Case No. S201619

COPY

IN THE
SUPREME COURT OF CALIFORNIA

BADRUDIN KURWA,

Plaintiff and Appellant,

v.

MARK B. KISLINGER, et al.,

Defendant and Respondent.

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

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

SUPREME COURT
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Deputy

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Through his Answer Brief on the Merits ("AB"), Appellant seeks for this Court to disregard 15 years of appellate decisions in this state and to adopt the Court of Appeal's narrow interpretation of the term "pending." Under this narrow definition, and pursuant to Appellant's suggestion, litigants would be able to stipulate to remove certain causes of action from the trial court's jurisdiction by dismissing those causes of action without prejudice and with a waiver of the statute of limitations, and thereby create appellate jurisdiction over other remaining causes of action where there otherwise would be none. However, at the same time, even though the end result would be the same, Appellant's rule would prohibit court's from entering that same stipulation as the order of the court.

This rule would allow parties to litigation to confer jurisdiction on the Courts of Appeal so long as they do not involve the trial court in the process. Contrary to Appellant's arguments otherwise, such a rule would lead to the unnecessary 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 v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 741, fn. 9.)

In contrast to Appellant's suggestion, for the sake of uniformity of law, and ease of understanding and application, Respondent suggests that the rule adopted by this Court should be the

rule applied by *Don Jose's*[1] and its progeny. That is, the bright line rule adopted by this Court should prohibit parties to litigation from entering into a stipulation that would dismiss certain causes of action without prejudice, and waive the applicable statute of limitations, whether or not the court enters said stipulation as the order of the court. As discussed in *Don Jose's* and its progeny, such stipulations clearly manifest an intent to confer jurisdiction on the court of appeal while reserving those dismissed causes of action for future litigation.

As a final note, however, in the end, whether this Court adopts Appellant's suggested rule, or Respondent's, the outcome is the same as the Court of Appeal, having reviewed the record, found that the agreement to dismiss the defamation causes of action without prejudice, and to waive the statute of limitations as to those claims, was part of the judgment entered by the court. (Court of Appeal Opinion, p. 6.)

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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.

LEGAL DISCUSSION

I. APPELLANT'S INTERPRETATION OF FINALITY BASED ON *SULLIVAN V. DELTA AIRLINES, INC.*, IS WITHOUT MERIT AND DOES NOT SUPPORT ITS CONCLUSION THAT THE JUDGMENT HERE WAS FINAL

At the heart of the issue before this Court is the language cited by both parties from the *Morehart* decision, which states that "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, supra*, 7 Cal.4th at 741.) All that needs to be understood is that a judgment is not final if any cause of action framed by the pleadings is not yet disposed of. That would include causes of action held for future litigation through stipulation of the parties.

Appellant, however, looks for further instruction on the finality of a judgment, and relies on *Sullivan v. Delta Airlines, Inc.* (1997) 15 Cal.4th 288, for it. (AB p. 11-12.) It should be noted that the portion of the *Sullivan* discussion cited to by Appellant does not concern appealability, but addresses the issue of whether *Code of Civil Procedure* § 377.34, which prohibits recovery of damages for pain and suffering in an action brought or maintained on behalf of a deceased plaintiff, applies when a judgment for such damages is

rendered while the decedent is alive but the decedent dies during the pendency of an appeal from that judgment. (*Id.* at 291-292.) Within that section this Court discussed the various meanings of "final judgment," including, as an example, the fact that "while it is pending on appeal a judgment is both 'final' in the sense that it is appealable and not 'final' in the sense that the appeal remains unresolved." (*Id.* at 304.)

However, what is at the heart of the issue here is timing. Clearly, there are judgments that are not appealable at the instant they are entered. This is the nature of interlocutory judgments, which are by definition, intermediate (*Code Civ. Proc.* §904.1), and not appealable at the time they are entered. Although they are final on a specific issue at the moment they are entered, appellate review must wait until all issues between the parties are resolved, unless a writ petition is appropriate. This is the essence of the one judgment rule, and this is the essence of the issue here. Although an appeal would be appropriate once a true final judgment disposing of all the causes of action between the parties was entered, there was no true judgment here. Instead, there was only a manufactured judgment created by the parties, with the trial court's blessing in contravention of the one judgment rule and the policy reasons behind it.

In fact, *Sullivan* does move on from discussing finality with regard to recovery of damages to discussing the one final judgment rule, but that discussion is more in line with Respondent's position than Appellant's. In *Sullivan*, the plaintiff had alleged fourteen causes of action, and the jury deadlocked on the sixth cause of action,

resulting in a mistrial from which the plaintiff successfully moved for a new trial. (*Sullivan, supra*, 15 Cal.4th at 292.) Concerning that sixth cause of action, this Court held that "[a]s long at that cause of action remained unresolved there was no final judgment from which defendant could appeal or which Sullivan could enforce. At the time the retrial was ordered, however, Sullivan could have removed this impasse by voluntarily dismissing the sixth cause of action with prejudice. (*Id.* at 308.) Without the final dismissal of the sixth cause of action, the time was not appropriate for an appeal. The Plaintiff had to resolve the issue by dismissing the cause of action in an appropriate manner.

Although the judgment entered in the instant litigation would have become final and therefore appealable in the future, *i.e.*, once all causes of action between the parties were properly disposed of, under the one judgment rule it was not appealable at the time Appellant sought relief from the Court of Appeal. This is because it was not truly final. Although the judgment entered had the appearance of a final appealable judgment, such appealability had been manufactured by the parties through stipulation and endorsed by the court.

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II. THE LANGUAGE OF, AND POLICY REASONS BEHIND THE DECISIONS IN *MOREHART*, *SULLIVAN*, AND *DON JOSE'S* AND ITS PROGENY CLEARLY LEAD TO THE CONCLUSION THAT THE APPEAL HERE MUST BE DISMISSED

Appellant argues, based on the Court of Appeal's reasoning, that judgment was appealable because no unadjudicated claims remained "pending in the trial court." The Court of Appeal held, and Appellant argues, that a cause of action is not "pending" when the trial court no longer has jurisdiction over it, because it has been dismissed by the party whose cause of action it is. (AB p. 13.) However, the more correct view of pending, insofar as it more fully meets the appellate policy concerns set out by this Court, is that discussed by *Don Jose's* and its progeny, *i.e.*, causes of action that have been relegated to the appellate netherworld are pending because fewer than all of the causes of action framed by the pleadings have been disposed of, as they are being reserved for future litigation. (See, *Morehart, supra,* 7 Cal.4th at 741; see also, *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 441.)

In order to reach his desired outcome, Appellant reads *Don Jose's* and its progeny with a narrow interpretation not applied by any other court, arguing that this Court should focus on whether the trial court entered the parties stipulation as a stipulated judgment, or whether the parties simply entered into a stipulation amongst themselves. However, despite his argument, although stipulated

judgments were present in some of those cases (see *Hill*), they were not present in all (see *Don Jose's*). Additionally, as recognized by Appellant (AB at 21), the courts never discuss them as being factors in their decision.

Instead, what *Don Jose's* and its progeny focus on is the existence of a stipulation that demonstrates the parties "intention to retain the remaining causes of action for trial." (*Don Jose's* 53 Cal.App.4th at 118; see also, *Four Point, supra,* 60 Cal.App.4th at 82; *Hill, supra,* 63 Cal.App.4th at 441; *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650 at 665.) As mentioned in *Don Jose's* "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 118-119 (emphasis added).)

Ultimately, whether the stipulation is entered as the judgment of the court or not, the parties have attempted to reserve certain causes of action for trial while impermissibly creating jurisdiction in the Court of Appeal. This cannot be permitted.

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III. PLAINTIFF'S BRIGHT LINE RULE DOES NOT MEET THE POLICY CONCERNS ENUMERATED BY THIS COURT AND PROVIDES LITIGANTS WITH INSTRUCTIONS FOR SKIRTING THE ONE JUDGMENT RULE

Appellant's suggestion for a bright line rule fails to fully address the issue here. In fact its adoption would encourage litigants to continue the same behavior this Court and the Courts of Appeal have held to be impermissible. Appellant's suggested rule is to separate those stipulations entered into between the parties and entered as part of the trial court's judgment, which would be impermissible, from those that are not entered as the trial court's judgment, which would be permissible. Clearly this would fail to advance the purposes of the one final judgment rule, or its policies, and would simply encourage parties to enter into these agreements without the court's knowledge, enabling the parties to "create by stipulation appellate jurisdiction where none otherwise exists." (*Don Jose's*, 53 Cal.App.4th, at p. 118-119.)

Instead, the bright line rule should be the rule already announced in *Don Jose's* and its progeny, *i.e.*, complete prohibition 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.)

Appellant argues that his rule would "make it clear that the

responsibility to ensure respect for the one final judgment rule and the 'sound reasons' that support it ... lies in this context, not with the parties, but with the trial court. (AB at 23.) Appellant then argues that it is in the cases involving court participation that piecemeal disposition and multiple appeals are most clearly present. (AB at 23.) However, it is unclear how those concerns are more present in cases where the court is involved, but, even if that is the case, the fact that it would still exist where the court is not involved is reason enough to prohibit it. Certainly, the best rule would be the one that aligns most closely with enforcing the one final judgment rule in all situations, not just some.

Appellant next argues that other rules would be more difficult to enforce; however, based on the case law cited by Appellant, as well as *Don Jose's* and its progeny, the rule outlined in *Don Jose's* would be simple and straightforward for court to enforce. For years, courts have been requiring parties to dismiss remaining unresolved causes of action prior to seeking appellate review. (See, *Sullivan*, *supra,* 15 Cal.4th at 308 [Plaintiff is in position to voluntarily dismiss remaining cause of action with prejudice]; *Atkinson v. Elk Corporation of Texas* (2006) 142 Cal.App.4th 212, 220 [Where cause of action was not disposed of on Motion for Summary Adjudication Plaintiff filed a voluntary dismissal without prejudice, followed thereafter by trial court's entry of judgment]; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1189, fn. 17 [Plaintiff instructed to stipulate that remaining causes of action had been dismissed with prejudice or waive any right to a trial or hearing on these causes of action]; *Don*

Jose's, supra, 53 Cal.App.4th at 118, fn. 3 [a stipulation for a judgment dismissing all remaining causes of action with prejudice would have solved the appealability problem].)

Where Appellant's bright line rule would not resolve all instances of parties creating appellate jurisdiction, and even instructs parties on how to do so, it should be rejected. Instead, the rule announced in *Don Jose's* should be adopted by this Court.

CONCLUSION

For the reasons discussed herein, and in Respondent's Opening Brief on the Merits, Respondent respectfully requests that this Court hold that the trial court's judgment was not appealable and dismiss this appeal.

DATED: October 9, 2012

Respectfully Submitted,

HARRINGTON, FOXX,
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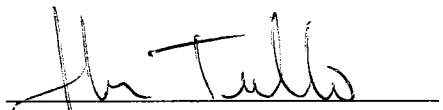
By: 

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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 Reply Brief on the Merits was produced on a computer, using Word 2007and the font is 14 point Times New Roman.

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DATED: October 9, 2012

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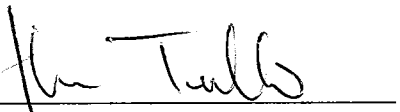
By: 

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PROOF OF SERVICE

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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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Executed on October 9, 2012, at Los Angeles, California.

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