CASE NO.: S234617

IN THE
SUPREME COURT OF CALIFORNIA

BADRUDIN KURWA,

Plaintiff and Appellant,

v.

MARK KISLINGER, et al.,

Respondent,

After a Decision By The Court of Appeal
Second Appellate District, Division 5
Case Number: B264641

Superior Court of Los Angeles
The Honorable Dan Thomas Oki
Case Number: KC 045 216

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

I. KISLINGER PRESENTS NO EFFECTIVE RESPONSE TO KURWA'S DEMONSTRATION THAT HE AND OTHERS SIMILARLY SITUATED MUST BE GRANTED RELIEF.

Kislinger argues against granting Kurwa relief on the basis that (1) using either of the alternatives Kurwa proposes would muddy the "bright line rule" this Court adopted in *Kurwa v. Kislinger* (2013) 57

Cal.4th 1097 (*Kurwa I*), and (2) would be unfair to Kislinger. Neither contention has merit. (Answer Brief, p. 2).

A. EITHER OF KURWA'S PROPOSED RESOLUTIONS WOULD MAINTAIN A "BRIGHT LINE" RULE FOR APPEALABILITY.

Kislinger argues that deciding in Kurwa's favor would blur *Kurwa I*'s "clear and definitive line" between judgments which are appealable and those which are not. (Answer Brief, p. 2). Neither of the alternative forms of relief Kurwa proposes would have that effect.

1. THE *VEDANTA* APPROACH

First, adoption of the approach taken in *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517 (*Vedanta*), would maintain the clarity of the line between appealable and unappealable judgments, while providing that it is only a cause of action dismissed without prejudice by the would-be appellant that can render the judgment unappealable, not one dismissed without prejudice by the would-be respondent. It would remain, as much of an "automatic standard" as ever, *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 at 742, applicable without any greater need to go beyond the fact of the record. (OB 25).

Kislinger also argues that *Vedanta* is not controlling here (Answer, 11-12), but that is not the issue. Rather, the question is whether the approach taken by the *Vedanta* court, which would respect both the one final judgment rule and the fundamental right to appeal, appropriately accommodates these basic but potentially conflicting principles of California appellate procedure. Kurwa has demonstrated in the Opening Brief (OB 22-25), and here, that it does.

2. THE *HILL* APPROACH.

The approach taken in *Hill v. City of Clovis* (1998) 634 Cal.App.4th 434, on the other hand, would not impact the line *Kurwa I* draws as a barrier against piecemeal appeals at all. Appeals running afoul of it would still be dismissed. Courts of Appeal would, however, accompany those dismissals with directions to the trial courts to set aside the judgments and stipulations which made appeal impossible under *Kurwa I. Id.*, at 446. (AOB 25-27). The result would be to ensure that litigants are not deprived of their right to appellate review, while holding the line against piecemeal appeals.

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B. KISLINGER'S CLAIM THAT THE STATUS QUO IS FAIR TO BOTH SIDES, AND THAT GRANTING RELIEF TO KURWA WOULD BE UNFAIR TO KISLINGER, RINGS HOLLOW.

Kislinger insists repeatedly that (1) the current status of the case – with Kurwa denied any opportunity to obtain appellate review of the trial court's rulings against him – is fair, and that (2) it would be unfair to Kislinger to grant Kurwa relief from it. (Answer Brief, 2, 3[1], 13, 14, 15). Both claims are baseless.

The arguments are two sides of the same coin. Kislinger's basic assertion is that, rather than using the stipulation as a means "to unfairly protect" the trial court's ruling in his favor from appellate review, he is simply "honoring the agreement" they knowingly entered into over five years before. (AB 2).

According to Kislinger, Kurwa "specifically"agreed to the stipulation knowing that under it "he would not be able to appeal unless certain conditions were met." (AB 14). While nothing in the trial court's in limine rulings precluded Kurwa from going forward on all of his claims, Kislinger asserts, he chose instead to agree to the

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[1]Kislinger purports to present his own new version of the Issue Presented, though he did not present it in his Answer to the Petition for Review as required by Rule of Court 8.500(a)(2).

stipulation, and the judgment against him. (AB 5). Kislinger claims that is how both parties understood the stipulation from the outset, and that Kurwa has never presented any evidence to the contrary. (AB 4, 5, 6).

Those claims cannot withstand a confrontation with the record.

1. THE STATUS QUO IS NEITHER FAIR NOR IN ACCORD WITH THE PARTIES ORIGINAL EXPECTATIONS.

First, the trial court's in limine rulings, which included orders denying Kurwa standing to bring the case and precluding him from introducing evidence of fiduciary duty (AA 1402), made it impossible for him to go forward to trial, leaving appeal as his only option.

Second, the stipulation on its face imposed *no* restriction on Kurwa's right to appeal. Rather, contemplating an immediate appeal of the trial court's rulings, it dismissed the defamation causes of action without prejudice and provided that they would be back to life only if that appeal was successful. (See RJN 212, Ex. N).

Far from restricting Kurwa's right to appeal, then, the stipulation was designed to expedite appellate review of the trial court's ruling on the issue central to the case by setting the

unresolved defamation causes of action aside for the time being.

Kislinger complains repeatedly (AB 5, 6, 15) that Kurwa provided no declaration or other evidence to support that understanding. But the evidence is on the record, in the form of remarks from Kislinger's own counsel.

Specifically, in the course of arguing that the trial court should grant his motions in limine, Kislinger's attorney commented that, because the defamation counts were "kind of outside this whole discussion," the parties had agreed to dismiss them without prejudice "so counsel [for Kurwa] can get a ruling, ... get a definitive ruling" on the fiduciary duty issue. (RT 7). Counsel for Kurwa concurred. He stated his understanding that Kislinger's counsel wished to "preserve his defamation [claim] without prejudice for such time as this case may come back from appeal," and said he would like to do the same. (RT 9-10).

The stipulation came to have the effect of restricting appeal only *after* this Court held in *Kurwa I* that the parties' stipulation, in dismissing their defamation causes of actions without prejudice and agreeing to waive the statute of limitations, rendered the judgment

non-final and unappealable. *Kurwa I*, 57 Cal.4th 1097, 1107-1108. It was then that the agreement intended to faciliate getting a "definitive answer" from the appellate court became a bar to getting any appellate review at all, so long as it stood.

Kislinger now contends that "[t]here was no mistake...." (AB 4). But that claim is belied by a comparison of his current view with that taken by his counsel when the stipulation was entered into. (RT 7) The truth is that the stipulation's current effect is directly opposite from that the parties originally intended, making appeal impossible rather than expediting it.

Kislinger gives the impression that he continues to value his defamation cause of action for its own sake. He asserts (without any support from the record) that, unlike Kurwa's defamation claim, his would likely produce "substantial damages" for him (AB 4), but for the terms of the stipulation which preclude him from litigating it. (AB 13).

Again, however, the record of his conduct shows the contrary. Rather than joining in Kurwa's numerous efforts to set the stipulation aside which, if successful, would have freed him to litigate his

defamation cause of action, Kislinger has consistently resisted them. (see MJN 13, 33, 186). In doing so, he has made it clear that his only interest in that cause of action now is to keep it as a means of preventing Kurwa from ever obtaining appellate review. This Court would in no way advance the cause of fairness by indulging that wish.

2. GRANTING EITHER FORM OF RELIEF WOULD ADVANCE THE CAUSE OF FAIRNESS HERE AND IN ALL SIMILAR CASES.

(a) *VEDANTA*

Contrary to Kislinger's claims of unfairness (AB 2, 2, 15-16), limiting the ambit of the *Kurwa I* rule as *Vedanta* suggests would serve the interests of fairness by even-handedly barring both sides from using causes of action they dismiss without prejudice to manipulate the appellate process.

On the one hand, it would continue in force the aspect of *Kurwa I* which prevents would-be appellants from manufacturing appellate jurisdiction while holding in reserve causes of action they have dismissed without prejudice. See *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 667.

On the other, it would prevent potential respondents from using

the causes of action *they* have dismissed without prejudice as a means to block appellants from appealing entirely.

Further, it would accomplish those goals by satisfying both parties' reasonable expectations in entering into the stipulation, at least with regard to causes of action dismissed by the respondent: the respondent would be able to keep those causes of action in reserve, while the appellant would obtain appellate review.

(b) *HILL*

As has already been made clear, the *Hill* approach would also serve fairness. It would restore appellants the right to appellate review so essential to securing fair treatment, while depriving respondents only of causes of action they value solely as means to block such appellate review.

II. KISLINGER'S CLAIM THAT KURWA'S APPEAL IS UNTIMELY IS BASELESS.

A. CONTRARY TO KISLINGER'S ASSERTION, A PARTY CAN VALIDLY TRANSFORM A DISMISSAL WITHOUT PREJUDICE INTO A DISMISSAL WITH PREJUDICE.

Citing Code of Civil Procedure section 581 and *Harris v. Billings* (1993) 16 Cal.App.4th 1405, Kislinger contends that because

a trial court loses jurisdiction for all purposes except awards of costs and fees once a plaintiff has dismissed an action, Kurwa's dismissal of his defamation "has no effect" and is a "nullity." (Answer Brief, p. 9, 13).

The law is to the contrary. The rule depriving a trial court of jurisdiction when an action is dismissed does not disable a party from turning a dismissal without prejudice into one with prejudice.

In *Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212, Atkinson dismissed his third and fourth causes of action without prejudice, and appealed from the trial court's entry of judgment against him on the other two. *Id.,* 220. The Court of Appeal then asked him to show cause why the appeal should not be dismissed under *Don Jose's Restaurant Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115. His response was to dismiss his third and fourth causes of action *with* prejudice. On that basis, the *Atkinson* court was satisfied to proceed with the appeal. *Id.*, 220, footnote 8.

Kurwa's action in turning his dismissal *without* prejudice into a dismissal *with* prejudice was valid. And, assuming the *Vedanta* approach to be sound, it effectively removed the barrier to the finality

and appealability of the judgment established by *Kurwa I.*

B. THE QUESTION HERE IS WHETHER THE NOTICE OF APPEAL WAS TIMELY OR PREMATURE. IT COULD NOT HAVE BEEN LATE.

Kislinger argues that Kurwa's notice of appeal, filed June 1, 2015 (AA 1461) was late because it was taken from a "five year old Judgment." (Answer Brief, p. 10). But Kislinger ignores this Court's conclusion in *Kurwa I* that the five year old "judgment" was "not final or appealable." *Kurwa v. Kislinger*, (2013) 57 Cal. 4th 1097 (*Kurwa I*). The Court of Appeal opinion concluded that Kurwa had "taken an untimely appeal from a nonfinal judgment (Opn., p. 2)," but any judgment from a nonfinal, non-appealable judgment is necessarily premature, not untimely.

The question here, however, is whether Dr. Kurwa's dismissal of his defamation cause of action *with* prejudice on April 23, 2015 (AA 1457), rendered the judgment final and appealable. If so, the notice of appeal was timely filed within 60 days of that date. If not, it is as premature and ineffectual as was the original notice of appeal filed in 2010.

Kislinger also argues (AB 10-11), without reference to any

authority, that the appeal is untimely because Kurwa could have dismissed this cause of action without prejudice years earlier, but did not. As Kurwa explained in the Opening Brief, however, he was not sitting on his hands during the intervening period. He attempted repeatedly to obtain writ relief before dismissing the defamation cause of action with prejudice. Kislinger has failed to explain why it was not his prerogative to do just that.

CONCLUSION

For the reasons stated above, Petitioner Kurwa respectfully requests that this Court vacate the order of the Court of Appeal herein simply dismissing Kurwa's appeal, and direct that court either to decide the appeal on its merits, or to accompany the dismissal with directions to the trial court to set aside the stipulation which, under *Kurwa I*, has made it impossible for Kurwa to obtain appellate review.

DATED: March 21, 2017

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the REPLY BRIEF ON MERITS is proportionately spaced, has a typeface of 14 points or more, and contains 2163 words.

DATED: March 21, 2017

LAW OFFICES OF ROBERT S. GERSTEIN

By: _____
ROBERT S. GERSTEIN
Attorneys for Appellant Badrudin Kurwa

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 171 Peir Ave., # 322. Santa Monica, CA 90405

On March 22, 2017, I served true and correct copies of the foregoing document described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action addressed as follows:

SEE ATTACHED MAIL SERVICE LIST

[X] BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing I know that the correspondence is deposited with the U.S. Postal Service on the same day this declaration was executed and in the ordinary course of business. I know that the envelope was sealed, and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practice, at Los Angeles, California.

[ ] SUBMISSION OF AN ELECTRONIC COPY provided to the Court of Appeal for service on the Supreme Court is provided to satisfy the requirements under rule 8.212(c)(2).

[ ] BY PERSONAL SERVICE: I delivered such envelope by hand to the addressee mentioned above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 22th Day of March, 2017, at Los Angeles, California.

Luda Rosenbaum

SERVICE LIST

Kurwa v. Superior Court Los Angeles County et al.
Case Number: KC 045 216

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