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

OPENING BRIEF ON THE MERITS

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◇

INTRODUCTION

When they first came before this Court in *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa I*), each of the parties retained a defamation cause of action dismissed without prejudice, and protected

by a mutual agreement to waive the statute of limitations. On that basis, this Court concluded that the judgment against Kurwa was not final, and dismissed his appeal.

In the following years, Kurwa struggled to move forward with the litigation, but without success. The trial court rejected Kurwa's motions to set aside the waiver agreement for mutual mistake of law or impossibility, as well as his suggestion that the trial court reconsider its ruling against Kurwa *sua sponte.* Kurwa's efforts to obtain writ relief from those rulings were also rejected.

Finally, Kurwa has dismissed his own defamation cause of action *with* prejudice, leaving Kislinger as the only party retaining a cause of action dismissed without prejudice. Kurwa then filed notice of appeal, contending that *Kurwa I* should apply only where it is appellant who retains such a cause of action, not respondent. The Court of Appeal rejected that contention, and applied *Kurwa I* to dismiss the appeal without qualification.

That result puts Kislinger in a position to prevent Kurwa from ever exercising his right to appeal. By simply retaining the defamation cause of action he dismissed without prejudice, and

insisting on the continued validity of the agreement which prevents the statute of limitations from running on it, he can stop the trial court's ruling in his favor from ever ripening into a final judgment, permanently thwarting appellate review.

The purpose of the one final judgment rule as developed by this Court in such cases as *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, codified in section 904.1, and applied in *Kurwa I,* is to enhance the effectiveness of the appellate process, not to stultify it. But an application of the rule which would allow a particular category of prevailing parties to block appellate review of rulings in their favor forever would do just that.

As Kurwa argued in the Court of Appeal, this Court can prevent such abuse by applying *Kurwa I* to deny finality to a judgment only when it is the party seeking to appeal that retains a cause of action dismissed without prejudice and protected by a waiver of the statute, not when the would-be respondent does so. *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517 (*Vedanta*).

In the alternative, *Hill v. City of Clovis* (1998) 634 Cal.App.4th

434, suggests another way to protect the right to appeal in such cases, while still allowing the rule of *Kurwa I* to apply across the board: to direct the Courts of Appeal to accompany their dismissals of appeals in such cases with instructions to the trial courts to vacate any elements of their judgments and rulings, or the parties' stipulations, that would prevent those judgments from becoming final under *Kurwa I*.

The essential point is to erase from our law the anomoly of allowing a rule intended to enhance the effectiveness of appellate review to be used as a weapon to deprive litigants of their right to appeal.

ISSUE PRESENTED FOR REVIEW

Does this Court's decision in *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, allow a prevailing party in the trial court to deprive the losing party of the right to appeal permanently by refusing to take further action on a cause of action previously dismissed without prejudice, and with an agreement to waive the statute of limitations?

STATEMENT OF THE CASE

Dr. Kurwa first brought this action against Dr. Kislinger and

others on November 23, 2004 (AA 9). On April 7, 2005, Dr. Kurwa filed the operative Second Amended Complaint against Dr. Kislinger, his professional corporations, and Physician Associates. It included causes of action for breach of contract, breach of the implied covenant of good faith and fear dealing, and breach of fiduciary duty, all on behalf both 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 (AA 11).

On August 11, 2005, Appellant amended his Second Amended Complaint to substitute Respondent's Attorney, Dale B. Goldfarb and Mr. Goldfarb's firm, Harrington, Foxx, Dubrow & Canter as DOES 1 and 2 (AA 1421). Those parties filed an anti-SLAPP motion (AA 1421) the denial of which was upheld by this Court in *Kurwa v. Harrington, Foxx, Dubrow & Canter* (2007) 146 Cal.App.4th 841.

On September 26, 2007, the trial court granted summary judgment to all defendants save Dr. Kislinger and his associated professional corporations (AA 1239). The Court of Appeal affirmed

in an unpublished opinion filed on January 14, 2009 (AA 1177-1184). The September 26, 2007 order also granted Dr. Kislinger's motion for summary adjudication as to the claim for tortious interference with contractual relations (AA 1239-41).

The case against the remaining defendants, Dr. Kislinger and his medical corporations, was called for trial on March 2, 2010. On that date, the trial court heard Dr. Kislinger's *in limine* motions. 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, electing to pursue only his claims for breach fiduciary duty, and for an accounting (RT 9-11).

The trial court then proceeded to grant three of Dr. Kislinger's motions *in limine*, including one precluding Dr. Kurwa from presenting evidence of fiduciary duty, another precluding him from presenting evidence of the contract with Physician Associates, or the 1997 written form of the contract with Dr. Kislinger, and a third holding that he had no standing, thus precluding him from presenting any evidence at all (AA 1402-03).

The parties also stipulated to dismiss the remaining cross-

claims for defamation they had against each other without prejudice, agreeing that they could be reinstated only if the judgment was reversed on appeal, and waiving the statute of limitations. The stipulation was entered as an order of the trial court on March 22, 2010. (RJN 212, Ex. N)

On August 23, 2010, the trial court purportedly entered judgment for Dr. Kislinger and his professional corporations. (AA 1404). Dr. Kurwa filed timely notice of appeal on October 12, 2010 (AA 1406).

On appeal, the Court of Appeal determined that the judgment was final and appealable. (AA 1431-34) Proceeding to the merits of the case, the court reversed the judgment in full. (AA 1435-39) One justice dissented, contending that the appeal should have been dismissed. (AA 1440)

This Court, having granted review, held that a trial court disposition could not be final and appealable if there remained a cause of action which a party had dismissed without prejudice, subject to an agreement to waive the statute of limitations. On that basis, this Court dismissed the appeal, nullifying the Court of Appeal's decision.

Kurwa v. Kislinger, (2013) 57 Cal. 4th 1097 (*Kurwa I*). (AA 1441)

On remand, Dr. Kurwa filed a Motion for Order Re-Setting Case for Final Status Conference and Trial Upon Remand. (See RJN 9, Ex. A)

In the motion, Dr. Kurwa asked the trial court either (1) to rescind the parties' stipulation as to dismissal of the defamation causes of action as the result of mutual mistake, which would have had the result of making the trial court's order a final, appealable judgment by operation of law, or (2) to reconsider its decision on the motions *sua sponte* in light of the Court of Appeal's earlier opinion in this matter under *Le Francois v. Goel* (2008) 35 Cal. 4th 1094.

The trial court denied the motion (See RJN 14, Ex. A), and another motion which sought to set aside the stipulation as void for impossibility under Section 1441 of the Civil Code. (RJN 89, Ex. D), on November 7, 2014.

On November 13, 2014, the Court of Appeal denied Dr. Kurwa's writ petition from that decision, commenting that "Dr. Kurwa is not without other means to attempt to make the judgment reviewable." B259558 (RJN 9, Ex. E). This Court denied review.

(RJN 118, Ex. G)

Thereafter, Dr. Kurwa moved to amend his complaint by addition of a cause of action to rescind the stipulation because it had been entered into under a mistake of law. (See RJN, 132, Ex. H) The trial court denied that motion as well (*Ibid.*)

Dr. Kurwa then petitioned the Court of Appeal a second time for a writ of mandate, seeking relief from that decision, as well as the previous decisions of the trial court which together barred Dr. Kurwa from obtaining appellate review. In the alternative, Dr. Kurwa asked that, if it found no other remedy available, the Court of Appeal consider on its merits the question of whether the trial court should have granted Dr. Kislinger's motions *in limine* (the basis for the judgment this Court found not to be final or appealable). (RJN 134-37, 140-59, Ex. H)

The Court of Appeal denied the Second Petition on July 10, 2015, by a two-to-one vote. Making no further comment as to "other means to attempt to make the judgment reviewable," the majority found no abuse of discretion in the trial court's denial of leave to amend, and rejected the requests for relief from the trial court's prior

actions as "untimely and repetitive." (RJN 162, Ex. I)

The dissenter would have granted the alternative writ directing the trial court to vacate its order granting Dr. Kislinger's motions *in limine* and allowing Dr. Kurwa to proceed to trial, or to show cause why "Dr. Kurwa's claims should not be granted."

In the dissenter's view, the majority has placed Dr. Kurwa in the "seemingly Kafkaesque situation" of being unable to correct a miscarriage of justice, though the court had earlier told him that he was "not without other means to attempt to make the judgment reviewable." (*Ibid.*). This Court denied review (RJN 211, Ex. M)

Meanwhile, Dr. Kurwa had dismissed his defamation cause of action *with* prejudice on April 23, 2015 (AA 1457), and thereafter filed notice of appeal on June 1, 2015. (AA 1461).

The Court of Appeal, however, dismissed the appeal for failure to satisfy the one final judgment rule as stated in *Kurwa I*, and refused to consider the appeal as a writ petition. (Petition for Review, App. A). Thereafter, Kurwa petitioned for review, and this Court granted review on August 10, 2016.

STATEMENT OF FACTS

(NOTE: With the exception of a few undisputed facts presented in support of Dr. Kislinger's motions, the facts as stated below are drawn from the allegations of Dr. Kurwa's Second Amended Complaint, by page and ¶ number.)

Drs. Kurwa and Kislinger are licensed ophthalmologists (AA 13, ¶¶12-13). Prior to 1991, Dr. Kurwa and Dr. Kislinger each had his own separate practice (AA 13, ¶15). In about 1991, Dr. Reginald Friesen brought them together to create a joint venture able to undertake large-scale agreements for the provision of ophthalmological services to medical groups (AA 13-14, ¶16).

On July 30, 1992, Drs. (Bud) Kurwa and (Mark) Kislinger both signed a handwritten "Agreement between Bud and Mark" in which they outlined the structure within which they would jointly pursue and share such business (AA 1295). Acting through Trans Valley Eye Associates, Inc., a corporation they created as a means to carry out the joint venture, they eventually obtained several such contracts, including one with Huntington Provider Group (AA 14, ¶18).

The venture was successful. As stated by this Court, "in the year prior to termination the Capitation Agreement [with Physician Associates] resulted in receipts of approximately $1.9 million dollars." *Kurwa, supra,* 146 Cal.App.4th at 843.

There was also a document entitled "Agreement Between Dr. Kurwa and Dr. Kislinger," dated April 29, 1997, which was attached to the Second Amended Complaint as an exhibit. It further develops the structure of the relationship between the two ophthamologists, stating their understanding that they were "partners in TransValley," that, if any of their managed-care contracts were lost, the remaining contracts would be equally split between them, and that any new managed-care contracts obtained by either party would be jointly administered (AA 29-30).

In 1999, a new corporation, Physician Associates, was established to buy Huntington Provider Group. Drs. Kurwa and Kislinger each made capital contributions of $100,000 to the new venture based on the assurance that Physician Associates would take over Huntington Provider Group's contract with Trans Valley and continue it permanently. (AA 14-15).

In 2001, Trans Valley entered into a new contract with Physician Associates (AA 15, 31). The contract included a term providing for automatic termination in the event a group physician's license was "revoked, expired or suspended...," or subject to

probation. (AA 43).

By an order of the California Medical Board, Dr. Kurwa was suspended from the practice of medicine for 60 days beginning 16 days after September 26, 2003, and placed on 5 years probation. (AA 1280).

Later in 2003, Dr. Kislinger's attorney, Dale Goldfarb, sent a letter to the president of Physician Associates pointing out that (1) Dr. Kurwa had been suspended from the practice of medicine, and (2) Trans Valley was not a professional corporation which could lawfully engage in the practice of medicine. The letter invited the HMO to make Dr. Kislinger's own recently formed medical corporation the exclusive ophthalmology provider for Physician Associates. (AA 15-16, 55). See *Kurwa, supra* at 843-844.

Thereafter, on October 31, 2003, the president of Physician Associates informed Dr. Kurwa that the contract with Trans Valley had been terminated because Trans Valley was not organized as a medical corporation (AA 55). The contract with Physician Associates was taken over by Foothill EyeCare Services effective December 1, 2003 (AA 58). The complaint alleges that Foothill EyeCare Services

is owned and/or controlled by Dr. Kislinger. (AA 16).

ARGUMENT

THIS COURT MUST NOT ALLOW PARTIES PREVAILING IN THE TRIAL COURT TO MISUSE *KURWA I* TO DEPRIVE THE LOSING PARTIES OF THEIR RIGHT TO APPEAL.

A. THE ONE FINAL JUDGMENT RULE.

Under the one final judgment rule,

> a judgment that fails to dispose of all causes of action pending between the parties is generally not appealable.

Kurwa I, at 1100.

This Court has made it clear it is not free to decide specific issues of appealability by whatever rule it finds "best balances party autonomy or trial and appellate efficiency." *Kurwa I* 57 Cal.4th at 1107. Rather, the one final judgment rule must in each case be applied in the manner "most consistent with the policy against piecemeal appeals...." *Kurwa I*, at 1100.

In addition to "reducing the number of appeals, this Court as cited these benefits of the one final judgment rule: avoidance of uncertainty and delay in the trial court, making it possible for the trial court to resolve potential appellate issues by altering its rulings, and providing the appellate court with a more complete record, as well as

a complete trial court adjudication, as the basis for its decision. *Kurwa I* at 1106, quoting *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-67.

In sum, the purpose of the rule is to enhance the effectiveness of the appellate process by avoiding premature appeals. The principal means of achieving that purpose is to deny appellants the ability "to separate [their] causes of action into two compartments for separate appellate treatment at different points of time." Crucially, however, a litigant denied that opportunity "... still has his right of appellate review... but at the appropriate time and no earlier." *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240 at 242, quoted in *Kurwa I*, at 1103.

The question the rule asks, then, is not *whether* losing parties can appeal trial court rulings, but *when*. An interlocutory (and therefore unappealable) judgment is one "not *yet* final, as to any parties between whom another cause of action remains pending." *Kurwa I*, at 1101, quoting *Morehart,* 7 Cal.4th 725 at 741 (emphasis added). But, while earlier, interlocutory orders cannot be immediately appealed, "later ones will certainly be appealable," *Kinoshita*, 186

Cal.App.3d at 966, and the appeal will cover all previous rulings which affect the final judgment. Code of Civil Procedure section 906.

But this Court has also made it clear that the one final judgment rule is not an absolute.

In *Kurwa I* itself, agreeing with the Court of Appeal that a cause of action dismissed without prejudice is "no longer pending in the trial court," this Court concluded, with *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 666, that such a dismissal, without more, creates "sufficient finality" to make a judgment on the rest of the case appealable. *Kurwa I*, at 1105.

On the other hand, it held that, where parties have agreed to waive the statute of limitations as to such causes of action, they are "'legally alive' in substance and effect," preventing the judgment disposing of the others from "achieving finality." *Id.*, at 1106.

The difference in impact on the policy against piecemeal appeals is one of degree. Even without tolling or waiver of the statutes of limitations, it is possible that some causes of action dismissed without prejudice at the time of judgment will be revived, resulting in piecemeal appeals. But, the "very real risk" that the

statute will run *before* they can be revived makes that possibility relatively less likely.

Where there is an agreement to waive the statute of limitations, however, the likelihood of piecemeal appeals is increased by an "artifice," providing sufficient reason to deny the resulting judgment finality. *Kurwa I*, 1105-06.

This Court also found good reason to depart from an absolutist approach to the one final judgment rule in adopting the "death knell" doctrine in class action cases. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 (*Daar*); *In re Baycol Cases I & II* (2011) 51 Cal.4th 751 (*Baycol*).

The "death knell" doctrine provides that an order disposing of all class action claims is immediately appealable, even if the claims of individual plaintiffs remain unadjudicated. The Court found this departure from the one final judgment rule necessary for two reasons:

First, the order terminating all class claims is "the practical equivalent of a final judgment for some parties...."

Second, if the order were not treated as an appealable final judgment, "any appeal would likely be foreclosed...." *Daar*, at 699;

Baycol, at 757. Though able as a matter of law to appeal, individual plaintiffs would, "without the incentive of a possible group recovery," be unlikely to make the effort of obtaining final judgments and appealing from them. *Baycol*, at 758, quoting *Daar*, at 699.

In this Court's own words, the "death knell" exception to the one final judgment rule came into being because

> we were understandably reluctant to recognize a category of orders effectively immunized by circumstance from appellate review.
>
> *Baycol*, at 758.

Kurwa does not here ask the Court to depart from, or reshape, the one final judgment rule to satisfy the extrinsic policy considerations, such as efficiency, that it rejected in *Kurwa I*. As in *Daar* and *Baycol*, there is here at stake something fundamental to the appellate process itself: the right to appeal.

B. THIS COURT CANNOT ALLOW THE ONE FINAL JUDGMENT RULE TO BE TWISTED INTO A MEANS OF PERMANENTLY DENYING THE RIGHT TO APPEAL TO CERTAIN LITIGANTS.

The problem presented here is that the continued application of *Kurwa I* under current circumstances provides Kislinger – and others like him – with sole veto power over the right to appeal trial court

rulings in their favor.

That problem was not before this Court in *Kurwa I*, when *both* Kurwa and Kislinger had causes of action dismissed without prejudice protected by a waiver of the statute of limitations. Now that Kurwa has dismissed his defamation cause of action *with* prejudice, however, and the Court of Appeal has nevertheless dismissed Kurwa's appeal, Kislinger is left with the power to negate Kurwa's right to appellate review completely.

This Court has affirmed the specially protected status of the right to appeal in many contexts.

Thus, the Court allows dismissal of appeals as frivolous only for "the most egregious conduct," *Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-51, has described the imposition of sanctions for frivolous appeals as "a delicate task," because it might "chill" litigants' access to the "fundamental protections of the right to appeal," *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782 at 797 41 Cal.3d at 797, and has also cited that "chilling effect" as being at the "core" of the rule barring imposition of a heavier sentences on remand from a successful criminal appeal. *People v. Hanson* (2000) 23

Cal.4th 355 at 365.

So too, this Court has been willing to take admittedly moot appeals where they raise issues which are important and likely to recur, but will otherwise evade appellate review. See, *e.g.*, *California Charter Schools Assn. v. Los Angeles Unified School District* (2015) 60 Cal.4th 1221 at 1233-34.

More broadly, this Court has "repeatedly held" that "if the Legislature intends to abrogate the statutory right to appeal, that intent must be clearly stated," *In re S.B., et al.* (2009) 46 Cal.4th 529 at 537, and that doubt as to the right to appeal "must be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment." *In re Matthew C.* (1993) 6 Cal.4th 386 at 394.

In *McDonald v. Superior Court* (1977) 75 Cal.App.3d 692, for example, the trial court had ordered a judgment debtor to answer post-judgment interrogatories or be barred from further prosecution of his appeal. *Id.* 694. But the *McDonald* court could not construe the relevant sanction statutes "as conferring upon the superior court the unprecedented power to prohibit an appeal from its own judgment." If the Legislature had so intended, "some more specific language

would have been employed." *Id.*, 697.

Here, the question is whether the one final judgment rule, as codified in Section 904.1(a)(1), can be applied to provide prevailing parties with "the unprecedented power to prohibit an appeal" from rulings favorable to them.

Nothing in section 904.1(a)(1)'s grant of the right to appeal final judgment and withholding of the right to appeal interlocutory judgments indicates a legislative intention to do so. On the contrary, the whole background and history of the rule as a means of making the appellate process *more* effective stands against any such perverse application.

Finally, as already seen, in adopting, and recently reaffirming the "death knell" doctrine, this Court affirmed the priority of the right to appeal over strict application of the one final judgment rule itself. The Court's "understandable reluctance" to accept "a category of orders effectively immunized by circumstance from appellate review,"*Baycol*, at 758, should be equally operative here.

Kurwa offers two alternative means to accomplish that purpose.

1. APPLICATION OF *KURWA I* SHOULD BE LIMITED TO CASES IN WHICH APPELLANT HAS A CAUSE OF ACTION DISMISSED WITHOUT PREJUDICE AND PROTECTED BY A WAIVER OF THE STATUTE OF LIMITATIONS.

In *Vedanta*, 525, footnote 8, the author of *Don Jose's Restaurant* (1997) 53 Cal.App.4th 115, concluded that, because the Vedanta Society prevailed, its dismissal of certain claims without prejudice "did not make the judgment any less appealable."

According to *Vedanta,* then, *Don Jose's* and its progeny do not apply to keep a judgment from being final where the "respondent on appeal" retains causes of action dismissed without prejudice. *Id.*

This Court explicitly adopted "*Don Jose's* rule" as the basis for its holding in *Kurwa I*. *Kurwa I* at 1107. By adopting *Vedanta*'s limit of "*Don Jose's* rule" application to cases in which appellants retain causes of action dismissed without prejudice, this Court can prevent respondents from using that rule as a means to take control of the right to appeal.

So limited, the one final judgment rule would still bar appellants from manipulating appellate jurisdiction by separating their causes of action "into two compartments for separate appellate

treatment at different points of time,"*Jackson v. Wells Fargo Bank, supra*, 54 Cal.App.4th at 242 while at the same time denying to respondents the ability to manipulate finality to prevent would-be appellants from appealing entirely.

Normally, there can be no final, appealable judgment until all claims between the parties have been finally resolved, whether in a complaint or cross-complaint. *Justus v. Atchison* (1977) 19 Cal.3d 564, 567-68.

But in the normal case both parties are motivated to present their claims to the trial court for adjudication. Where, however, respondents can immunize rulings in their favor from appeal by keeping causes of action in the "appellate netherworld" of dismissal without prejudice, the incentive to do so may well predominate. *Don Jose's,* 53 Cal.App.4th at 118.

The Ninth Circuit has recognized that fact by taking the *Vedanta* approach to its own version of the one final judgment rule. In *Local Motion v. Niescher* (9th Cir. 1997) 105 F.3d 1278, Local Motion, having won partial summary judgment on some among its causes of action, dismissed the others without prejudice. When

Niescher appealed, Local Motion sought dismissal of the appeal on the basis that, under *Dannenberg v. Software Tookworks, Inc.* (9th Cir. 1994) 16 F.3d 1073, its causes of action dismissed without prejudice prevented the judgment from becoming final. *Id.*, 1279.

The Ninth Circuit agreed that it had held, in *Dannenberg* that "a *losing* party" cannot "manufacture finality" and appellate jurisdiction out of a judgment on some of its claims by dismissing its remaining claims without prejudice. In the case before it, however, Local Motion was engaging in an equally objectionable "manipulation" of the appellate process intended "to thwart an appeal." In response, the *Local Motion* court allowed the appeal to go forward to decision on the merits.

By adopting the *Vedanta* approach, and holding the rule of *Kurwa I* applicable only where it is the party seeking to appeal that has a cause of action dismissed without prejudice, this Court can stop manipulation of appellate jurisdiction from both sides: maintaining the ban on appellant-manufactured finality, while also disabling respondents from preventing trial court rulings from ever becoming final, appealable judgments.

To do so might, it is true, make possible some number of piecemeal appeals. But, as already seen, the same is also true of the decision – in *Kurwa I* itself – to limit the one final judgment rule's application to causes of action dismissed without prejudice *and* protected by an agreement to waive the statute, and of the decision, in *Daar* and *Baycol*, to adopt and maintain the "death knell" exception to the one final judgment rule.

In *Kurwa I*, the line was drawn on the basis of the relative degree of finality. Here, as is the case in *Daar*, and *Baycol*, it would be drawn on the basis of a factor at least equally important to the one final judgment rule: this Court's unwillingness to create categories of cases "effectively immunized by circumstance from appellate review."

Finally, the line drawn by the adoption of *Vedanta* will be clear, and readily applicable. It will be what this Court described in *Morehart*, 7 Cal.4th at 742, quoting *Sears, Roebuck & Co. V. Mackey* (1956) 351 U.S. 427, 434-36, as an "automatic standard," one which will allow litigants to determine immediately whether there is an appealable judgment. There will be no need for litigants to file what may turn out to be premature appeals out of uncertainty about

appealability.

2. IN THE ALTERNATIVE, THIS COURT CAN REQUIRE THAT THE DISMISSAL OF APPEALS UNDER *KURWA I* BE ACCOMPANIED BY RELIEF FROM JUDGMENTS AND STIPULATIONS BELOW WHICH RESPONDENTS CAN USE TO BLOCK APPELLATE REVIEW.

There is another approach which would allow full enforcement of the holding of *Kurwa I*, while preventing respondents from using it as a means of blocking appellate review of rulings favorable to them.

The court in *Hill v. City of Clovis* (1998) 634 Cal.App.4th 434 (discussed in *Kurwa I* at 1104), was faced with an appeal from a stipulated judgment which provided for two of respondent city's causes of action to be dismissed without prejudice, with the statute of limitations tolled until 30 days after remittitur.

The *Hill* court, following *Don Jose's*, dismissed the appeal. But, recognizing that dismissal alone would give appellants "reason for concern... about their remedy of appeal from a final judgment in the action," decided "not leave appellants entirely without recourse."

It therefore accompanied the dismissal with directions to the trial court to "vacate the judgment and the stipulation on which it was based." *Id.* at 446. See *Four Point Entertainment, Inc. v. New World*

Entertainment, Ltd. (1997) 60 Cal.App.4th 79, 83, and *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1470 (taking the same approach in cases where it was the appellants who had causes of action dismissed without prejudice).

The crucial point would be to ensure that the trial courts on remand take the action required to ensure that respondents cannot use *Kurwa I* to prevent the judgment from becoming final. Specifically, it would be sufficient to vacate any stipulation by the parties to waive the statute of limitations as to the respondent's cause of action dismissed without prejudice, and any embodiment of that stipulation in the trial court's judgment. That would, as the *Hill* court commented, ensure that appellants such as Kurwa are not left "entirely without recourse": that they will at some point be able to obtain final judgments from which they can appeal.

In *Nasca v. Peoplesoft* (9th Cir.1998) 160 F.3d 578, and *Allen v. Meyer* (9th Cir. 2014) 755 F.3d 866, the Ninth Circuit took much the same approach to a similar problem in federal law.

Nasca involved an appeal from the decision of a magistrate, remanding a case to state court and awarding attorney's fees. Finding

sua sponte that the parties had not given the consent necessary to validate the magistrate judge's authority, the *Nasca* court found the magistrate lacked jurisdiction to make the orders, and that "[h]is lack of jurisdiction *a fortiori* deprives this court of appellate jurisdiction." *Id.*, at 580.

Nevertheless, the *Nasca* court found sufficient authority, not simply to dismiss the appeal, but also to direct the magistrate to withdraw his orders. *Id.*, at 578.

In a later case, *Allen v. Meyer* (9th Cir. 2014) 755 F.3d 866, the Ninth Circuit explained how it took that action despite its admitted lack of appellate jurisdiction. The question in *Allen* was again whether the parties had validly consented to a magistrate's authority to enter the judgment appealed from, 755 F.3d 866, 867, and again the *Allen* court found they had not. It held, therefore, that the judgment was a nullity, and that it had no jurisdiction "to adjudicate the underlying merits of this appeal...." *Id.*

The court concluded, however, that it still could, and should, "fashion a remedy to undo" the magistrate's invalid judgment. *Id.*, at 868. While lacking jurisdiction to decide the merits, it had

jurisdiction to review not only the validity of the magistrate's judgment, but, "of equal importance," to "correct the magistrate's errors." *Id.*

The point in the Ninth Circuit, as here, is not to leave appellants "entirely without recourse," but instead to recognize that an appellate court without jurisdiction to decide an appeal on the merits may still have the authority to ensure that the appellant is not left in a legal cul de sac without any means of obtaining appellate review.

This approach would fully vindicate appellants' right to appeal in cases such as this, without detracting at all from the enforcement of the policy against piecemeal appeals. Its only casualties would be the agreements to protect the respondents' causes of action dismissed without prejudice from the running of the statute of limitations. Given, however, that those agreements were entered into based on the mistaken assumption that they would expedite appeal (see p.8, above), that should be no reason for concern.

CONCLUSION

For the reasons stated above, Petitioner Kurwa respectfully requests that this Court restore the right to appeal to Kurwa and all

those similarly situated, by reversing the Court of Appeal's order dismissing Kurwa's appeal without more, and instead either directing the Court of Appeal to (1) decide the appeal on its merits, or, in the alternative, to (2) dismiss the appeal and direct the trial court to vacate the agreement to waive the statute of limitations as to Kislinger's libel cause of action dismissed without prejudice.

DATED: November 18, 2016

Respectfully submitted,
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LAW OFFICE OF STEVEN H. GARDNER

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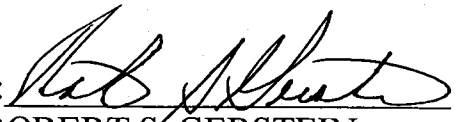
By: 
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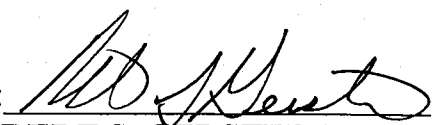
CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the OPENING BRIEF ON MERITS is proportionately spaced, has a typeface of 14 points or more, and contains 5521 words.

DATED: November 18, 2016

LAW OFFICES OF ROBERT S. GERSTEIN

By: 
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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 723 Ocean Front Walk, Venice, California 90291.

On November 21, 2016, I served true and correct copies of the foregoing document described as **OPENING 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 21st Day of November, 2016, 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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