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January 28, 2015

Hon. Norman L. Epstein, Presiding Justice
Hon. Thomas L. Willhite, Jr., Associate Justice
Hon. Audrey B. Collins, Associate Justice
Court of Appeal for the State of California
Second District, Division 4
300 S. Spring Street, Floor 2 North Tower
Los Angeles, California 90013-1213

RE: *Simona Wilson v. Southern California Edison Company*
2d Civil No. B249714
Response to Court's request for supplemental brief

Honorable Justices:

This letter responds to the Court's December 31, 2014 request for supplemental briefing on Wilson's nuisance claim.

Although the letter asks the parties to assume "that Wilson's [nuisance and other] claims do not come within the exclusive jurisdiction of the California Public Utilities Commission," the very questions the Court has asked demonstrate that this conclusion would be mistaken. We will show why this is so after answering the Court's questions.

ANSWERS TO THE COURT'S QUESTIONS

Question No. 1: Did the jury consider irrelevant evidence when determining whether the seriousness of the harm to Wilson outweighed the public benefit of Edison's conduct? Answer: Yes

a. Overview.

"Harm" has a special meaning in nuisance law. The presence of harm, even if unquestionably caused by the defendant's conduct, doesn't automatically mean liability. "'The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937-938 (*Covalt*), quoting Rest.2d Torts (1979) (Restatement), § 822, com. g.)[1] Accordingly, "for a nuisance to exist there must be harm to another or the invasion of an interest, but there need not be liability for it. If the conduct of the defendant is not of a kind that subjects him to liability (see § 822), the nuisance exists, but he is not liable for it." (§ 821A, com. c.)

As our Supreme Court explained in *Covalt*, there are two additional requirements: First, the harm must be "substantial" or "significant"; second, it must be "unreasonable." (13 Cal.4th at p. 938.)

- In assessing whether harm is "substantial" or "significant," "[t]he degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community?" (*Covalt*, *supra*, 14 Cal.4th at p. 938.) "If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies [*sic*] of the particular plaintiff may make it unendurable to him." (§ 821F, com. d.) In short, there are no eggshell plaintiffs in nuisance law.
- To meet the second requirement that the harm be "unreasonable," "the gravity of the harm [must] outweigh[] the social utility of the defendant's conduct, taking a number of factors into account." (*Covalt*, *supra*, 13 Cal.4th at p. 938.)

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[1] Further undesignated citations are to the Restatement.

Our principal briefs demonstrated that the jury could not possibly have awarded over a million dollars for emotional distress unless it based the award on Wilson's physical symptoms. (AOB 65-77.) The same is true with respect to the jury's determination of whether there was harm for purposes of nuisance liability: The jury could not have found "substantial" or "significant" harm without considering Wilson's physical symptoms and ignoring the idiosyncratic nature of Wilson's reaction to the miniscule level of current she felt.

b. The jury improperly considered evidence of harm that was not relevant to the harm/utility balance.

There is no dispute that Wilson felt current—a "tingling sensation" (5RT2431-2432)—because of the existence of stray voltage on her property, and that stray voltage is an unavoidable byproduct of Edison's operation of its electrical distribution system. Stray voltage is unavoidable because, as Wilson's expert Bennett testified, a grounded system "will always do that" (4RT2170), and the PUC required Edison's system to be grounded.

1. Wilson's physical symptoms and any resulting emotional distress were irrelevant given that there was no evidence that the stray voltage could or did cause Wilson's physical symptoms—indeed, all evidence was contrary.

What *harm* did Wilson suffer? The undisputed evidence was that Wilson experienced a tingling sensation so barely perceptible that it took her several weeks to realize she was feeling electricity, and that the current was at such a low level that it posed no threat of injury. (AOB 6-9, 16-28.) Annoying? Certainly. But "substantial" or "significant"? Certainly not.

Wilson never claimed any damage to the property itself, such as a diminution in value. (See 2RT604:16-23 [counsel disclaims property damage].) Instead, the *only* harm she ever claimed was emotional distress. And she has consistently and unequivocally—at trial, in her respondent's brief and at oral argument (see Recording, 47:20 et seq.)—grounded her emotional distress claim primarily on her panoply of physical symptoms.

Yet Wilson has also conceded—tacitly in her respondent's brief by not addressing the question, and explicitly at oral argument (Recording, 47:20 et seq.)—that no medical evidence connects the stray voltage with her symptoms. Beyond that, the only evidence

on the subject, including the testimony of Wilson's own expert and one of her treating physicians, *negated* the possibility of causation. (See AOB § III.C.) Wilson's physical symptoms and any resulting emotional distress were therefore irrelevant. But because the trial court refused Edison's medical probability instruction (see AOB § III.E.), the jury lacked the necessary filter to screen this irrelevant evidence from its consideration.

2. Wilson's physical symptoms and resulting emotional distress were also irrelevant because the undisputed evidence established that they were the result of Wilson's hypersensitivity and idiosyncratic reaction to a barely perceptible level of current.

As noted above, there are no eggshell plaintiffs in nuisance law. Yet on the undisputed record in this case, the only permissible conclusion the jury could have reached was that Wilson was hypersensitive—"the idiosyncracies [*sic*] of the particular plaintiff [made the current] unendurable to [her]." (§ 821F, com. d.) Why? The undisputed testimony demonstrated that if causation of Wilson's symptoms could occur at all, it would have to be extremely rare—not the impact that "persons of normal health and sensibilities living in the same community[]" would experience. (*Covalt*, *supra*, 13 Cal.4th at p. 938.)

Wilson was also idiosyncratic in her reaction to Edison's advice about how to mitigate the effects of stray voltage. She refused Edison's offer to install plastic insulators because she believed that plastic piping was "substandard" and would just be a "bandaid" (4RT1893-1894)—even though, apart from her remodel, there was already plastic piping throughout her house (ART37-38, 101; AA1106-1114; see AOB 20-21). She testified that she never would have accepted the offer, because "[t]he only thing that would be acceptable to me is to completely eliminate the stray voltage on my property" (4RT1903)—an impossibility, as her own expert testified. So instead, she "put duct tape on every single fa[u]cet, every single fixture in my house" and "put rubber mats down everywhere." (3RT1579; 4RT1836; 5RT2493-2494.) No reasonable jury could see this behavior as the reaction of someone "of normal health and sensibilities living in the same community[.]" (*Covalt*, *supra*, 13 Cal.4th at p. 938.)

3. The jury necessarily considered this irrelevant evidence of Wilson's symptoms and resulting emotional distress in determining both liability and damages on the nuisance claim.

Liability. The jury was instructed to determine whether "the seriousness of the harm outweigh[ed] the public benefit of Southern California Edison's conduct[.]" (1AA133.) But the only "harm" Wilson ever identified that might qualify as "serious" was her physical symptoms and the resulting emotional distress—and no evidence connected those with stray voltage.

Damages. Although the special verdict form described nuisance damages as "Past Damages for Interference With Use/Enjoyment of Property" (1AA134), and although the court noted that nuisance damages "'are distinct from general damages [f]or mental or emotional distress'" (6RT2794, quoting use note for CACI No. 2031), the relevant jury instruction speaks only in terms of "annoyance and discomfort caused by the injury to her peaceful enjoyment of the property that she occupied" (ART152).

Wilson drew no meaningful distinction, either in her presentation of the evidence or in closing argument, between symptoms/emotional distress and any other kind of harm, beyond parroting the words of the special verdict (not the instruction). Everything was about Wilson's distress and the symptoms that purportedly caused it. (See 7RT3340-3341 [counsel argues that "[h]aving electricity all over your fixtures, it effectively destroyed her use and enjoyment of the home. . . . It's a nightmare"; leaving aside the unsupported exaggeration—"all over [her] fixtures"—the barely-perceptible current could only be a "nightmare" because of the distress/symptoms].) This irrelevant evidence unquestionably played a major role in the damages award. (See AOB § III.)

Question No. 2: Was the jury instructed on the factors it was to consider to determine whether the seriousness of the harm to Wilson outweighed the public benefit of Edison's conduct? Answer: No.

a. The Court may properly consider the absence of sufficient jury instructions on the harm/utility balance.

We first acknowledge a threshold issue. Not evident from the appendix is that the parties jointly requested the CACI nuisance instruction (CACI No. 2021) that the trial court gave (ART151-152 [reading of instructions]), and an appellant ordinarily cannot challenge an instruction that it requested. But the Court certainly has the *power* to

address the purely legal issue of the instruction's correctness on its own initiative if, as the Court has done here, it provides the parties an opportunity to brief the issue. (Gov. Code, § 68081.)

A jointly-requested jury instruction is nothing more than a concession regarding the applicable law, and it is well settled that "an appellate court is never bound by concessions of counsel as to the applicable law . . . ." (*Amer. Auto. Ins. Co. v. Seaboard Surety Co.* (1957) 155 Cal.App.2d 192, 200, citing *Desny v. Wilder* (1956) 46 Cal.2d 715, 729; accord, *Pease v. Brown* (1960) 186 Cal.App.2d 425, 430, fn. 6; see also, e.g., *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438, 449, disapproved on another point in *State of California v. Superior Court* (2004) 32 Cal.4th 1234 [same].)

There is an analogy in new trial motions. "If error appears in the record, the power of the trial court to grant a new trial is not limited by the conduct of the parties in inviting such error" (*McCarty v. Department of Transportaion* (2008) 164 Cal.App.4th 955, 984, internal quotation marks and citations omitted) or in waiving the issue by failing to object (*Neal v. Montgomery Elevator Co.* (1992) 7 Cal.App.4th 1194, 1199). This power extends to instructional errors: "Where the jury has been erroneously instructed and the trial court has determined that the error was prejudicial, we do not believe that it is precluded from granting a new trial merely because there may be said to be a waiver or an estoppel on the part of one of the parties. [Citation.] To hold otherwise would mean that the trial court, by reason of the action of the parties, would be powerless to correct what might be an obvious miscarriage of justice." (*McCarty, supra,* 164 Cal.App.4th at p. 984, internal quotation marks omitted [citing numerous cases].) We have found no authority suggesting that an appellate court's power is any more constrained.

Moreover, although "there ordinarily is no duty to instruct in the absence of a specific request by a party," there is an exception: "a complete failure to instruct on material issues and controlling legal principles which may amount to reversible error." (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

This Court has good reason to exercise its power here. That an instruction comes from CACI is no guarantee of correctness. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298, fn. 6 ["Plaintiff suggests, without citation to any authority, that CACI instructions are entitled to a 'presumption of correctness.' We reject that

suggestion as unsupported by the case law"].) But it is certain that parties and trial judges will continue to rely on erroneous CACI instructions until the appellate courts correct them.

CACI No. 2021 is both erroneous on its face and incomplete in its failure to provide meaningful guidance on the factors that juries must consider in evaluating a nuisance claim. As we demonstrate below, these insufficiencies almost certainly affected the outcome.

b. In evaluating instructional error, the Court must construe the evidence favorably to the appellant.

When reviewing a claim of instructional error, the Court does not, as with a review for substantial evidence, construe the evidence favorably to the respondent. Rather, the Court "must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing [party] and rendered a verdict in [that party's] favor on those issues as to which it was misdirected." (*Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 5, internal quotation marks and citations omitted.) Accordingly, although we believe that the evidence on which the instructional errors bear is undisputed and uniformly favors Edison, if there is any doubt the Court must assume that the jury, if properly instructed, might have found for Edison.

c. CACI 2021 is erroneous.

Nothing in CACI No. 2021 requires the plaintiff to prove that the harm she has suffered is *substantial* or *significant.* That is directly contrary to *Covalt*, which states that the plaintiff *must* prove "that the invasion of the plaintiff's interest in the use and enjoyment of the land was *substantial*, i.e., that it caused the plaintiff to suffer '*substantial actual damage.*'" (*Covalt, supra,* 13 Cal.4th at p. 938, emphasis added; see also § 821F [harm must be "significant"]; § 821F, com. c ["By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance"].)

If anything, CACI No. 2021 suggests the opposite. It states, as the fifth element that the plaintiff must prove, "[t]hat an ordinary person would be reasonably annoyed or disturbed by [*name of defendant*]'s conduct." (CACI No. 2021; see ART151.] Not only

does this fail to convey the idea of "substantial" or "significant," but the use of "reasonably" to modify "annoyed or disturbed" suggests that the effect of the conduct need only be moderate. (See <http://www.merriam-webster.com/dictionary/reasonable> [as of Jan. 26, 2015] [alternative meaning of "reasonable" is "moderate, fair <a reasonable chance> <a reasonable price>"].) Whatever "reasonably" means in CACI No. 2021, it does *not* mean "substantial" or "significant."

Compounding this deficiency is the sixth element, which states that the plaintiff must prove "[t]hat [*name of plaintiff*] was harmed." (CACI No. 2021.) Again, nothing suggests that the harm must be "significant." Rather, given the use of "reasonable" in the fifth element, a jury could conclude that *any* measurable harm will suffice.

d. The trial court failed to instruct the jury on the factors to apply in the harm/utility balance.

These deficiencies could at least arguably have been cured by the inclusion of instructions embodying the Restatement factors that *Covalt* requires to be part of the analysis. (*Covalt*, *supra*, 13 Cal.4th at p. 938 ["The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. (Rest.2d Torts, §§ 826–831.)"].) But that did not happen.

1. The Restatement factors.

The Restatement test approved by *Covalt* involves a detailed, step-by-step approach to analyzing whether a defendant should be liable for nuisance, with 16 sections and commentary spanning almost 60 pages. Obviously we do not suggest that a jury should receive anything close to this length. But the Restatement's detail demonstrates that the subject is too complicated to be adequately addressed by a single instruction of just over 150 words.

The analysis begins with section 822, which requires that the "invasion of another's interest in the private use and enjoyment of land" be either "intentional and unreasonable" or unintentional but actionable as negligent or reckless conduct. Sections 824-825 (there is no section 823) define the type of conduct that can trigger liability (i.e., acts and certain failures to act) and whether conduct is intentional.

Section 826's definition of "unreasonable" triggers the harm/utility analysis: An intentional invasion is unreasonable if "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."

The next two sections provide indispensable guidance for undertaking the harm/utility balance.

Section 827 addresses the "gravity of the harm":

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) The extent of the harm involved;
>
> (b) the character of the harm involved;
>
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
>
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
>
> (e) the burden on the person harmed of avoiding the harm.

Five pages of commentary illuminate how these factors should be applied.

Section 828 addresses "the utility of the actor's conduct":

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) the social value that the law attaches to the primary purpose of the conduct;
>
> (b) the suitability of the conduct to the character of the locality; and
>
> (c) the impracticability of preventing or avoiding the invasion.

Again, five pages of commentary provide further guidance.

Sections 829A, 830 and 831 and their many pages of commentary provide still more factors, including whether the harm is "so severe as to require a holding of

unreasonableness as a matter of law" (§ 829A, com. b); whether "the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship" (§ 830); and whether the plaintiff's use of the property is "well suited to the character of the locality" and the defendant's conduct is "unsuited" to that character (§ 831).

2. The need for instructions reflecting the Restatement factors.

Even if CACI No. 2021's seven elements were accurate—as shown above, they are not—the instruction gave the jury no guidance on how to undertake the required harm/utility balance. At the very least, the jury needed sections 827 and 828.

Harm. Either in the basic seven elements or in additional factors, the jury should have learned not only that the harm must be substantial, but also that it must evaluate harm from an objective standpoint and that it may not consider "the idiosyncracies [*sic*] of the particular plaintiff." (§ 821F, com. d.) That would have let the jury know that even if Wilson's symptoms might have been relevant to her negligence and IIED claims, they were irrelevant to her nuisance claim, because there was no basis on which the jury could properly conclude that "normal persons" (*ibid.*) would have suffered them.

In addition, from section 827 the jury would have learned that in determining harm, it must consider "the burden on the person harmed of avoiding the harm." The undisputed evidence was that Wilson could easily have eliminated touch potential herself—the burden of doing so was insignificant—and for purposes of this discussion the Court must presume that the jury could have accepted Edison's evidence that it offered to pay for the work. (See p. 7, *ante*.)

Utility. The most dramatic example of the need for guidance is Wilson's argument to the jury that on the utility side of the balance it should weigh the utility of the emission of stray voltage, rather than the utility of Edison's distribution of electricity—even though the latter is unquestionably "the primary purpose of [Edison's] conduct." (§ 828, subd. (a).) Indeed, all three of section 828's factors bear heavily on the analysis, but the jury received no instruction about them.

In addition to the primary purpose factor, section 828 requires consideration of the extent to which the defendant's conduct was "suitab[le] . . . to the character of the locality." (§ 828, subd. (b).) Given that electrical distribution substations have to be near

the neighborhoods they serve, this factor would add weight to the utility side of the scale—but the jury never knew that it must consider this factor.

Section 828 also requires consideration of "the impracticability of preventing or avoiding the invasion." (§ 828, subd. (c).) The undisputed evidence was that stray voltage was inevitable—it wasn't just "impracticab[le]," but *impossible*, to avoid. That factor, too, should have weighed on the utility side of the scale—but again the jury was never told to consider it.

Question No. 3: Should the Court reverse the jury's verdict on the nuisance claim and remand for a new trial because of the foregoing matters? Answer: The Court should reverse, but Wilson's failure of proof requires a reversal with directions to enter judgment for Edison on the nuisance claim. At a minimum, the jury's consideration of irrelevant evidence and instructional error require a new trial.

a. The Court should reverse with directions to enter judgment for Edison on the nuisance claim because the only relevant evidence established that, as a matter of law, Wilson suffered no "harm" sufficient to even trigger harm/utility balancing, much less harm that could outweigh the indisputable social utility of providing electricity.

If one excludes Wilson's symptoms from consideration as irrelevant—whether because of the absence of an evidentiary link to her emotional distress or because they demonstrate that Wilson's harm was idiosyncratic—then no substantial evidence remains that would support a determination that Wilson suffered the substantial harm required for nuisance liability. That means the inquiry stops. No harm/utility balancing need be done. (See p. 4-5, *ante*.)

Even assuming that balancing is appropriate, the Restatement factors, applied to the undisputed evidence, yield extremely low to non-existent harm and extremely high utility. The balance therefore weighs so heavily on the utility side of the scale that the Court can properly find that Wilson has no nuisance claim as a matter of law.

Thus, for both reasons, the proper result is not a new trial, but judgment for Edison on the nuisance claim. It has long been the law that "'[w]hen the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new

trial is ordinarily allowed, save for newly discovered evidence.'" (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919, quoting *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661.) Under these circumstances, "'a reversal with directions to enter judgment for the defendant is proper.'" (*Ibid.*)

In addition, and assuming that the Court does not otherwise reverse Wilson's IIED verdict, reversal with directions of the nuisance verdict would require a new trial on punitive damages, even if the Court were to conclude that substantial evidence supports the punitive damages verdict. That is because the special verdict on punitive damages did not distinguish between the nuisance and IIED claims. (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 977, 1004 [although the punitive damages award was supported by substantial evidence, the judgment did not attribute it to a specific claim; accordingly, reversal of one of the claims that might have supported punitive damages required that the punitive damages award be reversed as well].)

b. At a minimum, the Court should order a new trial on the nuisance claim because, in addition to refusing Edison's medical probability instruction, the trial court failed to properly instruct the jury on the elements of a nuisance claim.

Even if the Court concludes that there was enough relevant evidence, it should nevertheless reverse because of instructional error. As demonstrated above, not only did the solitary, brief instruction on nuisance misstate the law, but in addition the jury received no guidance on how to undertake the single most important task in assessing liability for nuisance: weighing "the gravity of the harm" against "the social utility of the defendant's conduct." (*Covalt, supra*, 13 Cal.4th at p. 938.) And without the medical probability instruction, the jury was free to treat Wilson's claimed harm as very grave indeed.

To establish prejudice, Edison need only show that the result would probably have been different. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [Prejudice exists when reviewing court concludes "'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility,'" citations omitted].) Here, the prejudice is clear—and indeed Wilson's closing argument demonstrates it.

As shown above, a complete instruction on utility would include section 828, subdivision (a). Since that subdivision focuses on the "social value" of "the primary purpose of the conduct," it would have required the jury to consider the utility of *the distribution of electricity*, which undeniably has an extremely high social value. But without that information, the jury was free to follow Wilson's urging that it weigh not the utility of the distribution of electricity, but rather only the utility of *emitting stray voltage*. (7RT3316 ["Let me, the final element here is that the seriousness of the harm outweighs the public benefit. That, I think, is an easy one because no one is claiming there's a public benefit to putting unacceptable levels of voltage on fixtures"]; 7RT3345 ["Did the seriousness of the harm outweigh the public benefit of Southern California Edison's conduct? There is no benefit"]; see 7RT3385-3386 [defense counsel argues that distribution of electricity is the relevant activity].) Wilson's approach is impermissible under section 828, but the jury had no way of knowing that.

The jury's decision would also probably have been influenced by the other two subdivisions of section 828, because it is highly probable that the jury would have found that both weigh in Edison's favor. As to subdivision (b), which requires consideration of "the suitability of the conduct to the character of the locality," substations that step down voltage for residential use must be near the residential property they serve (see *Covalt*, *supra*, 13 Cal.4th at p. 909), so they are not just "suitab[le]" to residential areas but unavoidably present. As to subdivision (c), which addresses "the impracticability of preventing or avoiding the invasion," the undisputed evidence was that the "invasion"—that is, the emission of stray voltage—cannot be "prevent[ed] or avoid[ed]" in a properly-grounded system. (See 4RT2170 [Wilson's expert Bennett testifies that stray voltage is unavoidable because a grounded system "will always do that"]; 5RT2425 [Bennett testifies that shutting down the substation would eliminate stray voltage].)

For these reasons, at the very least the Court should order a new trial on nuisance with correct jury instructions.

THE PUC HAS EXCLUSIVE JURISDICTION OVER WILSON'S NUISANCE CLAIM

The Restatement factors identified in *Covalt* and the Court's briefing request are so clearly the responsibility of the PUC that they require a finding of exclusive PUC jurisdiction. Accordingly, despite the Court's statement that the parties should assume that the trial court had jurisdiction, we cannot ignore the impact of these factors, and we urge the Court not to do so.

Covalt is clear: In order for a plaintiff to recover on a nuisance claim, "'[t]he interference with the protected interest must not only be substantial, but *it must also be unreasonable*' . . . . The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, *taking a number of factors into account. (Rest.2d Torts, §§ 826–831.)*" (*Covalt*, 13 Cal.4th at p. 938, emphasis added.)

Under Public Utilities Code section 1759, it is for the PUC, and *only* the PUC, to undertake the weighing and balancing of these factors. Determining the balance after weighing these factors is central to the PUC's regulatory function. For a superior court or jury to attempt to undertake that balance inherently "interfere[s] with the commission in the performance of its official duties." (Pub. Util. Code, § 1759, subd. (a) (§ 1759(a)).)

a. It is for the PUC to balance harm against utility.

The balancing required to determine liability on Wilson's nuisance claim is classically a matter for the PUC. As we demonstrated in our principal briefs, the PUC unquestionably has jurisdiction over the design, siting, construction, operation and safety of electrical distribution systems, and it has exercised that jurisdiction in a comprehensive way. (See AOB §§ I.B.1.-2.)

Among many other things, the PUC is required by statute (Pub. Util. Code, § 2101) to ensure that utilities "furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public" (Pub. Util. Code, § 451; see AOB 34-39). It has "broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect" and "is generally authorized to require every public utility to 'construct, maintain,

and operate' its 'plant, system, equipment, [or] apparatus' in such manner as to 'safeguard the health and safety of its employees, . . . customers, and the public . . . . ' (§ 768.)" (*Covalt, supra*, 13 Cal.4th at pp. 923-924.)

The PUC's discharging of these responsibilities necessarily means undertaking the very kind of balancing that *Covalt* and the Restatement factors require. Indeed, it is impossible to imagine how the PUC could properly discharge its Constitutional and statutory duties—to ensure that electrical utilities provide "service, instrumentalities, equipment, and facilities" that will "promote the safety, health, comfort, and convenience of its patrons, employees, and the public" (Pub. Util. Code, § 451)—without undertaking that balance. That is why, as in *Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, the question whether Edison should have taken different or additional steps "is a factual issue that is within the exclusive jurisdiction of the commission to decide." (*Id.* at p. 243, citing *Covalt, supra*, 13 Cal.4th at p. 918.)

Section 828's factors address specific decisions that are necessarily committed to the PUC's exclusive power and judgment and could not possibly be the proper subject of superior court or jury decision.

Subdivision (b) addresses "the suitability of the conduct to the character of the locality." There can be no question that the PUC, and *only* the PUC, has the ultimate power to decide where a utility can place an electrical distribution substation. There can be no question that in making its decision, the PUC, and *only* the PUC, must decide whether the substation is "suitab[le] . . . to the character of the locality." And there accordingly can be no question that a jury cannot second-guess that decision: Doing so would not just interfere with the Commission's performance of its duties, it would effectively "review, reverse, correct, or annul [an] order or decision of the commission," directly contrary to 1759(a).

Subdivision (c) addresses "the impracticability of preventing or avoiding the invasion." In our situation, it is undisputed that the PUC requires Edison to operate the Topaz substation in a way that inevitably generates stray voltage. Here, too, a jury verdict that second-guessed the PUC's grounding and other regulations would directly contravene 1759(a).

Related to section 828, subdivision (c) is section 830, which requires consideration of whether "it would be practicable for the actor to avoid the harm in whole or in part

without undue hardship." For a regulated power utility, "undue hardship" involves not only the reasonableness of the expense required to address a particular situation but also whether the utility can pass that expense on to its ratepayers. These, too, are subjects over which the PUC necessarily has exclusive jurisdiction. (See Pub. Util. Code, § 451; *Guerrero v. Pacific Gas & Electric Co.* (2014) 230 Cal.App.4th 567, 574 [action alleging misappropriation of PUC approved funds interfered with the PUC's authority over natural gas rates].)

Fundamentally, the Restatement factors require a balancing of (i) the harm to Wilson from the barely perceptible current she felt as a result of the stray voltage emitted from Edison's electrical distribution system against (ii) the public benefit to the community from Edison's distribution of electricity in compliance with the PUC's grounding and other regulations, in light of (iii) the burden that would be placed on Edison (and other public utilities and ratepayers) from a decision that the distribution of electricity in accordance with those regulations can constitutes a "nuisance" for which utilities may be liable. The PUC has made its determinations approving the siting and requiring the grounding that inevitably result in the emission of stray voltage on Wilson's property.

That the PUC has not yet formally declared a harm/utility balance that explicitly addresses stray voltage does not change the fact that because of the very nature of the factors involved, the weighing and balancing is necessarily an exercise solely for the PUC, and therefore must be presented to the PUC for determination. "That the PUC 'may' supervise and regulate every public utility in the state in a manner that is 'necessary and convenient' (§701) does not mean that if it does not expressly do so, a local entity may fill the breach with legislation that places a burden on the operation of utility facilities." (*San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 802.) Section 1759 bars a superior court action "not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*Covalt*, *supra*, 13 Cal.4th at p. 918.)

b. The PUC itself claims jurisdiction over nuisance claims like Wilson's.

In its *Richmond/Barber* amicus brief, the PUC states its view that it has exclusive jurisdiction to address in the first instance the very nuisance claim that Wilson asserts. The *Richmond* and *Barber* lawsuits each include a claim for "nuisance" that, like Wilson's claim, is based on stray voltage emitted from Edison's electrical distribution system.[2] Although the PUC does not separately discuss nuisance in its amicus brief, it unequivocally states that it has exclusive jurisdiction in the first instance over the plaintiffs' claims.

If the Court believes it would be assisted by having the PUC directly address whether it has exclusive jurisdiction over Wilson's nuisance claim in particular, we respectfully suggest that the Court invite the PUC to submit an amicus brief on that subject. (See *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1155, fn. 12 ["(A) court, faced with the question whether the civil action is barred by section 1759(a), may deem it appropriate to solicit the views of the PUC regarding whether the action is likely to interfere with the PUC's performance of its duties"].)

c. Nothing in post-*Covalt* California case law suggests that nuisance claims are an exception to the PUC's exclusive jurisdiction.

We have not found a single California decision, reported or unreported, in which a nuisance claim survived an exclusive jurisdiction challenge under section 1759(a). To the contrary, our Supreme Court has rejected nuisance claims on the ground of exclusive PUC jurisdiction in its seminal decisions on the subject.

In *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 260-61, hundreds of plaintiffs alleged a claim for nuisance (and other claims) against the defendant public utility water companies, asserting that the water companies provided them unsafe drinking water. The Supreme Court held that the PUC had exclusive jurisdiction over all of the plaintiffs' claims, including nuisance, where, like Wilson's claims in this case, the plaintiffs did not show that the utilities' operations violated any PUC regulation, rule or order. (*Id.* at p. 276.)

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[2] We attach the face pages of the operative complaints, which list "nuisance" as one of the causes of action.

Covalt, *supra*, 13 Cal.4th at p. 893 explicitly found that the plaintiffs' nuisance claim was preempted by the PUC's exclusive jurisdiction, at the very pages this Court cited in its briefing request. (*Covalt*, 13 Cal.4th at pp. 937-939.) The decision was based on the relatively narrow ground that a nuisance claim would contradict the PUC's determination "that the available evidence does not support a reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm . . . ." (*Id.* at p. 939, emphasis omitted.) But the Court's rationale precludes a superior court or jury from even inquiring into the question. As the Court observed, "in order to award such damages on a nuisance theory the trier of fact would be required to find that reasonable persons viewing the matter objectively (1) would experience a substantial fear that the fields cause physical harm and (2) would deem the invasion so serious that it outweighs the social utility of SDG&E's conduct." (*Ibid.*) That the PUC in *Covalt* undertook this balancing demonstrates the reach of its power.

There is an older decision, *Calif. Oregon Power Co. v. Superior Court* (1955) 45 Cal.2d 858 (*California Oregon Power*), not cited in *Covalt* or *Hartwell*, that upheld a nuisance claim against a claim of exclusive PUC jurisdiction, but it does not support such a result here. There, the California Attorney General, on behalf of the State of California, alleged that the manner in which the defendant public utility operated certain dams constituted a public nuisance and should be enjoined. (*Id.* at pp. 860-861.) In a very brief discussion, the Court rejected the defendant's assertion that the PUC had exclusive jurisdiction, suggesting that the reason was that the PUC had not acted with respect to the defendant's activities that the Attorney General challenged. (*Id.* at p. 870.) The Court undertook nothing remotely like the three-prong analysis that *Covalt* now requires. Moreover, the opinion does not "cite[] section 1759 [or] discuss[] its application," and "[c]ases are not authority for propositions not considered." (*Disenhouse v. Peevey* (2014) 226 Cal.App.4th 1096, 1103, internal quotation marks, citations and bracketed text omitted [distinguishing *California Oregon Power* on this ground and citing, among other cases, *Covalt*, *supra*, 13 Cal.4th at p. 943]; see also *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, 704, fn. 9 [noting that *California Oregon Power* "did not address the jurisdictional effect of section 1759"].)

In any event, unlike *California Oregon Power*, here the PUC has extensively regulated the exact conduct that Wilson challenges—the design, siting, construction, operation and safety of Edison's electrical distribution system, and specifically the

grounding requirement that unavoidably produces stray voltage. Later courts have distinguished *California Oregon Power* on this very basis. (See *City of Union City v. Southern Pac. Co.* (1968) 261 Cal.App.2d 277, 280-81 ["(A)lthough admittedly the superior court has jurisdiction, in general, of actions against public utility entities based upon alleged nuisance" (citing *California Oregon Power* and one of the cases it cites), "this jurisdiction does not exist whenever the Public Utilities Commission, acting within its powers, has passed on the very matter asserted to be a nuisance"]; *Ford v. Pacific Gas & Elec. Co.*, *supra*, 60 Cal.App.4th at p. 704, fn. 9 (*Ford*) [distinguishing *California Oregon Power* on the ground that "the PUC had not acted" in that case and "[t]hus, there was no question of interfering with a particular PUC policy"].)

The Restatement factors demonstrate that allowing a jury to impose nuisance liability on Edison cannot be squared with the PUC's overarching responsibility to balance the effects of stray voltage against the social utility of electrical distribution.

* * *

We appreciate the opportunity to provide this briefing. We are prepared to supplement it to whatever extent the Court requests.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL CIVIL DISTRICT

LORI BARBER, et al.,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, et al.,

Defendants.

DANIEL RICHMOND, et al.,

Plaintiffs,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, et al.,

Defendants.

Case No.: YC 066729

[Case Consolidated with Case No. BC 497689]

Assigned For All Purposes To:
Hon. John S. Wiley, Jr. - Dept. 311

THIRD AMENDED COMPLAINT FOR PERSONAL INJURIES AND DAMAGES

[Intentional Infliction of Emotional Distress; Negligence; Negligence Per Se; Nuisance; Fraud and Deceit; Negligent Misrepresentation; Trespass; and Inverse Condemnation; Intentional Assault and Battery]

COME NOW the Plaintiffs, LORI BARBER, THOMAS BARBER, CHANCE BARBER, a minor, by and through his Guardian ad Litem, LORI BARBER, ADELAIDE BARBER, a minor, by and through her Guardian ad Litem, LORI BARBER, MARY CONTRERAS, CONSTANTINO CONTRERAS, CRISTOBAL CONTRERAS, and STEPHANIE CONTRERAS, a minor, by and through her Guardian ad Litem, MARY CONTRERAS, and for causes of action against the Defendants, and each of them, allege as follows:

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JURY DEMANDED

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 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 28, 2015, I served the foregoing document described as: **APPELLANT'S LETTER BRIEF** on the parties in this action by serving:

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(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States 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 party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 28, 2015, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie