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.	

PETITIONER'S REPLY TO RETURN TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION

As defendant Mark Rycz (petitioner) has shown, this is a San Diego case that ought to be tried to a San Diego jury. Contrary to respondent San Francisco superior court's thinking, a fundamental aspect of trial by jury, that is, the jury's in-person evaluation of the witnesses and the physical locations at issue in a personal injury case like this one has not been outmoded by "modern technology." The supposed "sea change" in the manner of trying cases that respondent court foresaw is already ebbing. Many courts are returning to in-person trials, as they should for the benefit of all concerned. The Legislature never intended that its emergency provision for the use of video technology in light of a pandemic would nullify long-standing laws allowing for a venue change for the convenience of witnesses and in the interests of justice.

Respondent court thus abused its discretion under Code of Civil Procedure section 397 by ruling out, far in advance of trial (and in fact before has been set), any possibility that a San Diego jury will be able to evaluate San Diego witnesses and view San Diego locations in person. The court erroneously acted on its own unfounded suppositions about witnesses and juries. The facts of this case speak for themselves in compelling the venue change.

The Return filed by real parties in interest McGarry, et al. (plaintiffs) is not a return at all. It is not verified and does not address the individual allegations of the petition. All well-pleaded factual allegations of the petition are therefore admitted.

In any event, the Return simply rehashes the arguments that plaintiffs made in their preliminary opposition to the petition, none of which arguments withstands scrutiny. In particular, there is no case law imposing five prerequisites to a venue change motion. The case relied on by plaintiffs does not exist. The only real requirement is that the moving party show a venue change is compelled for the convenience of witnesses and in the interests of justice. Petitioner has met that requirement.

A peremptory writ should issue as prayed.

ARGUMENT

I. Plaintiffs' Unverified Return Admits The Factual Allegations Of The Petition

A. A Return Is A Verified Pleading.

When, as in this case, the Court of Appeal issues an order to show cause, the real party in interest may file "a return by demurrer, verified answer, or both." (Cal. Rules of Court, rule 8.487(b)(1).) In response to this Court's order to show cause, plaintiffs, the real parties in interest, have filed a Return that includes neither a verified answer to the allegations of the petition nor a demurrer to the writ petition.[1] In the absence of a verified return or demurer, all well-pleaded and verified allegations of the writ petition are accepted as true. (Code Civ. Proc., § 1094; *Bank of America, N.A. v. Superior Court* (2013)

[1] Plaintiffs sometimes erroneously refer to petitioner Mark Rycz and his co-defendants as "real parties in interest" (e.g., Return, p. 5) and to plaintiffs as "respondents" (e.g., Return, p. 16).

212 Cal.App.4th 1076, 1085 ["we deem the well-pleaded and verified allegations of the petition to be true"].)

B. Plaintiffs' Unverified Return Admits The Petition's Verified Facts; The Return Asserts Other Unverified Facts That Should Be Ignored.

1. The verified facts support overturning denial of a venue change.

By failing to file a valid return, plaintiffs admit petitioner's allegations as to plaintiffs' complaint, plaintiffs' discovery responses and the extensive police investigative reports and GPS records are true. These admissions establish that (a) there were dozens of identified potential non-party trial witnesses who reside in the San Diego area; (b) several of those witnesses are eyewitnesses to the evening's events leading to Ms. Yeh's death; (c) and there are many more potential witnesses include first responders, ambulance attendants and government employees in the police, fire, and coroner departments who investigated the accident scene, interviewed witnesses, located evidence and conducted forensic studies and plaintiffs' damages witnesses; (d) in all, there are 40 non-party witnesses who are likely to provide relevant and material testimony at trial; (e) thirty-three are from San Diego and twenty-seven are government employees from San Diego; and (f) only six reside out of state (as do plaintiffs) and only one may live near San Francisco. (Petition, pp. 13-14.)

These now undisputed facts establish that trying this case in San Francisco would inconvenience the vast majority of non-party witnesses. It would be in the interests of justice for these witnesses and to the people of San Diego to try the case where it arose, in San Diego. (Petition, pp. 18-19.) It is an abuse of discretion to conclude otherwise.

2. Plaintiffs' unverified factual assertions should be disregarded.

a. This case is not just about petitioner's asserted breach of duty to Ms. Yeh.

Plaintiffs claim that "the only thing at issue here is whether [defendants] owed Ms. Yeh a duty and whether they breached that duty by leaving her where they did, when they did, in the condition she was in when they left her." (Return, p. 6.) Not so.

First of all, duty is only the first of many issues to be decided between plaintiffs and petitioner. There can be no liability for breach of duty unless the breach was a substantial cause of the plaintiffs' harm. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482 ["From the evidence presented by both sides, we are satisfied that causation was not—and could not be—established in this case"].) Causation will be a major *factual* issue to be decided by the jury. What happened between the time Ms. Yeh refused a ride with petitioner near a freeway on-ramp and the time she was struck by cars driven by others on another freeway five miles away, and the manner in which she

was struck, create significant causation issues. Moreover, plaintiffs now suggest there is evidence Ms. Yeh was taken to where she met her death by yet another driver (Return, p. 5, fn. 1), which raises additional issues as to why she got out of that driver's car on that second freeway. Petitioner contends that his supposed breach of duty at an earlier time and at a different location was not a substantial or even contributing cause of Ms. Yeh's death. Third-party eyewitnesses and law enforcement officials who investigated the incident and interviewed witnesses will have valuable testimony to give in that regard.

Second, the crux of plaintiffs' case against petitioner is their allegation that the place where Ms. Yeh refused to accept a ride from petitioner was so dangerous that he should not have driven away. That is a disputed factual issue that can only be resolved by a view of the location. A video tape of the scene is easily manipulated and no substitute for the real thing.

Third, this case is not just about alleged interaction between Ms. Yeh and petitioner. There are multiple cross-complaints among other persons who may have contributed to Ms. Yeh's death, including those who provided her with liquor and marijuana until she was highly intoxicated and those who were driving the cars that struck her on the freeway. (E.g., 1Exh 3/62.) And the degree of Ms. Yeh's comparative fault is at issue. Ms. Yeh's friends who were with her while she was becoming intoxicated, those who provided her with drugs and alcohol, those who conspired with or aided and abetted her drug and alcohol use, law enforcement officers who investigated the circumstances

of her death, and third-party witnesses to the subject accident between Ms. Yeh and some of the cross-defendants, all will have valuable testimony to provide the jury in these regards.

b. There are no stipulations of fact, offered or accepted.

Plaintiffs assert that many factual issues can be resolved by stipulation rather than in-court testimony. (Return, p. 7.) However, plaintiffs offer no evidence, verified or not, that there are such stipulations or ever will be stipulations. Even when stipulations are offered, where credibility is in issue, a litigant may decide it is more important to his case to call witnesses to testify in court and in front of a jury.

c. Plaintiffs cannot explain away their recent discovery responses that list dozens of potential San Diego witnesses.

Plaintiffs assert that their discovery responses listing many potential San Diego witnesses should be disregarded because they made no independent inquiry as to the current location of those potential witnesses and simply relied on official reports. (Return, p. 20.) That too is a bald assertion, not a verified fact. If plaintiffs thought the information they were submitting in sworn discovery responses was in fact unknown to them or was stale or inaccurate, they should have said so at the time. (Code Civ. Proc., § 2030.220, subd. (c) ["If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state . . . ."].) Moreover, even

three-year-old information about a person's residence is not necessarily unreliable, nor does it mean further that the witnesses have not only moved in the interim but moved out of the San Diego area.

d. Mr. Rycz's petition still has nothing to do with Uber.

Plaintiffs quote from earlier proceedings in which respondent court (a different judge) partially overruled a demurrer by co-defendant Uber (Return., p. 10) and then suggest that petitioner is somehow a stalking horse for Uber (Return, p. 15, fn. 5). But there is no evidence of that. Petitioner is not Uber. He is represented by his own counsel. Absent any material connection of the witnesses and events of this case to San Francisco, he should be entitled to a change of venue to San Diego. Nor would it matter who brought the motion if the facts compel a venue change. This is simply plaintiffs' attempt to avoid the real issues.

II. The Return Offers Nothing New Legally In Defense Of Respondent Court's Denial Of A Change Of Venue From San Francisco – Which Has No Connection To This Case – To San Diego – Where All The Relevant Events Occurred And Most Witnesses Reside.

Plaintiffs previously filed a preliminary opposition to the petition. Plaintiffs' new Return shuffles around some of the paragraphs of their preliminary opposition, but its substance and legal authorities are essentially the same. And the Return ignores the counter arguments and additional authorities

asserted by petitioner in his reply to plaintiffs' preliminary opposition. Petitioner won't repeat it all here, but these points bear emphasis:

A. Respondent Court's Reasons For Denying The Venue Motion Are Unsustainable; Its Personal Observations Are Inadmissible And Irrelevant.

Respondent court noted that many depositions and much trial testimony are now given by remote technology such as Zoom. According to the court, "This is certainly what San Francisco jurors expect." (2Exh. 17/558.) How the court knows what San Francisco jurors expect is a mystery. Moreover, what San Francisco jurors expect in the abstract is not relevant to whether this case should be moved to San Diego for the convenience of San Diego witnesses and in the interests of justice.

Similarly, respondent court simply assumed that after three years, most first responders and other government employees would have left their jobs and moved elsewhere and that other potential witness who once lived in the San Diego area would have moved on. The court premised this assumption not on evidence but on his personal experience with a peripatetic college-age daughter. (2 Exh 16/554-555.)

Such comments by a court are "not evidence, let alone substantial evidence." (*In re Calvin S.* (2016) 5 Cal.App.5th 522, 529 [court's personal view "juvenile hall is 'not a treatment center,' but 'a detention center'" is inadmissible to support a ruling on the issue].) Moreover, it was not reasonable for the court to assume that the majority of witnesses employed by

government agencies in San Diego and residing in the San Diego area would in just three years have left their jobs and moved on to places more convenient to San Francisco than San Diego.

Finally, respondent court's musings about a "sea change" in the way cases will be tried in the future are already proving to be overblown. As the pandemic recedes, courts are beginning to return to in-person trials. Emergency legislation allowing for video trials in certain situations (Code Civ. Proc., § 367.75) is set to expire in little more than a year (*id.*, subd. (*l*)). There is no indication the Legislature ever intended that the emergency statute would override long-standing venue change rules such as Code of Civil Procedure section 397, which was first enacted in 1872 and has been followed ever since.

B. Plaintiffs Fail To Address The Applicable Authorities That Support Petitioner And Issuance Of A Writ.

Plaintiffs fail to mention, much less distinguish, applicable cases cited in the petition.

For example, in *Pearson v. Superior Court, City and County of San Francisco* (1962) 199 Cal.App.2d 69, 77-78, the appellate court overturned the denial of a venue change, finding the denial an abuse of discretion where twelve potential witnesses resided in the county to which the transfer requested, and the ends of justice would be promoted by moving the trial closer to the residence of the witnesses, by the delay and expense in court proceedings that were avoided, and by the savings in the witnesses' time and expense. In the present case there are

40 potential witnesses identified so far who reside in the San Diego area and no more than one in the San Francisco area.

Similarly, in *Henson v. Superior Court for Yuba County* (1963) 218 Cal.App.2d 327, 329-330, the appellate court overturned the denial of a venue change in a divorce action from the county where neither party had any connection, to the county where five witnesses had knowledge of facts bearing upon the pertinent issues resided. The present case likewise has no connection to San Francisco; it has every connection to San Diego.

Plaintiffs do cite two other cases relied on by petitioner, but those cases support petitioner, not plaintiffs. In *Richfield Hotel Management, Inc. v. Superior Court* (1994) 22 Cal.App.4th 222, a writ was granted to change venue to Tulare County from San Mateo County, 210 miles away. Tulare County was where all witnesses lived or worked, all relevant events took place, and many of the lay witnesses were employees for whom the lost working time and travel expenses to San Mateo County would be significant. It is true that the moving party was able to obtain declarations from several witnesses, but the appellate court did not hold that such declarations are always required as plaintiffs claim. An appellate decision is not authority on a point the appellate court did not consider. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11.)

Likewise, in *Seybert v. Imperial County* (1956) 139 Cal.App.2d 221, the appellate court overturned an order denying a change of venue in a personal injury case from

Los Angeles County to Imperial County, two hundred miles away. The accident occurred in Imperial County, at least six eyewitnesses to the events surrounding the accident were Imperial County residents, and there was no showing by the plaintiffs that any necessary and material witnesses resided in Los Angeles County or whose convenience would be aided by retaining the trial in Los Angeles County. The only declaration filed in that case was by one of the defendants who alleged in substance that he and all of his witnesses resided in Imperial County and he expected to call eight witnesses and the substance of the testimony he expected each to give. That declaration alone was sufficient. Again, the appellate court did not hold that such a declaration was required, much less that declarations from all inconvenienced witnesses were required. Often, the nature of an action like this one speaks for itself.

Remarkably, plaintiffs continue to rely on authority they cite as "*Juneau v. Juneau* (1941) 258 Cal.App.2d 65, 68 [*sic*]." (Return, p. 18.) As petitioner pointed out in his reply to plaintiffs' preliminary opposition, there is no such case at 258 Cal.App.2d 65. The case at 258 Cal.App.2d 65 is *Sequoia Pine Mills, Inc. v. Superior Court of Tuolumne County* (1968) 258 Cal.App.2d 65. That case says nothing about plaintiffs' assertion of 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.

As petitioner also pointed out in his reply, 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 contains no list of five rigid requirements that plaintiffs claim are prerequisites to a motion to change venue.

Finally, *Lieppman v. Lieber* (1986) 180 Cal.App.3d 914 (*Lieppman*), also relied on by plaintiffs, still does not support denial of a venue change in this case. 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.)

Unlike the "hearsay, generalities and conclusions" offered by the defendant in *Lieppman* (180 Cal.App.3d at p. 919), petitioner offered far more, including the allegations of plaintiffs'

own complaint which constitute judicial admissions, plus police and other official investigative reports, plaintiffs' own sworn discovery responses, other matters of which the court could take judicial notice, and reasonable and necessary inferences from the undisputed facts.

CONCLUSION

Plaintiffs' return is procedurally defective and substantively lacking in merit. This Court should issue a peremptory writ of mandate as prayed, directing respondent San Francisco superior court to set aside its order denying petitioner's motion to change venue to San Diego and to enter a new order granting the motion.

Dated: March 25, 2022

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By s/ Marc J. Poster

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this Petitioner's Reply to Return to Petition for Writ of Mandate contains **3,098 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: March 25, 2022 s/ Marc J. Poster

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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.

On March 25, 2022, I served the foregoing document described as: **Petitioner's Reply to Return to Petition for Writ of Mandate** on the parties in this action by serving:

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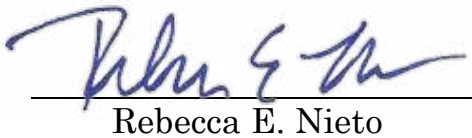

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		5398a9e1-74c8-42df-858b-d5a4698360b6	
Matthew Jamie	mjamie@mathenysears.com	e-Serve	03-25-2022 3:21:50 PM
		0cde0842-6f09-4674-8149-d3263637ede0	
Aline Perusse	aperusse@mathenysears.com	e-Serve	03-25-2022 3:21:50 PM
		1aa1f2d7-68b5-4286-994a-5ddadea42d25	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.
The contents of this proof of service are true to the best of my information, knowledge, and belief.

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

03-25-2022
Date

/s/Rebecca Nieto

Signature

Poster, Marc (48493)

Last Name, First Name (Attorney Number)

Greines, Martin, Stein & Richland LLP

Firm Name