IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST DISTRICT, DIVISION 3

PIERCE WARD AND JOHN WARD, *Plaintiffs and Respondents*, v. GOSS-JEWETT CO. OF NORTHERN CALIFORNIA, *Defendant and Appellant*.	Court of Appeal No. A139306 Alameda County Superior Court No. RG12626502 From Order of Alameda County Superior Court (The Honorable Jo-Lynne Q. Lee)

RESPONDENT'S BRIEF

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INTRODUCTION

In its Opening Brief, Goss-Jewett presents what happened in a distorted and selective way – failing to tell this Court about key evidence and laws that support the trial court's ruling, such as:

- Goss-Jewett's brief fails to mention – let alone try to rebut – one of the three independent reasons the trial court gave for denying Goss-Jewett's motion to set aside the default judgment: Goss-Jewett had failed to comply with the statutory mandate that it ***submit a proposed pleading*** with its motion. This was no technical defect. If Goss-Jewett presented no issues for trial, why bother setting aside the default? The court even ***told*** Goss-Jewett about this defect ***before*** the hearing on the motion, so Goss-Jewett had a chance to fix the problem before the court ruled – but Goss-Jewett failed to do so.
- While Goss-Jewett's brief accuses Plaintiffs' counsel of hatching a scheme to lure Goss-Jewett into sitting on its rights, it omits any mention of the ***change of circumstances*** that led Patricia Ward to take Goss-Jewett's default: news in late September of 2012 that Ms. Ward would not live much longer. This change for the worse required her counsel to set an early trial date against other defendants, because if Ms. Ward died before trial, there could be no claim for her pain and suffering. But Ms. Ward would lose that trial date if Goss-Jewett did not appear, default, or was dismissed. After this change, Plaintiff's counsel ***still*** gave Goss-Jewett a reasonable time to answer, but the company failed to do so.
- While Goss-Jewett's brief focuses on the injury the default judgment allegedly imposed ***on Goss-Jewett's insurers***, it

fails to note that the insurers were not parties in the trial court and are not parties to this appeal. Those insurers could have moved to intervene in the trial court, in order to file their own motion to set aside the default judgment, but they declined to do so.

- While Goss-Jewett's brief asserts that the insurers will suffer prejudice if the judgment stands, it cites no evidence that Goss-Jewett ***had any defense*** to the lawsuit. It cites no evidence that Goss-Jewett was not liable for Ms. Ward's suffering. It cites no evidence that the amount of damages awarded by the court was excessive.
- While Goss-Jewett's brief tries to excuse Goss-Jewett's ***agent*** (Mr. Lamanet) for Goss-Jewett's failures, the brief cites no evidence excusing Goss-Jewett's ***lawyer*** (Mr. Creech) for failing to file a simple general denial on any of his multiple opportunities to do so – or for that lawyer's failure to file a motion to set aside the default judgment for more than five months after he knew about the judgment.
- While the brief tries to justify Goss-Jewett's five-month delay in filing its motion to set aside by blaming Ms. Ward's counsel – for failing to tell the insurers about the default judgment – it cites no authority requiring a plaintiff to notify non-party insurance carriers about a default judgment.
- While the brief challenges the trial court's exercise of its discretion, the brief fails to recount the careful consideration the trial court gave to every aspect of this case – both before and after the default judgment was entered. The court went out of its way – several times – to protect Goss-Jewett's interests. The court made sure that Goss-Jewett had been

> properly served, examined the evidence of liability, carefully assessed the damages (reducing Ms. Ward's claim by over $3 million), and reviewed all evidence regarding Goss-Jewett's failure to file a responsive pleading and delay of more than five months to move to set aside the judgment.

Yes, trial on the merits is favored. But so is the finality of judgments. Goss-Jewett's failure to respond to the complaint and failure to file a timely motion to set aside led both the trial court and Plaintiffs to spend significant time and expense dealing with Goss-Jewett's failures. The trial court tried to protect the interests of a party who chose not to appear, and the judgment was final for over five months before Goss-Jewett bothered to move to set it aside. And this was after Plaintiffs had already incurred expenses in trying to enforce the judgment.

The trial court's denial of that motion should be affirmed.

STATEMENT OF THE CASE

Appellant's recitation of certain evidence appears under the heading: "FACTS." A more appropriate heading would be "Selected Evidence that Favors Only the Appellant."

Below is a more complete summary of ***all*** the relevant facts on which the trial court based its ruling denying Appellant's motion to vacate the default judgment. (These facts were summarized for the trial court in the Declaration of Richard A. Brody In Opposition to Motion to Set Aside Entry of Default/Default Judgment (4 AA 861-880), and supported by over 170 pages of exhibits attached to his Declaration (4 AA 881-1058)).

The Complaint Is Filed.

On April 12, 2012, Patricia Ward filed a complaint against Appellant Goss-Jewett and twenty-eight other Defendants. 1 Appellant's Appendix ("AA") 1.

The First Cause of Action, for negligence, included the following allegations:

Ms. Ward cleaned and pressed clothing at the New Method Laundry in Sausalito from 1959 through 1972. 1 AA 4:3-20. During her work, Ms. Ward was exposed to asbestos that was released into the air from several products used in the laundry, including pipe covering, boiler ovens, ironing boards, presses, and pads. 1 AA 4:21-5:8. This exposure caused her to contract mesothelioma. 1 AA 5:9-10.

Ms. Ward did not know of her condition until she was so diagnosed in 2011. 1 AA 6:25-28. The disease has caused her to incur medical expenses and loss of income in amounts yet to be determined. 1 AA 7:4-20. It also caused her pain and emotional distress in excess of $50,000. 1 AA 7:21-26.

Defendants (including Goss-Jewett) were engaged in various businesses that used asbestos in their products, to which Ms. Ward was exposed. 1 AA 3:15-28. Defendants had negligently researched, designed, manufactured, marketed, and installed their products, and failed to warn consumers of the hazards posed by the asbestos. 1 AA 6:6-17. Defendants knew that asbestos was dangerous when inhaled, and therefore they acted in conscious disregard of the safety of consumers, and therefore Ms. Ward is entitled to punitive damages. 1 AA 8:2-11.[1]

On the same basic facts, the Second Cause of Action pleaded strict liability, the Third Cause of Action pleaded failure to warn, the Fourth Cause of Action pleaded breach of implied warranties, the Fifth Cause of Action pleaded fraud, the Sixth Cause of Action pleaded civil conspiracy, and the Seventh Cause of Action pleaded enterprise liability. 1 AA 8:13-18.21.

The prayer requested:

1. General damages "in excess of $50,000.00 in accordance with the proof,"

2. Damages for fraud and conspiracy "in accordance with the proof,"

3. Punitive damages "in an amount found appropriate by the trier of fact in accordance with the proof,"

4. Special damages "in accordance with the proof", plus interest and costs. 1 AA 18:23-19:4.

[1] "The judgment by default is said to 'confess' the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint." Witkin, Calif. Procedure, *Proceedings Without Trial*, § 176.

The Complaint and Summons Are Served on Goss-Jewett.

Goss-Jewett had named Stephen Lamanet as its agent for service of process in its statement filed with the California Secretary of State. 3 AA 549. The proof of service shows that the summons and complaint were served on Goss-Jewett by personal service on Stephen Lamanet, at 3363 Kimberly Way, in San Mateo, on Thursday, May 24, 2012, at 8:00 p.m. 1 AA 24. Mr. Lamanet sent these documents to attorney Randall Creech. 3 AA 659:6-10.

Goss-Jewett filed no responsive pleading.

Communications Between Counsel

Ms. Ward's counsel and Goss-Jewett's counsel thereafter communicated with each other between July and September 2012. On July 10, 2012, Goss-Jewett's counsel (Mr. Randall Creech) wrote a letter to Ms. Ward's co-counsel (Ronald Shingler) regarding "*Patricia Ward v. Ajax Boiler, Inc., et. al.*" Mr. Creech wrote the letter on behalf of "Our Client: Goss-Jewett Company of Northern California." 4 AA 887.

Mr. Creech explained the financial condition of Goss-Jewett and possible insurance coverage. 4 AA 887-888. Mr. Creech did not request an extension of time to file a responsive pleading.

Ms. Ward's counsel then added Mr. Creech to the service list for all documents, along with Mr. Lamanet. 4 AA 866:11-15. Thereafter, both of them were served with all pleadings and notices filed in the case. 4 AA 866:11-19. On September 20, 2012, electronic service via LexisNexis was instituted in the case, and thereafter Mr. Creech was served with all documents electronically. 4 AA 866:20-26. "Randall Creech and his law firm were included in this service list as counsel for defendant Goss-Jewett, and were served with all documents filed and served in this case from that time forward." 4 AA 866:20-26. This gave Mr. Creech "virtually

instantaneous notice of every document and pleading served in this case." 4 AA 867:2-4.

Mr. Shingler responded to Creech's letter with a phone call in which Mr. Shingler, "as a professional courtesy, agreed to give Goss-Jewett an open extension of time to answer the complaint while the statements made by Mr. Creech were investigated. That open extension was subject to revocation on reasonable notice." 4 AA 862:25-863:2.

On August 3, 2012, Ms. Ward's co-counsel Richard Brody wrote an e-mail to Mr. Creech, thanking Creech for speaking to Brody "on behalf of your client Goss-Jewett Company of Northern California." 3 AA 832. Brody continued:

> We have agreed that plaintiff's counsel will not take the default of your client at present, and will attempt to work cooperatively with you and your client to see whether coverage may exist. In the unlikely event that it appears to be necessary to take the default of your client, we will provide you with as much notice as possible to allow your client to file a responsive pleading prior to the entry of a default. [3 AA 832.]

In his declaration in support of Goss-Jewett's motion to set aside the default judgment, Creech asserted that on August 9, 2012, he and Brody "discussed how we would work together to see if there was any insurance for Goss-Jewett," and Brody told him that "he would not take the default of Goss-Jewett, and that if he for some unlikely reason would need to take a default, he would give me notice well in advance so Goss-Jewett would have sufficient time to respond." 3 AA 662:4-9.

On August 28, 2012, Mr. Brody sent an e-mail to Mr. Creech complaining that Creech had not sent information about insurance and informing Creech that "discovery is now moving forward at a rapid rate. . . ." Brody then stated:

> I don't want to be unreasonable, but I need to have the information necessary to be able to evaluate your client's potential available insurance coverage. If we don't receive the documents or make other suitable arrangements, I am going to need to take the default of your client. Obviously, given our prior positive discussions, I would prefer not to have to take that course. I will hold off on filing the request for entry of default until next Friday, August 31, 2012. [4 AA 926.]

On September 10, 2012, Brody wrote a letter to Creech again complaining about Creech's failure to send insurance information, concluding: "If we have not received the requested documents or otherwise made suitable arrangements by 4:00 p.m. this coming Wednesday, September 12, 2012, we will file a request for entry of default as to your client." 4 AA 934-935. Later that day, Creech sent Brody some insurance information. 4 AA 930. Brody then sent an e-mail to Creech thanking Creech and stating "I will look this over and be back in touch with you. I will not be taking a default for your client." 3 AA 834.

Ms. Ward's Condition Deteriorates.

At page 5 of Goss-Jewett's Opening Brief, Goss-Jewett states "Thereafter, things suddenly changed." But Goss-Jewett's brief fails to tell this Court the evidence showing why they changed. Here is that evidence.

In late September, Ms. Ward's health took a severe turn for the worse. She learned that her mesothelioma had spread to multiple locations in her brain. 4 AA 870:16-26. A physician (Dr. Horn) examined her and predicted that "there was substantial medical doubt of Ms. Ward's survival beyond three months." 4 AA 871:2-6. See also 4 AA 991, where Dr. Horn concluded on October 1, 2012, that "Ms. Ward has malignant mesothelioma caused by prior occupational and paraoccupational exposure to asbestos. She will die in the very near future of complications of this malignancy." 4 AA 991.

Because of this, the court granted Ms. Ward's request for trial preference and set trial against two other defendants for January 2, 2013. 4 AA 871:8-9. Notice of this trial date and the fact that Ms. Ward was dying was served on Mr. Creech. 4 AA 871:5-14. However, "If the case were going to trial, we would either have to take the default of any served but non-appearing defendants or dismiss them." 4 AA 874:13-18.

Ward Offers to Compromise for $500,000.

On October 4, 2012, Ms. Ward's attorneys sent to Mr. Creech an offer to compromise the case for $500,000 (pursuant to Code Civ. Proc. § 998). 4 AA 994.

The record contains no response from Mr. Creech. Goss-Jewett filed no responsive pleading during the month of October or during the month of November.

Ward Files Her Settlement Conference Statement.

On November 29, 2012, Plaintiff filed a confidential settlement conference statement informing the court that Ms. Ward was "dying from malignant mesothelioma which tragically has recently spread to multiple locations in her brain." 1 AA 28:25-26. Plaintiff's counsel stated that Goss-Jewett had been served with process, that Plaintiff's counsel was having discussions with counsel for Goss-Jewett "on an informal basis aimed at finding coverage for Ms. Ward's claims," and that Plaintiff had not taken the default of Goss-Jewett. 1 AA 32:15-20. Extensive discovery had been conducted with the other defendants. 1 AA 25-26.

This document was served electronically on Mr. Creech. 4 AA 866:20-26.

Ms. Ward Serves Economic Impact Report On Goss-Jewett.

On December 7, 2012, Ms. Ward's counsel served on Mr. Creech an Economic Impact Report prepared by an expert economist, stating that Ms. Ward's economic loss (exclusive of medical expenses) could be as high as $2,278,642. 4 AA 873:1-9.

Ms. Ward Offers to Compromise for $300,000.

On December 10, 2012, a month had passed without any communication from Mr. Creech, so one of Ms. Ward's attorneys (Mr. Brody) sent an e-mail to Mr. Creech, telling him that trial against the two non-settling defendants had been re-set for January 13, 2013, and that the case had trial preference. 3 AA 873:10-13; 4 AA 1019. Brody told Creech that "Your client was properly served with the summons and complaint and has not appeared. As a courtesy to you and your client, our office has refrained from taking your default while you were attempting to locate insurance coverage." 4 AA 1019.

Brody then offered to settle the case for only $300,000. He concluded the e-mail with the following sentence:

> If the offer is not accepted by 12:00 noon this coming Friday, December 14, 2012, we will have no choice but to take the default of your client. [4 AA 1019-1020.]

For the convenience of this Court, Mr. Brody's December 10 e-mail is attached to this brief as Exhibit A.

At the same time, Brody also sent settlement offers to two other defendants, giving them the same deadline, and both responded. 4 AA 874:5-12. But Goss-Jewett did not respond. Neither Mr. Creech nor any other representative of Goss-Jewett asked Mr. Brody to extend the deadline. Indeed, neither Mr. Creech nor any other representative of Goss-Jewett responded in any way to Mr. Brody's e-mail. And Goss-Jewett failed to file any responsive pleading.

After December 14, Mr. Brody followed up his letter with a phone call to Mr. Creech, leaving a message indicating that he had not heard back from Mr. Creech and that Brody was going to need to take Goss-Jewett's default. 4 AA 874:1-4. Brody never received a response. *Ibid.*

Ms. Ward Serves Her Statement of Damages on Goss-Jewett.

On December 20, 2012, Ms. Ward's attorneys served on Goss-Jewett a California Judicial Council Form Statement of Damages. 1 AA 38. That Statement says that Ms. Ward seeks damages in the following amounts:

> "Pain, suffering, and inconvenience": $3 million.
> "Emotional distress": $3 million.
> "Medical expenses (*to date*)": $250,000.
> "Future medical expenses (*present value*)": $100,000.
> "Loss of earnings (*to date*)": S13,601.
> "Loss of future earning capacity (*present value*)": $757,297.
> "Other (*specify*)": Social Security income: $367,905.
> "Other (*specify*)": Household services: $1,033.804.

No punitive damages were requested.

The Statement of Damages was served on Goss-Jewett, by personal service on Stephen Lamanet. 1 AA 40. It was also served electronically on Mr. Creech. 4 AA 866:20-26.

Service of the Statement of Damages produced no responsive pleading from Goss-Jewett.

Ms. Ward Files Notice of Default.

Ms. Ward's attorneys believed that it was important to get the case to trial in January:

> We had every reason to believe that there should have been assets available to settle the case for Goss-Jewett, but we also had a history of delays from Goss-Jewett's attorney in responding to virtually every communication we had sent to him.
>
> We were also aware that Patty Ward had mesothelioma which had spread to numerous locations in her brain, that her health status was precarious, and that defense counsel were well aware that she could pass away at any moment. If that happened, we would lose the opportunity to recover pain and suffering damages for Ms. Ward. It is difficult to conceive of a case with more substantial pain and suffering damage than that presented by Ms. Ward's tragic disease. [4 AA 874:26-875:10.]

Two of the defendants had not settled, so Ms. Ward was going to trial against them in January. But if the trial were to proceed, her counsel "would either have to take the default of any served but non-appearing defendants or dismiss them." 4 AA 874:13-18.

Therefore, on December 28, 2012 – more than eight months after the Complaint was served on Goss-Jewett – Plaintiff filed a Notice of Default against Goss-Jewett. AA 41. The Notice of Default was served by first class mail on December 28 on Mr. Lamanet and on Mr. Creech. 1 AA 43; 4 AA 877:7-13.

On January 2, 2013, the court rejected the Notice of Default because the name of the defendant on the proof of service did not correspond to the complaint and summons: the process server had failed to place a hyphen between "Goss" and "Jewett." 1 AA 44; 4 AA 876:22-877:3.

None of this produced a responsive pleading from Goss-Jewett.

Ms. Ward Files a Request for Default Judgment.

On January 4, 2013, Plaintiff filed a Notice of Default Judgment Hearing Date, setting the hearing for January 11. 1 AA 49; 3 AA 562. The request was supported by a 19-page brief (1 AA 52-70) and 483 pages of Exhibits (1 AA 71 through 3 AA 557) establishing Goss-Jewett's liability and Ms. Ward's damages. Most of the Exhibits were depositions, responses to interrogatories, and other documents obtained during discovery with the other defendants.

The brief noted that "Patricia Ward is near death after a more than one year struggle with malignant mesothelioma," which was caused by exposure to asbestos products at the New Method Laundry. 1 AA 52:23-2:1. Goss-Jewett "was a major supplier of those very products to the New Method Laundry." *Id*. at 2:1-2. The brief and Exhibits explained in detail how Goss-Jewett distributed asbestos-laden press pads to the New Method Laundry. 1 AA 53:23-55:2. The brief and Exhibits also described in detail how Ms. Ward (now 65 years old) was exposed to the asbestos products distributed by Goss-Jewett (1 AA 58:2-64:8).

The brief and Exhibits also described how Ms. Ward's life was changed by the mesothelioma. She lives near Mount Lassen, where she used to carry wood to heat her home and shovel snow. She had enjoyed cross-country skiing, hiking to the top of the mountain, long-distance biking, swimming, and sailing. She had travelled frequently, to the British Isles and to South America. In 2011, while returning from a trip to the Amazon, she felt chest pains. This led to the diagnosis of the deadly disease by experts at Stanford and UCSF. She then suffered through chemotherapy and a pneumonectomy (removal of her left lung, pleural membranes, and parts of her aorta and heart) – all quite painful. After the surgery, she could no longer host her annual family Christmas parties and had to stay in bed. She could no longer swim without a flotation belt. Post-

surgery radiation treatments led to severe nausea and skin burns. She lost 50 pounds, and she could no longer maintain her self-sufficient lifestyle. Her left side is numb. The disease spread to her brain. She is able to eat about six tablespoons of food each day. She is now at death's door. 1 AA 64:12-68:4.

Ms. Ward asked for judgment in the amount of $8,560,076.87, calculated as follows:

> 1. Pain and suffering: $3 million.
> 2. Emotional distress: $3 million.
> 3. Present value of economic loss: $2,159,006.
> 4. Past medical bills: $400,476.
> 5. Filing fees: $419.
> 6. Process server's fees: $175. [1 AA 53:9-19, 68:14-70:20.]

Ms. Ward also asked for future medical expenses, in the court's discretion. 1 AA 53:20-21.

Ms. Ward's brief stated that "The sales by Goss-Jewett of toxic asbestos products to which Ms. Ward was exposed was a substantial factor in increasing her risk of contracting the mesothelioma which is now killing her. Goss Jewett is an active California corporation, has been properly served with the summons and complaint in this action, and has never appeared in this action." 1 AA 53:2-7.

The brief described in detail how Goss-Jewett was notified of this lawsuit – four times:

> This case was filed on April 17, 2012. Stephen Lamanet, the registered agent for defendant Goss Jewett Co. of Northern California, was served with the summons and complaint on May 24 2012. The proof of service was filed on July 5, 2012. (See, Exhibit N, information re: defendant Goss Jewett from the California Secretary of State website, and Exhibit M, file-endorsed Proof Of Service of Summons and Complaint). On December 28, the Statement of Damages as to defendant Goss Jewett was filed, along with a proof of

> service showing that Stephen Lamanet had been personally served with that document on behalf of Goss Jewett. (See Exhibit O). On December 28, 2012, a Request For Entry of Default was filed. That Request for Entry of Default was rejected on January 2, 2013, because the name on the proof of service did not match the name on the summons (one contained a hyphen, the other did not). A second Request For Entry of Default was filed on January 4, 2013. On January 4, 2013, notice of the time, date and location for this default judgment hearing was mailed to Stephen Lamanet and to Randall Creech, Esq., the attorney for Goss Jewett. (See Exhibit Q). [1 AA 56:5-21.]

Notice of the "default judgment hearing" was sent by first class mail to both Stephen Lamanet (Agent for Service for Goss-Jewett) and Randall C. Creech of Creech, Liebow & Kraus. 3 AA 563. Notice of the hearing was also sent by electronic service. 3 AA 564.

On January 15, 2013, Plaintiff sent to Lamanet (by first class mail) and to Creech (by electronic transmission) a Notice of Continuance of the default judgment hearing to January 18. 3 AA 571-573; 4 AA 879:1-4.

None of these notices produced any responsive pleading from Goss-Jewett.

The Court Hearing on the Request for Default Judgment

On January 18, 2013, the court held a hearing on Ms. Ward's request for default judgment. 4 AA 1042.

To ensure that Goss-Jewett's right to defend itself had been adequately protected, the court put Ms. Ward's co-counsel – Mr. Brody – under oath. 4 AA 1043 at 4:2-7. The court then asked Mr. Brody questions to make sure that Goss-Jewett had been properly served:

> THE COURT: You know, Mr. Brody, I am just going to put you under oath. Do you swear and affirm that all the statements made in your declaration as filed with the Court are true and correct to the best of your legal knowledge?
>
> MR. BRODY: I do, Your Honor.
>
> THE COURT: All right. You also did file I believe a -- you filed an actual proof of service with respect to the filing of the complaint?
>
> MR. BRODY: Correct, Your Honor. That is on file and available on domain web.
>
> THE COURT: Okay. The defendant has not appeared, and you -- so this company -- does this company still exist?
>
> MR. BRODY: Yes, Your Honor. As of the time that I filed my brief with my declaration, I had personally gone to the California secretary of state's business portal website that confirmed the information we've had all along, which is that this is an active corporation and that Stephen Lamanet, L-a-m-a-n-e-t, and Stephen with a p-h, is the agent for service of process.
>
> THE COURT: All right. So the record should reflect that service of process is made, proof of service filed with the Court. Defendant has not appeared in this case, is not present at this time, and was given notice of a default hearing I think at some point that we had continued and is not present.
>
> MR. BRODY: Yes, Your Honor.
>
> THE COURT: So the entry of default will be entered. [4 AA 1043 at 4:8-5:5.]

Mr. Brody testified that he and his co-counsel (Mr. Shingler) had discussed the case with Goss-Jewett's lawyer. "We exchanged information. We granted every courtesy in terms of not entering default

earlier. We were trying to work to identify insurance, and at some point, the communication ceased for whatever reason." 4 AA 1047 at 19:8-14.

The court noted that it had reviewed the videotaped trial preservation deposition of Ms. Ward. 4 AA 1044 at 6:3-10. The court asked Mr. Brody to summarize the evidence of Goss-Jewett's involvement in exposing Ms. Ward to asbestos, which he did. 4 AA 1044 at 6:19-11:15. The court asked several questions during this discussion. *Ibid*.

Based on the many exhibits introduced by Ms. Ward, the court found that it was "more likely than not that Goss-Jewett did expose Ms. Ward to asbestos." 4 AA 1045 at 12:3-6. The court ruled that judgment should be entered in favor of Ms. Ward on her causes of action for strict liability, negligence, and breach of warranty. 4 AA 1045 at 12:10-18.

The court asked Mr. Brody many questions about the amount of damages, which Mr. Brody answered. 4 AA 1045-1046 at 12:19-17:24. Then the court made sure that the request for damages did not exceed statement of damages that was served on Goss-Jewett. 4 AA 1046-1047 at 17:25-20:21. The court asked about possible set-offs against the judgment for amounts received from defendants who had settled and was told that there was no evidence of any set-offs. 4 AA 1047-1048 at 20:22-22:2. The court took the issue of damages under submission. 4 AA 1048 at 22:3-13.

The Court Enters The Default Judgment.

On January 22, 2013, the court entered the default judgment against Goss-Jewett. 3 AA 574-575. The court found that the complaint was properly served on Goss-Jewett, but the company failed to respond. The statement of damages and notice of the default judgment hearing had been mailed to counsel for Goss-Jewett. Because Goss-Jewett was "regularly served with process" but failed to appear, its default was entered.

The court reviewed the testimony of seven witnesses, and entered judgment in favor of Ms. Ward against Goss-Jewett for:

> Past medical expenses: $400,476.87.
> Future medical expenses: $100,000.
> Past & future loss of earnings: $888,174.
> Pain & suffering: $2 million.
> Emotional distress: $2 million. [3 AA 575.]

The total was $5,388, 650.87, plus costs of $594. This was $3 million less than Ms. Ward had requested in her Statement of Damages and in her Request for Default Judgment. There was no award of punitive damages.

Service of Notice of the Default Judgment

On January 24, 2013, Ms. Ward's attorneys served notice of entry of the default judgment – with a copy of the judgment – both on Goss-Jewett's agent (Mr. Lamanet) and on Goss-Jewett's lawyer (Mr. Creech). 3 AA 577-581; 4 AA 879:19-24.

But no motion to set aside the default judgment was filed in January. Or in February. Or in March. Or in April. Or in May.

Plaintiffs File Notice of Ms. Ward's Death.

On March 14, 2013, Plaintiff's counsel filed a Notice of Death, stating that Patricia Ward had died on March 7, 2013. 3 AA 582. The Notice was served electronically on all counsel. 3 AA 583. On March 22, 2013, the court appointed Plaintiffs John T. Ward and Pierce J.E. Ward (Ms. Ward's brothers) as successors in interest to Ms. Ward. 3 AA 584.

Plaintiffs' Efforts to Enforce the Judgment.

The court ordered Goss-Jewett to provide a representative to appear at an order of examination, and on April 5, 2013, Mr. Stephen Lamanet appeared on behalf of Goss-Jewett. 4 AA 893:22-894:4, 897:17-20. The court itself presided over the examination. Lamanet testified that he kept Goss-Jewett documents with him at his home. 4 AA 899:10-20. He admitted that he was served with the summons and complaint in this lawsuit. 4 AA 907:1-9. He had forwarded them to lawyer Randall Creech. 4 AA 907:9-15.

On April 8, 2013, Plaintiffs served subpoenas on several insurance companies, seeking policies held by Goss-Jewett. 3 AA 774-786. On April 18, 2013, Plaintiffs sent letters to several insurance companies demanding payment of the default judgment against Goss-Jewett. 3 AA 788-812.

Goss-Jewett Files Its Motion to Set Aside the Default Judgment.

On June 6, 2013 – more than a year after Goss-Jewett was served with the summons and complaint, and more than five months after Goss-Jewett was notified that the default judgment had been entered – Goss-Jewett appeared for the first time in this action.

Goss-Jewett filed a motion to set aside the default judgment, under Code of Civil Procedure § 473, subdivision (b), "on grounds that the entry of default and default judgment is the result of surprise and excusable neglect." 3 AA 586.

Goss-Jewett's memorandum of points and authorities in support of its motion asked the court to "exercise its broad discretionary power to set aside the default and default judgment. . . ." 3 AA 647:17-18. Goss-Jewett argued that Ms. Ward's counsel had led Mr. Lamanet and Mr. Creech to believe that Goss Jewett did not have to answer the Complaint, and that if Ms. Ward's counsel were ever to pursue a default, they would give fair notice, but they failed to do so. 3 AA 644:3-11. Goss-Jewett admitted, however, that on December 10, 2012, Ms. Ward's counsel warned Mr. Creech that unless Goss-Jewett agreed within the next three days to settle for $300,000, Ms. Ward's counsel would take Goss-Jewett's default. 3 AA 649:3-5.

One of the exhibits attached to the motion was the Declaration of Stephen Lamanet, in which he admitted that he was the agent for service of process on Goss-Jewett, admitted that he was served with the summons and complaint, admitted that he was served with the Statement of Damages, and admitted that he was served with "additional court documents" right after New Years'. 3 AA 658:20-659:21. Mr. Lamanet claimed:

> In recent years, I have suffered health and financial problems, which has made it difficult for me to attend to the business of Goss-Jewett. I suffer from Post-Traumatic Stress

> Disorder and have issues with being able to drive and leaving my home. [3 AA 659:1-3.]

Nevertheless, he was able to identify the documents described above and was able to forward the summons and complaint to attorney Creech. 3 AA 659:4-10. And he did not deny that he also sent to Mr. Creech other documents served in the lawsuit.

Goss-Jewett also submitted the Declaration of Randall Creech. 3 AA 661. Mr. Creech claimed that he was Lamanet's counsel but not "counsel of record" for Goss-Jewett in the present case. 3 AA 661:24-27. He did not deny, however, that he was representing Goss-Jewett when he communicated with Ms. Ward's counsel about this case, several times. Nor did he deny that he wrote the letter to Ms. Ward's counsel in which he stated that he was acting on behalf of "Our Client: Goss-Jewett Company of Northern California." 4 AA 887.

Plaintiffs filed points and authorities in opposition to the motion (4 AA 846), supported by the Declaration of their co-counsel Richard A. Brody and 22 exhibits (4 AA 861 et. seq.) Plaintiffs summarized their exhibits as follows:

> Goss-Jewett's failure to act was not the product of surprise, mistake, inadvertence or excusable neglect. Nearly six months after being served with process in a case advanced for trial because the plaintiff was dying, Goss-Jewett's counsel was given notice that if Goss-Jewett did not resolve the case, its default would be taken. Rather than resolving the case or simply filing a responsive pleading, Goss-Jewett and its counsel chose to do nothing. Twenty nine (29) days elapsed between the date that the Statement Of Damages was personally served on Goss Jewett and the date that Goss-Jewett's default was entered. Thirty nine (39) days elapsed between the date that Goss-Jewett's attorney was advised that a default would be taken against his client if it did not resolve the case and the date that the default was entered. Goss-Jewett had more than ample time to file a responsive pleading and

> avoid the entry of default. Goss-Jewett also had ample time to avoid the entry of judgment against it.
>
> Patricia Ward died two months after the Court entered judgment in her favor. There can be no trial on the merits in this personal injury action because of her death. If the Court grants Goss-Jewett's motion, her estate will forever lose the $4,000,000.00 in pain and suffering damages awarded to her. Those damages are not recoverable in a wrongful death action. By contrast, Goss-Jewett admits that it is a company in name only, that it has no assets and no ongoing business. There is no demonstrable prejudice to Goss-Jewett in upholding this validly issued judgment. [4 AA 846:27-847:18]

At the default hearing, Plaintiffs had submitted evidence supporting the complaint's allegations that Goss-Jewett was liable to Plaintiffs. But Goss-Jewett's 154 pages of exhibits included no evidence rebutting this. At the default hearing, Plaintiffs presented evidence supporting the amount of damages awarded by the default judgment. But Goss-Jewett's exhibits included no evidence suggesting that this award was excessive.

Goss-Jewett did not submit a proposed answer denying the complaint's allegations of liability and damages.

Court Issues Its Tentative Ruling.

On July 3, 2013, the court issued its tentative ruling denying Goss-Jewett's motion to set aside the default judgment. Respondent's Appendix ("RA"), page 1. The court gave several separate reasons of its denial. One of those reasons was this:

> Defendant has not attached a responsive pleading to the moving papers, as required by C.C.P. sec. 473(b). The declaration of Weintraub states that Defendant's proposed responsive pleading is attached as Exhibit 22, but it has not been attached to her declaration. [RA 2.]

On July 5, 2013, the court heard oral argument on Goss-Jewett's motion. Counsel for Goss-Jewett admitted that "I did read the tentative this morning." RT 7/5/13 at 1:14-15. Nevertheless, Goss-Jewett made no effort to file an amended declaration of Weintraub that attached a proposed responsive pleading.

The Trial Court Denies Goss-Jewett's Motion to Set Aside the Default Judgment.

After the hearing, the court entered its order denying Goss-Jewett's motion to set aside the default judgment. 4 AA 1086-1088. The court explained:

1. Goss-Jewett had failed to establish that its default was taken by mistake, inadvertence, surprise, or excusable neglect – primarily because "Plaintiffs' counsel gave notice by email on December 10, 2012 that default would be entered if Defendant did not accept Plaintiffs' settlement offer by December 14, 2012," and Goss-Jewett failed to accept the offer or file an answer.
2. Goss-Jewett failed to establish that it sought relief from default within a reasonable time. The default was entered on January 15, 2013, but Goss-Jewett did not move to set aside the default until June 7, 2013. "This unexplainable delay shows lack of diligence in seeking relief."
3. Goss-Jewett failed to attach a proposed responsive pleading to its motion to set aside the default.
4. Ms. Ward would suffer substantial prejudice if the default were vacated. "The original personal injury Plaintiff, Patricia Ward, died after the Default Judgment was entered, so Plaintiffs would not be entitled to recover for her pain and suffering if the default were vacated. Plaintiffs have also incurred substantial expense in obtaining a default judgment and initiating collection activities."

For the convenience of this Court, a copy of the trial court's order is attached to this brief as Exhibit B.

On July 23, 2013, Goss-Jewett filed notice of appeal from that order. 4 AA 1092.

ARGUMENT

The trial court gave three alternative reasons for denying Goss-Jewett's motion to set aside:

1. Goss-Jewett failed to comply with the statutory mandate that it file a proposed responsive pleading with its motion.
2. Goss-Jewett failed to prove that it had filed its motion within a reasonable time after entry of the default judgment.
3. Goss-Jewett did not prove that its failure to appear was justified by "surprise" or by "excusable neglect."

To win this appeal, Goss-Jewett must show that the trial court was wrong on all three. Goss-Jewett has failed to show that the trial court was wrong on any of them.

I. THE TRIAL COURT PROPERLY DENIED GOSS-JEWETT'S MOTION TO SET ASIDE, BECAUSE GOSS-JEWETT FAILED TO COMPLY WITH CCP § 473'S MANDATE THAT IT ATTACH A RESPONSIVE PLEADING TO ITS MOTION.

One of the reasons the trial court gave for denying Goss-Jewett's motion to set aside the default judgment was this:

> Defendant has not attached a responsive pleading to the moving papers, as required by C.C.P. sec. 473(b). The declaration of Weintraub states that Defendant's proposed responsive pleading is attached as Exhibit 22, but it has not been attached to her declaration. [4 AA 1087.]

Goss-Jewett's Opening Brief fails to mention this ruling. Nor does Goss-Jewett present any argument that the ruling was incorrect.

The ruling was correct.

California law requires that

> Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted. [Code Civ. Proc. § 473(b).]

The Legislature's use of the words "shall" and "shall not" leave the trial court with no choice but to deny the application when it is not accompanied by a proposed answer or other pleading. As Witkin notes, "The requirement is clearly mandatory, and failure to comply necessarily results in a denial of relief." 8 Witkin, Calif. Procedure, *Attack on Judgment in Trial Court*, § 180. See also *Bailiff v. Hildebrandt* (1920) 47 Cal. App. 564, where the court reversed an order granting relief from default where "no copy of any answer, or other pleading proposed to be filed, accompanied defendant's notice of motion, nor does the record anywhere show that any answer, or other pleading, was served upon the plaintiff or offered to the clerk for filing." *Id*. at 567.

The policy behind this requirement is not hard to see. What is the point of setting aside the default judgment if the defendant has no defense? Why put the plaintiff and the court to the trouble and expense of starting over if the final result will be the same: judgment as prayed for in the complaint?

That is exactly the situation here. Goss-Jewett presented no potential defense. (Nor, incidentally, did Goss-Jewett submit with its motion any evidence contesting either its liability or the amount of damages awarded by the default judgment.)

While Goss-Jewett's ***initial*** failure to attach a proposed responsive pleading might have been due to some clerical error, its failure to do so ***after Goss-Jewett's attorney read the tentative ruling*** cannot be so easily explained. In the tentative, the court expressly stated that the motion to set aside would be denied because Goss-Jewett had failed to comply with the statutory mandate. At the outset of the hearing on the motion, Goss-Jewett's counsel admitted that she read the tentative before the hearing. She then had the opportunity to supply the pleading but chose not to do so. One might conclude from this that she believed she could not ethically file a proposed answer - because Goss-Jewett had no defense.[2]

The trial court properly denied the motion to set aside, because Goss-Jewett failed to comply with the mandatory requirement of the statute. If this Court agrees, it may affirm on this basis alone, making it unnecessary to consider the other separate reasons the trial court gave for denying Goss-Jewett's motion.

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[2] And ***after*** the court's ruling, Goss-Jewett might have tried to add to the record a proposed responsive pleading, perhaps via an attachment to a motion for reconsideration of the ruling. But once again, Goss-Jewett did nothing.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT GOSS-JEWETT UNREASONABLY DELAYED FILING ITS MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

Code of Civil Procedure § 473, subsection (b), provides in part:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted***, and shall be made within a reasonable time***, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. [Emphasis added.]

The trial court ruled that Goss-Jewett had failed to show that it had filed its motion to set aside "within a reasonable time":

> Defendant also has not established that it sought relief from default within a reasonable time. Although six months is the outer limit for a motion seeking relief under C.C.P. sec. 473(b), Defendant must also show that it acted with diligence after discovering the default. Defendant has not made that showing here. The default was entered on January 15, 2013, but Defendant did not move to vacate the default and default judgment until June 7, 2013. This unexplainable delay shows lack of diligence in seeking relief. [4 AA 1087.]

At page 24, Goss-Jewett contends that this ruling was erroneous and reversible. Goss-Jewett is mistaken.

A. The Standard of Review Is Abuse of Discretion.

In its heading at the top of page 24, Goss-Jewett says that the trial court's denial of its motion to set aside the default judgment was "an error of law" - in an apparent effort to slip this case into de novo review.

However, Code of Civil Procedure § 473(b) provides that a trial court "may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

The key word is "may," which connotes discretion. Because of this language, denial of a motion to set aside a default judgment is reviewed for an abuse of discretion and not *de novo*. *Weitz v. Yankosky* (1966) 63 Cal. 2d 849, 854; *Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal. App. 3d 826, 829.

B. The Trial Court Did Not Abuse Its Discretion.

1. Plaintiffs Had No Duty to Notify Non-Party Insurance Carriers.

Goss-Jewett blames Plaintiffs for this five-month delay, because Plaintiffs did not give notice to Goss-Jewett's insurer carriers during that period.

But Goss-Jewett cites no authority imposing any duty on a judgment creditor to notify non-parties about a judgment. No insurance carrier was a party in the trial court. No insurance carrier is a party to this appeal.

Any insurance carrier potentially affected by the judgment had the right to file a motion to intervene in the trial court. Upon a proper showing, the carrier would have been allowed to intervene and then to file its own motion to set aside the default judgment. *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal. 3d 865, 886; *Nasongkhla v. Gonzalez* (1994) 29 Cal. App. 4th Supp. 1, 3 ("An insurer may, in some circumstances, intervene and set aside a default against its insured as to itself.").

Goss-Jewett's insurers chose not to do so – perhaps because filing a motion to intervene would have required the companies to reveal to the Plaintiffs what Plaintiffs had unsuccessfully sought from Mr. Creech: the names of the carriers who had insured Goss-Jewett.

In sum, Goss-Jewett has failed to show that Plaintiffs had any obligation to notify any carriers, the carriers have never been parties to this case, and Goss-Jewett itself has no standing to complain about any injury to any non-party insurance carrier.

2. Mr. Lamanet's Alleged Shortcomings Did Not Excuse Goss-Jewett's Delay.

Goss-Jewett also contends that its five-month failure to file a motion to set aside is excused by Mr. Lamanet's alleged lack of appreciation of the default documents, due to his supposed disabilities. Goss-Jewett provided no physician's declaration to support this claim.[3] In any event, it is irrelevant, because Goss-Jewett was represented by counsel: Mr. Creech. (When Creech communicated with Ms. Ward's counsel, he expressly referred to "Our Client: Goss-Jewett Company of Northern California." 4 AA 887.) Mr. Creech was served by paper and/or electronically with all documents filed in this action, giving him "virtually instantaneous notice of every document and pleading served in this case." 4 AA 866:20-867:4. Since Goss-Jewett's lawyer had the documents, it does not matter whether Goss-Jewett's agent for service of process understood them.[4]

[3] Similar claims were rejected in *Kim v. Westmoore Partners* (2011) 201 Cal. App. 4th 267, 280; *Davis v. Thayer* (1980) 113 Cal. App. 3d 892, 909; and *Transit Ads v. Tanner Motor Livery, Ltd.* (1969) 270 Cal. App. 2d 275, 286.

[4] Goss-Jewett might argue that it had no funds for a court appearance. A similar argument was rejected in *Davis v. Thayer, supra*, 113 Cal. App. 3d at 906-907.

3. The Potential Prejudice to Ms. Ward Outweighed Potential Prejudice to Goss-Jewett.

The trial court's ruling that Goss-Jewett had failed to file a motion to set aside within a reasonable time is further supported by the evidence of prejudice to Plaintiffs if the judgment were set aside and lack of prejudice to Goss-Jewett if it were not set aside. The trial court ruled:

> In addition, the evidence before the court shows that Plaintiffs will suffer substantial prejudice if the default is vacated. The original personal injury Plaintiff, Patricia Ward, died after the Default Judgment was entered, so Plaintiffs would not be entitled to recover for her pain and suffering if the default were vacated. Plaintiffs have also incurred substantial expense in obtaining a default judgment and initiating collection activities. [4 AA 1087.]

a. <u>The trial court properly considered prejudice.</u>

In determining whether Goss-Jewett acted diligently, the court may consider the prejudice that Plaintiffs will suffer if the judgment is set aside. *Rappleyea v. Campbell* (1994) 8 Cal. 4th 975, 982-984; *Weitz v. Yankosky* (1966) 63 Cal. 2d 849, 856-857 ("Lack of prejudice is ***one*** of the factors the trial court may properly consider in determining whether defendant acted diligently."); *Falahati v. Kondo* (2005) 127 Cal. App. 4th 823, 833.

b. <u>Plaintiffs will be prejudiced if the default judgment is set aside.</u>

Plaintiffs will be prejudiced in two ways if the judgment is set aside. First, because Patricia Ward died after the default judgment was entered, Plaintiffs will lose the right to claim at trial the pain and suffering damages that constituted a major part of the judgment. Second, Plaintiffs will lose the costs they already incurred in attempting to enforce the default judgment.

i. Loss of pain and suffering damages

Ms. Ward's claim for pain and suffering damages was substantial and viable when trial against two other defendants was set to occur, on January 13, 2013. 3 AA 873:10-13; 4 AA 1019. Had Goss-Jewett answered and gone to trial on that date, it is highly likely that the jury would have returned a large verdict against Goss-Jewett for her pain and suffering, and Plaintiffs would have inherited that judgment. But Goss-Jewett failed to answer, and it was necessary for Ms. Ward to seek a default judgment in order to protect her right to damages against Goss-Jewett for her pain and suffering.

Shortly after the default judgment was entered, she died (as Dr. Horn had predicted). Her brothers were substituted as plaintiffs. If the default judgment is set aside and they are required to go to trial, they would not be able to claim damages for their sister's pain and suffering. Once a plaintiff dies, her successors cannot recover damages for her pain and suffering. Code Civ. Proc. § 377.34; 5 Witkin, Summary of Calif. Law, Torts, § 23.

ii. Loss of expenses of obtaining and enforcing the default judgment

Ms. Ward incurred large expenses in obtaining the default judgment. She produced over 500 pages of points and authorities and exhibits. 1 AA 49 through 3 AA 557. And her attorneys had to appear at the hearing on the motion and testify. 4 AA 1042.

After the default judgment was entered, she sought to enforce it. Her attorneys noticed an order of examination of Goss-Jewett's representative (Mr. Lamanet), and then conducted that hearing. 4 AA 893:22-894:4, 897:17-20. Her attorneys then attempted to subpoena records from certain insurance companies that might have insured Goss-Jewett against liability, and wrote letters to those companies. 3 AA 774-812.

And then, of course, Plaintiffs incurred additional expenses in opposing Goss-Jewett's motion to set aside, developing a memo of points and authorities and 22 exhibits. 4 AA 861 et. seq.

All these expenses would be for naught if the default judgment were now to be set aside.

c. Goss-Jewett has failed to prove that it will be prejudiced if the default judgment is not set aside.

Goss-Jewett might argue that the trial court's denial of the motion to set aside the default judgment deprives Goss-Jewett of its right to a jury trial. But ***what issues*** would a jury decide? Plaintiffs presented substantial evidence of Goss-Jewett's ***liability*** for her suffering. Goss-Jewett's 154 pages of exhibits (3 AA 658-812) include ***no*** evidence rebutting this. Plaintiffs presented substantial evidence supporting the ***amount of damages*** the court awarded. But once again, Goss-Jewett's exhibits include no evidence suggesting that this award was excessive.

Indeed, Goss-Jewett did not even submit a proposed answer denying the complaint's allegations of liability and damages. Why should the court go to the trouble of setting aside the default judgment and holding a jury trial if there are no disputed issues to try?

And if Goss-Jewett does not dispute the allegations of the complaint, how was Goss-Jewett ***prejudiced*** by the default judgment? Plaintiffs' claim of $8+ million in total damages was well supported by its evidence, but the trial court reduced that amount by over $3 million. Had Goss-Jewett gone to trial in January of 2013, a jury might not have been so lenient. Goss-Jewett might have been ***better*** off with the default judgment than going to trial

4. The Trial Court Did Not Abuse Its Discretion By Denying the Motion.

In *Carrasco v. Craft* (1985) 164 Cal. App. 3d 796, 806, defendants claimed that their four month delay in filing their motion to set aside was justified by their difficulty in obtaining funds to hire defense counsel. The court held that the trial court did not abuse its discretion in rejecting this claim and denying the motion due to unreasonable delay. In *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal. 2d 523, 529, the court reversed an order granting a motion to set aside a default judgment, because of an unexplained delay of 3.5 months in filing the motion. And in *Kendall v. Barker* (1988) 197 Cal. App. 3d 619, the court reversed an order granting a motion to set aside a default judgment, because of an unexplained delay of more than five months in filing the motion.

In the present case, the delay was even longer than the delays in *Benjamin* and *Carrasco*, and the "justification" was not merely weak – it was totally absent. If *Benjamin* held that a trial court abused its discretion by finding the delay reasonable, it follows that the trial court in the present case did not abuse its discretion by finding a longer, less-justified delay to be untimely.

III. ON THE MERITS, THE TRIAL COURT DID NOT ERR IN RULING THAT GOSS-JEWETT FAILED TO SHOW CAUSE TO SET ASIDE THE DEFAULT JUDGMENT.

A. The Judgment Is Not Void for Failure to Give Goss-Jewett 30 Days to Respond to the Statement of Damages.

At page 11, Goss-Jewett argues that the trial court was required to set aside the default judgment because Goss-Jewett was not given 30 days to respond to the statement of damages. This argument is without merit.

1. The Trial Court's Ruling

The trial court rejected Goss-Jewett's argument. At AOB 20, Goss-Jewett contends that the trial court abused its discretion because the court "conducted no evaluation of the totality of the reasonableness of the circumstances impacting the timeframe afforded Goss-Jewett to review and evaluate the statement of damages before the default proceedings commenced." But the trial court's opinion belies that claim:

> Plaintiffs were not required to wait 30 days after serving the statement of damages before entering the default. The rule is that a defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered. *Schwab v. Rondel Homes* (1991) 53 Cal. 3d 428, 435. The court is only required to find that minimum standards of due process have been met. Here, Plaintiffs served the Statement of Damages on December 20, 2012, and filed it on December 28, 2012, but did not file the Notice of Default until January 15, 2013. The court finds that Plaintiffs have established that they gave Defendant the requisite actual notice of its maximum potential liability for general and special damages and provided it a reasonable period of time within which to respond. That is all that was required. *California Novelties, Inc. v. Sokoloff* (l992) 6 Cal. App. 4th 936, 944. [4 AA 1087.]

2. The Facts

The Statement of Damages was served on Goss-Jewett on Thursday, December 20, 2012, by personal service on Stephen Lamanet. 1 AA 40. It was also served electronically on Goss-Jewett's lawyer, Mr. Creech. 4 AA 866:20-26.

The court did not order the default to be entered until January 18, 2013. 4 AA 1045. This was 29 days after Goss-Jewett was served with the Statement of Damages. The court then took the issue of damages under submission, and did not enter the default judgment until January 22, 2013. 3 AA 574-575. This was 33 days after Goss-Jewett was served with the Statement of Damages.

3. The Law

Before a default judgment is entered, the defendant must be given a "reasonable time" to respond to a Statement of Damages. Our Supreme Court so held in *Schwab v. Rondel Homes* (1991) 53 Cal. 3d 428:

> A defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered. [*Id.* at 435.]

Several Court of Appeal decisions have also applied the "reasonable time" standard. See, e.g., *Connelly v. Castillo* (1987) 190 Cal. App. 3d 1583, 1589-90; *Parish v. Peters* (1991) 1 Cal. App. 4th 202, 208 ("The defendant is then accorded a "reasonable" amount of time to respond (or not) to the statement of damages before the default may be entered"); and *California Novelties v. Sokoloff*, *supra*, 6 Cal. App. 4th at 944-945 ("A defendant is entitled to ***actual*** notice of the liability to which he or she may be subjected, a ***reasonable period of time*** before default may be entered") (italics in original).

Goss-Jewett argues that all these cases are wrong and that the defendant must in all circumstances be given a minimum of 30 days to respond to the Statement of Damages. Goss-Jewett says that "multiple courts" have so held (AOB 12), but cites only two cases – both of which predated the above decisions: *Plotitsa v. Superior Court* (1983) 140 Cal. App. 3d 755, 761, and *Twine v. Superior Court* (1986) 179 Cal. App. 3d 514, 517. Witkin, however, explains the present status of *Plotitsa* and *Twine*:

> Two cases have held that a defendant is entitled to the same period of time to respond to service of a statement of damages under C.C.P. 425.11 as is allowed to respond to an amended complaint under C.C.P. 586(a)(1); i.e., default may not be entered until 30 days after service. However, this view was rejected in *Connelly v. Castillo*, which held that only "reasonable" notice is required, and that a 27-day notice period was reasonable. The Supreme Court has apparently approved the "reasonable notice" interpretation of the statute. [Witkin, Calif. Procedure, *Proceedings Without Trial*, § 157, internal citations omitted.]

4. Substantial Evidence Supported the Trial Court's Finding that Goss-Jewett Had a Reasonable Time to Respond to the Statement of Damages.

At AOB 15-21, Goss-Jewett argues that the trial court erred in finding that Goss-Jewett had been given a reasonable time to respond to the Statement of Damages.

Goss-Jewett first claims that it was somehow unfair for Ms. Ward's counsel to "change their minds" about insisting that Goss-Jewett respond. Goss-Jewett makes no mention, however, of the facts that caused the change of mind: (1) Ms. Ward's imminent death (which had been caused by Goss-Jewett's negligence), (2) the resultant need to get the case to trial quickly against the other two defendants, to preserve Ms. Ward's right to recover for her pain and suffering against them before she died, and (3) the need for Goss-Jewett to either appear or default, in order to allow the case against the other two defendants to go to trial.

Goss-Jewett next argues that Ms. Ward's counsel had "promised" to give as much notice as possible. It is not clear that such a promise would be binding, as Goss-Jewett provided no evidence of any consideration for such a promise. In any event, the promise was performed: Ms. Ward's counsel gave Goss-Jewett close to 30 days' notice before the default judgment hearing, when trial was set for only a few days after that.

Goss-Jewett then argues (at AOB 16) that the Statement of Damages "asked for 170 times the amount of damages in the complaint." But how could this be a surprise? Code Civ. Proc. § 425.10, subsection (b) ***prohibits*** the plaintiff from specifying the amount of damages in a personal injury complaint. "The purpose of this statute is to protect defendants from adverse publicity resulting from inflated demands." Witkin, Calif. Procedure, *Pleading*, § 511. The complaint complied with this prohibition by alleging only that the pain and suffering damages exceeded $50,000. 1 AA 7:21-26. But before receiving the Statement of Damages, Goss-Jewett

knew that the damages would be far more than $50,000. Goss-Jewett had been informed several times of the serious nature of Ms. Ward's injuries and suffering – in the complaint (1 AA 5:9-7:26), in the settlement conference statement (1 AA 28:25-26), and in the Economic Impact Report (4 AA 873:1-9). So the fact that the damages she eventually sought were much greater than $50,000 came as no surprise to Goss-Jewett.

Goss-Jewett next argues (at AOB 16) that the Statement of Damages was served on Goss-Jewett "over the holidays." It is not clear that December 20 qualifies as "over the holidays" – unless one places the entire second half of December in that category. But even if one did, it would not matter. Courts and businesses are open "over the holidays" (except for two days: Christmas Day and New Year's Day), and lawyers and parties are expected to comply with the rules during those periods. In any event, if Mr. Creech was too busy Christmas shopping "over the holidays" to file a simple answer, all he had to do was ask Ms. Ward's counsel for more time to respond. (Ms. Ward's counsel had already shown their willingness to extend professional courtesies to Ms. Creech. 4 AA 862:25-863:2.) But that never happened.

At AOB 17, Goss-Jewett argues that the eight days between the day Goss-Jewett was served with the Statement of Damages (December 20) and the day Ms. Ward asked for the default (December 28) was too short. But ***asking for*** a default is not the same as ***entry*** of a default. The court did not announce its decision to enter the default until January 18, 2013 (4 AA 1045 at 12:10-18), and did not actually enter the default judgment until January 22 (3 AA 574-575).[5] Thus, Goss-Jewett had much more than eight days to file an answer and put a stop to Plaintiff's quest for a default judgment.

None of this would seem to matter, however, because Goss-Jewett did nothing before December 28, nothing before January 18, and nothing before January 22 – not even a phone call to ask Ms. Ward's counsel for more time.

At AOB 18, Goss-Jewett argues that "it would have appeared to a reasonable observer that the default had been entered on or about December 28" and therefore it would be fruitless to file an answer after that. Of course, Mr. Creech could have simply visited the court's website and seen that the request had been rejected. See AA 1109 (entry of 01/02/13) and AA 1110 (entry of 01/14/13). Also, Goss-Jewett has provided no evidence that Goss-Jewett ***had planned*** to file an answer, but dropped the idea because it thought the default had been entered.

Goss-Jewett has failed to produce any evidence that it was ***prejudiced*** by any arguable shortage in time to respond to the Statement of Damages. There was no evidence that giving Goss-Jewett any additional

[5] At AOB 18, Goss-Jewett says that the default was entered on January 15, citing 4 AA 1087, where the trial court so stated. It appears, however, that the trial court was mistaken. The only thing that happened on January 15 was Plaintiff's sending Notice of Continuance of the default judgment hearing to January 18 to Lamanet and Creech. 3 AA 571-573; 4 AA 879:1-4.

time to respond to the Statement of Damages would have produced any response. Goss-Jewett filed no answer after it was served with the Statement of Damages. Nor did it file a demurrer. Nor did anyone from Goss-Jewett ask Ms. Ward's counsel for an extension of time to do so. Nor did anyone from Goss-Jewett ask Ms. Ward's counsel to continue the hearing on the request for default judgment in order to give Goss-Jewett more time to prepare. Compare *Connelly v. Castillo*, *supra*, where the defendant argued that "Had the court clerk waited 30 days to file the request for default, respondent contends, his answer would have been accepted by the court, having been mailed to the court on October 4, the same day that the default request was filed." 190 Cal. App. 3d at 1588. No similar effort was made here.

Goss-Jewett's claim that it needed a full 30 days to respond to the Statement of Damages rings hollow when one realizes that Goss-Jewett took more than ***300*** days after service of the complaint to ***first appear*** in this lawsuit. Goss-Jewett made no prior effort to protect its rights, and there is no evidence that giving Goss-Jewett a few extra days to file an answer would have made a difference.

B. The Judgment Is Not Void for Failure to Send an Amended Request to Enter Default.

At page 21, Goss-Jewett argues that the default judgment is void because Goss-Jewett did not receive the ***amended*** request for judgment. This argument fails, for four separate reasons

First, Goss-Jewett failed to make this argument in the trial court. See 3 AA 643 *et. seq.* (Goss-Jewett's memo of points and authorities in support of its motion to set aside the default judgment) and 4 AA 1061 *et. seq.* (Goss-Jewett's reply memo). Therefore, this argument is waived on appeal. See *In re Aaron B.* (1996) 46 Cal. App. 4th 843, 846.

Second, Goss-Jewett received more than adequate notice that Ms. Ward was about to seek a default.

- On December 28, 2012, Plaintiff served notice that Plaintiff was requesting a default, by first class mail on both Mr. Lamanet and on Mr. Creech. 1 AA 43. On January 2, 2013, the court rejected the notice of default because the name of the defendant on the proof of service did not correspond to the complaint and summons - solely because the process server had failed to place a hyphen between "Goss" and "Jewett." 1 AA 44, 4 AA 876:22-877:3.
- On January 4, 2013, Plaintiff served notice of the "default judgment hearing" by first class mail on both Lamanet and Creech. 3 AA 563. Notice of the hearing was also sent by electronic service. 3 AA 564.
- On January 15, 2013, Plaintiff sent to Lamanet (by first class mail) and to Creech (by electronic transmission) a Notice of Continuance of the default judgment hearing to January 18. 3 AA 571-573; 4 AA 879:1-4.

None of these notices produced any responsive pleading from Goss-Jewett.

Third, Goss-Jewett cites no authority for the notion that a plaintiff – after properly serving a notice of default – must serve on the defendant a second notice, telling the defendant that the request for default has been amended to add a hyphen to the defendant's name.

Fourth, Goss-Jewett failed to provide any evidence that receipt of an amended notice would have made any difference. An amended request for default judgment would have done nothing more than *inc**lude the missing hyphen***. Goss-Jewett submitted no evidence that Mr. Creech or anyone else from Goss-Jewett would have responded to such an amended request by filing an answer, by filing a demurrer, or by asking Ms. Ward's counsel for an extension of time to do so. It strains credulity to believe that – after passing over so many opportunities to file an answer – Creech would have ignored the request for default because his client's name was missing a hyphen, then seen an amended request that included the hyphen, and then said to himself: "Aha! A hyphen! So they are seeking a default from my client 'Goss-Jewett' and not from 'Goss Jewett,' so I'd better file an answer."

C. The Trial Court Did Not Err by Awarding More Damages than Requested in the Statement of Damages.

At AOB 26, Goss-Jewett argues that the default judgment is void to the extent that it awards damages for more past medical expenses and future lost earnings than were requested in the statement of damages. This argument is without merit, because the statement of damages gave Goss-Jewett fair warning of what might be awarded.

On December 20, 2012, Ms. Ward's attorneys served the Statement of Damages on Goss-Jewett. 1 AA 38-40. The attorneys used Judicial Council Form No. CIV-050, which is titled "STATEMENT OF DAMAGES (Personal Injury or Wrongful Death)." The Statement says that Ms. Ward is seeking, among other amounts:

> "Medical expenses (*to date*)": $250,000.
> "Loss of earnings (*to date*)": S13,601.
> "Loss of future earning capacity (*present value*)": $757,297. [1 AA 38.]

The words in quotes are the Judicial Council's words, not Plaintiffs'. Use of this form is mandatory, and therefore the amounts indicated by the quoted words are also mandatory.[6] Therefore, Plaintiffs were ***required*** to state Ms. Ward's medical expenses "***to date***" and her loss of earnings "***to date***."

The default judgment (entered on January 22, 2013) awarded the following amounts for the above items:

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[6] At the bottom of the first page the following printed words appear: "Form Adopted for Mandatory Use Judicial Council of California CIV-050 [Rev. January 1, 2007]." See also Witkin, Calif. Procedure, *Pleading*, § 511: "The Judicial Council has adopted a mandatory form for the statement of damages. (See Judicial Council Form No. CIV-050 [Statement of Damages (Personal Injury or Wrongful Death)].)"

Past medical expenses: $400,476.87.
Future medical expenses: $100,000.
Past & future loss of earnings: $888,174. [3 AA 574-575.]

More than a month had passed between the date the Statement of Damages was served (December 20, 2012) and the date the default judgment was entered (January 22, 2012). During that month, Ms. Ward's condition was changing (for the worse), and therefore her expenses and loss estimates were changing.

Goss-Jewett does not challenge the reasonableness of the estimates in the Statement of Damages. Nor does Goss-Jewett challenge the amounts awarded by the default judgment. Goss-Jewett argues only that it was somehow unfair that the amounts were different. But the amounts set out in the Statement of Damages were explicitly stated to be "to date." These limitations were not Plaintiffs' ideas. They were mandated by the Judicial Council. These limitations make sense, of course, because a plaintiff cannot know with any certainty the amount of one's future medical expenses or loss of earnings. These limitations ("to date") are clearly indicated, so the defendant is not misled into believing that – if the defendant fails to appear – the default judgment might not include additional damages. See *People v. Brar* (2005) 134 Cal. App. 4th 659, 668 (defendant is entitled only to "fair warning" of the amount that might be awarded in default judgment). If the defendant fears a higher award, his remedy is simple: just file an answer and go to trial. But Goss-Jewett chose not to do so.

D. The Trial Court Did Not Abuse Its Discretion in Rejecting Goss-Jewett's Claims of Surprise and Excusable Neglect.

At page 27 of its opening brief, Goss-Jewett argues that the trial court abused its discretion in rejecting its argument that its failure to file a responsive pleading was due to "surprise" and "excusable neglect."

Goss-Jewett accuses Plaintiffs' counsel of obtaining the default "by stealth and surprise," of "rushing" to obtain the default, and of "lulling" Goss-Jewett into believing that no default would be taken. But the evidence before the trial court – unmentioned in Goss-Jewett's brief – painted quite a different picture.

For several months, Mr. Shingler and Mr. Brody tried to work with Mr. Creech to find insurance coverage. During this time, Shingler and Brody told Creech that they had no present intention to take his default. But they never suggested that he should not file an answer to protect his client's interests.

In the Fall of 2012, however, two things changed. One, Creech had stopped communicating with them. Two, Ms. Ward's condition deteriorated, so there arose a need to get the case to trial against two other defendants before she died – but that trial could not proceed unless Goss-Jewett appeared or defaulted. Thus, Ms. Ward's counsel properly and ethically sought to protect their client's interests by giving Goss-Jewett fair warning and – when that produced no results – moving to take Goss-Jewett's default.

Goss-Jewett's brief mentions none of these facts.

1. The Trial Court's Opinion.

The trial court rejected Goss-Jewett's argument that its failure to file an answer should be excused:

> Defendant has not established that the default was taken as a result of mistake, inadvertence, surprise or excusable neglect. C.C.P. sec 473(b). The declaration of Randall Creech shows that he was informed on August 3, 2012, in an email by Plaintiff's counsel, that Plaintiff would not take Defendant's default at that time, and in the unlikely event that it became necessary to take Defendant's default, Plaintiffs' counsel would provide as much notice as possible prior to entry of a default. Plaintiffs' counsel gave notice by email on December 10, 2012 that default would be entered if Defendant did not accept Plaintiffs' settlement offer by December 14, 2012. Plaintiffs served a Statement of Damages on John [*sic*][7] Lamanet on December 20, 2012. The Statement of Damages was filed on December 28, 2012 Plaintiff attempted to file a Request for Entry of Default starting on January 2, 2013, but did not successfully file a Notice of Default until January 15, 2013. A Default Judgment hearing was held on January 18, 2013. Judgment was issued on January 22, 2013, and Notice of Entry of Judgment was mailed on January 24, 2013. Defendant did not seek relief until June 7, 2013.
>
> The evidence offered by Defendant does not show that the neglect on the part of John Lamanet and Randall Creech that resulted in the default and default judgment was the result of excusable neglect. Defendant is required to show that the conduct of John Lamanet and Randall Creech that resulted in the default could have been committed by a reasonably prudent person under the same circumstances. John Lamanet contends that he did not understand what the Statement of Damages was or what it meant, and also did not understand other documents he received right after New Years', but he does not explain why he did not send these documents to the law office of Creech, Liebow and Kraus, as was his practice with legal documents. John Lamanet states that he suffers from Post Traumatic Stress Disorder, which makes it difficult for him to attend to his business, and creates issues with

[7] The court was mistaken. Mr. Lamanet's first name is Stephen, not John.

driving and leaving his home, but those health problems do not appear to have any connection with his failure to forward the Statement of Damages and other documents to Defendant's counsel. In any event, Defendant's counsel was already aware of the lawsuit and had been informed on December 10, 2012, that the default could be entered as soon as December 14, 2012. Randall Creech points to assurances he received from Plaintiffs' counsel in August 2012 that Plaintiffs would not take the default of Goss-Jewett without providing as much notice as possible. However, he does not explain why the December 10, 2012 email, in which Plaintiffs' counsel explicitly warns that the default will be taken, did not prompt him to file responsive pleadings on behalf of Defendant. Defendant's suggestion that Plaintiffs somehow prevent Defendant from filing an answer lacks factual support. No evidence is offered of any conduct on the part of Randall Creech after December 10, 2012. Mr. Creech's assertion that he was not counsel for Defendant is not determinative of any issue, since he was acting as Defendant's agent in communicating with Plaintiffs' counsel, and Mr. Lamanet testifies that his practice was to forward documents to the law firm of Creech, Lie bow and Kraus. Defendant's contention that it has no assets except insurance is not relevant to any issue in this motion. Defendant's assertion that it would blindsided by the size of the judgment ignores both the Statement of Damages and Plaintiffs' 998 settlement offer for $500,000, which was made in October 2012.

2. The Standard of Review

"The standard for appellate review of an order denying a motion to set aside under section 473 is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice." *In re Marriage of Eben-King & King* (2000) 80 Cal. App. 4th 92, 118; see also *Hearn v. Howard* (2009) 177 Cal. App. 4th 1193, 1200.

3. The Trial Court Did Not Abuse Its Discretion.

a. <u>The trial court did not abuse its discretion in rejecting Appellant's claim of "surprise."</u>

At AOB 28, Goss-Jewett says that Plaintiff's counsel "agreed" that they would not take Goss-Jewett's default and "promised" that they would provide reasonable notice before doing so. There are two problems with these characterizations. First, there was no evidence that Goss-Jewett gave Ms. Ward any ***consideration*** that would turn these communications in binding contracts. Second, there was no evidence that these communications were anything more than statements of counsel's ***present intentions***. Counsel did not at any time say, "We will ***never*** take your default." No reasonable attorney would say such a thing, and no reasonable attorney would construe counsel's statements this way. Indeed, Ms. Ward's counsel had told Mr. Creech that no default would be taken "at present" (3 AA 832) and testified that their "open extension was subject to revocation on reasonable notice." 4 AA 862:25-863:2.

During litigation, things often change. In this case, something did change: Ms. Ward's health. Because of this, Plaintiffs' counsel needed to get the case to trial against the other two defendants before Ms. Ward died, so he then gave Goss-Jewett's counsel "fair warning" that a default would be entered unless Goss-Jewett acted.

Also at page 28, Goss-Jewett says that Mr. Creech "relied" on counsel's statements. But how? By not filing an answer? Reliance must be reasonable. How is it reasonable for a licensed attorney to expose his client to a possible default judgment when filing a simple general denial

(which would take less than an hour of the lawyer's time) would preserve his client's rights? [8]

The trial court did not abuse its discretion in finding that there was no "surprise" here. Witkin states: "C.C.P. 473(b) provides for relief from a judgment or order taken by 'surprise.' This term refers to 'some condition or situation in which a party … is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' (*Baratti v. Baratti* (1952) 109 Cal. App. 2d 917, 921." Witkin, Calif. Procedure, *Proceedings Without Trial*, § 157. As the trial court stated, Mr. Creech did "not explain why the December 10, 2012 email, in which Plaintiffs' counsel explicitly warns that the default will be taken, did not prompt him to file responsive pleadings on behalf of Defendant."

[8] In the trial court, Goss-Jewett made no claim for mandatory relief under Code Civ. Proc. § 473, subsection (b). See 8 Witkin, Calif. Procedure, *Attack on Judgment in Trial Court*, § 144: "Where a timely application for relief under C.C.P. 473(b) is accompanied by an attorney's sworn affidavit attesting to his or her 'mistake, inadvertence, surprise, or neglect,' the court ***must*** vacate any resulting default, default judgment, or dismissal unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The attorney's neglect may be inexcusable as well as excusable." Even if such a claim had been made, it would have failed, because the trial court did not abuse its discretion in finding that Goss-Jewett had failed to file a "timely application for relief."

b. The trial court did not abuse its discretion in rejecting Appellant's claim of "excusable neglect."

At AOB 30, Goss-Jewett asserts that Mr. Lamanet "was unable to understand that he was served with process." But Mr. Lamanet "forwarded all the service documents to attorney Randall Creech." 4 AA 863:14-864:25. So none of Mr. Lamanet's claimed disabilities are relevant to whether ***Mr. Creech's*** neglect was excusable. Goss-Jewett's lawyer, not its agent for service of process, was responsible for filing an answer, so Goss-Jewett's focus on Mr. Lamanet is just a red herring.

At AOB 31-32, Goss-Jewett turns to Mr. Creech, arguing that he "reasonably relied" on counsel's "lulling" and that he "did not have sufficient time to evaluate the situation and proceed with a plan of action to avoid a default." But substantial evidence showed that Creech had plenty of time. How much time does it ***take*** to "proceed with a plan of action to avoid a default"? Less than an hour to prepare and file a general denial. How much time did Mr. Creech ***have*** to proceed with such a plan? Almost a year from when he received the complaint and summons, and several weeks after he received counsel's notice that they planned to take Goss-Jewett's default. And why did he fail to do so? Goss-Jewett presented no persuasive evidence of excusable neglect. In *Hearn v. Howard*, *supra*, the court affirmed the denial of a motion to set aside a default judgment because "appellant had multiple opportunities to avoid the entry of the default judgment against her. Instead, she elected to do nothing." *Id*. at 1206. The same is true here.

In *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal. App. 4th 600, 611-612, the court stated: "There is nothing in section 473 to suggest it was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal." See also Witkin, Calif. Procedure, *Proceedings Without Trial*, § 170 ("As a general rule, the client

is chargeable with the negligence of his or her attorney. And the attorney's inexcusable neglect, though it may subject the attorney to liability to the client, is as much a reason for denial of relief under the ***discretionary*** provisions of C.C.P. 473(b) as the client's inexcusable neglect.")

Here, the trial court did not abuse its discretion in finding that Mr. Creech's failure to file a responsive pleading for his client Goss-Jewett was inexcusable neglect.

CONCLUSION

In *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal. App. 3d 1009, the respondent stated: "While difficult to visualize, it appears that appellant sat on his hands at the same time he thumbed his nose at the judicial process." *Id*. at 1015, fn. 3. The same is true here. After being served with the summons and complaint, Goss-Jewett sat on its hands for more than a year before appearing in this action. When it finally did appear, Goss-Jewett thumbed its nose at the most basic rule for moving to set aside a default judgment: you must file a proposed responsive pleading, to show the court that you are not just wasting its time.

Goss-Jewett has failed to show that the trial court abused its discretion. The denial of the motion to set aside the default judgment should be affirmed.

Date: December 16, 2013

Respectfully submitted,

_____/s/_____
Myron Moskovitz
Ronald J. Shingler
Richard A. Brody
Counsel for Respondents

WORD COUNT CERTIFICATE

I hereby certify that the attached Respondent's Brief, including footnotes, contains 13,689 words, according to the word count indicator on my Microsoft Word program.

Date: December 16, 2013

_____/s/_____
Myron Moskovitz

PROOF OF SERVICE

I, the undersigned, certify that I am citizen of the United States and employed in the City of Piedmont and County of Alameda, I am over the age of eighteen years and not a party to the within action; my business address is 90 Crocker Avenue, Piedmont, California 94611; that I served copies of the following document:

RESPONDENT'S BRIEF

as follows:

I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing by with the United States Postal Service and that, as such, the foregoing document would be deposited with the United States Postal Service the same day as placed for collection and mailing, in the ordinary course of business.

Copies of the foregoing documents were placed in envelopes, which were thereafter sealed, with first class postage fully prepaid thereon, at the foregoing business address, and were placed for collection and mailing, following ordinary business practices, on the below specified date.

The names and addresses of the persons served as shown on the envelopes were:

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Also, I served the Supreme Court electronically by submitting a text-searchable PDF copy of the Respondent's Brief to the First District Court of Appeals Electronic Filing website, in satisfaction of Rule 8.212(c)(2) of the California Rules of Court.

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

Dated: December 16, 2013

_____/s/_____
Brian O'Hara