyond "Judgment affirmed") reasoned discussion of the other successful causes of action and Applicant would not have had the opportunity to request directly (or via petition for rehearing or review by this Court) to have every cause of action be the subject of some level of additional commentary by the reviewing court. In short, if the Court is inclined to revisit and revise the scope of *Skidmore*, the application of any new rule should only be prospective so that the litigants and underlying reviewing courts can, going forward, address the impact of this Court's ruling in future proceedings.

Applicant Barton therefore prays that, for all the reasons stated herein, the Court takes this opportunity to renew the commitment to the finality of judgments (and the preclusive effect thereof) as exemplified in the fundamental tenet of judicial review that when a judgment on several causes of action is affirmed (but the reviewing court elects only to comment upon one of the causes of action and chooses not to consider the others), the judgment (and all causes of action therein) is affirmed on all grounds for res judicata and collateral estoppel purposes. The creation of an "implied" reversal or a subset of affirmed judgments that have no meaning in the context of res judicata and collateral estoppel will only create chaos in the reviewing courts, trial courts and for litigants and be at odds with the policy supporting application of such principles. As this Court, in *Murray v. Alaska Airlines* (2010) 50 Cal.4th 860, 877, instructed (in a decision which advised the 9th Circuit that collateral estoppel applied to administrative findings where the plaintiff did not pursue an appeal past the administrative remedies): "Last, "[e]ven assuming all the threshold requirements are satisfied ... [w]e have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342–343, 272 Cal.Rptr. 767, 795 P.2d 1223.) ***We find that the public policies***

underlying the doctrine of collateral estoppel will best be served by applying the doctrine to the particular factual setting of this case. Those policies include conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and avoiding the harassment of parties through repeated litigation. (Allen v. McCurry (1980) 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308; Montana v. United States (1979) 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210; Sims, supra, 32 Cal.3d at pp. 488–489, 186 Cal.Rptr. 77, 651 P.2d 321; Syufy Enterprises v. City of Oakland (2002) 104 Cal.App.4th 869, 878, 128 Cal.Rptr.2d 808.)." (Emphasis Added). The parsing of "judgment affirmed" to create a circumstance which forces reviewing courts to weigh in more fully in determining each cause of action at issue on appeal or risk repetitive litigation in the trial court, reviewing court and federal courts, is not consistent with the policies restated in Murray or, for that matter, in Skidmore and its progeny over the years.

II. HOLDING THAT "JUDGMENT AFFIRMED" TRIGGERS THE PROTECTIONS OF *RES JUDICATA* AND COLLATERAL ESTOPPEL IS CONSISTENT WITH THE POLICIES OF THOSE DOCTRINES AND DUE PROCESS.

Missing from Appellant Samara's brief is any discussion as to how the Skidmore rule – that "judgment affirmed" means the judgment is affirmed in all respects (including on those causes of action the reviewing court choose not to comment upon further than the affirmance) – violates principles of due process when that affirmed judgment is used to preclude the re-litigation of claims/issues tried below and challenged through an appeal. "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon

the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." Black's Law Dictionary 500 (6th ed. 1992) In other words, the appellate process guarantees the appellant the right to present arguments and be heard, but does not guaranty a certain outcome or discussion by the reviewing court of all of the arguments, evidence and causes of action in the litigation. The reviewing court's decision to affirm a judgment overall, while choosing to discuss in detail only one of several causes of action, does not constitute a violation of the litigant's due process rights so as to (a) avoid the application of *res judicata* and collateral estoppel principles to all causes of action adjudicated in the judgment and (b) force the prevailing litigant to re-litigate the disposition of the successful cause of action not commented upon in detail in the appellate opinion.

Despite this fundamental concept, however, those that would seek to deploy *Zevnik* to undercut the finality of judgments and limit their preclusive effect do indeed argue that they were entitled to a specific outcome; they argue that they are somehow owed a certain level of discourse or written analysis and, barring same being provided, "judgment affirmed" is not specific enough and, as the assertion goes, their "due process" rights have been abridged. Not so. However, the fact that such assertions can wreak havoc on a successful litigant who has already prevailed at the trial court and then appellate levels is hardly academic, as Applicant has experienced first-hand: *Barton v. Khan*, United States Bankruptcy Court, Central District of California, Los Angeles Division, Adv. No. 2:13-ap-01752. In that bankruptcy adversary proceeding (and a companion adversary proceeding against Khan's co-defendant in the prior state matter, Terrance Tomkow), following the state trial court's judgment

in favor of Barton and the Second District Court of Appeal's affirmance of the Judgment (except on an emotional distress damages component), Barton subsequently moved for summary judgment (for non-dischargeability of his fraud judgment, etc. against Khan) in bankruptcy court (which was granted). Thereafter, defendant (based upon *Zevnik* and another inapt decision[1]) argued that only the cause of action specifically addressed within the Court of Appeal's affirmance of the trial court's *entire* Judgment in favor of Barton had a preclusive effect. What is critically lacking in that argument, however, and what is lacking in *Zevnik*, is any cogent analysis of due process; either from the standpoint of the party seeking or the party avoiding the preclusive effect of the judgment in question.

Having had full opportunity to be heard, present argument and evidence they deemed favorable, a litigant has received due process. That fact does not somehow change at the appellate level should a reviewing court deem that it need not reach each and every one of the underlying and successfully adjudicated causes of action. Also lacking from any analysis in the Samara briefing is an explanation as to how their loosely proposed limitation on the effect of the "judgment affirmed" (on claim and issue preclusion application, for example) would be in furtherance of the policies articulated in *Murray* or rectify any unarticulated (by Samara) denial of due

---

1 *Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, was cited by Khan and was not factually or legally persuasive as a challenge to *Skidmore*. There, the Appellate Court did not affirm the entire judgment as occurred in Barton (See, Motion for Judicial Notice ("**MJN**"), Ex. 4). Unlike Barton's separate and each successful causes of action sustained by the SOD/RSOD and Judgments (MJN, Exs. 2, 3 and 5, respectively), *Newport* involved alternative theories within a single cause of action, a distinction which Appellant does not address or account for where, as in Barton's case, he succeeded on separate causes of action as confirmed in his Judgment.

process by the reviewing court. Conversely, a party who received a favorable judgment from a trial court on several causes of action, and later has that judgment affirmed in its entirety by a reviewing court, would have its due process rights encroached upon if, after prevailing once, and having that victory affirmed, they are then required to prove their case once more in a different forum simply because the reviewing court chose to conserve its resources and not provide more detailed discussion on other successful causes of action included in the underlying judgment. *Zevnik* and the disciples of its purported limitation on the preclusive effect of final judgments, wholly fail to account for the facts that: (a) limiting the preclusive effect of an affirmed final judgment unjustly abridges the due process rights of the successful litigant; and (b) no due process violation occurs simply because a reviewing court chooses not to address all of the appellant's arguments and evidence citations or chooses to sweep aside challenges to other causes of action by determining the judgment is affirmed. Due process and the principles articulated in *Murray* underscore the prudence in California's prevailing policy that a successful litigant should not be forced to re-litigate an affirmed judgment. A party who has exercised its appellate rights has received due process, which is all it is entitled to, is not then entitle to perpetual litigation of claims simply because the appellate court was not persuaded by the appellant's contentions to answer same – as to particular causes of action – with a response of "judgment is affirmed."

Having failed to address, much less account for, the due process issue (whether analyzed from the standpoint of the successful litigant (who is entitled to rely upon the final affirmed judgment and the preclusive effects thereof) or from the standpoint of the unsuccessful litigant (who cannot point to any due process right beyond the rights afforded and enjoyed in being heard and presenting evidence at every level of

proceeding), the attempts to limit the preclusive effect of final, affirmed judgments is both unavailing and lacking in legal support and must be rejected. If it is not, as addressed more fully herein in Section III, the result (in addition to the unjust abridgment of the successful litigants due process rights) will be to spawn endless litigation in which the same issues are tried and re-tried *ad infinitum* in an unending series of forums, with the resulting burdens borne by a judicial system and litigants rightfully relying on the efficiencies which *res judicata* and collateral estoppel principles are intended to bring about for the benefit of all..

III. LITIGANTS, AND THE JUDICIARY ITSELF, DEPEND UPON THE FINALITY OF JUDGMENTS.

In addition to the aforementioned abridgment of a successful litigant's due process rights (so that undeserved and unwarranted, additional rights akin to an undeserved new trial on a decided matter can be granted to an unsuccessful litigant by virtue of permitting them to re-litigate issues resolved in a final, affirmed judgment simply because a reviewing court's opinion does not consider in more detail any particular cause of action at issue in the judgment), that process would also up-end the concept of finality of judgments. Judgment Affirmed must mean the judgment is affirmed; it is as simple as that. Permitting defeated litigants to claim that an affirmed judgment does not have a preclusive effect – invoking an untenable "implied reversal" as the net effect of the reviewing court's opinion - because the reviewing court did not find affirmance required it to substantively address each of the successful causes of action in the judgment, would produce a result that is both unintended and unmanageable:

Unintended because, where a reviewing court intends anything other than to affirm, it is fully capable of so stating. There is no good cause to

look to a defeated litigant to say what a reviewing court expressly declined to say. If a judgment is not expressly reversed, then it is not reversed at all. The approach in *Skidmore*, et al enhances efficiency by affirming the finality of judgments.

Unmanageable because removing the finality of an affirmed judgment would serve only to spawn either unlimited re-litigation of decided matters, or an unlimited workload for reviewing courts who, if the strained interpretation of *Zevnik*, et al. were permitted to stand, would suddenly find that they could no longer cease their review when they determined that the matter pending should either be affirmed or reversed. Instead, a reviewing court would be forced to consider and address within its written opinion each and every stated underlying cause of action in the judgment. If the judiciary believes its resources are taxed now, phrases like "judicial efficiency" or "economy" will no longer exist, appellate proceedings will be needlessly protracted and "finality" will be an anachronism to the bar and litigant alike.

IV. *ZEVNIK, ET AL.* CANNOT BE PERMITTED TO CREATE AN *AD HOC* SYSTEM OF 'NULLIFACTION BY IMPLICATION" AND THEREBY DISTURB THE LAW OF FINALITY OF JUDGMENTS.

Zevnik purports to allow a defeated litigant to speak for a reviewing court where, despite having had every opportunity to expound to whatever extent it felt was necessary, the reviewing court declined to do so. It would be unwise indeed if litigants were allowed to speak for a reviewing where that court chose not to do so. Moreover, it would be directly contrary to the ruling of the reviewing court. While *Zevnik* and its disciples would like to create the inference that the reviewing court simply forgot to rule upon certain issues or theories, such an inference is incorrect. The truth is that the

reviewing court found it *unnecessary* to address those further causes of action, for example, because to do so would be superfluous to the affirmation of the judgment or decision before it. Holding otherwise, as litigants striving to extrapolate *Zevnik*, et al. into a one-size-fits-all rules that plainly does not fit and is inapt to, for example, the circumstances in Applicant's case here, would create a *de facto* "nullification by implication" rule: if an appellate court affirmed a judgment containing three successful causes of action but only choose to/concluded it needed to substantively discuss the claims elements, etc. of one such cause of action, then, the reviewing court's decision not to discuss the other two causes of action creates a circumstance where those two causes of action have not been decided on the merits and are subject to (i) re-litigation in the trial court and (ii) potential malicious prosecution and/or abuse of process claims (or at least a class of claims that are purportedly not finally adjudicated). *Zevnik*, et al. have created and, if not overruled or at least substantially curtailed, will continue to prop up needless and unfounded challenges to underlying judgments and appellate decisions. Moreover, such a disposition would also create mass confusion among litigants and trial and reviewing courts, as it could and would inevitably lead to disparate rulings of law and fact; precisely what the finality of judgments is meant to prevent. The instant review by this Court presents an important opportunity to provide guidance to state and federal courts seeking guidance on the application of these doctrines in the context of a "judgment affirmed" reviewing court opinion.

The overruling and/or curtailing of *Zevnik*, et al. (and re-affirmance of Skidmore and providing the clarity Applicant has requested above) is also key to the orderly administration of justice. For example, when a party is permitted to relitigate an issue or claim upon which it previously lost (which judgment was affirmed by a reviewing court), and that party succeeds, what becomes of the disparate and contradictory

rulings/judgments? Each party could then rightly point to a "final judgment" which memorialized a decision in its favor, even though those decisions are wholly contradictory. Succinctly, the implementation of such a paradigm would spawn not just myriad iterations of litigation and re-litigation, but wide-spread confusion among litigants, the bar, insurers, courts and all reviewing courts.[2]

V. THE IMPACT OF A DECISION THAT DOES NOT AFFIRM SKIDMORE AND OVERRULE/CURTAIL ZEVNIK, ET AL. WILL REACH FAR BEYOND THE INSTANT ACTION.

Without this Court's ruling and commitment to the bright line rule of *Skidmore*, and disavowal / overturning of *Zevnik*, et al, the unintended and unmanageable consequences discussed *supra* in Sections III and IV are sure to follow. This is not a prognostication or a view into a crystal ball, it is an absolute certainty. The Court need look no further than Barton's own experience for a glimpse into what the judiciary can expect if the finality of judgments (and the preclusive effects thereof) are disturbed.

Succinctly, Barton filed an action for conversion, etc. against Defendants RPost International Limited (**"RIL"**), Zafar Khan (**"Khan"**) and Terrance Tomkow (**"Tomkow"**) (Appendix, Ex. 1). After a full trial on the matter in three different phases lasting more than a year, as well as extensive briefing before, during and after trial, Barton was successful and a judgment was entered in his favor in excess of $4,000,000.00. (Appendix, Exs. 2-3). In a further exercise of their due process rights Khan, Tomkow

---

[2] Highlighting the importance of the issue of finality of judgments as well as the far-reaching impact of any change to the long-standing rule re same, in *In re Khan* (Case no. 17-60011) the United States Court of Appeals for the Ninth Circuit granted a stay pending this Court's decision in the instant matter. (Ex. 20)

and RIL filed an appeal the result of which was an affirmance in all material respects and resulted in an amended judgment after trial and appeal. (Appendix, Exs. 4-5) Thereafter, when Khan and Tomkow filed bankruptcy in an effort to avoid responsibility for the aforementioned judgments, Barton filed adversary complaints in the Bankruptcy Court and moved for summary judgment based upon those state court final judgments/decisions. (Appendix Ex. 6 (Reply at Appendix, Ex. 8)) Given that the trial court had already found Khan and Tomkow liable for fraud and conversion, etc., which findings/judgment were then upheld by the Court of Appeal, there was no need to re-litigate those issues for a non-dischargeability judgment from the bankruptcy court. In opposition to summary judgment, however, Khan and Tomkow began to rely upon *Zevnik, et al* to argue that, despite having enjoyed their full due process rights before both the trial court and the court of appeal, the judgment should not have a preclusive effect because the court of appeal had not considered all the causes of action that Barton prevailed upon as reflected in the judgment. (Appendix, Ex. 7, pg. 2:10-11)) The bankruptcy court rightly rejected that argument (relying on *Skidmore* and 9th Circuit authority) and, in light of the fact that Khan and Tomkow had exercised and enjoyed their full due process rights in attempting (albeit unsuccessfully) to defend against the action for conversion, fraud, etc., issued an Order granting summary judgment and issued its own judgment in favor of Barton. (Appendix, Exs. 9-10)

In an even further exercise of their due process rights, Khan and Tomkow appealed the bankruptcy court's order granting summary judgment (and subsequent judgment) and sought to have the appeal certified for review by the 9th Circuit Court of Appeals, based largely upon a desire to seek determination from that court regarding whether *Skidmore* or *Zevnik* should control. (Appendix, Ex. 11; (Reply at Ex. 13)) In denying

Khan and Tomkow's Motion for Certification, the Bankruptcy Court had before it the Court of Appeal's decision in *Gonzalez v. Beyer Pongratz & Rosen*, Case No. C065197 (2010 WL 4849920) which matter expressly addressed *Zevnik*.[3] (See Barton's Opposition at Appendix Ex. 12) Therein, the reasoning and ruling of the *Zevnik* court was rejected:

> "Gonzalez disagrees, arguing his seventh and eight causes of action survived issuance of the remittitur. He appears to believe that this court's unqualified affirmance of the judgment in favor of the law firm on all causes of action was transformed into a reversal of the judgment on the two causes of action not explicitly addressed in this court's decision affirming the judgment. Not so. The trial court entered judgment against Gonzalez on all causes of action. This court affirmed. The fact that the decision affirming the judgment did not explicitly discuss two causes of action does not transform its unqualified affirmance of the judgment into the reversal of the judgment as to those causes of action."

While *Gonzalez* is not precedential, as the 9th Circuit in *Davis* confirmed, the unpublished decision can be considered as a relevant reflection of California law on the subject. (Appendix Ex. 12, at pg. 5:4-14) The Motion for Certification was thereafter denied. (Appendix Ex. 14)

The appeal proceeded to be fully briefed before the United States Bankruptcy Appellate Panel of the Ninth Circuit (Appendix Exs. 15-17),

---

[3] The *Gonzalez* decision was not published and is, therefore, not cited for precedential value here, but was properly considered by the court under 9th Circuit precedent. *Daniel v. Ford Motor Co.* 806 F.3d 1217 (9th Cir. 2015) ("Even though unpublished California Courts of Appeal decisions have no precedential value under California law, the Ninth Circuit is not precluded from considering such decisions as a possible reflection of California law.).

and – once again – resulted in the affirmance of the judgment of the bankruptcy court, which judgment was based upon the affirmed judgment of the trial court. (Appendix Ex. 18) The court noted that, as the California Supreme Court has not overruled *Skidmore*, it remains good law and the court likewise remained bound by *Skidmore* and *DiRuzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003). (Appendix Ex. 18 at p. 18:12-14)

The 9th Circuit Bankruptcy Appellate Panel also remarked that **"In cases involving California judgments that have gone through appeal, the bankruptcy courts need certainty regarding the law we must apply; *DiRuzza* currently supplies this certainty."** (Appendix Ex. 18 at p. 18:12-14 (fn 6)) The instant action presents an ideal opportunity for this Court to provide guidance to lower courts and federal courts by affirming its commitment to *Skidmore* and the finality of judgments and the preclusive effects thereof. The history of the Barton litigation, and the efforts of Khan and Tomkow to use *Zevnik* to extend litigation in perpetuity, sending matters into an unending spiral of re-litigating issues, is just one example of the havoc that will continue to be wrought by unsuccessful litigants without an unequivocal statement by this Court that affirms *Skidmore*, overrules *Zevnik* and its progeny and sets forth the clear statement (as set forth in the above amicus application) as to the effect of a judgment affirmed determination on preclusion principles in the case, for example, where only one of several causes of action is expressly commented upon and considered and the reviewing court has not reversed the judgment on any claim. Accordingly, Barton submits this *amicus* brief in the hope that this Court will issue just such a decision and squelch the attempts to chip-away at the finality of judgments (and preclusive effects thereof), which principles are both foundational and necessary components of California jurisprudence.

VI. IN THE UNLIKELY EVENT THAT THE COURT WERE TO DECIDE NOT TO AFFIRM *SKIDMORE*, SUCH DECISION AND RULE SHOULD ONLY APPLY TO PROSPECTIVE CASES IN WHICH AN UNDERLYING JUDGMENT HAS NOT YET BEEN ENTERED OR, IF APPEALED, BRIEFED TO THE REVIEWING COURT.

Even if this Court were to reverse course and issue a decision that in any way restricted the application of *Skidmore* as it pertains to the finality of judgments and the preclusive effects of same, that decision should not be applicable to judgments or underlying reviewing court opinions entered prior to such a decision. To do so would result in judgments not being given the full force and effect intended by the trial court or the subsequent reviewing court(s). If such a drastic policy change regarding the finality of judgments were to be enacted (and it should not be), Courts of Appeal must be given fair notice that, for example, all causes of action adjudicated in the judgment must be expressly addressed within written decisions and/or provided with language that will permit a reviewing court to not address (but also not diminish or nullify) all such causes of action once it affirms (so as to avoid the confusion and additional burdens that will ensue with such a change in the law). Further, application of a "nullification by implication" doctrine as those proponents of *Zevnik, et al.* explicitly or tacitly promote would result in unintended consequences for all courts who have affirmed on certain grounds while declining (for reasons of lack of necessity, mootness, resource and timing limitations, for example) to review all adjudicated causes of action. For Barton's part, his underlying judgment was entered in August 2013 and his Second District opinion in December 2014; summary judgment in the Bankruptcy Court was entered in 2016 and the BAP's decision entered thereafter – all of which underscores that retroactivity concerning any such extraordinary change in

the law would be inappropriate and not just to litigants or the courts.

VII. CONCLUSION.

Without a clear statement by this Court, the assault upon the finality of judgments (and preclusive effects thereof) proposed by *Zevnik* will continue. Unsuccessful litigants will argue that *Skidmore* is no longer good law and that courts and litigants are no longer bound by the rule that the affirmance of a judgment is an affirmance of the *entire* judgment. Because of the uncertainty created by the promulgation of that theory, until this Court affirmatively rules to the contrary, courts and litigants will continue to face uncertainty, as well as the loss of finality of judgments and a drastic downsizing of the fundamental principle of *stare decisis*. Specifically, until this Court addresses the issue, some litigants and courts will continue to suggest – without substantive discussion of the effects and the absence of logic supporting a deviation from the finality of judgments principles - that the *Skidmore* principle is dead (though it has never been overturned), and that whenever a reviewing court fails to address each cause of action comprising a judgment, any cause of action not specifically addressed can be deemed to have not been affirmed, opening a Pandora's box of unintended and unimaginable consequences (and imaginable results that will prejudice the rights of litigants and the orderly process of the courts).

In addition to reversing the decision of the Court of Appeal in this instant matter, Barton respectfully requests that the Court affirm Skidmore, overrule *Zevnik*, et al. and clarify through a clearer articulation of the

interplay between the judgment affirmed and preclusion principles, as suggested by Barton in the above Application.

Dated: February 7, 2018

McGARRIGLE, KENNEY & ZAMPIELLO, APC

By: s/ Michael J. Kenney
Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorney for Kenneth Barton

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 APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF KENNETH BARTON IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR is produced using 13-point Roman type and contains approximately 5,066 words.

Dated: February 7, 2018

By: s/ Michael J. Kenney
Patrick C. McGarrigle, Esq.
Michael J. Kenney, Esq.
Attorney for Kenneth Barton

PROOF OF SERVICE BY MAIL

Document: APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF KENNETH BARTON IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR.

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 LOS ANGELES

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, CA 91311. 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.

X 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 February 7, 2018 at Chatsworth, California.

/ Vanessa Bravo /
Vanessa Bravo

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant: Alexis Galindo Curd, Galindo & Smith, LLP 301 E. Ocean Blvd., Suite 1700 Long Beach, CA 90802 Facsimile: (562) 624-1178 *Via U.S. Mail*	***Attorney for Respondent:*** 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*
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*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 *Via Federal Express* *(Original plus 8 copies, one via e-submission)*	

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

AMENDED PROOF OF SERVICE RE: APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF KENNETH BARTON IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR

Patrick C. McGarrigle, Esq. (SBN 149008)
Email: patrickm@mkzlaw.com
Michael J. Kenney, Esq. (SBN 192775)
Email: michaelk@mkzlaw.com
MCGARRIGLE, KENNEY & ZAMPIELLO, APC
9600 Topanga Canyon Boulevard, Suite 200
Chatsworth, California 91311
T: (818) 998-3300; F: (818) 998-3344

PROOF OF SERVICE BY MAIL

Document: APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF KENNETH BARTON IN SUPPORT OF PETITIONER, RESPONDENT AND DEFENDANT HAITHAM MATAR.

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 LOS ANGELES

I am a citizen of the United States and a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9600 Topanga Canyon Boulevard, Suite 200, Chatsworth, CA 91311. 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.

X 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 February 7, 2018 at Chatsworth, California.

Vanessa Bravo

Vanessa Bravo

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant: Alexis Galindo Curd, Galindo & Smith, LLP 301 E. Ocean Blvd., Suite 1700 Long Beach, CA 90802 Facsimile: (562) 624-1178 *Via U.S. Mail*	***Attorney for Respondent:*** 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*
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*
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 *Via Federal Express* *(Original plus 8 copies, one via e-submission)*	