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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

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

SUPREME COURT
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RESPONDENT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES FOR REVIEW

Was the judgment in this case, which dismissed most of the causes of action with prejudice and the remainder, pursuant to the parties' stipulation, without prejudice and with a waiver of the applicable statute of limitations, an appealable judgment?

INTRODUCTION

This Court granted review to determine whether a judgment, which dismisses most of the causes of action with prejudice and the remainder, pursuant to the parties' stipulation, without prejudice and with a waiver of the applicable statute of limitations, is an appealable judgment. 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 the one judgment rule bars such appeals.[1]

Nonetheless, despite the well reasoned and persuasive opinions from four California appellate districts, including one from a different

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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.

division of its own district, all of which based their holdings on this Court's decision in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 [29 Cal.Rptr.2d 804, 872 P.2d 143] (*Morehart*), the Court of Appeal here issued a 2-1 split opinion that directly conflicts with all of them. The majority reached this contrary outcome even while the dissenting opinion fully recognized that the one judgment rule had been violated. If followed, the precedent established in the Court of Appeal's opinion will create an unmanageable burden on the appellate courts.

As discussed in *Abatti v. Imperial Irrigation District* (2012), 205 Cal.App.4th 650, 664-665 [140 Cal.Rptr.3d 647], which was published after the decision in this case was handed down, the Court of Appeal's split decision here conflicts with the five published decisions that constitute *Don Jose's* and its progeny. Additionally, the decision in this case presents an issue that is at the very heart of California appellate practice and procedure. Further, this 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 allows parties to an action to create 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.

By reversing the Court of Appeal's decision and holding that the law stated in *Don Jose's* and its progeny is the law in the State of California, this Court will allow the legislature to remain the law

making body, and prevent parties from conferring jurisdiction upon the Courts of Appeal themselves. Further, doing so will prevent the parade of horribles that would occur if the rule announced by the Court of Appeal here were to become the law in California. Such a disastrous outcome would include piecemeal disposition of matters and multiple appeals, more costs to parties, and increased burden on the Courts of Appeal, all at a time where a budget crisis in the state is already straining the limited resources of the courts. Finally, by reversing the Court of Appeal's decision, writ petitions will retain their proper place as the correct means for obtaining review of judgments and orders that lack finality.

The rule created by the Court of Appeal's majority decision here 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.) Based on that seemingly innocuous variation of the one judgment rule, the Court of Appeal essentially held that subsequent to the issuance of 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 to 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, supra*, 7 Cal.4th at 741 (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 it more difficult to determine when a matter was appealable. Further, the *Schonfeld* exception clogged the appellate courts, and was wholly unnecessary where writ petitions already provided a means for obtaining review of an interlocutory order or 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 the Court of Appeal here threatens to bring back those same 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 entering into stipulations wherein they would dismiss causes of action, which had not been addressed by a court's interlocutory judgment or order, without prejudice and with a waiver of the applicable statute of limitations. These stipulations served 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 or to become the rule in California, as it gives parties authority to bypass the rules established by the legislature and this Court, would lead to an increase in costs to parties to an action, and

clog the Courts of Appeal.

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. (C.T. 13, para. 12-13.) In March of 1992, the two doctors formed a corporation, Trans Valley, (J.A. 1328) and entered into an agreement on July 30, 1992 (J.A. 1295) to obtain managed care capitation agreements[2] through Trans Valley to provide ophthalmological services to medical groups in the area. (J.A. 13-14.) Their agreement and references to the corporation they had formed, TVEA or TV, can be found in the 1992 agreement and the subsequent contract in 1997. (J.A. 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. (J.A. 1328.) Through the corporation, the doctors contracted with Physician Associates and several other medical groups in capitation arrangements. (J.A. 1188 and 1328.)

In 2001, Trans Valley entered into a new contract with Physician Associates. (J.A. 15, 31.) The contract included a term providing for automatic termination in the event a group physician's

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

license was revoked, expired, suspended or subject to probation. (C.T. 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." (C.T. 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. (C.T. 246-248.) During his 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. (C.T. 237; J.A. 1179 and 1328; RT 6-7.)

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. (J.A. 1179.)

On October 1, 2003, Dr. Kislinger's attorney, Harrington, Fox, Dubrow & Canter, wrote a letter to Physician 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 Physician Associates that Dr. Kislinger would be forming a new appropriate professional corporation. (C.T. 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 (C.T. 55.)

PROCEDURAL BACKGROUND

Dr. Kurwa brought this action against Dr. Kislinger and others on November 23, 2004. (C.T. 9.) Dr. Kurwa filed the operative Second Amended Complaint against Dr. Kislinger, his professional corporations and Physician Associates on April 7, 2005 (the "Complaint"). The 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. (C.T. 11.) Dr. Kurwa later amended the Complaint to name Dr. Kislinger's attorneys, Dale B. Goldfarb and Harrington, Foxx, Dubrow & Canter,

[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)

as DOES 1 and 2. (C.T. 1421.)

The trial court granted summary judgment to all defendants on September 26, 2007, except for Dr. Kislinger and his professional corporations. (J.A. 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. (J.A. 1239-41.) The Court of Appeal affirmed the trial court's rulings in an unpublished opinion filed on January 14, 2009. (J.A. 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] (R.T. 9-11; J.A. 1402-03.[6]) After the dismissals, the gravamen of Dr. Kurwa's case was his assertion that he and Dr. Kislinger were partners or joint venturers and that Dr. Kislinger owed him fiduciary duties in the affairs of the

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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 "J.A." 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 "C.T." rather than "J.A."

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. (J.A. 1402; R.T. 6 and 11.) The trial court also ruled that Dr. Kurwa had no standing. (J.A. 1402-03; see Motion *in Limine* No. 2 at J.A. 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 (see J.A. 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 (J.A. 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 made with an understanding that, if Dr. Kurwa's appeal were successful, these causes of action would be revived. (R.T. 8-9, 14-15;

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[7] On January 14, 2009, the Court of Appeal 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.) (J.A. 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 (J.A. 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*.

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 that an appellant's opening brief "[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 violated the one final judgment rule because the rule "does not allow 'contingent causes of action to exist in a kind of appellate netherworld.'" (See Gerstein Declaration, 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 Appeal 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, 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 REVERSE THE COURT OF APPEAL'S HOLDING THAT A JUDGMENT OR ORDER IS APPEALABLE EVEN WHERE ITS FINALITY HAS BEEN MANUFACTURED BY STIPULATION BETWEEN THE PARTIES, DISMISSING 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).) As applied to the facts of this case, there can be 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-

[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

740.) *Morehart* reaffirmed 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." (*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. These parties began 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 here (Opn., at p. 9), the First, Second, Fourth, and Fifth districts each had the opportunity to address cases attempting to artificially create 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

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"*Code of Civil Procedure section 1048* no longer authorizes severance in a civil action." (*Morehart*, 7 Cal.4th, at p. 738, fn. 3.)

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

defendant insurance companies on no less than 11 causes of action. Defendants brought a motion for summary adjudication on two causes 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 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 malicious prosecution cause of action that was dismissed without prejudice and with a waiver of the statute of limitations, as well as any other causes of action that the Court of Appeal determined to be 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 different 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 "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 were 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 stating "[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*—facts which are also at the heart of the appealability issue here—and stated 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

[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.)

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 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 time *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 distinguished itself 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 in *Vedanta*. Additionally, there were no facts that would indicate there was a stipulation between the parties governing the dismissal and allowing for a waiver of the statute of limitations, and the court's statement, *supra*, seems to be an aside, 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.

Additionally, in the short three and one-half months that the Court of Appeal's ruling in this matter was published—from the date it was issued on March 5, 2012, until the time review was granted and it was ordered depublished on June 20, 2012—the Court of Appeal's decision here has already received criticism from the Court of Appeal for the Fourth Appellate District. (See *Abatti, supra*, 205 Cal.App.4th at 665.) In *Abatti* the appellants, owners and/or users of agricultural land in Imperial County, filed a verified petition for writ of mandate/complaint in the trial court alleging, among other claims, that the respondents there failed to comply with the California Environmental Quality Act ("CEQA"). (*Id.* at 654.) The trial court held a hearing on the CEQA claim only, took the matter under submission, and later issued an order denying the petition as to appellants' CEQA claim. (*Id.*) The appellants dismissed their remaining non-CEQA causes of action without prejudice, and the court entered a judgment on the CEQA claim in favor of the

respondents. (*Id.*)

Distinguishing its facts from *Don Jose's*, the *Abatti* court held "that a party may appeal from a judgment rendered on a particular claim in a case, notwithstanding that certain other claims have been dismissed *without* prejudice, as long as there are no remaining claims pending between the parties and the parties have not entered into a stipulation that would facilitate potential future litigation of the dismissed claims." (*Id.*) Clearly, as discussed in greater detail herein, *infra*, although the *Abatti* decision is distinguishable by its facts from *Don Jose's* and its progeny, it is in line with the reasoning found in those decisions, and further shows how far afield the decision by the Court of Appeal here is from the well-reasoned opinions issued by the other California appellate districts and divisions.

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 Result in 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 dismissed only 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. (J.A. 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. (R.T. 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, the majority opinion here did not discuss the nature of the stipulated judgment at issue in *Don Jose's* and its progeny. (*Abatti, supra,* 205 Cal.App.4th 650 at 665, fn. 10.) By not

discussing the nature of the stipulated judgment, the majority failed to address the artifice employed by parties to create appellate jurisdiction and contrive a lack of jurisdiction in the trial court, the majority failed to address, or even acknowledge, the policy reasons behind the rule in *Morehart* and the *Don Jose's* line of cases, and the majority failed to recognize the consequences that will surely follow from the implementation of its rule.

The rule announced by the Court of Appeal here takes a step backward toward the precedent set by *Schonfeld*, and creates a work around of 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 final judgment rule and allow parties to an action to create appealability where this Court has said none exists.

Additionally, implementation of the Court of Appeal's 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, increasing the 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; see also *Abatti, supra*, 205 Cal.App.4th at 666.)

In short, as recognized in *Hill* and *Abatti*, there is a difference between the two cases where, on the one hand, a party voluntarily dismisses a cause of action without prejudice in order to take an appeal, and in so doing risks that the statute of limitations will run and bar any future litigation of that dismissed cause of action, and on the other hand, a party enters into a stipulation to dismiss a cause of action without prejudice, and with a waiver of the statute of limitations, in order to facilitate potential future litigation of the dismissed claims. (See *Abatti*, 205 Cal.App.4th at 665.)

In a situation such 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 courts in *Hill* and *Don Jose's*, 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)

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 different 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 that 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. 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.)

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CONCLUSION

Because the Court of Appeal's opinion here runs far afield of the well-reasoned and thoughtful opinions issued by the other California appellate districts, including a division within its own district, all of which rely on this Court's reasoning and the policy considerations in *Morehart*, Respondent respectfully requests that this Court hold that the trial court's judgment was not appealable and dismiss this appeal.

DATED: July 19, 2012

Respectfully Submitted,

HARRINGTON, FOXX,
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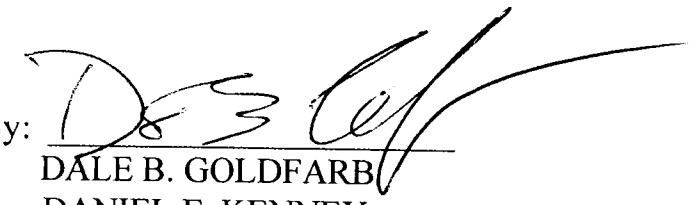
By: 

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, Respondent's Brief was produced on a computer, using Word 2007and the font is 14 point Times New Roman.

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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.

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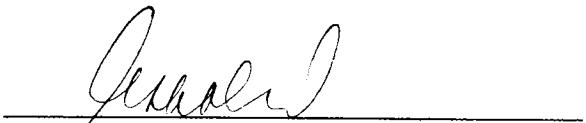

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