No. S234617

In the Supreme Court of California

BADRUDIN KURWA,
Plaintiff and Petitioner

vs.

MARK B. KISLINGER et al.,
Defendants and Respondents.

After a Decision of the Court of Appeal,
Second Appellate District, Division Five
Case No. B264641

Appeal from the Superior Court of the State of California
County of Los Angeles. Case No. KC045216
Honorable Dan Thomas Oki, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to rule 8.520(f) of the California Rules of Court, the California Academy of Appellate Lawyers respectfully requests leave to file the attached amicus curiae brief in support of Petitioner Badrudin Kurwa on the issue as to which the Court granted review: "Can plaintiff take an appeal in the current posture of this litigation?" (Order, Aug. 10, 2016.)

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy has participated as amicus curiae in many cases before this Court, including, most recently, *Ryan v. Rosenfeld*, Case No. S232582 (to be argued Apr. 5, 2017), *Jameson v. Desta*, Case No. S230899 (review granted Jan. 27, 2016), *F.P. v. Monier*, Case No. S216566 (review granted Apr. 16, 2014), *Conservatorship of McQueen* (2014) 59 Cal.4th 602, and in this Court's earlier review of this same dispute — *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097.

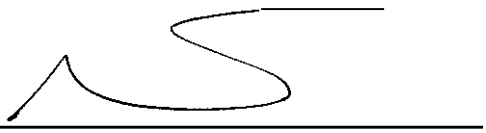
The Academy has no interest in or connection to either side of this case. No party or party's counsel authored the attached amicus curiae brief in whole or in part. Other than the Academy and its

members, no person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Robert Gerstein, counsel for plaintiff and petitioner Badrudin Kurwa, is a member of the Academy and its amicus curiae committee, but, in accordance with the Academy's rules, did not participate in the Academy's decision to file this brief or in its preparation.

DATED: March 31, 2017

COLANTUONO, HIGHSMITH & WHATLEY, PC



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I. INTRODUCTION

This Court granted review to decide if Appellant Badrudin Kurwa may appeal here, given that he and Respondent Mark B. Kislinger stipulated to dismiss without prejudice and toll defamation claims Kislinger asserts against Kurwa. This Court ruled that stipulation reflected a mistake of law in an earlier phase of this litigation, because parties cannot agree to create appellate jurisdiction while reserving claims so as to preclude entry of a final, appealable judgment. (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa I*).) Yet Kislinger will neither abandon nor try his claims and Kurwa has found no means to compel him to do so. Instead, both lower courts hold him to a mistaken stipulation and impose a Catch-22 — he has no appeal until Kislinger's claims are resolved, but has no means to resolve Kislinger's claims.

Dr. Kurwa's predicament is not unique. Members of the Academy are aware of other situations — including cases filed after *Kurwa I* — in which parties and trial courts sought to facilitate appeal by dismissing claims without prejudice pursuant to tolling agreements. Indeed, trial judges have approved — and even urged — such stipulations. Those would-be appellants presumably will face dismissal by appellate courts with greater appreciation for the esoteric point decided in *Kurwa I*, returning their cases to trial courts also in need of the guidance required here.

This brief argues that a trial court abuses its discretion when it allows a mutual mistake of law to preclude a party from ever obtaining a final, appealable judgment. The result the Court of Appeal would allow is contrary to this Court's stated policy of enforcing the orderly administration of justice and to the Legislature's commands that litigants proceed with reasonable diligence and that courts decide cases without undue delay. Our proposed approach would not require the Court to revisit its prior decisions on the one-final-judgment rule. It would simply extend this Court's precedent that trial courts abuse discretion by denying a party relief from a mutual mistake of law that deprives him of appellate review. Such a holding avoids the need to add yet another exception to the already complex case law regarding the one-final-judgment rule.

II. ARGUMENT

A. IT IS AN ABUSE OF DISCRETION TO ALLOW A MUTUAL MISTAKE OF LAW TO PERMANENTLY BAR APPEAL

We respectfully submit that it was an abuse of discretion for the lower courts to deny Kurwa relief here, barring him from appellate review because of a mutual mistake of law and his opponent's strategic behavior.

Of course, to fail to exercise discretion when warranted is to abuse that discretion. (*S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016; *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118,

1124.) The permitted scope of discretion "resides in the particular law being applied, i.e., in the legal principles governing the subject of the action." (*Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 832–833, internal quotation and citation omitted.) But what guides the exercise of discretion in this unusual situation?

On one hand, there can be no question a court may invalidate any contract, including a stipulation, arising from "[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law." (Civ. Code, § 1578.) Here, not only did the parties misapprehend the law — so did the trial court, which approved a stipulation embodying the misunderstanding of the law that this Court corrected in *Kurwa I*. The law allows parties to unwind contracts based on mistake for a simple reason: there can be no free, mutual, and communicated consent to a contract based upon a common mistake of law. (Civ. Code, §§ 1565, 1567.)

On the other hand, a mistake of law is insufficient in itself to require a trial court to set a stipulation aside; the court retains discretion to refuse rescission if doing so would not serve justice. (*Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, 755 ["Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation."]; cf. *Berry v. Chaplin* (1946) 74 Cal.App.2d 652,

658 ["Courts will not permit the course of justice to be controlled or the conduct of an action to be circumscribed in such manner as to defeat the ends of justice."].)

We submit that discretion to enforce a mistaken stipulation is appropriately limited when the mistake of law is clear and strips a party of her appeal right. Waiver of the right to appeal "should be clear and express" (*Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1088) and any doubt must be resolved against it (*Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 953). (See also *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 509 ["[A]ll things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action."].) Moreover, courts need not countenance "procedural gamesmanship" (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784) that frustrates appeal.

I. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE KISLINGER ACKNOWLEDGES MUTUAL ERROR OF LAW BUT DOES NOT EXPLAIN HIS FAILURE TO PURSUE HIS REMAINING CLAIMS

Kislinger does not deny that he refuses to proceed with a defamation cause of action arising from a business relationship dissolved a decade ago or that his refusal bars Kurwa's appeal. Rather, he stands on a stipulation arising from the mutual mistake of law corrected in *Kurwa I*. Kislinger's counsel acknowledged his

mistake by admitting the intent of the stipulation was to allow his client to first "'test the issue' of fiduciary duty and 'get a ruling' on non-defamation claims" (*Kurwa I, supra,* 57 Cal.4th at p. 1101). This statement evidences a mutual error of law — Kurwa's, Kislinger's, the trial court's, and the Court of Appeal's — which this Court corrected in *Kurwa I.* (*Id.* at p. 1105; see AA at pp. 64–65 [counsel agree to "preserve [Kislinger's] defamation [claim] without prejudice for such time as this case may come back from appeal," 69–70 [trial court dismissing claims without prejudice pursuant to stipulation], 72–73 [stipulation to dismiss signed by trial court].)

Kislinger's brief in this Court does not further explain his actions or disclose any intent to pursue the remaining claims which prevent final judgment, nor does he deny a mutual mistake of law. His Answer Brief on the Merits (ABOM) claims he is not using the stipulated judgment to protect himself but is "merely honoring the agreement that was bargained for" (ABOM, p. 2) — an agreement founded on mutual mistake of law. One cannot "honor" an agreement never properly formed, although one might try to take advantage of such an "agreement." Kislinger claims his defamation claim has not been resolved (*id.* at p. 13), but he fails to acknowledge that the tolling agreement which bars Kurwa's appeal also allows Kislinger to pursue his defamation claim — if and when he should choose.

No one disputes that a trial court has the power to compel a party in Kislinger's position to pursue or abandon a claim. This Court

should now hold that under circumstances like those here, trial courts have the duty to do so. A trial court's discretion should not extend to keeping cases like this in an "appellate netherworld" in which appeal is neither possible nor subject to the running of time in which to pursue it. (*Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 118 (*Don Jose's*).) This scenario creates a permanent, unresolvable conflict between the parties — a perversion of the purpose of courts and the civil laws they enforce to resolve disputes so that parties need not resort to extra-legal means to do so.

Kislinger notes "litigation has been pending for more than 12 years" and asks the Court to end it (ABOM, p. 15), but does not acknowledge that his defamation claim is the bar to final judgment; he does not want peace, but an unappealable victory. Our system of justice does not allow such a victory outside the realm of private binding arbitration — for which the parties here did not contract.

2. Other authority is consistent with allowing Kurwa to rescind the mistaken stipulation

The Court of Appeal addressed a similar situation in which the parties stipulated to a separate judgment that did not decide every cause of action, but which they stipulated would confer appellate jurisdiction. (*Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 441–442 (*Hill*).) Neither party there raised the appealability of the separate judgment; the Court of Appeal raised it sua sponte and concluded it lacked appellate jurisdiction, citing, inter alia, *Don Jose's*. (*Id.* at

pp. 442, 443, 446.) The Court also found the parties' dismissal without prejudice of some claims, as in *Don Jose's*, expressed an intention to retain them for trial after appeal. (*Id.* at p. 444.) The Court made clear, however, that the appellants would not be left without recourse when it vacated both the judgment and the stipulation which produced it. (*Id.* at p. 446.)

Thus, even without a request to unwind a stipulation that could prevent appeal, *Hill* recognized that a mutual mistake of law should not prevent appeal, suggesting that to deny such an appeal would be an abuse of discretion. Similarly, *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79 (*Four Point Entertainment*), followed *Don Jose's* and noted — as here — "the court, not the parties, dismissed the unresolved claims based on a stipulation that is unenforceable because it purports to vest jurisdiction in an appellate court where none exists." (*Id.* at p. 83, fn. 4; see also *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1470 [dismissing appeal and remanding with directions to vacate judgment and underlying stipulation]; cf. *Vedanta Soc. of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 525, fn. 8 [holding *Don Jose's* inapplicable where respondent dismissed claims without prejudice].) What justified judicial refusal to honor mistaken stipulations in *Hill*, *Four Point Entertainment*, and *Hoveida* justifies similar relief here.

3. Refusing to rescind the stipulation is as unfair as allowing multiple appeals

Don Jose's noted "the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld." (*Don Jose's*, *supra*, 53 Cal.App.4th at p. 118.) But here, causes of action the trial court adjudicated now exist in that very netherworld due to Kurwa's inability to appeal, Kislinger's refusal to try his reserved claims, and the trial court's refusal to rescind the mistaken stipulation.

No time is running on Kurwa's right to appeal; this conflict is preserved as in amber — never to be resolved. Just as multiple appeals violate the one-final-judgment rule, so do tactics that prevent even one appeal. (*Kurwa I*, *supra*, 57 Cal.4th at p. 1107 ["manipulation of appellate jurisdiction" is "inconsistent with the one final judgment rule"].)

B. THE LAW'S DIRECTION THAT COURTS TIMELY RESOLVE CASES ALSO SUPPORTS A CONCLUSION THAT THE LOWER COURTS ABUSED THEIR DISCRETION HERE

The Legislature, this Court, and the Court of Appeal have all directed litigants to pursue cases promptly and courts to resolve them promptly. The trial court's refusal to require Kislinger to pursue his remaining claims violated that direction.

Code of Civil Procedure section 583.130 states: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in

the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition." The next sentence states a preference for "the right of parties to make stipulations in their own interests" over dismissal for failure to proceed diligently. But, that policy must have limits; moreover, here, the stipulation was not made in the parties' "own interests" but was a mutual mistake of law and — upon the trial court's dismissal of the reserved claims — legal error, too. The statute also prefers "trial or disposition of an action on the merits" over other outcomes. (See also *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788–789 [remanding with directions to dismiss with prejudice after demurrer sustained and plaintiff sought to dismiss without prejudice, noting "obvious consequence of such a statutory construction would be to prolong, rather than to terminate, lawsuits" and contrary rule "would not serve the orderly and timely disposition of civil litigation"]; cf. *California Crane School, Inc. v. National Commission for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22 ["the court has the power to expedite proceedings which, in the court's view, are dragging on too long without significantly aiding the trier of fact"].)

III. CONCLUSION

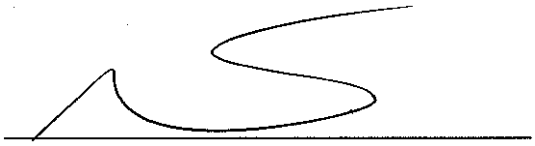
Here, the parties' mutual mistake of law is plain — as *Kurwa I* demonstrates. This Court therefore need not blaze a new trail or identify yet another exception to the one-final-judgment rule to determine whether the lower courts abused their discretion in

refusing to relieve the parties of a stipulation based on mutual mistake of law. It need only apply existing law empowering courts to relieve parties of such stipulations, favoring resolution of cases on their merits, and promoting timely resolution of cases. To do otherwise strips Kurwa of his right to appeal, leaving this conflict unresolved indefinitely.

The Academy urges the Court to hold that a trial court abuses its discretion when it enforces a stipulation based on a mutual mistake of law that precludes a party from ever obtaining a final, appealable judgment. Such a rule is preferable to yet another exception to the already complex law of the one-final judgment rule.

DATED: March 31, 2017

COLANTUONO, HIGHSMITH & WHATLEY, PC



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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(f), the foregoing Brief of Amicus Curiae in Support of Petitioner contains 2,295 words, including footnotes, but excluding the Application, caption page, and tables. This is fewer than the 14,000-word and 8,400-word limits set by rule 8.520(c)(1) of the California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 15, included in Microsoft Office 365 ProPlus 2013.

DATED: March 31, 2017

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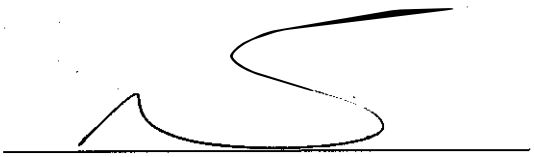

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PROOF OF SERVICE

Badrudin Kurwa v. Mark B. Kislinger, et al.
California Supreme Court Case No. 234617
Second Appellate District, Division Five Case No. B264641

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. On April 4, 2017, I served the document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST

_X_ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope. 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 Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on April 4, 2017, at Grass Valley, California.

Ashley A. Lloyd

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