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 TO PETITION FOR REVIEW

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Petitioner, HAITHAM MATAR DDS, (hereinafter "Petitioner"), by order of this Court, submits the following Reply to the ANSWER TO PETITION FOR REVIEW submitted by Plaintiff and Appellant RANA SAMARA (hereinafter "Appellant").

I. INTRODUCTION

This Court ordered Appellant to submit and ANSWER all issues. Appellant does not address all issues and adds new ones. The gravamen of Appellant's Answer addresses many issues never raised by Appellant in her opposition to the motions for summary judgments or on appeal and thus these issues should be considered waived.

It is Petitioner's contention that no matter how you look at this case, it comes down to the issue as to whether Appellant's claim is barred by the doctrine of claim preclusion under *People v. Skidmore* (1865) 27 Cal. 287 ("*Skidmore II*"), or issue preclusion because the trial court (a court of competent jurisdiction in a prior proceeding) ruled on the issue in the first motion for summary judgment or because the trial court ruled on the issue in the first motion for summary judgment and the motion was affirmed on appeal in its entirety with no revisions which leads everyone back to *Skidmore II.*

The Court of Appeal in *Samara v. Matar* (2017) 8 Cal.App.5th 796 ("*Samara II*") skirts the *Skidmore II* issue in its analysis of whether claims preclusion bars Appellant's action against Petitioner by stating that two separate actions are required for claim preclusion and issue preclusion to ever apply. Petitioner's contend this is not the law as it applies to this case which is an action based upon derivative liability and that *Skidmore II* or the general rules of issue preclusion bars Appellant's action against Petitioner.

The Court of Appeal avoids its jurisdictional duty under *Auto Equity Sales, Inc. v Superior Court* (1962) 57 Cal.2d 450 ("*Auto Equity*") in its analysis of whether issue preclusion bars Appellant's action against Petitioner by stating that *Skidmore II* does not apply because that decision was based solely on claim preclusion principles and relies instead on *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal. App. 4th 1549-1574 ("*Tri-Union Seafoods*"); *Zevnik v. Superior Court* (2008) 159 Cal. App. 4th 76, 87-88 ("*Zevnik II*"); and *Newport Beach Country Club, Inc. vs. Founding Members of Newport Beach Country Club* (2006) 140 Cal. App. 4th 1120, 1130 ("*Newport Beach II*") and Article VI, section 14 of the California Constitution for the proposition that it is not proper to give conclusive effect under the doctrine of issue preclusion to a ground the appellate court declined to address in the first appeal. Petitioner contends *Skidmore II* applies to both claims preclusion and issue preclusion because all facts and issues were decided in *People v. Skidmore* (1861) 17 Cal. 260 ("*Skidmore I*") and thus must be followed by the Court of Appeal. Even if *Skidmore II* does not apply to issue preclusion, arguendo, Article VI, section 14 of the California Constitution was never intended to mandate that for an issue to be decided on the merits the appellate courts must address that particular issue in writing even though there are other grounds for affirming the judgment and that section 27 of the Restatement Second of Judgments, comment o ("Restatement 2d") should not be followed because it encourages and promotes the relitigation of the same issue already decided by a court of competent jurisdiction rather than

promoting judicial economy and putting an end to piecemeal litigation.

As this Court can readily see, the bottom line is that there exists significant ambiguity in the law of res judicata in California that needs to be addressed to provide uniformity to the inconsistent opinions that have made it difficult for lawyers, judges and appellate justices to properly analyze these important issues. Review should be granted to address these issues.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

As a reminder, the issues presented for review, in the order addressed in the Answer, in summary form, are as follows:

1. Is Appellant's action against Petitioner based upon derivative liability of the alleged agent, Dr. Nahigian, who was found not liable by the trial court in a previous summary judgment motion and affirmed on appeal, barred by the doctrines of claim preclusion and/or issue preclusion?

2. Does Article VI, section 14 of the California Constitution require appellate courts, including this Court, to address in writing their reasons for affirming a judgment as to every ground asserted on appeal even if it is unnecessary for affirmance to give finality to those grounds not necessary to address?

3. Should the Court of Appeal have granted Petitioner leave to file Supplemental Briefing pursuant to Government Code, section 68081?

4. Did the Court of Appeal lose jurisdiction to issue its opinion on the claim preclusion and issue preclusion issues when it ruled in such a way that the "judgement" was no longer an appealable order?

III. ARGUMENTS

A. CLAIM PRECLUSION BARS APPELLANT'S ACTION AGAINST PETITIONER AND REVIEW SHOULD BE GRANTED TO REAFFIRM THE VIABILITY OF SKIDMORE II

Appellant contends in its Answer that this Court should not grant review because the Court of Appeal decision is correct on the grounds: 1) The elements of claims preclusion requires two separate and distinct lawsuits; 2) the elements of claim preclusion require the "identical" parties and Petitioner is not the same party[1], and 3) *Skidmore II* does not apply because a) it was a ruling on a demurrer and motion for judgment on the pleadings which is different that a motion for summary judgment and b) the Court in *Skidmore I* actually addressed the merits and therefore the Court of Appeal decision is not inconsistent with *Skidmore II*. Most of these issues were never addressed at trial or on appeal and rejected by the Court of Appeal.

Petitioner contends Appellant's position is incorrect.

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[1] This was an issue never addressed on appeal or at trial by Appellant. In addition, the Court of Appeal expressly found the parties were in privity with each other. (Opinion Page 9-10)

1. THE REQUIREMENTS FOR APPLICATION OF THE DOCTRINE OF CLAIM PRECLUSION DOES NOT REQUIRE SEPARATE LAWSUITS

Appellant and the Court of Appeal seem to rely on *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 827-828 ("*DKN Holdings*"); *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 ("*Mycogen*"); *Clark v. Lesher* (1956) 46 Cal.2d 874, 880 ("*Clark*"); *Brinton v. Bankers Pension, Inc.* (1999) 76 Cal.App.4th 550, 557-558 ("*Brinton*") and *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749,757 ("*Thibodeau*") for the proposition that in order to invoke the defense of claims preclusion there must be two separate lawsuits. None of these cases mandate such a requirement and such a requirement in a case based upon derivative or vicarious liability, where the plaintiff has the option of suing the agent and principal in the same action or separately, makes no judicial sense.

In *DKN Holdings*, the creditor elected to sue joint and several obligors in two separate lawsuits. In the first lawsuit against one of the obligors, the creditor DKN prevailed. When the judgment was not paid, DKN filed a separate action against the remaining obligors. This Court held that claim preclusion does not prevent a creditor from filing separate actions against joint and several obligors – nothing more. As this Court pointed out, DKN could have filed one action against all obligors in one action or elected to file separate actions. More importantly, this Court in *DKN Holdings* held that the co-obligors were not the same party or in privity with each other so this case has no applicability to a case based upon derivative liability. (*DKN Holdings at 826*)

Nor does *Mycogen* mandate separate lawsuits to set up a claim preclusion defense – separate actions were merely part of the factual background. Mycogen sued Monsanto for declaratory relief and specific performance of seed technology licenses in its first suit and prevailed. When the relief awarded in the first action did not make Mycogen whole, Mycogen filed a second action for money damages. This Court correctly held that Mycogen had one cause of action against Monsanto and it should have sought damages in the first action and thus is precluded from seeking damages in the second action because to do so would be splitting a cause of action. *Mycogen* has no applicability to an action based on derivative liability where the plaintiff is not mandated to sue both the principal and agent in the same lawsuit.

Clark is no different. A judgment was rendered against Clark in an action by the administrator of her father's estate arising out of the operation of a newspaper business. Clark filed a separate action against Lesher, who purchased the business, for conspiracy and fraud. Lesher asserted the defense of claim preclusion arising from the judgment in favor of the administrator. This Court held claim preclusion did not apply because it was a completely different cause of action and Lesher was not a party to the first lawsuit. Interestingly, this Court held in dicta that Clark could have easily set up the second suit by way of a cross-complaint against Lesher but his election not to do so did not preclude the second action. Again, *Clark* does not stand for the proposition that to assert the defense of claim preclusion, two separate lawsuits must be brought.

Brinton is no different. In *Brinton*, plaintiff filed a claim against the agents of defendant Bankers Pension through the National Association of Securities Dealers (NASD). The matter was submitted to binding arbitration and a monetary award was rendered against plaintiff and in favor of defendant's agents. A judgment was entered. Defendant refused to participate in the arbitration because there was no arbitration clause between plaintiff and defendant. Plaintiff filed a second action against defendant - the alleged principal of the agents. The trial court held that relitigation of matters which have been resolved in a "prior proceeding" are precluded under the doctrine of claims preclusion. (*Brinton* at 556) The Court of Appeal affirmed stating that claims preclusion applies to a "previously litigated cause of action". (*Brinton* at 556) The appellate court went on to state that even though defendant was not a party to the arbitration proceeding, since defendant's liability is derivative, it is unnecessary for defendant to have been a party to the prior proceeding to assert claim preclusion as a defense. (*Id* at 557-558) Nowhere in this case does the court require a separate lawsuit as a condition precedent to asserting the defense - merely a "prior proceeding" as in this case.

Thibodeau is no different. Plaintiff sued a concrete subcontractor in a separate lawsuit after plaintiff concluded an arbitration with the general contractor which included concrete issues. The arbitrator awarded $2,261 to plaintiff for the concrete work against the general contractor. However, after the award, the concrete allegedly worsened and the estimated repair was $26,194 and the plaintiff sued the concrete subcontractor in a separate lawsuit. The subcontractor asserted the defense of claim preclusion. The trial court

rejected the defense. The Court of Appeal reversed stating that the doctrine of res judicata precluded plaintiff from relitigating a cause of action that has been "finally determined by a court of competent jurisdiction". (*Thibodeau* at 754) The Court of Appeal, even though the award was never confirmed because the general contractor filed bankruptcy, held plaintiff should have litigated all concrete issues in the arbitration against the general contractor and thus the award was sufficient as a prior adjudication to give rise to the use to the defense of claim preclusion.

In short, all that is required for the application of claim preclusion is a "prior proceeding" – not a separate lawsuit. (See also *Freeman v. Churchill* (1947) 30 Cal.2d 453 – claim preclusion applies in same lawsuit against agent's principal wherein agent was held not liable by jury.)

2. PETITIONER IS IN PRIVITY WITH DR. NAHIGIAN

Appellant seems also to argue for the first time that for claims preclusion to apply the parties must be the identical. (Answer – page 11) There has never been a dispute that Petitioner and Dr. Nahigian were in privity with each other. The Court of Appeal expressly held – and appellant never disputed – that Petitioner and Dr. Nahigian were in privity with each other. (Opinion *Samara II* at page 9)

B. ISSUE PRECLUSION BARS APPELLANT'S ACTION AGAINST PETITIONER AND REVIEW SHOULD BE GRANTED TO REAFFIRM THE VIABILITY OF SKIDMORE II

The Court of Appeal held that *Skidmore II* applies only to claim preclusion, and not issue preclusion. Appellant disagrees because as trial courts and appellate courts have done in the past is many times confusingly lumped the two concepts together. As this Court stated in *DKN Holdings* at page 823:

> "In fairness to the Court of Appeal, our terminology in discussing the preclusive effect of judgments has been inconsistent and may have caused some confusion. We have frequently used "res judicata" as an umbrella term encompassing both claim preclusion and issue preclusion."

Skidmore II is no exception to that confusion and like other courts in the past, used the term "res judicata" with "imprecision". (*Id* at 824) Contrary to Appellant's description of *Skidmore I* and *Skidmore II*, the underlying case was clearly tried on the merits. Even though the underlying case procedurally started as a demurrer and motion for judgment on the pleadings, the parties submitted the case to a referee by stipulation to determine all issues of fact and law. The referee found on all the issues of fact and law in favor of the defendant as well as confirming the ruling on the demurrer that the case was procedurally defective because of improper joinder. In *Skidmore I*, the plaintiff even brought a motion for new trial which was denied. Identical to *Samara v. Estate of Stephen Nahigian D.D.S.* (Nov. 10,

2014, B248553) [nonpub. opn.] (*"Samara I")*, this Court affirmed the judgment on procedural grounds and expressly refused to address the substantive issues because it was not necessary for an affirmance of the judgment. (*Skidmore I*)

Plaintiff then filed a second action without the joinder problems. The defense argued the second action was barred by "res judicata". The trial court found the action was not barred because the "issues of fact" had not been decided on the merits. This Court disagreed and held that even though this Court expressly did not address the substantive issues in *Skidmore I*, because it was not necessary, by affirming the judgment with no changes, "res judicata" applied:

> "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 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 it was entered in the court below."
> (*Skidmore II* at 292-293)

This Court in *Skidmore II* did not distinguish between issue preclusion and claim preclusion because it did not need to do so because clearly one or both were applicable. The facts and procedural posture is no different in this case. The first judgment in *Samara I* was adjudicated by a court of competent jurisdiction. The Court of Appeal affirmed the judgment with no changes of any sort and properly refrained from

addressing issues it did not have to address. *Skidmore II* stands for the proposition that under these set of facts, the first judgment is on the merits and the Court of Appeal in *Samara II* was bound jurisdictionally to follow *Skidmore II*. (*Auto Equity*)

C. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE VIABILITY OF THE 1982 RESTATEMENT SECOND OF JUDGMENTS, SECTION 27, COMMENT O IN CONJUNCTION WITH THE APPELLATE COURTS' CONSTITUTIONAL DUTY TO PUT ALL DECISIONS IN WRITING

Applicable to this case, section 27, comment o states that if the judgment of the trial court of the first instance was based on a determination of two issues and the appellate court upholds one of those determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination. The Restatement 2d concept has been described as "the modern rule". (See *Tomkow v. Barton* (2017) 563 B.R. 716,725) The competing concept is obviously that an appellate court's affirmance of a judgment for any reason implicitly ratifies all reasoning given in the trial court below. This concept has been referred to by the courts as "the general California rule", "the Skidmore rule" or the "traditional rule". (*Id* at 724)

The "modern rule" has been followed by *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442 ("*Butcher*"), *Newport Beach II*, *Zevnik II* and now *Samara II*.

The "traditional rule" has been followed by this Court's seminal case in *Skidmore II*; *Bank of America National Trust & Savings*

Association v. McLaughlin Land & Livestock Co. (1940) 40 Cal.App.2d 620 ("*McLaughlin*"); *Natural Soda Products Co. v. City of Los Angeles* (1952) 109 Cal. App. 2d 440 and others. (*Id* at 725-726)

The "modern rule" does not promote judicial economy but promotes the relitigation of issues that have previously been fully litigated by a court of competent jurisdiction which undermines and diminishes the role of the trial courts and gives the litigants several "bites at the apple".

In reading through *Newport Beach II*, *Samara II* and the cases supporting the Restatement 2d, the main justification for adopting the Restatement 2d is the perceived mandate of Article VI, section 14 of our California Constitution requiring appellate courts, including this Court, to put in writing "with reasons stated, ***decisions that determine causes***". Interpreting this constitutional provision to mandate that issues not necessary to the affirmance or reversal of a judgment must be in writing makes no judicial sense and is a burden clearly not intended by the People of California. This is an issue ignored by Appellant in the Answer.

This Court should accept review to once and for all accept or reject the traditional rule that has been in place with no apparent problems for over 150 years and decide the burden Article VI, section 14 of our California Constitution actually places on appellate courts.

D. THE DECISIONS OF THE COURT OF APPEAL IN SAMARA II WERE NOT FAIRLY INCLUDED WITHIN THE ISSUES ACTUALLY RAISED BY APPELLANT ON APPEAL AND THUS SUPPLEMENTAL BRIEFING SHOULD HAVE BEEN ALLOWED

Appellant contents that the issue of "splitting a cause of action," the requirement of two separate lawsuits for claim preclusion and/or issue preclusion to apply, and the issue that a motion for summary adjudication was necessary to dispose of Appellant's claim of post-surgical negligence were fairly included within the issues actually raised by Appellant on appeal. A review of the record on appeal and Appellant's Opening Brief clearly show the contrary.

The only contention on appeal made by Appellant was that *Skidmore II* is outdated and should be rejected and *Newport Beach II* and *Zevnik II* should be followed. It is true that the standard of review is *de novo* but all this means is that on appellate review the appellate court reviews only the moving and opposing papers and nothing more. (See *Troyk vs. Farmers Group, Inc.* (2009) 171 Cal. App. 4th 1305, 1321-1322). At the trial level, Appellant never argued applying claim preclusion to her claim against Petitioner would be splitting a cause of action. She correctly treated the judgment in favor of Dr. Nahigian as a separate cause of action with a separate appealable order. Petitioner clearly would not address the issue in his Opening Brief if it was never argued at the trial level or on appeal. The only thing similar in both the causes of action against Dr. Nahigian and Petitioner was the injury being alleged. Dr. Nahigian was claimed to be liable on a cause

of action for direct negligence. Petitioner was claimed to be liable on a cause of action for derivative liability.

Nowhere in Appellant's opposing papers or on appeal did Appellant argue two separate lawsuits were required. Appellant, like Petitioner, treated *Samara I* as a "prior proceeding" decided on the merits by a court of competent jurisdiction.

Nowhere in Appellant's opposing papers or on appeal did Appellant object to the issue of Petitioner's alleged post-surgical care being decided by the trial court without a motion for summary adjudication. As a matter of fact, Appellant submitted no evidence to rebut Petitioner's claim that he did not fall below that standard of care or that the alleged post-surgical care did not cause injury to Plaintiff.[2] That procedural defect was clearly waived by Appellant and was never briefed.

Supplemental briefing should have been allowed under Government Code, section 68081.

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[2] Appellant's counsel admitted this in oral argument. (See also Opinion page 20).

E. IF APPELLANT DID NOT WAIVE HER RIGHT TO OBJECT TO THE PURPORTED PROCEDURAL DEFECT OF THE DEFENSE NOT INCLUDING A MOTION FOR SUMMARY ADJUDICATION, THE END RESULT IS A NONAPPEALABLE JUDGMENT

Even though the Court of Appeal claims there was only one cause of action that could not be split, it then reversed itself and claims that even though the case was plead as one cause of action, there were really two causes of action, one for the surgical injury and one for post-surgical injury. (Opinion, page 20) Then, even though Appellant never contested the trial courts' ruling in favor of Petitioner on the claim for Petitioner's alleged direct liability and never objected to any procedural defect, the Court of Appeal reversed on the ground a motion for summary adjudication was necessary to dispose of that cause of action even though this issue was never raised by either party. Petitioner sought a Petition for Rehearing to address the waiver issue and potential jurisdictional issue posed by the ruling which was summarily denied.

Even though the Court of Appeal further piecemeals this litigation, the substantive effect was to strip itself of jurisdiction to address any of the *Skidmore II* issues because it turned an appealable order into a non-appealable order because the Court of Appeal ruling on the lack of a motion for summary adjudication resulted in the judgment entered by the trial court on the motion for summary judgment not disposing of all issues in the case and thus not appealable. (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097)

The Court of Appeal seems to be saying that it had no jurisdiction to treat the trial court's ruling in the post-surgical case as a motion for summary adjudication by citing *Troyk v. Farmers Group, Inc.*, *supra*, 171 Cal. App. 4th 1305. *Troyk* does not stand for such a proposition. In *Trovk*, the Court of Appeal reversed the judgment but affirmed the findings of the trial court that were part of a summary adjudication that was actually brought by Plaintiff as to the affirmative defenses of the defendants.

Petitioner contends that the Court of Appeal had two choices. It could have and should have to avoid relitigating a matter already litigated, treated the post-surgical issues as if the trial court granted a motion for summary adjudication on remand since Appellant never objected to the procedural defect. In the alternative, since the "judgment" did not dispose of all issues against Petitioner, treat the judgment as a non-appealable order and dismiss the appeal.

IV. CONCLUSION

Petitioner is well aware that issues warranting the grant of review by this Court must be unique and as the highest court in California, assist lawyers and the lower courts in laying the foundation for California jurisprudence. It may seem that Petitioner has taken the "everything in the kitchen sink" approach. However, each issue asserted for review has its unique judicial issues most of which have never been addressed by this Court and falling under the grounds set forth in California Rule of Court, Rule 8.500.

Skidmore II needs to be addressed to secure uniformity of decisions and is needed to settle an important question of law.

The Court of Appeal's attempt to avoid addressing the viability of *Skidmore II* by requiring two separate lawsuits needs to be addressed to secure uniformity of decisions between cases like *Freeman v. Churchill* and this Court of Appeal Opinion and is an important question of the law of claim preclusion and issue preclusion.

The interpretation of Article VI, section 14 of the California Constitution should be addressed to settle the equally important issue of the constitutional duties of appellate courts, including this Court.

The interpretation of Government Code, section 68081 is also an important question of law for appellate advocates and for this Court to assure that all lower appellate court decisions are fully briefed before being submitted to this Court for review. It is also an important procedural due process issue.

The requirement of a motion for summary adjudication when the Plaintiff has waived that procedural requirement and submitted no evidence in opposition to the adjudicated issue or separate cause of action should be addressed for jurisdictional purposes under Rule 8.500 (b)(4) and to avoid the relitigation of matters already fully litigated and decided by a court of competent jurisdiction.

Petitioner requests that his Petition for review be granted.

Respectfully submitted,
FORD, WALKER,
HAGGERTY & BEHAR

Dated: May 9, 2017

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NEIL S. TARDIFF,
Attorneys for Respondent,
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 to Petition for Review by Petitioner HAITHAM MATAR D.D.S. is produced using 14-point Roman type and contains approximately 4,148 words.

Dated: May 9, 2017

FORD, WALKER,
HAGGERTY & BEHAR

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NEIL S. TARDIFF,
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