

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLAM MICHAEL HENSLEY et al.,

Plaintiffs and Appellants,

v.

SAN DIEGO GAS & ELECTRIC
COMPANY,

Defendant and Respondent.

D068276

(Super. Ct. Nos. 37-2008-
00093080A-CU-NP-CTL &
37-2008-00081779-CU-PO-CTL)

APPEAL from a stipulated judgment of the Superior Court of San Diego County,
Richard E. L. Strauss, Judge. Dismissed.

Manuel Corrales, Jr., for Plaintiffs and Appellants.

Quinn, Emanuel, Urquhart & Sullivan, Daniel H. Bromberg, Kenneth R. Chiate,
Jeffrey N. Boozell, Colin B. Vandell; and C. Larry Davis for Defendant and Respondent.

William Michael Hensley (William) and Linda Hensley (collectively, the Hensleys) appeal from a stipulated judgment. Because the stipulated judgment is not a final judgment, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, the Hensleys' Poway home was damaged and an avocado orchard on their 2.3 acre property was destroyed by the Witch Creek Fire. After repairing their property using insurance money, the Hensleys sued San Diego Gas & Electric Company (SDG&E) for negligence, trespass, and nuisance, as well as intentional and negligent infliction of emotional distress. In claiming emotional distress, William alleged that the stress he experienced as a result of the fire and its resulting damage exacerbated his previously quiescent Crohn's disease, which worsened so substantially he had to stop working in February or March 2013.

SDG&E successfully moved for summary adjudication on the Hensleys' intentional and negligent infliction of emotional distress causes of action, leaving emotional distress claims remaining only under William's trespass and nuisance causes of action. The parties filed opposing motions in limine to resolve the issue of whether such damages were recoverable. After oral argument, the trial court ruled that William could not seek recovery of emotional distress damages allegedly caused by exacerbation of his preexisting Crohn's disease under trespass or nuisance causes of action.¹

¹ William filed a writ petition challenging the court's in limine ruling. This court summarily denied the petition in May 2015 (No. D067986).

Rather than proceed to trial, the parties agreed to settle part of the Hensleys' claims and entered a stipulated judgment stating in part:

"to avoid trial on only a small part of . . . [William]'s claimed damages, i.e., [his] property damage claims, and to avoid having to try potential liability before seeking an appeal of the trial court's ruling, and if successful on appeal, having to proceed to trial again to recover all of [William]'s claimed damages, the parties agreed to settle this case in a way that allows [William] to seek an appeal and the right to proceed to trial on all of [his] claimed damages before trying liability, including the Crohn's disease related damages the trial court has ruled are not recoverable[.]"

Despite this language seemingly contemplating a possible postappeal trial, the stipulated judgment also stated the parties were "entering into a settlement agreement in which a monetary amount shall be paid irrespective of the results of the Hensleys' subsequent appeal[.]" The stipulated judgment also recited that the settlement amount being paid by SDG&E was less than what William would recover if he was able to claim and prove all of his Crohn's disease related damages, that the judgment was adverse to the Hensleys, and that the parties "expressly agree that the Hensleys' right to appeal this stipulated judgment shall be preserved."

After the notice of appeal was filed, this court solicited briefing from the parties regarding the finality of the stipulated judgment and its appealability in light of the prohibition against piecemeal disposition and multiple appeals in a single action. In response, the parties submitted a redacted version of their settlement agreement, which is not part of the trial court record but which the parties contend establishes that their settlement agreement is final, regardless of the outcome of the appeal. The parties represent that they have agreed to two alternative amounts for settlement, one if the final

appellate ruling allows emotional distress damages, and a lesser amount if the appellate court concludes emotional distress damages are not recoverable. The court deferred the jurisdictional issue to the merits panel.

DISCUSSION

On the merits of the jurisdictional issue, the parties contend that the stipulated judgment is appealable. We disagree.

"[Code of Civil Procedure s]ection 904.1, subdivision (a) allows appeal '[f]rom a judgment, except . . . an interlocutory judgment . . .'"² (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1101 (*Kurwa*).)³ This rule, which is known as the one final judgment rule, precludes an appeal from a judgment disposing of fewer than all causes of action extant between the parties, even if the remaining causes of action have been severed for trial from those decided by the judgment. A judgment that disposes of fewer than all causes of action asserted by two parties against each other is necessarily " 'interlocutory' " and, thus, not final if any cause of action remains pending between them. (*Ibid.*) The theory underlying the requirement of finality is that piecemeal dispositions and multiple appeals in a single action would be oppressive and costly and that a review of the superior court's intermediate rulings should await the final disposition of the case. (*Id.* at p. 1102.)

² All further statutory references are to the Code of Civil Procedure.

³ As shown by the earlier proceedings in this case, a petition for a writ, rather than an appeal, is the authorized means for seeking review of judgments and orders that lack the finality required by section 904.1, subdivision (a). (*Kurwa, supra*, 57 Cal.4th at p. 1102.)

The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 (*Jennings*); *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696) and a reviewing court is required to raise the issue sua sponte "whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by . . . section 904.1." (*Jennings*, at p. 126.) A judgment that leaves nothing to be decided between a party and its adversary, or that can be amended to encompass all controverted issues between them, is final for purposes of section 904.1, subdivision (a). (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.)

In most cases, a stipulated judgment is not appealable. (*Harrington-Wisely v. State of California* (2007) 156 Cal.App.4th 1488, 1495.) The parties cannot create appellate jurisdiction by stipulation. (*Kurwa, supra*, 57 Cal.4th at pp. 1103, 1107.) Were we to allow this, "we would in effect be permitting the parties to confer jurisdiction upon us where none exists." (*Id.* at p. 1103.) "To permit this kind of manipulation of appellate jurisdiction—in effect, allowing the parties and trial court to designate a substantively interlocutory judgment as final and appealable—would be inconsistent with the one final judgment rule." (*Id.* at p. 1107.)

We must determine whether or not the stipulated judgment in the present case is final based on its wording. The language of the judgment is ambiguous, even as to whether the question of liability has been decided. In part, the stipulation states: "to avoid having to try potential liability before seeking an appeal of the trial court's ruling, and if successful on appeal, having to proceed to trial again to recover all of [William]'s

claimed damages, the parties agreed to settle this case in a way that allows [William] to seek an appeal and a right to proceed to trial on all of [William]'s claimed damages before trying liability, including the Crohn's disease related damages the trial court has ruled are not recoverable[.]" These words strongly imply that no final determination has been reached on the issue of liability, and that after the appeal is decided, a trial on liability and damages would transpire.

Despite this language indicating a postappeal trial could occur, the parties reference another provision in the stipulated settlement agreement to assure this court that the case will be finally settled without trial for an agreed upon sum that will vary depending on the outcome of the appeal. "[T]he parties agree that the Hensleys' appeal rights are preserved, despite entering into a settlement in which a monetary amount shall be paid irrespective of the results of the Hensleys' subsequent appeal"; however, to the extent this vague wording suggests a final settlement has been reached regardless of the outcome on appeal, it directly conflicts with the language discussed in the previous paragraph which contemplates a trial on the issue of liability and damages and creates a conflict that cannot be readily resolved.

Faced with ambiguities in the stipulated judgment, and to bolster their argument that no postjudgment trial will be required, the parties for the first time on appeal attempt to introduce their settlement agreement as evidence for this court's consideration, which they contend includes a promise to settle after the appeal regardless of the result. However, this agreement is not incorporated into the judgment and constitutes a kind of

parole evidence that was not a part of the trial court record and is not properly before this court.⁴

In addition, the parties' stipulated judgment contravenes the one final judgment rule because it does not completely resolve the issues of liability and damages, excluding the contested emotional distress damages. For example, the trial court record does not reflect an agreement on an exact amount of property damages, nor does it reflect an amount for annoyance and discomfort damages available in a trespass case. (See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 455, 457.) Since these issues remain unresolved, the stipulated judgment is interlocutory and does not eliminate the possibility of further litigation and possible further appellate review regardless of the decision on the first appeal on availability of emotional distress damages. Moreover, the ambiguity of the settlement terms in the stipulated judgment creates the potential for a

⁴ Because the settlement agreement is not a part of the record on appeal, SDG&E filed a postjudgment motion under section 909 to admit the settlement agreement into evidence for first time on appeal. SDG&E offers the settlement agreement to support its contention that no postappeal trial will be required.

The circumstances under which we can receive new evidence after judgment are very rare. (*Phillippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1090.) For us to take new evidence under section 909, "the evidence normally must enable the Court of Appeal to affirm the judgment, not lead to a reversal. [Citations.] The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings." (*Ibid.*)

As we have discussed, *ante*, the stipulated judgment itself presents conflicting evidence as to its finality. On the one hand, it states that a trial on liability would take place after the appeal. However, it also suggests no postappeal trial will be required because the parties have agreed to a settlement, avoiding the possibility of a second postjudgment trial and possible second appeal. In light of this conflicting evidence, the motion to admit the settlement agreement is denied.

complete misunderstanding between the parties that could necessitate additional postappeal trial court proceedings. Considering all of these circumstances, we conclude that the stipulated judgment is not final and thus not appealable.

The parties contend that the stipulated judgment is more efficient than a trial followed by appellate review. Even assuming the correctness of this questionable contention, however, the parties cannot avoid the one final judgment rule and confer appellate jurisdiction over this case where none exists. (*Kurwa, supra*, 57 Cal.4th at pp. 1103, 1107.)

Respondent, citing *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399-403, contends that a consent judgment does not bar standing to appeal where the appellant's consent to judgment was given to facilitate an appeal. However, *Norgart* is distinguishable because it constitutes an appeal from a *final judgment* entered after an order granting summary judgment that completely disposed of the sole cause of action in the case. Here, the appeal seeks to challenge a nonappealable, interlocutory order made before complete disposition of the damages component of certain causes of action. Because there is no authority permitting an appeal from an order granting an in limine ruling and in the absence of a final judgment, this court lacks jurisdiction to resolve this appeal.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs on appeal.

PRAGER, J.*

WE CONCUR:

O'ROURKE, Acting P. J.

IRION, J.

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.