CHAPTER 1

March 15, 1983
Los Angeles, California

Trials, they called them. And now I knew why. Although the jury was still out, my first one was finally over. Feeling vaguely short of breath, I leaned back on the hardwood bench across from the double doors to Department 49 of the Los Angeles County Superior Court, my black leather briefcase tattered and near collapse on the floor next to my right foot. Through the fabric of my blue suit, thin and shiny with wear, I could feel the cool marble of the wall against my spine. The lunch break – the absolute final deadline for anything good to happen, if somehow it was going to – was almost over. Court staffers returned to their departments one by one, clerks' heels clicking on the polished stone floor as they rushed back to court, bailiffs' soft soles pacing by as they hurried past in their perfectly-pressed tan uniforms, the grips of their Glocks sticking out of their black holsters. To my left, at the end of the long fifth floor corridor, the jurors began returning from lunch, spilling off the top of the escalator like bags at an airport carousel.

Unlike the first few days of deliberations, they did not look happy. They weren't smiling and laughing, or bringing in doughnuts anymore. No, by now they had been out eleven days and the initial banter and camaraderie were long gone. Who could blame them? After spending day after day in that tiny, hot, windowless room, arguing about every detail of the tons of evidence we lawyers had thrust upon them, they had failed to reach a verdict. And after three long months of mortal combat between the plaintiff and the defendant, both sides bruised and battered like heavyweights at the end of the 15th Round, they would soon come into the courtroom and say, "We can't decide. Sorry you wasted your time."

They trudged up the hallway towards me, in groups of two or three, beaten and spent, like remnants of a tribe of Visigoths straggling home after a losing battle. The jurors never coalesced in large clusters anymore – no groups or seven or eight, and certainly not nine – hinting perhaps that a consensus was in the offing. Since nine or more votes were needed by either side to win, it was obvious, as it had been for days, really, that there would be no verdict. There was no point in prolonging the agony any further. All that remained was for the judge to declare a hung jury and grant the defendant's motion for a mistrial. The long twisted path leading to this day would be obliterated, gone as if it had never been traveled upon. And I would be left only with the bitter residue of having made the biggest mistake of my life.

I tried to ignore the burning gnaw in my stomach as I looked across the hall at my client's mother, sitting on her own hard oak bench. Her head was arched back against the wall, her dark eyes almost shut, six-year old Joshua was curled up on her lap like a cat, asleep. His one and only leg dangled over his mother's left thigh, its club foot hanging ingloriously at the end of a bony ankle. The stump of his other leg, ending above the knee, pointed towards the ceiling. The stumps of each arm ended above where his elbows should have been and rested at his side, small nubbins of what might have been.

When Josh was awake his short arm stumps would jerk quickly and sharply, like flippers on a pinball machine. He would gesture with them, but to little avail. They were useless. The whole purpose of arms, their entire reason d'etre, is to get your hands where you want them to be, so you can grab, hold, tear, turn, and twist; so you can feel. Everything that hands do. Without hands, even normal arms lose their reason for being. Josh's stumps were of no use to him at all. I looked at his little face. When he was sleeping, its deformity was dormant, making it seem normal and symmetrical. When he was awake and smiling – a distorted smile where one side of his mouth would go up and the other would go down – his sweetness shined through, and made you want to just hug him. And tell him that everything was going to be okay.

ABOVE ALL THINGS

The jurors stood at a respectable distance from my clients and me, as the judge had admonished them to do. Some talked in hushed tones to each other, others just stood quietly, leaning against the wall and waiting for the clerk to open the door. I counted eleven. Juror #9, the only juror surely on my side, hadn't come back from lunch yet. What did it matter? I told myself again, if they hadn't reached a verdict by now, they weren't going to. I had to accept that. Josh's mother Theresa lifted her head away from the wall and looked at me as she rubbed her hand over the fine hair on her son's head. I held up a single finger, signaling we were still one juror short. She nodded. She knew the routine by now.

Theresa had been energetic and angry when this all started, and until the last few days had held up well. But three months was a long time; three months of hearing in terrible detail what had happened to her baby while he lay in her womb; about how the negligent actions of her doctor had caused him to be born with horrific birth defects that would challenge him every day for the rest of his life. Or, as the defense put it, how the actions of her doctor had been perfectly reasonable under the circumstances, and had nothing whatsoever to do with her son's awful, but altogether unavoidable, birth defects. It was hard for a mother to sit and listen to that, day in and day out, especially in the contentious, adversarial, and often surreal environs that had been the jury trial of Joshua Kayne v. E.R. Squibb & Sons, Inc. Like all of us – lawyers, jurors, even the judge and the court staff – she was exhausted. She wanted it to end.

Two months had already passed since Theresa had testified. Given her nervousness when she stumbled over the oath, and over the two steps leading up to the witness box, she had done well on the stand. Her black hair tied back in a bun, her brown eyes sad but clear, she bravely answered all my questions. She told the story of how her doctor had given her injections of sex hormones at the beginning of her pregnancy, before they knew she was already pregnant. Not one shot, but two. She told the jury how happy she and her husband Courtney had been when they found out later she was going to have a baby after all. How excited they were to start their family. As my questioning came to a close, she looked to her right, at Dr. Henley sitting with his renowned defense attorney at counsel table.

"Did you ask him about the shots he had given you," I asked.

"Yes," she said, turning back to me. "I asked him."

"And what did he tell you? Do you remember?"

Tears formed in her bottom eyelids, but they did not overflow. "Oh yeah, I remember all right," she answered softly. "Like it was yesterday."

It had been six years since Fredrick Henley, M.D., an obstetrician from Panorama City, California, had seen Theresa Kayne in his office. She was trying to get pregnant, but after four years on the birth control pill she wasn't having regular menstrual periods – a not uncommon phenomenon. To "kick-start" her periods, Henley gave her an injection of Delalutin, a female sex hormone manufactured by the pharmaceutical giant E.R. Squibb & Sons, Inc. Delalutin was similar, but not quite identical, to the progesterone naturally made by a woman's body. When that injection didn't work, he gave her another shot four weeks later. Still, no menstrual period. This was puzzling, because progesterone (or, more precisely, progesterone withdrawal as the medication wore off) should re-cycle the menstrual period in a healthy woman of child-bearing age, leading to sloughing of the lining of the uterus and menstruation. That is, unless she is pregnant. Which, unbeknownst to Henley and the Kaynes, Theresa was.

"And what did he say?" I asked.

"What did he say?"

"Yes, Mrs. Kayne. Once the doctor learned you were pregnant, what did he tell you about those shots

he had given you?"

Theresa folded her hands on the shelf in front of her, next to the box of tissues, and looked at the defendant again.

"I said, 'Dr. Henley, those shots you gave me…'"

Her voice cracked and the tears did overflow now, mixing with mascara and forming black rivulets down her face. She glared at Henley, who sat motionless and stared silently ahead, his face even redder than usual. The jurors sat quietly as the witness pulled a tissue from the box and put it to her eyes, then took a deep breath and continued.

"Will they … will they hurt my baby?"

I still hadn't gotten an answer to my question, but that was Theresa. She told you what she wanted to tell you, when she wanted to tell it to you.

"And what did he say, Mrs. Kayne?"

Her voice caught as she squeezed each word out past tight vocal cords one at a time. "He … said… 'Nothing to… Nothing to … worry about, Mrs. Kayne,' he said. I can still hear those words. Those exact words." Her speech came more freely now, as anger began to trump pain. "He was so sure … so sure of himself! He kind of laughed and said, 'Nothing to worry about at all…'"

She wiped her eyes with the tissue, then dropped her chin to her chest as her shoulders convulsed in quiet sobbing. There was silence in the courtroom. I let it sit. A few of the women jurors sniffled and a few others looked over at Josh, perched on his father's knee in the audience, his wide eyes darting from his mother to the jurors, to the judge, then back to his mother, while his arm stumps twirled in the air as if he were conducting an orchestra. At the time, I thought it was powerful stuff. When combined with how well Josh himself had done on the witness stand a few days earlier – his crooked smile drawing return smiles from the jurors, his high-pitched voice sharp and clear, his sweetness shining through – it would surely sway the jury over to our side, right?

Wrong. So much for the conventional wisdom that jurors reach verdicts based on sympathy – one of the many false "truisms" I had heard before beginning this crazy quest, this final step in my long downward spiral to failure.

I looked down the corridor to my left to see if Juror #9 was coming off the escalator. He wasn't. I leaned my head back against the wall, closed my eyes to block out the fluorescent ceiling bulbs, and tried to tune out the chatter around me. What had I done? I ran through the scenario again in my mind for the thousandth time, hoping somehow to change the ending that was now just a few minutes away. But it was always the same. It was insane to have started off, in my first trial ever, with a complex, expensive, products liability/medical malpractice case against two of the best defense lawyers in the country, where the outcome would determine the future of a catastrophically injured child, as well as my own career. Insane, and irresponsible. I had chosen to throw myself – along with my armless, legless client – into the deep end of the pool the first time I tried to swim. That we were both about to drown should have come as no surprise to anyone. What I had done was criminal, digging such a deep and unnecessary hole for myself, just as Kim and I were about to start a family of our own. No, actually. Not criminal. As Talleyrand once said of an ill-advised overreach by Napoleon, it was worse than a crime. It was a blunder.

When we had broken for lunch at noon, our judge said he would declare a mistrial as soon as everyone got back, sinking once and for all any remote chance I had to salvage a victory. Since I could never re-try

the case – I had neither the money nor the mental fortitude to go through this again – a mistrial was as bad as an outright loss. Either way, the case would end. And I would be finished.

The hallway buzzed with random noise and movement as the clock struck 1:30 sharp and the courtrooms on each side of the fifth floor opened for their afternoon sessions. Jurors and lawyers deserted the corridor and poured into their respective departments. The Kayne jurors shuffled past me, avoiding eye contact as they returned to their lair. Soon it was quiet in hallway, and Theresa and I sat in silence on our benches. Witnesses who had been excluded from other courtrooms until they themselves were called to testify sat haphazardly on the other benches lining the long corridor. A messenger walked by in grey slacks and a powder blue shirt pushing a shopping cart full of case files in Manila folders, softly whistling an unknown tune.

I turned to my left again and saw Juror #9 trotting down the hall, his grey sweatshirt with the cutoff sleeves bouncing as he ran. Late, as usual. Good old Juror #9, with his short black hair and the tattoo on his neck, way before his time in 1983, when tattoos were seen mostly in sailors, punks, and felons. He was the only juror I could count on, the only one obviously in my camp. At least I had convinced one of them.

Theresa lifted her head away from the wall. "Russ, can Josh and I go home now?"

Josh turned his face towards me and opened his eyes half-way, then gave me one of his cock-eyed crooked smiles. He was awake, and with a sharp nod of his head he seconded his mother's request. He wanted to go home, too. Courthouses were no place for kids.

I nodded back at the boy who was by now no longer just a client or a plaintiff. He was a child I knew and cared about. A child who knew me, and who needed my help. But I had been unable to help him. Now, after the awful months of trial turmoil, it would finally end. Not with a dramatic win, or even a dramatic loss. It would just end with a whimper, and disappear forever. Once the judge declared the mistrial, Josh would get nothing from the doctor who'd cause him to be born without limbs; and when the case was dismissed, Josh would owe him his court costs – literally adding insult to injury. Theresa had been through enough. She didn't need to be here to see that.

Juror #9 strode by us, gave me the briefest instant of eye contact, then looked away. He grabbed the steel knob of the courtroom door, pulled it open, and ducked into the hell-hole that was Department 49. All twelve jurors were back from lunch now.

I took a deep breath in, then whispered across the quiet hallway. "Okay, Theresa, you and Josh should go. I'll call you when it's over."

Through a clenched jaw, I tried to smile at them as they rose to go, unaware of the angry words Juror #9 was chalking on the blackboard in the secret jury room so close by. Words I could not have imagined, but would never forget.

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CHAPTER 4

After Lois left, I picked up another box from the corner and put it on top of my desk, pulling out a few folders. The sun had set by then and as I looked out my office door, down the hall towards the entrance that opened onto Santa Monica Boulevard, I had the now-familiar feeling of being the last one in the building. I grabbed the phone and called home.

"Kimmer, I'm just about done here," I said. "Be there in about thirty minutes."

"Great," she said. "I'll put in the frozen pizzas."

"What are you wearing?"

"Nothing."

"Really? Nothing?"

"Nothing special, I meant."

"Oh. Well, be home in half an hour."

Leafing through the photos of the Kayne baby once again, I felt a mixture of sadness and fear. I hadn't mentioned it to Courtney Kayne, but my own wife was almost seven months pregnant with our first child. I thought of what it must have been like in the delivery room for the Kaynes. They had been expecting a normal child. They had no idea there were any problems, when suddenly they saw their baby born with no arms and only one leg, which was markedly deformed. A wave of nausea began to well up in my abdomen as I tried to put that thought in the back of my mind.

I perused the manila folders which held numerous memos, letters, and pleadings, realizing there was no need to learn the file in detail. We were dropping the case, after all. I just needed to learn enough about it – some basic facts, some essential allegations – so I wouldn't look like an idiot in court the next day. Maybe I'd run into something to excuse our failure to respond to the defendants' Requests for Admissions. Best case scenario, I would convince the judge to put the MSJ over until we had a chance to formally deny the RFA's, putting the facts back in dispute. Then, we file the substitution of attorney, and the case is over. No need to spend a lot of time on it. Worst case scenario, the judge grants the MSJ outright, and the case is dismissed. The end result would be the same, anyway. Sure, we would look worse – our firm had missed a deadline that caused the case to be thrown out – but in the end, would it matter? The case had no merit. We couldn't really be held liable for legal malpractice. There would be no damages. A client can't recover from an attorney whose malpractice causes him to lose his case, if the case has no merit to begin with. It would be like suing a doctor for failing to rule out heart disease in a patient with a normal heart.

Having convinced myself to relax, I undid the top button of my shirt, loosened my tie, put my feet up on my desk, and opened a copy of Dr. Frederick Henley's medical chart. It was thin and the handwriting was good. It wouldn't take much time to review. The facts were straightforward. In the early spring of 1976, Henley had given Theresa Kayne two injections of a progestational agent, Delalutin, to re-cycle her menses after missing several periods – which wasn't uncommon in a woman who had been on birth control pills. He gave the first shot on March 15, and when that didn't work, he gave a second shot a month later, on April 15. I looked to see if he had ruled out pregnancy first, since from what little I already knew about the case, the issue was whether this drug caused the baby's birth defects. Henley had done a urine pregnancy test on February 25 -- almost three weeks before he gave the first Delalutin injection. It was negative. I had been practicing medicine in those days and remembered that urine pregnancy tests were not very sensitive; a woman could have a negative test and nevertheless be in the early weeks of pregnancy.

I looked to see if Henley had repeated the pregnancy test before giving Mrs. Kayne the first shot of Delalutin on March 15. He hadn't. Then, I looked to see if he'd repeated the pregnancy test before he gave her the second shot on April 15. He hadn't. He didn't order another pregnancy test until April 28 -- sixty-two days after the initial injection. During that time, he gave her two shots of Delalutin. He didn't know if she was pregnant when he gave her the drugs, and he didn't repeat the initial test in order to find out. Henley must have believed sex hormones were safe for use in pregnant women. Otherwise, he wouldn't have given

them to Theresa Kayne -- a married woman of childbearing age -- without first ruling out pregnancy. I had no reason to think Henley didn't know what he was doing. Plus, the FDA had approved the drug for use in women. If there was reason to think it was a teratogen, the FDA would have required the package insert or the Physician's Desk Reference to include a warning against its use during pregnancy. I knew of no such warning.

When I left medicine, I had vowed to take meritorious cases only. I wasn't going to be one of those lawyers I'd been told were out there, suing anyone for anything, hoping to hit the jackpot with a frivolous case. If a case had no merit, I wanted no part of it. This case had no merit, and I wanted no part of it. I would go to court in the morning to show diligence, as part of my professional responsibility to the client. I would apologize for having failed to respond to the Requests for Admission, and ask for a delay so I could do so. But, most likely, the motion would be granted, the case would be dismissed, and that would be that. It was a sad situation, a child born with no arms or legs. But if the drug didn't cause this, it wasn't the drug company's fault, and it wasn't the doctor's fault, either – Courtney Kayne's sad eyes notwithstanding. There were other cases to worry about; valid cases with clients who needed my help.

I decided to quit for the night and began to gather the files when I spotted a manila folder with a little tab on the side that said "Research." This would no doubt close the circle, explaining why the experts felt progestins were safe in pregnancy; why Delalutin had not caused the baby's birth defects; and why this case should be dismissed. In short, why six lawyers -- now, seven -- had decided to cut these clients loose.

In the folder were several articles from the medical literature. One or two were from the *New England Journal of Medicine,* the bible of peer-reviewed research. Others were from the *Journal of the American Medical Association, Nature,* and *The Lancet*, a prestigious British medical journal. These publications would confirm that sex hormones were not teratogens, and I would be on my way.

As I started to skim the abstracts at the beginning of the articles, I noticed one loose, single-page document sitting by itself in the folder. It was a dark, poorly-copied package insert for "DELALUTIN (Hydroxyprogesterone Caproate Injection USP), Revised August 1977." At the top was a large box which contained the following statement:

WARNING

THE USE OF PROGESTATIONAL AGENTS DURING THE FIRST FOUR MONTHS OF PREGNANCY IS NOT RECOMMENDED

….

Several reports suggest an association between intrauterine exposure to female sex hormones and congenital anomalies, including congenital heart defects and limb reduction defects. One study estimated a 4.7 fold increased risk of limb reduction defects in infants exposed in utero to sex hormones (oral contraceptives, hormone withdrawal tests for pregnancy, or attempted treatment for threatened abortion). Some of these exposures were very short and involved only a few days of treatment. The data suggest that the risk of limb reduction defects in exposed fetuses is somewhat less than 1 in 1,000.

If a patient is exposed to progestational agents during the first four months of pregnancy or if she becomes pregnant while taking this drug, she should be apprised of the potential risks to the fetus.

In addition to the boxed warning, the folder contained a separate page entitled **INFORMATION FOR PATIENTS.** This portion read:

WARNING FOR WOMEN

There is an increased risk of birth defects, such as heart or limb defects, if progesterone and progesterone-like drugs are taken during the first four months of pregnancy.

This was precisely what I was expecting *not* to find. As of August 1977, the manufacturers of progestins included a boxed warning in their package inserts addressing an increased risk of limb reduction defects – the type of defects suffered by Joshua Kayne – when these drugs were used in the first four months of pregnancy. They also directly warned all women given these drugs about the potential risk of such birth defects – an extraordinary procedure. The entries cited five relevant medical articles,[i] four of which had been published by 1974.[ii] Squibb must have been aware of them at the time of their publication. How long did it take before Squibb included the warnings about birth defects in its product information? Did it drag its feet, or refuse to act, until required to do so by the FDA? If so, how long had it taken for the FDA to mandate the warning? And warning aside, was Theresa Kayne's doctor aware of the risk of birth defects – published in major medical journals by 1974 – before giving her the Delalutin injections in 1976? If so, why give them to her without repeating her pregnancy test to make sure she wasn't pregnant? Suddenly, question begat question begat question.

I picked up the phone again.

"Kimmer."

"Yes?"

"Have you put the frozen dinners in yet?"

"Just about to."

"Hold mine out for a few minutes, okay?"

"Again?"

"I'll be home as soon as I can."

"What are you working on?" she asked.

I scanned the photos of the armless child strewn across my desk and picturing my wife's belly with our baby inside.

"Just something that came up last minute."

"What?"

"Nothing."

"It can't wait 'til tomorrow?"

"Not really."

"How long will you be?"

"Don't know. Not long. You can put yours in."

"I'll wait."

"I'll hurry."

I hung up the phone and opened Henley's chart again. Using Joshua's birth date of December 2, 1976, I worked backwards to estimate the date of conception. Then, working forward with my rusty memory of medical school embryology, I estimated the dates that his face, arms and legs were being formed in the womb. Late March to mid-April. Right when Henley had given the injections. I re-did the calculations. They came out the same.

I swung my feet off my desk and onto the floor, sat up in my chair, and forced myself to concentrate after a long, long day. No matter how I turned it and twisted it, the facts didn't change: The medical literature had been solid enough to require a boxed warning to be included in the packaging materials for progestins, apprising both doctors and patients alike of an increased risk of birth defects, including limb reduction defects, if sex hormones were given to a pregnant woman during the first four months of her pregnancy. Whether Squibb failed to adequately and timely warn the medical community of these risks, or Theresa Kayne's obstetrician failed to properly stay abreast of the medical literature (or both), there was no disputing that she was given two injections of progestins during the first four months of pregnancy, just as her baby's limbs were developing *in utero*. And that, lo and behold, he was born with severe birth defects of his limbs.

Something didn't add up. Or, actually, something did add up. That's what confused me.

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[i] Gal, I, Kirman, B, Stern, J. Hormonal pregnancy tests and congenital malformations. *Nature* 216:83, 1967; Levy, EP, Cohen, A, Fraser, FC. Hormone Treatment during pregnancy and congenital heart defects. *Lancet* 1:611, 1973; Nora JJ, Nora AH. Birth Defects and oral contraceptives. *Lancet* 1:941-942, 1973; Janerich DT, Piper JM, Glebatis DM. Oral Contraceptives and congenital limb-reduction defects. *New England Journal of Medicine* 291:697-700, 1974; Heinonen OP, Slone D, Monson RR, et. al: Cardiovascular birth defects and antenatal exposure to female sex hormones. *New England Journal of Medicine* 296:67, 1977.

[ii] The fifth article, by Heinonen, et. al., was published in 1977 and found a statistically significant association between *in utero* exposure to female hormones and cardiovascular birth defects. It did not directly address the question of limb reduction defects.

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CHAPTER 7

After dinner, as Kim leaned back on the couch eating ice cream from a carton, I sat at our dining room table and began writing the Motion for Reconsideration. It was especially challenging because there were no

legal grounds whatsoever for such a motion. In order to prevail on a Motion for Reconsideration, one needed to present new facts or new law the court had not considered in its initial ruling. It wasn't simply that you wanted the judge to take another look at the issue, like an instant replay. It wasn't that you could argue the issue again, hoping this time to convince him he had made the wrong call. And it wasn't even enough that an injustice had been done.

"But an injustice has been done," Kim said from the couch. While she was reluctant to hear much about the case, and absolutely refused to look at the photos of Josh, she was always up for a debate.

"But how do I make Olsen care about that? I've got to hit on something important to him."

I couldn't argue that Josh Kayne should be given a break, and not punished for his lawyer's mistake. Or that it wasn't fair for a little armless, legless boy to lose his day in court over a procedural SNAFU. Olsen didn't care about such things. He didn't care about fairness, or even justice; and he didn't care about the boy with no arms and legs either. He'd been a judge for too long. If he ever had empathy in his veins, it had been bled out of him by lawyers parading through his courtroom daily for years on end, pleading for one thing or another. I wasn't going to change his mind by appealing to his humanity, if there was any humanity left behind those cold eyes of his. I had to come up with something else.

"What does a man like that care about?" Kim asked, rubbing her swollen belly with both hands.

"I don't know. Probably nothing."

She dropped her spoon into the now-empty carton and placed it on the coffee table. "Everybody cares about something."

I pictured the judge sitting on the bench and tried to think of times when someone almost got him to change his mind. What had hit home? One thing he didn't like was being taken advantage of, being made to look foolish. He didn't like to be manipulated by lawyers – annoying, lying, deceptive lawyers asking him to do things, asking him not to do things, and rarely giving him a straight story. Lawyers who twisted the facts and misrepresented the law to get him to do something that might be a mistake, that might get him reversed by the Court of Appeal or the Supreme Court, embarrassing him in the process. No judge, especially not a disagreeable bastard like Olsen, wanted to be reversed by a higher court. I had to do something to make him see how mortified he would be if his ruling was reversed in an appellate opinion, published in the Official Reports of California for all to see, for all eternity. Since he didn't know we would never actually appeal his ruling, maybe it would work.

Words began pouring out of my blue pen onto the yellow pad. The defendants had cynically manipulated this court into accepting things as true that had to be false, on their face. Whatever the facts of the case actually were, it was impossible for Theresa Kayne to have been given Delalutin after the baby's limbs were formed, yet to have never been given Delalutin at all. It was just not possible for Joshua's birth defects to have been caused by some drug other than Delalutin, while at the same time for them not to have been caused by any drug whatsoever. I listed the many "facts" the defendants sought to have deemed admitted. In their zeal to have every possible incriminating fact deemed true, they had gotten greedy; they had badly overreached. Since many of the facts were mutually inconsistent, they simply could not all be true at once. It necessarily followed that the court knew at least some of them were false.

With its initial ruling, the court had found that certain facts it knew to be false were actually true. As such, the ruling had created a farce. Worse yet, it made the court a party to it. Imagine, your honor, if this were an auto accident case and the defendant sent out an RFA asking the plaintiff to admit the light was red; and another RFA asking him to admit it was green. If the plaintiff failed to respond at all, both facts would

be deemed true. The court would have thus determined it was undisputed that the light was *both* red and green. And the defendant could decide which "true fact" to use at trial, depending on which was more advantageous to him at the time. This wasn't simply illogical and unfair. It made a mockery of the litigation process.

It was one thing for lawyers to play games. Unfortunately, they do that sometimes. But it was quite another for the judge to become a willing participant. That not only led to a bad result, but undermined respect for the due process of law. It was something the Appellate Court, guardian of the integrity and stature of the judicial system, would not take to kindly. How humiliating it would be if the Court of Appeal published a written opinion reversing – no, reprimanding! – Judge Robert Olsen for deeming true facts he *knew* to be false.

Sure, Josh Kayne's lawyer messed up. There was no denying that. And we deserved to be punished. So sanction us; make us pay a fine. Make us pay the defendant's expenses, if need be, since our negligence led to this unnecessary waste of time. But don't become party to a joke. A joke that reflects poorly on the judiciary itself. Don't let the defense lawyers and their powerful clients make a clown of this honorable court.

* * * * *

We returned to Department A four weeks later for the hearing on my Motion for Reconsideration, a legal Hail Mary if there ever was one. We were the last case on calendar, which meant I would be there for a while. The same defense lawyers were there, sitting on the other side of the courtroom, relaxed and joking before Olsen took the bench. They had reason to be confident. Not only did Olsen never change a tentative ruling, he had never been known to grant a Motion for Reconsideration. Not ever. It would be unprecedented for him to change a final ruling like this. Squibb and Henley's attorneys sat back in their seats and waited for the other cases to finish, figuring no doubt this was an easy billing opportunity for them. If there was ever a slam dunk on a motion, this was it. Olsen granting a Motion for Reconsideration? Not a prayer.

The only thing making me think I might have a chance was that we were last on the calendar, and there was no tentative ruling posted. Every other case had a tentative ruling. I hoped, as unlikely as it was, that meant Olsen hadn't decided yet and he wanted to save us for last, so no other lawyers would be present in case he did change his mind. He wouldn't want anyone to see such a thing. Word might get out and ruin a spotless reputation.

But I was dreaming. Especially given his hatred of the flamboyant Mr. Belli, there was no chance Olsen would reverse himself. Watching him dispatch the rest of the lawyers in the cases before mine gave me no basis for optimism. He was ornerier than ever, insulting and humiliating young lawyers at will. When he'd ruled on all the other matters, he peered out into the courtroom with his beady brown eyes, his hair matted down on his head, the cowlick standing straight up in back, and said, "Okay, number 17, Kayne vs. Squibb."

My two opponents got up and strutted to the front of the room and I joined them at counsel table, the three of us stating our appearances for the record. Olsen looked at defense counsel, then down at me.

"Mr. Kussman?"

"Yes, your honor?"

"You have presented no new grounds upon which I should reconsider my previous ruling."

I started to speak, but he continued.

"There are no new facts. No new law. None whatsoever."

"Your honor...."

"All you've done is made some fancy argument here."

He simply had to say, "denied." Why was he even discussing it?

"Your honor, I think that ... it is clear that..."

He waved me off with the back of his hand and looked over at the defense attorneys, who were beginning to shuffle their papers, looking for notes. Were they actually going to have to argue this thing?

"Counsel?" he said to them.

The Squibb lawyer spoke. "We agree, your honor. There is no basis for you to reconsider your prior ruling, which was absolutely correct."

Henley's man chimed in. "There are no grounds to reconsider, your honor. No new facts, no new law. None."

Olsen shook his head sharply back and forth twice, like he was trying to wake himself up. He curled his fingers around the sides of the Kayne file, then looked straight at me. If eyes could ever say "you son of a bitch," his did. Finally he spoke, spitting out his words:

"The motion for reconsideration is granted. The court's previous order deeming defendants' requests admitted is hereby vacated. The court's prior order granting the motions for summary judgment is set aside. Defendants' motion for summary judgment is back on calendar, continued for 30 days, and scheduled to be heard on August 30 at 8:30 a.m. in this department. Plaintiff's counsel is sanctioned $750 for failure to respond to defendant's Requests for Admission, payable to each defense counsel within ten days. Plaintiff to file and serve responses to the Requests for Admission within ten days." He plopped the file down on his desk and nodded to his clerk, making sure she got each part of the ruling. She nodded back.

I was so surprised, I almost said, "What?" I thought I'd heard it wrong and considered asking the court reporter to read back Olsen's rulings. But I forced myself to focus, and remembered that Lois had prepared denials to the Requests for Admission the day before, just in case the judge ruled in our favor. "I'm not going to need these, Lois," I'd told her. "You never know," she'd said. "Best to be prepared."

"I ... I... have them right here, your honor!" I pulled the denials out of my briefcase. They were short, simply saying "deny" after each request – which is what our office should have done in the first place. But now that the requested facts were denied, the defense could no longer win their motion for summary judgment based on them having been deemed true. *Kayne v. Squibb* was back on track. We could file the Substitution of Attorney and extricate ourselves from the case in a proper and orderly fashion.

"Okay, give them to the clerk, Mr. Kussman," Olsen said. As I walked around counsel table and handed them to the clerk sitting at her desk next to the bench, the judge stood up with a grimace and started down the stairs into his chambers. "We are in recess."

The defense attorneys stood motionless. There was nothing they could say. The ruling was the ruling, and it was done.

"Thank you, your honor," I said, trying to keep the glee out of my voice as I turned to leave the courtroom.

Olsen pointed his finger at me as he stepped down, "And you tell Mr. Belli he dodged a bullet on this one!"

"I will, your honor," I said, not breaking stride towards the doors in back, then pushing through them like a cowboy bursting out of a saloon.

As I entered the sunny hallway and turned right, the two defense lawyers followed. I could hear them behind me. They weren't chortling this time.

"Shit," one of them said.

"Jesus Christ," muttered the other. "What the hell are we going to tell ...."

I didn't catch the end of it. But as I made my way to the elevators, Squibb's lawyer said something to Henley's lawyer I can still hear clearly in my head after all these years.

He said, "The Kaynes finally got themselves a fucking lawyer. *Goddamnit!"*