

### **III. QUESTIONS PRESENTED**

1. Did The Superior Court Err by Entering Nonsuit on Three of Smith and Jones's Claims Because Questions of Material Fact Existed Regarding When All the Elements of Their Negligence Causes of Action Accrued?
2. Did the Superior Court Err by Denying the Motion for New Trial Because the Mortuary Was Barred under California Law from Appearing in Court Because it Was Not a Viable California Corporation?
3. Did the Superior Court Err by Excluding Admitted Exhibits From Jury Deliberations?
4. Did the Superior Court Err by Failing to Submit an Instruction Based on California Health and Safety Code Section 7054.7(a)(3) Regarding the Illegality of Commingling Cremains?

### **IV. STATEMENT OF THE CASE**

This case has its genesis in the commingling of James Smith's cremated remains ("cremains") with the cremains of two or more decedents. The main issue in this case is whether the Superior Court correctly granted nonsuit on three negligence causes of action based on the applicable one-year statute of limitations for negligence claims and application of the discovery rule ameliorating the limitations rule. More specifically, Plaintiffs/Appellants Mary Smith ("Smith") and Sara Jones ("Jones"), wife and mother-in-law respectively of the deceased, assert that their injuries arose when they learned that their relative's cremains had been commingled or, at the earliest, when the California Funeral Board Director advised them to retain an attorney due to its

findings regarding the purity of Smith's cremains, both of which occurred within the one-year limitations period.

**A. Statement of Facts**

This case involves breach of contract and negligence claims, including negligent infliction of emotional distress and negligent handling of a decedent's remains, that arose when Smith and Jones discovered that the Mortuary commingled Mr. Smith's cremains with at least one, and possibly two, other people.

1. On November 17, 1992, Smith and Jane Adams Entered Into a Contract With the Mortuary for the Mortuary to Handle Funeral Arrangements and Cremation Details for the Remains of Mr. Smith.

Mr. Smith died of natural causes on November 15, 1992. (Clerk's Transcript "C.T." p. 4). At the time of his death, Mr. Smith was married to Mary Smith, although they were separated. (Reporter's Transcript "R.T." p. 139; C.T. p. 2). Upon Mr. Smith's death, Smith and Jane Adams ("Adams"), Mr. Smith's house-mate, met with a representative from the Mortuary to make funeral arrangements. (R.T. p. 141, 154; C.T. p. 4, 27). Smith signed a contract with the Mortuary for that facility to handle the funeral arrangements. (R.T. p. 141, 142; C.T. p. 4, 27). Smith also signed an authorization presented by the Mortuary in the funeral paperwork for Acme Memorial Park to perform the cremation. (R.T. p. 143; C.T. p. 4, 27). Smith requested that Mr. Smith's

ashes be scattered at sea after cremation. (R.T. p. 141, 146). Smith and Adams made all payments for services to the Mortuary. (R.T. p. 157).

Several days after these arrangements were made, Adams asked Smith if she could have the cremains, instead of having them scattered at sea. (R.T. p. 146, 158). Smith agreed and called the Mortuary to advise the staff of this change. (R.T. p. 147, 158).

2. Approximately Two Years Later, a Representative From the Mortuary Called Smith Asking Her to Retrieve Her Husband's Cremains Because They Had Not Given the Cremains to Adams as Promised.

In September, 1994, the Mortuary called Smith requesting that she pick up her husband's cremains which were allegedly being stored on a shelf in a storage room at the Mortuary. (R.T. p. 149, 160). Smith asked why it took two years for someone to even try to contact her. The representative of the Mortuary claimed they had attempted to contact Adams several times by phone and by mail, but with no success. (R.T. p. 161, 382, 383). Adams maintains that she was never contacted in either fashion and had no knowledge that the Mortuary was trying to reach her to deliver the ashes to her. (R.T. p. 445, 446). The Mortuary did not keep records of telephone calls allegedly made or copies of letters allegedly mailed to Adams. (R.T. p. 360, 391, 392).

Smith was surprised and upset that two years had passed without

delivery of the cremains. She then telephoned her mother, Jones, with this information. (R.T. p. 161, 162). Jones reported these events to the California Funeral Board and the A.B. Foundation, a funeral industry consumer help group. (R.T. p. 224, 225).

3. Smith and Jones Went to the Mortuary to Retrieve Mr. Smith's Cremains.

Approximately one week later, Smith, Jones, Funeral Board Investigator Jeff Johnson ("Johnson") and A.B. Foundation member Audrey Madison ("Madison") went to the Mortuary to retrieve Mr. Smith's cremains. (R.T. p. 163, 226). Upon arrival, they were sent to an upstairs room, and there they met James Harrison ("Harrison"), the Mortuary's funeral director. (R.T. p. 164, 228). At this time, Smith again asked why two years had passed without the cremains being delivered. Harrison offered the same explanation that Smith had received on the telephone. (R.T. p. 164).

Harrison then entered a side room and came back with a box wrapped and secured in white paper, as is the normal custom for the packaging of cremains. (R.T. p. 165, 228, 352-355). Brown and Jones took the box to another room to inspect the contents. (R.T. p. 165, 228, 352). Upon inspection, Brown determined that the proper certificates were not attached, and the pair returned to question Harrison about this discrepancy. (R.T. p. 166, 229). Harrison again retreated into the storage room and came out with

another box, purporting that this, too, was a box of Mr. Smith's cremains. (R.T. p. 166, 230). This box was not wrapped or secured as the first had been. (R.T. p. 166, 230). Upon receipt of this second box, the group left the Mortuary. (C.T. p. 167).

4. Smith and Jones Asked the California Funeral Board to Examine Mr. Smith's Cremains for Authenticity.

Jones then took the boxes of cremains to California Funeral Board Director John Tyler ("Tyler") to have him examine the cremains to verify their authenticity. (R.T. p. 231). Two months later, in December, 1994, after completing his examination, Tyler advised Smith to hire an attorney because of his concerns regarding the purity of the cremains after investigation. (R.T. p. 236). Tyler, himself, was unable to come to any definite conclusions regarding the authenticity of the cremains.

5. In the Autumn of 1995, an Expert Tested Mr. Smith's Cremains and Determined That They Had Been Commingled With Other Decedents' Cremains.

Smith and Jones followed Tyler's advice and immediately hired Attorney Robert Polk ("Polk"). (R.T. p. 236). Polk contacted Alexander Taylor ("Taylor"), a professor of anthropology at Acme State University, who tested the cremains in October, 1995. (R.T. p. 263). Taylor determined that the cremains were those of at least two, and maybe three, people. (R.T. p.

269). Upon learning that Mr. Smith's cremains had been commingled, Smith was shocked, became physically ill and began having nightmares. (R.T. p. 168-169). Jones felt grief and sadness, stating that "it just seems like he's been thrown away.... We can't come to any closure here. It doesn't seem like anybody cares." (R.T. p. 242). After suffering injuries from learning these results, Smith and Jones filed suit on November 13, 1995. (C.T. p. 1).

## **B. Procedural History**

This lawsuit was filed in the Superior Court of Los Angeles County by Smith and Jones against Acme Memorial Park and the Mortuary. (C.T. p. 1). Smith and Jones settled their case with Acme Memorial Park prior to trial, and the Superior Court dismissed all cross-complaints for indemnity against Acme Memorial Park at the commencement of the trial, finding that the settlement was made in good faith and within the range of that party's potential exposure. (R.T. p. 2, 3).

Trial of Smith and Jones's claims against the Mortuary began on July 30, 1997. (R.T. p. 1). After Smith and Jones rested their case, the Mortuary orally moved for nonsuit on counts six, seven and nine of the Complaint on the basis of the one-year statute of limitations for negligence claims under California Code of Civil Procedure section 340.3. (R.T. p. 296). Those three counts were claims for negligence, negligent interference with a decedent's cremains and negligent infliction of emotional distress. (C.T. p. 24). On

August 7, 1997, the Superior Court granted the Mortuary's motion for nonsuit. (R.T. p. 336; C.T. p. 93). The Superior Court concluded that the one-year limitations period for these causes of action began to run in October, 1994, when Smith and Jones picked up Mr. Smith's cremains at the Mortuary, and the Court took judicial notice that Smith and Jones filed their Complaint on November 13, 1995. (R.T. p. 335). At the same time, the Mortuary moved for nonsuit on the issue of agency between the Mortuary and Acme Memorial Park. (C.T. p. 93). The Superior Court denied this motion, determining it was an issue for the jury to decide. The Mortuary's final motion for nonsuit regarding count five, a claim for negligent misrepresentation, was granted on August 8, 1997. (R.T. p. 398). The Mortuary rested its case on August 11, 1997, and the Superior Court submitted the case to the jury on that same day. (R.T. p. 486). Upon submitting the case to the jury, the judge indicated that the four exhibits sent into deliberations would be the only exhibits the jury would see, and that they should not request to see any other exhibits. (R.T. p. 486). The jury returned with a verdict for the Mortuary on all counts. (C.T. p. 153).

On August 29, 1997, Smith and Jones filed a notice of intention to move for new trial pursuant to California Code of Civil Procedure section 657. (C.T. p. 105). Smith and Jones contended that there were irregularities in the proceedings of the court and jury, an abuse of law, an abuse of discretion by

the court, surprise, newly obtained relevant evidence not previously discoverable, and insufficient evidence to justify the verdict. (C.T. p. 105). The Mortuary timely filed its opposition to the motion for new trial. (C.T. p. 126). The Superior Court denied the motion on September 29, 1997. (R.T. p. 490; C.T. p. 152). Smith and Jones filed a timely appeal on October 10, 1997. (C.T. p. 162).

## **V. STATEMENT OF APPEALABILITY**

This is an appeal from a final judgment pursuant to California Code of Civil Procedure section 904.1.

## **VI. ARGUMENT**

The Superior Court's judgment against Smith and Jones should be reversed. The Superior Court erred in granting the motion for nonsuit because triable issues of material fact existed regarding whether Smith and Jones suffered injuries within the one-year statute of limitations period. In addition, the judgment entered by the Superior Court was in favor of a suspended corporation which, under California law, could not appear in court to defend itself. The Superior Court also erred by excluding admitted exhibits from the jury's review during deliberation, which unduly prejudiced Smith and Jones's case. Finally, the Superior Court erred by refusing to submit a jury instruction based on California Health and Safety Code section 7054.7(a)(3) regarding the illegality of commingling cremains.

### A. Standards of Review

In reviewing a grant of nonsuit, an appellate court must evaluate the evidence in the light most favorable to the plaintiff. (*Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 291 [763 P.2d 948].) “On a motion for nonsuit, the court may not weigh the evidence or consider the credibility of witnesses; instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded; further, the court must give to plaintiff’s evidence all the value to which it is legally entitled.” (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517 [52 Cal.Rptr.2d 861].) On appeal, the Superior Court’s judgment of nonsuit “cannot be sustained unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.” (*LaMonte, supra*, 45 Cal.App.4th at p. 517, quoting *Freeman v. Lind* (1986) 181 Cal.App.3d 791, 798-799 [226 Cal.Rptr. 515].) If the court entertains a dismissal motion or motion for nonsuit based on the statute of limitations, “it may not be granted unless reasonable minds can draw only one conclusion from the evidence.” (*Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 419 [154 Cal.Rptr. 146, 147].)

When the Superior Court refuses to give a proposed jury instruction or supply jury exhibits, the appellate court must examine the entire record to determine whether giving or excluding a jury instruction or exhibit was prejudicial error in accordance with the pleadings and the proof. (*Wilkinson v. Southern Pacific Company* (1964) 224 Cal.App.2d 478, 483 [36 Cal.Rptr. 689].) The appellate court must consider the evidence most favorable to the plaintiffs, as the losing party, and “assume that the jury might have believed the evidence upon which that instruction was predicated.” (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674 [117 Cal.Rptr. 1, 527 P.2d 353], quoting *O’Meara v. Swortfiguer* (1923) 191 Cal. 12, 15 [214 P. 975]; See also, *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 298 [45 Cal.Rptr.2d 10].)

The interpretation of California Code of Civil Procedure section 23301.5 is a pure question of law and does not involve the resolution of disputed facts. Accordingly, this Court should review the decision below de novo. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 [35 Cal.Rptr.2d 418, 883 P.2d 960]; *Stratton v. First Nat’l Life Ins. Co.* (1989) 210 Cal.App.3d 1071 [258 Cal.Rptr. 721, 727]. This Court may independently determine the proper interpretation of the statute, giving no deference to the lower court’s interpretation. (See *California Teachers Ass’n v. San Diego Comm. College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856]; *R & P*

*Capital Resources, Inc. v. California State Lottery* (1995) 31 Cal.App.4th 1033, 1036 [37 Cal.Rptr.2d 436].

**POINT I -- THE SUPERIOR COURT ERRED BY ENTERING NONSUIT ON THREE OF SMITH AND JONES'S CLAIMS BECAUSE QUESTIONS OF MATERIAL FACT EXISTED REGARDING WHEN ALL THE ELEMENTS OF THEIR NEGLIGENCE CAUSES OF ACTION ACCRUED.**

Pursuant to the Mortuary's oral motion for nonsuit at trial, the Superior Court dismissed three counts of Smith and Jones's complaint, eliminating the negligence claims against the Mortuary. Smith and Jones's causes of action did not accrue until all of the elements of those causes of action were present and they had a cognizable claim. Questions of material fact existed regarding when all of the elements of Smith and Jones's negligence causes of action accrued, and the Superior Court should have allowed the jury to make this determination. Furthermore, the Superior Court erred in its application of the discovery rule by granting nonsuit when questions of material fact remained for the jury to decide.

**A. The Statute of Limitations Begins to Run When All of the Elements of a Cause of Action Are Present and the Plaintiffs Have a Cognizable Claim.**

The Superior Court erred in granting nonsuit under California Code of Civil Procedure section 340 (3). "A cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and liability arises, i.e., upon the occurrence of the last fact essential to the cause of action." (*Cross v.*

*Bonded Adjustment Bureau* (1996) 48 Cal.App.4th 266, 280 [55 Cal.Rptr.2d 801] quoting *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 296 [146 Cal.Rptr. 271].) The Superior Court erred when it found that Smith and Jones's claims were barred under the one-year limitations period for negligence claims.

**B. Questions of Material Fact Existed Regarding When All of the Elements of Smith and Jones's Negligence Causes of Action Accrued.**

The Superior Court erred by granting the motion for nonsuit on counts six, seven and nine of Smith and Jones's complaint based on the statute of limitations defense because questions of fact exist regarding when Smith and Jones's injuries or damages arose. A reasonable jury could conclude that Smith and Jones only became aware of their damages and that they had an actionable claim in October, 1995, after the cremains of Mr. Smith were tested by Taylor. (R.T. p. 169) Alternatively, a reasonable jury could conclude that the limitations period began to run when the California Funeral Board Director advised them to seek counsel, because that was when they first learned of the actual possibility that Mr. Smith's cremains had been commingled. The Superior Court should have left this determination to the jury.

1. The Emotional Injuries Suffered by Smith and Jones Were Not Triggered Until

Smith and Jones Had Knowledge of the  
Commingling of the Cremains.

The three causes of action raised in Smith and Jones's complaint included negligence (count six), and two additional negligence causes of action which refine the negligence claim by focusing on the Mortuary's actions and the damages sustained. These claims were for negligent interference with decedent's remains (count seven) and negligent infliction of emotional distress (count nine). It is undisputed that mortuaries undertake the duty "to provide appropriate and dignified services of the type that bereaved family members normally anticipate." (*Saari v. JonJones Corp.* (1992) 5 Cal.App.4th 797, 805 [7 Cal.Rptr.2d 82].) The right of recovery in tort for a breach of that duty extends to "close family members who were aware of the funeral and/or crematory services and on whose behalf or for whose benefit the services were rendered." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 875 [2 Cal.Rptr.2d 79, 820 P.2d 181].)

California also recognizes the tort of negligent interference with a decedent's remains. "It has long been recognized that the mistreatment of a corpse could give rise to tort liability." (*Quesada v. Oak Hill Improvement Co.* (1989) 213 Cal.App.3d 596, 604 n3 [261 Cal.Rptr. 769].) Negligent infliction of emotional distress is also recognized in this context. "To recover for emotional distress, a plaintiff must establish 'a well-founded substantial

certainty that [the] decedent's remains were among those reportedly mistreated.... A generalized concern that the remains of a relative may have been involved ... is insufficient to satisfy the requirement that there be a direct connection between a defendant's conduct and the injury suffered by the plaintiff." (*Saari, supra*, 5 Cal.App.4th at p. 806, quoting *Christensen, supra*, 54 Cal.3d at p. 902.) Under each of these causes of action, Smith and Jones claimed a right to recover money damages for the emotional injuries caused by the commingling. This emotional trauma took the form of shock, mental anguish, emotional distress, humiliation, grief and sorrow. (C.T. p. 38, 39, 41). Ultimately, these three causes of action are grounded on negligence, and the issue for purposes of the limitations analysis is when did the damages element of the negligence claims accrue.

2. Smith and Jones Filed Their Complaint Within The Applicable Statute of Limitations.

Smith and Jones's three negligence causes of action only accrued when their emotional injuries actually occurred – that is, only when they found out that the cremains were commingled. A reasonable jury could conclude that their causes of action accrued in October of 1995 or, at the earliest, in December of 1994 when the state first signaled there was a physical problem with the cremains.

This analysis turns on a careful examination of all the elements of a cause of action. The court in *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457 [246 Cal.Rptr. 815], provided guidance in differentiating between an injury and its cause.

“‘Wrongful act’ and ‘injury’ are not synonymous. The word ‘injury’ signifies both the negligent cause and the damaging effect of the alleged wrongful act and not the act itself. The date of injury could be much later than the date of the wrongful act where the plaintiff suffers no physical harm until months or years after the wrongful act.’”

(*Kappel, supra*, 200 Cal.App.3d at p. 1468, quoting *Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 54 [210 Cal.Rptr. 781, 694 P.2d 1153].) A limitations period cannot begin running until all the elements of a cause of action have accrued. In this case, “one of the necessary elements of any tort is injury, and until injury occurs there is no cause of action; a suit would be premature.” (*Kappel, supra*, 200 Cal.App.3d at p. 1468.)

a. *Smith and Jones’s Injuries Accrued Within One Year of Filing Their Complaint Against the Mortuary.*

First, the Court must consider when Smith and Jones first suffered emotional injury. Under either analysis, Smith and Jones were actually injured within one year of filing their complaint. As a preliminary matter, it should be noted that there is no assertion that the statute of limitations started running during the two years that elapsed between Mr. Smith’s death and Smith and

Jones's retrieval of his cremains. It is undisputed that Smith understood Adams was going to pick up the cremains from the Mortuary, and that Smith and Jones were not notified that the cremains had not been retrieved until they received the phone call in late September or early October, 1994.

b. *Smith and Jones Did Not Have Actual Knowledge of Their Injuries until October, 1995.*

A reasonable jury could conclude that Smith and Jones's emotional injuries were not triggered until October, 1995, when Taylor notified them that Mr. Smith's cremains had been commingled. The record supports a conclusion that Smith and Jones sustained injuries of emotional distress, the injury claimed under each of the three negligence causes of action, upon learning this information.

A similar case arose in Alabama. In *Payne v. Alabama Cemetery Association, Inc.* (Ala.1982) 413 So.2d 1067, a daughter sued a vault worker, a mortuary and a cemetery for several causes of action, including negligent destruction of her mother's bodily remains. In that case, the plaintiff's mother had died years earlier in 1953 and had been buried in a casket placed in an in-ground vault. Upon the plaintiff's grandmother's death in 1975, the plaintiff requested that her grandmother be buried over the mother's grave. To do this, the original vault had to be deepened to allow room for both caskets, and the mortuary arranged to do this. On Mother's Day, 1979, the plaintiff's uncle

visited the grave and noticed that it was sinking. The grave was opened to determine the cause of the sinking, and it was discovered that the mother's casket and vault were missing. The daughter filed a lawsuit within a year of this discovery. The trial court granted the defendant mortuary's motion for summary judgment. On appeal, the mortuary argued that the one-year statute of limitations had run because the mother's body and casket had disappeared in 1975 when the grave was deepened. The appeals court found, however, that the statute began to run "when and only when, the damages are sustained." (*Payne, supra*, 413 So.2d at p. 1072). The court found that the damages could only have been sustained when the daughter discovered that her mother's body was missing when the grave was unearthed.

The similarities between *Payne* and Smith and Jones's case are obvious. As *Payne* indicates, a cause of action cannot arise until all of the elements are present to make a claim. Smith and Jones did not sustain emotional injuries until October, 1995, when Sonek advised them of the test results. It was this event that triggered their injuries and triggered the start of the one-year time limitation. Until then, they had no cognizable cause of action and the limitations period did not begin to run.

**C. The Superior Court Erred in Its Application of the Discovery Rule to Improperly Enter a Nonsuit.**

At trial, the Mortuary argued that Smith and Jones had a suspicion of wrongdoing at the time that the Mortuary returned the cremains in October, 1994, and successfully relied on the *Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959 [38 Cal.Rptr.2d 298], a case applying the discovery rule, to support that contention. The Mortuary and the Superior Court misapplied *Bristol-Myers*. The real issue in this case is not when did Smith and Jones discover their injuries. Instead, it turns on when a reasonable jury could conclude their injuries actually occurred and they therefore had a cause of action. Even under *Bristol-Myers*, Smith and Jones's limitations period did not begin to run until they actually sustained their emotional injuries.

The court in *Bristol-Myers* reiterated the discovery rule formula used by the Supreme Court in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103 [245 Cal.Rptr. 658, 751 P.2d 923] stating that a limitations period cannot start running until the plaintiffs have both knowledge of the injury and a suspicion of wrongdoing on the part of someone. In *Bristol-Myers*, the plaintiff experienced a rupture of a silicone implant in 1982 after an altercation with another woman. The plaintiff knew that she had an obvious injury, and sought medical attention immediately. She experienced ulcerations in her arm, causing physical injury beginning in 1984 and 1985. From 1982 through 1984 and 1985, plaintiff saw several doctors, had surgery, and consulted an attorney

because she thought that she had been wrongfully injured. In April, 1991, the plaintiff sued the doctor who performed the breast implant and sued other Doe defendants, including Bristol-Myers, the manufacturer of the implants. In finding that the statute of limitations had run, the Court of Appeals concluded that the "plaintiff knew or at least suspected that she had an action for malpractice in 1984 or 1985" after a specialist determined that the silicone had migrated into her arm. (*Bristol-Myers, supra*, 32 Cal.App.4th at p. 967.) While the court did find that the claim was time barred, it did not find that the accrual date occurred until 1984 or 1985, at least one year after the plaintiff had consulted an attorney in October, 1983, about a claim against the doctor who did the surgery.

The Superior Court turned *Bristol-Myers* around in finding that it barred Smith and Jones's claims. *Bristol-Myers* actually supports Smith and Jones's arguments that an injury must first occur before any suspicion of wrongdoing can arise. Whether they reasonably suspected something was awry in October of 1994 when they got two boxes of what was supposed to be Mr. Smith, a reasonable jury could find that they did not suffer the requisite injuries until later when concerns about commingling were first raised or confirmed. The record supports this conclusion. Upon the return of Mr. Smith's cremains, Harrison represented to Smith and Jones that it was not unusual that the cremains would be packed in two containers, one of which he did not even

retrieve at first, and without which the group would have left had the proper documentation been in place in the first container. At that point, it is reasonable that Smith and Jones were concerned, but they did not necessarily suffer significant, cognizable harm at that point. Only after attempting to verify the authenticity of the cremains which Harrison represented to be Mr. Smith's did that happen.

In contrast, the plaintiff in *Bristol-Myers* was acutely aware of her injuries. She had already sustained the injury; the court then asked if she should have reasonably suspected that the injuries were caused by wrongdoing. Even if Smith and Jones were concerned about Mr. Smith's cremains in October, 1994, a reasonable jury could conclude that such suspicion did not cause emotional injury at that time. (See *Cross, supra*, 48 Cal.App.4th at p. 280.)

There is no dispute that the commingling occurred outside of the one-year limitations area. However, contrary to the Superior Court's determination, a reasonable jury could find that this breach of duty did not culminate in injuries to Smith and Jones until they learned that the cremains had been commingled or, at the very earliest, had been put on notice by Tyler at the California Funeral Board in December, 1994, that the purity of the cremains was questionable. Both of these potential triggering events occurred within the one-year statute of limitations time period. As such, the judgment

of the Superior Court should be reversed and the case should be remanded for new trial.

**POINT II-- THE SUPERIOR COURT ERRED BY DENYING THE MOTION FOR NEW TRIAL BECAUSE THE MORTUARY WAS BARRED UNDER CALIFORNIA LAW FROM APPEARING IN COURT BECAUSE IT WAS NOT A VIABLE CALIFORNIA CORPORATION.**

In their motion for new trial, Smith and Jones informed the Superior Court that, at the time of trial, the Mortuary was a suspended corporation due to its failure to file its corporate franchise taxes and reports from 1992 through the trial. (C.T. p. 111). Smith and Jones discovered this evidence only after the trial because Harrison had concealed this information by falsely testifying that the Mortuary was a viable California corporation. (C.T. p. 492). The Superior Court erred in refusing to grant a new trial on this basis.

A corporation may only sue or be sued if it is in good standing.

California law is clear on this issue:

Except for the purpose of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer may be suspended ... if (1) the corporation fails to pay franchise taxes on time; (2) fails to file a required annual information statement; or, (3) fails to file a franchise tax return, even when no tax is due.

(Rev. & Tax Code, § 23301.5.) When a corporation is suspended, it may not defend or prosecute an action nor appeal from an adverse judgment in a

California court. (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1365, 1366 [64 Cal.Rptr.2d 4, 6].) It is undisputed that, at the time of the trial, the Mortuary was in arrears in filing its corporate taxes, fees and papers. (C.T. p. 111). It was therefore barred from appearing in court, and the judgment in its favor should be vacated.

The Superior Court erred in concluding that the Mortuary's filing of outstanding taxes and papers after the filing of Smith and Jones's motion for new trial somehow saved the verdict. While reinstatement of a corporation's legal status may arguably serve to retroactively validate its prior legal actions, the Superior Court did not make the obligatory finding regarding whether the Mortuary substantially complied with the revival statute to allow it to proceed as a valid, legal entity. (*Sade Shoe Company, Inc. v. Oschin & Snyder* (1990) 217 Cal.App.3d 1509, 1513 [266 Cal.Rptr. 619, 622].) The test of substantial compliance is whether a corporation's compliance with the revival statute satisfies the policy of the statute--that is, to get the taxes paid. (*Sade Shoe Company, Inc., supra*, 217 Cal.App.3d at p. 1515.) The court in *Sade Shoe Company* stated:

The revival statute itself requires the suspended corporation to pay the tax and any interest and penalties for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest and penalties due.

(*Sade Shoe Co., Inc.*, *supra*, 217 Cal.App.3d at p.1516.) In *Sade Shoe Co.*, a corporate plaintiff could not avoid the running of the statute of limitations although its lawsuit was timely filed because it had not “substantially complied” with the revival statute by paying approximately \$100.00 in taxes and penalties due.

The Mortuary had not substantially complied with the revival statute at the time of trial. It made no attempt to comply at all until Smith and Jones revealed its noncompliance upon their motion for new trial. From 1992 to 1997, *six years* passed during which the Mortuary was not a valid, legally active corporation under California law despite Harrison’s representations that it was. (C.T. p. 111-114.) At the hearing on Smith and Jones’s motion for new trial, the Superior Court disregarded this newly discovered information, holding that it was Smith and Jones’s responsibility to have checked on the corporation’s status. However, fairness requires that this burden should not have been placed on Smith and Jones. Disregarding Harrison’s misrepresentations about the validity of the Mortuary’s viability worked a substantial injustice against Smith and Jones, and the Mortuary should not be allowed to prevail because of it. The Superior Court erred in denying the motion for new trial.

**POINT III-- THE SUPERIOR COURT ERRED BY EXCLUDING ADMITTED EXHIBITS FROM JURY DELIBERATIONS.**

The Superior Court's judgment should be reversed because the Superior Court improperly prohibited the jury from examining admitted exhibits during deliberations. Before sending the jury into deliberations, the trial judge told to the jury in open court:

I will advise you at this time that the items of evidence sent in to you will be the only items you will be allowed to see even though it may not be all of the items received in evidence. Do not ask for more.

(R.T. p. 486). Under California law, this irregularity in the proceedings of the court constitutes reversible error.

An irregularity in the proceedings of court is defined as any departure by the court from the due and orderly method of disposition of an action by which substantial rights of a party are affected. (*Gay v. Torrance* (1904) 145 Cal. 144 [78 P. 540].) California Code of Civil Procedure section 612 allows the jury to examine "any exhibits which the court may deem proper...." This provision stands for the proposition that "the jury, in the course of its deliberations, may examine the exhibits introduced at trial." (*People v. Barrett* (1913) 22 Cal.App. 780 [136 P. 520].) The jury then "may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter." (*Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 658 [115 P. 313].)

The Superior Court improperly denied the jury the opportunity to examine the trial exhibits. A survey of several jurors revealed that approximately four out of 14 exhibits were given to the jury to use in deliberations, with the admonition from the court that they could not request, and would not be given, additional exhibits, even if the jurors felt they needed to examine exhibits to reach a proper verdict. (C.T. p. 486.) This irregularity of trial procedure substantially prejudiced Smith and Jones. The jury could not consider all of the exhibits and weigh the evidence fairly and properly. The Superior Court gave no reason why the exhibits were kept away from the jury. But for the Superior Court's arbitrary and unexplained sequestration of admitted evidence, there is certainly a reasonable probability that the jury would have returned a verdict for Smith and Jones had it seen all of the exhibits. The judgment should be reversed and the case should be remanded for a new trial.

**POINT IV-- THE SUPERIOR COURT ERRED BY FAILING TO SUBMIT AN INSTRUCTION BASED ON CALIFORNIA HEALTH AND SAFETY CODE SECTION 7054.7(A)(3) REGARDING THE ILLEGALITY OF COMMINGLING CREMAINS.**

The Superior Court also erred by failing to give a requested instruction. This case involved issues related to the handling of cremains and one of the issues that went to the jury was the breach of contract claim. At trial, Smith and Jones submitted a jury instruction based on California Health and Safety

Code section 7054.7(a)(3) which regulates the handling of cremains. A party is entitled to request instructions on pertinent issues of law. Substantial evidence supports the conclusion that the Superior Court erred in refusing the instruction, and that refusal was prejudicial error.

**A. A Party Is Entitled to Request Special Instructions on Pertinent and Applicable Law.**

California Code of Civil Procedure establishes the requirements a court must follow in presenting a party's special instruction to the jury.

Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

(Code Civ. Proc. §609). Either party may request special instructions on any pertinent and applicable law. (*Parker v. Granger, Inc.* (1935) 4 Cal.2d 668, 677 [52 P.2d 226].) If regulations offered in jury instructions contain law pertinent to and controlling in the case, appellants are privileged to request special instructions regarding those rules. (*Parker, supra*, 4 Cal.2d at p. 677.) When an instruction is within the issues, and not covered by another instruction, it may be reversible error for the court to refuse that instruction. (*Palmer v. Brown* (1954) 127 Cal.App.2d 44, 62 [273 P.2d 306, 317].) "Each party is entitled to have his theory of the case submitted to the jury in accordance with the pleadings and proof, and it is incumbent upon the trial

court to instruct on all vital issues involved.” (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633 [255 P.2d 795], citing *Cole v. Ridings* (1949) 95 Cal.App.2d 136, 144 [212 P.2d 597] and *Jaeger v. Chapman* (1950) 95 Cal.App.2d 520, 525 [213 P.2d 404].)

When a trial court refuses to give a requested jury instruction, the appellate court must perform a two-step review to determine if the requesting party suffered prejudicial error warranting a reversal. First, the court must determine if the requested instruction was supported by substantial evidence for a theory of the case. (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148,158 [75 Cal.Rptr.2d 132].) If so, the requested instruction was refused in error. Second, if the court determines that the requested instruction was refused in error, it must then determine whether that error was prejudicial and that there is a “reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 p.2d 298].) Based on this two-part test, the Superior Court’s refusal

to give Smith's and Jones's proposed instruction was prejudicial error warranting a reversal in this case.

**B. The Superior Court's Refusal to Give Smith's and Jones's Proposed Jury Instruction Was Error Based on the Substantial Evidence Presented.**

The Superior Court erred in refusing to give the proposed jury instruction based on the substantial evidence in this case. Modeled on California Health and Safety Code section 7054.7(a)(3), the following proposed jury instruction was submitted to the Superior Court:

No person shall place cremated or uncremated remains of more than one person in the same container or the same interment plot.

(C.T. p. 91). California Health and Safety Code section 7054.7(a)(3) is clearly applicable in this case where Smith and Jones's expert testified that two or more decedents' cremains were in the containers which the Mortuary returned to Smith and Jones. (R.T. p. 269). As the determination about how that commingling occurred should be a question of fact for the jury, the jury had the right to know and needed to know that commingling of cremains is prohibited in California. This instruction was fundamental on the issue of whether the mortuary breached its contract with Smith and Jones because an illegal act goes directly to the crux of whether the contract was breached. Furthermore, because the instruction did not refer to any criminal ramifications of commingling cremains, the Mortuary would not have been unfairly

prejudiced by the presentation of this instruction to the jury. In refusing to give this instruction, the court severely hindered Smith and Jones's showing of wrongful conduct on the part of the Mortuary. Smith and Jones's breach of contract claim and the agency issue presented to the jury depended on the jury understanding that commingling of cremains is improper, in part because there were questions regarding the Mortuary's responsibilities under the contract and as an agent of Acme Memorial Park. Based on the undisputed testimony of Sonek, the cremains were commingled, and it was extremely relevant that the commingling of those cremains was unlawful. Therefore, the omission of the instruction was error.

**C. The Omission of the Jury Instruction Was Prejudicial, and Had the Jury Heard the Instruction, a Reasonable Probability Exists That the Jury Would Have Returned a More Favorable Verdict to Smith and Jones.**

The Superior Court's refusal of the instruction was prejudicial error and a reasonable probability exists that the jury would have returned a more favorable verdict to Smith and Jones had the instruction been given. "Prejudice is established if it seems probable that the error prejudicially affected the verdict, a determination which 'depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury.'" (*Gutierrez, supra*, 64 Cal.App.4th at p. 158, quoting *Soule, supra*, 8 Cal.4th at p. 580.) Therefore, when deciding

whether an error of omission of an instruction is prejudicial, a court must consider “(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.” (*Soule, supra*, 8 Cal.4th at p. 580, 581.)

Based on these four factors, it is clear that the refusal to give the jury instruction was prejudicial error. As stated above, substantial evidence justified giving the instruction proposed by Smith and Jones. The instruction spoke directly to issues regarding agency liability and proper completion of the contract. In addition, no other instructions presented to the jury addressed the serious nature of commingling cremains and the liability attached to doing so. (C.T. p. 87). Only through this refused instruction would the jury have the chance to understand that Smith and Jones’s claims regarding the commingling of cremains were more than just a personal dispute with the Mortuary. The refused instruction indicated the seriousness and severity of such an act because it is codified under California law. Furthermore, it is evident from the jury’s verdict form that it did not appreciate the agency aspect of Smith and Jones’s claims, and that had the jury known of the unlawfulness of commingling of cremains, it very likely may have reconsidered its determination on the breach of contract and agency claims by Smith and Jones. (C.T. p. 153).

Had the jury been allowed to consider the refused instruction, there is

a reasonable probability that Smith and Jones would have had a more favorable outcome in this case. The Superior Court committed prejudicial error in refusing to give this instruction, and the judgment should therefor be reversed.

## **VII. CONCLUSION**

For the foregoing reasons, Appellants Smith and Jones respectfully request that this Court reverse the judgment of the Superior Court and grant to them such other and further relief to which they may be justly entitled.

Respectfully submitted,