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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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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 Several lower appellate courts have refused to follow *Skidmore* claiming it is outdated and has been impliedly overruled by this Court in light of this Court's apparent approval of the Second Restatement of Judgments causing confusion and lack of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

disqualify the law firm on the grounds that the law firm violated its ethical duties by representing all plaintiffs wherein a conflict of interest existed. The law firm opposed the motion on the grounds that no conflict existed and the motion should be denied on the grounds of laches. The trial court denied the motion on the grounds of laches and ruled the law firm did not violate any ethical duties. On appeal, the Second District Court of Appeal, Division Three, affirmed the denial on the ground of laches and did not address the issue as to whether the law firm violated its ethical duties. ((*ITT Industries, Inc. v Pacific Employers Ins. Co.* (Jan. 29, 2007, B187238 [nonpub. opn.] ("*Zevnik I*")). See *Zevnik II* at 159 Cal.App.4th 76,80.). The divergent plaintiffs then filed a legal malpractice case against the law firm claiming it fell below the standard of care by representing the plaintiffs when a conflict of interest existed. The law firm brought a "motion" in the malpractice action arguing the findings in the motion to disqualify in the insurance case were "conclusively established" and affirmed on appeal and thus the plaintiffs were collaterally estopped from asserting that the law firm violated its ethical duties. The trial court denied the motion and submitted the following issues for appellate interlocutory review pursuant to Code of Civil Procedure, section 166 to be 1) whether issues decided on a motion to disqualify counsel can be collaterally estoppel in a malpractice case; and 2) whether collateral estoppel applies to each alternative ground supporting a trial court decision in these circumstances, or only to the ground which the appellate court based its affirmance. The Second District affirmed the denial of the motion on the ground that with respect to the first appellate decision in the insurance case, collateral estoppel of that

decision can only be used as to the issue addressed by the appellate court, not the alternative ground not addressed by the appellate court. Interestingly, the Second District refused to express an opinion whether issues decided on a motion to disqualify counsel can be used as collateral estoppel in a malpractice case. (*Zevnik II* at Page 81 Fn. 2) First, the ruling in *Zevnik I* was interlocutory and resulted in no final judgment and arose from a motion to disqualify which hardly qualifies as a trial or adjudication on the merits. Second, in *Zevnik II*, the Court of Appeal held that its decision does not apply to res judicata principles. Third, *Zevnik II* merely holds that the Court of Appeal opinion affirming the trial court's rulings in the first action does not always "conclusively establish" those issues for collateral estoppel purposes in the second action. The Court of Appeal remanded arguably giving the trial court the right to assess whether collateral estoppel applied to the issue notwithstanding the Court of Appeal decision in *Zevnik I.*

Newport Beach II involves a dispute between the owner of a country club and its members arising out of a written "right of first offer" between the two. In the first action, the members sued the owner Newport Beach Country Club (NBCC) to enforce a written agreement which allegedly entitled the members to notice of any offer to buy the club by a third party and the opportunity to purchase under the same terms. NBCC had received an offer to purchase the stock of NBCC's parent company IBC, Inc. from a third party. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944 ("*Newport Beach I*") The trial court granted summary judgment in favor of NBCC on the

grounds that pursuant to the written agreement before the members were entitled to exercise the right of first refusal, they had to be a "member organization" at the time of the offer and they were not and 2) the type of offer that was made to the owner (sale of stock of parent company) did not trigger the right of first refusal in any event. On appeal in *Newport Beach I*, the Fourth District Court of Appeal, affirmed on the grounds the members failed to set up a member organization but did not address whether the offer triggered the right of first refusal. The judgment in favor of NBCC was affirmed. After the decision in *Newport Beach I*, the members created and registered a member organization with the NBCC. NBCC acknowledged the validity of the member organization and the right to exercise the right of first offer but confirmed that the organization had no right of first offer as to the proposed sale of the stock of NBCC's parent company IBC. The members refused to acknowledge the lack of that right. In *Newport Beach II*, NBCC then filed its own action for declaratory relief to declare the members had no right of first offer as to the offer to purchase the IBC stock based upon the previous judgment in *Newport Beach I*. The trial court granted summary judgment in favor of NBCC. The trial court ruled:

"The Order Granting Summary Judgment in favor of NBCC and against Founding Members in that certain action known as *Founding Members of The Newport Beach Count[r]y Club v. Newport Beach Country Club, Incorporated* (Orange County Superior Court Case No. 01CC10534) is binding upon Founding Members in its entirety, including, without limitation, the conclusion in the Order that the sale of the stock of NBCC's parent corporation, International Bay

Clubs, Incorporated, does not trigger the Right of First Offer in Article V, Section 2 of the Governing Regulations."

"In granting this summary judgment, the Court has examined the competing lines of authority on the scope of res judicata/collateral estoppel effect to be accorded orders and judgments of trial courts, including the California appellate court decision cited by *Newport Beach* of *Butcher v. Truck Ins. Exchange*, 77 Cal.App.4th 1442... (2000). However, this Court ultimately concludes that *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450...1962), *People v. Skidmore*, [*supra*,] 27 Cal. 287 ... and the persuasive discussion of California law in *Di[R]uzza v. County of Tehama*, 323 F.3d 1147 (9th Cir. 2003) establish that, under California law, the affirmance of a decision at the trial court level by an appellate court extends binding and legal effect to the whole of the trial court's determination, with attendant collateral estoppel effect." (*Id.* at 1125)

The members appealed. The Fourth District Court of Appeal reversed. The Court of Appeal refused to follow the "traditional rule" set forth in *Skidmore* and *McLaughlin* because in the Court's opinion, *Skidmore* and the "traditional rule" had not withstood the test of time because Section 27 of the Restatement Second of Judgments, Comment o was adopted in 1982 which in the Court's opinion effectively overrules *Skidmore*. That comment states: "If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other [determination] is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination." The Court of Appeal stated:

> We believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second of Judgments, section 27. We therefore adopt the modern/Restatement Second rule and, agreeing with *Butcher*, hold that "if 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." (*Butcher*, *supra*, 77 Cal.App.4th at p. 1460.)

On its face, the *Newport Beach II* opinion violates the jurisdictional mandates of stare decisis and should be ignored. (*Auto Equity Sales v. Superior Court*, *supra*, 57 Cal.2d 450, 455-456) Even so, the distinguishing feature in the *Newport Beach II* case is that it was NBCC, not the members, suing offensively by declaratory relief in the second lawsuit. Res judicata and collateral estoppel are generally considered to be defensive mechanisms to avoid the relitigation of matters already litigated. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 88-89) If after the *Newport Beach I* case was decided and judgment was entered against the members and *the members* sued for the exact same thing in the second lawsuit, similar to the Plaintiff in this case, it is highly unlikely the Court of Appeal would have ruled the same way.

In *Butcher*, the Plaintiff contracted with Truck Insurance through his insurance agent to obtain coverage for malicious prosecution by asserting to his agent that he wanted the same

coverage he had with his previous carrier West American. When sued for malicious prosecution, Butcher tendered to Truck and West American which said tender was denied. In a federal court action, Butcher sued West American for insurance bad faith asserting coverage under his old policy. The district court granted summary judgment in favor of West American on the grounds 1) the policy did not cover malicious prosecution and 2) the acts or omissions in the malicious prosecution suit did not occur within the West American policy period. On appeal, the Ninth District Court of Appeal affirmed the judgment on the ground the acts fell outside the policy period and did not address the coverage issue. ("*Butcher I*") In state court, Butcher sued his insurance agent claiming he misled Butcher into thinking the Truck policy covered malicious prosecution. The agent brought a summary judgment motion on the ground the federal action barred the action against the agent because it conclusively established the West American policy did not cover malicious prosecution and the contract between the agent and Butcher was the procurement of the same coverage Butcher had under the West American policy. The trial court granted summary judgment. On appeal, the Court of Appeal reversed holding that because the Ninth District refused to address the coverage issue, it was not on the merits and could not be used for preclusive effect in the state action. The Butcher court determined that federal law applied but conceded that federal law on the issue is the same as California law and then it proceeded to analyze the conflicting cases. It never mentioned *Skidmore*. Even so, the case is distinguishable because the issues in *Butcher I* were clearly not similar to the issues in *Butcher II*.

Again, *Skidmore* is still good law and makes judicial sense to continue to follow because it promotes judicial economy and promotes the avoidance of relitigating previously adjudicated claims and/or issues. In light of the conflicting opinions between *Skidmore*, *McLaughlan* and *DiRuzza* on the one hand, and *Butcher*, *Zevnik II* and *Newport Beach II* on the other hand, this Court should accept review to provide uniformity and clarity to the principles of claim and issue preclusion.

B. ARTICLE VI, SECTION 14 DOES NOT MANDATE THAT THE COURT OF APPEAL ADDRESS EVERY ISSUE BEFORE IT IN WRITING FOR IT TO BE CONSIDERED ON THE MERITS

Article VI, section 14 provides:

> The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.
>
> Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

As one of its grounds for not giving preclusive effect to the Nahigian Judgment, the Court of Appeal stated that:

> Third, as a policy matter, giving preclusive effect to an issue expressly not decided in the appellate opinion would conflict with the appellate court's duty

> under article VI, section 14 of the California Constitution to set forth its decisions in writing "'with reasons stated.' ... To comply with th[at] constitutional mandate, and to avoid unintended collateral estoppel consequences under the traditional [Skidmore] rule, the appellate court would have to address every ground recited in a judgment, even though a decision on one ground would resolve the dispute before the court." (*Newport Beach, supra*, 140 Cal.App.4th at p. 1132.) (*Samara II* at page 809)

Article VI, section 14 does not mandate that in order to affirm a judgment on the merits decided by the trial court that the appellate court address all those issues in writing on appeal even if it is not necessary to affirm the judgment. No published opinion has ever addressed this issue other than the Court of Appeal in this case and *Newport Beach II*. Neither the Court of Appeal in this case nor the Court of Appeal in *Newport Beach II* cited any case authority interpreting Article VI, section 14 in such a narrow manner. Granting review to address this issue in conjunction with the collateral estoppel and res judicata issues will provide the appellate courts with significant guidance in the future when addressing the merits of the trial court's grounds for entry of judgment.

C. THE COURT OF APPEAL SHOULD HAVE GRANTED PETITIONER LEAVE TO FILE SUPPLEMENTAL BRIEFING PURSUANT TO GOVERNMENT CODE, SECTION 68081.

Government Code, section 68081 provides:

> "Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

The sole ground asserted by Plaintiff on appeal was that res judicata and/or collateral estoppel did not apply because of the rulings in *Zevnik II* and *Newport Beach II*. Nowhere in the briefs did the Plaintiff argue preclusion principles did not apply because the claims or issues were not asserted in a separate lawsuit or that applying preclusion principles would be splitting a cause of action. It was not until oral argument when the Court of Appeal brought the potential issue to the attention of appellate counsel. The Court of Appeal essentially based its entire decision on the holding that preclusion principles do not apply in this case because to do so would be splitting a cause of action. Petitioner brought a timely

Petition for Rehearing requesting leave to file supplemental briefing to address this new issue which was denied. Government Code, section 68081 mandates the Court of Appeal to grant such leave which it refused to do.

In addition, Plaintiff never asserted on appeal that the issue of post-surgical acts or omissions of Petitioner was a separate and distinct cause of action requiring the defense to bring a motion for summary adjudication. This issue was never briefed by any party. This issue should have been deemed waived by the Plaintiff. Instead, the Court of Appeal, as a second reason for reversing the trial court's judgment, held a second cause of action for post-surgical acts was included in the Amended Complaint and should have been addressed by a motion for summary adjudication. Again, Petitioner requested leave to file supplemental briefing which was erroneously decided. If review is not granted to address the viability of *Skidmore* and the interpretation of Article VI, section 14, Petitioner requests that the matter be remanded to the Court of Appeal ordering that the Petition for Rehearing be granted and Petitioner be granted leave to file supplemental briefing.

D. IF THE COURT OF APPEAL DECISION REGARDING THE ASSERTION OF A SECOND CAUSE OF ACTION FOR POST-SURGICAL ACTS OR OMISSIONS OF PETITIONER, IS CORRECT, IT DID NOT HAVE JURISDICTION TO ISSUE THEIR PUBLISHED OPINION BECAUSE THE TRIAL COURT ORDER WAS NOT AN APPEALABLE ORDER BECAUSE IT DID NOT DISPOSE OF ALL CAUSES OF ACTION.

Since the Court of Appeal held that Plaintiff's claims for negligent referral and negligent post-operative care by Petitioner is a separate cause of action claiming separate primary rights, then the summary judgment order that forms the basis of this appeal is no longer an appealable order. It is hornbook law that a trial court judgment that does not dispose of all pending causes of action is not appealable. Under the "one final judgment rule', the appeal must await final judgment in the entire action. (*Angell v. Superior Court* (1999) 73 Cal.App.4th 697) If this Court refuses to grant review as to the viability of *Skidmore* and the interpretation of Article VI, section 14, then Petitioner requests that the Court of Appeal opinion be vacated for lack of jurisdiction.

IV. CONCLUSION

The law of claim preclusion and issue preclusion in California has developed inconsistent opinions and rulings because of the lack of clarity of the viability of *Skidmore*. (See for example, ARTICLE: *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 San Diego L. Rev. 55; and ARTICLE: *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 San Diego L. Rev. 509.) Review is needed to provide clarity and uniformity of decisions.

Respectfully submitted,

Dated: 3-27-17

FORD, WALKER,
HAGGERTY & BEHAR

_____

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 Petition for Review by Petitioner HAITHAM MATAR D.D.S. is produced using 14-point Roman type and contains approximately 7,056 words.

Dated: 3-27-17

Neil S. Tardiff

Filed 2/15/17

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RANA SAMARA, Plaintiff and Appellant, v. HAITHAM MATAR, Defendant and Respondent.	B265752 (Los Angeles County Super. Ct. No. EC056720)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Reversed and remanded.

Curd Galindo & Smith, Alexis Galindo for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Katherine M. Harwood and Neil S. Tardiff for Defendant and Respondent.

Rana Samara sued Dr. Haitham Matar and Dr. Stephen Nahigian for dental malpractice, alleging Dr. Nahigian had negligently performed oral surgery on her and Dr. Matar, as Dr. Nahigian's principal and employer, was vicariously liable for Dr. Nahigian's negligence. The trial court granted summary judgment for Dr. Nahigian on alternative grounds—Samara's negligence claim was barred by the statute of limitations and Samara could not establish causation. We affirmed the judgment in favor of Dr. Nahigian based solely on the statute of limitations, expressly declining to reach the issue of causation. (See *Samara v. Estate of Stephen Nahigian D.D.S.* (Nov. 10, 2014, B248553) [nonpub. opn.] (*Samara I*).)

Following our decision in favor of Dr. Nahigian, Dr. Matar moved for summary judgment, arguing the question of Dr. Nahigian's liability had been conclusively determined in Dr. Nahigian's favor (issue preclusion) and Dr. Matar was thus entitled to judgment on Samara's vicarious liability claim as a matter of law. Dr. Matar also asserted Samara could not establish that he had been independently negligent or that his own acts or omissions had caused her injury.

The trial court granted Dr. Matar's motion, concluding Samara's claim for vicarious liability was barred under the doctrine of claim preclusion—a ground not raised in Dr. Matar's motion—and Samara could not show Dr. Matar independently caused her any injury. On appeal Samara contends neither claim preclusion nor issue preclusion applies in this case. We agree and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *This Lawsuit*

On September 6, 2011 Samara sued Drs. Nahigian and Matar for professional negligence/dental malpractice. As to Dr. Nahigian, the operative first amended complaint alleged he had negligently inserted a dental implant while performing oral surgery on Samara on August 16, 2010. As a result of Dr. Nahigian's negligence, Samara suffered permanent nerve damage. As to Dr. Matar, Samara alleged Dr. Nahigian had performed the surgery while on probation by the California Dental Board and was working under a restricted dental license as an agent/employee of Dr. Matar. Samara asserted Dr. Matar, as Dr. Nahigian's principal/employer, was vicariously liable for Dr. Nahigian's negligence. She also alleged Dr. Matar was directly negligent in failing to inform her of Dr. Nahigian's probationary status and of the risks of surgery and for failing to conduct appropriate post-operative care and treatment. Samara sought damages from Drs. Matar and Nahigian in excess of $250,000.

2. *Dr. Nahigian's Motion for Summary Judgment*

Dr. Nahigian moved for summary judgment on three grounds: (1) Samara could not demonstrate his conduct fell below the standard of care; (2) she could not establish his allegedly deficient performance caused her nerve damage; and (3) Samara's action was time-barred. Dr. Nahigian submitted the declaration of Dr. Bach Le, an oral surgeon, who opined "to a reasonable degree of medical probability, that no negligent act or omission on the part of Dr. Nahigian caused or contributed to" Samara's injuries.

With her opposition to Dr. Nahigian's motion Samara submitted the declaration of Dr. Gregory Doumanian, who testified Dr. Nahigian had used an implant that was too large, conduct that fell below the standard of care. He also declared Samara's nerve injury "could have been prevented had Dr. Nahigian used a shorter implant or an alternative treatment plan."

The trial court granted Dr. Nahigian's motion, ruling Samara's action against Dr. Nahigian was time-barred under the one-year-from-discovery provision of Code of Civil Procedure section 340.5.[1] Alternatively, the court ruled Dr. Nahigian had met his burden to show Samara could not establish the essential element of causation. The court found Dr. Doumanian's opposition declaration did not state an opinion on causation to a "reasonable degree of medical probability" and, therefore, failed to raise a triable issue of material fact on that question. The court entered judgment in favor of Dr. Nahigian.

3. *Samara's Appeal from the Judgment in Favor of Dr. Nahigian*

On appeal from the judgment in favor of Dr. Nahigian, Samara conceded the trial court had correctly ruled her action

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[1] Dr. Matar also moved for summary judgment contending Samara's negligence claims were barred by the statute of limitations. The court denied Dr. Matar's motion, concluding Samara's notice of intention to commence an action for professional negligence to Dr. Matar, unlike her earlier separate notice to Dr. Nahigian, extended the limitations period by 90 days, making the lawsuit against Dr. Matar timely. (See Code Civ. Proc., § 364, subds. (a), (d).) At Samara's request, following entry of judgment in favor of Dr. Nahigian, further proceedings in the action against Dr. Matar were stayed pending resolution of Samara's appeal from that judgment.

against Dr. Nahigian was time-barred. However, she requested we reverse the alternative ground on which the court had granted summary judgment—lack of causation—to preclude Dr. Matar from relying on that ruling in the action against him under the doctrine of collateral estoppel/issue preclusion. Dr. Nahigian did not file a respondent's brief. We affirmed the judgment, but expressly declined to reach the alternative ground of causation because it was not necessary to our decision. Citing case law that holds an affirmance on an alternative ground operates as collateral estoppel/issue preclusion only on the ground reached by the appellate court, we also noted, "Because the question is not before us, we also do not address whether collateral estoppel may be used with regard to an alternative ground for judgment not reviewed by the appellate court. (See generally *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 [(*Newport Beach*)].)" (*Samara I, supra,* B248553.)

4. *Dr. Matar's Motion for Summary Judgment*

Following our decision in *Samara I,* Dr. Matar moved for summary judgment. Citing principles of collateral estoppel/issue preclusion, he argued Samara's unsuccessful action against Dr. Nahigian had conclusively established Dr. Nahigian's conduct did not cause Samara's injury, precluding her claim against him based on a theory of vicarious liability as a matter of law. With respect to the allegations of his own negligent conduct, Dr. Matar argued Samara could not prove he had acted below the standard of care or had caused any injury. Dr. Matar included with his motion the declaration of Dr. Barton Kubelka, a licensed dentist, who opined Dr. Matar's treatment plan both before and after the

surgery was appropriate and in accordance with the standard of care; he did not have a duty as a referring dentist to warn Samara of the risks of the dental implant procedure; and no negligent act or omission on Dr. Matar's part caused Samara any injury.

Samara opposed the motion, arguing collateral estoppel/issue preclusion did not apply because we had expressly declined in our decision affirming the judgment in favor of Dr. Nahigian to decide the alternative ground of causation. Samara also included a revised declaration from Dr. Doumanian, who opined Dr. Nahigian's use of the wrong-sized implant during surgery was below the standard of care and that his conduct, "to a reasonable degree of medical probability," had caused Samara permanent nerve damage. Finally, citing Dr. Doumanian's declaration, Samara argued triable issues of material fact existed as to whether Dr. Matar was independently negligent in his post-operative treatment of her. She did not argue or include evidence Dr. Matar was negligent in referring her to Dr. Nahigian or that his post-operative care or treatment had caused her injury.

In his reply Dr. Matar argued Samara had failed to raise a triable issue of material fact that any post-operative action or omission had directly caused her injury.

The trial court granted Dr. Matar's motion, ruling under the doctrine of claim preclusion the earlier judgment for Dr. Nahigian barred Samara's vicarious liability claim. The trial court acknowledged modern case law holding issue preclusion/ collateral estoppel inapplicable when the ground relied on by the trial court in an earlier action had not been addressed in the appellate opinion affirming the judgment, but distinguished those authorities on the ground the question in the instant

matter was one of claim preclusion, not issue preclusion. The court also found Samara had failed to establish a triable issue of material fact that Dr. Matar had independently caused her injury.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

2. *The Trial Court Erred in Granting Summary Judgment on the Ground of Claim Preclusion*

The question of the applicability of claim preclusion or issue preclusion is one of law to which we apply a de novo review. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507 (*Johnson*); *Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.)[2]

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[2] Although Dr. Matar moved for summary judgment on the ground of issue preclusion, the trial court decided the motion based on claim preclusion—an issue not raised in Dr. Matar's motion or addressed in Samara's opposition. However, Samara has not objected on notice grounds to the court's ruling; we consider that issue forfeited. (See *Fourth La Costa Condominium Owners Assn. v. Seith* (2008)

a. *Res judicata: claim preclusion and issue preclusion*

The doctrine of res judicata has two aspects—claim preclusion and issue preclusion. (*DKN Holdings LLC. v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*); *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) "*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings*, at p. 824; accord, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*); *Johnson*, *supra*, 166 Cal.App.4th at p. 1507.) The bar applies if the cause of action could have been brought, whether or not it was actually asserted or decided in the first lawsuit. (*Busick v. Workermen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974; *Zevnik v. Superior Court*, *supra*, 159 Cal.App.4th at p. 82.) The doctrine promotes judicial economy and avoids piecemeal litigation by preventing a plaintiff from "'"splitting a single cause of action or relitigat[ing] the same cause of action on a different legal theory or for different relief."'" (*Mycogen*, at p. 897.)

The second aspect of res judicata, issue preclusion, historically referred to as collateral estoppel, "prohibits the relitigation of issues argued and decided in a previous case, even

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159 Cal.App.4th 563, 585 [due process notice issue forfeited because not raised in trial court]; *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1478.)

if the second suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings, supra,* 61 Cal.4th at p. 824; accord, *Boeken v. Philip Morris USA, INC., supra,* 48 Cal.4th at p. 797.) The doctrine 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." (*DKN Holdings*, at p. 825.) The doctrine differs from claim preclusion in that it operates as a conclusive determination of issues; it does not bar a cause of action. (*Ibid.*) In addition, unlike claim preclusion, issue preclusion can be raised by one who is not a party to the prior proceeding against one who was a party or his or her privy. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Moreover, even if the minimal requirements for issue preclusion are satisfied, courts will not apply the doctrine if policy considerations outweigh the doctrine's purpose in a particular case. (*Lucido,* at pp. 342-343.)

b. *Claim preclusion is not applicable because there were not successive lawsuits*

There is no dispute the first two elements necessary for claim preclusion are present here: (1) Samara's action against Dr. Matar for professional negligence, to the extent it is based on his alleged vicarious liability for Dr. Nahigian's conduct, involves the same cause of action, that is, the same primary right, as that alleged in her lawsuit against Dr. Nahigian;[3] and (2) as an

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[3] Under the primary rights theory of claim preclusion applicable in California, "a cause of action arises from the invasion of the primary

alleged employer/principal, Dr. Matar is in privity with Nahigian. (See *DKN Holdings, supra,* 61 Cal.4th at pp. 827-828 ["[w]hen a defendant's liability is entirely derived from that of a party in an earlier action, claim preclusion bars the second action because the [primary right is the same and] second defendant stands in privity with the earlier one"]; *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 578-579 [same].)

The essential third element—separate or successive lawsuits—is not. As discussed, summary judgment in favor of Dr. Nahigian was granted on alternative grounds, causation and statute of limitations. Had no appeal been filed, that judgment, on the merits, would have been final and entitled to preclusive effect. (See *Brown v. Campbell* (1893) 100 Cal. 635, 647; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 [in California, unlike in federal courts, "the rule is that the finality required to invoke the preclusive bar of res judicata [claim preclusion] is not achieved until an appeal from the trial court judgment has been exhausted or the time to appeal has expired"].) However, an appeal was filed and decided solely on the basis of the statute of limitations, a purely procedural ground that was personal to Dr. Nahigian (see fn. 1, above). (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751-752 [termination of action on statute of limitations ground is not an adjudication on the merits]; *Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 183-184 ["California law holds that a civil

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right. Although different grounds for legal relief may be asserted under different theories, conduct that violates a single primary right gives rise to only one cause of action." (*DKN Holdings, supra,* 61 Cal.4th at p. 818, fn. 1; see also *id.* at p. 828; *Boeken v. Philip Morris, supra,* 48 Cal.4th at pp. 797-798.)

judgment based solely on the statute of limitations is not on the merits"].)

Notwithstanding the expressly limited nature of our decision in *Samara I,* relying on the Civil War-era case of *People v. Skidmore* (1865) 27 Cal. 287 (*Skidmore*), Dr. Matar argues our decision affirmed the entire judgment, including the trial court's merits-based determination on causation, even though we did not reach that question. In *Skidmore* the lower court had entered a judgment in favor of defendants on alternative grounds, one procedural (misjoinder) and one on the merits. On appeal the Supreme Court affirmed the judgment on misjoinder grounds without reaching the merits, stating its decision would not "'preclude the plaintiff from suing again when the cause of action c[ould] be more formally set out.'" (*Id.* at p. 292.) The plaintiff then filed a second action against the same defendants, alleging the same cause of action. The defendants argued the action was barred under the doctrine of claim preclusion by the judgment in the first lawsuit. The plaintiff, on the other hand, argued there had been no final judgment on the merits in that lawsuit, only a decision on procedural grounds.

The *Skidmore* Court acknowledged that in its prior decision it had affirmed the trial court judgment on purely procedural grounds. Nonetheless, characterizing as dicta its earlier suggestion that the plaintiff could refile the action, the Court held its affirmance of the judgment "was an affirmance to the whole extent of the legal effect of the judgment when it was entered in the [c]ourt below." (*Skidmore, supra,* 27 Cal.2d at p. 292.) In other words, because the judgment below was on the merits, the Supreme Court's affirmance of that judgment, even on purely procedural grounds, was tantamount to an affirmance

of the judgment in its "entirety, and by direct expression." (*Id.* at p. 293 ["[t]he 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"].)

Assuming the *Skidmore* holding still remains viable—a question we need not decide but which the Supreme Court might want to address[4]—our decision in *Samara I* in favor of Dr. Nahigian might well have barred Samara's vicarious liability claim against Dr. Matar if she had asserted it in a separate lawsuit. But Samara did not "split" her cause of action: She sued Drs. Nahigian and Matar in a single action asserting they were both liable (Dr. Nahigian, directly; Dr. Matar, vicariously) for Dr. Nahigian's negligent performance of her oral surgery. Accordingly, the judgment in favor of Dr. Nahigian does not bar Samara from continuing her action against Dr. Matar. Claim preclusion simply does not apply in these circumstances. (See *DKN Holdings, supra,* 61 Cal 4th at pp. 827-828 [judgment in favor of one defendant bars a second action against a second defendant in privity with the first under the doctrine of claim preclusion]; *Clark v. Lesher* (1956) 46 Cal.2d 874, 880 [in claim preclusion, a prior judgment bars a "second suit between the same parties"]; see also *Mycogen, supra,* 28 Cal.4th at p. 897 ["A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought

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[4] Several appellate courts have rejected *Skidmore*'s applicability in the related collateral estoppel/issue preclusion context. (See Discussion, *infra*, at pp. 15-19.)

initially, they may not be raised at a later date"]; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 557-558 [where securities broker found not liable for investment losses, losing plaintiff cannot subsequently sue broker's principal based on same claim; successive lawsuit barred by claim preclusion]; *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 757 [when general contractor prevails in arbitration, claim preclusion barred plaintiff's successive lawsuit against the subcontractor who did the work].)

As Dr. Matar realized when he moved for summary judgment, the question here is not whether claim preclusion applies, but whether under the doctrine of issue preclusion resolution of Dr. Nahigian's liability in his favor conclusively established the question of causation for purposes of Dr. Matar's alleged vicarious liability. (See *Freeman v. Churchill* (1947) 30 Cal.2d 453, 462 [when employee and employer are sued in same lawsuit and employer's liability is alleged to be solely derivative of employee's, judgment favorable to employee conclusively established employer not liable; employer thus entitled to directed verdict based on issue preclusion];[5] *Sartor v.*

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[5] Language in *Freeman v. Churchill, supra,* 30 Cal.2d 453 that the rule of "res judicata" "is the same whether the actions are separate or the employee and employer are joined in the same action" (*id.* at p. 461) does not suggest otherwise. A careful review of *Freeman* reveals that, in holding the employer was entitled to a directed verdict rather than dismissal of the lawsuit based on its finding in favor of the employee, the Court used the term "res judicata" to refer to issue preclusion, not claim preclusion. (See *id.* at pp. 461-462; see also *DKN Holdings, supra,* 61 Cal.4th at pp. 823-824 [observing the Court's prior opinions have caused some confusion because of the Court's historic tendency to use the "umbrella term" "res judicata" to refer to claim preclusion, issue preclusion or both; in fact, "[i]t is important to

Superior Court (1982) 136 Cal.App.3d 322, 325-328 [when plaintiff sued employees and principal corporation, and claim against employees stayed pending arbitration against principal corporation, ruling in favor of corporation operated as collateral estoppel/issue preclusion on question of employees' liability].)

c. *The issue of Dr. Nahigian's negligence has not been conclusively established*

Dr. Matar contends *Skidmore* is controlling on the applicability of issue preclusion. That is, even though we affirmed the judgment in *Samara I* solely on statute of limitations grounds, expressly declining to reach the causation question, Dr. Matar argues our affirmance necessarily encompassed all issues reached by the trial court, including its finding Samara could not show Dr. Nahigian caused her injury. (See *DiRuzza v. County of Tehama* (9th Cir. 2003) 323 F.3d 1147, 1156 (*DiRuzza*) [the California position as articulated in *Skidmore* is that "even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect"]; see also *Tomkow v. Barton* (9th Cir. Jan. 5, 2017, BAP No. CC-16-1075) __ F.3d __ [2017 Bankr. Lexis 31, at *10, *19 [following *Di Ruzza* as "binding precedent from the Ninth Circuit"].)

With one relatively timeworn exception California courts of appeal have rejected application of *Skidmore* in the collateral estoppel context, concluding an affirmance on an alternative

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distinguish these two types of preclusion because they have different requirements" and effects].)

ground operates as collateral estoppel/issue preclusion only on the ground reached by the appellate court. (See *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1574-1575; *Zevnik v. Superior Court, supra,* 159 Cal.App.4th at pp. 87-88; *Newport Beach, supra,* 140 Cal.App.4th at p. 1131; *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1459-1460; see also *Tomkow v. Barton, supra,* __ F.3d __ [2017 Bankr. Lexis 31 at *10] [following *DiRuzza* as controlling precedent while acknowledging California courts of appeal have made "compelling arguments" for departing from *Skidmore* rule]; but see *Bank of America v. McLaughlin Etc.* (1940) 40 Cal.App.2d 620, 628 [issue preclusion applicable to all issues decided by trial court in judgment even those appellate court expressly declined to reach; "when the bankruptcy court determined that the petitioner therein had no interest in the property listed, such determination became final as to that issue, notwithstanding the fact that the Circuit Court of Appeals, in affirming the judgment, based its conclusions upon the other issues"].)

In declining to apply the *Skidmore* rule to issue preclusion, modern appellate authorities have identified three main justifications: First, and in our view most persuasively, *Skidmore* addressed the doctrine of claim preclusion as it applied to successive lawsuits between the same parties; it did not address issue preclusion. (See *Zevnik v. Superior Court, supra,* 159 Cal.App.4th at p. 88 & fn. 9.) That distinction is critical. Unlike claim preclusion, for issue preclusion to apply the issue must have been actually litigated and decided. That cannot have occurred if the appellate court reviewing the judgment expressly declined to address the issue. (*Ibid.;* see *id.* at p. 85 ["[t]he opportunity for review of a decision is an important procedural

protection against a potentially erroneous determination"; "an appellate court's failure to review an alternative ground on appeal has the same effect as the absence of an opportunity for review and, we believe, should result in no collateral estoppel as to that alternative ground"]; *Butcher v. Truck Ins. Exchange, supra,* 77 Cal.App.4th at p. 1460 [same]; see also *Moran Towing & Transportation Co. v. Navigazione Libera Triestina, S.A.* (2d Cir. 1937) 92 F.2d 37, 40 [to treat as controlling the findings of a trial court when the appellate court expressly declines to rule upon them and instead renders a decision of affirmance on different grounds is "the height of unreason" and furnishes "a false guide" to parties and to other litigations affected by the decision].)

Second, even if *Skidmore* were to apply to the separate, albeit related, doctrine of issue preclusion, the law of issue preclusion "has undergone tremendous change" since *Skidmore* was decided, culminating in the adoption in 1982 of the Restatement Second of Judgments (Restatement Second). (See *Newport Beach, supra,* 140 Cal.App.4th at p. 1131.) Unlike its predecessor, which set forth a contrary rule (one that the Court of Appeal in *Bank of America v. McLaughlin Etc. Co., supra,* 40 Cal.App.2d at page 628 relied on to find issue preclusion applicable to questions expressly not reached by the appellate court), the Restatement Second provides, if a judgment rendered by a court of first instance on alternative grounds is upheld by the appellate court on only one of the grounds, and the appellate court "'refuses to consider whether or not the other [ground] is sufficient and accordingly affirms the judgment, the judgment is conclusive [only] as to the first determination.'" (*Newport Beach,*

at pp. 1128-1129, quoting Rest.2d. Judgments § 27, com. *o*.)[6] Observing that the California Supreme Court had never confirmed *Skidmore* in the 150 years since it was decided, but has cited the Restatement Second with approval concerning the doctrine of issue preclusion (see, e.g., *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 874, & fn. 6; *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1290, fn. 7), the *Newport Beach* court found *Skidmore* inapplicable to issues of collateral estoppel/issue preclusion. The court reasoned, "[T]he California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment *o* to the Restatement Second of Judgments, section 27."

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[6] Section 27 of the Restatement Second of Judgments provides, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Comment *o* to that section explains, "If a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court (or by the court of first instance in pursuance of the mandate of the appellate court), this latter judgment is conclusive between the parties. [¶] If the judgment of the court of the first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. . . . [¶] If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination. [¶] If the appellate court upholds one of these 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."

(*Newport Beach*, at p. 1132; accord, *People ex rel. Brown v. Tri-Union Seafoods, LLC, supra,* 171 Cal.App.4th at p. 1575.)[7]

Third, as a policy matter, giving preclusive effect to an issue expressly not decided in the appellate opinion would conflict with the appellate court's duty under article VI, section 14 of the California Constitution to set forth its decisions in writing "'with reasons stated.' . . . To comply with th[at] constitutional mandate, and to avoid unintended collateral estoppel consequences under the traditional [*Skidmore*] rule, the appellate court would have to address every ground recited in a judgment, even though a decision on one ground would resolve the dispute before the court." (*Newport Beach, supra,* 140 Cal.App.4th at p. 1132.) In effect, application of this rule would generate the very judicial inefficiency the doctrine of issue preclusion is designed to avoid. (*Ibid.*; accord, *Zevnik v. Superior Court, supra,* 159 Cal.App.4th at p. 85; see generally *Lucido v. Superior Court, supra,* 51 Cal.3d at p. 343 ["the public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy"].)

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[7] Citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the *Newport Beach* court acknowledged its duty under the doctrine of stare decisis to follow decisions of courts exercising superior jurisdiction, but reasoned *Skidmore* had been impliedly, albeit not expressly, overruled. (See *Newport Beach, supra,* 140 Cal.App.4th at p. 1131, citing *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 728 ["'the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it'"].)

For all these reasons, we agree with our colleagues in the Fourth District (*Newport Beach*), the First District (*Tri-Union Seafoods*) and Division Three of this court (*Zevnik*) and conclude it is not proper to give conclusive effect under the doctrine of issue preclusion to a ground we expressly declined to reach in our review of the judgment. Indeed, as Justice Fybel recognized in *Newport Beach,* "[W]e wrote the [first] appellate decision [in this case]. We know we did not decide the [alternative ground now at issue] and expressly stated 'we do not address' [that question.] 'To hold now the judgment [in our first case] is [collateral estoppel] on that issue would be, as Judge Hand put it, 'the height of unreason.'" (*Newport Beach, supra,* 140 Cal.App.4th at p. 1130.)

In so holding, we emphasize the reasons for finding collateral estoppel/issue preclusion inapplicable to grounds not passed on by the appellate court do not apply in the claim preclusion context. As discussed, under the doctrine of claim preclusion, as long as an appellate court affirms at least one ground on the merits, any other claim that was or could have been brought would be subsumed in the judgment, which operates as a merger or bar to any subsequent lawsuit based on the same primary right whether or not the appellate court addressed the merits of that cause of action on appeal. (See generally *DKN Holdings, supra,* 61 Cal.4th at p. 824; *Boeken v. Philip Morris USA, Inc., supra,* 48 Cal.4th at p. 797.)

3. *The Trial Court's Summary Judgment Ruling Covering Both the Vicarious Liability and Direct Liability Claims Must Be Reversed*

In addition to challenging Samara's vicarious liability claim, in his summary judgment motion Dr. Matar also argued Samara had no evidence that any negligent act or omission by him directly caused her injury. The trial court agreed, concluding Dr. Doumanian's declaration focused on Dr. Matar's vicarious liability and did not establish a causal nexus between any postoperative care, act or omission by Dr. Matar and Samara's injury.

Samara's appeal does not contest the trial court's ruling on her claim of direct liability against Dr. Matar. Nonetheless, Samara's vicarious liability claim against Dr. Matar based on Dr. Nahigian's alleged negligence in performing her oral surgery and her direct liability against Dr. Matar based on his allegedly negligent post-operative care asserted violations of separate primary rights and, therefore, constituted separate causes of action for purposes of Code of Civil Procedure section 437c, subdivision (f)(1). (See *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855.) To prevail on summary judgment Dr. Matar had to defeat both causes of action. He did not. And because he did not move in the alternative for summary adjudication of Samara's direct liability claims, in reversing the order granting summary judgment, we are unable to direct the trial court on remand to enter a new order disposing of that claim. (See *People ex rel. Government Employees Ins. Co. v. Cruz* (2016) 244 Cal.App.4th 1184, 1197 ["[i]f a trial court erroneously grants summary judgment when a factual dispute exists but affects fewer than all causes of action,

the appellate court may direct the trial court to enter an order granting summary adjudication of the unaffected causes of action if the moving party alternatively moved for summary adjudication"]; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1354.)

DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. Samara is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

PROOF OF SERVICE BY MAIL

Document: PETITION FOR REVIEW

Caption: Rana Samara,
Plaintiff and Appellant,

vs.

Haitham Matar D.D.S.,
Defendant and Respondent.

Court of Appeal Case No.: B265752

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN LUIS OBISPO)

I am a citizen of the United States and a resident of or employed in the County of San Luis Obispo; I am over the age of eighteen years and not a party to the within action; my business address is: PO Box 1446 San Luis Obispo CA 93406. On this date, I served the persons interested in said action by placing one copy of the above-entitled document as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed March 27, 2017 at San Luis Obispo, California.

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Julia Small

ATTACHMENT TO PROOF OF SERVICE

Attorney for Appellant: Alexis Galindo Curd, Galindo & Smith, LLP 301 E. Ocean Blvd., Suite 1700 Long Beach, CA 90802 Facsimile: (562) 624-1178 *Via U.S. Mail*	***Attorney for Respondent:*** Katherine M. Harwood Ford, Walker, Haggerty & Behar One World Trade Center, 27th Floor Long Beach, CA 90831-2700 Facsimile: (562) 983-2555 *Via U.S. Mail*
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