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 REPLY BRIEF

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INTRODUCTION

The judgment in this case must be reversed. The trial court acted without authority – and in direct violation of express statutory mandate – when it allowed Out-Patient Surgery Center ("OPSC") to use the contribution statute (Code Civ. Proc., §§ 875-880)[1/] to enforce its right to fault-based indemnity against Dr. William Keel. By improperly permitting OPSC to use the statute's motion procedure to summarily obtain entry of a $1.6 million judgment against Keel, the trial court denied Keel fundamental rights that every litigant possesses – to responsively plead, to conduct discovery, to proceed to trial and to assert and prove defenses to the asserted claim.

OPSC is unable to defend this grotesque procedure. Its response ignores the facts, misstates the law and fails to contest most of Keel's arguments. For example:

- Keel showed that the plain language of the contribution statute (§ 875, subd. (f)) bars a tortfeasor who is "entitled to indemnity" from using a contribution motion to seek relief. (AOB 12-16.) OPSC argues that it was not "entitled to indemnity" when it brought its contribution motion because there had been no "finding" to that effect.

Wrong.

As a joint judgment debtor, OPSC became entitled to indemnity as a matter of law when it paid the medical-malpractice plaintiff more than the fault-allocated share of the underlying medical malpractice judgment which the jury had determined OPSC owed. Since OPSC then unquestionably had

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

an indemnity entitlement which it could elect to enforce, the contribution statute was inapplicable by its own terms.

- Keel also showed that the judgment cannot stand because the statute's plain language (§§ 875, subd. (c), 876, subd. (a)) bars a court from awarding a tortfeasor anything other than a pro rata division of a judgment; yet, the judgment entered here was not pro rata, but rather was comparative fault-based. (AOB 6-7, 9-10, 30.) OPSC has no answer. It doesn't discuss the relevant statutory provisions nor does it deal credibly with *Lamberton v. Rhodes-Jamieson* (1988) 199 Cal.App.3d 748, 753, which squarely holds that a court cannot award comparative indemnity under the contribution statute.

- Keel showed that the trial court acted unconstitutionally when it entered judgment against him without allowing him to present his substantive defenses to OPSC's claim. (AOB 29-34.) Once again, OPSC has no meaningful response. It argues, with *no* record citation, that the trial court did consider Keel's equitable defenses. (RB 12.) But Keel showed, *with* record citations, that the trial court repeatedly refused to consider those defenses. (AOB 7, 29-30.) Indeed, the trial court told Keel it should assert those defenses in OPSC's simultaneously pending comparative indemnity lawsuit. (AOB 7, 29-30.)

It is unconstitutional for a court to enter judgment without hearing affirmative defenses. Yet, that's exactly what occurred here. Unsurprisingly, OPSC has found no doctrine, case or rationale that allows a court to enter judgment after considering only the claimant's position.

- OPSC makes no credible response to Keel's showing that the trial court apportioned the wrong judgment amount, overstating the present judgment by hundreds of thousands of dollars. (AOB 42-46.)

In short, OPSC has not answered – and cannot answer – Keel's case. Having no substantive position, OPSC tries to frame this appeal as some sort of a titanic contest between "the modern principles of comparative fault" and the "equal division" approach of contribution. (RB 9.) In fact, there is no such conflict. Nor is OPSC's entitlement to comparative indemnity at stake here. Its original – and still-pending – action based "on Dr. Keel's comparative fault as determined by the jury" affords OPSC a proper – indeed, the only – avenue for seeking to enforce its indemnity entitlement. (AOB 5-6, 9.) That action and not a contribution motion is where this case has always belonged. As our Supreme Court declared in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1197-1198:

> "[A] defendant may pursue a comparative equitable indemnity claim against other tortfeasors *either* (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of the damages through the satisfaction of a judgment or through a payment in settlement." (Emphasis added.)

OPSC cannot substitute a motion for contribution for these exclusive avenues for obtaining indemnity recovery.

The judgment here should be reversed with directions to the trial court to enter judgment in Keel's favor on OPSC's contribution motion. OPSC can then seek to enforce its indemnity entitlement in the proper forum – its presently-pending indemnity lawsuit – where it will be able to obtain an indemnity judgment provided it is able to prove its case and overcome Keel's asserted affirmative defenses.

I. CONTRARY TO OPSC'S CONTENTION, THE TRIAL COURT HAD NO POWER TO ENTERTAIN OR ENTER JUDGMENT PURSUANT TO A STATUTORY CONTRIBUTION MOTION WHERE, AS HERE, THE MOVING PARTY WAS ENTITLED TO INDEMNITY.

In his opening brief, Keel demonstrated that the trial court violated express statutory law and, thus, acted beyond its power in allowing OPSC to use a contribution statute to enforce an entitlement to indemnity based on percentages of comparative fault found by the jury in the underlying medical malpractice action. (AOB 9-16.) As an adjudged joint and several judgment debtor who undisputedly paid more than its fault-allocated share of the underlying medical malpractice judgment, OPSC was entitled to indemnity as a matter of law. However, OPSC cannot enforce that entitlement by motion under the contribution statute, because the statute and its motion procedure are expressly off-limits to a "tortfeasor judgment debtor [who] is entitled to indemnity from another." (§ 875, subd. (f); AOB, 12-13.) This alone requires reversal.

OPSC has no response to these points. Significantly, OPSC never even disputes (nor could it dispute) that in enacting subdivision (f) of section 875, the Legislature intended to preclude application of the contribution statute when there is an entitlement to indemnity. (AOB 14; RB 10.) Rather, it advances two arguments as to why it claims this case does not fall within the legislative prohibition: (1) that its contribution motion "is not barred" because "[t]here has been no finding that [it] is 'entitled to indemnity'" (RB 10, 11) and (2) that our Supreme Court has

held that tortfeasors may use a motion under the contribution statute to obtain comparative indemnity (RB 8-9).

OPSC is wrong on both counts. First, it is "entitled to indemnity" within the meaning of the statute because the law establishes that a joint tortfeasor adjudged to have been comparatively at fault is entitled to indemnity on a comparative fault basis once it has paid more than its percentage of the loss. (*People ex rel. Dept. of Transportation v. Superior Court* (1980) 26 Cal.3d 744, 757-759.) Here, the jury found that OPSC and Keel were joint tortfeasors who were 45 percent and 55 percent at fault, respectively; and, OPSC paid more than its percentage share of the judgment. These uncontroverted facts establish that OPSC was entitled to indemnity as a matter of law when it brought its motion for contribution, thus precluding its use of the contribution statute.

Second, contrary to OPSC's contention, no court has ever held that a tortfeasor can obtain comparative indemnity by motion under the contribution statute. As noted above, our Supreme Court in *Evangelatos* declared that the only avenues for obtaining comparative indemnity are a cross-complaint in the original tort action or a separate indemnity action.

A. Both Statutory And Decisional Law Establish That The Contribution Statute Cannot Be Used By A Tortfeasor Who Has An Entitlement To Indemnity.

1. The statute.

The contribution statute could not be plainer: "[W]here one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them." (§ 875, subd. (f).)[2/]

Under this statute, if a tortfeasor judgment debtor, such as OPSC, is entitled to indemnity from another, such as Keel, there "shall be no right of contribution between them." Period.

2. The decisional law.

The case law is equally plain that a tortfeasor who is entitled to indemnity cannot utilize the contribution statute. The Supreme Court made this clear in the very case in which it established a comparative indemnity entitlement based on a jury allocation of fault.

In *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, the Court modified the all-or-nothing rule of common law indemnity to permit comparative fault-based indemnity between joint tortfeasors. (*Id.* at pp. 582-583, 592; see AOB 10-11, 19.) The court was undeterred by the contribution statute's provisions calling for fault allocation on a pro rata basis. Rather, it held that the contribution statute had nothing to do with common law indemnity and did *not* preclude the courts from developing a rule of indemnity law that allowed fault-based apportionment.

2/ Subdivision (f) also provides that "*[t]his title* shall not impair any right of indemnity." (Emphasis added.)

American Motorcycle concluded that the contribution statute operated in a separate sphere from common law indemnity and "by its own terms, expressly *subordinates* its provisions to common law indemnity rules." (20 Cal.3d at pp. 584, 592; see AOB 19-20.) The court specifically recognized that section 875, subdivision (f) is one of the statutory terms that "specifically preserve[s] the right of indemnity, and indeed, provide[s] that the right of contribution shall be subordinate" to it. (*Id.* at p. 602.) According to the Court:

> "[S]ince the comparative indemnity rule we recognize today is simply an evolutionary development of the common law equitable indemnity doctrine, *the primacy of such right of indemnity is expressly recognized by the statutory provisions*." (*Id.* at p. 584, emphasis added.)

American Motorcycle can have but one meaning – a meaning that OPSC, despite its obfuscation, cannot subvert. The entire contribution statute, including its motion procedure (§ 878), is "expressly subordinat[ed] . . . to common law indemnity rules." (20 Cal.3d at p. 584; cf. § 875, subd. (f) [providing that subdivision (f)'s bar on using contribution statute to obtain indemnity supercedes all other provisions in "[t]his title"].)

When the trial court here allowed OPSC to use a statutory contribution motion to obtain indemnity, it turned the statutory scheme on its head. For this reason alone, the judgment is erroneous on its face and must be reversed.

B. The Contribution Statute Is Inapplicable In This Case As A Matter Of Law Because It Is Indisputable That When OPSC Brought Its Contribution Motion, It Was Entitled To Indemnity.

The trial court refused to apply subdivision (f) of section 875 to bar OPSC from using a motion for contribution to enforce its entitlement to indemnity because, according to the trial court, a tortfeasor is not "entitled to indemnity" unless he has obtained a final judgment establishing that fact. (See AOB 13-14.) Along the same lines, OPSC argues that a tortfeasor is not "entitled to indemnity" unless there has been a "finding" to that effect. (RT 10-11.)

This is not the law.

When OPSC sued Keel under the contribution statute, OPSC was then and there entitled to indemnity because it had been held jointly and severally liable in a medical malpractice case in which the jury determined percentages of comparative fault and, thereafter, it paid more than its fault-allocated share. The law unequivocally so establishes.

1. As a matter of law, OPSC was entitled to indemnity when it brought its motion for contribution.

California precedent establishes that a joint tortfeasor is entitled to indemnity whenever these criteria are satisfied:

a. He is jointly liable to the plaintiff (*Major Clients Agency v. Diemer* (1998) 67 Cal.App.4th 1116, 1126 ["unless the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff there is no basis for indemnity"]); and

b. He has suffered a loss through payment of an amount in excess of his share of damages. (See, e.g., *People ex rel. Dept. of Transportation v. Superior Court, supra,* 26 Cal.3d at pp. 757-759 [a claim for comparative indemnity, like a claim for contribution, accrues when a tortfeasor "has paid out more than his share of the damages"]; *Preferred Risk Mutual Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208, 213 [the equitable indemnity cause of action accrues when the tortfeasor pays the injured party's claim].)

Undisputed evidence establishes that these criteria are satisfied here. The jury in the underlying medical malpractice case found OPSC and Keel jointly and severally liable to the plaintiff and it apportioned fault, 55 percent to Keel, 45 percent to OPSC. (AOB 4.) Three years later, OPSC paid Hamel an amount in excess of its fault-allocated share of the judgment. (*Id.* at 5; CT 2-16, 289, 293, 317, 326, 332-333, 342, 384, 397, 724-725.)

For these reasons, when OPSC brought its motion for contribution, it was entitled to indemnity within the meaning of section 875, subdivision (f). As a matter of law, then, the contribution statute was inapplicable.

2. Contrary to OPSC's and the trial court's positions, the inapplicability of the contribution statute does not depend on a "finding" or "final judgment" awarding indemnity.

There is no merit in OPSC's argument that it was not "entitled to indemnity" when it brought its contribution motion because there had not yet been a "finding" that it was entitled to indemnity. (RB 11.) Nor is there any requirement that there be a "final judgment" awarding indemnity, as the trial court intimated.

Not only are these positions contrary to the decisional authority just discussed, they are not supported by the statute's language. The controlling statute does not use the word "finding" or "judgment." Rather, it merely says, "entitled." The dictionary defines "entitle" as meaning "[t]o furnish with a right or claim to something." (American Heritage Dict. (3d College ed. 1993) p. 459; Black's Law Dict. (6th ed. 1990), p. 532.) ["entitle" means "[t]o qualify for; to furnish with proper grounds for seeking or claiming"].)

Here, OPSC "qualified for" comparative indemnity because it was a joint judgment debtor on the underlying malpractice judgment and it paid more than its fault-allocated share of the judgment. These facts furnished OPSC with the "proper grounds for seeking or claiming" comparative indemnity. At that point, OPSC was "entitled to indemnity" because it had "proper grounds for seeking or claiming" it.[3/]

No other result makes sense. If a tortfeasor were free to bring a motion for contribution as soon as he or she becomes a joint judgment debtor and pays more than his or her fault-allocated share of the judgment,

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3/ But even if – contrary to the statute's clear meaning – a "finding" were somehow required, the same result would be mandated because there *was* such a finding here. Specifically, a "finding" was made by the malpractice jury when it assigned percentages of fault to Keel and OPSC.

Nor is there any basis for equating "entitled" with "judgment," as the trial court did. When the Legislature meant "judgment" in the contribution statute, it specifically used that word. For example, subdivision (c) of section 875 provides that a "right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint *judgment* or paid more than his pro rata share thereof." (Emphasis supplied.) In distinct contrast, subdivision (f) carefully speaks in terms of a "right of indemnity" and of a tortfeasor who "is entitled to indemnity." There is no mention of "judgment" or "finding." The Legislature could easily have referred to a tortfeasor who "has obtained a judgment for indemnity," if that was what it meant to say.

statutory contribution would swallow comparative indemnity in every case. This would defy more than a quarter century of California law establishing that a fault-based sharing of losses is more equitable than mechanical apportionment. This would be ludicrous.[4/] And, it would destroy a foundational element of our tort system – that liability must be shared in accordance with fault. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804; *American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d 578.)

For these reasons, the contribution statute must be construed to deny a tortfeasor access to its provisions so long as he has an entitlement to indemnity – that is, as soon as he pays more than the share of the judgment allocated to him by the jury.

3. The proper – indeed, the only – means for OPSC to seek enforcement of its indemnity entitlement is for it to pursue its still-pending liability lawsuit.

OPSC's misuse of the contribution statute has led to a particularly perverse result. Long before OPSC conceived of manipulating the contribution statute to obtain an unlawful comparative indemnity judgment, it actually saw the true light. Its initial instincts were correct: It filed a separate lawsuit to determine "its rights to contribution or partial or

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4/ For example, imagine a tortfeasor to whom the jury apportions 80 percent of the fault. If he pays the entire judgment immediately after it is entered, what is to stop him from quickly bringing a motion under the contribution statute to inequitably force the 20 percent-liable co-defendant to pay 50 percent of the judgment, rather than the jury-apportioned 20 percent contemplated by *American Motorcycle*? Nothing. Once the 80 percent tortfeasor brings his motion for contribution, he will defeat *American Motorcycle* by forcing an unfair equal division of the judgment long before his co-tortfeasor can secure a finding or judgment that enforces his right to indemnity.

comparative indemnity based on Dr. Keel's comparative fault as determined by the jury." (CT 494; JN 6; AOB 5-6.) That action was pending when OPSC brought its motion for contribution and it is still pending. (AOB 5-6, 9.) There, Keel (and other defendants) pleaded equitable defenses and offsets to OPSC's indemnity claims. (AOB 6-8.) It is there that OPSC's claims must be tried.

Had the trial court here obeyed the mandate of section 875, subdivision (f), the unfortunate duplication, delay and unnecessary expense occurring here would never have happened. As demonstrated in our opening brief (AOB 25-27), the trial court should have denied OPSC's contribution motion not merely because section 875, subdivision (f) compelled denial, but also for the same reasons courts routinely dismiss a second action pending between the same parties on the same cause of action. (See AOB 25-27.)

Once again, OPSC fails to credibly respond. It argues that "both a motion and an action can be brought and the denial of one does not require denial of the other," but it cites no case that favors such duplication. OPSC's inability to furnish authority is not surprising, since its position directly contradicts section 875, subdivision (f).

The two authorities OPSC does cite are completely irrelevant to this issue. (RB 11.) First, OPSC quotes subdivision (c) of section 883, which provides that "[n]othing in this section limits any other remedy that a judgment debtor entitled to contribution or repayment may have." But that section is part of a chapter that "governs contribution among joint judgment debtors *other than joint tortfeasors*." (§ 881, emphasis added.) Here, the proceedings involve joint tortfeasors. Thus, section 883 is inapplicable on its face.

Second, OPSC cites *Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, but that case did not involve – as the present case plainly does – two separate actions pending at the same time seeking identical relief. In *Coca-Cola*, defendant Coca-Cola brought a cross-complaint for comparative indemnity in a personal injury action. The court dismissed the cross-complaint with prejudice, and Coca-Cola chose not to seek review of the dismissal. (*Id.* at pp. 1375-1376.) Later, in the personal injury action, a joint and several judgment was entered against Coca-Cola and its co-tortfeasor, and Coca-Cola paid the judgment. (*Id.* at p. 1376.) After the personal injury action had concluded, Coca-Cola brought a *separate action* – not a motion in the concluded personal injury action – for contribution. (*Id.* at pp. 1374, 1376.)

Here, unlike the situation in *Coca Cola*, neither OPSC nor Keel filed an indemnity cross-complaint in the underlying malpractice action; at no point was it ever adjudged that either tortfeasor had no indemnity entitlement; after exhausting its appellate remedies in the underlying action, OPSC filed an indemnity action seeking allocation of the judgment on a comparative fault basis; and, *while that action was still pending,* it brought a motion for contribution in the malpractice action. (AOB 5-6.) Here, unlike the situation in *Coca Cola*, OPSC at all times possessed a right to seek enforcement of its entitlement to indemnity and was always free to continue to prosecute the separate indemnity lawsuit it voluntarily chose to bring.

4. The courts have uniformly refused to allow tortfeasors to use the contribution statute to obtain a common law indemnity remedy.

No case has ever allowed a tortfeasor to use the contribution statute to enforce or defeat an entitlement to comparative indemnity. The reason why is obvious: A statute (§ 875, subd. (f)) precludes such a result.

In the rare instances where a party has tried to employ such an unfounded maneuver, the courts have acted uniformly to reassert the boundaries between statutory contribution and common law indemnity. (See *Safeway Stores, Inc. v. Nest- Kart* (1978) 21 Cal.3d 322 [reversing order granting contribution motion where jury had made comparative fault allocations]; *Lamberton v. Rhodes-Jamieson*, *supra*, 199 Cal.App.3d 748 [affirming denial of motion seeking comparative indemnity under contribution statute]; *American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at p. 602 [holding that section 875, subdivision (f), subordinates contribution to indemnity]; *Evangelatos*, *supra*, at pp. 1197-1198 [establishing that an entitlement to indemnity is enforceable either by cross-complaint in the original tort action or by a separate civil action].) As demonstrated above, any other result would subvert the legislative will and deny due process.

C. None Of The Cases Cited By OPSC Supports Its Claim; All Reject It.

OPSC cites *Safeway*, *American Motorcycle* and *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87 as support for its position. (RB 5-10.) None helps OPSC. None awards comparative indemnity under the contribution statute or even suggests that such a topsy-

turvy procedure could be countenanced. If anything, these cases preclude application of the contribution statute in this case.

1. *Safeway Stores* negates OPSC's position.

According to OPSC, *Safeway* "hold[s] that contribution should be determined in accordance with the comparative fault assessed by the jury; not equal division pro rata." (RB 9.) Nothing could be further from the truth.

First, OPSC is wrong because the Legislature has said it is wrong. The contribution statute expressly provides that its provisions are unavailable where a litigant is entitled to indemnity (§ 875, subd. (f)); it also provides that the only remedy available under the statute is a *pro-rata*, or equal, division of a judgment, not a distribution in accordance with fault. (See pp. 19-22, *post*; AOB 16-24.) In short, by legislative directive, statutory contribution is one procedure, common law fault-based indemnity is another, and never the twain shall meet.

Second, OPSC is wrong because *Safeway* squarely confirms the statute's directives. There, the jury allocated fault percentages 80/20 between co-tortfeasors. Each tortfeasor then paid plaintiff in accordance with its allocated share. Since neither tortfeasor paid more than his share, neither asked, nor could ask (*People ex rel. Dept. of Transportation v. Superior Court, supra,* 26 Cal.3d at p. 744), the trial court for indemnity. Nevertheless, the 80 percent tortfeasor tried to end run the comparative fault doctrine by seeking an order under the contribution statute to divide the judgment pro rata. Rather than bearing 80% of the liability, the 80% tortfeasor sought a windfall 50-50 allocation.

Acting prior to the decision in *American Motorcycle*, the trial court held that it was compelled to make an equal division of the judgment because the contribution statute required such a division. (*Safeway Stores, Inc. v. Nest-Kart*, *supra*, 21 Cal.3d at p. 326.) The Supreme Court reversed, categorically rejecting the charade.

By the time *Safeway* reached the Supreme Court, *American Motorcycle* had been decided, and had explicitly held that the contribution statute did not preclude recognition of a common law right to comparative indemnity. (*Id.* at p. 328.) Based on *American Motorcycle*, *Safeway* reversed the judgment, holding that the contribution statute did not apply. (*Id.* at p. 334.)

The *Safeway* court was not called upon to do anything more. It did not direct the trial court to enforce the jury's fault allocations, because the two tortfeasors had already paid their allocated shares. Contrary to what OPSC asserts (RB 7-9), the *Safeway* court never stated (or even hinted) that a tortfeasor entitled to indemnity could recover by motion under the contribution statute. On the contrary, by reversing the judgment, *Safeway* categorically rejected a contribution approach. In doing so, it labeled as polar opposites "the common law comparative indemnity doctrine" and the "inflexible pro rata apportionment pursuant to the contribution statutes," and it held the contribution statute could not be used. *(Safeway Stores, Inc. v. Nest-Kart*, *supra*, 21 Cal. 3d at 331.)

It is truly astounding that OPSC could possibly take comfort in *Safeway*'s holding.

2. *American Motorcycle* negates OPSC's position.

American Motorcycle is equally unhelpful to OPSC. According to OPSC, *American Motorcycle* "rejected the argument that the contribution statutes precluded application of comparative fault principles to liability apportionment between joint tortfeasors." (RB 6-7.) That's true, but so what? This pronouncement helps Keel, not OPSC.

Keel is not rearguing *American Motorcycle*. He does not assert that the contribution statute precludes OPSC from obtaining comparative indemnity. On the contrary, Keel *insists* that, based on *American Motorcycle*'s holding, OPSC *was* entitled to comparative indemnity when it brought its contribution motion and is *still* entitled to that remedy.

Under the law, OPSC can enforce its indemnity entitlement only in an ordinary civil action – like its presently-pending indemnity action – and not by motion under the contribution statute. And, OPSC can obtain a comparative indemnity judgment in that action *provided* it is able to prove its case and overcome the affirmative defenses and offsets pleaded by Keel in that action.

American Motorcycle commands this result. *American Motorcycle* specifically declined the offer "to interpret the contribution statute itself as providing for comparative rather than per capita contribution." (*Id.* at p. 602.) Rather, it held that "the comparative indemnity rule we recognize today is simply an evolutionary development of the common law equitable indemnity doctrine" introduced not by construing the contribution statute but "under the common law of this state." (20 Cal.3d. at pp. 584, 604.)

Indeed, when the Supreme Court adopted comparative indemnity as the proper and fair method of allocating fault in California, it held that the

contribution statute "shall not impair any right of indemnity" nor permit "a right of contribution" where "one tortfeasor judgment debtor is entitled to indemnity from another" (20 Cal.3d at pp. 599, fn. 5, 602) and that "the California contribution statute, by its own terms, expressly subordinates its provisions to common law indemnity rules" (*id.* at pp. 584, 602).

Just as *Safeway* squarely supports Keel's position, so too does *American Motorcycle*.

3. *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87.

Paradise Valley does not help OPSC either. That case involved a common law indemnity action, not a proceeding brought under the contribution statute. There, the court decided, as a matter of *indemnity* law, that an insolvent tortfeasor's share of a judgment should be divided among the remaining tortfeasors proportionally in accordance with their comparative fault, rather than pro rata. (143 Cal.App.3d at p. 93; AOB 21-22.) *Paradise Valley* has nothing to do with applying the contribution statute.

II. CONTRARY TO OPSC'S CONTENTION, THERE IS NO SUCH THING AS "COMPARATIVE CONTRIBUTION"; THE CONTRIBUTION STATUTE, AS WELL AS THE *SAFEWAY* AND *AMERICAN MOTORCYCLE* DECISIONS, EXPRESSLY PROHIBIT CONTRIBUTION ON A COMPARATIVE FAULT BASIS.

The trial court used the contribution statute to award OPSC fault-based indemnity. (RB 12; AOB 6-7, 16-17; 12/10/98 RT 19-20.) That directly contravenes the statute.

The contribution statute defines precisely what it means by a right to contribution: It is an allocation of tort liability pro rata, regardless of comparative fault, and it applies only when there is no entitlement to comparative indemnity. (AOB 16-17.) This is the law – in black and white. Section 875, subdivision (f) says it's the law and so too do *Safeway*, *American Motorcycle* and *Lamberton*.

Incredibly, OPSC does not so much as mention the controlling language. Nor does it credibly deal with *Lamberton*, the case that definitively applies the statute's plain language to preclude a tortfeasor from using a motion for contribution to obtain comparative indemnity. Instead, OPSC plays word games, inventing a new term "comparative contribution" (RB 5) to substitute for a reasoned response to the statute's clear language. However, there is no such thing as comparative contribution.

A. Both Statutory And Decisional Law Establish That A Joint Tortfeasor Cannot Obtain Under The Contribution Statute An Allocation Of Liability Based On Comparative Fault Principles.

1. The statute.

OPSC fails to come to grips with the controlling fact that the contribution statute defines the meaning of "contribution" and specifies exactly what a "right to contribution" does and does not include.

Under subdivision (c) of section 875, a tortfeasor can obtain only what he paid over and above his "pro rata share" and he cannot "be compelled to make contribution beyond his own pro rata share of the entire judgment." Subdivision (a) of section 876 defines "pro rata share" as the equal division of the judgment among co-tortfeasors, directing that "[t]he pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them." Finally, section 878 provides that only a judgment for "contribution" may be entered on "motion."

This means exactly what it says. The court's power in response to a contribution motion begins and ends with a pro rata apportionment of liability in cases where there is no entitlement to indemnity.

2. The case law.

Lamberton squarely confirms that this is the law. It affirmed the trial court's order denying a tortfeasor's motion under the contribution statute to apportion liability in accordance with fault. (199 Cal.App.3d at p. 751; AOB 17-18.) In doing so, it relied on sections 875, subdivision (c), and 876, subdivision (a); the latter, it held, "plainly provides that '[t]he pro

rata share of each tortfeasor judgment debtor *shall be determined* by dividing the entire judgment equally among all of them.'" (Emphasis in original.)

Lamberton further ruled that it had no authority to rewrite the contribution statute to transform it into a vehicle for obtaining fault-based apportionment:

> "[T]he 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.)
>
> End of story.[5/]

B. None Of OPSC's Authorities Permits A Tortfeasor To Obtain A Fault-Based Apportionment Under The Contribution Statute.

Ignoring the controlling statutory language and decisional law, OPSC engages in a tortuous discussion of the case law to try to prove that California cases somehow authorize courts to do what the contribution statute prohibits them from doing. (RB 5-10.) But OPSC comes up empty-handed. Not surprisingly, OPSC cannot find a single case in which any reviewing court has ever allowed a tortfeasor to use the contribution statute

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5/ OPSC concedes that *Lamberton* demolishes its position, but argues that the case is wrong because it takes "a different approach than the California Supreme Court in *American Motorcycle* and *Safeway Stores*." (RB 8-9.) Not so. *Lamberton* discusses both *Safeway* and *American Motorcycle*, and is completely consistent with their holdings. (AOB 15, 20-21.)

to obtain a distribution of liability based on comparative fault principles. (See pp. 14-18, ante; AOB 16-22.)

OPSC tries to manufacture a split in the authorities on this issue. (RB 7-9.) But there is no split. How could there ever be when the statutory language is so clear? Under the law, comparative indemnity is the preferred remedy; contribution applies only when there is no entitlement to comparative indemnity. Reversing the judgment simply leaves OPSC free to seek to enforce its indemnity entitlement the right way – by pursuing its pending civil action. (See, e.g., *Evangelatos* v. *Sup*erior Court at pp. 1197-1198.)

III. CONTRARY TO OPSC'S CONTENTION, A COURT MAY NOT DECIDE BY MOTION UNDER THE CONTRIBUTION STATUTE DISPUTED FACTUAL ISSUES RELATED TO COMPARATIVE INDEMNITY ENTITLEMENTS.

In his opening brief, Keel showed that the trial court erred in deciding by motion disputed factual issues going to the merits. (AOB 27-29.) OPSC asserts that "Keel's position is ludicrous." (RB 12.) However, OPSC cites no cases on the issue and responds to none of Keel's arguments.

OPSC's response begins and ends with the observation that "parties make motions on a daily basis on various issues and provide the court with declarations and other evidentiary support" on the basis of which the court "makes a decision." (*Ibid.*) But so what? Courts decide motions that the law authorizes parties to bring and the courts to decide, but courts do not decide the *merits* of an action by motion, except in accordance with the

stringent requirements of the summary judgment statute (§ 437c). (See *School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1133-1134 ["Most pretrial motions are decided without a determination of contested facts related to the merits of the case"]; *Mass v. Superior Court* (1961) 197 Cal.App.2d 430, 435-436.)

Unsurprisingly, OPSC cites no authority in which a court ever used a motion to decide disputed factual issues on the merits regarding an indemnity claim. There is no such authority.

A. The Contribution Statute's Motion Procedure Was Never Intended To Supplant The Need For A Trial On Disputed Issues Of Fact.

While it is true, as OPSC contends, that section 878 permits the use of affidavits, such use is limited by the jurisdictional limits of the statute, namely, entry of judgment for contribution. The purpose of the affidavits is obvious; it is to enable the parties to prove, or contest, that one tortfeasor has or has not paid more than his pro rata share of the judgment. There is not a word in the statute to permit the use of affidavits to resolve disputed factual issues going to the merits of whether an indemnity claim can be enforced; indeed, the statutory language precludes the consideration of indemnity issues in a motion context.

There is no other reasonable way to view the matter. For a court to resolve by motion contested factual issues going to the merits of a claim violates express statutory and decisional law and contravenes elementary due process principles as well. First, California law favors trial on the merits. (*Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 997-998.) Second, the summary judgment statute applies to every

"action or proceeding" (§ 473c, subd. (a)); thus, if there is a disputed issue of material fact going to the merits, summary disposition is inappropriate.[6/]

The Legislature intended to make it difficult for a party to avoid a trial on the merits. That explains summary judgment's labyrinthine of stringent requirements. (See § 437c, subds. (b), (c), (g).) The courts treat summary judgment as "a drastic measure that deprives the losing party of a trial on the merits" and insist that it "be used with caution." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 925, internal quotation marks omitted.) To this end, the moving party's affidavits must "be strictly construed, and those of the opponent liberally construed," and "[a]ny doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." (*Id.* at pp. 925-926, internal quotation marks omitted.)

The motion procedure under section 878 contains none of those protections or assumptions in favor of trial. On this ground too the judgment here cannot stand.

6/ Under section 437c, a party can avoid trial only if he can prove that "that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (§ 473c, subd. (c).) If the court finds that triable issues exist, a trial is compelled. (*Pacific Indemnity Group v. Dunton* (1966) 243 Cal.App.2d 504, 507 ["triable issues must be heard at trial upon their merits"].) The court cannot resolve those issues by affidavits or even in ad hoc evidentiary proceedings. Therefore, it is irrelevant that the trial court here held a limited evidentiary hearing. (RB 13; AOB 27-28.) It was not a trial. And the court specifically did not decide the merits of Keel's affirmative defenses to OPSC's indemnity claim. Indeed, the trial court repeatedly told the parties that those issues should be resolved in the pending indemnity action, not in the contribution motion proceedings. (AOB 6-7, 29-30.)

B. Since The Contribution Statute Does Not Apply To Cases Involving Indemnity Entitlements, A Tortfeasor Can Only Seek Enforcement Of His Entitlement To Fault-Based Indemnity In An Ordinary Civil Action.

In addition to depriving Keel of his right to a trial on the merits, the court below also denied him the full panoply of procedural rights available to all defendants who are civilly sued. These include the right to file pleadings in response to a complaint, to file motions to test the pleadings, to pursue discovery, to proceed to trial and to assert and prove affirmative defenses. (See AOB 13, 28.) These rights cannot be circumvented by a contribution motion.

If OPSC wanted to enforce its indemnity claim, then the only place to do it is by pursuing its pending civil indemnity lawsuit. Only in that setting could Keel defend in the manner contemplated by law. As our Supreme Court has held:

> "Subsequent cases established that under the principles articulated in *American Motorcycle* . . . a defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of the damages through the satisfaction of a judgment or through a payment in settlement." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at pp. 1197-1198.)

The court conspicuously fails to mention a motion under the contribution statute as an available option for obtaining comparative

indemnity. Unsurprisingly, we have found no case in which indemnity has ever been awarded in any fashion other than by cross-complaint in the underlying tort action or by a separate action by a tortfeasor who paid more than his fault-allocated share of the judgment. (See, e.g., *People ex rel. Dept. of Transportation v. Superior Court, supra,* 26 Cal.3d at pp. 748, 757-758 [denying writ relief where trial court overruled demurrer to comparative indemnity cross-complaint; held, once tortfeasor has paid more than his fault-allocated share, "he is entitled to pursue his own *indemnity action,*" emphasis added]; *Botsford v. Pascoe* (1979) 94 Cal.App.3d 62, 65 [cross-complaint for indemnity actively litigated with challenges to the pleadings and discovery]; *Commercial Union Ins. 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].)

C. Contrary To OPSC's Assertion, The Malpractice Case Jury's Comparative Fault Findings Did Not Alone Permit OPSC To Enforce Its Indemnity Entitlement; To Prevail, OPSC Also Had to Prove That It Paid More Than Its Fault-Apportioned Share Of The Judgment And Had To Survive Keel's Equitable Defenses On The Merits.

OPSC asserts that the jury's comparative fault findings ipso facto require that the court summarily enter a comparative judgment in its favor. (RB 12-13.) This isn't so, as our discussion above demonstrates.

This case involves much more than simple arithmetic. True, the jury in the underlying medical malpractice case allocated fault percentages as between Keel and OPSC. While that satisfies one essential element of an indemnity entitlement, it does not alone allow enforcement of such

entitlement. In addition, the party seeking indemnity must prove that it paid more than its fault-allocated share of damages. (Pp. 8-9, *ante*.) Moreover, to translate its indemnity entitlement into an enforceable judgment for indemnity, a party must also withstand any affirmative defenses asserted, just as any plaintiff in any civil action must overcome the affirmative defenses asserted by his adversary. (See *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387 ["The defenses raised in the answer to the complaint are a real part of any action."].)

Here, Keel was deprived of his fundamental rights – the right to put OPSC to its burden of proof, the right to assert and prove his defenses, and the right to present his side of the dispute. (AOB 29-42.)

This is impermissible.

IV. CONTRARY TO OPSC'S CONTENTION, KEEL HAS VIABLE EQUITABLE DEFENSES TO OPSC'S COMPARATIVE INDEMNITY CLAIM.

In his opening brief, Keel showed he had bona fide defenses to OPSC's comparative indemnity claim and that the trial court erred in refusing to allow him to present and prove them. (AOB 29-42.) Instead, the Court entered a final, enforceable judgment against Keel on motion, without hearing his side of the story. (AOB 6-7.) This cannot be.

OPSC fails to offer any credible defense of this irregular, prejudicial and blatantly unconstitutional procedure. (See AOB 28-29, 33-34.) First, it asserts, without any citation to the record, that the court considered and found against Keel on his equitable defenses. (RB 12.) This is false. The trial court purported to enter a contribution judgment here, while repeatedly

informing Keel he was free to and should assert his affirmative defenses in the pending indemnity action. (AOB 6-7, 29-30.)

Second, OPSC asserts that Keel's equitable defenses are meritless. (RB 13-14.) This is for a trier of fact to say, not OPSC. If OPSC feels that Keel's affirmative defenses are meritless, then the appropriate way to attack them is by employing proper procedures, including summary judgment procedures, in its pending indemnity action. Absent the successful employment of such procedures, the case must proceed to trial. Moreover, except for an incomplete excerpt from this court's unpublished opinion affirming the underlying malpractice judgment (a judgment that did not purport to resolve any contribution or indemnity entitlement), OPSC does not support its factual claims regarding Keel's defenses with a single record citation. (RB 13-14.) But even if it could point to such facts in the record, that would be meaningless, since factual issues cannot be decided by briefs. They can only be decided by a trial on the merits. There has been no such trial here.

A. Keel Has Asserted And Has A Constitutional Right To Try His Equitable Defenses.

In OPSC's still-pending indemnity action, Keel (and other defendants) pleaded equitable defenses based on unclean hands and the maxim that he who seeks equity must do equity. (AOB 5-6, 8, 38, fn. 18.) Those are recognized defenses under the law (AOB 35, 37) and are grounded in OPSC's improper post-judgment conduct.[7/]

7/ The nature of Keel's affirmative defenses are summarized in his opening brief. (AOB 5-6, 36-40.)

The trial court considered none of this. Rather, it told Keel to assert those defenses in OPSC's pending indemnity action.

Keel had a right to try its defenses. The proper place to try them is in the same action in which OPSC was seeking to recover comparative indemnity. (AOB 33-36.) Had the trial court not allowed OPSC to short-circuit its own indemnity action by bringing an illegal contribution motion, that is exactly what would have happened here.

The contribution judgment should be reversed so the pending indemnity action can proceed to trial on the merits in accordance with the law.

B. Contrary To OPSC's Assertion, The Trial Court Refused To Permit Keel To Prove Or Argue His Equitable Defenses.

OPSC argues, again without record citation, that "the trial court did consider the equitable issues which it found did not effect [*sic*] the jury apportionment of 45/55% and OPSC's entitlement to contribution." (RB 12.) Not so.

The record shows, without contradiction, that the court refused to allow Keel to plead and prove his defenses. (AOB 6-7, 29-30.) Indeed, the court specifically gave judgment "*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." (AOB 7-8, emphasis added.)

C. Until Keel's Equitable Defenses Are Resolved On The Merits, OPSC Cannot Enforce Its Indemnity Entitlement.

There is no precedent for entering a judgment against a defendant without requiring the plaintiff to prove his case and allowing the defendant to tell his side of the case. Such a notion is preposterous on its face. Its implementation offends elementary due process. (See AOB 33-36.)

OPSC does not even try to mount a credible defense of the bizarre procedure employed here. It simply asks this Court to assume on faith that Keel's defenses lack merit. (RB 13-14.) But that's not this court's function. Only a trier of fact can make that determination.[8/]

What OPSC did here – bring an indemnity action, short-circuit its progress by filing an illegal contribution motion, persuade the trial court not to hear the defendant's evidence and then ask the appellate court to decide factual disputes – is improper across the board.[9/]

8/ There are proper procedures to be followed when a plaintiff contends that a defense has no legal merit – move for summary judgment under section 437c or otherwise attack the affirmative defenses by demurrer, judgment on the pleadings or other appropriate procedures. OPSC has never done that in this action or in its indemnity action.

9/ In any event, OPSC's untenable effort to try the defenses by brief, rather than on the merits (RB 13-14), is unsupported, as well as unsupportable. For example, the trial court was prompted to vacate its periodic payment judgment primarily due to OPSC's obstructive behavior. (AOB 36-38.) OPSC insists that "[n]one of the defendants are in a position to complaint [*sic*] to the other about the loss of periodicizing since it is undisputed that everyone failed." (RB 14.) First, that is *not* undisputed. Second, what "everyone" did is irrelevant; it is OPSC who seeks equity, and "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." (*Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 646.) At the very least, under California's comparative fault doctrine, if Keel were somehow at fault, his recovery would not be barred but merely "diminished in proportion to the amount of

(continued...)

V. CONTRARY TO OPSC'S CONTENTION, THE TRIAL COURT PREJUDICIALLY ERRED IN CALCULATING THE AMOUNT OF THE JUDGMENT SUBJECT TO APPORTIONMENT AND IN AWARDING OPSC PREJUDGMENT INTEREST.

In addition to showing that the entire $1.6 million contribution judgment must be reversed, Keel also demonstrated that independent portions of the judgment must be reversed because the court awarded OPSC hundreds of thousands of dollars to which it was not entitled. (AOB 40-46.)

OPSC does not controvert this argument on the merits. Instead, it simply parrots – as if there were no dispute on the matter – the same erroneous numbers that the trial court used in computing the judgment amount subject to apportionment. Repetition, however, does not refute

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9/(...continued)
negligence attributable to" him. (*Li v. Yellow Cab Co.*, *supra*, 13 Cal.3d at p. 829.)

In addition, OPSC hid the fact that it had obtained an appeal bond 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. (AOB 38-39.) Instead of addressing this fraudulent conduct, OPSC argues that "with the help of its bonding company," it "paid the entire *Hamel* verdict after it became final." (RB 14.) This is both untrue and irrelevant. It is untrue because OPSC did not pay "the entire *Hamel* verdict," but only what remained after deducting Keel's prior $4 million settlement payment, and it only paid that amount after pursuing every avenue of appeal, and even then, not until four months after the remittitur issued. (AOB 5; CT 289, 293, 317, 326, 332-333, 342, 384, 397, 724-725.) OPSC's claim is irrelevant; the fact that OPSC and/or its surety paid the remainder of the underlying judgment in the end does not erase OPSC's prior improper and inequitable conduct, its secret agreements and its other machinations, all of which created a costly, protracted, unnecessary and frivolous dispute that affected all parties and the court. (AOB 38-39.)

Keel's arguments as to why those numbers are illegally inflated. (RB 14-15.)

OPSC also tries to show that there are equities in its favor. But, even if that were true, so what? Such claims can only appropriately be asserted at the trial of OPSC's pending indemnity action. In any event, OPSC's purported showing is based on a wholesale misstatement of the record.

A. OPSC Fails To Show How It Can Legally Recover From Keel $75,000 In So-Called "Transactional Costs" That OPSC Agreed To Pay Its Bonding Company In Order To Get A Loan.

OPSC made a side deal with its appellate surety to borrow money to pay the judgment and it agreed to pay the surety a fee in the form of "transactional costs." (AOB 42.) The contribution judgment requires Keel to pay those costs. (AOB 42.) That's improper.

OPSC acknowledges that the current judgment includes "$75,000 in premiums, attorneys fees, costs and 10% interest" and that those "transactional costs" were not part of the underlying judgment amount subject to apportionment. (RB 15.)

The award must be reversed because the only amount subject to apportionment is the amount of the underlying judgment. (AOB 42-43.)

Furthermore, OPSC was a joint and several judgment debtor. (AOB 4.) As such, it was obligated to pay the entire economic damages judgment. (Civ. Code, § 1431; *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1198.) It was OPSC's job, not Keel's, to satisfy OPSC's judgment

obligations. If OPSC had to finance its judgment obligation, the finance charge was for OPSC to bear, not Keel.

Even if Keel had somehow breached some unfathomable legal duty to OPSC – and there is not a shred of evidence in the record to support such a notion – OPSC could recover in such breach only by bringing an ordinary civil damage action against Keel, in which Keel could demand trial by jury. There is no way a damage award can ever be bestowed in a motion proceeding for contribution. (AOB 43.)

B. OPSC Fails To Show How It Could Ever Properly Recover From Keel A Fault-Based Share Of The Interest That Accrued On The Underlying Malpractice Judgment After Keel Settled With Plaintiff.

In 1996, Keel paid the underlying medical malpractice plaintiff $4 million, obtained her covenant not to execute, and dismissed his appeal. (AOB 4-5, 39.) Vis-a-vis the underlying plaintiff, then, Keel had made his peace. During the period following Keel's settlement with the medical malpractice plaintiff, interest continued to run on the underlying judgment. The court ordered Keel to pay 55 percent of such interest. The court was wrong.

The court's decision on this point means that a party who has settled with a plaintiff must continue to pay interest on an underlying judgment – even though he has been released and even though interest continued to run only because another tortfeasor judgment debtor failed to pay its portion of the judgment. This cannot be.

After losing its appeal and unsuccessfully petitioning the Supreme Court for review and then dribbling out partial payments to plaintiff that she

refused to accept, OPSC finally paid plaintiff what she claimed as the full outstanding amount of her judgment, including accrued interest; this occurred *two years* after Keel settled with plaintiff. (AOB 5; CT 159-161, 289, 293, 317, 326, 332-333, 342, 384, 397, 724-725.) Why should Keel be responsible for any portion of the interest that continued to run during those two years? Clearly, he shouldn't. (See AOB 44.) Not surprisingly, OPSC fails to show otherwise. (RB 14-15.)

C. OPSC Fails To Show How It Can Legally Recover From Keel A Fault-Based Share Of The Payments OPSC Made To The Plaintiff That Exceeded What Was Owing On The Underlying Malpractice Judgment.

In his opening brief, Keel showed that the final judgment amount that the trial court apportioned was inflated because OPSC voluntarily paid plaintiff more than it owed.[10/] OPSC does not contest that it voluntarily overpaid plaintiff, but it claims that Keel is somehow bound by that unilateral action and can be forced to subsidize OPSC's folly. (RB 14-15.) Unsurprisingly, OPSC cites no authority that holds that a joint judgment debtor must reimburse his co-tortfeasor for monies gratuitously paid to a plaintiff because they were no part of the underlying judgment.

10/ The discrepancy arose because OPSC made partial payments to plaintiff that stopped interest from running on those amounts, but plaintiff refused to accept the partial payments and calculated interest on the entire outstanding judgment without regard to the partial payments. (AOB 44-45.) OPSC argued in the trial court that once it made partial payments to plaintiff, it did not owe any further interest on those amounts; in the end, however, it chose to pay the inflated judgment amount, since it feared that plaintiff would execute on the judgment and shut down OPSC. (AOB 44-45; CT 292-293, 313-314, 320, 334, 342-343.)

OPSC's argument begins and ends with a citation to a ruling below by Commissioner Gould granting plaintiff's motion to enforce OPSC' s surety bonds, denying one surety's motion for exoneration and denying OPSC's motion for permission to deposit its partial payments in court and stay plaintiff's execution of the judgment. (RB 14-15.) But this proves nothing. First, OPSC doesn't make any argument based on the ruling, but simply cites it and leaves it at that. (RB 14-15.) Second, OPSC doesn't explain how that ruling could possibly affect Keel since he was not a party to any of the motions which the Commissioner decided. (See AOB 45, fn. 25.)

D. OPSC Fails To Show That It Is Entitled To Prejudgment Interest On This Judgment.

In our opening brief, we showed that courts have discretion to deny prejudgment interest where, as here, the claimant is pursuing an equitable claim. (AOB 46.) But here the court refused to consider the equities and therefore did not exercise its discretion. Where a trial court fails to exercise its discretion, an appellate court may reverse even a judgment supported by substantial evidence. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611-612, 615.)

Significantly, OPSC does not deny any of this. (RB 14-15.) Rather, it appears to take a different approach, arguing that the equities favor awarding it pre-judgment interest. But this court cannot decide that issue; only the trial court can decide an issue that requires the exercise of its discretion. (*Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180-1181.) In any event, OPSC has utterly failed to demonstrate that it has an equitable basis for demanding prejudgment interest.

According to OPSC, it has a right to prejudgment interest because it worked together with its surety Safeco Insurance Company "to make sure [plaintiff] was paid." (RB 15.) OPSC then contrasts its supposedly equitable conduct with the alleged refusal of Reliance Insurance Company to pay the remainder of the judgment. (RB 15.) Even if all this were true, it has nothing to do with Keel, especially since Keel stepped up to the plate and settled with the malpractice plaintiff two years before OPSC did. In fact, OPSC's version of events is sheer fantasy.[11/]

There are no equities in favor of OPSC; the equities all favor Keel. The award of prejudgment interest must be reversed.

CONCLUSION

The judgment in this case is riddled with prejudicial error. It must be reversed.

OPSC's original and still pending indemnity action is and has always been the proper forum for it to seek to enforce its entitlement to indemnity.

11/ The notion that OPSC dealt equitably with plaintiff at any time is fantasy. Whereas Keel promptly settled with plaintiff and dismissed his appeal, OPSC spent two additional years pursuing its appeal and dodging its obligation to pay plaintiff the full unpaid amount of the judgment, causing her attorney to charge that OPSC was trying to "throw into litigation a shortfall on a joint and several verdict." (CT 332; see p. 34, *ante*.) Second, Reliance did nothing wrong. The trial court granted plaintiff's motion to enforce the bonds; it did not order Reliance or anyone else to pay plaintiff anything. (CT 383-385.) Plaintiff *chose* to enforce *only* the Safeco bond. (CT 615.) It had every right to do so. (*American Motorcycle Assn. v. Superior Court*, *supra*, 20 Cal.3d at pp. 582-583 ["adoption of comparative negligence . . . does not warrant the abolition or contraction of the established 'joint and several liability' doctrine"].) Of course, whatever Reliance did nor did not do is irrelevant to a determination of whether as a matter of equity Keel should pay OPSC prejudgment interest.

But OPSC abandoned that action to get a "quick fix" recovery by bringing an unauthorized motion for contribution. OPSC chose the wrong remedy in the wrong court because the contribution statute clearly precludes a tortfeasor from using a motion for contribution to obtain a judgment awarding equitable comparative indemnity.

At long last, this case should now be set on the proper track. The unlawful contribution judgment should be reversed and OPSC should be permitted to seek enforcement of its indemnity entitlement by pursuing its still-pending action, subject to Keel's equitable defenses.

Date: March 17, 2000

Respectfully submitted,

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