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 5
Case Number: B228078

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

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In granting review here, this Court has decided to address, for the first time, the impact of dismissals of causes of action without prejudice on the appealability of a subsequent judgment under the "one final judgment rule."

All of the published opinions on the issue until that in the present case have, given the specific circumstances of the cases before them, held the judgments were unappealable, and either dismissed the appeals (*Don Jose's Restaurant v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115; *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), or allowed the appeals to go forward only after obtaining dismissals *with* prejudice from the parties. *Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174.

Since the instant case was decided, there has been an additional decision, in *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, which, like the opinion of the Court of Appeal here, has held a judgment appealable despite the fact that a cause of action had been dismissed without prejudice before judgment was entered.

The very existence of so many published decisions on the issue (and a number of unpublished decisions showing further instances of

the same practice) stretching over a period of 15 years suggests either that the doctrine first enunciated in *Don Jose's* has not been well understood, or that litigants and trial courts are tenaciously sticking to a practice they regard as useful despite the appellate courts disapproval, or both.[1]

Something more is required, therefore, if that doctrine is to be effective in achieving the one final judgment rule's goal of eliminating the burden of wasteful "multiple appeals." *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 at 741, n. 9, quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-67 This Court can provide what is missing with a decision which draws a bright, readily applicable, line clearly delineating which dismissals without prejudice violate the one final judgment rule, and at the same time ensuring that the right to appeal as granted by the Legislature is fully respected.

As Dr. Kurwa will show below, that bright line should be drawn between those cases in which dismissal of causes of action

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[1] See also *James v. Price Stern Sloan* (9th Cir. 2002) 283 F.3d 1064, 1069-70 (Kosinski, J.), reviewing the numerous decisions on the issue and diverse array of approaches to it in the federal Circuit Courts of Appeal.

without prejudice results solely from the actions of the parties themselves, and those in which the parties' stipulated dismissal without prejudice is endorsed by the trial court and incorporated into the judgment.

Both the Court of Appeal here and the *Abatti* court concluded that a party's prior dismissal of a claim without prejudice does not, in itself, make entry of a subsequent judgment a violation of the "one final judgment rule." The Court of Appeal here, taking the *Don Jose's* line of cases to hold that a party's dismissal causes of action without prejudice *always* renders the judgment unappealable, rejected that holding. The *Abatti* court, on the other hand, accepted what it took to be the holding of the *Don Jose's* line as sound, but distinguished the case before it on its facts.

The issue largely hinges on those courts varying interpretations of this Court's holding, in *Morehart*, *supra*, 7 Cal.4th at 741, that a judgment is "not yet final," and therefore not appealable, "as to any parties between whom another cause of action remains *pending* (emphasis added)." What does it mean for a cause of action to be "pending" for purposes of the one final judgment rule?

The Court of Appeal here understood the *Don Jose's* cases to hold that any claim dismissed by a party without prejudice is "pending," just because it may at some future time be revived and adjudicated, but rejected that reasoning. "[I]nterpret[ing] the term 'pending' more narrowly," the Court of Appeal concluded that a claim can be "pending" only if a trial court currently has jurisdiction over it as part of a case pending before it. Because the trial court has no jurisdiction over a cause of action once a party has, as here, voluntarily dismissed it before trial – whether with or without prejudice – it is not, therefore"pending", in the relevant sense (Opn., p. 9).

The *Abatti* court, on the other hand, took the *Don Jose's* cases to hold that a cause of action is pending if it was dismissed without prejudice with "a stipulation between the parties facilitating future litigation of the dismissed claims," resulting in "a stipulated judgment." 205 Cal.App.4th at 667. As there was no such stipulation in *Abatti*, the "one final judgment rule" was not violated.

Dr. Kislinger contends that the contrary is true here, asserting that, because the Court of Appeal found the parties had agreed to

waive the statute of limitations as to the dismissed claims, the appeal here should have been dismissed. According to Dr. Kislinger, the stipulation here was "entered as the judgment of the court," making the court "complicit" in ensuring that there was no risk that the causes of action would not survive the appeal, and in "fabrication of appellate jurisdiction... (Respondents' Brief on the Merits, [hereinafter ROBM] 26)."

As will be seen, Dr. Kurwa agrees with Dr. Kislinger in one respect. The *Don Jose's* cases do indeed hold that there is a violation of the "one final judgment rule" when there is a "stipulated judgment": a judgment incorporating the parties' stipulation to dismiss a claim or claims without prejudice, thereby giving judicial sanction to the parties' agreement, and making it "clear that the *trial court intended to retain* the remaining causes of action for trial." Eisenberg, Horvitz and Weiner, *Civil Appeals and Writs*, *supra,* p. 2-44, ¶ 2:75.

Here, however, there was, at most, an oral agreement between the parties to waive the statute of limitations, or allow the cause of action to return. As that agreement could not in itself ensure there

would be "no risk" that the parties would lose the dismissed claims they wished to keep in reserve, and as the trial court neither incorporated that agreement into the judgment, nor was otherwise "complicit" in it, Dr. Kislinger's claims must be rejected.

The decision of the Court of Appeal, holding that the judgment did not violate the "one final judgment rule" and is therefore appealable, should be affirmed.

STATEMENT OF THE CASE

Dr. Kurwa first brought this action against Dr. Kislinger and others on November 23, 2004 (JA 9).

Following a SLAPP motion, a summary judgment motion, and two appeals, the case against the remaining defendants, Dr. Kislinger and his professional corporation, was called for trial on March 2, 2010. On that date, the trial court heard and granted Dr. Kislinger's *in limine* motions seeking to preclude Dr Kurwa from presenting certain evidence. At the hearing, Dr. Kurwa voluntarily dismissed his causes of action for fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing with prejudice (RT 8-9). Also, the parties agreed at the hearing that they would dismiss

their defamation claims against each other without prejudice (RT 9-10).

A the conclusion of the hearing, the trial court granted three of the motions *in limine*, entirely precluding Dr. Kurwa from presenting any evidence (JA 1402-03). On August 23, 2010, the trial court entered judgment for Dr. Kislinger and his professional corporations. The judgment made no reference to the dismissed claims (JA 1404-05).

Dr. Kurwa filed timely notice of appeal on October 12, 2010 (JA 1406). Early in the briefing Dr. Kurwa suggested that the Court of Appeal might consider whether the dismissals without prejudice of the defamation claims might require dismissal of the appeal before completion of briefing and decision on the merits. Instead, the Court of Appeal went forward to decide the case on its merits.

In its opinion, the court construed the record to reflect an agreement between the parties to dismiss the defamation causes of action without prejudice, and to waive the statute of limitations as to those claims (Opn., p. 6). The court then determined that the judgment was final and appealable (Opn., pp. 6-9). Proceeding to the

merits of the case, the court reversed the judgment in full (Opn., pp. 10-14). Justice Kriegler dissented, contending that the appeal should have been dismissed (Opn., p. 15).

STATEMENT OF FACTS

As the Court of Appeal's decision on the merits is not at issue here, and Dr. Kislinger has in no way challenged it, Appellant Kurwa adopts the statement of facts in the Opinion of the Court of Appeal (Opn., pp. 2-4).

ARGUMENT

I. THE ONE FINAL JUDGMENT RULE.

This Court's "one final judgment rule" provides that only judgments which "leave nothing to be decided between one or more parties and their adversaries, or can be amended to encompass all controverted issues..." are appealable. *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 at 741.

"The right to appeal California is wholly governed by statute," *Loya v. Loya* (1987) 1899 Cal.App.3d 1636 at 1638, and the "one final judgment" rule has been codified in Code of Civil Procedure

section 904.1, which provides that an appeal can be taken "from a judgment, except... an interlocutory judgment."

As this Court interpreted that language in *Morehart*, "a judgment that disposes of *fewer* than all of the causes of action framed by the pleadings... is necessarily 'interlocutory'... and not yet final, as to any parties between whom another cause of action remains pending." *Morehart, id.* Thus, application of the "one final judgment" rule depends, not necessarily on whether the judgment disposed of all the causes of action in the pleadings, but on whether a cause of action "remains pending" as to the parties between whom a final judgment was supposed to have been entered.

Further, just as the ambit of the right to appeal cannot be expanded "except as provided by the Legislature," *Loya v. Loya, supra,* 899 Cal.App.3d at 1638, so too, its ambit cannot be diminished except by statute. See *In re Aaron* (2005) 130 Cal.App.4th 697, 704 ("the Judicial Council does not have power to restrict the statutory right of appeal in promulgating rules of court"). With the exception of the appellate courts' inherent power to dismiss or stay appeals by those who have wilfully disobeyed court orders, *TMS, Inc. v. Aihara*

(1999) 71 Cal.App.4th 377, 379, those courts are without authority to deprive parties of their rights to appeal as defined by section 904.1.[2]

Following *Morehart*, in *Sullivan v. Delta Airlines, Inc.* (1997) 15 Cal.4th 288 at 304, this Court affirmed that the "one final judgment rule" governs, not only the appealability of judgments, but also the authority of trial courts to enter them. According to the *Sullivan* court, "[t]he Legislature, has incorporated this meaning of finality into the very definition of a judgment: 'A judgment is a final determination of the rights of the parties in an action or proceeding." Code of Civil Procedure section 577. It follows that

> [i]n its most fundamental sense, "finality" is an attribute of every judgment at the moment it is rendered; indeed, if a judicial determination is not immediately "final" in this sense it is not a judgment, no matter what it is denominated.

In effect, then, there is no such thing as a non-appealable "judgment." There are only "judicial determinations" which are erroneously denominated "judgments" and are non-appealable for the

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[2] Dictum in *Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 208-09, which assumes, on the contrary, that appellate courts have a broader discretion to refuse to hear statutorily authorized appeals, has never been relied upon since, and has been criticized as lacking in precedential support, and being contrary to the well-established rule that the right to appeal is wholly statutory. Eisenberg, Horvitz and Weiner, *Civil Appeals and Writs, supra* p. 2-20 ¶ 2:25.

same reason they are not judgments. If a "judicial determination" is truly a judgment which the trial court had the authority to enter, therefore, the losing party should have the right to appeal from it.

II. THE JUDGMENT HERE SATISFIES THE "ONE FINAL JUDGMENT RULE."

A. THE REASONING OF THE COURT OF APPEAL IS IN ACCORDANCE WITH THE "ONE FINAL JUDGMENT RULE" AS ENUNCIATED BY THIS COURT.

The Court of Appeal here applied section 904.1 as construed by *Morehart*, and concluded that the judgment was appealable because no unadjudicated claims remained "pending in the trial court (p. 7)."

The crucial point in that reasoning was to recognize that, for a cause of action to "remain pending," in the sense used by this Court in *Morehart,* it must remain pending *in the trial court* which purports to enter the judgment. Thus, the Court of Appeal went on,

> [i]f 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.,pp. 7-8.

That reasoning follows from this Court's identification, in *Sullivan*, of the definition of a "final judgment" from the appellate perspective with the statutory definition of a "judgment" as "the final determination of the rights of the parties *in an action or proceeding*." Code of Civil Procedure section 577 (emphasis added). As described by the Court of Appeal, the relevant proceedings in the trial court were (1) the parties' voluntary dismissal without prejudice of their defamation causes of action before trial under Code of Civil Procedure section 581 (with an oral agreement to waive the statute of limitations), and (2) the trial court's subsequent entry of judgment in favor of Dr. Kislinger and against Dr. Kurwa (Opn., p. 8).

At the time judgment was entered, the defamation causes of action were not "pending" in the trial court because, the parties having exercised their "absolute" right to dismiss their claims with or without prejudice before trial, the trial court thereafter lacked jurisdiction over them (Opn., p. 8). *Wells v. Marina City Properties, Inc.* (1981) 290 Cal.3d 781, 784; *Paniagua v. Orange County Fire Authority* (2007) 149 Cal.App.4th 83, 89 ("...where the plaintiff has

filed a voluntary dismissal of an action..., the court is without jurisdiction to act further...").

The trial court made no reference to those causes of action in the judgment (CT 1404-05), and appropriately so. That court was without jurisdiction to deal with the dismissals themselves, or the proviso that they were made without prejudice, or the parties' agreement to reciprocal waivers of the statute of limitations. See *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120 (voluntary dismissal "effective immediately" upon "filing of a written request therefore").

Its jurisdiction extended only to entry of judgment on the causes of action which remained within its authority, all of which were finally disposed of. See Code of Civil Procedure section 664 ("If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision").

In the words of the Court of Appeal, the judgment was final, because the trial court "had no jurisdiction to do anything except enter judgment.... (Opn., p. 9)."

This Court's teaching in *Sullivan* is that, because the trial court had the jurisdiction to enter the judgment against Dr. Kurwa, Dr. Kurwa had a right to appeal the judgment.

B. THE *DON JOSE* LINE OF CASES DOES NOT WARRANT DISMISSAL OF THE APPEAL HERE.

1. THE *DON JOSE* LINE OF CASES.

The Court of Appeal in this case understood itself to be departing from the precedent set by *Don Jose's v. Truck Insurance Exchange* (1997) 53 Cal.App.4th 115, and its progeny, *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, and *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, because it took those cases to hold that "a cause of action dismissed without prejudice remains 'pending' within the meaning of *Morehart* (p. 9)."

Assuming that to be the holding of the *Don Jose* line of cases, the Court of Appeal's response to it was, as shown above, a sound application of this Court's *Morehart* and *Sullivan* holdings. The fact that parties exercise their right to dismiss causes of action without

prejudice before judgment is, in itself, no justification for holding that judgment not to be final and appealable.

Beyond that, however, a more careful look at the *Don Jose* line of cases leads to the conclusion that they do not straightforwardly hold what the Court of Appeal took them to hold. The decisions are not uniform, except insofar that all do involve dismissals of causes of action without prejudice and all result in dismissals of the appeal, but in each there appear to have been circumstances in addition to the dismissals without prejudice in themselves which the courts took into account in deciding that dismissal of the appeal was justified.

In each case, rather than simple dismissals without prejudice followed by a judgment which does not reference the dismissals, there appears to be some form of stipulated judgment which provided *on its face* that the dismissed causes of action would remain "pending" after entry of the judgment and the appeal (at least if the appeal was successful).

Though *Don Jose's Restaurant* initiated the line of cases and was the ultimate source of its rationale, it was different from the later cases in that it involved an effort to appeal where no judgment had

been entered. Rather, after trial court granted summary adjudication on two causes of action, the parties had entered a "formal written stipulation" to dismiss the plaintiffs' remaining causes of action without prejudice. The stipulation included a waiver of all applicable statutes of limitations, and a provision that, if the appeal was successful, the action would proceed on all causes of action in the operative complaint, including those which had been dismissed. 53 Cal.App.4th 115, 117-118.

In effect, the parties were attempting to cobble together a final appealable judgment by combining a summary adjudication order with a written stipulation, and did so with the apparent "encouragement by the trial court." 53 Cal.App.4th at 118. The *Don Jose* court found "indirect" support for its conclusion that this combination of order and stipulation did not equal an appealable judgment in this Court's holding in *Tenhet v. Boswell* (1976) 18 Cal.3d 150 at 1554, that the "one final judgment rule" had been modified where the trial court's failure to dispose of all causes of action "results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial."

In *Jackson*, which followed *Don Jose,* a summary adjudication of some causes of action was again followed by a written stipulation, filed with the trial court, in which the parties agreed to dismissal of the remaining cause of action without prejudice to filing a new complaint including the dismissed cause of action, and to waive the statute of limitations. The trial court then entered judgment "[p]ursuant to this stipulation." 54 Cal.App.4th 242-43.

In *Four Point*, again after summary adjudication of some causes of action, the parties "entered a stipulation for dismissal of all remaining claims and entry of a 'final judgment'..., stating their intent that "the filing and prosecution of an appeal in this action shall not prejudice either party's future right to prosecute such claims and causes of action which are being voluntarily dismissed by both parties following the conclusion of the appeals process." The trial court then "went along with this arrangement, signing "a final judgment" and dismissing "all claims... that had not been decided in New World's favor."

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The *Four Point* court, following *Don Jose's*, commented that

> if 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.
>
> 60 Cal.App.4th at 83

Rejecting New World's argument that the stipulated dismissals were nothing more than "permissible voluntary dismissals," the court responded that

> the court, not the parties dismissed the unresolved claims based upon astipulation that is unenforceable because it purports to vest jurisdiction in an appellate court where none exists.
>
> *Id.*, note 4.

In *Hill*, the situation was much the same as in *Four Point*. Once more, after summary adjudication of some causes of action, the parties filed an "Entry of Judgment on Stipulated Facts" and "Separate Judgment on Stipulated Facts." The trial court signed both documents, and two of the parties appealed. 63 Cal.App.4th 434, 439-40. The Court of Appeal then notified the parties that it was considering dismissing the appeal because there were causes of action not covered by the judgment or otherwise disposed of. In response, the trial court provided an "Order Correcting Judgment and

Amending Judgment," approving the parties' stipulation to dismiss the remaining causes of action without prejudice and to toll the statute of limitations. *Id.*, 441-42.

The *Hill* court dismissed the appeal, relying heavily on *Four Point,* and making the point that "the dismissal here was not the unilateral act of the City." As in *Four Point*, the trial court itself was involved. 63 Cal.App.4th at 445. The *Hill* court also pointed out that a voluntary dismissal without prejudice in itself does not come "equipped by law with an automatic tolling or waiver of all relevant limitations periods," or protect a cross-complainant from the contention that the cross-complaint was compulsory and cannot be filed in a new action. *Id.*, 445. The implication is that the court understood the parties to the appeal before it to be protected from any such eventualities, and effectively guaranteed the opportunity to raise their claims again at will.

Finally, in *Hoveida*, once again after summary adjudication of some of the causes of action, the parties entered a written stipulation providing that Dr. Hoveida dismissed his remaining cause of action without prejudice, waiving the statute of limitations, and allowing

him to maintain that cause of action if his appeal was successful. The trial court "entered a judgment pursuant to the stipulation." 125 Cal.App.4th at 1468. The *Hoveida* court dismissed the appeal, relying on *Don Jose's*, and *Four Point*. *Id.*, 1469.

In all of these cases causes of action were dismissed without prejudice, and, as indicated recently in *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650 at 665, there was "a stipulation between the parties facilitating future litigation of the dismissed claims."

But in each there was something more: a judgment entered "pursuant to the stipulation": as shown most clearly in *Four Point* and *Hill*, a stipulated judgment (or, in the case of *Don Jose's*, a stipulation and an order purporting to be the equivalent of a judgment), which, while adjudicating some of the causes of action, gave explicit judicial sanction to the "pendency" of others which had not been adjudicated. These were judgments which *on their face* made it "clear that the *trial court intended to retain* the remaining causes of action for trial." Eisenberg, Horvitz and Weiner, *Civil Appeals and Writs*, *supra,* p. 2-44, ¶ 2:75.

As will be shown in the next section, it is that aspect of the *Don Jose* line of cases which is the key to their rationale under the "one final judgment rule" as articulated in *Morehart* and *Sullivan*.

2. THE LINE SHOULD BE DRAWN TO PRECLUDE THE APPEAL OF PURPORTEDLY FINAL JUDGMENTS WHICH *ON THEIR FACE* INCLUDE STILL PENDING, UNADJUDICATED CAUSES OF ACTION.

(A) THE CENTRAL ROLE OF "STIPULATED JUDGMENTS" IN THE *DON JOSE'S* LINE OF CASES PROVIDES THE BASIS FOR A "BRIGHT LINE."

It has already been shown (pp. 15-21, *supra*) that a common thread in the *Don Jose's* line of cases is that the trial court in each entered a purported "judgment" giving judicial sanction to the continuing pendency of unadjudicated causes of action as agreed to by the parties.

As seen most clearly in *Hill* and *Four Point,* the results were "stipulated" judgments, see *Hill*, 63 Cal.App.4th at 445, *Four Point,* 60 Cal.App.4th at 83, in which the parties make an agreement to dismiss causes of action with specified conditions and qualifications,

"which the court agrees to enforce as a judgment." *California State Automobile Association Inter-Insurance Bureau v. Superior Court* (1990) 50 Cal.3d 658 at 663.

Such a stipulated judgment, enforcing the parties' agreement to keep unadjudicated causes of action alive pending appeal, is a patent violation of the "one final judgment rule." It shows on its face that it is no judgment at all under *Sullivan*, and that it is "interlocutory" within the meaning of section 904.1 and *Morehart*.

A decision endorsing the *Don Jose's* line of cases insofar as they hold that such "stipulated judgments" violate the "one final judgment rule" would draw a clear line, readily applicable by the trial courts and parties. It would also make it clear that the responsibility to ensure respect for the one final judgment rule and the "sound reasons" that support it, *Morehart*, *supra,* 7 Cal.4th at 741, n. 9, quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-67, lies in this context, not with the parties, but with the trial court.

The evils of "piecemeal disposition and multiple appeals," *id.*, are most clearly present in such cases, where the trial court's involvement ensures that the parties will be able to bring the

dismissed causes of action back to life on remand after appeal.[3] Further, there is reason to believe that any potential loss of breadth resulting from this tightening of the *Don Jose* doctrine will be offset by the increase in effectiveness likely to follow from drawing "bright line" on this issue, and making clear the trial courts' responsibility for its enforcement.

The alternatives are more problematic.

(B) ALTERNATIVE APPROACHES TO THE IMPACT OF DISMISSALS WITHOUT PREJUDICE ON APPEALABILITY.

(1) HOLDING THAT A PARTY'S DISMISSAL OF A CLAIM WITHOUT PREJUDICE IN ITSELF ALWAYS MAKE THE SUBSEQUENT JUDGMENT UNAPPEALABLE.

As already seen, the trial court has no jurisdiction to do anything further with a cause of action after voluntary dismissal before trial. *Wells v. Marina City Properties, Inc.*, *supra*, 290 Cal.3d

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[3]*Dannenberg v. Software Toolworks Inc.* (9th Cir.1994) 16 F.3d 1073, 1074, and *Cheng v. Commissioner of Internal Revenue* (9th Cir.1989) 878 F.2d 306, 308-09, are two Ninth Circuit cases in which such judgments, approving or entered "pursuant to" such stipulations, were found unappealable. See *James, supra,* 283 F.3d 1064, 1066.

781, 784; *Paniagua v. Orange County Fire Authority*, *supra*, 149 Cal.App.4th 83, 89. To decide that prior voluntary dismissal of a cause of action without prejudice always deprives a judgment of appealability, therefore, is to hold that, even though the trial court "had no jurisdiction to do anything except enter judgment... (Opn., p. 9)", the judgment entered will still not be appealable.

That would, contrary to *Sullivan*, drive a wedge between finality for appellate purposes and finality for trial court purposes, creating a situation in which judgments as final as the trial court has authority to make them could nevertheless remain unappealable, defeating the parties' statutory right to appeal "final judgments".

Further, as pointed out by the *Abatti* court, it would create the potential for "the highly undesirable consequences of making it difficult to determine the date from which a party must taken an appeal...," giving the appellant "the power to delay indefinitely the date on which an appealable final judgment is entered...." 205 Cal.App.4th at 666-67.[4]

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[4]The concurring opinion in *State Treasurer v. Barry* (11th Cir. 1999) 168 F.3d 8, 19-21, cited in *James v. Price Stern Sloan*, *supra*, 1070, n. 8, sets out a number of policy reasons for allowing appeals despite the fact that voluntarily dismissed claims remain.

(2) MAKING APPEALABILITY DEPENDS ON THE INTENT OF THE PARTIES.

Second, there is the suggestion, based on *Don Jose's's* quotation from this Court's opinion in *Tenhet v. Boswell* (1976) 18 Cal.3d 150 at 154[5], that the line should be drawn at cases in which parties display "an intention to retain the remaining causes of action for trial." 53 Cal.App.4th at 118. A line drawn based on the intent of the parties would, however, be vague, and its application difficult to determine.

Further, it is hard to see why the party's *intent* in dismissing a cause of action without prejudice should impact the court's power to enter judgment. Certainly, this Court did not draw any such line in *Tenhet*. *Tenhet* endorsed the Court of Appeals' practice of saving appeals by amending judgments to dismiss causes of action which the trial court had inadvertently left pending as an appropriate modification of the "one final judgment rule."

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[5]"... the [one final judgment] rule has been modified in cases in which the trial court's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial."

By way of contrast, the *Tenhet* court made it clear that it would not modify the rule to accommodate trial courts which act with "an intention to retain the remaining causes of action for trial." 18 Cal.3d at 153-54. The parties' intent was not at issue. *Tenhet*, therefore, supports placing responsibility for ensuring entry of a final, appealable judgment on the trial courts, where it properly belongs.

(3) DR. KISLINGER'S APPROACH

Finally, there is the approach which Dr. Kislinger develops in his Brief on the Merits, based on language in *Abatti* (ROBM 21-22, 23-24, 26). It would hold that, while the presence of claims dismissed without prejudice alone does not make an otherwise final judgment unappealable, it does so when accompanied by "a stipulation between the parties that facilitates potential future litigation of the dismissed claims." 205 Cal.App.4th at 659 (ROBM 22).

The problem with making such a stipulation – for example, one waiving any statute of limitations objection to the refiling of a dismissed cause of action – grounds in itself for holding a judgment unappealable is, again, that it involves only the exercise of the right to dismiss voluntarily by the parties themselves, without the intervention

of the trial court. Nothing in existing law suggests that the "absolute" right of litigants to dismiss claims either with or without prejudice under Code of Civil Procedure section 581, *Wells v. Marina City Properties, Inc., supra*, 290 Cal.3d at 784, does not include the right to enter into such agreements, or that trial courts, which lose jurisdiction once such dismissals occur, *id., Paniagua v. Orange County Fire Authority*, *supra*, 149 Cal.App.4th 83, 89, have any authority to invalidate them.

It remains true that, once all of the causes of action left after such a dismissal have been adjudicated, the trial court has "no jurisdiction to do anything except enter judgment.... (Opn., p. 9)," and a judgment entered confirming the adjudication of those causes of action is a final judgment under *Sullivan*.

Once more, unless finality for appellate purposes is to be split off from finality for purposes of the trial court – and this Court made it clear in *Sullivan* that it should not – the judgment should also be appealable.

In fact, there is language in the *Abatti* opinion that suggests an awareness of that problem. While that court repeatedly makes the

point that claims dismissed without prejudice are not pending for purposes of the "one final judgment rule," "*unless*" there is a stipulation between parties facilitating litigation of those claims, 205 Cal.App.4th at 665, 667, it also describes the judgment entered in such a case as a "stipulated judgment," 205 Cal.App.4th at 665, n. 10, & at 665, or a "resulting stipulated judgment." *Id* at 667.

Assuming the *Abatti* court meant by that language to limit unappealability to cases in which the parties stipulation was incorporated into a "stipulated judgment" as described in *California State Automobile Association Inter-Insurance Bureau*, *supra,* 50 Cal.3d 658 at 663, it supports the position taken here, not Dr. Kislinger's.

As already shown (pp. 15-21), there were clearly such "stipulated judgments" in *Four Point* and *Hill*, and apparently in *Jackson,* 54 Cal.App.4th 242-43 (judgment entered "[p]ursuant to this stipulation"), and *Hoveida,* 125 Cal.App.4th at 1468 (trial court "entered a judgment pursuant to the stipulation").

But it may also be that Dr. Kislinger is correct in finding support for its view in *Abbati*. There is ambiguous language

suggesting that the *Abatti* court – disregarding the *Hill* court's emphasis on the fact that the trial court there "approved the stipulation," and that "the court, not the parties, dismissed the unresolved claims based upon the stipulation....," 63 Cal.App.4th at 444-45 – may have interpreted *Hill* to hold that a party's dismissal of a claim "pursuant" to such a stipulation *by definition* "results in a 'stipulated judgment,'" though the judge has not in fact filed any such "stipulated judgment." In the absence of any indication that the trial court actually incorporated the dismissal or agreement of the parties into its judgment, the "stipulated judgment" becomes a kind of legal fiction. That seems to be Dr. Kislinger's understanding of *Abatti,* as shown by his Opening Brief's own frequent use of the phrase "stipulated judgment" (ROBM 23,24, 26).

(C) CONCLUSION

Whether or not Dr. Kislinger is correct in his understanding of *Abatti*, however, the approach most clearly in accord with the principles underlying the one final judgment rule is that *actually* taken by the *Four Point* and *Hill* courts, which focused on the trial

courts' active participation in producing a genuine "stipulated judgment" incorporating the stipulated dismissals, not a legal fiction.

This approach holds that it is not voluntary dismissals by the parties, or their agreements as to those dismissals, which render judgments non-appealable. It is the action of trial courts incorporating those dismissals and agreements into their purported judgments, rendering those judgments interlocutory.

While stipulations including statute of limitations waivers may remove some barriers to the bringing dismissed claims back to life, they by no means guarantee it. Other barriers remain.

Thus, as the *Hill* court pointed out, a claim voluntarily dismissed without prejudice where there is a cross-complaint will still face the statutory bar of resuscitation if the cross-complaint was compulsory. 63 Cal.App.4th 434, 445. Code of Civil Procedure section 426.30(a). Further, to the extent that the parties stipulate to bring the dismissed claims back into the current case if the appeal is successful, they will have to move to do so on remand, with no guarantee of success.

As the *Hill* and *Four Point* courts make clear, however, *all* such concerns disappear if the trial court approves the stipulation and incorporates it into a purportedly final "stipulated judgment." In such a case the voluntarily dismissed claims can be described as "pending" despite their dismissal, because *the trial court* is treating them as pending. So too, in such a case the "judgment" shows on its face that it is neither final, nor appealable.

3. THE COURT OF APPEAL RIGHTLY REGARDED THE JUDGMENT BEFORE IT TO BE APPEALABLE.

As made clear above (p. 8), this is a case as to which the term"stipulated judgment" can indeed be used only as a legal fiction. There is a brief reference in the transcript of the hearing to the possibility of bringing the dismissed defamation claims back to life (RT 9-10), which the Court of Appeal apparently took to indicate an agreement to waive the statute of limitations (Opn., p. 6). Beyond that, however, there was simply an agreement of both parties to dismiss their defamation claims without prejudice, followed by the trial court's entry of judgment in favor of Dr. Kislinger (Opn., p. 6).

The dismissals were the product of the parties exercise of their

right to voluntarily dismiss before trial, and required no intervention by the court (Opn., p. 8). There is no reference to the dismissals in the judgment (CT 1404-05). Given those circumstances, there is no authority, with the possible exception of *Abbati*, which supports Dr. Kislinger's contention that the Court of Appeal erred in allowing the appeal to go forward to decision on the merits.

Dr. Kislinger quotes the *Four Point* and *Hill* courts as making the point that, in those cases, [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 (ROBM 25)."

But that language does not fit the situation here. Here, it was the parties, *not* the court, that dismissed the defamation causes of action. Nor was there a stipulation purporting "to vest jurisdiction in an appellate court where none exists." There was no more than a verbal agreement to dismiss the causes of action without prejudice and waive the statute of limitations.

Dr. Kislinger describes this as a situation in which "the parties'

stipulation has been entered as a judgment of the court," making the court "complicit in creating a situation where there is no risk of losing it [the defamation causes of action] in the future... (ROMB 26)."

But there was no entry of the stipulation as a judgment here, except perhaps in the "fictional" sense which may have been used in *Abatti*, and only one risk of losing the defamation claims had been eliminated: the parties invocations of the statute of limitations bar. All other risks remained.

In the absence of any complicity of the court in the dismissals, or in ensuring that the dismissed claims could be brought back into the case after the appeal, there was no plausible sense in which those claims are "pending" in the trial court at the time judgment was entered. The decision of the Court of Appeal should be affirmed.

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CONCLUSION

For the reasons stated above, Appellant respectfully requests that the decision of the Court of Appeal herein be affirmed.

DATED: September 18, 2012

Respectfully submitted,
ROBERT S. GERSTEIN
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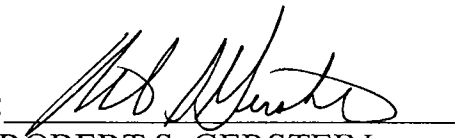
By: 
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the APPELLANT'S ANSWER BRIEF ON THE MERITS is proportionately spaced, has a typeface of 14 points or more, and contains 7,441 words.

DATED: September 18, 2012

Respectfully submitted,
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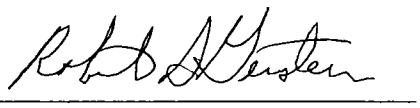
By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA)
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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 12400 Wilshire Boulevard, Suite 1300, Los Angeles, California 90025.

On September 19, 2012, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on the parties interested in this action by enclosing true copies thereof in sealed envelopes with postage thereon fully prepaid, and by providing for their deposit in the United States Mail at Los Angeles, California, addressed as follows:

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Second Appellate District
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Honorable Dan Thomas Oki
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Pomona, CA 91766

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 19, 2012, at Los Angeles, California.

Nanci VeSota