1st Civ. No. A163741

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MARK RYCZ, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO, Respondent,	San Francisco Superior Court Case No. CGC-20-584408 Hon. Richard B. Ulmer, Jr. Department 302 Telephone: (415) 551-3723
MCKENNA MCGARRY LIMENTANI, as an individual, MCKENNA MCGARRY LIMENTANI, as the personal representative for THE ESTATE OF STELLA GRACE YEH; and JOSEFINA MCGARRY, Real Parties in Interest.	

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF

BREMER WHYTE BROWN & O'MEARA LLP
John O'Meara, SBN 144416
jomeara@bremerwhyte.com
Casey B. Nathan, SBN 302453
cnathan@bremerwhyte.com
21215 Burbank Boulevard, Suite 500
Woodland Hills, California 91367-7092
(818) 712-9800 / Fax (818) 712-9900

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster, SBN 48493
mposter@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Petitioner MARK RYCZ

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INTRODUCTION

Plaintiffs' opposition to defendant Mark Rycz's writ petition fails to overcome the plain fact that this is a San Diego case that should be tried to a San Diego jury. San Diego is where all of the physical events occurred and where most of the many potential witnesses reside.

Contrary to respondent court's thinking, no amount of "modern technology" can nullify a litigant's rights under Code of Civil Procedure section 397 and thereby impose unwarranted inconvenience on witnesses whom the party chooses to call to testify in person. The Legislature has never said it did.

Nor should "modern technology" negate the interests of San Diego residents in the conduct of persons in San Diego and the determination whether San Diego locations are dangerous.

Nor can "modern technology" substitute for a critical aspect of trial by jury – the jury's in-person evaluation of the witnesses and the physical locations at issue in this personal injury case. Respondent court abused its discretion by ruling out, far in advance of trial, any possibility that a San Diego jury will be able to do that. (See pp. 12-16, *infra*.)

Plaintiffs' opposition conjures up an alternate universe where existing matters do not exist and non-existent matters do:

- Plaintiffs claim the petition is not verified. (Opp., p. 16.) It is. (See p. 7, *infra*.)

- Plaintiffs claim the law required petitioner to offer an extensive factual showing of five specific elements for a change of

venue, including the expected testimony of each potential witness for each party. (Opp., pp. 14, 16-20.) However, the case that plaintiffs cite to purportedly support their claim (Opp., p. 16) does not exist, and the law has no such rigid requirements to unduly cabin application of the venue change statute.
(See pp. 7-9, *infra*.)

- Plaintiffs claim petitioner offered no admissible evidence to support his motion. (Opp., pp. 16-20.) But he did offer admissible evidence, including plaintiffs' pleadings and sworn discovery responses, undisputed official government reports and business records, and common sense inferences from undisputed and indisputable facts. (See pp. 10-12, *infra*.)

- And plaintiffs claim, absurdly, that petitioner wants a 1:30 a.m. jury visit to the San Diego sites that plaintiffs claim were dangerous. (Opp., p. 21, fn. 6.) Petitioner has never suggested that.

The writ should issue as prayed.

ARGUMENT

I. THE PETITION IS VERIFIED.

Plaintiffs say they can't find a Verification in the Petition. (Opp., p. 16.) Petitioner directs plaintiffs' attention to the Verification at page 22 of the Petition.

II. PLAINTIFFS MISSTATE THE LAW; THERE ARE NO RIGID REQUIREMENTS FOR DETERMINING THE CONVENIENCE OF WITNESSES AND THE INTERESTS OF JUSTICE.

Plaintiffs contend petitioner's motion for change of venue for the convenience of witness and in the interests of justice under Code of Civil Procedure section 397 was inadequate to even require a response. (Opp., pp. 14, 16-20.) They claim that the law requires the moving party to supply admissible evidence of "(1) the names of each witness expected to testify for both parties; (2) the substance of their expected testimony; (3) whether the witness has been deposed or has given a statement regarding the facts of the case (and if so, the date of the deposition or statement); (4) The reasons why it would be 'inconvenient' for the witnesses to appear locally; and (5) The reasons why the 'ends of justice' would be promoted by transfer to a different county." (Opp., p. 16, citing *Juneau v. Juneau* (1941) 258 Cal.App.2d 65, 68 [*sic*].)

That is not the law. First of all, there is no "*Juneau v. Juneau* (1941) 258 Cal.App.2d 65." The case found at 258 Cal.App.2d 65 is *Sequoia Pine Mills, Inc. v. Superior Court of Tuolumne County* (1968) 258 Cal.App.2d 65. *Sequoia Pines*

says nothing about a rigid formula for proof of the convenience of witnesses and the interests of justice for a venue change under Code of Civil Procedure section 397.[1]

If plaintiffs are referring to *Juneau v. Juneau* (1941) 45 Cal.App.2d 14 (*Juneau*), that case is of no assistance to them either. In *Juneau*, the appellate court *reversed* an order denying a change of venue from San Diego to Los Angeles under a law that allowed a defendant to have a divorce case tried at her place of residence. The defendant swore she was a resident of Los Angeles. The plaintiff's opposing affidavit merely recited that plaintiff did not believe defendant was a resident of Los Angeles County. *Juneau* held that the defendant's declaration was sufficient and the plaintiff's declaration insufficient to create an issue as to the defendant's place of residence or the convenience of witnesses, and defendant's motion to change venue should have been granted. (*Id.* at pp. 16-17.) The real *Juneau* decision also contains no list of the rigid requirements that plaintiffs claim are mandatory prerequisites to a motion to change venue.[2]

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[1] Instead, *Sequoia Pines* concerned a motion to change venue under a different statute, Code of Civil Procedure section 395, which permits filing of suit in any county where a defendant resides. Because the moving defendants offered no evidence as to the residence of another defendant, the trial court did not err in denying the motion. (*Sequoia Pines*, *supra*, 258 Cal.App.2d at p. 68.)

[2] Plaintiffs apparently lifted their recitation of supposed mandatory requirements for a venue change motion verbatim from Weil & Brown, Cal. Practice Guide: Civil Procedure Before

Contrary to the rigid formula relied on by plaintiffs, the law actually holds that the question of whether to change venue must be determined on a case-by-case basis. (*Pacific Coast Title Ins. Co. v. Land Title Ins. Co.* (1950) 97 Cal.App.2d 829, 832.) A single affidavit may set forth the facts warranting a venue change. (E.g., *Harden v. Skinner and Hammond* (1955) 130 Cal.App.2d 750, 753 [the supporting affidavit listed 99 potential witnesses and their residences]; *Henson v. Superior Court for Yuba County* (1963) 218 Cal.App.2d 327, 328 [affidavit of merits, showing the names of five necessary witnesses, their residences and expected testimony].) And the moving party may rely not only on the direct facts set forth in an affidavit, but also on any reasonable and relevant inference arising from the facts. (*J. C. Millett Co. v. Latchford-Marble Glass Co.* (1959) 167 Cal.App.2d 218, 227; *Minatta v. Crook* (1959) 166 Cal.App.2d 750, 755 [no requirement of direct evidence of the facts showing the ends of justice will be served by granting or denying the change]; *Richfield Hotel Management, Inc. v. Superior Court* (1994) 22 Cal.App.4th 222, 226-227 ["logical inferences which arise from the affidavits demonstrate the inconvenience of trying this case in San Mateo County" 210 miles from where all the events took place and all the witnesses resided].)

Trial (The Rutter Group 2021) Jurisdiction and Venue, ¶ 3:576. The only source cited by the Rutter Group is *Juneau*. As we have shown, *Juneau* says no such thing.

III. PETITIONER PRESENTED SOLID ADMISSIBLE EVIDENCE TO ESTABLISH THE NEED FOR A VENUE CHANGE, INCLUDING GOVERNMENT REPORTS AND PLAINTIFFS' OWN DISCOVERY RESPONSES.

Plaintiffs assert that petitioner did not offer admissible evidence to support his motion for a venue change.[3] Yes, he did. While it is true that a venue change should not be based on "hearsay, generalities and conclusions" (*Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 919 (*Lieppman*)),[4] petitioner's proof was far more than hearsay and generalities. He did not pull the facts out of thin air. He presented respondent court with:

- *Plaintiffs' complaint*. This details the alleged conduct of petitioner and other defendants, identifies witnesses and the locations and circumstances leading to Stella Yeh's death, all of which occurred in San Diego. (1Exh 1/7-49.) Plaintiffs' complaint is admissible as a judicial admission. (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 586.)

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[3] Plaintiffs did not file separate objections to petitioner's evidence in respondent court. Petitioner did file separate objections. (2Exh 14/531-536.) Respondent court did not rule on either side's objections. (2Exh 16/539-557 [reporter's transcript of hearing on motion]; 2Exh 17/558-559 [order denying venue motion].)

[4] In *Lieppman*, the defendant moved to change venue from Los Angeles County to San Luis Obispo County based on his sole declaration that he had limited financial resources and was in poor health. (*Lieppman*, *supra*, 180 Cal.App.3d at p. 917.) He lost the motion because he offered no other proof of his financial condition and only hearsay from unnamed doctors as to the condition of his health. (*Id.* at pp. 919-920.)

- *Police and coroner's investigative reports*. These extensive government documents describe what official investigators learned about Ms. Yeh's death from an autopsy and from interviews with dozens of percipient witnesses, pre-accident, accident, and post-accident. (1Exh 5/108-229, 249-250.) They detail what the investigators saw themselves and learned from their interviews with potential witnesses and therefore the nature of the witnesses' anticipated testimony. These reports were produced, some by plaintiffs, under a public records request (1Exh 5/104) and by deposition subpoena for official business records (1Exh 5/241-248). They are therefore admissible as against plaintiffs' hearsay objections. (Evid. Code, § 1280 [writing made as a record of an act within the scope of duty of a public employee at or near the time of the act, condition, or event from a reliable source of information]; see also, Evid. Code, § 664 [rebuttable presumption that an official duty has been regularly performed by public employee]; Evid. Code, § 1400 [All that is required to authenticate a writing is that there be "evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is"].)

- *Plaintiffs' own sworn discovery responses*. These recent verified documents detailed the names and San Diego addresses of many of the same potential witnesses and the nature of their testimony as identified by petitioner. (1Exh 5/231-239, 252-262, 264-274, 276-281; 2Exh 11/485-511.) These are party admissions and constitute admissible evidence as against their hearsay objections. (Evid. Code, § 1220 [party

admissions]; *Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 ["Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact"].)

- *Judicial notice.* The 500-mile travel distance and all-day travel time from San Diego to San Francisco are matters of mandatory judicial notice. (1Exh 5/97, 287-289; Evid. Code, § 451, subd. (f).)

- *Reasonable and necessary inferences from the undisputed facts.* (*Minatta v. Crook*, *supra*, 166 Cal.App.2d at p. 755.) San Diego police, fire and coroner investigators – and there were many in this case – and other San Diego percipient witnesses naturally would be inconvenienced to be called away from their jobs, classes and personal responsibilities for all-day travel to San Francisco.

Petitioner thus presented respondent court with solid admissible evidence of the pressing need for a venue change.

IV. PLAINTIFFS' OPPOSING ARGUMENTS ARE UNAVAILING; THE AVAILABILITY OF VIDEO TECHNONOLGY DOES NOT NULLIFY THE STATUTORY RIGHT TO A CHANGE OF VENUE FOR THE CONVENIENCE OF WITNESSES AND THE INTERESTS OF JUSTICE.

Plaintiffs' opposition rehashes the very same ineffectual arguments they made in respondent court.

Evidence of the percipient witnesses' address is not three years' old. (Opp., p. 19.) Just weeks before the hearing on the

venue motion plaintiffs identified those same addresses in their discovery responses. (2Exh. 11/485-511.) Moreover, it is improbable that government employees who investigated the incident would have moved away in the interim.

The fact that some percipient witnesses were or are University of San Diego students does not mean they no longer live in San Diego, nor does it mean they would find it convenient to testify in San Francisco. (Opp., p. 19.) Respondent court went far outside the realm of judicial notice to rely on his personal experience with his peripatetic college-age daughter. (2Exh 16/554-555.) This was just more of respondent court's unwarranted disregard of Code of Civil Procedure section 397 and its pre-determination of how this case will have to be tried, probably by some other judge, at some unknown future date.

Plaintiffs speculate that only some of more than 40 potential witnesses will need to be called at trial. (Opp., p. 20.) But even if it were only some necessary witnesses (it's hard to say since petitioner has only just filed an answer), that would nevertheless be insufficient to deny a venue change. Plaintiffs have yet to identify more than a single potential witness who may reside in the San Francisco Bay area. (1Exh 5/103 [Alexandra Cooley]; see *Garrett v. Superior Court of Kings County* (1967) 248 Cal.App.2d 263, 268 [ten witnesses at the new venue; abuse of discretion to deny change].) Thus, even if only

some of the witnesses still reside in San Diego[5], which they surely do, it cannot be said that any will be convenienced and none will be inconvenienced by a San Francisco trial. (See *Richfield Hotel Management, Inc. v. Superior Court*, *supra*, 22 Cal.App.4th at p. 227 [emphasizing that the ends of justice are promoted by moving trial closer to the residence of witnesses; delay and expense in court proceedings are avoided; and savings in witnesses' time and expenses are effected].)

Plaintiffs renew their suggestion that petitioner is a stalking horse for Uber Technologies, and they purport to know what would have happened if petitioner had not filed this venue motion. (Opp., p. 10, fn. 2.) Plaintiffs do not explain how they know this canard to be true, nor do they explain why petitioner's attorneys would do Uber's bidding rather than meet their professional duty to protect their own client's best interests. Petitioner and most witnesses reside in San Diego County where all the pertinent events occurred, and where a jury from San Diego rather than from San Francisco would be best suited to, and have the only direct interest in, deciding this San Diego case.

Plaintiffs reiterate respondent court's belief that "audio/video platforms such as Zoom will allow for remote appearances." (Opp., p. 20.) It may allow for it, but it does not nullify petitioner's rights under Code of Civil Procedure section 397. Petitioner, and all the others involved in this

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[5] Plaintiffs identify only two out-of-state witnesses from the list of dozens of witnesses identified by petitioner. (Compare Petition, p. 13, fns. 3, 4 & 5 with Opp., p. 18.)

contentious personal injury case, should not be required to litigate their San Diego claims and defenses by tiny video screens through advance fiat from a San Francisco court. "Modern technology" cannot replace in-person evaluation of witnesses and of physical locations by a jury. (*Seybert v. Imperial County* (1956) 139 Cal.App.2d 221, 231 ["'it is manifestly always more satisfactory and desirable, in jury cases in particular, to present the testimony first hand to those who must determine the questions of fact,'" quoting *Carr v. Stern* (1911) 17 Cal.App. 397, 408].)[6]

Plaintiffs again argue that it is ridiculous for petitioner to urge a 1:30 a.m. site visit for a jury. (Opp., p. 21, fn. 6.) Neither petitioner nor any other defendant has ever made that suggestion.

Finally, plaintiffs assert that petitioner has not shown "true prejudice" by the denial of his venue motion. (Opp., p. 21.) That might be a plausible argument to make if plaintiffs had filed their action in a county adjacent to San Diego, but instead plaintiffs chose to file in San Francisco, five hundred miles and a day's travel away from the people and places involved in their case. That is prejudice on its face. (*J. C. Millett Co. v. Latchford-Marble Glass Co.*, *supra*, 167 Cal.App.2d at p. 227 [inconvenience

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[6] "Modern technology" for court proceedings is hardly perfected. One of the most viewed memes on the internet has been the "cat lawyer," a distraught advocate who could not figure out how to make a Zoom-type court appearance without a cat's face filter interposed on his. (https://www.youtube.com/watch?v=TDNP-SWgn2w [as of Jan. 10, 2022].)

of witnesses and the interests of justices may be inferred from the great distance between Los Angeles and San Francisco].)

CONCLUSION

This action should have been filed in San Diego, where all the pertinent physical events occurred, and almost all of the many third-party witnesses reside. San Francisco as a physical location and its residents have nothing to do with it. The case should be tried by a jury of San Diego residents, who have a genuine interest in the outcome of cases arising in San Diego, of the safety of San Diego locations, and of the conduct of San Diegans.

Plaintiffs purport to reserve the right to file a "formal response" if the petition is not summarily denied. (Opp., p. 22.) To what end, other than delay, they do not say. The record is complete. The facts are what they are. This Court invited plaintiffs to file an opposition, and they did. Plaintiffs made their arguments in respondent court and have made them again almost verbatim in this Court. They do not suggest what more they could possibly say or prove.

A peremptory writ should issue to correct respondent court's clear abuse of discretion in denying a change of venue from San Francisco to San Diego, and commanding respondent court to set aside its October 1, 2021 order denying petitioner's motion for a venue change and to direct the court to grant the motion.

Dated: January 10, 2022

BREMER WHYTE BROWN & O'MEARA LLP
John O'Meara
Casey Nathan

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster

By s/ Marc J. Poster

Attorneys for Petitioner MARK RYCZ

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this Reply in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief contains **2,852 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 10, 2022 s/ Marc J. Poster

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

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Via TrueFiling:

Gregory Ramon De La Pena, SBN 126626
gdelapena@dlphlaw.com
Thomas J. O'Brien, SBN 274969
tobrien@dlphlaw.com
calendaring@dlphlaw.com
De La Pena & Holiday LLP
One Embarcadero Center, Suite 2860
San Francisco, CA 94111
Telephone: (415) 268-8000
Attorneys for Plaintiffs and Real Parties in Interest MCKENNA MCGARRY LIMENTANI, as an individual; MCKENNA MCGARRY LIMENTANI, as the personal representative for THE ESTATE OF STELLA GRACE YEH; and JOSEFINA MCGARRY

William Noel Edlin, SBN 107796
nedlin@eghblaw.com
Jesper Rasmussen, SBN 121001
jrasmussen@eghblaw.com
Edlin, Gallagher, Huie & Blum LLP
500 Washington Street, 7th Floor
San Francisco, CA 94111
Telephone: (415) 397-9006
Attorneys for Defendant LOUVENSKY GEFFRARD

Laura S. Flynn, SBN 148511
lflynn@murchisonlaw.com
Murchison and Cumming, LLP
2175 N. California Blvd., Suite 900
Walnut Creek, CA 94596
Telephone: (415) 524-4300
Attorneys for Cross-Defendant VASTHI CURCIO

Beth Issacs Golub, SBN 123584
beth.golub@wilsonelser.com
Wilson Elser Moskowitz Edelman & Dicker LLP
401 W. A Street, Suite 1900
San Diego, CA 92101-7908
Telephone: (619) 881-3323
Attorneys for Defendants RASIER LLC; RASIER-CA LLC and UBER TECHNOLOGIES, INC.

Joseph S. Leventhal, SBN 221043
joseph.leventhal@dinsmore.com
Dinsmore & Shohl LLP
655 W. Broadway, Suite 800
San Diego, CA 92101-8482
Telephone: (619) 400-0500
Attorneys for Cross-Defendant ALLISON MARIE CAMPOS

Nominal Cross-Defendant CHUN H. YEH, in pro per
12721 Nottingham Street
Cerritos, CA 90703
allen@muirsismedical.com

Via US Mail:

Office of the Clerk
Honorable Richard B. Ulmer, Jr.
San Francisco Superior Court
400 McAllister Street
San Francisco, California 94102-4514

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Chun Yeh	allen@muirsismedical.com	e-Serve	01-10-2022 5:16:13 PM
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Joseph Leventhal	joseph.leventhal@dinsmore.com	e-Serve	01-10-2022 5:16:13 PM

Dinsmore & Shohl LLP		9cc49c24-e3fb-4ba8-aec0-e1c4297a4427	
Laura Flynn	lflynn@murchisonlaw.com	e-Serve	01-10-2022 5:16:13 PM
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Poster, Marc (48493)
Last Name, First Name (Attorney Number)

Greines, Martin, Stein & Richland LLP
Firm Name