

QWarterly Chronicles

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You Be the Judge

On January 30, 2006, Rebecca Cherry was operating a vehicle on southbound Lincoln Boulevard intending to make a left turn onto eastbound Melrose Avenue. Cherry had stopped to wait for traffic conditions to allow her to safely make the turn and was talking on her cell phone. Kyseme Ellington was driving a car northbound in the lane closest to the center of the street. Ellington stopped and gestured,



indicating that it was safe for Cherry to make the turn. However, Daniel Gilmer was riding his motorcycle northbound on Lincoln Boulevard through the intersection with Melrose Avenue and was struck when Cherry attempted to make the left turn.

Gilmer brought suit against Cherry for making an unsafe left turn. He also sued Ellington claiming that Ellington was negligent in signaling to Cherry that she could safely make the left

turn. Gilmer contended that Ellington had a duty to ensure that Cherry could proceed safely in front of all oncoming northbound traffic. Ellington challenged the legal adequacy of the claim, arguing that there was no legal duty to determine whether Cherry could safely turn across lanes that Ellington's vehicle did not occupy and that the signal given by him could only be interpreted as an indication that he was yielding his right-of-way.

Gilmer countered with the argument that Ellington had a duty to use reasonable care in signaling other drivers to initiate a turning maneuver. Gilmer also contended that the general duty to use ordinary care to prevent others from being harmed as a result of one's conduct was applicable.

What do you think the ruling should be? How do you think the court ruled?

See "Ruling" on page 6

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Tax Benefits for Businesses With Export Sales

Does your closely held corporate business generate a significant amount of income from export sales? Are you looking for a way to legitimately reduce the corporate tax burden on your business and transfer additional cash to shareholders with preferential tax treatment? If so, then you may want to investigate if setting up a DISC, an interest

charge-domestic international sales corporation (IC-DISC) would benefit your corporate business.

An IC-DISC is a special type of corporation created by the Tax Reform Act of 1984 that is designed to provide a tax incentive for the exportation of certain United States produced goods to foreign countries. The process involves a U.S. export business (either an LLC or corporation) forming a domestic C corporation (IC-DISC) with individual shareholders. These individual shareholders also directly or indirectly own shares of the U.S. export business. The U.S. export business then contracts the IC-DISC as its sales commission agent and serves as its products supplier.

An immediate tax benefit occurs when the

U.S. export business pays the IC-DISC a sales commission because such commission is not taxable on the federal income level to the IC-DISC. Another tax benefit occurs when the U.S. export business deducts the commission as an operating expense, essentially shielding that amount from taxation at the higher 35% tax rate. The IC-DISC can then either immediately distribute its commission earnings as a dividend taxable to its shareholders, or retain the earnings, deferring the taxation to the shareholder until much later. Dividends paid by the IC-DISC to its individual shareholders are taxable at a maximum rate of 15%. If earnings are not distributed currently to its shareholders, then shareholders

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as a service to clients and friends. This publication is intended for general information and should not be relied upon for any other purpose. QWLLP encourages questions, comments, and ideas for future articles. Please call us; we'd love to hear from you.

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See "IC-DISC" on page 3

If you're too open minded, your brains will fall out.

“IC-DISC”

must pay interest on the related deferred tax liability.

In each tax year, an IC-DISC may only defer taxation on the first \$10 million of qualified export receipts. For amounts in excess of that, IC DISC shareholders are treated as having received a distribution taxable as a dividend in an amount equal to the lesser of the shareholder's share of specific income items, or the IC-DISC's current earnings and profits.

To be treated as an IC-DISC, a corporation needs to satisfy certain criteria, including the following: a) be a domestic/US corporation, elect to be a IC-DISC during its tax year, and maintain separate books and records; b) cannot have more than one class of stock, the par value of which must be at least \$2,500; c) cannot be a member of any controlled group in which a foreign sales

corporation is a member; d) meet the 95% gross receipts and qualified export property tests (at least 95% of its foreign trading gross receipts for the taxable year must be from qualified export receipts); and e) meet the 95% qualified export assets test (the adjusted basis of its qualified export assets must be at least 95% of all its total assets at the end of the taxable year).

An IC-DISC is ideal for closely held corporate or LLC export businesses with sufficient cash flow available to make shareholder distributions. A business with an export margin of about \$100,000 or more generally saves enough tax in a year to make the cost and formation of an IC-DISC a worthwhile investment. Call us to see if setting up an IC-DISC would benefit your business.

Norma Iris Garcia

SPOTLIGHT ON JAMES F. HENSHALL



Meet Jim Henshall, our new Senior Associate attorney, practising in the areas of business law and civil litigation. Jim has 20 years of insurance litigation, insurance coverage, and business litigation experience gained while working at a large Southern California law firm. No stranger to the courtroom, Jim has handled trials, arbitrations, and appellate arguments to the California Appellate Courts, the 9th Circuit Court of Appeals, and the California Supreme Court. Jim is also a licensed real estate broker in the state of California. You can reach Jim at (714) 241-1919, extension 125 or at J.Henshall@qwillp.com.

If you look like your passport picture, you probably need the trip.

Are You Being Deposed?

You need not be involved as a party in litigation to be thrust into the role of a deposition witness. There are numerous events and circumstances in which you may be a participant or bystander that can lead to your receipt of a subpoena to give deposition testimony in subsequent litigation. The deposition procedure can be a stressful experience. Of course, if you are asked to submit to a deposition while a party to a lawsuit (or an employee of a party), then you will likely be represented by counsel and will have the guidance of your attorney in preparing for the process. However, if you are not a party to the lawsuit, a basic understanding of the process in advance can help calm some of the standard pre-deposition nerves.

A deposition is a procedure in which counsel for a litigant can ask you questions to obtain information about the subject of the lawsuit (for example, an automobile accident) while you are under oath. The deposition discloses what you will say if the case goes to trial and helps the attorneys evalu-

ate the merits of the case. If the matter is not settled, you may be required to testify at the trial even though you have already testified in deposition. If there are inconsistencies between your deposition testimony and what you say on the witness stand during trial, the deposition testimony can be read to the jury. In order to reduce the potential for an attorney to make you appear dishonest or foolish at trial, there are some basic guidelines to follow.

While it may seem obvious, always tell the truth. Listen carefully and never answer a question unless you have heard and understood the complete question. Never guess or speculate. Never be embarrassed if you do not know or remember the

Office Hours:

Our normal office hours are 8:30 a.m. to 5:30 p.m. Monday through Friday, Saturday by appointment only.

Closures:

Friday, July 4
Independence Day

Monday, September 1
Labor Day

See "Deposed" on page 5

Interesting Fact:

The aorta, which is the largest artery in the body, is about the diameter of a garden hose.

“Deposed”

answer to a question. Do not assume that you are expected to know the answer to a question just because it is being asked. Don't lose sight of the fact that memories, including yours, are imperfect. If you avoid guessing, there is less chance that you will later be confronted at trial with compelling evidence to show that your testimony at deposition was inaccurate.

It is important to be well rested and alert. Get a good night's sleep before the deposition. When you arrive in the deposition room, try to relax. Remember that you are in complete control of what you say when responding to a question. No attorney can force you to say

something that you know to be untruthful or require you to testify about something concerning which you have no knowledge. If the attorney suggests the answer to a question, don't adopt that answer unless you know it to be



accurate and truthful. Don't try to anticipate what the next question will be or what the attorney's strategy is.

Focus on the question that is asked and answer only that which is asked in the question.

We understand that the deposition process can be intimidating and frightening despite guidelines we have provided. If you find yourself summoned to a deposition and have any concerns about the process, subject matter, or possible effects of your testimony, you should consult with an attorney. We are here to assist in any way we can, whether by a brief consultation or by appearing at the deposition with you as your counsel.

Jeffrey J. Gillard

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QWLLP QUARTERLY CHRONICLES

About Quinlivan Wexler LLP

Patrick “Rick” C. Quinlivan and **Daniel “Danny” J. Wexler** bring almost 55 years of combined legal experience to Quinlivan Wexler LLP. With careful selection and addition of talented professionals to the firm, QW has grown over the years to the point where we now boast of many specialty areas to suit the needs of our clients.

Located near South Coast Plaza, QW engages in a general civil practice that includes civil litigation, business and corporate law, estate planning, probate, conservatorships and elder law.

The breadth of our litigation experience assures our clients’ representation by lawyers who fully understand the techniques, not only of trial advocacy, but of negotiations and persuasion as well. So, while being very meticulous about doing our homework, planning ahead, and writing precise contracts to prevent litigation, we are also fully prepared to litigate when it is in the best interests of our clients.

“Ruling”

The trial court in this California case held that there was no duty of care on the part of Ellington to ascertain whether other lanes were clear for a safe turn by Gilmer and the Court of Appeal agreed. Although it is foreseeable that serious injury could occur if a left turning driver relies on a signal from a yielding vehicle, several factors weighed in favor of not imposing a duty. A yielding driver bears no

moral blame for a collision between a left turning vehicle and one that does not yield the right-of-way. The duty to ascertain whether it is safe to make a left turn is placed by the legislature upon the driver making the turn. Furthermore, it would place an unreasonable burden upon the yielding driver to assure that it is safe to turn across all lanes. The yielding driver is not in the best position to view the oncoming traffic and its speed and has no way of anticipating how fast the left turn will be made. Finally, placing a duty on the yielding

driver would likely result in fewer courtesies being given as well as possible misinterpretation of ambiguous signals. So, feel free to be courteous and yield to other drivers, but always make sure the coast is clear if you are the one making the turn. (Note: There is a split among the courts in other states on this issue. Some would impose a duty on the driver yielding the right of way while others have reached the same conclusion as the California court.)

Patrick C. Quinlivan