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

PETITIONER'S OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED FOR REVIEW

1. Is Plaintiff's/Appellant's derivative liability action against Defendant/Petitioner based upon the negligence of Petitioner's 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 by Appellant, even if it is unnecessary for affirmance, to give finality to those grounds not necessary to address?
3. If the Court of Appeal opinion is correct as to the direct negligence of Petitioner, arguendo, did it 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?
4. Should the Court of Appeal have granted Petitioner leave to file Supplemental Briefing pursuant to Government Code, section 68081 because the Court of Appeal decision was based upon grounds not addressed in any of the briefing?

II. INTRODUCTION AND STATEMENT OF THE CASE

This is a dental malpractice action filed by Plaintiff (Samara) against two dentists, an oral surgeon (Nahigian) and a general dentist (Petitioner) in one complaint alleged as one cause of action. Plaintiff alleged Nahigian negligently performed surgery causing Plaintiff injury. Plaintiff alleged Petitioner was Nahigian's agent and

employee and did the operation in the course and scope of his employment with Petitioner. [1CT:66]

Nahigian filed a motion for summary judgment against Plaintiff arguing her action against Nahigian was barred by the statute of limitation and that Nahigian as a matter of law did not cause Plaintiff injury. Plaintiff vigorously opposed the motion. The trial court granted the summary judgment on both grounds asserted by Nahigian in a detailed decision. [3CT503-509] Judgment was entered in favor of Nahigian. [1CT60-63]

Plaintiff appealed the judgment in favor of Nahigian conceding that the statute of limitations barred the action but asked the Court of Appeal to address the causation issue. The Court of Appeal declined to address the causation issue because it was not necessary and affirmed the Judgment in its entirety. [*Samara v. Estate of Nahigian* (2014) 2014 Cal.App. Unpub. LEXIS 8052 ("*Samara I*")]

After the Judgment became final in *Samara I*, Petitioner then brought a motion for summary judgment arguing that issue and/or claim preclusion barred Plaintiff's action against Petitioner because Plaintiff's claim against Petitioner was based upon the liability of Nahigian which had been previously adjudicated in favor of Nahigian. Petitioner also argued that there existed no triable issue of fact that Petitioner was negligent for any post-operation acts or omissions.[1]

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[1] 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

Plaintiff opposed the motion as to the derivative liability issue arguing because the Court of Appeal in *Samara I* did not address the issue of whether Nahigian caused Plaintiff injury, the action was not barred by issue preclusion. Plaintiff did not oppose the post-operation arguments made by Petitioner.[2] The trial court granted Petitioner's summary

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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 Nahigian'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)

[2] 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)[2]; 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 Nahagian Deposition

judgment motion on claim preclusion grounds and ruled there existed no triable issue of fact as to post-operation acts or omissions. [3CT537-549] Judgment was entered in favor of Petitioner accordingly. Plaintiff appealed.

Even though it was never argued by the Appellant, the Second District Court of Appeal, by way of a published opinion, reversed the judgment in favor of Petitioner holding that claim preclusion does not apply because there were not successive lawsuits because to do so would be "splitting a cause of action". (*Samara vs. Matar* (2017) 8 Cal.App.5th 796, 804-806 – "*Samara II*".) The Court of Appeal in *Samara II* was of the opinion that the operative issue before it was strictly "issue preclusion". It held that issue preclusion does not bar Plaintiff's claim against Petitioner because *Samara I* did not result in a final judgment on the issue because the Court in *Samara I* had declined to address the issue. The Court of Appeal followed the principles set forth in *Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 87-88 ("*Zevnik II*"); *Newport Beach Country Club, Inc. v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1132 ("*Newport Beach II*"); *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1459–1460 ("*Butcher*") and

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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)

Restatement Second of Judgments, section 27, comment o. (*Samara II* at 807-810)

The Court of Appeal also opined that, as a policy matter, for the Judgment to be final, the causation issue had to be addressed by the Court of Appeal in writing pursuant to Article VI, section 14 of the California Constitution. (*Samara II* at 809)

With respect to the post-operation direct negligence asserted by Plaintiff, the Court of Appeal held that because the post-operation allegations constituted a separate cause of action, Petitioner was required to seek a motion for summary adjudication as to those issues even though Plaintiff did not object to the manner in which the issue was brought before the trial court and did not oppose those issues. The Court of Appeal reversed that portion of the judgment as well. (*Samara II* at 810-812)

Petitioner asserts that the law of claim preclusion does not require two successive lawsuits when a single cause of action is asserted against two separate defendants that can result in two separate appealable judgments as to each Defendant as it did in the present case. (*Freeman v. Churchill* (1947) 30 Cal.2d 462 (*Freeman*).)

Petitioner further asserts that claim preclusion bars plaintiff's action against Petitioner because the judgment in favor of Petitioner's alleged agent involved 1) the same cause of action; 2) between parties in privity and 3) a final judgment on the merits in the first proceeding because it was affirmed in whole by the Court of Appeal in *Samara I* with no modifications. (*People v. Skidmore* (1865) 27 Cal. 287 (*Skidmore II*).)

Petitioner further asserts that issue preclusion bars Plaintiff's action against Petitioner because 1) there was a final adjudication of the issue of Nahigian's liability by the time Petitioner's second summary judgment motion was heard; 2) the issue of Petitioner's liability in the second summary judgment motion and Nahigian's liability in the first summary judgment motion are identical; 3) the issue was actually litigated and necessarily decided in the first summary judgment motion; 4) which was asserted against the Plaintiff in the first summary judgment and vigorously defended by Plaintiff in the first summary judgment motion. (*Skidmore II*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335,341 ("*Lucido*"). The fact that the Court of Appeal in *Samara I* did not address the issue because it was not necessary does not preclude finality pursuant to the express terms of Article VI, section 14 of the Constitution requiring appellate courts to issue their decisions that determine causes in writing with reasons stated. The Court of Appeal in *Samara I.* complied with Section 14 as to all grounds found by the trial court.

With respect to Plaintiff's claim that Petitioner was directly liable, Petitioner asserts that because Plaintiff submitted no evidence in opposition, it was the same cause of action but merely a different theory of liability and Plaintiff never objected to the procedure utilized by Petitioner, the Judgment relating to this theory of liability should be affirmed. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 818 fn 1)

Last, with respect to the Court of Appeal's refusal to allow supplemental briefing pursuant to Government Code, section 68081,

Petitioner asserts that the issue is moot because this Court has accepted review to address the unbriefed issues.

III. STANDARD OF REVIEW

This Court's task, like any other appellate court after the trial court has granted a summary judgment, is to review the matter de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)

The question of the applicability of claim preclusion or issue preclusion is one of law which this Court is to apply de novo review. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507.)

With respect to constitutional interpretation, the proper interpretation of constitutional provisions is a question of law subject to de novo review. (*Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74: *Mart v. Severson* (2002) 95 Cal.App.4th 521,530.)

With respect to pure questions of law, this Court should give no deference to the lower courts' ruling or the reasons for its ruling but instead decide the matter anew. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185,1191)

IV. ARGUMENT

A. CLAIM PRECLUSION BARS PLAINTIFF'S ACTION AGAINST PETITIONER PURSUANT TO PEOPLE VERSUS SKIDMORE

Claim preclusion prevents relitigation of the same cause of action in a prior proceeding by a court of competent jurisdiction between the same parties or parties in privity with them. Claim preclusion arises if a second proceeding involves 1) the same cause of action litigated in the prior proceeding (2) between the same parties or their privity (3) after a final judgment on the merits in the first proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798 ("*Philip Morris*").) Its purpose is to preserve the integrity of the judicial system, promote judicial economy and protect litigants from harassment by vexatious litigation. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829 ("*Vandenberg*"). See also Note, *Alternative Grounds in Collateral Estoppel* (1984) 17 Loyola L.A. L. Rev. 1085)

There is no dispute that the second motion for summary judgment by Petitioner involves the same cause of action as the cause of action asserted by Plaintiff against Nahigian and there is no dispute that Petitioner is in privity with Nahigian. (*Samara II* at 804.) The core issue on review is whether there was a final judgment on the merits in the first summary judgment proceeding as to both grounds found by the trial court. The Court of Appeal never reached the issue because it held that for claim preclusion to apply, there must be two separate lawsuits. (*Samara II* at 804-806.) As will be discussed below, it is Petitioner's contention two separate lawsuits are not necessary for

claim preclusion to apply. Assuming separate lawsuits are not required, the third element, whether there is a final judgment on the merits in the prior proceeding, has been met. (*Skidmore II* at 293-294; *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 II*, this Court held that even if an appellate court refrains from considering one of the grounds upon which the trial court's decision is based, an affirmance of the judgment extends finality on the merits to the whole of the trial court's determination for purposes of claim preclusion and/or issue preclusion. (*Skidmore II* at 293-294) The Court of Appeal concedes that if separate lawsuits are not required and *Skidmore II* is still good law, at a minimum, claim preclusion would apply to Plaintiff's claim against Petitioner. (*Samara II* at 353-354.) The question remains whether this Court's decision in *Skidmore II* is still good law as it applies to claims preclusion and/or issue preclusion principles and whether it should be followed in light of modern changes to the law of issue preclusion under the Second Restatement of Judgments.

1. THE TRIAL COURT DID NOT SPLIT A CAUSE OF ACTION

There is no doubt that when reviewing the multitude of appellate cases addressing claim preclusion and issue preclusion, one could come to the conclusion that separate *lawsuits* must exist for claim preclusion or issue preclusion to apply. However, a close reading of these cases that state that one of the elements of claim or issue preclusion is the same issue or claim that was previously

litigated in a "prior *lawsuit*" is because there was in fact a previous *lawsuit* that had been filed in the factual background of the case. Other than the opinion in *Samara II*, no other appellate court has held that there must be "successive ***lawsuits***" as opposed to "successive ***proceedings***" resulting in a judgment or the adjudication of a claim. (See for example, *Philip Morris* at 797 – "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue ***litigated in a prior proceeding***; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]".) 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.

The Court of Appeal in *Samara II* relied 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 lawsuit 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 a lawsuit by the administrator of her father's estate arising out of the operation of a newspaper business. Clark filed a separate lawsuit 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 in the first lawsuit. 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 claim by way of a cross-complaint against Lesher in the first lawsuit but his election not to do so did not preclude the second lawsuit. Again, Clark does not stand for the proposition that to assert the defense of claim preclusion, two separate lawsuits must be brought.

Brinton actually supports Petitioner's position. 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 an award was rendered against plaintiff and in favor of defendant's agents. A judgment was entered in favor of the agents. Defendant Bankers Pension 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" that can lead to a final adjudication of the claim 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 based upon the arbitration award. 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 into an appealable judgment 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.

More similar to this case, this Court held in *Freeman v. Churchill* (1947) 30 Cal.2d 453, that claim preclusion applies in the same lawsuit against the agent's principal by way of an instructed directed verdict by the trial court wherein the agent was held not liable by the jury. In *Freeman*, Plaintiffs sued the operator of a truck and his employer for wrongful death and personal injuries arising out of an automobile accident between the Plaintiff mother and the driver of the truck. The matter went to trial. The jury returned a verdict in favor of the truck operator and pursuant to the trial court's instruction apparently rendered a directed verdict in favor of the employer. In its analysis of the case, this Court held that if the employee is found not liable, as a matter of law the employer is not liable. This Court further held that for purposes of issue preclusion or claim preclusion, "***the rule is the same whether the actions are separate or the employee and employer are joined in the same action***." (*Id.* at 460-462. Emphasis added.)

In short, all that is required for the application of claim preclusion or issue preclusion is a "prior proceeding" – not a separate lawsuit.

2. SKIDMORE II IS STILL THE LAW FOR PURPOSES OF CLAIM PRECLUSION AND SHOULD NOT BE REVERSED

As this Court stated in *DNK Holdings*, it is important to distinguish between the concept of claims preclusion and issue preclusion. (*DKN Holdings* at 824) Claim preclusion prevents the relitigation of the same cause of action in a second proceeding between the same parties or parties in privity with them. *(Id.)* Issue preclusion prohibits the relitigation of issues argued and decided in a previous proceeding, even if the second proceeding raises different causes of action. *(Id.)* "Issue preclusion" differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privity in the first suit." *(Id.)*

In this particular case, it is difficult to distinguish between the two concepts because the sole determination at the end of the day is the finality of the trial court's finding that Dr. Nahigian did not cause Plaintiff injury. For purposes of claim preclusion, the determination is whether the "causation issue" was subsumed into the final judgment in favor of Dr. Nahigian even though the Court of Appeal did not address the issue in *Samara I* thus precluding relitigation of the same cause of action in the proceeding against Petitioner, Nahigian's alleged principal. For purposes of issue preclusion, the determination is whether the issue of causation was previously finally adjudicated