

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA NOV 09 2017

No. S240918

Jorge Navarrete Clerk

Deputy

RANA SAMARA,
Plaintiff and Appellant,

v.

HAITHAM MATAR,
Defendant and Respondent.

Court of Appeal of California
Second District, Division Seven
B265752

Superior Court of California
Los Angeles County
EC056720
Hon. William Stewart

**Answer Brief on the Merits
On Review of the Published Decision of the Court
of Appeal, Second District, Division Seven,
Samara v. Matar (Feb 15, 2017) 8 Cal.App.5th 796
[Petition for Rehearing Denied March 7, 2017].
Appellate Case No. B265752**

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

Petitioner Haitham Matar, DDS, seeks to have this Court rewrite and ignore Restatement (Second) of Judgments, § 27, com. (o), finding that the ground(s) not relied upon by the intermediate court have no preclusive effect and ignore the body of law created by California Appellate Courts which uniformly follow Section 27, Com. (o). Petitioner seeks to have the timeworn case of Skidmore to trump Section 27 and the California courts of appeal that have rejected application of Skidmore in the collateral estoppel context, concluding an affirmance on an alternative ground operates as collateral estoppel/issue preclusion only on the ground reached by the appellate court.

STATEMENT OF ISSUES

The issues presented as specified in Petitioner's Opening Brief, rephrased for clarity are the following:

1. Does Claim Preclusion Bar Plaintiff's Action Against Petitioner Pursuant to People v. Skidmore?
2. Does Issue Preclusion Bar Plaintiff's Action Against Petitioner?
3. Does Article VI, Section 14 Mandate That the Court of Appeal Address Every Issue Before It In Writing For it to Be Considered on the Merits?
4. Was the Trial Court's Order An Appealable Order?

PROCEDURAL HISTORY

This Court granted review after a second appeal arising from a single lawsuit for personal injuries brought by Plaintiff/Appellant, Rana Samara (hereinafter Samara) who sustained injuries after a dental implant procedure. The Petitioner is Defendant/Respondent, Haitham Matar, D.D.S. (hereinafter Dr. Matar) a dentist.

Samara's First Amended Complaint was originally brought against two parties: Dr. Nahigian, an oral surgeon, and Dr. Matar, a general dentist, for damages based on theories of professional negligence. [CT 000065–000072]. Samara alleged that Dr. Nahigian was the agent or employee of Dr. Matar and that Dr. Nahigian's negligence was imputed to Dr. Matar as Dr. Matar recommended Nahigian, Matar provided the office space, staff and equipment and Dr. Matar billed Samara's insurance company for the dental implant procedure performed by Nahigian. (See Plaintiff's SSUMF #18–27). [CT 000402–000403]. Both Dr. Nahigian and Dr. Matar filed Motions for Summary Judgment, Samara opposed the motions and Dr. Nahigian's Motion for Summary Judgment was granted. [CT 000503–000509]. Judgment was entered in favor of Dr. Nahigian on February 6, 2013. [CT 000061–000062]. The case against Dr. Matar was stayed pending the first appeal. Dr. Nahigian argued in his Motion, through the declaration of Bach Le, DDS, that his conduct did not fall below the standard of care and that he did not cause the injuries to Samara. [CT000054–000058]. Samara opposed the motion for summary judgment and submitted as evidence a declaration of her expert Dr. Doumanian. Dr.

Doumanian opined that Dr. Nahigian's treatment and care fell below the standard of care and that Dr. Nahigian's negligence was the cause of Samara's injury. Dr. Doumanian's declaration stated specific facts and basis for his opinions on standard of care and causation but it did not state the words "my opinions are within a reasonable degree of medical probability". Although the trial court found that triable issues were raised as to negligence, the trial judge ruled that there was no triable issue as to causation. [CT000507–000508] On February 6, 2013 the court granted judgment in favor of Stephen Nahigian, D.D.S., on both the statute of limitations and causation. Samara filed her first appeal and the Court of Appeal affirmed the judgment; however, it did so by confirming that Samara's case against Dr. Nahigian was time barred which was the first ground. The Court of Appeal in its ruling determined that it did not reach the trial court's alternative ground of lack of causation for granting summary judgment. [CT 000497–000500] The Court of Appeal issued its Remittitur. [CT 000356–000359]

On April 30, 2013 Defendant/Respondent, Haitham Matar, D.D.S. filed his second Motion for Summary Judgment. [CT 000009–000041] Samara filed her opposition on April 3, 2015. [CT 000360–000379] Matar argued in his motion that the negligence of Nahigian could not be imputed to him based on collateral estoppel and res judicata, as the trial court had already determined that there were no triable issues of fact as to whether Nahigian's negligence caused Samara's injuries. However, the Court of Appeal in Samara I did not reach the trial court's alternative ground (causation) for granting summary judgment. The reviewing court relied on *Zevnik v. Superior Court*

(2008) 159 Cal.App.4th 76, 86–88, *Newport Beach Country Club, Inc v. Founding Members of Newport Beach Country Club* (2006) 140 Cal.App.4th 1120, 1132. The cases provide that “[i]f a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established. (Also see *Butcher v. Truck Ins. Exch.* (2000) 77 Cal.App.4th 1442.)

After the Remittitur and at the hearing on Dr. Matar’s Motion for Summary Judgment, the trial court failed to follow the Court of Appeal’s opinion on the Matar motion and instead ruled that the trial court had previously found that Nahigian was not negligent which was not a correct statement. [CT 000543–000547.] The trial court in Nahigian’s Motion for Summary Judgment found that there were triable issues as to negligence but that causation could not be established. [CT000507–000508.] In Dr. Matar’s second Motion for Summary Judgment, Samara submitted the revised declaration of Gregory Doumanian, D.D.S. which provided facts which would establish a triable issue of fact as to causation. [CT000408–000412.]

The trial court nevertheless did not even consider Dr. Doumanian’s revised declaration. Rather, it rejected Samara’s causation argument and concluded that the negligence and causation of Nahigian had already been decided, applying res judicata, or claim preclusion – a ground not asserted by Dr. Matar in his Motion for Summary Judgment. However, Nahigian’s judgment was affirmed in Samara I on the basis of the

statute of limitations, an alternative ground, while the issues of negligence and causation were not conclusively determined. [CT 000497–000500].

STATEMENT OF FACTS

Samara alleged in her first amended complaint that Dr. Nahigian was acting as the agent and employee of Dr. Matar. [CT000066: 18–23] Samara contends that both Dr. Matar and Dr. Nahigian negligently and wrongfully failed to disclose to her that Dr. Nahigian was working under a restricted license and was on probation by the California Dental Board. [FAC ¶ ¶ 3, 7; CT 000066–000067] Dr. Nahigian performed a dental implant on August 16, 2010. [DSSUMF # 1, 2, 3] [CT 000027]

Dr. Matar had treated Ms. Samara since 1997. [PSSUMF # 18]. [CT 000402, 000415–000417] Many years before the implant procedure at issue, Dr. Matar extracted Samara’s No. 18 tooth. [PSSUMF # 3] [CT 000398] Tooth No. 18 (subject tooth) is located in the mandibular portion of the mouth on the lower left side. Dr. Matar in mid- 2010 suggested that Ms. Samara have an implant placed in the No. 18 tooth space as the lack of a tooth could cause her to have complications in the upper tooth. [PSSUMF # 19] [CT 000402; 000483]

Dr. Nahigian had worked with Dr. Matar performing dental implants for three years before the subject procedure on Ms. Samara. [CT 000452:15–25] Dr. Matar and Dr. Nahigian had an arrangement where Dr. Matar provided the office space, equipment and staff for Dr. Nahigian to use in performing dental implants. [PSSUMF # 20]. [CT 000402; 000479–000483;

000450–000452 & 000454] Dr. Matar’s office billed for and collected the fee for the dental implant. [PSSUMF # 22] [CT 000403; 000487–000488, 000491–000492] Dr. Matar would price the procedures, maintain the office, sell the procedure to the patients and Dr. Nahigian would perform the oral surgery procedure and the fees collected would be split 50–50. [PSSUMF # 20] [CT 000402, 000479–000483, 000493, 000450–000452, 000454]

Dr. Matar knew that the implant was removed and failed to provide Samara with a treatment plan. [PSSUMF # 25] [CT 000403; 000493–000496] Matar also failed to review other films after Samara complained of pain. [PSSUMF # 26] [CT 000403; 000493] Dr. Doumanian opined that Dr. Matar’s treatment of Ms. Samara fell below the standard of care. [PSSUMF # 27] [CT 000403; 000408–000412] Dr. Matar’s chart shows that he prescribed Amoxicillin 500mg to Ms. Samara. [PSSUMF # 21]. [CT 000402, 000489–000490] The insurance billing shows that Dr. Matar billed for the implant procedure. [PSSUMF # 22] [CT 000403, 000487–000488, 000491–000492, 000510]

On the day of the procedure, Dr. Nahigian met with Ms. Samara, he had Dr. Matar’s staff go over the informed consent; however, the risks and complications of the surgery were not explained to Ms. Samara and she was given the informed consent paperwork while under anesthesia in the operation chair. [PSSUMF # 1, & 2] [CT 000398, 000419–000427, 000443–000445; 000463–000464] Dr. Nahigian did not take a periapical x-ray but did order a panoramic x-ray. [PSSUMF # 8 & 9] [CT 000399, 000408–000411; 000455–000456, 000462, 000469- 000471] Based on the panoramic x-ray, Dr. Nahigian negligently diagnosed the

size of Samara's bone space at the No. 18 tooth. Dr. Nahigian determined that a 10mm implant would be appropriate to implant at the No. 18 space. [PSSUMF # 8, 9, 10, 11 &12] [CT 000399-000400; 000408-000411; 000465-000466; 000467, 000468, 000428-000430, 000442] Dr. Nahigian performed the boring and placed the 10mm implant. Dr. Nahigian believed the implant was properly placed and Samara was released and sent home. The following day, Ms. Samara complained of continuous pain and numbness in the implant area. [PSSUMF # 12] [CT 000400] Dr. Nahigian agreed to see Ms. Samara at his Malibu office. Ms. Samara drove to Dr. Nahigian's Malibu office on August 18, 2010, where she was to be examined. Dr. Nahigian performed a cone beam CT scan. Dr. Nahigian removed the implant at that time and prescribed medication to Samara. [PSSUMF # 13.] [CT 000400; 000453, 000467, 000468]

Both Dr. Matar and Dr. Nahigian failed to refund the money paid for the implant. Both doctors also failed to follow up with Ms. Samara and abandoned her treatment and care. The treatment and care provided by both Dr. Nahigian and Dr. Matar fell below the standard of care. [PSSUMF # 14, 15, 25, 26, 27] [CT 000401, 000403; 000408-000412; 000493-000496]

The dental implant which had been placed in Ms. Samara's mouth was placed and traversed and impacted Samara's nerve, causing permanent nerve damage. [PSSUMF # 5, 6, 7] [CT 000398-000399; 000408-000412; 000455-000456, 000458-000461; 000469-000473]

Dr. Nahigian's conduct fell below the standard of care when he failed to properly examine, care and treat Ms. Samara. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398-000400; 000458-000461,

000469, 000408–000412, 000472–000473, 000455–000456, 000428–000429, 000442, 000465–000466] Dr. Nahigian failed to properly inform Ms. Samara of the risks and complications associated with the surgery. [PSSUMF # 2, 17, 23] [CT 000408–000412, 000426–000427] Dr. Nahigian was negligent when he chose and prescribed a 10 mm implant for the No. 18 space when the bone area at that space was totally inadequate to support a 10mm implant. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398–000400; 000408–000412] Dr. Nahigian was negligent when he only relied on a panoramic x-ray and did not consider using a periapical film to accurately determine the spacing for the appropriate implant. [PSSUMF # 5, 6, 7, 8, 10, 11, 12] [CT 000398–000400; 000408–000412] The 10mm implant placed at the No. 18 space perforated the inferior alveolar canal. The perforation of the inferior alveolar canal caused nerve damage. The perforation is visible on the cone beam CT scan that was taken August 18, 2010. [PSSUMF # 13, 14] [CT 000400–000401; 000408–000412]

The trial court previously denied Dr. Matar's first Motion for Summary Judgment as there was a question of fact whether Matar directly breached his duty of care to Ms. Samara. [PSSUMF # 29] [CT 000404; 000503–000506] The trial court in Dr. Nahigian's Motion for Summary Judgment ruled that a question of fact was presented as to Dr. Nahigian's negligence. [CT000506–000508]

Dr. Matar filed his second Notice of Motion for Summary Judgment on or about April 23, 2013, stating that the Motion was made pursuant to Code of Civil Procedure section 437c, subdivision (a). [CT 000009–000010]

Dr. Matar's Notice of Motion stated that he moved for Summary Judgment in his favor "as to Plaintiff's entire action" on three grounds:

1. As a result of this Court's Judgment dismissing STEPHEN NAHIGIAN, D.D.S. ("Dr. Nahigian") from this lawsuit, circumstances have changed: Plaintiff may no longer rely on a theory of vicarious liability against Dr. Matar for Dr. Nahigian's alleged negligence, or a theory of negligent referral of Plaintiff to Dr. Nahigian by Dr. Matar;
2. Dr. Matar met or exceeded the standard of care in the community as it relates to his dental care and treatment of Plaintiff; and
3. No negligence on Dr. Matar's part caused or contributed to the injuries and damages claimed by Plaintiff in this lawsuit.

[CT 000009-000010]

Dr. Matar's first Motion for Summary Judgment was denied by the trial court as to both the statute of limitations argument and the standard of care, with the trial court noting that the Plaintiff's expert "provided a number of grounds in his opinion to demonstrate that the Defendant's treatment [of Samara] fell below the standard of care, e.g., the Defendant failed to inform properly, the Defendant failed to provide sufficient post-procedure care, and the Defendant abandoned her treatment."

[CT 000501-000509]

Plaintiff Samara filed a Notice of Motion and Motion to Stay the trial court hearing on Dr. Matar's second Motion for Summary Judgment pending the Court of Appeal ruling on Plaintiff's appeal of the judgment in favor of Dr. Nahigian. [CT

000349–000355] In this Motion to Stay, Plaintiff emphasized that despite the trial court granting judgment for Dr. Nahigian on other grounds, “what is relevant is the causation contention.” [CT 000351]

Ms. Samara filed her Opposition to Dr. Matar’s second Motion on or about April 3, 2015. In her brief, Plaintiff argued that the trial court had already found triable issues of fact regarding Dr. Matar’s breach of the standard of care, alleging that collateral estoppel did apply to the trial court’s previous ruling that Matar was individually negligent. Samara further asserted that both Nahigian and Matar were individually negligent, that the doctors engaged in a joint venture, and that causation on the part of Dr. Nahigian was no longer conclusively established after the Court of Appeal’s opinion in Samara I. [CT 000360–000380]

In his reply brief, Dr. Matar acknowledged that “Plaintiff advances two distinct theories,” referring to Samara’s assertions of both direct and derivative liability. [CT 000525–000536]

Judgment in the instant action was entered in favor of Dr. Matar on or about July 9, 2015. Notice of Entry of Judgment was served upon the Plaintiff by mail on July 16, 2015. Plaintiff filed her Notice of Appeal on or about July 28, 2015. [CT 000539–000565]

LEGAL ARGUMENT

I. Standard of Review

A trial court’s determination of a summary judgment motion is subject to de novo review, following the same analysis as required

of the trial court under Code of Civil Procedure section 437c. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716–717.) When a case comes before this Court after a trial court grants a motion for summary judgment and the appellate court reverses, this Court independently “takes the facts from the record that was before the trial court when it ruled on that motion.” (*Ibid.*, quoting *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 [internal citations omitted].) This Court “liberally construe[s] the evidence in support of the party opposing summary judgment and resolve[s] doubts concerning the evidence in favor of that party.” (*Wilson v. 21st Century Ins. Co.*, *supra*, at p. 717, quoting *Yanowitz v. L’Oreal USA, Inc.*, *supra*, at p. 1037 [internal citations omitted].)

De novo review, therefore, applies in this case.

II. The Trial Court’s Grant of Summary Judgment as to Dr. Matar was Appealable Pursuant to Code of Civil Procedure Section 904.1

According to Code of Civil Procedure section 904.1, which provides: (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

1. From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.F
2. From an order made after a judgment made appealable by paragraph (1).

While the Court of Appeal found that the trial court's judgment in favor of Dr. Matar could not dispose of all causes of action due to Plaintiff's pleaded allegations and arguments opposing the motion indicated that her action against Dr. Matar involved both direct and derivative liability, the fact remains that the underlying judgment was entered in favor of Dr. Matar as to the entire case. Thus, because there was nothing left to adjudicate at the trial level, the trial court's judgment was a final, appealable order.

A summary judgment entered under section 437c is an appealable judgment. (Code Civ. Proc., § 437c, subd. (m)(1).) Judgment was entered by the trial court in favor of Dr. Matar and against Ms. Samara on July 9, 2015. [CT 000539–000540]. Notice of Entry was served July 16, 2015, authorized by Code of Civil Procedure section 904 and section 904.1, subdivision (a)(1), and section 906. [CT 000550–000551]

Petitioner argues for the first time in his Opening Brief that if the Court of Appeal was correct in asserting there were both direct and derivative causes of action against Dr. Matar, the judgment was not appealable. However, the Judgment entered on July 9, 2015 clearly states that Dr. Matar's Motion for Summary Judgment was granted "as to Plaintiff's entire action against Dr. Matar," and that Plaintiff was to take nothing by virtue of her First Amended Complaint. [CT 000552–000553] Given that the judgment effectively disposed of Plaintiff's entire FAC, including all causes of action alleged therein, the judgment was an appealable order.

III. Neither Claim Preclusion Nor Issue Preclusion Should Apply in the Instant Case

A. CLAIM PRECLUSION AND ISSUE PRECLUSION HAVE DISTINCT REQUIREMENTS WHICH WERE NOT MET BY PETITIONER.

While res judicata principles may have been historically used interchangeably, this Court recently and significantly clarified the separate and distinct requirements of “claim preclusion,” also known as “res judicata,” and “issue preclusion,” also known as “collateral estoppel.” (See generally *DKN Holdings v. Faerber* (2015) 61 Cal.4th 813.)

Claim preclusion, or res judicata, “prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them.” (*DKN Holdings v. Faerber, supra*, 61 Cal.4th at p. 824, quoting *Mycogen v. Monsanto* (2002) 28 Cal.4th 888, 896.) “Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit.” (*DKN Holdings v. Faerber, supra*, at p. 824.)

Issue preclusion, or collateral estoppel, “prohibits the re-litigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party.” (*DKN Holdings v.*

Faerber, supra, 61 Cal.4th at p. 824 [internal citations omitted].) Issue preclusion only applies “(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.” (*Id.* at p. 825; see also *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828; *Teitelbaum Furs, Inc. v. Dominion* (1962) 58 Cal.2d 601, 604.)

Even where preclusive principles may lie, this Court has found that public policy principles may override preclusive application in some circumstances. (*Lucido v. Superior Court, supra*, 51 Cal.3d 335) As the court of appeal found in this case neither claim or issue preclusion applies. As detailed below the several other jurisdictions have found these strict requirements were not met in situations similar to the instant case.

***B. SEVERAL STATES' HIGHEST COURTS AND
FEDERAL CIRCUIT COURTS HAVE ALSO
ADOPTED RESTATEMENT (SECOND) OF
JUDGMENTS, § 27, COMMENT O, AND
THEIR REASONING IS INSTRUCTIVE***

When the highest courts of several states have considered whether issue and/or claim preclusion applies to alternative grounds, where an appellate court expressly declines to reach one or more of the other grounds, these courts have adopted the view expressed in the Restatement (Second) of Judgments, § 27, com. (o), finding that the ground(s) not relied upon by the intermediate court have no preclusive effect. (See generally *Stanton v. Schultz*

(Colo. 2010) 222 P.3d 303; *Beaver v. John Q. Hammons Hotels, L.P.* (2003) 355 Ark. 359; *Humana, Inc. v. Davis* (1991) 261 Ga. 514.)

The opinion by the Georgia Supreme Court in 1991 involved strikingly similar facts to the instant case. There, one medical malpractice action was filed against both a health clinic and its physicians as agents, and summary judgment was granted by the trial court for the physician defendants on alternative grounds: (1) statute of limitations, and (2) negligence. (*Humana, Inc. v. Davis, supra*, 261 Ga. at p. 514.) The trial court's judgment in favor of the physicians was affirmed by the Court of Appeals, "relying solely on the statute of limitation issue." (*Ibid.*) Thereafter, the remaining defendant health clinic moved for summary judgment on three grounds, the first of which was that res judicata barred the action against it because its liability was solely derivative; the health clinic also contended that even if non-negligence was not conclusively established by the prior judgment, the physicians were not negligent and further contended the physicians were not agents of the clinic. (*Id.* at pp. 514–515.)

In concluding that "the trial court's grant of summary judgment to the doctors did not conclusively establish the non-negligence of the doctors, and that res judicata [was] thus not a bar" to the action against the clinic, the Georgia Supreme Court noted that "when an appeal is taken, the ruling of the appellate court controls the res judicata effect of the judgment." (*Humana, Inc. v. Davis, supra*, 261 Ga. at p. 515; see also Restatement, Second, Judgments, §27, com. (o) (1982); 1B Moore's Federal Practice § 0.416[2] (2d ed. 1988); Wright, Miller & Cooper,

Federal Practice and Procedure: Jurisdiction, § § 441 and 4432 (1981).) The Georgia Court further opined that in the situation contemplated by the Restatement, §27, com. (o), “the ground omitted from the [appellate] decision is not considered to have been finally adjudicated” and is thus not conclusively established for purposes of res judicata. (*Humana, Inc. v. Davis, supra*, at p. 515 [emphasis added].)

When the Arkansas Supreme Court decided to adopt the Restatement (Second) of Judgments §27, com. (o) in *Beaver*, it considered not only the comment standing alone, but in conjunction with the whole of Section 27, entitled “Issue Preclusion,” particularly comments i and h, and noting that it had previously adopted other aspects of Section 27. (*Beaver v. John Q. Hammons Hotels, L.P., supra*, 355 Ark. at pp. 365–367.) In that case, the plaintiff, Mrs. Beaver, cited to numerous additional authorities “to support her contention that collateral estoppel is inappropriate with regard to an issue that is a ground for a judgment later affirmed by an appellate court on another ground without reaching the issue in question.” (*Id.* at pp. 368–369; see also *Niagara v. Mohawk Power Corp v. Tonawanda Band of Seneca Indians* (2d Cir. 1996) 94 F.3d 747; *Borst v. Chevron Corp.* (5th Cir. 1994) 36 F.3d 1308; *Ash Creek Mining Co. v. Lujan* (10th Cir. 1992) 969 F.2d 868; *Dow Chem. v. U.S. EPA* (5th Cir. 1987) 832 F.2d 319; *Hicks v. Quaker Oats Co.* (5th Cir. 1981) 662 F.2d 1158; *State v. Stanford*, 111 Or.App.509 (1992) 828 P.2d 459.)

The *Beaver* court emphasized the Seventh Circuit’s reasoning in *Gray v. Locke* (7th Cir. 1989) 885 F.2d 399, 406, to support its adoption of comment o:

“The policy underlying collateral estoppel is that a party is entitled only one fair opportunity to litigate an issue. In furtherance of this policy, courts will not apply collateral estoppel when the party against whom the prior decision is invoked did not have a ‘full and fair opportunity to litigate’ that issue in the prior case. As [the Seventh Circuit] has recognized on prior occasions, a ‘full and fair opportunity to litigate’ includes the right to appeal an adverse decision. [citations omitted in original.]”

(*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 368, quoting *Gray v. Locke*, *supra*, 885 F.2d at p. 406.)

As recognized by the *Beaver* court in its opinion, adoption of comment o would not apply in those instances where an intermediate court affirms all alternative grounds for judgment; rather, in those instances, preclusion would still be viable.

(*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 367.)

Interestingly, the *Beaver* court devoted an entire paragraph of its opinion to discussing the “California position,” concluding that *Bank of Am. v. McLaughlin Land & Livestock Co.* (1940) 40 Cal.App.2d 620, “decided decades before the Restatement (Second) of Judgments was written,” had been effectively abrogated by California appellate courts. (*Beaver v. John Q. Hammons Hotels, L.P.*, *supra*, 355 Ark. at p. 368.) No mention is made of *Skidmore*, however, the decision in *Beaver* involved issue preclusion only, not claim preclusion.

The Colorado Supreme Court expressly adopted comment o in *Stanton v. Schultz*, *supra*, 222 P.3d 303. In its opinion, the Colorado court cited to *Beaver* for the proposition that “[i]f the appellate court declines to consider certain grounds, those