4th Civil No. G024802

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WILLIAM A. KEEL,

Appellant,

vs.

OUTPATIENT SURGERY CENTER,

Respondent.

On Appeal from the Orange County Superior Court
The Honorable Theodore E. Millard, Judge Presiding
OCSC Case No. 719947

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This is a tale of two tortfeasors and two parallel proceedings to apportion a judgment between them. Dr. William A. Keel ("Keel") and Out-Patient Surgery Centers ("OPSC") were joint tortfeasors on a medical malpractice judgment. Both parties appealed, but Keel then paid the plaintiff $4 million in full settlement of her claims against him, received plaintiff's covenant not to execute, and dismissed his appeal. In an unpublished decision, this court affirmed the judgment against OPSC. (CT 29.)

OPSC eventually paid the unsatisfied portion of the judgment. Then, in a bizarre proceeding, OPSC sought to obtain partial comparative indemnity from Keel under a statute that permits a court to award a tortfeasor pro rata contribution by way of motion. But the contribution statute cannot be used to award indemnity and it completely bars a motion for contribution if the moving or responding party has a right to indemnity. Keel objected to these jurisdictional infirmities and tried to raise several equitable defenses based on unclean hands and the maxim that he who seeks equity must do equity. The trial court overruled all of Keel's jurisdictional objections, refused to consider his defenses, and awarded OPSC more than $1.6 million without permitting a trial.

This was prejudicial error, and Keel appeals the resulting judgment. Among its more egregious actions:

- The court improperly permitted OPSC to bring a motion for contribution when its alleged right to indemnity based on jury allocations of fault remained unadjudicated. This directly contravenes the contribution statute (Code Civ. Proc., §§ 875-880) which precludes the court from considering a motion for contribution in cases where either tortfeasor was

entitled to indemnity.[1/] Indeed, at the very time that it brought its contribution motion, OPSC, as the trial court knew, was claiming an entitlement to comparative indemnity in a separate declaratory relief action.[2/]

- The court improperly took a special statutory procedure that permits a court on noticed motion to enter judgment *for pro rata contribution* (§§ 875, subd. (c), 876, subd. (a), 878) and used it to award OPSC *comparative indemnity* in an amount greater than its pro rata share of the judgment. The court accomplished this trick by claiming that it was "not really giving equitable indemnity," but "contribution per the jury's allocation of fault." (12/10/98 RT 22.) That is mere word-play. As we demonstrate, an award in accord with the jury's fault allocation is, by definition, an award of comparative indemnity, not contribution. Indeed, contribution is specifically defined in the statute as the pro rata share which results by "dividing the entire judgment *equally* among all [tortfeasors]." (§ 876, subd. (a), emphasis added.) Moreover, the statute expressly provides that no tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire judgment. (§ 875, subd. (c).) Yet, the judgment here requires that Keel do just that, i.e., it requires him to pay *more* than his pro rata share.

- The court violated the contribution statute and elementary principles of due process by denying Keel the right to raise equitable

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1/ All statutory references are to the Code of Civil Procedure, unless otherwise noted.

2/ This court is asked to take judicial notice of the relevant documents in *Outpatient Surgery Center v. Keel, et al.*, Orange County Superior Court Case No. 796035. See Appellant's Request to Take Judicial Notice filed concurrently with this brief.

defenses in the same proceeding in which OPSC was asserting its equitable claims. First, the court disregarded the statutory directive that the right to contribution "shall be administered in accordance with the principles of equity" (§ 875, subd. (b)) by granting OPSC an indemnity award without considering Keel's equitable defenses. Second, the court denied Keel due process by entering a judgment on OPSC's claim, while ruling that Keel's defenses to that claim could be raised only in OPSC's separate declaratory relief action. (12/10/98 RT 17-19.) This was no mere bifurcation of issues within a single lawsuit: the court told Keel to bring his defenses in a different lawsuit before a different judge; and, without considering those defenses, it entered a monetary judgment against him on which OPSC had the right then and there to execute. In short, what amounted to an indemnity judgment was entered against Keel on motion – without trial of his equitable defenses. But for this appeal and the posting of an appeal bond, Keel or his insurer would have been out of pocket to the tune of $1,654,356.10, while waiting for a chance to prove that OPSC was never equitably entitled to indemnity in the first place. This makes a mockery of constitutional due process guarantees.

- The court compounded its freewheeling use of the contribution statute by awarding OPSC damages that were never part of the original judgment. Specifically, it awarded OPSC $75,000 to cover a transaction fee that it agreed to pay to its bonding company. But contribution and comparative indemnity are procedures exclusively concerned with dividing an existing judgment among co-tortfeasors; neither comprehends an award of separate damages that were not part of or included within the judgment.

The trial court cut corners to give OPSC a quick and unimpeded path to judgment. There was neither an equitable compulsion nor a legal basis to do so. The judgment must be reversed.

STATEMENT OF THE CASE AND STANDARD OF REVIEW

A. The Underlying *Hamel* Action Results In A Judgment, An Appeal And A Settlement.

1. The Court Enters Judgment In The *Hamel* Action; Keel and OPSC Appeal.

A jury found OPSC and Keel negligent in performing a gynecological diagnostic procedure that left Jennifer Louise Hamel with irreversible brain injury. It awarded her approximately $24 million in damages over her lifetime, reduced to present value of $9,387,109. (CT 15, 30.) It apportioned liability 55 % to Keel and 45% to OPSC. (CT 15, 30.) In addition, it awarded Hamel $137,500 in damages against Keel alone and $112,500 against OPSC alone. (CT 15.)

The court originally entered a judgment based on periodic payments, but subsequently vacated the periodic payment schedule and entered an amended cash sum judgment. (CT 2, 9-11.) The court credited defendants with monies deposited in trust to satisfy a Blue Cross lien, leaving $8,551,093.47 owing to Hamel on the joint and several judgment. (CT 51-52, 83, 135.)

Both defendants appealed from the judgment. (CT 212.)

2. Keel Settles With Hamel and Dismisses His Appeal.

In August 1996, Keel and his insurance carrier The Doctor's Company ("TDC") entered into a settlement agreement with Hamel and paid her $4 million dollars in full settlement of all her claims against Keel

in return for a covenant not to execute. (CT 51, 75, 159.)[3/] Keel dismissed his appeal. (CT 29, 159.)

3. OPSC Pursues Its Appeal And The Court Of Appeal Affirms The Judgment.

OPSC did not settle with Hamel, but pursued its appeal. In an unpublished opinion issued on January 30, 1998, this court affirmed the judgment as against OPSC. (CT 29.) OPSC then unsuccessfully petitioned for review from the Supreme Court. (JN 5.)[4/]

B. OPSC Seeks Comparative Indemnity In Separately-Filed Duplicative Proceedings.

1. OPSC files an action for declaratory relief as to its right to indemnity and contribution.

OPSC filed an action for declaratory relief (*Outpatient Surgery Center v. Keel, et al.*, Orange County Superior Court Case No. 796035) in June 1998 to determine "its rights to contribution or partial or comparative indemnity based on Dr. Keel's comparative fault as determined by the jury in the Underlying Action [OCSC 719947]." (CT 494; JN 6.) OPSC sued Keel, his insurer TDC and Jennifer Hamel. (JN 3.) Later, OPSC served a first amended complaint praying "[f]or damages in an amount to be proved at time of trial representing the amount OPSC has paid toward the judgment in Hamel I that exceeds its forty-five percent apportionment share." (CT 499, 502, 504.)

3/ The $4 million payment was apportioned as follows: a payment of $3,848,750 on the joint and several judgment and a payment of $151,250 representing the full amount owed (including accrued interest) on Keel's separate judgment. (CT 51.)

4/ "JN" refers to Appellant's Request To Take Judicial Notice.

Both TDC and Hamel answered the complaint, pleading unclean hands and other equitable defenses. (CT 507; JN 15.) Keel answered the first amended complaint, pleading unclean hands and other equitable defenses based on OPSC's post-verdict conduct and pleading his settlement as an equity. (JN 55.)[5/]

2. OPSC also files a motion for contribution in the *Hamel* action.

OPSC brought a motion for contribution in the all-but-wound-up Hamel action in October 1998 against Keel, his insurer TDC and his bonding company Reliance Insurance Company. (CT 386.) In fact, OPSC did not seek contribution (i.e., a pro-rata division of the judgment), but comparative indemnity (i.e., a division in accord with the jury's allocation of fault.) (CT 386, 389, 393, 584-585.)[6/]

C. Over Keel's Objection, The Court Grants OPSC's Contribution Motion In The *Hamel* Action Without Permitting Keel To Present His Defenses.

The court tentatively granted OPSC's motion for contribution against Keel and Reliance, and set a limited evidentiary hearing to determine the

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5/ On the motion for contribution, OPSC discussed the first amended complaint as the operative pleading in its separate indemnity action. (CT 554.) But, unbeknownst to Keel, OPSC had not filed its first amended complaint. (JN 55, 78, 87.) Whatever its current status, the first amended complaint clearly embodies OPSC's undeviating position in both lawsuits that it is entitled to comparative indemnity.

6/ Meanwhile, OPSC's indemnity action continued to be vigorously litigated. For example, the parties filed a Joint Management Statement that (1) estimated a five-day jury trial; (2) stated that a motion for summary judgment was anticipated; and (3) listed substantial discovery that was not yet completed. (CT 657; see also CT 494-495, 512, 521.) Keel unsuccessfully attempted to consolidate the motion for contribution and the on-going indemnity action before a single judge. (JN 20, 29.)

correct amount of the judgment and what portion of that amount OPSC had paid. (12/10/98 RT 23; CT 713, 714-715 ["[e]vidence at the hearing shall be limited to the issue of the proper calculation of the parties' respective shares pursuant to the jury's allocation of fault, the amounts paid and who paid them"].) The court held that OPSC could use the motion procedure for obtaining contribution as a means to obtain comparative indemnity. (12/10/98 RT 15, 19-21.)

The court refused to permit Keel and Reliance to assert and prove any equitable defenses, holding that those could be raised by cross-complaint in OPSC's separate pending indemnity action. (CT 713, 715, 12/10/98 RT 15-19 ["Whatever contribution order I make I can make it without prejudice to the other matter involving claims for indemnity . . . . [¶] I'm not trying to prejudice the other action at all"].)

After a limited evidentiary hearing, the court purported to award OPSC "contribution" against Keel in accord with the jury's allocation of fault in the amount of $1,654,356.10. (1/7/99 RT 91-98; CT 793-795.)[7/] Seventy-five thousand dollars of that "contribution" amount was not part of the judgment, but post-judgment "transactional costs" that OPSC had agreed to pay to its bonding company with regard to OPSC's own appeal. (CT 725-726; 1/7/99 RT 91-92.)

The court entered its Order granting OPSC's motion for contribution "without prejudice to the litigation of OUT-PATIENT'S SURGERY CENTER's separate action . . . and any cross-complaint therein including the equitable defenses raised in opposition to [its] Motion for Contribution." (CT 793-795.)

7/ Keel and Reliance filed objections to the limited nature of the hearing and to the restrictions placed on their right to prove equitable defenses. (CT 718,740.) The court overruled all the objections. (1/7/99 RT 8.)

D. Keel Brings This Appeal From The Orders And Judgment Granting OPSC's Motion For Contribution.

Keel filed his Notice of Appeal from the December 10, 1998 and January 29, 1999 orders on February 2, 1999. (CT 797.) On February 25, 1999, the court entered judgment on the motion for contribution. (CT 816, 821.) Keel filed his Notice of Appeal from the judgment on March 8, 1999. (CT 830.)

E. The Parties Continue To Litigate OPSC's On-Going Indemnity Action.

1. Keel and OPSC file cross-complaints.

Having previously answered the original complaint, TDC filed an answer to the first amended complaint and a cross-complaint against OPSC. (JN 60, 66.)[8/] Having previously answered the first amended complaint, only to learn that it had not been filed, Keel filed an answer to OPSC'S original complaint and a cross-complaint seeking a declaration that he and TDC were excused from any further payment to OPSC and were entitled to equitable offsets against any sums claimed by OPSC in an amount no less than $1.9 million. (JN 92, 98.) OPSC subsequently answered both cross-complaints, raising its own equitable defenses. (JN 113, 119.)

8/ OPSC unsuccessfully demurred to and moved to strike the cross-complaint. (JN 106, 109.)

2. The court stays the indemnity action pending this appeal.

Pursuant to stipulation among counsel for plaintiff OPSC and defendants Keel, TDC and Hamel, the court stayed the indemnity action pending the outcome of this appeal. (JN 125.)[9/]

F. Standard Of Review.

The issues raised by this appeal present purely legal questions as to the proper application of the contribution statute (§§ 875-880) and the common law doctrine of equitable indemnity. Therefore, the appellate court reviews them de novo. (See *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 128; *California School Employees Assn. v. Kern Community College Dist.* (1996) 41 Cal.App.4th 1003, 1008.)

LEGAL ARGUMENT

I.

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN AWARDING OPSC COMPARATIVE INDEMNITY BY MOTION UNDER THE CONTRIBUTION STATUTE.

The trial court entered a $1.6 million comparative indemnity judgment against Keel on OPSC's motion for contribution pursuant to the contribution statute (§§ 875-880). The court described its action this way: "I'm not really giving equitable indemnity. I'm giving contribution per the

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9/ The parties further stipulated that Keel and TDC could complete outstanding discovery and that OPSC would not execute on the judgment for contribution if it were affirmed on appeal unless OPSC first sought and obtained permission by way of noticed motion. (JN 126.)

jury's allocation of fault." (12/10/98 RT 22.) This was prejudicial error. The truth is that the court awarded OPSC exactly what the statute forbids (an amount in excess of its pro rata share of the judgment) in precisely the situation (the existence of an unadjudicated claim for indemnity) in which the statute denies the court jurisdiction to grant a motion for contribution. This is why the trial court was wrong.

A. Contribution And Indemnity Are Different, And The Law Requires That They Be Treated Differently.

1. An historical perspective.

Equitable indemnity is a creature of common law; contribution is a creature of statute. At common law, there was no right of contribution between joint tortfeasors, and there was no such thing as comparative indemnity. Courts could regulate the relation between tortfeasors in only one way. They were empowered -- under the doctrine of equitable indemnity -- to shift the burden of the judgment entirely from one tortfeasor to another.[10/] (See *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 591, 593; *Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 Cal.App.3d 1227, 1238, disapproved on another point in *Bay Development Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1032, fn. 12; *Alisal Sanitary Dist. v. Kennedy* (1960) 180 Cal.App.2d 69, 74; *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1337.)

In time, states passed contribution statutes (see Section I.A.2., below), but the fundamental distinction between the doctrines remained. "The right of contribution, where it exists, presupposes a common liability

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10/ This could occur, for example, where one defendant was only vicariously liable for the wrongdoing of another defendant.

which is shared by the joint tortfeasors on a pro rata basis," whereas the right of equitable indemnity "shifts the entire loss upon the one bound to indemnify." (*Alisal Sanitary Dist. v. Kennedy*, *supra*, 180 Cal.App.2d at p. 75.)

Things changed when *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 declared that comparative fault principles applied in California. Under that doctrine, a plaintiff who contributes to his own injury is no longer barred from any recovery; rather his compensation is proportionately diminished in relation to his degree of fault. *American Motorcycle Assn. v. Superior Court*, *supra*, expanded *Li's* principles so that they governed the allocation of comparative fault as between joint tortfeasors. (20 Cal.3d at pp. 582-583.) Even after *American Motorcycle*, however, the law continues to distinguish between contribution, on the one hand, and indemnity, on the other. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 108, fn. 6; *Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1379.)

2. The Legislature enacts a limited right to contribution, but preserves the distinction between contribution and indemnity.

In 1957, California added sections 875-880 "to ameliorate the harsh effects of that 'no contribution' rule." (*American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at p. 592.) The statute provided for a right of contribution on a pro rata basis among joint tortfeasors to be administered in accordance with the principles of equity. (§ 875, subds. (a) and (b).) It permitted the court to enter a judgment for contribution upon noticed motion. (§ 878.) Most importantly, by expressly defining contribution as the pro rata or equal division of a judgment (§§ 875, subd. (c), 876, subd. (a)), the statute preserved the longstanding distinction between contribution and indemnity. What's more, it directed that "in no

event shall any tortfeasor be compelled to make contribution beyond his own pro rata share." (§ 875, subd. (c).) And, in section 875, subdivision (f), it provided that "where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

The statute was not intended as a general reform of the relations between tortfeasors, but "made rather modest inroads into the contemporary doctrine, restricting a tortfeasor's statutory right of contribution to a narrow set of circumstances." (*American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at p. 592.) It was never intended to make comparative indemnity available by simple motion in lieu of an ordinary civil action for indemnity. Yet, that is exactly what the trial court did here.

B. The Plain Language Of The Contribution Statute Bars The Trial Court From Considering OPSC's Motion For Contribution While Its Alleged Right To Indemnity Remained Undecided.

It is undisputed that at the time of its motion for contribution, OPSC was claiming in its separate lawsuit a "right of indemnity under existing law." (§ 875, subd. (f).) That brings OPSC squarely within subdivision (f), which explicitly bars the use of a motion for contribution if any co-tortfeasor has an unadjudicated right to indemnity. Specifically, the statute provides:

> "This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."

American Motorcycle created a right to comparative indemnity. That right comprehends an ordinary civil trial in which the pleadings can be

tested, undisputed facts may be adjudicated summarily, discovery and motions to compel discovery are available and there can be a full trial on matters of disputed fact. (See *American Motorcycle Assn. v. Superior Court, supra*, 20 Cal.3d at p. 584 [affirming right to sue for comparative indemnity by cross-complaint in underlying action]; *People ex rel. Dept. of Transportation v. Superior Court* (1980) 26 Cal.3d 744 [demurrer filed to comparative indemnity cross-complaint]; *Botsford v. Pascoe* (1979) 94 Cal.App.3d 62, 65 [cross-complaint for indemnity actively litigated with challenges to the pleadings and discovery]; *Brown v. Presley of So. California* (1989) 213 Cal.App.3d 612.)

A right to contribution is a different matter. The legislature has provided a special procedure whereby a tortfeasor can obtain contribution by motion, without going through all the stages of a civil action. (§ 878.) There is no such summary procedure for indemnity. By enacting subdivision (f) of section 875, the Legislature ensured that the contribution statute would not be used to substitute a procedure by motion for the full panoply of procedural rights embodied in the ordinary civil action. (Cf. *People v. Friscia* (1993) 18 Cal.App.4th 834, 839 ["A party sued civilly has important due process rights, including appropriate pleadings, discovery and a right to a trial by jury"].) That is why the statute provides that "there *shall be no right* of contribution" when "one tortfeasor judgment debtor is entitled to indemnity from another." (§ 875, subd. (f).) That is why the statutory bar applies to "*[t]his title*" so that nothing in the statute, including section 878 authorizing judgment by motion, can be used to "impair any right of indemnity under existing law." (*Ibid.*)

By awarding OPSC "contribution per the jury's allocation of fault" (12/10/98 RT 22), the trial court did what the statute forbids – it impaired the "right of indemnity under existing law." The court defended its action

on the theory that no tortfeasor has a right to indemnity until the tortfeasor obtains an actual judgment for indemnity. (12/10/98 RT 8 [the statute "doesn't say has a claim for indemnity," but "is entitled to indemnity." That would appear to me to mean there is some kind of judgment indicating the person is entitled to indemnity"].) Since OPSC's pending indemnity action had not yet been tried to judgment, the trial court held that OPSC was not precluded from seeking relief by motion under the contribution statute.

The trial court was wrong. Its assumptions, if sustained, would undermine the principles of comparative fault that underlie *Li* and *American Motorcycle*. For example, under its construction of section 875, subdivision (f), if one tortfeasor brought an action for comparative indemnity, another tortfeasor could race to bring a motion for contribution and obtain a quick pro rata division of the judgment, because though the first tortfeasor had a claim for indemnity, he had not yet obtained a judgment. But that result would turn the statutory scheme on its head.

The Legislature enacted section 875, subdivision (f) to make statutory contribution subordinate to the older form of all-or-nothing indemnity; and since comparative indemnity "is simply an evolutionary development of the common law equitable indemnity doctrine," its "primacy" over contribution is also recognized by the statute. (*American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at pp. 584, 602; accord *Coca-Cola Bottling Co. v. Lucky Stores, Inc.*, *supra*, 11 Cal.App.4th at p. 1379 ["a resolution of the loss-sharing claims of multiple tortfeasors are most often completely resolved by *a comparative indemnification cross-complaint* in the underlying action rather than by a postjudgment claim for contribution," emphasis added].)

The most recent pronouncement on the matter by our Supreme Court further confirms that what OPSC was allowed to do in this case cannot lawfully be done. In *Safeway Stores, Inc. v. Nest- Kart* (1978) 21 Cal.3d 322, the court reversed an order granting a motion for contribution on the ground that a tortfeasor could not bring such a motion to defeat a co-tortfeasor's right to comparative indemnity. The present case involves OPSC's effort to use a motion for contribution to defeat Keel's right to pleading, discovery and trial on OPSC's unadjudicated claim for indemnity, which OPSC had asserted in a separate indemnity action, in which discovery was on-going and Keel and others had filed answers and cross-complaints. In both cases, the tortfeasor runs afoul of the rule that the contribution statute is subordinate to the common law right of comparative indemnity. (See *American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at p. 602.)[11/]

In short, a tortfeasor cannot bring a motion for contribution when a right to indemnity may exist. This rule applies with particular force when a co-tortfeasor has in fact asserted such a right in a pending lawsuit. And it is most insistent where, as in the present case, the same tortfeasor first brings an action for indemnity and then attempts to short-circuit its own lawsuit by bringing a motion for contribution before a different judge in a different case.

11/ For the same reasons, the trial court could not have granted OPSC even a pro rata division of the *Hamel* judgment. In *Coca-Cola Bottling Co. v. Lucky Stores, Inc.*, *supra*, a tortfeasor was permitted to seek a pro-rata division of the judgment only after a court had held that it was not entitled to comparative indemnity and dismissed its cross-complaint. The court stated that there was no "reason to conclude that one defendant who *unsuccessfully* seeks indemnification is prohibited from *thereafter* seeking contribution if the statutory preconditions are met." (11 Cal.4th at p. 1379, second emphasis added.) Here, OPSC's indemnity claim has yet to be fully and properly tried.

If this court agrees that the trial court failed to comply with the jurisdictional restrictions of section 875, subdivision (f), it need read no further. Reversal is required, with directions to deny OPSC's motion for contribution with prejudice.

C. Even If The Court Was Not Barred From Granting The Contribution Motion, It Prejudicially Erred In Awarding OPSC Comparative Indemnity Under The Contribution Statute.

1. The plain language of the contribution statute precludes a court from awarding tortfeasors anything other than an equal division of a judgment.

As we have shown, the contribution statute was enacted before comparative fault principles were introduced into California law. Unsurprisingly, then, it does not equate contribution with comparative fault. Instead, it defines contribution as a pro rata, or an equal, division of a judgment, and restricts a tortfeasor's recovery under the statute to no more than the excess paid over his pro rata share. The statute could not be clearer on this point.

Subdivision (a) of section 875 provides for a right of contribution "as hereinafter provided." This is what the statute thereinafter provides. First, subdivision (c) of section 875 provides that the right of contribution "*shall be limited* to the excess . . . paid over the pro rata share of the person so paying and *in no event* shall any tortfeasor be compelled to make contribution *beyond his own pro rata share* of the entire judgment." (Emphases added.) Second, subdivision (a) of section 876 directs that "[t]he pro rata share of each tortfeasor judgment debtor *shall* be determined by dividing the entire judgment *equally* among all of them." (Emphases added.)

In short, the statute empowers the court to award "contribution" and then twice expressly defines that term to mean a pro rata division of the judgment. Since the court did not award contribution as so defined but awarded comparative indemnity, the judgment must be reversed.

Lamberton v. Rhodes-Jamieson (1988) 199 Cal.App.3d 748 is directly on point and compels reversal. There, appellant brought a motion for contribution against two co-tortfeasors to obtain comparative indemnity, and the court affirmed the trial court's order denying appellant's motion. The court held that the "plain words of the statute" restrict a tortfeasor's right to contribution "to the *excess* of amounts paid over its pro rata share," and that such "pro rata contribution is flatly incompatible with apportionment of liability according to fault." (*Id.* at pp. 751, 753.)

The facts in *Lamberton* are strikingly similar to the facts in the present case. Here, Keel entered into a post-judgment settlement with plaintiff and dismissed his appeal after receiving a covenant not to execute. OPSC pursued its appeal, and lost. Unsurprisingly, OPSC had to pay more than its share of fault as found by the jury. Similarly, in *Lamberton*, two of three co-tortfeasors settled shortly after judgment, but the appellant only settled belatedly, and wound up paying more than his allocated share of fault.

In contrast to the approach of the trial court in the present case, the *Lamberton* court refused to rewrite the contribution statute to bring it into line with comparative indemnity, stating:

> "How, one may well ask, is this result conceivable in the modern era of apportionment of liability in accordance with fault? The answer is that the contribution statutes were enacted in 1957, well before the judicial adoption of comparative negligence." (199 Cal.App.3d at pp. 751-752.)

Because the Legislature "has not revised the pro rata rule," the court held it was not "free to replace it," for it was bound by the Legislature's "definitions of its own language." (*Id.* at pp. 753, 754.) And "[s]ince the adoption of comparative negligence was almost 20 years away, the Legislature could not possibly have intended "pro rata" to mean fault proportioned rather than per capita as prescribed in section 876, subdivision (a). There is absolutely no basis for inferring that the Legislature meant anything other than what the plain words of the statute say." (*Id.* at p. 754, footnote omitted.)

Lamberton completely undermines any notion that when it introduced comparative indemnity, the Supreme Court rewrote the contribution statute. As shown below, none of the cases cited by OPSC or relied on by the trial court support that extraordinary proposition.

2. The adoption of comparative indemnity did not and could not change the scope of the statutory right to contribution.

a. The trial court erroneously assumed that the Supreme Court had "rewritten" the contribution statute to bring it into line with *American Motorcycle*.

OPSC argued that *American Motorcycle* and other cases establish "that the jury's apportionment of fault should be utilized in determining the appropriate contribution." (CT 702.) As we show below, no case "establishes" such a proposition, or even suggests an outcome that would so vitiate the plain meaning of the statute.

The trial court advanced an even more astonishing proposition. It held that the Supreme Court could rewrite the statute even though the Legislature had chosen not to do so. The trial court acknowledged that it had no power under the statute as written to award comparative indemnity

because "875 has not been amended to keep up with the progress of the California Supreme Court." (12/10/98 RT 3.) But it held that the Supreme Court had in fact been "rewriting the [contribution] statute" to allow a tortfeasor to obtain comparative indemnity and that the Court had the power to do so under section 875, subdivision (b), which provides that the right of contribution must be administered in accordance with equitable principles. (12/10/98 RT 10-11.) The trial court was wrong on all counts.

b. The Supreme Court did not purport to rewrite the contribution statute when it decided *American Motorcycle*.

In *American Motorcycle Assn. v. Superior Court*, *supra*, our Supreme Court modified the common law doctrine of indemnity "to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis." (20 Cal.3d at p. 583.) The decision was not based on a construction of the contribution statute, but was a "common law development[] . . . channeled instead through the equitable indemnity doctrine." (*Id.* at p. 592; see *Topa Ins. Co. v. Fireman's Fund Ins. Companies*, *supra*, 39 Cal.App.4th at p. 1342 ["[t]he Supreme Court's decision was not, and did not purport to be, a construction of existing statutory language," but was "a modification of the common law equitable indemnity doctrine," internal quotes omitted].)

No common law development could change the meaning of the contribution statute. After *American Motorcycle*, statutory contribution remains as distinct from comparative indemnity as it previously remained distinct from all-or-nothing indemnity:

> "Indemnity either imposes the entire loss on one of two or more tortfeasors *or apportions it on the basis of*

comparative fault. Contribution, *on the other hand*, is a creature of statute and *distributes the loss equally* among all tortfeasors." (*Coca-Cola Bottling Co. v. Lucky Stores, Inc.*, *supra*, 11 Cal.App.4th at p. 1378, emphasis added, footnote omitted.)[12/]

c. Subsequent to *American Motorcycle*, the Supreme Court has not purported to rewrite the contribution statute to allow the recovery of comparative indemnity under the statute.

The trial court cited *Safeway Stores, Inc. v. Nest- Kart*, *supra*, 21 Cal.3d 322, as evidence that after deciding *American Motorcycle*, the Supreme Court began rewriting the contribution statute. (12/10/98 RT 9-11.) The case does not remotely support that proposition, for it does not rewrite or even creatively construe any provision of the contribution statute and, in particular, does not meddle with its mandate that "[t]he pro rata share of each tortfeasor judgment debtor *shall* be determined by dividing the entire judgment *equally* among all of them." (§ 876, subd. (a), emphases added.)

In *Safeway*, one tortfeasor paid 80 percent of the judgment in accord with the jury's findings of fault and later sought contribution under sections 875 and 876 from its co-tortfeasor. The trial court ordered that each

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12/ And the Supreme Court recognized that "contribution" could not be evolved as a matter of common law:

> "[T]he passage of the 1957 legislation had the effect of foreclosing any evolution of the California common law contribution doctrine beyond its pre-1957 'no contribution' state." (*American Motorcycle Assn.*, *supra*, 20 Cal.3d at p. 592.)

defendant bear 50 percent of the judgment, i.e., it awarded contribution, notwithstanding the jury's fault allocation.[13/]

The Supreme Court reversed the order apportioning liability on a pro rata basis. (*Id.* at p. 334.) Unlike the present case, both defendants in *Safeway* had already paid their *comparative* shares of the judgment; therefore, the court was not required to determine whether a tortfeasor could use the contribution statute to obtain comparative indemnity. *The court had nothing to say on that point.* And a case "is not authority for an issue not considered in the court's opinion." (*People v. Heitzman* (1994) 9 Cal.4th 189, 209; accord *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 196 .)

Safeway teaches that a tortfeasor cannot use a motion for contribution to undo a co-tortfeasor's right to comparative indemnity. This is precisely how the *Lamberton* court understood the case: "*Safeway* affirms the court's equitable power *to refrain from applying* the contribution statutes where payment *has been made* in accordance with comparative responsibility." (199 Cal.App.3d at p. 753, emphases added.) It is a radically different proposition to argue that a court has the equitable power to apply the contribution statute to *give* what the statute forbids: contribution in the form of an *unequal* division of the judgment.

OPSC argued below that the court in *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87 had awarded a tortfeasor comparative indemnity by the route of a motion for contribution. (CT 560-561.) Not so. In *Paradise Valley*, the court was faced with the problem of

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13/ One tortfeasor had been found liable on the basis of negligence and strict liability, the other tortfeasor on strict liability alone. The trial court incorrectly believed that *American Motorcycle* did not permit comparative indemnity as between negligent and strictly liable defendants. (21 Cal.3d at pp. 325, 328.)

how to divide the shortfall created by an insolvent tortfeasor. One tortfeasor argued that the insolvent's share of the judgment should be divided equally between the two solvent tortfeasors (i.e., by analogy to contribution), the other tortfeasor argued that it should be divided according to the jury's apportionment of fault (i.e., by analogy to comparative indemnity). Neither tortfeasor sought relief under the contribution statute.[14/] Nor was that statute relied on by the court in its decision to divide the insolvent's share proportionally. (143 Cal.App.3d at p. 93; see *Lamberton v. Rhodes-Jamieson, supra*, 199 Cal.App.3d at p. 754, fn. 3 [holding that the court in *Paradise Valley* had "decided to bypass the contribution statutes" and therefore did not give "fault-proportioned liability under section 875"].)

d. Even if it purported to do so, the Supreme Court has no authority to rewrite a statute.

Not even the Supreme Court has authority to rewrite legislation. (§ 1858 [in construing statutes, the "office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or omit what has been inserted"]; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [courts cannot "under the guise of construction, rewrite

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14/ Although the tortfeasor who argued for a comparative indemnity approach styled his cross-complaint as one for contribution, the court treated it at all times as a common law claim for indemnity. (143 Cal.App.3d at pp. 89, 94 ["Hospital sought both a judgment *of indemnity* and also a declaration of rights," emphasis added].) In similar circumstances, the court in *Coca-Cola Bottling Co. v. Lucky Stores, Inc., supra*, 11 Cal.App.4th 1372 also looked beyond the label of the pleading to its substance. There, one tortfeasor filed a cross-complaint for "equitable contribution . . . in direct proportion to the amount of [co-tortfeasor's] negligence." (*Id.* at p. 1375, internal quotes omitted.) The court held that, notwithstanding the term "equitable contribution," the claim was really for comparative indemnity. (*Id.* at pp. 1378-1379.)

the law"]; *Topa Ins. Co. v. Fireman's Fund Ins. Companies, supra*, 39 Cal.App.4th at pp. 1341-1342 [rejecting contention that courts have inherent power to rewrite contribution statute].)

In *American Motorcycle*, the court observed that it "need not decide" whether that section would permit the court to interpret the statute as providing for comparative rather than per capita contribution. (20 Cal.3d at p. 602.) That issue had in fact surfaced in a pre-*American Motorcycle* case, and the court there, quoting the "principles of equity" language of subdivision (b), held that comparative indemnity "is *not* a 'right of contribution . . . administered in accordance with the principles of equity.'" (*Kerr Chemicals, Inc. v. Crown Cork & Seal Co.* (1971) 21 Cal.App.3d 1010, 1016, emphasis added.) In any event, no post-*American Motorcycle* decision has used subdivision (b) to turn a pro rata contribution statute into an equitable indemnity statute. As we've seen, *Topa* rejects the idea that any such rewriting can be based on an inherent judicial power. And according to *Lamberton*, there is no scope for a court to interpret the statute because it expressly:

> "states that the pro rata share *shall be determined* by dividing the judgment equally among the number of defendants. The Legislature has the power to prescribe legal definitions of its own language, and when the meaning to be given to particular terms is prescribed by the Legislature, it is binding on the courts." (199 Cal.App.3d at p. 754.)

At any rate, the trial court in this case appears to have based its decision to disregard the statutory language not so much on anything the Supreme Court has actually written but rather on this misguided syllogism: first premise: the contribution statute provides that the "right of contribution shall be administered in accordance with the principles of

equity" (§ 875, subd. (b)); second premise: comparative indemnity is an equitable remedy, and therefore a "principle" of equity; conclusion: when the Supreme Court adopted comparative indemnity it ipso facto rewrote the contribution statute. (12/10/98 RT 10-11.) But that logic is completely invalid. First, the term "principles of equity" was surely not meant to encompass equitable remedies, but only the traditional equitable maxims that ensure that he who seeks equity has done equity.[15/]

More importantly, the legislature could not have intended the term "principles of equity" to refer to comparative indemnity because no such device or principle existed at the time, or was even foreseeable. (Cf. *Lamberton v. Rhodes-Jamieson, supra*, 199 Cal.App.3d at p. 754 ["(s)ince the adoption of comparative negligence was almost 20 years away, the Legislature could not possibly have intended 'pro rata' to mean fault proportioned rather than per capita as prescribed in section 876, subdivision (a)"].)

In short, the contribution statute does not permit a court to award a tortfeasor anything more than his pro rata share of the judgment, and no court has ever used the statute to do so. Thus, even if it had jurisdiction under the contribution statute, the trial court still prejudicially erred in using it to award comparative indemnity.

15/ Any other construction of the term would lead to absurd results. For example, if comparative indemnity is now one of the "principles of equity" within section 875, subdivision (b), then the pre-*American Motorcycle*, all-or-nothing form of equitable indemnity must have been one of the "principles of equity" as well. But if that had been the case, a court applying the contribution statute in accordance with "principles of equity" could have effectively eradicated the contribution remedy by applying equitable indemnity through subdivision (b). No court has adopted such perverse logic.

II.

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN AWARDING OPSC RELIEF WHEN ITS MOTION FOR CONTRIBUTION WAS IN EFFECT A SECOND ACTION BETWEEN THE SAME PARTIES SEEKING THE SAME RELIEF.

We have shown that the jurisdictional bar of section 875, subdivision (f) precludes a court from granting a motion for contribution while there is an unadjudicated right to indemnity. We have also shown that sections 875, subdivision (c) and 876, subdivision (a) preclude a court from awarding anything other than a pro-rata division of the judgment under the contribution statute. Independent of those sections, the judgment below must be reversed because OPSC brought its motion for contribution while it was already seeking the same relief in its earlier-filed action for contribution and comparative indemnity.

The trial court held that OPSC could pursue its motion for contribution at the same time it continued to pursue its pending action for contribution and indemnity. The court based this decision on the same assumption that the Supreme Court had "rewritten" the contribution statute so that a party could use it to seek comparative indemnity by motion. (12/10/98 RT 10-11.) That assumption has already been shown to be faulty. (See discussion, pp. 18-24, *ante*.) From that erroneous assumption, the court made the logical leap that a tortfeasor could maintain two actions at once, one for comparative indemnity under the contribution statute and one for comparative indemnity under common law. (12/10/98 RT 10-11.) Again, the court was wrong.

Section 430.10, subdivision (c) provides that a party may object to a complaint or cross-complaint on the ground that "[t]here is another action pending between the same parties on the same cause of action." If the court determines that the second action raises "substantially the same issues between the same parties" as the first action, it must enter an interlocutory judgment in effect staying the second action until the first action has been tried. (See § 597; *Leadford v. Leadford*, *supra*, 6 Cal.App.4th at p. 574 ["trial court has no discretion to allow the second action to proceed if it finds the first involves substantially the same controversy between the same parties"].)

Here, OPSC sued Keel and TDC for declaratory relief to determine its "rights to contribution or partial or comparative indemnity based on Dr. Keel's comparative fault as determined by the jury" (JN 6); then, while discovery was ongoing in that action, it brought a motion for contribution before a different judge seeking partial or comparative indemnity, and, while that motion was pending, it served a first amended complaint seeking a judgment for contribution or partial or comparative indemnity (CT 499). The reasons underlying sections 430.10 and 597 apply equally to those facts, though strictly speaking there was no demurrable pleading involved:

> "The rule that the pendency of one action abates another is based in part upon the practical supposition that the first suit is effective and affords an ample remedy to the party and that the second is unnecessary and vexatious, and in part upon the legal principle that the law abhors a multiplicity of actions." (*National Auto. Ins. Co. v. Winter* (1943) 58 Cal.App.2d 11, 16.)

These principles apply independently of section 875, subdivision (f). Combined with its rule that a motion for contribution is subordinate to an action for indemnity, they compel reversal.

III.
THE TRIAL COURT PREJUDICIALLY ERRED IN DECIDING DISPUTED FACTUAL ISSUES ON THE MERITS BY MOTION.

Even if the statutory procedure for contribution could somehow be used to obtain indemnity, the trial court clearly abused its discretion in allowing a judgment to be rendered on motion when there were disputed issues of fact with respect to OPSC's entitlement to equitable indemnity.

It appears that no court has expressly addressed the question of whether under section 878 disputed fact issues can be decided by motion. The drafters of the 1957 contribution statute undoubtedly envisioned that in most cases, the court would need to do little more than make an equal division of what was an agreed-upon judgment amount, in circumstances where there was no factual dispute concerning the entitlement to such apportionment. (Cf. § 875, subd. (c) [contribution may not be given until the tortfeasor has "discharged the joint judgment or has paid more than his pro rata share thereof"].)

The drafters surely did not envision that a court would allow a motion for contribution to be used where an apportionment claim involved multiple factual issues and where even the judgment amount was subject to factual dispute. Yet, that is what the trial court allowed here. From the outset, the trial court made clear that it was willing to litigate only some of the issues involved in OPSC's claim, relegating others (including Keel's equitable defenses) to the pending indemnity action and deciding the

remaining issues by motion. (12/10/98 RT 24-28.) The court agreed to hold a one-day evidentiary hearing to determine the amount of the judgment that was subject to division and whether OPSC had in fact paid it. (12/10/98 RT 25-31.) That hearing was not a trial. In the end, most of the evidence before the court on those issues had come in by declaration. (CT 394, 397, 477, 494, 567, 686, 743; see also CT 436, 723; see 12/10/98 RT 32 ["This is a motion, so the court does have discretion to decide it on the basis of declarations."].) There was no opportunity for pleading, full discovery or pre-trial motions. The court stated that it was "not going to wait for discovery to be completed in the other case." (12/10/98 RT 27.)

But where, as here, there are disputed factual issues concerning a claimant's entitlement to equitable apportionment, a party is entitled to the full panoply of pre-trial and trial procedures. If a court on a motion for contribution must do more than simple arithmetic, to wit, dividing a stipulated judgment amount pro rata between the parties, it cannot use motion procedure. Before a defendant is denied his right to trial, the moving tortfeasor should be required to demonstrate the absence of triable issues. This is surely true if a court uses the contribution to give comparable indemnity. We have found no case in which courts have granted indemnity on motion other than by the traditional route of summary judgment, which preserves the right to a trial on disputed issues of material fact. (See *Commercial Union Insurance Co. v. Ford Motor Co.* (N.D.Cal. 1984) 599 F.Supp. 1271 (applying California law) [deciding equitable defenses to a claim for comparative indemnity under summary judgment procedure].) At any rate, there is no evidence that the Legislature intended judges to summarily dispose of claims for or defenses to contribution or indemnity where more than a simple arithmetic division is involved.

In the present case, the trial court didn't even do that much. As shown below, it recognized Keel's right to introduce evidence on its equitable defenses, but then it refused to hear such evidence. This was no mere bifurcation of a trial, with the court trying certain issues out of order, and rendering interim rulings. Rather, the court gave a final, enforceable money judgment against Keel, and told him to raise his equitable defenses by cross-complaint in OPSC's pending action. (12/10/98 RT 15, 17-19.) The trial court's limited, one-day evidentiary hearing may have ameliorated some of the improper effects of deciding disputed issues by motion, but the very fact that even the court recognized that it could not decide all the issues involved in OPSC's claims under that hybrid procedure shows that as a matter of law a motion for contribution can never be used when a right to equitable indemnity or contribution involves disputed factual issues.

IV.

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN ENTERING A MONEY JUDGMENT AGAINST KEEL WITHOUT ALLOWING HIM TO PROVE HIS EQUITABLE DEFENSES AND OFFSETS.

Despite repeated objections (12/10/98 RT 13-19; CT 718, 740), the trial judge adamantly refused to allow Keel or TDC to assert and prove equitable defenses to OPSC's comparative indemnity claim. The court acknowledged that the defenses existed; indeed, it discussed one at length and stated that "I think that might be the basis of a cross-complaint." (12/10/98 RT 15.) The court assured the parties that its ruling would be without prejudice to their right to raise those defenses in OPSC's pending indemnity action. (12/10/98 RT 17, 19 ["I'm not saying you can't raise a

bunch of equitable defense[s] in it"].) But the court saw its task under the statute as a purely mechanical one: to divide the judgment "the way the jury anticipates it should be divided up . . . . And then whatever goes on after that can go on after that." (12/10/98 RT 19.)

Unfortunately, what "went on" after the court divided the judgment in accord with the jury's fault allocations was a travesty of proper legal procedure: the court entered an enforceable judgment against Keel, told him to raise his defenses in OPSC's separate action and denied Keel's request to stay the judgment for two months until the defenses could be tried. As shown below, this was worse than irregular; it was unconstitutional.

A. Statutory Contribution And Common Law Indemnity Are Both Subject To Equitable Defenses.

Contribution and equitable indemnity are subject to equitable defenses. As we've seen, subdivision (b) of section 875 provides that the "right of contribution shall be administered in accordance with the principles of equity." While subdivision (c) of section 875 provides that a tortfeasor cannot be compelled to make contribution "*beyond* his own pro rata share of the entire judgment" (emphasis added), subdivision (b) contemplates that, once the equities are considered, a court may decline to compel the tortfeasor to pay even his pro rata share. (See *Rollins v. State of California* (1971) 14 Cal.App.3d 160, 165, fn. 8 ["A fair reading of sections 875, subdivision (c), and 876, subdivision (a), offers the possibility that a contributor's pro rata share *is only a ceiling* on his contribution, not an inflexible rule," and that equitable considerations might be taken into account under subdivision (b) to reduce contribution below the pro rata ceiling, emphasis added].)

Similarly, a joint tortfeasor does not have an absolute right to comparative indemnity, even after a jury has made allocations of fault,

because equitable considerations may preclude him from enforcing that right. Indeed, the *American Motorcycle* "opinion itself . . . recognized that there will be situations where the new partial indemnification doctrine will not result in any apportioning of liability." (*Munoz v. Davis* (1983) 141 Cal.App.3d 420, 428 [the decision "did not establish a new cause of action separate and distinct from the traditional equitable indemnity action, but simply modified the all-or-nothing aspect of the pre-*American Motorcycle* doctrine to permit partial indemnification in appropriate cases," internal quotes omitted; emphasis in original]; see *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, supra,* 8 Cal.4th at p. 109 [the doctrine of comparative indemnity did not "alter the principle that indemnification is not automatically available," internal quotes omitted].) And this court has recognized that comparative indemnity is subject "to the ordinary rules of implied equitable indemnity." (*Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1541.)

In every case, the right to obtain equitable indemnity must be supported by an equitable basis which allows the court to translate the jury's fault allocations into an award in favor of one tortfeasor and against another. (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital, supra*, 8 Cal.4th at p. 107 ["In determining the availability of equitable indemnity, each case must be evaluated in its own unique context to determine whether and to what extent one concurrent tortfeasor is permitted to recover from another."].) The rationale for this rule is straightforward:

> "the key ingredient in equitable indemnity [is] *equity*. Where that element is missing, the complaint fails to state a cause of action and the question of how to apportion liability never arises." (*Munoz, supra*, 141 Cal.App.3d at p. 428, emphasis added.)

The absence of "equity" can be raised by way of an equitable defense. For example, in *Commercial Union Insurance Co. v. Ford Motor Co., supra,* 599 F.Supp. 1271, Ford was allowed to raise "several equitable defenses" to Commercial's action for "partial indemnity based upon comparative fault," including unclean hands and equitable estoppel. (*Id.* at p. 1272 & fn. 1, 1273, fn. 2.) Ford had been a defendant in the underlying personal injury action and Commercial insured Ford's co-defendant. Ford asserted that Commercial should be precluded from obtaining equitable indemnity because it acted inequitably in settling the underlying action for a sum in excess of its policy limits so as to avoid a potential bad faith claim.

The court agreed. Applying California law, the court held that "Commercial's procedural maneuvering should not permit it to obtain indemnity" as to that portion of its payment made to avoid a bad faith suit. (*Id.* at p. 1276.) Its conduct, the court concluded, whether or not considered as unclean hands, was inequitable and against public policy. (*Ibid.*)

In this case, the court refused to allow Keel to defend against the contribution motion by producing evidence of his equitable defenses. The court acknowledged that the defenses could be asserted, but it relegated them to OPSC's pending action for indemnity, stating: "I'm not saying you can't raise a bunch of equitable defense[s] in it" and "I'm not trying to prejudice the other action at all." (12/10/98 RT 17, 19.)

This was prejudicial error – the court first precluded Keel from asserting defenses that would have reduced or eliminated any amount due to OPSC as comparative indemnity and then proceeded to enter an enforceable judgment against Keel.

B. The Court Denied Keel's Constitutional Right To Due Process When It Entered A Final Money Judgment Against Him Without Permitting Him To Assert Or Prove His Equitable Defenses.

The federal and California Constitutions both guarantee due process of law. (U.S. Const., Amend. XIV, § 1 ["nor shall any State deprive any person of life, liberty or property without due process of law"]; Cal. Const., art. I, § 7 ["[a] person may not be deprived of life, liberty or property without due process of law"].) At its most elemental, that right guarantees that a party has the opportunity to be heard on his claims and defenses before judgment. (See, e.g., *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338-339 ["[t]he guarantee of procedural due process—a meaningful opportunity to be heard—is an aspect of the constitutional right of access to the courts for all persons, without regard to the type of relief sought"]; *Meller & Snyder v. R & T Properties, Inc.* (1998) 62 Cal.App.4th 1303, 1314-1315 [it is a violation of due process to deny joint judgment debtor opportunity to raise defenses to merits of underlying complaint because even if he is "ready to admit every allegation of the complaint . . . yet [he may] be ready, if an opportunity were presented, to make a successful defense"; these principles "lie at the base of all judicial proceedings," internal quotes omitted, emphasis omitted].)

Here, the trial court trampled on these constitutional rights. It entered a money judgment against Keel without permitting him to argue or present evidence on his equitable defenses. The court did not simply bifurcate the defenses from the claim with each to be decided in a different phase of the matter, but rather it decided OPSC's claim and told Keel to raise his defenses in response to OPSC's indemnity action, and then it refused to stay execution on the judgment until Keel's defenses had been heard and determined in the indemnity proceeding. (CT 795.)

The court's ruling is constitutionally infirm. (See *Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 430 [114 S.Ct. 2331, 2339, 129 L.Ed.2d 336] [the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis"].)

C. Had Keel Been Permitted To Prove His Equitable Defenses, The Judgment Would Have Been Substantially Reduced Or Altogether Eliminated.

Keel was ready to assert his equitable defenses in response to OPSC's pending indemnity action. After OPSC short-circuited the progress of that action by bringing its motion for contribution in the court below, Keel was again ready to prove his equitable defenses and asked for leave to do so. But, as we've seen, the trial judge refused to permit that.

The issue here involves the narrow question whether the court erred when it prevented Keel from asserting equitable defenses. Although the trial court did not base its decision on any evaluation of the merits of Keel's defenses, we briefly discuss them below in order to demonstrate that Keel intends to raise substantial issues that could well have affected the outcome of the motion for contribution.[16/]

16/ The discussion that follows is necessarily based largely on what Keel has pleaded in his answers and cross-complaint in the indemnity action and on limited evidence that he and TDC placed before the court below before it ruled that it would not consider equitable defenses. In addition, this Court adverted to many of the facts underlying Keel's main equitable defense in its January 30, 1998 unpublished decision affirming the judgment in the underlying malpractice case as against OPSC. (CT 29, 39-47.)

The common denominator of Keel's equitable defenses is OPSC's bad faith behavior during the post-judgment period. Throughout that period, OPSC actively deceived the court, the plaintiff and Keel and his insurer and delayed complying with its obligations so that, as it candidly admitted to this Court in its appeal from the underlying judgment, it could "ride on the coattails of Dr. Keel." (CT 43.) As shown below, this bad faith conduct resulted in losses to Keel that swamp the judgment for contribution. OPSC's conduct falls within the well-recognized equitable defense of unclean hands and the maxim that he who seeks equity must do equity. (See, e.g., *Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 862 [discussing both defenses].) The defense of unclean hands, if proven, entirely shuts the doors of a court of equity to OPSC's claim for contribution and indemnity. (See *Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 635 [where a party "has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy," internal quotes omitted].) The requirement that OPSC "do equity" means that it must take responsibility for the losses it caused Keel and TDC. (See *id.* at p. 645 [where both parties have equitable rights, "the plaintiff seeking relief "must provide for defendant's rights"]; *In re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 257-258 ["it is axiomatic that one who seeks equity must be willing to do equity"; thus, wife seeking spousal support is effectively seeking equitable apportionment and must do equity by conceding her husband's laches defense].)

Moreover, if a court of equity must consider OPSC's bad behavior before allowing it an equitable remedy, it must also consider Keel's good behavior in settling with Hamel and dismissing his appeal. Here, again,

OPSC hung back and waited to see if it could profit by Keel's exertions. When it decided it could not do so, it pursued its appeal, lost in the appellate court, unsuccessfully petitioned for review and then delayed for months in paying Hamel the remaining amounts on the joint and several judgment.

If there is a case for bending the legal rules to get a tortfeasor a quick indemnity judgment, this isn't it.

1. Because of OPSC's obstructive behavior, the *Hamel* trial court vacated its periodic payment judgment, causing Keel and TDC financial loss in an amount that swamps the present judgment.

Both Keel and OPSC requested that the Hamel trial court enter a periodic payment judgment under section 667.7. (CT 40.) Subsequently, the court vacated the periodicized judgment and entered a lump sum judgment because it determined that neither party was adequately insured. (CT 42.) Keel has pleaded in his answer and cross-complaint in the pending indemnity action and would have proven in the court below – had he been given a chance to do so – that OPSC had the ability to secure an annuity in a timely fashion, but intentionally took no action in the expectation that the court would allow it to get a free "ride on the coattails of Dr. Keel" who would be forced by circumstance to furnish adequate security for the entire joint and several judgment. (See CT 43.) This was OPSC's real agenda from the outset. (See JN 56, 93, 98; CT 40-46 [though "all parties contemplated that the periodic payment judgment would be secured by annuities," and Keel filed a statement from TDC guaranteeing his share of the periodic payments, OPSC did not offer any form of security until nearly two weeks after the court imposed deadline]; CT 495, 644-656 [OPSC's principal Neil Friedman conceded that despite a net worth of $44 million he had let his attorney represent to the court that without a loan,

Friedman could put up only a couple of hundred thousand dollars for an annuity to secure the periodic payment judgment].)[17/]

Such tactical game-playing may not strictly violate a legal duty; but it offends the clean hands requirements in equity. (See *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 291 ["[t]he equitable principles underlying the clean hands doctrine do not require a finding . . . of perjury, concealment or other illegal conduct," but "*[a]ny unconscious conduct* . . . which is connected with the controversy will repel [a plaintiff] from the forum whose very foundation is good conscience," emphasis in original, internal quotes omitted]; *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 684 ["Equity does not wait on precedent . . . but will adjust itself to those situations where right and justice would be defeated but for its intervention," internal quotes omitted].)

Losing the periodic payment judgment caused Keel and TDC substantial financial loss. Specifically, the $4 million Keel and TDC paid to settle the matter was "at least twice the cost of Dr. Keel's share of an annuity, which could have covered the judgment had [OPSC] not unreasonably failed and refused to timely fund an annuity." (JN 56, 93,

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17/ On OPSC's appeal of the underlying judgment, this Court held that the trial court had not abused its discretion in finding that neither OPSC nor Keel had been adequately insured. (CT 43-44.) Keel's equitable position is based on (1) the huge differences in the comparative degree of responsibility between himself and OPSC for the loss of the periodicized judgment; and (2) the fact that OPSC is the party seeking equitable relief. (See *Russell v. Soldinger*, *supra*, 59 Cal.App.3d at p. 646 ["the one coming into a court of equity for relief [must] prove not only his legal rights but his clean hands, and he may not rely on any deficiencies that may be laid at the door of the defendants]; *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 52 ["the doors of a court of equity [are closed] to one tainted with inequitableness or bad faith . . . however improper may have been the behavior of the defendant," internal quotes omitted].)

101-102; CT 42-43, 493.) OPSC acted inequitably and therefore is not entitled to equitable relief. (JN 55, 92 98.)[18/]

2. OPSC acted inequitably by misleading Hamel, Keel and the *Hamel* trial court as to the true status of its appeal bond.

OPSC also played fast and loose with its obligation to bond its appeal. Indeed, before the saga of its appeal bond concluded, OPSC had managed to deceive Hamel, Keel, TDC and the Hamel trial court and entwine the parties, their insurers and two bonding companies in a controversy that required hundreds of pages of briefing and a lengthy court proceeding to unravel. (See CT 48, 68, 73, 111, 122, 151, 191, 236, 240, 284, 292, 299, 313, 359; ACT 1, 15, 33, 45.)[19/]

Briefly, OPSC obtained a surety bond from Safeco Insurance Co. under a secret agreement that the bond would be operative for somewhere between "a matter of hours" to a few days, though no such limitation appeared on the face of the bond. (JN 56, 93, 102; CT 17, 143; ACT 17, 20.) The purpose of this so-called "stop-gap" bond was to prevent Hamel from conducting a judgment-debtor exam of Dr. Neil Friedman, the principal of OPSC. (CT 198-199; ACT 16-17, 34.) The ploy worked. The judgment debtor examination did not go forward but in fact at that time OPSC did not have a proper appeal bond.

In the meantime, OPSC arranged to be covered by a bond procured by Keel and TDC from Reliance Insurance Company, none of whom were

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18/ TDC asserted similar defenses based on these facts in its answer to OPSC's original complaint (CT 508-509), in its answer to OPSC's first amended complaint (JN 60) and in its cross-complaint. (JN 66.)

19/ "ACT" refers to the Augmented Clerk's Transcript, attached to Appellant's Application To Augment the Clerk's Transcript On Appeal.

aware of the Safeco bond. (CT 209.) Par for the course, OPSC paid no premium on either bond. (CT 76, 156, 237; ACT 35.)[20/]

Everybody lost because of OPSC's machinations, except OPSC. The plaintiff was improperly denied her judgment-debtor exam, because in fact OPSC was not acceptably bonded as of that date. The court was defrauded because the Safeco bond did not reflect the secret arrangement between OPSC and Safeco as to the bond's limited period of operation. And all parties were put to major expense in briefing and arguing which bonding company covered which tortfeasor.[21/]

3. Keel's post-judgment settlement qualifies as an equitable defense to part or all of a claim for contribution or indemnity.

As a matter of equity, OPSC should not be permitted to recover indemnity or contribution by reason of the settlement between Hamel and Keel, under which Keel paid Hamel $4 million, dismissed his appeal and obtained a covenant not to execute. (JN 57, 94, 100; CT 159.) Because that settlement came post-judgment, it cannot automatically bar further claims for contribution or indemnity by OPSC even if it were determined to

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20/ OPSC's failure to timely pay its share of the Reliance bond premium and to provide an indemnification regarding the coverage caused Keel and TDC to withdraw the offer to have the Reliance bond cover OPSC. (CT 75, 209-210, 212, 221, 225.)

21/ Safeco insisted that it had no liability on its bond because it was only meant to be in place for a few days. (See CT 191, 299; ACT 45.) Reliance insisted it was not liable because it did not cover OPSC, which had paid it no premium and had given it no indemnity. (CT 76, 151, 236.) Keel argued that if Hamel were allowed to enforce the Reliance bond, it would necessarily violate her covenant not to execute against him, since only Keel and his insurer had indemnified Reliance. (CT 111, 151, 242-243.) Hamel argued that both bonding companies were liable for the outstanding amount of the judgment. (CT 288.) This protracted and costly dispute can be laid at OPSC's door, and its failure to act equitably should bar its claim to equitable indemnity.

have been entered into in good faith. (§ 877.6.) Keel should be permitted to raise the settlement and the events surrounding it as a matters of equity that may reduce or defeat OPSC's equitable claim.

Our Supreme Court has already held that nothing in the legislative history of the contribution statute was intended to foreclose developments in the common law that furthered the equitable resolution of disputes among co-tortfeasors. (*American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at pp. 601-602.) Similarly, allowing the court to consider the equities of a party settling post-judgment furthers the policies behind the absolute immunity granted by section 877.6 to a tortfeasor who enters into a good faith settlement prior to judgment.[22/] It is also public policy to encourage early post-judgment settlements; indeed, they are particularly favored since there has now been an actual judgment in favor of plaintiff.[23/]

4. Equitable considerations preclude the court from compelling Keel to indemnify OPSC for any portion of the interest that continued to run on the *Hamel* judgment after he settled with Hamel.

After Keel settled and received a covenant not to execute, OPSC pursued its appeal, failed to reverse the judgment, unsuccessfully petitioned the Supreme Court for review and then delayed paying Hamel the full amount of the judgment until four months after the remittitur issued. Without considering the equities, or even permitting Keel to raise them, the

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22/ In 1998, Keel brought an action for declaratory relief on the premise that section 877.6 applied to post-judgment settlements that were on appeal and thus not yet final. (JN 133, 149.) OPSC successfully demurred to the complaint. (JN 161.) Keel is not seeking to reargue that issue on this appeal.

23/ Keel also expects to show that, in a repeat of the pattern seen in connection with the periodic judgment and the appeal bond, OPSC chose not to settle with Hamel, but to wait and see if it could get a free ride on whatever Keel and TDC agreed to pay.

court included as part of the *Hamel* judgment subject to equitable division the interest that continued to run on what remained of the *Hamel* judgment after Keel settled and OPSC elected to continue to fight. (1/7/99 RT 94-98; CT 52, 675-677.) Where, as here, the only reason interest continued to run was because OPSC elected to continued to litigate, it is inequitable that Keel should be required to reimburse OPSC for the cost of its own folly. This placed Keel at the mercy of OPSC's delaying tactics. The longer OPSC took to pay, the longer interest would continue to run on the unsatisfied portion of the judgment; and, under the trial court's view, Keel would be required to indemnify OPSC for part of that interest. This makes no sense. It punishes a settling party and rewards the party who delays.

The trial court refused to consider any of this evidence of inequitable conduct by OPSC. But in an equitable proceeding, this type of evidence is exactly what a court *should* consider. For "[i]nterest is awarded only when such an award is fair and equitable in consideration of the facts of the particular case." (*Industrial Indem. Co. v. Golden State Co.* (1957) 49 Cal.2d 255, 271-272.) Hamel's attorney certainly doubted that OPSC's post-appeal shenanigans were either fair or equitable:

> "Neil Friedman [OPSC's principal] and his attorneys are doing nothing more than trying to pay 45 percent, and throw into litigation a shortfall on a joint and several verdict. . . . [¶] Neil Friedman and OPSC have assets ten times greater than this judgment. If they wanted to pay the entire judgment and get out from under the indemnity agreement with the bonding companies, they certainly could." (CT 332.)

The trial court erred in refusing to consider this kind of evidence before requiring Keel to pay post-settlement interest. Keel suffered

prejudice because, as we next explain, the judgment awards OPSC hundreds of thousands of dollars in interest that it had no right to recover.

V.

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE COURT PREJUDICIALLY ERRED IN AWARDING OPSC $75,000 IN DAMAGES THAT THE COURT HAD NO POWER TO AWARD ON A CONTRIBUTION MOTION AND HUNDREDS OF THOUSANDS OF DOLLARS IN INTEREST TO WHICH OPSC WAS NOT LEGALLY OR EQUITABLY ENTITLED.

A. The Court Improperly Awarded OPSC $75,000 That Was No Part Of The Judgment Subject To Equitable Division.

It is undisputed that the trial court awarded OPSC $75,000 that it claimed it was obligated to pay to Safeco "to cover 'transactional costs including, but not limited to attorneys fees, costs, expense, bond premium, and title insurance'" under a loan agreement between Safeco and OPSC. (CT 744-745.) But that sum was not part of the underlying judgment and therefore could not be a division of the judgment either on a pro rata basis (contribution) or in accordance with the jury's allocation of fault (comparative indemnity). (CT 389-390, 557, 725-726, 744-745, 750; 1/7/99 RT 24, 95-99.)

The court in effect awarded damages, which it had no authority to do on a motion for contribution. First, the sole purpose of contribution and indemnity is to divide a judgment after the tortfeasor has paid more than his allocable share. (*River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 993; *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 494.) Contribution and indemnity cannot be used to

award other damages, such as compensating a tortfeasor for losses due to his co-tortfeasor's breach of an alleged obligation between them.

Second, even if a court could award damages in a proceeding for contribution or indemnity, it could not do so by motion. Rather, the recovery of damages requires a suit, followed by discovery and trial. (*People v. Friscia, supra*, 18 Cal.App.4th at pp. 839-840.) Here, damages were awarded without pleading and without a trial. This is unconstitutional. (*Ibid.*)

Third, there was no legal duty or breach that entitled OPSC to recover from Keel service charges it agreed to pay to its bonding company. Hamel had every right to enforce her joint and several judgment against OPSC alone. No one forced OPSC to post an appeal bond. An appeal bond is not a condition to the right of appeal. (*Buchwald v. Katz* (1972) 8 Cal.3d 493, 498-499.) Rather, it serves simply to stay execution of the judgment pending appeal if the judgment debtor elects to obtain a stay. (*Huskey v. Berini* (1955) 135 Cal.App.2d 613, 617-618; see also *Oyakawa v. Gillett* (1992) 8 Cal.App.4th 628, 630.) Keel had nothing to do with OPSC's decision to post a bond or to enter into a loan agreement with its bonding company and there is nothing in the law which would permit OPSC to recover its voluntarily-incurred bond costs from Keel. Keel cannot be responsible for the fact OPSC chose to call on its bonding company to help it meet its severable obligation to Hamel to pay the remainder of the judgment amount.

B. The Court Improperly Ordered Keel To Indemnify OPSC For Post-Settlement Interest On The *Hamel* Judgment.

1. As a matter of equity, the trial court erred in ordering Keel to pay post-settlement interest.

The court required Keel to indemnify OPSC for 55 percent of the interest that continued to run on the underlying judgment after Keel's settlement with Hamel. (1/7/99 RT 94-98; CT 52, 675-677.) As argued above (pp. 40-42), this is contrary to equity and wise public policy, for to hold a settling tortfeasor responsible for post-settlement interest on the unsatisfied part of a judgment substantially reduces the value of a covenant not to execute, undermines the policy of encouraging settlements and holds the settling party hostage to a co-tortfeasor, like OPSC, who delays paying the full amount of the judgment as long as possible. That is why a court giving equitable relief must weigh the equities to ensure that the award "is fair and equitable in consideration of the facts of the particular case." (*Industrial Indem. Co. v. Golden State Co.*, *supra*, 49 Cal.2d at p. 272.) The court here refused to consider the equities of the case or the equitable implications of Keel's settlement.

2. As a matter of law, the court erred in compelling Keel to pay a fault-apportioned share of OPSC's wilful overpayments of interest to Hamel.

OPSC or its liability insurer made payments to Hamel in partial satisfaction of the outstanding judgment, but she refused to accept anything but full payment. (CT 293, 317, 342, 724-725.) As a matter of law, these tenders stopped the running of interest on the amounts tendered.[24/]

24/ Section 685.010, subd. (a) ("Interest accrues . . . on the principal amount of a money judgment remaining unsatisfied"); § 685.030, subd. (c) (when money judgment partially paid, "interest ceases to accrue as to the part satisfied on the date the part is satisfied"); § 685.030, subd. (d)(2)

(continued...)

Although OPSC itself had argued that its tenders – actual checks made out and delivered to Hamel – stopped the running of interest on the amount tendered (CT 294, 342-343), it nonetheless voluntarily chose to pay such interest even though it was not owing. But under the law, a party who pays something that was not owed acts as a volunteer and cannot recover such volunteered payment from anyone else. (*Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal.App.3d 1308, 1323, disapproved on another point in *Buss v. Superior Court* (1997) 16 Cal.4th 35; *American Oil Service v. Hope Oil Co.* (1961) 194 Cal.App.2d 581, 586.)

Here, the trial court held that "[m]oney that is tendered that isn't paid is not going to stop interest for purposes of contribution under [section] 875." (1/7/99 RT 22-23.) But, as we have demonstrated, the law is otherwise.[25/]

24/(...continued)
(money judgment satisfied when "satisfaction is tendered to the judgment creditor"); *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.* (1990) 222 Cal.App.3d 146, 150 ("Interest ceases to accrue on the date the judgment is satisfied in full *or, as to a part satisfied*, on the date that part is satisfied," emphasis added); *Montano v. City of South Gate* (1970) 13 Cal.App.3d 446, 449; 8 Witkin, Cal. Procedure (4th ed. 1997) Enforcement of Judgments, § 478, p. 474 ("Mere tender . . . stop[s] the running of interest"); 2 Ahart & Michaelson, Cal. Practice Guide: Enforcing Judgments and Debts (Rutter 1998) § 6:26, p. 6A-10 (partial payment stops interest "as to the part [of the judgment] satisfied, emphasis omitted").

25/ OPSC has argued that the court was bound by the amount OPSC paid Hamel (even though it included gratuitous payments) because that was the figure that Commissioner Gould had used in his ruling granting Hamel's motion to enforce the Safeco and Reliance surety bonds. (1/7/99 RT 82-85, 95-96; CT 48, 383-385.) But the components of that figure were not raised or adjudicated on the motions before the commissioner. (CT 48, 68, 313.) At any rate, Keel was not a party to Hamel's motion and Hamel sought no relief against him. Keel participated in briefing and oral argument to ensure that no decision was made that violated his covenant not to execute. But given the covenant, Keel had no standing to litigate over what Hamel was claiming as the outstanding judgment amount.

C. The Trial Court Erred In Awarding OPSC Prejudgment Interest On The Judgment In This Case Without Considering The Equities.

Under Civil Code section 3287, subdivision (a), a person who is entitled to recover "damages" in an amount certain is entitled also as a matter of right to prejudgment interest. Courts granting equitable remedies usually follow the approach of section 3287, subdivision (a), but they do so as a matter of equity, and sometimes they grant interest where the statute does not allow it and sometimes they deny it where it would be allowed at law. (See *Leonard v. Huston* (1954) 122 Cal.App.2d 541, 548 [denying interest allowable under § 3287, subd. (a) because "[i]f a court of equity may award damages to compensate for the unreasonable demands of a buyer, it may also withhold interest to compensate for the unreasonable demands of a seller"]; *Industrial Indem. Co. v. Golden State Co.*, *supra*, 49 Cal.2d at pp. 271-272 [citing *Leonard* with approval]; *Rabinowitch v. Cal. Western Gas Co.* (1967) 257 Cal.App.2d 150, 160-161 [unlike interest on legal claim, interest in equity is a matter of discretion]; *McCowen v. Pew* (1912) 18 Cal.App.482, 485.)[26/]

The trial court was obliged, therefore, to consider the equities, including Keel's equitable defenses, before awarding prejudgment interest.

26/ It is questionable whether section 3287, subdivision (a) even applies here because an award of comparative indemnity is not an award of damages. Indemnity, like account, is an equitable remedy, even though it results in a money judgment; damages, however, are the legal remedy par excellence. (See *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1555; *Larwin-Southern California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626, 636 [referring to "the traditional legal remedy of damages"]; *Crouser v. Boice* (1942) 51 Cal.App.2d 198, 202-203 [contrasting "equitable relief of specific performance" with "legal relief of damages"].)

CONCLUSION

There is a right way and a wrong way to do things. OPSC chose the wrong way, and the trial court went along. Here, a statute expressly barred OPSC from bringing a motion for contribution while it had an outstanding indemnity claim, yet the trial court allowed OPSC to enforce that claim by way of a motion for contribution, thus denying Keel the benefits of pleading, discovery and trial. That same statute restricted the relief that a court can give under a contribution motion to a pro rata division of the judgment, yet here the trial court effectively awarded OPSC comparative indemnity. And, finally, the court entered a money judgment against Keel without allowing him to raise equitable defenses that, if proven, would have entirely defeated OPSC's claims.

The right way to proceed is for this Court to reverse the judgment, with directions to deny the motion with prejudice, thus allowing OPSC's own suit to go forward as it would have done had OPSC itself not tried to short-circuit it by seeking relief on a motion for contribution. A reversal of the judgment does not mean that OPSC loses its right to seek comparative indemnity. OPSC's original action for indemnity is still pending, stayed during this appeal. In that action, OPSC can make its case within the rules, Keel (and the other defendants) can assert their equitable defenses, all parties can cross-examine witnesses, all parties can have discovery, and a

judgment can be entered that leaves no relevant issue for another court to adjudicate.

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Respectfully submitted,

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