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Supreme Court No. _____

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS (*Continued*)

Description **Page No.**

TABLE OF AUTHORITIES

CASES

Case **Page No.**

TABLE OF AUTHORITIES (*Continued*)

CASES

TABLE OF AUTHORITIES (*Continued*)

CASES

STATUTES

Other

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to California Rules of Court, Rule 8.500, Petitioner, Respondent and Defendant, HAITHAM MATAR D.D.S. ("Petitioner") hereby seeks review by this Court of the published opinion of the Second District Court of Appeal, Case Number B265752 attached hereto as Appendix 1 on the following issues:

1. When a trial court grants a motion for summary judgment and enters judgment against a plaintiff in a professional negligence case against a surgical dentist on the ground that the surgical dentist did not cause plaintiff's injuries and the action as to that surgical dentist was barred by the statute of limitations, which, even though the Court of Appeal did not address the causation issue because it did not need to do so, was affirmed on appeal, is it a bar to plaintiff's claims against the surgical dentist's alleged principal in the same lawsuit, whose liability is derivative of the surgical dentist on an agency theory, on the grounds of res judicata (claim preclusion) and/or collateral estoppel (issue preclusion)? Answering this question in the negative as the Second District Court of Appeal did in the attached published opinion[1], required the Court of Appeal to refuse to follow this Court's decision in *People v. Skidmore* (1865) 27 Cal. 287 ("*Skidmore*") which is still good law and has never been overruled. (See *DiRuzza v. County of Tehama*

[1] *Samara vs. Matar* (2017) 8 Cal.App.5th 796 ("*Samara II*").)

(2003) 323 F.3d 1147 at 1153[2]; *Tomkow v. Barton* (9th Cir. Jan. 5, 2017, BAP No. CC-16-1075) __ F.3d __ [2017 Bankr. LEXIS 31][3]; *Bank of America v. McLaughlin etc. Co.* (1940) 40 Cal.App.2d 620, 628-629 ("*McLaughlin*").) Several lower appellate courts have refused to follow *Skidmore* claiming it is outdated and has been impliedly overruled by this Court in light of this Court's apparent approval of the Second Restatement of Judgments causing confusion and lack of uniformity in this

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[2] "California case law addressing this question is sparse. The earliest of the relevant cases, a California Supreme Court case decided in 1865 [Skidmore], supports the conclusion that an appellate court's affirmance for any reason implicitly ratifies all reasoning given in the court below. To be sure, a nebulous exception to the rule and a recent California appellate decision cut against the timeworn precedent and may counsel in favor of more selective application of collateral estoppel principles. In the end, however, we conclude that the 1865 decision is controlling. The principles enunciated in that opinion have been questioned by a lower appellate court, but we find no opinions from the highest California court undermining the authority of its early holding."

[3] Here, the California Supreme Court has neither overruled *Skidmore* nor adopted the modern rule announced in *Butcher*, *Newport Beach*, and *Zevnik*. In the absence of a decision by the California Supreme Court contrary to the Skidmore rule, we remain bound by *DiRuzza*. In Flying J, the district court arrived at the same conclusion, stating that: "Because the California Supreme Court's decision in Skidmore and the Ninth Circuit's decision in *DiRuzza* are binding law of the state and Ninth Circuit, respectively, and a federal trial court does not have the authority to change the state law of California even if a Supreme Court decision is criticized and not followed by more recent intermediate California appellate decisions, see *Butcher*, *Newport Beach*, and *Zevnik*, the rule of *Skidmore* applies." 2008 U.S. Dist. LEXIS 26243. We note that the Ninth Circuit affirmed the district court in *Flying J* in 2009, although its memorandum decision does not refer to the *DiRuzza/Skidmore* issue. See 351 Fed. Appx. 236.

important area of the law. 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 v. Superior Court*, (2008) 159 Cal App4th 76 ("*Zevnik II*")

2. Does Article VI, section 14 of the California Constitution, require the Court of Appeal to address in writing their reasons for affirming a judgment as to every ground asserted on appeal in order to give finality as to that ground? The Court of Appeal has concluded that *Skidmore* is no longer viable because otherwise Article VI, section 14 would require appellate courts to address all issues on appeal even if not necessary to affirming the judgment. Petitioner contends Article VI, section 14 gives the appellate courts discretion to address only those issues in writing necessary to affirming the judgment and still have the judgment affirmed on the merits on all grounds supporting the trial court's entry of judgment.
3. Did the Court of Appeal lose jurisdiction to issue its opinion once it determined that the trial court's granting of summary judgment was not an appealable order? The Court of Appeal held the trial court committed error by entering judgment when the ruling did not dispose of all causes of action. If this is the case, there did not exist an appealable order and the Court of Appeal did not have jurisdiction to issue its opinion.
4. Should the Court of Appeal have granted Petitioner leave to file Supplemental Briefing pursuant to Government Code, section

68081 as to the Court of Appeal decision that res judicata did not apply because there was only one action and applying claim preclusion as a bar would be splitting a cause of action? The Court of Appeal reversed the judgment on the grounds there was not a second separate action, that the cause of action against the agent and principal cannot be split and the Defendant failed to seek summary adjudication as to the alleged active negligence of Petitioner. The Plaintiff on appeal never asserted these grounds and thus waived them and they were never briefed on either side. Government Code, section 68081 dictates that Petitioner should have been given leave to brief these issues if they were not waived by Appellant.

II. INTRODUCTION AND REASONS WHY REVIEW IS NECESSARY

Plaintiff, Rana Samara, (Plaintiff), filed a dental malpractice claim in one single action against two dentists, Defendant Stephen Nahigian DDS (Nahigian) and Petitioner in Los Angeles Superior Court, Case No. EC056720, the Honorable William D. Stewart, Judge Presiding. The gravamen of the Complaint was that Nahigian negligently performed oral surgery while he was in the course and scope of an agency relationship with Petitioner causing injury to Plaintiff. (1CT:65-73) Nahigian moved for summary judgment on the grounds the action was barred by the statute of limitations, that he did not fall below the standard of care of an oral surgeon and his acts or omissions did not cause Plaintiff's alleged injuries. The trial court granted summary judgment on the grounds that the action was barred by the statute of limitations and that his acts or omissions did not

cause Plaintiff's alleged injuries. Judgment was entered accordingly in favor of Nahigian. (3CT:501-509)

Plaintiff appealed the Nahigian Judgment to the Second District Court of Appeal, Division Seven, Case No. 248553. On appeal Plaintiff conceded the action against Nahigian was barred by the statute of limitations but argued the trial court committed error when it ruled that the acts or omissions of Nahigian did not cause Plaintiff's alleged injuries. The Court of Appeal held that because Plaintiff conceded the action was barred by the statute of limitations, it was unnecessary to address the causation ruling and affirmed the judgment by way of an unpublished opinion. (See *Samara v. Estate of Stephen Nahigian D.D.S.* (Nov. 10, 2014, B248553) [nonpub. opn.] (*Samara I*).) A remittitur was issued affirming the judgment in favor of Nahigian. (2CT:358)

After the Nahigian Judgment became final, Petitioner moved for summary judgment on the grounds that the Nahigian judgment and/or issues decided therein barred the action against Petitioner, that Petitioner did not fall below the standard of care and that the acts or omissions of Petitioner did not cause Plaintiff's injuries because he was not involved in the surgery. ((1CT:9-10 (Notice of Motion); 1CT:11-25 (Memorandum of Points and Authorities); 1CT:26-38 (Separate Statement of Undisputed Material Facts); 1CT:39-190, 2CT:191-346 (Evidence in Support of Motion for Summary Judgment - Declaration of Barton Kubelka DDS (1CT:43-48); Declaration of Katherine Harwood (1CT:50-52); Declaration of Bach Le, DDS, MD (1CT:54-58); Judgment in favor of Defendant Nahigian (1CT:60-

63); First Amended Complaint (1CT:65-73); Plaintiff's Deposition Excerpts Vol. 1 (1CT:75-115); Plaintiff's Deposition Excerpts Vol. 2 (1CT:117-130); Defendant Matar's Deposition Excerpts (1CT:132-151); Defendant Nahaigian's Deposition Excerpts (1CT:153-178); Defendant Matar's dental records (1CT:180-190, 2CT:191-204); Monty Wilson DDS Dental Records (2CT:206-225) Rivera Family Dental Records (2CT:227-246); Raffi Mesrobian MD medical records (2CT:248-263) Douglas Daws DDS dental records (2CT:265-289); Edith Gevorkian DDS dental records (2CT:291-322); Hillside Dental Group dental records (2CT:324-345).) Plaintiff opposed the motion arguing res judicata or collateral estoppel did not apply because the Court of Appeal refused to address the causation issue and therefore there was not a judgment on the merits in favor of Nahigian and that there existed a triable issue of fact as to whether Nahigian caused Plaintiff's injuries. (2CT:360-380; 3CT:381-513; Memorandum of Points and Authorities (2CT:360-380); Response to Separate Statement of Undisputed Material Facts (3CT:381-396); Plaintiff's Supplemental Separate Statement of Undisputed Material Facts (3CT:397-405) ; Declaration of Alexis Galindo and Evidence in Opposition (3CT:406-511 - Declaration of Gregory Doumanian DDS (3CT:408-413); Plaintiff's Deposition Excerpts (3CT:414-447); Defendant Nahigian Deposition Excerpts (3CT:448-476); Defendant Matar Deposition Excerpts (3CT:477-496); Court of Appeal Opinion in Samara I – B248553 (3CT:497-500); Trial Court's Ruling on First Summary Judgment Motion (3CT:501-509); Excerpt of Defendant Matar Dental Record

(3CT:510); Request for Judicial Notice (3CT:512-513).) The trial court granted summary judgment in favor of Petitioner on the grounds that the Plaintiff was barred from asserting liability against Petitioner under the doctrine of res judicata, joint venture principles and that there did not exist a triable issue of fact as to whether Petitioner caused Plaintiff's alleged injuries. (3CT:537-549) Judgment was entered in favor of Petitioner. (3CT:537-551)

Plaintiff appealed Petitioner's Judgment to the Second District Court of Appeal, Division Seven, Case No. B265752. Plaintiff's sole argument on appeal was that issue and claim preclusion principles do not apply to the case because *Skidmore* has been impliedly overruled as set forth in *Zevnik II* and *Newport Beach II* and the Restatement of Judgments 2nd and Petitioner's Judgment should be reversed. In a published opinion, the Court of Appeal reversed the trial court's granting of summary judgment on the grounds: 1) res judicata (claim preclusion) does not apply because its application would result in the splitting of a cause of action against Nahigian and Petitioner; 2) collateral estoppel (issue preclusion) does not apply because the trial court's finding that Nahigian did not cause Plaintiff's injuries was not determined in *Samara I* because the Court of Appeal elected not to address the issue; and 3) because Petitioner did not bring a motion for summary adjudication as to a separate cause of action for post-surgical acts of Petitioner, the trial court improperly granted the motion as to post-surgical acts or omissions of Petitioner. (*Samara vs. Matar* (2017) 8 Cal.App.5th 796 ("*Samara II*").)

Petitioner brought a Petition for Rehearing requesting leave to file supplemental briefing as to the Court of Appeal rulings regarding splitting a cause of action and the necessity for two separate actions for issue preclusion to apply since Plaintiff never asserted any of these grounds in any of his briefs and these issues were never briefed. Petitioner also requested the Court of Appeal to reconsider its ruling regarding splitting a cause of action and address the real issue which is the viability of *Skidmore*. Petitioner also asserted that if the Court of Appeal treated the post-surgical acts as a separate cause of action requiring a motion for summary adjudication, then the trial court's granting of a summary judgment was not an appealable order because it did not dispose of all causes of action and thus the Court of Appeal did not have jurisdiction to issue its published opinion. The Petition was summarily denied.

The Court of Appeal concedes that if *Skidmore* still is viable, res judicata would apply if Plaintiff had filed a separate action against Petitioner. The Court of Appeal points out that several appellate courts have refused to follow *Skidmore* but claims it did not need to address the issue by interpreting *Skidmore* as applying to claim preclusion only and not issue preclusion. Federal Courts continue to follow *Skidmore* in diversity cases and Bankruptcy cases where state law applies. Petitioner contends res judicata does not require two separate lawsuits against Nahigian and Petitioner for the principle to apply as the Court of Appeal held. Such a rule makes no judicial sense and goes completely against the public policy behind claim

preclusion and issue preclusion which is to promote judicial economy and avoid relitigation of matters already adjudicated. This Court should address the viability of *Skidmore* and the conflicting state and federal appellate cases to bring uniformity to the rules of claim preclusion and issue preclusion.

Review is necessary to secure uniformity of decisions between this Court's decision in *Skidmore* (and the appellate court's following *Skidmore*) on the one hand, which holds that when a trial court enters judgment on alternative grounds both sufficient to uphold a judgment and the appellate court only addresses one of the grounds but affirms the judgment, it is considered affirmed on all grounds decided by the trial court, with the cases that refuse to follow *Skidmore,* on the other hand.

Another reason for review is because the Court of Appeal in this case and in *Newport Beach II* assert, without any authority, that in order for an issue to be decided on the merits on appeal, pursuant to Article VI, section 14 of the California Constitution, the Court of Appeal must address that issue in writing. This Court accepting review to address the mandates of Article VI, section 14 could help resolve the conflict in the claim and issue preclusion cases and would promote judicial economy in a significant manner. Petitioner contends Article VI, section 14 does not mandate that the lower appellate courts, and this Court for that matter, address every issue asserted on appeal for the judgment to be on the merits. (*Skidmore* at Page 294)

III. ARGUMENT

A. CLAIM PRECLUSION AND/OR ISSUE PRECLUSION BARS PLAINTIFF'S ACTION AGAINST PETITIONER AND REVIEW SHOULD BE GRANTED TO REAFFIRM THE VIABILITY OF SKIDMORE

1. Separate Lawsuits are not required for Principles of Claim Preclusion or Issue Preclusion to Apply

The Court of Appeal held that Claim Preclusion and Issue Preclusion do not apply because separate lawsuits were not filed and applying preclusion principles in this case would be splitting a cause of action. There is no case authority for the proposition that separate lawsuits are needed for claim preclusion or issue preclusion to apply.

Because the gravamen of Plaintiff's complaint is that the liability of Petitioner is derivative of Defendant Nahigian and because all of Plaintiff's claims against Defendant Nahigian were previously litigated and resulted in a final judgment in favor of Defendant Nahigian and are now final, the trial court ruled that res judicata principles preclude Plaintiff's claims against Petitioner. (3CT:543-547) This was a correct decision. (*Skidmore*; *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120 Cal.App.3d 622,628 ("*Columbus Line*") (elements of res judicata); *Brinton v. Bankers Pension Servs.* (1999) 76 Cal.App.4th 550, 556 (precludes litigation of certain matters resolved in a *prior proceeding*); *Vandenburg v. Superior Court* (1999) 21 Cal.4th 815, 828-829).

"The doctrine of res judicata provides that a final judgment on the merits bars the parties or those in privity with them from litigating

the same cause of action in a *subsequent proceeding* and collaterally estops parties or those in privity with them from litigating in a subsequent proceeding on a different cause of action any issue actually litigated and determined in the ***former proceeding***. (Citations. Emphasis added.) The application of the doctrine in a given case depends upon an affirmative answer to three questions: (1) Was the issue decided in the ***prior adjudication*** identical with the one presented in the action in question? (2) Was there a valid and final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (Citations)" (*Columbus Lines*, 120 Cal.App.3d 622,628)

The doctrine of res judicata, of which collateral estoppel is a part, encompasses both claim preclusion and issue preclusion. The elements of collateral estoppel are essentially the same as res judicata but the principle is limited to issue preclusion and not claim preclusion. (*Hawkins v. Sun Trust Bank* (2016) 246 Cal.App.4th 1387, 1392; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 fn.3) An issue, however, must have been previously ***"adjudicated"*** in order to be given preclusive effect. What has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues presented for decision. (*Ball v. Rodgers* (1960) 187 Cal. App. 2d 442, 448).

There is no requirement that the "former proceeding" be in a different lawsuit. A summary judgment in favor of a party defendant where multiple defendants are named in a lawsuit is considered to be a separate trial on the merits as between that party Defendant and the Plaintiff. (*Freeman v. Churchill* (1947) 30 Cal.2d 453, 462) The

ruling on Nahigian's summary judgment motion carried with it a right to a motion for new trial by the Plaintiff (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,858) and was treated as a separate appealable order. (Code of Civil Procedure, section 904.1(a)(1); *Justus v. Atchison* (1977) 19 Cal.3d 546, 567-568; *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425,430). In the instant case, the motion for summary judgment by Nahigian was a former proceeding, resulting in a separate judgment against Plaintiff which was separately appealable and thus clearly a "former proceeding" for purposes of claim or issue preclusion.

2. ***Skidmore* is still the law, makes good judicial sense even after being on the books for 150 years because it supports the public policies favoring Claim and Issue Preclusion and should be affirmed by this Court to clear up the confusion caused by the decisions in *Butcher, Zevnik II* and *Newport Beach II.***

The policy behind claim preclusion and issue preclusion is to prevent relitigation of the same claim or issue and encourage judicial economy. The key is whether the Plaintiff had a fair opportunity to assert her claim or the issues being asserted in the former proceeding. In the instant case, the Plaintiff had every opportunity to oppose the issues in Nahigian's motion for summary judgment which she did and did not prevail. She elected not to bring a motion for new trial which she had every right to do. She did nothing to set aside the trial court's ruling after the remittitur was issued. Unfortunately for Plaintiff, she failed to file her claim against Nahigian in a timely manner thus forcing the Court of Appeal not to address the causation issue.

However, it makes no judicial sense to give Plaintiff a second opportunity to relitigate the same claim or same issues she had already litigated in front of the same judge merely because she failed to file a timely claim against Nahigian and the Court of Appeal elected not to address the causation issue.

Zevnik II and *Newport Beach II* are distinguishable or incorrectly decided because they refused to follow precedent. (*People v. Skidmore* (1865) 27 Cal. 287 ("*Skidmore*"); *Bank of America v. McLaughlin etc. Co.* (1940) 40 Cal.App.2d 620, 628-629 ("*McLaughlin*"); *DiRuzza v. County of Tehama* (2003) 323 F.3d 1147, 1153 ("*DiRuzza*")

In *Skidmore*, the Plaintiff in the first action sued Defendants on a recognizance alleging various equitable and legal claims. The matter was referred to a referee to decide all legal and factual issues. The referee found in favor of the Defendants on all claims. One of the defenses was misjoinder. On appeal to the California Supreme Court in the first action, the Supreme Court addressed only the misjoinder issue and affirmed the judgment. In the second action, the Plaintiff attempted to remedy procedurally the misjoinder problems and filed the same claims against the defendants. The Defendants argued the first action was res judicata as to all issues embraced within the complaint at the trial level but did not prevail. On appeal, the California Supreme Court[4] reversed ruling that even though it had addressed only the misjoinder issue in the first appeal, it had

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[4] Interesting from a historical standpoint, the Supreme Court panel in *Skidmore II* was a completely different Supreme Court panel than in *Skidmore I*.

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

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

Skidmore is still good law and has not been reversed by this Court and must be followed by lower appellate courts, otherwise they exceed their jurisdiction. (*DiRuzza v. County of Tehama*, *supra*, 323 F.3d 1147, 1153; *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450. See also *Markoff v. N.Y. Life Ins. Co.* (1976) 530 F.2d 841, 842 – describing the rule as "the California Position on Collateral Estoppel")

In the *McLaughlin* case, the First District Court of Appeal evaluated the collateral effect of an affirmance by the Ninth Circuit Court of Appeal of a bankruptcy judgment. The bankruptcy court had based its decision on two grounds (that the Appellant was not a farmer and did not own the property in question) but the federal appellate court addressed only one of the issues (not a farmer) and affirmed the bankruptcy judgment. In the second action, the Plaintiff Bank in an unlawful detainer action asserted res judicata to the issue as to whether the Defendant owned the property. Judgment was entered in favor of the Bank. On appeal, the Court of Appeal affirmed holding that "a general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action and passed upon by the court below, although the appellate court does not consider or decide upon all of them. (*Id* at Page 629)

In the *DiRuzza* case, the Plaintiff, a deputy sheriff, was charged with a crime and as part of a plea deal, agreed to resign from her job as a deputy sheriff. Even so, she filed a state action against the Sheriff's Department for wrongful discharge and other causes of action. Among other things in the Department's summary judgment motion, the defense argued the plea agreement barred Plaintiff's

action against the Department. Summary Judgment was granted. On appeal, the Court of Appeal affirmed the judgment but addressed procedural issues only and elected not to address the plea agreement issue. Plaintiff then filed a federal action alleging multiple causes of action based upon a claim for constructive discharge. The Department brought a summary judgment claiming the state court action barred Plaintiff's claim. On appeal to the Ninth Circuit Court of Appeal, the Ninth Circuit concluded state law applied as to res judicata and collateral estoppel issues and analyzed California law. The Court concluded that under *Skidmore*, because the state trial court concluded Plaintiff's plea agreement precluded her from claiming constructive discharge and because the Court of Appeal affirmed the judgment in total even though it did not address the plea-bargaining issue, claim or issue preclusion applied.

Plaintiff claims because this Court only addressed the statute of limitations in *Samara I*, the trial court's findings that Defendant Nahigian was not negligent and did not cause Plaintiff injury cannot be used for claim preclusion or issue preclusion against Petitioner relying upon *Zevnik v. Superior Court,* (2008) 159 Cal App4th 76, 86-88 ("*Zevnik II*") and *Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club* (2006) 140 Cal App4th 1120, 1132 ("*Newport Beach II*") (See also *Butcher* relied upon in *Newport Beach II.*) These cases are distinguishable or decided incorrectly.

In *Zevnik*, a law firm represented four plaintiffs in a complex insurance litigation for many years. Two of the plaintiffs developed divergent interests and in the insurance case brought a motion to