Supreme Court No. S240918
(2nd Civ. No. B2657521)
(Superior Court Case No. EC056720)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RANA SAMARA,

Plaintiff/Appellant,

v.

HAITHAM MATAR D.D.S.,

Defendant/Respondent.

After a Decision by the Court of Appeal
Second Appellate District, Division Seven

APPLICATION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE by STEPHEN H. BENNETT; RICHARD T. LETWAK; AND LETWAK & BENNETT, an Accountancy Corporation

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APPLICATION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE.

Pursuant to rule 8.520, subdivision (f), of the California Rules of Court, STEPHEN H. BENNETT; RICHARD T. LETWAK; AND LETWAK & BENNETT, an Accountancy Corporation (collectively "L&B") respectfully request this Court's permission to file an amicus brief. The amicus brief is combined herein with the application and is not submitted in support of any party.[1]

I. APPLICATION TO FILE AMICUS CURIAE BRIEF.

A. Amicus Interest.

L&B are plaintiffs and cross-defendants in an action pending in Orange County Superior Court, case number 30-2011-00497143 and entitled *Bennett, et al. v. Progressive Casualty Ins. Co.* (*Bennett v. Progressive*").

An issue in *Bennett v. Progressive* is the preclusive effect of a prior order/judgment in that case against non-parties. This issue in *Bennett v. Progressive* is essentially the same, or extremely similar, to

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[1] No party in this matter or any other person has contributed monetarily or otherwise to the preparation or submission of this Amicus Brief by L&B.

the issue on which this Court granted review in this case, *Samara v. Matar*. L&B seeks to file an amicus brief to assist this Court in addressing this issue of the preclusive effect of a prior judgment/order after an appeal when that issue was not addressed by the Court of Appeal. Specifically, L&B seeks to explain Code of Civil Procedure section 1908, subdivision (b), provides on an efficient procedure whereby a trial court, or an appellate court, may consider whether a prior judgment/holding will be binding on a non-party.[2]

L&B believes the second paragraph in section 1908, subdivision (b), would help solve the inefficient procedural conundrum regarding issue preclusion that is before this Court. L&B has raised this statute in its own motion before the trial court in its pending action, *Bennett v. Progressive*, but no ruling has yet been issued on that motion.

There is no known helpful case law on the use of the second paragraph of section 1908, subdivision (b). For this additional reason,

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[2] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

L&B seek to bring this Court's attention to the second paragraph of section 1908, subdivision (b).

B. Request to File Amicus Brief.

For all these reasons, L&B seeks to file the amicus brief that follows.

II. BRIEF OF AMICUS CURIAE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

STEPHEN H. BENNETT; RICHARD T. LETWAK; AND LETWAK & BENNETT, an Accountancy Corporation (collectively "L&B") respectfully submit the following Amicus Brief.

A. Key Facts.[3]

Plaintiff/Appellant Rana Samara ("Samara") filed a dental malpractice action against two dentists, an oral surgeon Stephen Nahigian D.D.S. ("Dr. Nahigian") and a general dentist Defendant/Respondent Haitham Matar D.D.S ("Dr. Matar"). Samara alleged Dr. Nahigian negligently performed surgery causing her

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[3] This statement of facts by L&B is streamlined to focus on the essential procedural facts due to the procedural nature of L&B's amicus assertions.

injury. Samara alleged Dr. Nahigian was Dr. Matar's agent/employee and did the operation in the course and scope of his employment. [1CT66]

Dr. Nahigian filed a motion for summary judgment against Samara on two bases: 1) Samara's action against him was barred by the statute of limitations; and 2) Dr. Nahigian did not cause Samara's injury. The trial court granted summary judgment on both grounds. [3CT503-509] Judgment was entered in favor of Dr. Nahigian. [1CT60-63]

Samara appealed but, on appeal, conceded the statute of limitations barred her action. Nonetheless, Samara asked the Court of Appeal to address the causation basis for granting summary judgment. The Court of Appeal declined to address the causation issue, finding it was not necessary to do so, and affirmed the judgment in favor of Dr. Nahigian in its entirety. (*Samara v. Estate of Nahigian* (2014) 2014 Cal.App. Unpub. LEXIS 8052 ("*Samara I*").)

Thereafter, Dr. Matar brought a motion for summary judgment as to Samara's claims against him. Dr. Matar asserted the prior "no causation" finding against Samara similarly barred her claims against him. Dr. Matar argued, among other things, Samara's claim against

him was based upon Dr. Nahigian's conduct, which had been previously and finally adjudicated as not causing any harm to Samara.

The trial court granted Dr. Matar's motion for summary judgment on claim preclusion grounds (and also ruled there existed no triable issue of fact as to any other grounds for Dr. Matar's liability.) [3CT537-549] Judgment was entered in favor of Dr. Matar and Samara appealed.

In a published opinion, the Second District Court of Appeal, reversed. The Court of Appeal held claim preclusion did not apply because there were not successive lawsuits, which it considered a necessary element for claim preclusion. (*Samara v. Matar* (2017) 8 Cal.App.5th 796, 804-806 ("*Samara II*").) In addition, the Court of Appeal in *Samara II* held issue preclusion does not bar Samara's claim against Dr. Matar because in *Samara I,* it declined to address the causation issue. Thus, the Court of Appeal in *Samara II* held the causation finding of the trial court had no preclusive effect under the principles set forth in several appellate decisions and specifically the

Restatement Second of Judgments, section 27, comment o. (See *Samara II, supra,* at pp. 807-810.)[4]

This Court granted review on the following issue:

> When a trial court grants a summary judgment motion on two alternative grounds, and the Court of Appeal affirms the judgment on only one ground and expressly declines to address the second, does the affirmed judgment have preclusive effect as to the second ground?

B. The Dilemma of Determining the Preclusive Effect of a Prior Finding Is Resolved by Section 1908.

1. Code of Civil Procedure section 1908, subdivision (b).

L&B contends that much of the confusion and inefficiency which the *Samara* case presents can be resolved by a seldom used statute; specifically, subdivision (b) of Code of Civil Procedure section 1908.

Section 1908 deals with the conclusive effect of judgments and final orders. Subdivision (b), and specifically, the second paragraph of that subdivision, provides a vehicle whereby a party or a non-party

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[4] Although not relevant to the issue on review in this Court, the Court of Appeal in *Samara II* also held Samara's allegations of Dr. Matar's post-operation negligence constituted a separate cause of action not addressed by the trial court.

can make a motion to determine the preclusive effect of a prior judgment or holding. Section 1908 provides in full:

> (a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> (2) In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.
>
> (b) A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.
>
> At any time prior to a final judgment, as defined in Section 577, a determination of whether the judgment, verdict upon which it was entered, or a finding upon which it was entered is to be binding upon a nonparty

> pursuant to this subdivision or whether such nonparty is entitled to the benefit of this subdivision may, on the noticed motion of any party or any nonparty that may be affected by this subdivision, be made in the court in which the action was tried or in which the action is pending on appeal. If no such motion is made before the judgment becomes final, the determination may be made in a separate action. If appropriate, a judgment may be entered or ordered to be entered pursuant to such determination.

L&B wishes to draw the Court's attention to subdivision (b) of section 1908, specifically the last paragraph. This paragraph provides a procedure whereby a party or even a nonparty can file a motion to determine if a judgment/verdict or a ruling contained therein, will be binding upon a nonparty. Importantly, that paragraph allows such a motion to be brought "in the court in which the action was tried or in which the action is pending or appeal." As discussed below, this procedure resolves the confusion and perceived inequity that resulted here in *Samara II*.

2. Had the Parties Followed Section 1908, There Would Have Been No Need for *Samara II*.

L&B respectfully sets forth below that section 1908 could have been used in this case to avoid the problems presently pending in this case.

i. Remedy in Trial Court.

After the trial court's initial summary judgment ruling in favor of Dr. Nahigian, any of the parties, including Samara (or indeed a non-party with an interest in the action if Dr. Matar is considered a non-party), could have brought a motion under section 1908, subdivision (b), to determine if the "no causation" finding in Dr. Nahigian's summary judgment was binding on Samara for her claims against Dr. Matar.

If the trial court found, "yes," that the "no causation" was binding on Samara for her claims against Dr. Matar, that conclusion (through the inevitable resulting judgment) would most likely be reviewed on appeal. Importantly, Samara would have had a momentous reason and basis for asking the Court of Appeal in *Samara I* to rule on the "no causation" finding in favor of Dr. Nahigian. Ostensibly, the Court of Appeal would have decided the issue knowing of the consequences of not ruling because of the section 1908 ruling. Thus, the Court of Appeal, unlike the situation here, would have reviewed the merits of the "no causation" basis for the judgment in favor of Dr. Nahigian.

ii. Remedy in Court of Appeal.

The second paragraph of section 1908, subdivision (b), also provides a vehicle for a motion in the Court of Appeal that would similarly prevent the problems here in *Samara*. Specifically, if the interested party or non-party did not file a motion in the trial court to determine the preclusive effect of the "no causation" finding, section 1908 allows such a motion to be filed in a pending appeal. Thus, Samara or Dr. Matar (if considered an interested non-party) could have filed a motion under the second paragraph of section 1908, subdivision (b), to have the appellate court determine the preclusive effect of the "no causation" finding in favor of Dr. Nahigian. This too would have avoided the procedural and substantive conundrum of the *Samara* case by again directing the appellate court to the necessity of deciding the preclusive effect of the finding in the first appeal.

3. The 1975 amendment to section 1908 that added subdivision (b), De Facto Overrules *Skidmore II.*

As discussed, section 1908, subdivision (b), gives a party (or a non-party with an interest) the right to file a motion to determine the preclusive effect of judgment/verdict or holding therein. Section

1908, subdivision (b), specifically states that such a motion can be filed "in a separate action" even after "the judgment becomes final." Thus, even after *Samara I*, Samara or Dr. Matar could have filed a motion in the trial court to determine the preclusive effect of the 'no causation" finding in the initial summary judgment in favor of Dr. Nahigian. Section 1908, accordingly, states it is indeed in a trial court's purview to decide this issue. To the extent this power conflicts with the holding of *People v. Skidmore* (1865) 27 Cal. 287 [holding an appellate decision is preclusive even for issue not specifically decided], the 1975 amendment to section 1908 that added subdivision (b), legislatively overruled this case.[5] For this additional reason, section 1908, subdivision (b), solves the problems – including conflicts in case law – highlighted here in *Samara*.

C. This Court Should Hold Section 1908, Subdivision (b), is the Proper and Efficient Vehicle to Determine the Preclusive Effect of Judgments/Verdicts and Holdings Therein.

As discussed, the section 1908, subdivision (b), motion is a vehicle whereby a Court of Appeal knows when it must rule on

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[5] Subdivision (b) of section 1908 was enacted in 1975.

additional issues. Although appellate courts are discouraged or even prohibited from ruling on issues not necessary to its decision, the section 1908 procedure lets the Court of Appeal know when an issue is not mooted by an alternative basis for the Court of Appeal's decision. Section 1908, subdivision (b), provides an efficient and fair vehicle to determine the preclusive effect of a ruling against or for another party (or a non-party with an interest in the action). If this procedure had been followed here in *Samara*, there would be no "*Samara II.*" This procedure would also prevent the resulting conflict in decisions on determining the preclusive effect of a ruling not decided by an appellate court.

Section 1908 offers a vehicle to place before the court of appeal the issue of the preclusive effect of a judgment/verdict/holding. The dilemma before this Court is to place some practical limits on what a Court of Appeal should decide in resolving the appeal before it. On the one hand, appellate courts cannot and should not decide every "issue" presented to them by the parties. Limited judicial resources and legal restraints prevent an appellate court from deciding multiple bases for affirmance (or even reversal) and drafting a decision to support these multiple bases. However, not deciding issues that will

later be asserted as preclusive against a party in other proceedings, makes for uncertainly, confusion in the law and inefficiency -- as this matter illustrates. Because the Court of Appeal in *Samara I* did not decide the causation issue, additional trial and appellate proceedings were required. Moreover, it also raises the specter of conflicts in policy and law on whether an undecided issue in an appellate proceeding is entitled to preclusive effect. As the parties' briefs here in *Samara* illustrate, there is law and important rationale on both sides of the issue of whether undecided issues in an appellate opinion are entitled to preclusive effect.

In sum, as discussed, the procedure set forth in the second paragraph of section 1908, subdivision (b), creates a workable and cost-effective process to alert a Court of Appeal of the need to decide certain issues in a controversy that avoids all these concerns.

III. CONCLUSION

For all the above reasons, this Court should accept this Amicus brief of L&B and take this opportunity to discuss section 1908, subdivision (b), and how it solves the procedural and substantive conundrum exemplified by this case.

Date: February 8, 2018

By: _____
MARY A. LEHMAN
Attorneys for Amicus
STEPHEN H. BENNETT;
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Accountancy Corporation

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to the California Rules of Court, the attached Application to File Brief and Brief of Amicus Curiae Stephen H. Bennett; Richard T. Letwak and Letwak & Bennett, an Accountancy Corporation is 14-point Roman type, double spaced and includes 2,472 words, including footnotes. Counsel relies on the word count of the word processing program used to prepare this brief.

Dated: February 8, 2018

By _____
MARY A. LEHMAN

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Defendants/RESPONDENTS: Matar		
PROOF OF SERVICE BY MAIL **(CCP 1013a(3) & 2015.5(b)**	HEARING DATE - TIME	**S240918**

I declare that: I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California, the later within which county the subject mailing occurred; my business address is:
941 Orange Avenue, Suite 531
Coronado, CA 92118; I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

On this date, I served the following document(s) by United States Mail:

APPLICATION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE by STEPHEN H. BENNETT; RICHARD T. LETWAK; AND LETWAK & BENNETT, an Accountancy Corporation

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows: **SEE ATTACHED SERVICE LIST**

I then sealed each envelope and placed each for collection and mailing on, following ordinary business practices. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 8, 2018.

Mary A. Lehman

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