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LIU, J.

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Case No. _____

IN THE
SUPREME COURT OF CALIFORNIA

BADRUDIN KURWA,

Plaintiff and Appellant,

v.

MARK B. KISLINGER, et al.,

Defendant and Respondent.

After a Decision By the Court of Appeal,
Second Appellate District, Division Five
Case No. B228078

Superior Court of Los Angeles
The Hon. Dan Thomas Oki
Case No. KC045216

SUPREME COURT
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Deputy

PETITION FOR REVIEW

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NOTICE OF INTERESTED PARTIES

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The undersigned, counsel of record for Respondents MARK B. KISLINGER, MARK B. KISLINGER, Ph.D., M.D., INC., and MARK B. KISLINGER M.D., INC., certifies that the following listed parties have a direct, pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

1.	BADRUDIN KURWA	Plaintiff, Appellant
2.	MARK B. KISLINGER, MARK B. KISLINGER, PH.D, M.D., INC. MARK B. KISLINGER, M.D., INC.	Defendant, Respondent
3.	PHYSICIAN ASSOCIATES OF THE GREATER SAN GABRIEL VALLEY	Defendant, dismissed
4.	TRANS VALLEY EYE ASSOCIATES, INC.	Defendant, dismissed
5.	FOOTHILL EYE CARE CENTER	Defendant, dismissed
6.	FOOTHILL EYE CARE SERVICES	Defendant, dismissed

DATED: April 9, 2012

Respectfully Submitted,

HARRINGTON, FOXX, DUBROW & CANTER, LLP

By: _____

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PETITION FOR REVIEW

STATEMENT OF ISSUES PRESENTED

1. Is an appeal barred by the one judgment rule where a judgment in the trial court does not resolve all claims between the parties, and the parties stipulate to dismiss any unresolved causes of action, without prejudice and with a waiver of the statute of limitations, prior to entry of the judgment?

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WHY REVIEW SHOULD BE GRANTED

The California Courts of Appeal for the First, Second, Fourth and Fifth Appellate Districts have each had the opportunity to address the issue presented here, and each has held that yes, the one judgment rule does bar such an appeal.[1] Despite the well reasoned and persuasive authority from four California appellate districts, including its own, the Court of Appeal here issued a 2-1 split opinion with its majority directly conflicting with all of them, although the dissenting opinion fully recognizes that the one judgment rule has been violated here. If followed, the precedent of this opinion will create an unmanageable burden on the appellate courts.

Due to the conflict that this Court of Appeal's split decision creates with the five recently published decisions, which constitute *Don Jose's* and its progeny, this case presents a pressing question that is at the very heart of California appellate practice and procedure, and therefore requires review. The Court of Appeal's split decision ignores statutes and long standing judicial rules governing appellate review that are used daily by every appellate court in this state. At its core, the majority opinion here allows parties to an action to create

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[1] See *Don Jose's Restaurant, Inc. v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115, 118 [61 Cal. Rptr.2d 370, 372] (*Don Jose's*); *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 244 [62 Cal.Rptr.2d 679, 681](*Jackson*); *Four Point Entertainment, Inc., v. World Entertainment, LTD.* (1997) 60 Cal.App.4th 79, [70 Cal.Rptr.2d 82](*Four Point*); *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 444 [73 Cal.Rptr.2d 638] (*Hill*); *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466 [23 Cal.Rptr.3d 667](*Hoveida*), which are collectively referred to herein as *Don Jose's* and its progeny, or *Don Jose's* line of cases..

appellate jurisdiction over an interlocutory judgment where there otherwise would be none, effectively manufacturing an exception to the one judgment rule as implemented by the legislature and interpreted by this Court.

If allowed to stand, the Court of Appeal's decision will divide the California District Courts of Appeal, including the Second District, where *Don Jose's* and its progeny have been united on this issue for the past 15 years, each holding the direct opposite of this panel's majority decision. Additionally, the appellate decision, where followed, will lead to piecemeal disposition of matters and multiple appeals, creating more costs to parties, and burden on the courts of appeal, when much of it could be resolved in the trial court. Further, this rule where applied obviates writ petitions, which are the correct means for obtaining review of judgments and orders that lack finality.

The rule created by Court of Appeal's majority decision states: "if at the time a judgment is entered there are causes of action remaining to be adjudicated in the trial court, over which that court has jurisdiction, the judgment is not final." (Opn., at p. 7.) On that rule the Court of Appeal essentially held that, following a judgment or order by a trial court that does not dispose of all causes of action between the parties, the parties may stipulate to dismiss the remaining causes of action without prejudice, and with a waiver of the statute of limitations, in order obtain a "final judgment" and confer jurisdiction on a court of appeal, later reviving the dismissed causes of action if the appellate court's decision makes doing so worthwhile. (See Opn., at p. 9.)

It has been "'well settled' in California that a judgment disposing of fewer than all causes of action between the parties was nonappealable even if those causes of action were separate and distinct from the causes of action remaining to be tried." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741 [29 Cal.Rptr.2d 804, 872 P.2d 143](*Morehart*) (citing *U.S. Financial v. Sullivan (1974) 37 Cal.App.3d 5, 11 [112 Cal.Rptr. 18]*).)

Prior to *Morehart* and the decisions in *Don Jose's* and its progeny, the appellate court decision of *Schonfeld v. City of Vallejo* (1976) 50 Cal.App.3d 401 [123 Cal.Rptr. 669] (*Schonfeld*) created an exception to the one judgment rule, which for almost 30 years made the determination of when a matter was appealable more difficult, clogged the appellate courts, and was unnecessary where there was already a means for obtaining review of an interlocutory judgment. This Court disapproved the *Schonfeld* exception, thus restoring the proper order and procedure for seeking an appeal. (*Id.* at p. 742-743.) Unfortunately, the majority opinion of this Court of Appeal threatens to bring back those problems created by *Schonfeld*.

After the *Morehart* decision, in an apparent attempt to skirt the one judgment rule and create appellate jurisdiction over matters that were not yet final, parties began to enter into stipulations wherein they would dismiss causes of action, which had not been reached by a court's interlocutory judgment or order, without prejudice and with a waiver of the applicable statute of limitations, to effectively "sever" or "separate" the issues while an appeal could be taken. Recognizing the wisdom in the *Morehart* decision, the First, Second, Fourth, and Fifth

Appellate Districts, in *Don Jose's* and its progeny, each had the opportunity to review such cases and stipulations and to determine that such a stipulation "virtually exudes an intention to retain the remaining causes of action for trial." (See *Don Jose's, supra,* 53 Cal.App.4th, at p. 118.)

As a wise and natural extension to this Court's decision in *Morehart, Don Jose's, supra,* held that "the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld.... It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists." (*Don Jose's*, 53 Cal.App.4th, at p. 118-119.) Pursuant to its holding, the *Don Jose's* court condemned "the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars. The one final judgment rule remains the rule in California." (*Id.*, at p. 116.)

Now, the Court of Appeal has created a division within the courts of appeal of the State of California, including its own district, where there had been unanimous agreement between all districts that had addressed this issue. If it were not for the already existent law on the issue, the Court of Appeal's decision could have become another *Schonfeld* creating an unsanctioned and long-lived exception to the one judgment rule. This Court should not allow the Court of Appeal's decision to stand where it gives parties authority to bypass the rules

established by the legislature and this Court, could potentially cause confusion among California's trial and appellate courts, and will very likely increase costs of parties to an action and clog the courts of appeal. Grounds for review exist here where it is necessary to secure uniformity of decision between the appellate courts, and where the Court of Appeal lacked jurisdiction in the first instance to hear the appeal. (*California Rules of Court*, rule 8.500 subd. (b)(1) and (2).)

FACTUAL BACKGROUND

The underlying litigation arises from Dr. Kurwa and Dr. Kislinger's practice of medicine. Dr. Kurwa and Dr. Kislinger are both licensed ophthalmologists in the State of California (CT 13, para. 12-13). In March 1992, the two doctors formed a corporation, Trans Valley, (JA 1328) and entered into an agreement on July 30, 1992 (JA 1295) to obtain managed care capitation agreements[2] through Trans Valley to provide ophthalmological services to medical groups in the area (JA 13-14). Their agreement and references to the corporation they had formed, TVEA or TV, can be found in the 1992 agreement and the later contract in 1997 (JA 1208-09).

Prior to Trans Valley's incorporation, the two doctors had completely independent practices with no relation to each other, and there was no pre-incorporation agreement between them (JA 1328). Through the corporation, the doctors contracted with Physician Associates, and several other medical groups in capitation

[2] Capitation agreements pay a doctor on a per patient, per month basis without regard to what, if any, medical services are provided.

arrangements (JA 1188 and 1328).

In 2001, Trans Valley entered into a new contract with Physician Associates (JA 15, 31). The contract included a term providing for automatic termination in case a group physician's license was revoked, expired, suspended or subject to probation (CT 43).

On or about August 12, 2003, after a prolonged investigation by the California Medical Board, Dr. Kurwa's license to practice medicine was revoked for "acts involving dishonesty" for improper billing practices. The Medical Board also concluded that Dr. Kurwa had "engaged in multiple acts of dishonesty over an extended period of time; his intentional misconduct [was] serious and he [had] not displayed any contrition" (CT 237-248). The revocation was stayed, pending a sixty day suspension and five year probation. Dr. Kurwa served his suspension from September 26, 2003 through November 24, 2003 (CT 246-248). During the suspension, Dr. Kurwa could not directly or indirectly engage in the practice of medicine or receive any fees or compensation based on the practice of medicine by others. (CT 237; JA 1179 and 1328; RT 6-7).

Furthermore, at the same time, Dr. Kurwa was also facing civil and criminal proceedings as a result of his alleged sexual battery of two female employees of Trans Valley. In an appeal taken from a separate issue in the underlying matter the Court of Appeal pointed to these serious circumstances as reasons why Dr. Kislinger wished to disassociate from Dr. Kurwa. (JA 1179).

On October 1, 2003, Dr. Kislinger's attorney, Harrington, Fox,

Dubrow & Canter, wrote a letter to Physicians associates informing them of the suspension of Dr. Kurwa's medical license, and that the corporate status of Trans Valley was inappropriate for the practice of medicine.[3] The letter also informed Physicians Associates that Dr. Kislinger would be forming a new appropriate professional corporation. (CT 794.) On October 31, 2003, Physician Associates informed Dr. Kurwa that the contract had been terminated because Trans Valley was not organized as a professional corporation (CT 55).

PROCEDURAL BACKGROUND

Dr. Kurwa brought this action against Dr. Kislinger and others on November 23, 2004 (CT 9). Dr. Kurwa filed the operative Second Amended Complaint against Dr. Kislinger, his professional corporations and Physician Associates on April 7, 2005. The operative Complaint includes causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, each on behalf of Dr. Kurwa, as an individual and derivatively on behalf of Trans Valley; causes of action for fraud, an accounting and defamation on behalf of Dr. Kurwa, individually, and for tortious interference and removal of a corporate director derivatively on behalf of Trans Valley (CT 11). Dr. Kurwa

[3] A California professional corporation's articles of incorporation are required to "contain a specific statement that the corporation is a professional corporation." (*Corp. Code* § 13404.) Trans Valley's Articles of Incorporation did not contain such a statement, and it was therefore not a professional medical corporation. (Opn., at p. 3)

later amended the Second Amended Complaint to name Dr. Kislinger's attorneys, Dale B. Goldfarb and Harrington, Foxx, Dubrow & Canter, as DOES 1 and 2 (CT 1421).

The trial court granted summary judgment to all defendants on September 26, 2007, except for Dr. Kislinger and his professional corporations (JA 1239-1243). The trial court also granted Dr. Kislinger's motion for summary adjudication of the Fourth Cause of Action for tortious interference with contractual relations (JA 1239-41). The Court of Appeal affirmed the trial court's rulings in an unpublished opinion filed on January 14, 2009 (JA 1177-1184).

The case on the remaining causes of action went to trial on March 2, 2010. Based on a lack of desire to proceed with certain causes of action, Dr. Kurwa voluntarily dismissed his sixth, seventh, eighth, and twelfth causes of action[4] with prejudice. This left his fifth, ninth, and tenth and eleventh causes of action.[5] (RT 9-11; JA 1402-03).[6] After the dismissals, the gravamen of Dr. Kurwa's case was his

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[4] Respectively, those causes of action were for fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and Derivative Action/Removal of Director.

[5] Respectively, those causes of action were for derivative action/breach of fiduciary duty, breach of fiduciary duty, and for an accounting, and defamation.

[6] The Joint Appendix incorporates by reference the Clerk's Transcript from Case No. B202301, the previous appeal in this matter, and Appellant's Opening Brief cites to the pages in the Clerk's Transcript as pages of the Joint Appendix with a designation of "JA." However, the Clerk's Transcript is not physically a part of the Joint Appendix, which includes only 16 tabs but starts at page 1177. Consequently, Respondent's Brief cites to the Clerk's Transcript numbered 000001 through 001176 with the designation of "CT" rather than "JA."

assertion that he and Dr. Kislinger were partners or joint venturers and that Dr. Kislinger owed him fiduciary duties in the affairs of the partnership or joint venture. Based thereon, he also claimed the right to an accounting.

However, the trial court agreed with Dr. Kislinger that their relationship was that of equal minority shareholders in the corporation they established, Trans Valley, and that no separate fiduciary duties remained between them after the corporation's formation in 1992 (JA 1402; RT 6 and 11). The trial court also ruled that Dr. Kurwa had no standing (JA 1402-03; see Motion *in Limine* No. 2 at JA 1215-28). Finally, the trial court agreed that evidence of the 1997 contract between the two doctors and the 1992 capitation agreement between Trans Valley and Physician Associates, previously known as Huntington Provider Group (JA 14-15) should be excluded.[7]

After the adverse rulings on the motions *in limine*, Dr. Kurwa voluntarily opted not to go forward with trial. Before judgment was entered on August 23, 2010 (JA 1404-05), the parties orally agreed to dismiss their respective causes of action for defamation without prejudice and to waive the applicable statute of limitations, which dismissal the court entered on the record. Thus, the dismissals were

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[7] On January 14, 2009, the Court of Appeals, held that Trans Valley was not a valid corporation, since it was not a medical corporation in compliance with the Moscone-Knox Professional Corporation Act (Corp. Code, § 13400 et seq.) (JA 1182). As such, it could neither directly nor indirectly engage in the practice of medicine. In fact, Trans Valley had been operating in violation of statutory law for its entire existence (JA 1177-84, 1188 and 1402-03; RT 3, 14). This "law of the case" was relied on by the trial court in ruling on Dr. Kislinger's motions *in limine*.

made with an understanding that, if Dr. Kurwa's appeal were successful, these causes of action would be revived (RT 8-9, 14-15; Opn., at p. 6).

Dr. Kurwa filed his Opening Brief to the Court of Appeal on June 2, 2011 (the "Opening Brief"). (Appellate Court Docket.) In his Opening Brief Dr. Kurwa failed to make a disclosure in compliance with *California Rules of Court*, rule 8.204 subd. (a)(2)(B), which requires an appellant's opening brief to "[s]tate that the judgment appealed from is final, or explain why the order appealed from is appealable." (See generally Opening Brief.) In fact, on June 22, 2011, Dr. Kurwa filed a Suggestion Re Issue of Appealability; Declaration of Robert S. Gerstein with the Court of Appeal (the "Gerstein Declaration). The Gerstein Declaration suggested that his own appeal violates the one final judgment rule because the rule "does not allow 'contingent causes of action to exist in a kind of appellate netherworld.'" (See Suggestion, p. 1-2; *Don Jose's, supra,* 53 Cal.App.4th, at p. 118-119.) Finally, Appellant's Reply Brief, filed with the Court of Appeals on October 27, 2011 (the "Reply Brief"), admitted that "Dr. Kurwa concurs in Dr. Kislinger's conclusion ([Respondent's Brief] 9-11) that there is no appealable judgment at this time." (Reply Brief, p. 3.)

Recognizing the Court of Appeal's lack of jurisdiction over his appeal, Dr. Kurwa requested that the Court of Appeal treat his notice of appeal as a writ petition instead. (Reply Brief, at p. 3.) The Court of Appeal did not address Dr. Kurwa's request that his notice of appeal be treated as a writ of petition, but instead disagreed with *Don*

Jose's and its progeny, and held that the trial court's judgment was final and therefore appealable, notwithstanding the defamation causes of action having been dismissed without prejudice and with a waiver of the applicable statute of limitations. (Opn, p. 2.) Then, having improperly conferred jurisdiction on itself, Court of Appeal addressed the merits of the case. (Opn., p. 2.)

LEGAL DISCUSSION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER A JUDGMENT OR ORDER IS APPEALABLE WHERE ITS FINALITY HAS BEEN MANUFACTURED BY STIPULATION BETWEEN THE PARTIES TO DISMISS UNRESOLVED CAUSES OF ACTION WITHOUT PREJUDICE AND WITH A WAIVER OF THE APPLICABLE STATUTE OF LIMITATIONS.

It is a simple and straightforward rule in California that "[a]n appeal ... may be taken from ... a judgment, except [] an interlocutory judgment." *Code of Civil Procedure* section 904.1, subdivision (a) . Commonly known as the "one judgment rule", this Court has made clear that "[j]udgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required by *section 904.1, subdivision (a)*. A judgment that disposes of fewer than all of the causes of action framed by the pleadings, however, is necessarily 'interlocutory' (*Code Civ. Proc., § 904.1, subd. (a)*), and not yet final, as to any parties between whom another cause of action

remains pending." (*Morehart, supra*, 7 Cal. 4th, at p. 740-741.)

Under this legislative and judicial structure, "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining. A petition for a writ, not an appeal, is the authorized means for obtaining review of judgments and orders that lack the finality required by *Code of Civil Procedure section 904.1, subdivision (a)*." (*Id.* at p. 743-744.)

In short, "[a] party may not normally appeal from a judgment on one of his causes of action if *determination* of any remaining cause is still pending." (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 153 (italics added).) There are no exceptions "when parties craft stipulations which allow remaining causes of action to survive to trial. ..." (*Don Jose's, supra*, 53 Cal.App. 4th, at p. 118 (explaining the *Tenhet* holding); see also *Hoveida, supra*, 125 Cal.App.4th 1466.)

In *Morehart* this Court recognized that there "are sound reasons for the one final judgment rule. As explained in *Kinoshita v. Horio, [(1986)], 186 Cal.App.3d 959, [231 Cal. Rptr. 241]*, '[t]hese include the obvious fact that piecemeal disposition and multiple appeals tend to be oppressive and costly. [Citing, inter alia, *Knodel v. Knodel, [(1975)], 14 Cal.3d 752, 766 [122 Cal.Rptr. 521, 537P.2d 353].]* Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog the appellate courts with a multiplicity of appeals. . . . (2) Early resort to the

appellate courts tends to produce uncertainty and delay in the trial court. . . . (3) Until a final judgment is rendered the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken. [Citations.] (4) Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless. (5) Having the benefit of a complete adjudication . . . will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings.' (*186 Cal.App.3d at pp. 966-967.*)" (*Morehart, supra*, 7 Cal. 4th, at p. 741, fn. 9; see also *Hill, supra*, 63 Cal.App.4th, at p. 443.)

A. The Recent California Appellate History of the One Judgment Rule Confirms that the Artifice of Trying to Create an Appealable Order from an Otherwise Non-Appealable Judgment or Order Should be Condemned

As discussed above, the *Morehart* opinion overruled a line of cases, starting with *Schonfeld, supra*, (see *Morehart, supra*, 7 Cal.4th, at pp. 743-744), which had allowed for appeals to be taken where judgment had been rendered as to a certain cause of action that had been properly "severed"[8] from another cause of action. (*Id.*, at p. 739-740.) *Morehart* reaffirmed that "a judgment disposing of fewer than

[8] This Court recognized in *Morehart* that the fourth cause of action in *Schonfeld* was not actually "severed," but ordered to be tried separately as "*Code of Civil Procedure section 1048* no longer authorizes severance in a civil action." *Morehart*, 7 Cal.4th, at p. 738, fn. 3.

all causes of action between the parties was nonappealable even if those causes of action were separate and distinct from the causes of action remaining to be tried." (*Id.* at p. 741.) Like *Schonfeld*, the opinion by the Court of Appeal here is contrary to the settled law in California, and seeks to create an improper exception to the one judgment rule.

Following the 1994 decision in *Morehart* it appears that parties to civil actions started looking for new ways to appeal interlocutory judgments and orders by entering into stipulations to dismiss—without prejudice and with a waiver of the statute of limitations—those causes of action that had not been addressed in the interlocutory judgment/order, thereby artificially "severing," or more correctly separating, the causes of action and conferring jurisdiction on the courts of appeal.[9] Prior to the decision at issue, and as recognized by the Court of Appeal (Opn., at p. 9), the First, Second, Fourth, and Fifth districts each had the opportunity to address cases attempting to create artificially created appellate jurisdiction, and on facts similar to those here, each came to a determination that a matter presenting for appeal in this posture is not appealable.

In *Don Jose's, supra*, the Court of Appeal for the Fourth Appellate District was the first to address facts nearly identical and undoubtedly on point with those here. There, the "plaintiffs sued defendant insurance companies on no less than 11 causes of action. Defendants brought a motion for summary adjudication on two causes

[9] The first four cases in the *Don Jose's* line of cases were decided between February 1997, and April 1998.

of action. That motion was granted. Plaintiffs and defendants then entered into a formal written stipulation in which the plaintiffs agreed to dismiss all their remaining causes of action, *but* without prejudice and *with* a waiver of all applicable statutes of limitation. Thus the parties agreed that in the event the plaintiffs' appeal from the trial court's 'order regarding [the] motion for summary adjudication' was successful and the matter was remanded, the action would proceed on all the causes of action set forth in the latest complaint. On the other hand, if the appellate court affirmed the trial court's order, then the plaintiffs agreed to dismiss their remaining causes *with* prejudice. Plaintiffs then filed a notice of appeal from the trial court's order granting summary adjudication on two of the eleven causes of action." (*Don Jose's*, 53 Cal.App.4th at 117 (emphasis in original).

On appeal the *Don Jose's* court held that "the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld. ... It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists." (*Id.*, at 118-119.) The *Don Jose's* opinion included a condemnation of "the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars." (*Id.* at 116.) Through its opinion the *Don Jose's* court affirmed that "the one final judgment rule remains the rule in California." (*Id.*)

The Court of Appeal for the First Appellate District next

addressed the same issue in *Jackson, supra*, 54 Cal.App.4th, at p. 244. Reaching appeal on similar procedural facts as *Don Jose's*, the notable difference between *Don Jose's* and *Jackson* was that the stipulated dismissal between the parties in *Jackson* allowed for the Plaintiff, following the decision by the court of appeal, to file a new complaint that could include the cause of action dismissed without prejudice for malicious prosecution, with a waiver of the statute of limitations, and any other causes of action that the court of appeal determined was viable. (See *Id.* at p. 243.) On appeal the *Jackson* court reasoned that the "main difference between *Don Jose's* and [the *Jackson*] case is that there is even less finality [in *Jackson*] than [*Don Jose's*]. In [*Don Jose's*], the parties stipulated that, if the appellate court ruled against the plaintiffs-appellants on the two causes of action as to which summary adjudication had been granted, they would 'dismiss their remaining causes *with* prejudice.' (*Don Jose's, supra, 53 Cal.App.4th at p. 117.*) [In *Jackson*], the appellant secured the delightful stipulation that, even if [the appellate] court were to affirm the summary adjudication striking the seven causes of action, he could still proceed with his remaining malicious prosecution cause of action." (*Jackson* at p. 244.)

The *Jackson* court held that "... appellant still has his malicious prosecution cause of action, because his dismissal of it was without prejudice and with a waiver of the statute of limitations. Further, he still has his right of appellate review regarding his other seven causes of action—but at the appropriate time and no earlier. What he does *not* have is the right—even with a willing accomplice in the

respondent—to separate those causes of action into two compartments for separate appellate treatment at difference points in time." (*Id.*, at p. 245 (emphasis in original).)

The *Jackson* decision was followed by the Court of Appeal for the Second Appellate District's decision in *Four Point, supra,*, which court "agree[d] wholeheartedly with *Don Jose's* and *Jackson*." (*Four Point*, 60 Cal.App.4th, at p. 83.) In *Four Point* the plaintiff sued for various tort and breach of contract causes of action. Parts of defendant's motion for summary adjudication as to the tort causes of action was granted, but its motion for summary adjudication as to the contract causes of action was denied. Similarly to *Don Jose's* and *Jackson*, the *Four Point* parties stipulated to a dismissal of all remaining claims and entry of "final judgment" so that the adjudicated issues could be reviewed by the court of appeal. (*Id.*, at pp. 81-82.)

On these facts the *Four Point* court reasoned that it saw "no reason to permit [the appellant] or any party to get in line for appellate review ahead of those who are awaiting entry of appealable orders and final judgments. Where there is a legitimate need for interlocutory review of an order that eviscerates a case without terminating its legal existence or where there are other truly unusual or extraordinary circumstances, a petition for a writ of mandate is the appropriate means by which to seek appellate review. (*Morehart v. County of Santa Barbara, supra, 7 Cal.4th at p. 743.*)" (*Id.*, at p. 83.) The *Four Point* court continued that "[i]f we permitted stipulated 'final' judgments in every case like this one, we would in effect be permitting the parties to confer jurisdiction upon us where none exists.

(*Code Civ. Proc. § 437c, subd. (j)*.) That we will not do." (*Id.*)

Taking its turn to review a case with similar facts to *Don Jose's*, *Jackson*, and *Four Point*, the Court of Appeal for the Fifth Appellate District agreed saying "[t]he three recent Court of Appeal opinions are well reasoned and correct in theory and outcome." (*Hill, supra*, 63 Cal.App.4th, at p. 444.) The court in *Hill*, summarized the similar facts shared between it, *Don Jose's*, *Jackson*, and *Four Points*, which are also at the heart of the appealability issue here, stating that "[i]n each case, the appellant lost a summary adjudication motion and the parties thereafter stipulated to a judgment. The stipulations included a provision authorizing the trial court to dismiss one or more unresolved causes of action without prejudice and with what was or what amounted to a waiver of the statutes of limitation otherwise applicable to the dismissed counts." (*Id.*)[10]

The *Hill* court further discussed the impact that allowing the appeal would have, observing that "the [stipulated] judgment keeps these causes of action undecided and *legally alive* for future resolution in the trial court." (*Id.*, at p. 445 (italics added).) The *Hill* court observed that if it "allowed the instant appeal to proceed, [the respondent] would remain free to refile the dismissed claims and try them in the superior court if our opinion made such action necessary

[10] Although the issue on appeal here concerns the trial court granting Respondent's motions in limine, which prevented Appellant from introducing certain evidence at trial, and not the disposal of causes of action based on a successful motion for summary judgment, as the Court of Appeal recognized, the material facts of the procedural treatment are the same, and therefore not a distinguishing factor. (Opn., at p. 9.)

or advisable. As such, the stipulated 'judgment' from which this appeal was taken is not final." (*Id.*)

Finally, the Court of Appeal for the Fourth Appellate District confirmed its position set out in *Don Jose's* in the most recent case to address this issue, *Hoveida, supra.* By the point *Hoveida* was decided, the other courts of appeal had essentially addressed all necessary aspects of the issue, and the *Hoveida* court quickly disposed of the matter holding that it "lack[ed] jurisdiction to decide the appeal because the judgment does not dispose of all causes of action between the parties." (*Hoveida*, at p. 1469.)

Until the ruling by the Court of Appeal in this matter, there had been no cases that disagreed with *Don Jose's* and its progeny, and there has been only one published case (or unpublished as far as Respondent is aware) that distinguishes its facts from *Don Jose's*. (See *Vedanta Society of So. California v. California Quartet, Ltd.*, (2000) 84 Cal. App. 4th 517 [100 Cal.Rptr.2d 889](*Vedanta*).) The *Vedanta* court distinguished the facts before it from the *Don Jose* line of cases on the grounds that, in *Vedanta*, it was the respondent on appeal who had dismissed its remaining cause of action without prejudice, and *Don Jose* "and its progeny have no application where the party dismissing causes of action without prejudice is the *respondent* on appeal." (*Id.*, at p. 525, fn. 8 (italics in original).)

However, the question of appealability did not appear to be at issue on appeal, there are no facts that indicate there was a stipulation between the parties governing the dismissal and allowing for a waiver of the statute of limitations, and the statement seems to be an aside

from the court, and therefore nothing more than dicta. Nevertheless, even if the *Vedanta* footnote were authoritative it would have no application here as both parties, appellant and respondent, dismissed their causes of action for defamation without prejudice pursuant to a stipulation that also provided for the waiver of the applicable statutes of limitation.

B. The Court of Appeal Announced an Exception to the One Judgment Rule that Conflicts with this Court's Precedents, as well as the Precedents of the Various California Appellate Districts, Including its Own, And Will Cause Confusion Among Trial Courts, Increased Costs to Parties, and Further Backlogging of the Appellate Courts.

Here, as recognized by the Court of Appeal, the facts are directly on point with *Don Jose's* and its progeny. (Opn., at p. 9.) The trial court only dismissed the fiduciary duty and accounting causes of action, with prejudice, leaving the eleventh cause of action for defamation to go forward at trial, which Dr. Kurwa dismissed without prejudice. (JA 1403.) It was agreed that the defamation cause of action would not be barred by the statute of limitations. (Opn., at p. 6.) The parties, thereafter, stipulated that this cause of action could be revived to go to trial under certain circumstances. (RT 8-9, 14-15; Opn., at p. 6).

After a review of the facts of this case and the pertinent case law, the Court of Appeal disagreed with the *Don Jose's* line of cases,

and reached a different conclusion by interpreting the term "pending" more narrowly than they did. (Opn., at p. 9.) The Court of Appeal stated that "a cause of action is pending when it is filed but not yet adjudicated." (Opn., at p. 9.) Extending that concept, the Court of Appeal held that "[w]hile a cause of action which has been dismissed may be pending 'in the appellate netherworld,' it is not pending in the trial court, or in any other court, and thus cannot fairly be described as 'legally alive.'" (Opn., at p. 9.) Under its more narrow reading of "pending," the Court of Appeal announced its rule to be applied to the instant facts as follows: "[I]f at the time a judgment is entered there are causes of action remaining to be adjudicated in the trial court, over which that court has jurisdiction, the judgment is not final. Another way of expressing this concept would be: If the trial court continues to have jurisdiction over any cause of action, the judgment entered is not final, for a final judgment disposes of all causes of action before the trial court, divesting that court of jurisdiction." (Opn., at p. 7-8.)

However, what the Court of Appeal's opinion fails to do is address the artifice employed by parties to create appellate jurisdiction and contrive a lack of jurisdiction in the trial court, the policy reasons that *Morehart* and the *Don Jose's* line of cases have given for instituting their rule, or the consequences that will surely follow from the implementation of the Court of Appeal's rule.

The rule announced by this Court of Appeal takes a step back toward the precedent set by *Schonfeld*, and creates a work around for the rule announced in *Morehart*. Under the Court of Appeal's holding, all the *Morehart* parties would have needed to do to make

their judgment appealable was to stipulate that the plaintiff's second and third causes of action be dismissed without prejudice, and with a waiver of the applicable statutes of limitations, thereby separating those causes of action, so that the first, fourth, and fifth causes of action could be appealed. What this amounts to is another method for separating causes of action in an effort to create appellate jurisdiction, which this Court rejected in Morehart. To the extent that there is a difference between what has been done here, and in the *Don Jose's* line of cases, and what was done in the *Schonfeld* line of cases, it is that the separation of causes of action in the *Schonfeld* line of cases had been done by the trial courts for a proper purpose, while here the only purpose was to confer jurisdiction on the courts of appeal. In practice the Court of Appeal's rule would completely eviscerate the one judgment rule and allow parties to an action to create appealability where this Court has said none exists.

Additionally, implementation of this rule ignores those "sound reasons" for the one final judgment rule that this Court recognized in *Morehart*, including avoiding the piecemeal disposition of matters and multiple appeals in a single matter, creating more cost to the parties and burden on the courts of appeal, when much of it may be resolved in the trial court had it been allowed to reach its final conclusion there. (See *Morehart*, 7 Cal. 4th, at p. 741, fn. 9.) Further, this rule is completely unnecessary as a "petition for a writ, not an appeal, is the authorized means for obtaining review of judgments and orders that lack finality required by *Code of Civil Procedure section 904.1, subdivision (a)*." (*Id.*, at p. 743-744.)

The Court of Appeal did address the fact that under *Code of Civil Procedure* section 581, subdivisions (b)(1) and (c), the parties have the statutory right to voluntarily dismiss causes of action without prejudice, and that "[u]pon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action." (Opn., at p. 8 (citing to *Wells v. Marina City Properties, Inc. (1981) 29 Cal.3d 781, 784*).) However, as the court in *Hill* recognized, a party's statutory right to dismiss a cause of action without prejudice "is not determinative of [the appellate court's] jurisdiction." It continued, "dismissal here was not the result of a unilateral act by the [respondent]. '[T]he court, not the parties, dismissed the unresolved claims based upon a stipulation that is unenforceable because it purports to vest jurisdiction in an appellate court where none exists.' (*Four Points, supra, 60 Cal.App.4th at p. 83, fn.4.*) Moreover, a party's voluntary dismissal without prejudice does not come equipped by law with an automatic tolling or waiver of all relevant limitations periods; instead, such dismissal includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action. Also, a voluntary dismissal does not protect a cross-complainant from a later contention that a dismissed cause of action in a cross-complaint was compulsory and therefore required to be brought and adjudicated in the action initiated by the plaintiff. ..." (*Hill*, 63 Cal.App.4th, at p. 445.)

In a situation as the one presented here, although the trial court may no longer have jurisdiction once the parties' stipulation has been

entered as the judgment of the court, it has been complicit in creating a situation where there is no risk of losing it in the future, while at the same time allowing for the fabrication of appellate jurisdiction in contravention of the one judgment rule. Contrary to the Court of Appeal's assertion, as recognized by the *Hill* and *Don Jose's* courts, the stipulated "judgment keeps these causes of action undecided and *legally alive* for future resolution in the trial court" (*Id.*, at p. 445 (italics added)), and "virtually exudes an intention to retain the remaining causes of action for trial." (*Don Jose's*, 53 Cal.App.4th, at p. 118)

As the dissenting opinion acknowledged "the dismissal without prejudice and waiver of the statute of limitations on the cause of action for defamation leads to the inescapable conclusion that the judgment did not dispose of the entirety of the action." (Opn., Dissent.) "There is no contrary authority supporting [the majority's] position on the issue of appealability." (Opn., Dissent.)

II. REVIEW SHOULD BE GRANTED ON THE BASIS THAT THE COURT OF APPEAL DID NOT HAVE JURISDICTION TO HEAR THE UNDERLYING APPEAL BECAUSE IT WAS TAKEN FROM AN INTERLOCUTORY JUDGMENT

As discussed above, at the time Dr. Kurwa appealed from the trial court's ruling on the motions in limine, the rule in California was that "the one final judgment rule does not allow contingent causes of

action to exist in a kind of appellate netherworld.... It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists." (*Don Jose's, supra*, 53 Cal.App.4th, at pp. 118-119.) There was no authority to the contrary. Review is proper where the Court of Appeal did not have jurisdiction to hear Dr. Kurwa's appeal, and it was only through its own decision that the Court of Appeal created jurisdiction.

PETITION FOR REHEARING

Appellant did not file a petition for rehearing in the Court of Appeal.

CONCLUSION

Because the Court of Appeals opinion has created a split among the various appellate districts of the State of California, review by this Court is urgently needed to settle the inconsistencies and lack of uniformity that now exists concerning the one judgment rule. Without review, future parties to an action will have authority to manufacture appellate jurisdiction, allowing them to make an end run around *Morehart* and the sound policies articulated there, and return to the days of *Schonfeld*, along with all the problems stemming therefrom.

DATED: April 9, 2012 Respectfully Submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BADRUDIN KURWA, Plaintiff and Appellant, v. MARK B. KISLINGER et al., Defendants and Respondents.	B228078 (Los Angeles County Super. Ct. No. KC045216)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dan Thomas Oki, Judge. Reversed.

Robert S. Gerstein; J. Brian Watkins for Plaintiff and Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb, Carol G. Arnold for Defendants and Respondents.

Plaintiff Badrudin Kurwa ("Dr. Kurwa"), on behalf of himself and derivatively on behalf of Trans Valley Eye Associates, Inc. ("Trans Valley"), sued defendant Mark B. Kislinger and his professional corporations (together, "Dr. Kislinger") for breach of fiduciary duty and defamation, and sought an accounting.[1] Dr. Kislinger cross-complained for defamation.

The trial court determined that Dr. Kislinger owed no fiduciary duty to Dr. Kurwa or to the corporation, and that Dr. Kurwa had no standing to sue Dr. Kislinger for breach of fiduciary duty or an accounting, and so dismissed those causes of action. After the parties voluntary dismissed without prejudice their causes of action for defamation, the trial court entered judgment in favor of Dr. Kislinger, from which Dr. Kurwa appeals.

We first determine that the judgment entered was final, notwithstanding that the defamation claims had been dismissed without prejudice. We then conclude that the court erred in ruling that Dr. Kurwa could not establish a fiduciary duty on the part of Dr. Kislinger, and that he lacked standing to prosecute this action. Consequently, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Prior to 1992, Drs. Kurwa and Kislinger each maintained his own ophthalmology/ optometry medical practice in the San Gabriel Valley and were not affiliated in any way. In 1992, a third party, Dr. Reginald Friesen, introduced the doctors and proposed that they create a joint venture in order to enter into and perform "capitation agreements." That is to say, the HMOs would pay the joint venture a monthly per capita fee, based on

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[1] The operative Second Amended Complaint included additional defendants and causes of action which are not before us on this appeal.

[2] The ruling below was in the nature of a judgment on the pleadings. That is to say, the trial court ruled that even if the factual allegations of the complaint were true, Dr. Kurwa could not, as a matter of law, recover damages from Dr. Kislinger for breach of fiduciary duty. Thus, this statement of facts is based onto the well-pleaded factual allegations of the complaint.

the number of participating members of the HMO, in consideration for the joint venture's agreement to provide the HMOs' members ophthalmology and optometry services. At the time, this was a novel arrangement for the provision of medical services through HMOs.

Drs. Kurwa and Kislinger agreed that they would together pursue this new business model. They signed a handwritten "Agreement between Bud and Mark" in which they outlined the structure within which they would jointly solicit the capitation business and share its profits. They agreed to incorporate a professional medical corporation to operate their joint venture business. Thus, Trans Valley was formed. Unfortunately, the Articles of Incorporation of Trans Valley did not "contain a specific statement that the corporation is a professional corporation" as required by Corporations Code section 13404. Consequently, Trans Valley was in fact not a professional medical corporation, but simply a general, for-profit corporation. (See Corp. Code, § 200.)

The joint venture entered into several capitation agreements, which served approximately 200,000 participating patients in three health maintenance organizations in the San Gabriel Valley and environs (the "HMOs"). From 1992 through 2003, Trans Valley provided ophthalmology services through three HMOs, earning revenues in the neighborhood of $2 million in the year prior to the joint venture's demise.

By an order of the California Medical Board, Dr. Kurwa was suspended from the practice of medicine for 60 days beginning on September 26, 2003, and was placed on five years' probation. Shortly thereafter, Dr. Kislinger effectively ended the joint venture. After consulting with his attorney, the latter wrote a letter on Dr. Kislinger's behalf (the "Solicitation Letter"), addressed to the president of Physician Associates of the Greater San Gabriel Valley ("Physician Associates"), the largest of the HMOs to contract with Trans Valley. We quote the letter in full:

> "This office represents Mark Kislinger, M.D. We are writing to you on his behalf on a matter that involves the continuity of patient care.
>
> "At the present time, there exists a provider agreement between Physician Associates and Trans Valle[y] Eye Associates. As you know, one of the two co-

owners of Trans Valley, Dr. Badrudin Kurwa has had his license to practice medicine suspended in the State of California. Pursuant to the agreement between you and that entity, his participation in the provider agreement is automatically terminated. Moreover, we believe the corporate status of Trans Valley is inappropriate for the practice of medicine.

"To solve these problems, we have formed a new appropriate medical corporation for Dr. Kislinger. This new corporation will hire substantially all of the employees and will contract physicians of the previous entity, so there will be no interruption of services to patients or any noticeable change to anyone. To facilitate this transfer, we would request that PA transfer its provider agreement from Trans Valley to Mark Kislinger, M.D., Inc. Dr. Kurwa, because of his suspension, will not be a part of the new corporation.

"We would appreciate having the transfer take place as soon as possible to maintain continuity and quality of patient care, and to avoid any improper entanglement with Dr. Kurwa, whose license is suspended at the present time.

"I would appreciate discussing this matter with you to effectuate this change as smoothly as possible. Your cooperation is appreciated."

Physician Associates responded by giving Trans Valley 30-days notice that it was terminating their capitation agreement because Trans Valley was not a licensed medical corporation. Physician Associates then awarded an exclusive capitation agreement to Dr. Kislinger's new medical corporation.

In 2004, Dr. Kurwa filed suit against Dr. Kislinger, alleging that the foregoing conduct on the part of Dr. Kislinger constituted, among other things, a violation of the latter's fiduciary duties to Dr. Kurwa and to Trans Valley, and seeking an accounting of his interest in the joint venture. Dr. Kurwa also sued Physician Associates for breach of

the capitation contract.[3] Physician Associates won summary judgment based on the undisputed fact that Trans Valley was not incorporated as a professional medical corporation pursuant to the Moscone-Knox Professional Corporation Act (Corp. Code, § 13400 et seq.). In affirming that judgment, we ruled that the effect of Trans Valley's failure to comply with Corporations Code provisions concerning professional medical corporations was to render its agreement to provide medical services to Physician Associates a violation of the ban on the corporate practice of medicine contained in Business and Professions Code section 2400. The capitation agreement was therefore void *ab initio*, and Trans Valley could not maintain its lawsuit against Physician Associates for breach of contract.

Prior to the commencement of trial on the remaining causes of action against Dr. Kislinger, the latter filed several motions in limine. He sought to preclude the introduction of certain evidence at trial, including evidence with respect to Dr. Kislinger's fiduciary duty, the capitation agreement between Trans Valley and Physician Associates, the handwritten notes dated July 1992 signed by Drs. Kurwa and Kislinger regarding the creation of their joint venture, and an additional 1997 writing concerning the doctors' further understanding regarding the terms of the joint venture. The trial court granted these motions, based on its conclusions that (1) because the doctors created a corporation to carry on the capitation business, they did not owe each other a fiduciary duty as partners or joint venturers, and thus Dr. Kurwa's cause of action for breach of fiduciary duty failed as a matter of law; and (2) because Trans Valley was not properly formed as a medical corporation, it could not sue, derivatively through its shareholder Dr. Kurwa, for breach of fiduciary duty. The court also ruled that the capitation agreements between Trans Valley and the HMOs were not admissible based on this court's ruling that they were void *ab initio*, and that the handwritten notes containing the doctors' original joint

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[3] In addition, Dr. Kurwa sued Dr. Kislinger's attorneys for tortious inference with contractual relations based on the Solicitation Letter. The attorneys filed an anti-SLAPP motion, which the trial court denied. We affirmed that ruling in a published opinion, *Kurwa v. Harrington, Foxx, Dubrow & Canter* (2007) 146 Cal.App.4th 841.

venture agreement were irrelevant and therefore inadmissible, since the joint venture was later incorporated.

Based on those rulings, Dr. Kurwa conceded that he could not proceed on his derivative and individual causes of action for breach of fiduciary duty, nor for an accounting based on such a breach, and the trial court dismissed those three causes of action. Dr. Kurwa also abandoned his causes of action for fraud, breach of contract, and breach of the contractual duty of good faith and fair dealing, and noted that his cause of action for removal of a director was moot. The court dismissed these causes of action with prejudice, "based upon plaintiff's lack of a desire to pursue [them] at this period of time." The doctors orally agreed to dismiss their causes of action for defamation without prejudice and to waive the applicable statute of limitations, which dismissal the court entered on the record. The court subsequently entered judgment in favor of Dr. Kislinger, from which Dr. Kurwa appeals.

APPEALABILITY OF JUDGMENT

Dr. Kislinger contends that the dismissal without prejudice of the parties' defamation causes of action, coupled with a waiver of the statute of limitations, renders the judgment interlocutory, as it leaves open the possibility that the parties may litigate those claims in the future. We do not agree, as we explain.

"[T]here can be but one judgment in an action no matter how many counts the complaint contains." (*Bank of America v. Superior Court* (1942) 20 Cal.2d 697, 701, quoted with approval in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 738 ("*Morehart*").) Code of Civil Procedure section 904.1, subdivision (a), codifies this "one final judgment" rule: "[T]hat subdivision authorizes appeal '[f]rom a judgment, except . . . an interlocutory judgment,' i.e., from a judgment that is not intermediate or nonfinal but is the one final judgment. (*Knodel v. Knodel* [(1975)] 14 Cal.3d 752, 760.) Judgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required by section 904.1, subdivision (a). A judgment that disposes of *fewer*

than all of the causes of action framed by the pleadings, however, is necessarily 'interlocutory' (Code Civ. Proc., § 904.1, subd. (a)), and not yet final, as to any parties between whom another cause of action remains pending." (*Morehart, supra,* 7 Cal.4th at pp. 740-741, italics in original.)

In *Morehart, supra,* 7 Cal.4th 725, a land use case, the trial court ordered the causes of action for a writ of mandate, declaratory relief and injunctive relief to be tried separately from the causes of action seeking damages for inverse condemnation and violation of civil rights. A trial of the first three causes of action resulted in a proposed statement of decision in favor of the landowner, and called for the entry of a judgment for a writ of mandate and declaratory relief. The landowner objected to entry of judgment before the determination of the remaining of causes of action. The trial court overruled the objection, stating that "'[i]t makes no sense to get involved in a protracted trial on various damage claims without obtaining a final resolution on the issue of the validity of the County's ordinance.'" (*Morehart, supra,* 7 Cal.4th at p. 736.) The County appealed the judgment, grounding its appealability in the fact that it resolved issues that had been ordered to be tried separately, which were separate and independent from the issues remaining to be tried. A line of appellate cases, starting with *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401 ("*Schonfeld*"), had indeed declared just such an exception to the one final judgment rule.

The *Morehart* court overruled *Schonfeld, supra,* 50 Cal.App.3d 401: "[W]e hold that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart, supra,* 7 Cal.4th at p. 743.) Thus, *Morehart* stands for the straightforward proposition that the parties may not appeal adjudicated claims or issues while unadjudicated claims remain pending in the trial court. Thus, if at the time a judgment is entered there are causes of action remaining to be adjudicated in the trial court, over which that court has jurisdiction, the judgment is not final. Another way of expressing this concept would be: If the trial court continues to

have jurisdiction over any cause of action, the judgment entered is not final, for a final judgment disposes of all causes of action before the trial court, divesting that court of jurisdiction.

We apply this rule to the facts before us. After Dr. Kurwa indicated that he was not able to proceed to trial given the court's rulings on Dr. Kislinger's motions in limine, the trial court stated that "the action is dismissed with prejudice, except for the 11th cause of action, which the parties have agreed would be dismissed without prejudice." The court also dismissed without prejudice, pursuant to the parties' agreement, Dr. Kislinger's cross-complaint for defamation. These voluntary dismissals were authorized by Code of Civil Procedure section 581, subdivisions (b)(1) and (c),[4] which "allow[] a plaintiff to voluntarily dismiss, with or without prejudice, all or any part of an action before the 'actual commencement of trial.' (§ 581, subds. (b)(1), (c).)" (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 261.) "Apart from certain . . . statutory exceptions, a plaintiff's right to a voluntary dismissal [before commencement of trial pursuant to section 581] appears to be absolute. [Citation.] Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.)

The trial court entered judgment on August 23, 2010, stating: "Good cause appearing, it is hereby ordered, adjudged and decreed that plaintiff Badrudin Kurwa, shall take nothing by reason of his Complaint herein and that Judgment shall enter in favor of defendant and cross-complainant, Mark Kislinger, and defendants Mark B. Kislinger, Ph.D., M.D., Inc. and Mark Kislinger, M.D., Inc. and against Plaintiff Badrudin Kurwa." On its face, this is a final, appealable judgment. Each cause of action was adjudicated,

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[4] Section 581 provides in pertinent part: "(b) An action may be dismissed in any of the following instances: [¶] (1) With or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any. [¶] . . . [¶] (c) A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial."

and there is nothing to be decided in the trial court. Unlike the trial court in *Morehart*, the court below no longer had jurisdiction in this matter.

We acknowledge that a line of appellate opinions, beginning with *Don Jose's Restaurant, Inc. v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115, reaches a different conclusion on similar facts. (See *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79; *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434; *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466.) These cases hold that a cause of action dismissed without prejudice remains "pending" within the meaning of *Morehart*. *Don Jose's Restaurant v. Truck Insurance Exchange, supra,* characterized the dismissed causes of action as existing "in a kind of appellate netherworld" (53 Cal.App.4th at p. 118), while *Hill v. City of Clovis*, *supra*, described them as "undecided and legally alive." (63 Cal.App.4th at p. 445.) Accordingly, these cases hold that a judgment entered following a dismissal without prejudice is not final, and the orders of the trial court subsumed in the interlocutory judgment are not appealable unless and until the dismissed causes of action are subsequently revived and adjudicated on the merits. (*Id.* at p. 446.)

We interpret the term "pending" more narrowly. In our view, a cause of action is pending when it is filed but not yet adjudicated. Such was the case in *Morehart, supra,* 7 Cal.4th 725. The Supreme Court there held that the judgment was not final because the trial court which entered it continued to have jurisdiction over additional causes of action pending before it. While a cause of action which has been dismissed may be pending "in the appellate netherworld," it is not pending in the trial court, or in any other court, and thus cannot fairly be described as "legally alive." We conclude that, because no causes of action remained to be tried in the court which entered judgment in favor of Dr. Kislinger, and indeed that court had no jurisdiction to do anything except enter judgment, the judgment entered is final.

STANDARD OF REVIEW

As noted above, Dr. Kurwa's lawsuit was dismissed as a result of the trial court's legal conclusion that, based on the allegations of the complaint, he had no standing to sue, and that Dr. Kislinger owed him no fiduciary duty. Consequently, we review the rulings de novo, giving the complaint a reasonable interpretation, and accepting as true all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

DISCUSSION

In its motions in limine, Dr. Kislinger maintained that, as a consequence of our ruling in the earlier appeal of the dismissal of Physician Associates, "Dr. Kurwa's 1992 and 1997 agreements with Dr. Kislinger [which] also stated that Trans Valley was to provide medical services . . . were also void *ab initio*, pursuant to law of the case." Dr. Kislinger argued that, because all of Dr. Kurwa's causes of action against him were based on one of these two agreements, he had no standing to bring any actions against Dr. Kislinger, either individually or derivatively on behalf of Trans Valley.

Initially, we reject the argument that the law of the case has any application to the issues presented on this appeal. The sum and substance of our holding in the prior appeal was simply that, for the reasons stated, Trans Valley could not enforce the capitation agreement against Physician Associates. Dr. Kurwa is not attempting to enforce the capitation agreement against Dr. Kislinger.

Dr. Kislinger's suggestion that the writings between the doctors evidencing the terms of their joint venture were void *ab initio* based on the law of the case is without merit. When entering the joint venture, the parties did not, as Dr. Kislinger avers, have "an unlawful purpose, namely to provide Trans Valley with payments for medical services." Rather, they had the lawful purpose, as licensed physicians, to establish a professional medical corporation to carry out the joint venture's capitation business.

The gist of Dr. Kurwa's complaint against Dr. Kislinger is that the two formed a joint venture to exploit the market for HMO ophthalmology capitation agreements in the

San Gabriel Valley, and that, in causing his attorneys to send the Solicitation Letter to Physician Associates, Dr. Kislinger unilaterally terminated the joint venture and appropriated to himself, without any compensation to Dr. Kurwa, the very successful business which had been conducted by the joint venture for the prior 11 years. The fact that the doctors chose to conduct the joint venture in corporate form, and that they failed to include in the Articles of Incorporation the particular language which was required to create a professional medical corporation in compliance with Corporations Code section 13400 et seq., has no bearing on the question of whether Dr. Kislinger must account to Dr. Kurwa for appropriating the latter's equity interest in the joint venture.

As Dr. Kislinger acknowledges, joint venturers, like partners, have a fiduciary duty to act with the highest good faith towards each other regarding the affairs of the joint venture. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) Relying on *Persson v. Smart Inventions* (2005) 125 Cal.App.4th 1141, Dr. Kislinger simply argues that, because the doctors chose to conduct the joint venture as a corporation, they did not owe each a fiduciary duty.

In *Persson v. Smart Inventions, supra,* two individuals began a business as partners. The venture was a success, and after several years, they incorporated the business, each partner receiving 50 percent of the shares and acting as directors and officers of the corporation. Several years thereafter, the two decided to terminate their relationship, and did so through a stock purchase agreement. The selling shareholder later claimed that the buying shareholder had concealed material facts regarding the corporation's prospects, facts which he was obligated to disclose based on his fiduciary duty to his partner. The Court of Appeal rejected this argument, stating: "We are persuaded that, in the usual case and in this case, a partnership does not continue to exist after the formation of a corporation." (*Id.* at p. 1157.)

This is not "the usual case" as described in *Persson v. Smart Inventions.* In that case, as well as in the cases upon which it relied (*Cavasso v. Downey* (1920) 45 Cal.App. 780; *Kloke v. Pongratz* (1940) 38 Cal.App.2d 395), individuals who originally conducted business as a partnership, and thereafter incorporated the partnership business, were

deemed to no longer be partners. We have no quarrel with the general proposition that, when persons conducting business as a partnership decide to incorporate the business, the partnership does not continue to exist after the formation of the corporation.

However, such were not the facts alleged in the second amended complaint. First, Drs. Kurwa and Kislinger were never partners. Rather, prior to 1992, the two doctors conducted the business of medicine independently of each other, not in partnership together. In 1992, they undertook a new venture separate from their ongoing medical practices – to provide medical services to HMO patients under capitation agreements. The fact that they chose to conduct their joint venture in corporate rather than partnership form does not change the fact that they were joint venturers. (*Elsbach v. Mulligan* (1943) 58 Cal.App.2d 354, 370.)

In *Elsbach*, two individuals, Elsbach and Mulligan, formed a joint venture, which they later incorporated, to import and sell alcoholic beverages by creating exclusive agencies with producers. The corporation issued shares of stock to the two principals. Mulligan induced two producers to terminate their agency agreements with the corporation and to award exclusive agencies to him personally. Elsbach, in his personal capacity, sued Mulligan in tort and recovered damages. (*Elsbach v. Mulligan, supra,* at pp. 356-361, 366.) The Court of Appeal affirmed the judgment, concluding that the evidence supported the findings that the corporation was in reality a joint venture and that Elsbach and Mulligan acted throughout as joint venturers. The Court of Appeal rejected the argument that the action should have been brought by the corporation, holding that Elsbach personally could recover damages from Mulligan for breach of his fiduciary duty to his co-venturer. (*Id.* at pp. 368–370.) Courts in other states have likewise recognized that joint venturers may choose to operate their venture in the corporate form without divesting themselves of the rights and obligations of joint venturers. (See, e.g., *Richbell Info. Servs. v. Jupiter Partners* (2003) 765 N.Y.S.2d 575, 585; *Yoder v. Hooper* (Colo.App. 1984) 695 P.2d 1182, 1187-1188; *Jolin v. Oster* (Wis. 1969) 172 N.W.2d 12, 17; *Campbell v. Campbell* (Kan. 1967) 422 P.2d 932, 941.)

Here, the complaint alleges that Drs. Kurwa and Kislinger formed a joint venture to provide medical services to HMO patients by entering into capitation agreements with local medical groups. The doctors incorporated the joint venture, and issued shares of stock to the two principals. Dr. Kislinger induced the HMOs to terminate their contracts with the corporation and to enter into capitation agreements exclusively with his medical corporation. These facts state a cause of action for breach of fiduciary duty owed by one joint venturer to another.

Moreover, unlike the plaintiff in *Elsbach v. Mulligan, supra*, 58 Cal.App.2d 354, Dr. Kurwa did not sue solely in his individual capacity, but derivatively on behalf of Trans Valley. In Trans Valley's cause of action for breach of fiduciary duty, the complaint alleged that Dr. Kislinger misappropriated assets of the corporation in breach of his fiduciary duties as a director. "It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders.' (Corp. Code, § 309, subd. (a).)" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037.) Dr. Kurwa maintains that Dr. Kislinger was obliged to correct the formal defects which precluded the corporation from practicing medicine; that is, to amend Trans Valley's Articles of Incorporation to include the statement required by Corporations Code section 13604, and to register the corporation with the California Medical Board, and that his failure to do so damaged Trans Valley. These allegations state a derivative cause of action on behalf of Trans Valley, which Dr. Kurwa is entitled to pursue on behalf of the corporation. (Corp. Code, § 800.)

In short, because the factual allegations of the complaint state a cause of action against Dr. Kislinger for breach of fiduciary duty, the trial court erred in dismissing Dr. Kurwa's lawsuit based on the absence of a fiduciary duty on the part of Dr. Kislinger.

Finally, Dr. Kislinger cites the California Code of Regulations which provides that "Where there are two or more shareholders in a professional corporation and one of the

shareholders [¶] . . . [¶] [b]ecomes a disqualified person[5] as defined in Section 13401(d) of the Corporations Code[, h]is or her shares shall be sold and transferred to the corporation, its shareholders or other eligible licensed persons on such terms as are agreed upon." (16 Cal. Code Reg., § 1345(a)(2).) Dr. Kislinger contends that, even if he had resolved the defect in Trans Valley's corporate status as Dr. Kurwa contends he had a duty to do, upon the latter's suspension from the practice of medicine in September 2003, Dr. Kurwa was precluded from owning shares in any professional medical corporation during the period of his suspension: "the regs which we cited say he must give up his stock in a medical corporation, [and] has no right to get it back." That may be so, but that does not mean that Dr. Kislinger is not required to account to Dr. Kurwa for the latter's interest in the parties' joint enterprise. Indeed, due to Dr. Kislinger's alleged actions in abandoning the joint venture and appropriating its assets to his own benefit, Dr. Kurwa was deprived of the opportunity to sell his shares in Trans Valley to another eligible licensed person as contemplated by the cited regulation.

DISPOSITION

The judgment is reversed. Dr. Kurwa is to recover his costs of appeal.

CERTIFIED FOR PUBLICATION

ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

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[5] A "disqualified person" is defined as "a licensed person who for any reason becomes legally disqualified (temporarily or permanently) to render the professional services that the particular professional corporation or foreign professional corporation of which he or she is an officer, director, shareholder, or employee is or was rendering." (Corp. Code, § 13401, subd. (e).)

KRIEGLER, J., Dissenting.

I respectfully dissent. The dismissal without prejudice and waiver of the statute of limitations on the cause of action for defamation leads to the inescapable conclusion the judgment did not dispose of the entirety of the action. Multiple authorities conclude that an appeal in the circumstances of this case violates the one judgment rule. (*Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1468-1469; *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 442-445; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 83; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 243-245; *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 116-119.) There is no contrary authority supporting my colleagues' position on the issue of appealability. The appeal should be dismissed.

KRIEGLER, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 West Seventh Street, 29th Floor, Los Angeles, California 90017-2547.

On April 10, 2012, I served the foregoing document described as **PETITION FOR REVIEW** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as stated on the attached service list:

[X] **BY MAIL** - I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[ ] **BY PERSONAL SERVICE** - I caused such envelope to be delivered by hand.

[ ] **VIA FACSIMILE**- I faxed said document, to the office(s) of the addressee(s) shown above, and the transmission was reported as complete and without error.

[ ] **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

[ ] **BY OVERNIGHT DELIVERY** - I deposited such envelope for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express. They are deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 10, 2012, at Los Angeles, California.

ELIZABETH S. SOLIDUM

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