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 Five
Case No. B264641

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

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

I. INTRODUCTION

Nothing of substance has changed in this matter since this Court issued its opinion more than three years ago. Appellant's claimed right to appeal is still governed by the Stipulation he made at

the time of trial, by the Judgment he approved at the time of trial, and by the dismissal he filed at the time of trial. All of Appellant's attempts to manipulate those facts are to no avail. This Court's decision in *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 is correct and created a clear and definitive line for practitioners as to what judgments were appealable and which were not.

Indeed, the ruling by this Court in *Kurwa 1* has had numerous articles written about it, and the practicing bar now understands that it cannot attempt to control or manipulate appellate jurisdiction. By permitting Appellant herein to avoid the rule he created, it would eliminate the bright line status of the rule and be unfair to Respondent who gave up rights in reaching the agreement with Appellant.

As the Court of Appeal noted in its Opinion dismissing Appellant's latest appeal, Appellant had taken an untimely appeal from a non-final Judgment. That was the situation when this matter was before this Court in *Kurwa 1*, and that is still the situation today. Respondent is not, as asserted by Appellant, using the stipulated agreement, judgment and dismissals entered as a means to unfairly protect itself, but is merely honoring the agreement that was bargained for by the parties over five years ago.

Appellant makes suggestions to weaken and change the *Kurwa1* judgment rule in ways which would benefit himself but would blur the bright line test that has been established. He also ignores the adverse impact that these new rules would have on Respondent who has honored all the commitments that he made at the

time this case originally went to trial.

II. ISSUE PRESENTED FOR REVIEW.

Can a party who enters into a stipulation, through counsel and approved by the Court, manipulate the Appellate Court's jurisdiction, and then when unsuccessful in doing so, obtain a special rule of appealability that violates the agreement and is detrimental to the party who has taken no unfair, inconsistent action?

III. STATEMENT OF THE CASE.

This action was originally brought by Appellant over 12 years ago. (AA 9) Appellant was aggressive in pursuing the matter and filed his Second Amended Complaint on August 11, 2005 which included suing Respondent's law firm. (AA 1421) Ultimately, summary judgment motions were granted for the law firm and other co-defendants in this matter, which were appealed by Appellant herein. The Judgments entered were affirmed. (AA 1239-41).

The remaining causes of action were called for Trial on March 2, 2010. At that time, various motions *in limine* brought by Respondent were granted by the Trial Court. Also, at that time, Appellant voluntarily dismissed most of his causes of action choosing to pursue only his claims for breach of fiduciary duty and for an accounting. *(RT9-11)*.

After the Motions *in limine* were granted by the Trial Court, Appellant's counsel voluntarily chose not to move forward with the trial. The decision made at that time by Appellant's counsel was a rational decision since it protected Appellant from substantial and valid defamation claims that were simultaneously pending against him by Cross-Complaint. The agreement also saved Appellant substantial fees and costs that he would have incurred to defend those defamation claims as well as prosecuting his own claims. At the time the stipulation was made, it was apparent that Appellant would most likely lose his claims against Respondent and that Respondent would most likely recover substantial damages on his defamation claim against Appellant. It is critical that the stipulation entered into by the parties at that time provided benefits to both sides, was made by counsel, and was approved by the Court. (RJN 212). There was no mistake and indeed there were rational reasons for the agreement being made.

After the stipulation was made to waive the statute of limitations and dismiss the defamation causes of action without prejudice, Appellant sought review in the Court of Appeal. That Court, by a two to one vote decided that the non-final Judgment was appealable and reversed the Judgment that had been entered. (AA 1435-39) Respondent petitioned this Court on the grounds that the mater should not have been appealable based upon the agreements made in the Trial Court and the applicable law. This Court issued its opinion in *Kurwa 1,* setting forth the bright line rule that a non-

appealable Judgment cannot be manipulated by counsel or the parties to make it appealable and ordered that the Court of Appeal dismiss Appellant's appeal.

Before his agreement, Appellant always had the option to move forward with the trial, present his available evidence regarding the business torts as well as his evidence for his defamation claim. He also could have responded to the evidence that would have been presented by Respondent on his defamation claim. There was nothing in the Trial Court's *in limine* Orders that precluded Appellant from moving forward. It was his decision not to do so and to carry out that decision he entered into a stipulation and Judgment in which the defamation actions were dismissed without prejudice and the statute of limitations were waived.

It was this conduct that this Court found violated the Final Judgment Rule enunciated in *Kurwa 1*. After this Court's ruling, Appellant took extreme measures in an effort to extricate himself from the conduct he had undertaken including his stipulation waving the statute of limitations and dismissing the defamation cause of action without prejudice. Appellant filed a motion in the Trial Court to rescind the Stipulation, to have the Trial Court reconsider its *in limine* rulings made years before, and to have the Trial Court set aside the Stipulation on the grounds of impossibility. (RJN9) None of these motions were accompanied by any declaration or evidence from trial counsel who had made the agreements. The Trial Court properly rejected all of Appellant's efforts to re-review the Orders and

agreements that had been made. (RJN 14) Appellant then petitioned the Court of Appeal for a Writ of Mandate which was denied, and thereafter review was unanimously denied by this Court.

Not giving up, Appellant filed another motion with the Trial Court to amend the Second Amended Complaint and to add a new cause of action for rescission of the Stipulation due to mistake of law. (RJN 89) Again, no supporting evidence was provided by Appellant. The Trial Court denied Appellant's motion, and the Court of Appeal again denied his subsequent Petition for Writ of Mandate. This Court also denied review. (RJN 14, RJN9, RJN 118)

After all of the Trial Court activity and Petitions of the Appellant, he decided to file a new and different dismissal of his defamation cause of action. This time, he filed it with prejudice. (AA 1457) However, since the defamation cause of action had already been dismissed by Appellant, the Trial Court was without jurisdiction to enter a new or different dismissal. *Code of Civil Procedure*, Section 581.

After filing this new (yet void) dismissal with prejudice, Appellant filed a Notice of Appeal which is the originating document of this matter. However, that Notice of Appeal did not regenerate or create new or different appellate rights because it changed nothing in the record since it was a nullity. The defamation Cross-Complaint of Respondent was still dismissed without prejudice with a waiver of any statute of limitation that applied to it. Unfortunately, Respondent cannot assert his defamation claim because he gave up that right as

part of his bargained for agreement with Appellant years before at trial.

The Court of Appeal in its Order below dismissing the Appeal again, found that all the problems that had already existed with Appellant's attempt to appeal, still existed, and that this Court's ruling in *Kurwa 1* required that the Appeal be dismissed.

IV. STATEMENT OF THE FACTS

A detailed statement of the underlying facts is not necessary to resolve the issue raised by the present Appeal. In brief, Appellant and Respondent, who are licensed ophthalmologists, had their own individual practices. (AA 13, Paragraph15). In about 1991, they created a new combined practice to take advantage of various HMO type of agreements which were becoming more common in the medical business. The two doctors did not have their new practice formed properly and never functioned as a professional corporation as required. The practice always had substantial disagreements between the approach of the practice of medicine by the two individuals and because of the different work ethic of the two shareholders.

Ultimately, Appellant was accused of billing fraud by the United States Government and was ordered to reimburse fees he had received. The California Licensing Board also took action against Appellant, and after numerous reviews by the Courts, ultimately ordered him suspended from the practice of medicine for two months

and placed him on five years probation. (AA 1280). At about the same time, Appellant was also criminally charged for sexually assaulting two young female employees who worked for the medical entity. As a result of this criminal claim, Respondent was sued because of the alleged conduct of Appellant.

In order to distance himself from these problems, Respondent advised Physician Associates, the entity with whom they had a contract to obtain patients, that Plaintiff had been suspended from the practice of medicine and that their entity was not a professional corporation. Both of these factors precluded the entity from continuing to service patients based upon the terms of the contract. (AA 15-16,55)

After Physician Associates was notified of these issues, it sought bids from all of the ophthalmologists in the community to service its patients. Five separate physicians made bids to handle the work including separate bids by Appellant and Respondent herein. Ultimately, Physician Associates entered into a new contract with Respondent who had the lowest bid. (AA 58)

Appellant then commenced litigation against Respondent because Appellant had been unsuccessful in his bid to maintain the business and because Respondent obtained the contract.

V. THE PURPORTED APPEAL BY APPELLANT IS UNTIMELY ON ITS FACE.

The Notice of Appeal filed in this matter specifies that the appeal is taken from the 2010 Judgment. A Notice of Appeal must generally be filed within 60 days of notice of entry of a judgment but in no instance more than 180 days from entry of judgment. (*California Rules of Court*, Rule 8.104(a)(1)(A-C) Therefore, on its face the Notice of Appeal filed five years after the Judgment is untimely as a matter of law. The mere fact that plaintiff has now filed a new dismissal with prejudice relating to his defamation cause of action does not suddenly make the only Judgment in this case appealable. Appellant had already dismissed this case as part of his stipulation with defendant made five years ago at the beginning of trial. The dismissal was entered by the Trial Court relative to the defamation cause of action. Once a case has been dismissed by a party, the Court no longer has jurisdiction over that claim and the party cannot "dismiss" the case again in a different manner. Therefore, Appellant's attempt to dismiss this case with prejudice after having already dismissed it without prejudice has no effect.

In *Harris v. Billings* (1993) 16 Cal.App.4th 1405, the Court stated: "Following entry of a dismissal of an action by a plaintiff under *Code of Civil Procedure* Section 581, 'a trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney's fees.

[citations.]' The trial court in this case had no jurisdiction to vacate the dismissal without prejudice, properly entered pursuant to appellant's request, or to enter a new order dismissing the action with prejudice."

This is exactly what plaintiff attempted to do here. He then somehow believes by doing so he has changed the judgment, made it a new judgment and starts the time to appeal all over again. This is completely inconsistent with the *Code of Civil Procedure*, and it makes no sense in the real world. If the changing of the form of dismissal were permitted, then a dismissal would have no effect since the status of the case could be changed after it was already dismissed. Moreover, even if such a dismissal could be changed, it could not possibly permit the Judgment that was approved by counsel and entered by the Court in this case, to become appealable. An appeal from the Judgment had long been barred and was still untimely.

Even if Appellants attempt to file a new dismissal could somehow transform the five year old Judgment to make it appealable, this appeal would still be untimely. If Appellant had the ability to file a dismissal with prejudice after already dismissing the case, he continuously had that ability for over five years. Here, Appellant chose not to utilize that ability and instead appealed to the Court of Appeal, responded in the Supreme Court, filed numerous trial court motions to change the Judgment and Stipulation, filed numerous Petitions for Writ of Mandate in the Court of Appeal and for review in this Court, all the while knowing all he had to do was to file a court

form to make the Judgment appealable. Then, more than one and a half years after this Court advised him of the issues with the Judgment and after taking all of these actions, Appellant decides to file a new dismissal. Even if it were otherwise effective, it is too late in this matter.

VI. EVEN IF TIMELY, THE JUDGMENT IS NOT APPEALABLE PURSUANT TO THE RULE OF *KURWA 1.*

Even if the dismissal with prejudice were effective as to Appellant's claim, the Cross-Complaint for defamation by Respondent has not been dismissed with prejudice. Significantly, Appellant attempts to skirt more significant problems by utilizing a new dismissal, and ignores his Stipulation to waive the statute of limitations and to preclude reinstitution of the case. It is that Stipulation (which Appellant has unsuccessfully attempted to set aside), that is the real problem, not the nature of the dismissal.

Appellant cited and continues to cite the case of *Vedanta Society of Southern California v. California Quartet, Ltd.*. (2000) 84 Cal.App.4th 517, 525. The citation is misleading and irrelevant. *Vedanta* did not discuss a situation where a stipulation to waive the statute of limitations in an effort to manipulate the appellant court's jurisdiction had been made. However, to the extent an innocuous footnote, not dealing with the stipulation question, was mentioned in

that case, it is not controlling. Indeed it was implicitly disapproved by this Court's decision in *Kurwa 1*.

Vedanta is also not controlling because the question of appealability was not a disputed issue on appeal in that case. Therefore, any language in the footnote or otherwise is dicta. Significantly, the *Vedanta* case did not include a waiver of the statute of limitations. Moreover, this Court approved the holding in *Hill v. City of Clovis* (1998) which made it clear that the reasoning in a line of cases beginning with *Don Jose's Restaurant* (1997) 53 Cal. App.4th 115, applied. That line of cases held that a cause of action in a cross-complaint that was dismissed without prejudice and had a waiver of the statute of limitations made a judgment non-appealable. That is the scenario here, not the scenario in *Vedanta*.

Appellant argues that the *Hill* case does not apply because the Appellant Court in that matter ordered a court to vacate the judgment and the stipulation on which it was based. The *Hill* court noted that the appellant there "May still challenge the trial court's rejection of their ... contention if and when *Clovis'* first and third causes of action are adjudicated or otherwise disposed of and appellants file a timely appeal from the ultimate judgment,]" and that the "appellants retain the right of appellate review at the appropriate time but not earlier. (Ibid.) In a subsequent appeal in the same action, the appellate court noted, "The parties' added provisions to the stipulated judgment which resolved the first and third causes of action in the city's cross-complaint which had not been addressed earlier," resulting in a final

and appealable judgment. *Hill v. City of Clovis* (2000) 80 Cal.App.4th 438, 445.)

The developments following dismissal of the initial appeal in *Hill* do not provide any support for Appellant's position. In *Kurwa 1*, this Court did not order the trial court to vacate the Judgment or the Stipulations. Indeed, the *Hill* case specifically mentioned Appellants could only obtain review when all causes of action were resolved. In this case Appellant bargained with Respondent to dismiss his defamation cause of action without prejudice and with a waiver of the statute of limitations. The agreement provided Appellant with monetary and exposure protection and he is now bound by that agreement. As a result of that agreement, Respondent's defamation cause of action has not been resolved. (As previously mentioned, neither has Appellant's defamation cause of action been resolved because his subsequent attempt to change the status of the dismissal was a nullity.)

This Court's decision in *Kurwa 1* is controlling. When a trial court resolves some causes of action and others are voluntarily dismissed and the parties have agreed to preserve the voluntarily dismissed counts for potential litigation upon the conclusion of an appeal from the Judgment entered, the Judgment is one that fails to complete the disposition of all causes of action between the parties and is not appealable. *Kurwa*, supra, 57 Cal.4th at 1105.

The reality is the status of the record in this case not changed, Appellant's problems with appealability have not changed and he has not suddenly obtained new appellant rights with all of his subsequent machinations.

VII. RESPONDENT IS NOT MISUSING THIS COURT'S OPINION. THERE ARE NO EQUITIES THAT FAVOR CREATING AN EXCEPTION FOR APPELLANT.

Appellant complains that it is somehow unfair to preclude him from appealing a case in which he specifically agreed he would not be able to appeal unless certain conditions were met. Here, none of the conditions that Appellant bargained for were met and he has voluntarily given up any right to appeal even if it were otherwise timely appealable.

The right to appeal is not absolute as Appellant contends. It may be given up or lost in numerous ways. A party may agree for economic or other strategic reasons to waive the right to appeal. A party's right to appeal may be barred because he waits too long to notice the appeal, fails to pay the appropriate fees, or otherwise fails to follow rules of appeal.

In this case, Appellant entered into a Stipulation with very specific requirements to permit either party to move forward. That agreement was made knowingly, with the advice of counsel at the time of trial. The agreement was approved by the Court and the

Judgment entered thereafter was approved by counsel. Trial counsel has never filed any declarations to support any of the motions filed by Appellant to set aside or otherwise change the Stipulation or dismissal.

Appellant is bound by that to which he agreed. Respondent is not making any claim that would make the agreement any broader then its own terms. He is not seeking to expand the agreement, he is merely expecting the agreement to be enforced. The agreement gave various rights to both parties and provides benefits and protection to both parties. Appellant cannot change or ignore the agreement because he has new counsel or because he would like to proceed in a different way.

None of the remedies suggested by Appellant are useful or appropriate. The bright line test set forth in *Kurwa1* is effective and consistent with the intent of the rules and statutes governing appeals. Creating exceptions to that rule as suggested by Appellant would return the rules of appellate practice back to the uncertainty that preexisted this Court's ruling in *Kurwa 1*. There is no public benefit for any such changes. *Kurwa 1* is controlling in this matter and nothing has changed since its issuance that would support changes to that ruling.

This litigation has been pending for more than 12 years. The case should finally be ended. Appellant's agreements that were helpful to him when made, are not helpful to him now. Unfortunately, he should not receive a "do over" because he has a new strategy. That

would be unfair to Respondent who has complied with all prior agreements and Orders.

VIII. CONCLUSION

The relief requested by Appellant is really quite extraordinary. He asks this Court to vacate an agreement to waive the statute of limitations that was entered into by all parties. This request was denied by the Trial Court based upon the evidence before it. Appellant has provided no new evidence to this Court nor could it properly do so. Appellant's second option is to ignore this Court's own opinion, ignore the agreement of the parties, ignore the reliance on that agreement by Respondent for 10 years, and create a special exception just for Appellant because he no longer likes the deal that he made.

The Order of the Court of Appeal should be affirmed and this appeal should be dismissed.

DATED: January 31, 2017

Respectfully Submitted,
DALE B. GOLDFARB

By: 

DALE B. GOLDFARB
Attorneys for Appellants,
Mark B. Kislinger, Mark B. Kislinger, Ph.D, M.D., Inc., and Mark B. Kislinger, M.D., Inc.

CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the ANSWER BRIEF ON THE MERITS is proportionately spaced, has a typeface of 14 points and according to the Word processing program used to generate the document contains 4,040 words.

DATED: January 31, 2017

Respectfully Submitted,

DALE B. GOLDFARB

By: 

DALE B. GOLDFARB
Attorneys for Appellants,
Mark B. Kislinger, Mark B. Kislinger, Ph.D, M.D., Inc., and Mark B. Kislinger, M.D., Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 West Seventh Street, 29th Floor, Los Angeles, California 90017-2547.

On January 31, 2017, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as stated on the attached service list:

[X] **BY MAIL** - I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[ ] **BY PERSONAL SERVICE** - I caused such envelope to be delivered by hand.

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[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 31, 2017, at Los Angeles, California.

MARTHA M. SUNGIA

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