LIU, J.

COPY

Case No. S201619

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

SUPREME COURT
FILED

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

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Deputy

REPLY TO ANSWER TO PETITION FOR REVIEW

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IN THE
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REPLY TO ANSWER TO PETITION FOR REVIEW

I. APPELLANT'S ANSWER IS WITHOUT MERIT AS IT REQUESTS THAT THIS COURT OVERLOOK THE COURT OF APPEAL'S LACK OF JURISDICTION TO HEAR THE MERITS OF THE UNDERLYING APPEAL ON THE BASIS THAT APPELLANT WANTS TO GO TO TRIAL

Appellant's Answer to Respondent's Petition for Review (hereinafter the "Answer") makes it clear that Appellant does not disagree that the Court of Appeal did not have jurisdiction to address

the merits of this case. Instead, Appellant requests that this Court deny Respondent's Petition for Review (hereinafter "the Petition") on the basis that this case is eight years old and should be permitted to go to trial. (Answer, p. 4.)

What Appellant's Answer fails to address is that there can be no exception to the one judgment rule where parties have stipulated to a final judgment that allows remaining causes of action to survive to trial. (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*) (explaining the holding in *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 153).) This Court has made the policy reasons as to why this rule exists very clear, yet Appellant requests that this Court ignore those reasons in this case. Additionally, Appellant fails to recognize that by this Court electing not to review this case now, even if it orders the Court of Appeal's decision depublished, it will allow other parties to improperly continue conferring jurisdiction on courts of appeal through stipulated judgments that dismiss causes of action without prejudice, creating excess costs, burden, and confusion among parties and courts, when such action could be ended now.

A. Appellant's Answer Requests that this Court Allow an Impermissible Exception to the One Judgment Rule

Plaintiff's Answer effectively requests an exception to the one judgment rule under circumstances that this Court and *Don Jose's* and its progeny have previously held none exists. Plaintiff's basis for the

exception is that "even if this Court were to reverse the Court of Appeal's decision on appealability, it would require only that the defamation claims be disposed of in the trial court, whether by agreement to dismiss *with* prejudice or otherwise, to put the case into a posture for an incontestably *appealable* final judgment." (Answer, p. 3 (italics in original).) Of course, the "otherwise" glossed over by Appellant is a determination on the merits, either by Motion for Summary Judgment or trial, of the remaining defamation causes of action.

This is exactly the point made in *Don Jose's* and its progeny. All causes of action between the parties must be disposed, either by dismissal with prejudice, or on the merits in order to make a judgment between the parties final. The fact that the defamation causes of action remain, no matter how easy or difficult it may be to dispose of them, means that the judgment at the trial level was not final and not appealable. (See *Don Jose's, supra*, 53 Cal.App.4th, at p. 118.) Of course parties to an action may dismiss causes of action with prejudice in order to make a judgment final; however, here they have not done so. The fact that proceeding to trial on the defamation causes of action may take more time does not create an exception to the one judgment rule.

Further, Appellant's summary of what will happen next is not as certain as Appellant makes it sound. (See Answer, pp. 3-4.) The fact is that it is not certain what will happen if the defamation causes of action go to trial. As recognized by this Court, in addition to the other benefits for following the one judgment rule, "[u]ntil 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." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, fn. 9, [29 Cal.Rptr.2d 804, 872 P.2d 143](*Morehart*); see also *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 443, [73 Cal.Rptr.2d 638] (*Hill*).) Additionally, "[l]ater actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless[, and 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.' (*Id.*)

Appellant further argues for denial of the Petition stating that this Court may simply remove conflict in the various districts of the Court of Appeal by simply depublishing the appealability portion of the subject opinion. (Answer, p. 4.) Appellant's "solution" fails to recognize that doing so creates problems in this matter and throughout California's courts. In this matter, simply depublishing the appealability portion of the opinion will be a grant of permission to the Court of Appeal to allow an exception to the one judgment rule, condoning the Court of Appeal's overeagerness to hear this case on the merits even when it did not have jurisdiction to do so.

Additionally, throughout the state, even with a depublished case, parties will be encouraged to "test the fences" to see if they can get a court of appeal to hear their case based on a stipulated judgment that dismisses causes of action without prejudice, in hope of reviving them after the appeal. It is now public knowledge that division 5 of

the Second Appellate District will. Without a definite decision from this Court the courts of appeal could be flooded with appeals from decisions that are not final.

In an attempt to make the picture less dim, Appellant goes on to argue that "[t]he portion of the opinion dealing with appealability is the first published challenge ever to the reasoning of *Don Jose's Restaurant v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115, and its progeny. If the opinion's reasoning on that point is compelling, there will surely be new opinions taking that position in future [sic], and this Court can choose to deal with the issue at that time. If not, then there will be no further conflict to concern this Court." (Answer, p. 4.) However, the fact is that by not reviewing this issue and making a final determination on it now, the door will be left open for parties to continue to artificially confer jurisdiction on courts of appeal, and allow other districts or divisions to make a decision similar to the one here.

Appellant argues that there has been enough delay and expense in this case and that this Court should wait for another case similar to this one to make a decision. This "solution" is a Band-Aid where a tourniquet is needed as it will only lead to delay and expense in other cases, which could be prevented by a decision on this issue from this Court now, instead of in a few years. Appellant is requesting that this Court allow such waste to happen again, that is, let other parties go through the same long process that has already occurred in this case so that the parties here can reach trial more quickly. The issue is presented by this case now. Why wait? Why allow the waste?

B. Appellant's Answer Requests that this Court Treat the Court of Appeal's Review as an Impermissible Petition for a Writ of Mandate

Appellant's request that the order be permitted to stand as to the determination on the merits, but order it depublished as to the appealability issue, would effectively treat the appeal as a petition for a writ of mandate, when, tellingly, Appellant provides no authority for this Court to do so. Appellant previously made this request to the Court of Appeal, and that court elected not to do so. As the Court of Appeal did not consider this request, or at the least did not address it, it would be inappropriate at this stage for this Court to do so.

Additionally, those courts from *Don Jose's* progeny that were requested to make such a consideration declined to do so as the procedural history in those cases, which is almost identical to the procedural history here, was run-of-the-mill, and not "unusual," as is required. (See *Four Point, supra,* 60 Cal.App.4th 79, 84-85; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 245 [62 Cal.Rptr.2d 679, 681](*Jackson*)) The only difference between the procedural history in *Four Point* and *Jackson*, and the procedural history here, is that the Court of appeal here decided it had jurisdiction to take the appeal up on review. Where a case's procedural history would otherwise be considered too run-of-the-mill to consider an improper appeal as a petition for a writ, it should not be made unusual by the fact that the Court of Appeal took it up for review. If that were to happen, an ordinary non-appealable order could be heard by a court of

appeal after it is improperly taken up on appeal, then determined that it is not appealable, creating such an unusual situation that it should be treated as a petition for a writ. The required unusual circumstances do not exist here, or to the extent they do, they only do because the Court of Appeal improperly took the matter for consideration.

In sum, Appellant still has his defamation cause of action and his right of appellate review regarding his other causes of action—but at the appropriate time and no earlier. (See *Jackson, supra,* at p. 245.) The fact is that the actions in Appellant's Complaint and Respondent's Cross-Complaint have not been fully disposed of, but have been separated into two compartments for separate appellate treatment at difference points in time. (*Id.*) As such, the Court of Appeal lacked jurisdiction to hear the merits of this case. The Court of Appeal acted in direct contravention of this Court's decision in *Morehart*, and created a division among the courts of have already addressed this issue. In doing so, the Court of Appeal has issued an opinion on a case over which it did not have jurisdiction. Review is necessary and proper where there is division among the courts of appeal, and the Court of Appeal here did not have jurisdiction to take the appeal.

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II. CONCLUSION

For the foregoing reasons, the Petition for Review should be granted.

DATED: May 3, 2012

Respectfully Submitted,

HARRINGTON, FOXX,
DUBROW & CANTER, LLP

By: _____
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1).)

The text of this brief consists of 1,758 words as counted by Word 10 word-processing program used to generate the letter brief.

DATED: May 3, 2012

Respectfully Submitted,

HARRINGTON, FOXX,
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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 May 3, 2012, I served the foregoing document described as **REPLY TO ANSWER TO 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.

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[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 May 3, 2012, at Los Angeles, California.

ELIZABETH S. SOLIDUM

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