

CALIFORNIA COURT OF _____
THIRD APPELLATE DISTRICT

CASE #: C098929

No. _____

██████████ ██████████
Plaintiff & Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SACRAMENTO,
Respondent,

PACIFICORP, AN OREGON CORPORATION, ET AL.,
Defendants & Real Parties in Interest.

From the Superior Court for the County of Sacramento
No. 34-2023-00333171
The Honorable Lauri A. Damrell

**Petition for Writ of Mandate, Prohibition, or Other
Appropriate Relief; Memorandum of Points &
Authorities**

John C. Lemon (175847)

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Counsel for Plaintiff & Petitioner

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 175847 NAME: John C. Lemon FIRM NAME: [REDACTED] STREET ADDRESS: [REDACTED] CITY: [REDACTED] STATE: [REDACTED] ZIP CODE: [REDACTED] TELEPHONE NO.: [REDACTED] FAX NO.: [REDACTED] E-MAIL ADDRESS: [REDACTED] ATTORNEY FOR (name): Plaintiff & Petitioner [REDACTED]	SUPERIOR COURT CASE NUMBER: 34-2023-00333171
APPELLANT/ [REDACTED] PETITIONER: RESPONDENT/ SUPERIOR COURT FOR THE COUNTY OF REAL PARTY IN INTEREST: SACRAMENTO	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (name): Plaintiff & Petitioner [REDACTED]
2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) PacifiCorp, an Oregon corporation	Defendant in the underlying action
(2) Richard Harris, an individual	Defendant in the underlying action
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 3, 2023

John C. Lemon
 (TYPE OR PRINT NAME)


 (SIGNATURE OF APPELLANT OR ATTORNEY)

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Introduction

This petition presents a single question of exceptional importance, which was certified for review by the trial court: “what is the meaning of ‘[a] substantial interest in the action as a whole’” for purposes of California’s preference-trial-setting statute, Cal. Code Civ. Proc. § 36(a)(1)?

Petitioner, [REDACTED] [REDACTED] is a victim of the McKinney Fire, which PacifiCorp started by allowing a large tree to fall into one of its powerlines. The resulting explosion ignited nearby vegetation and erupted into a devastating wildfire. Ms. [REDACTED] is one of 376 victims of the fire who have filed suit against PacifiCorp; those cases have been consolidated in Sacramento Superior Court.

Ms. [REDACTED] is also 87 years old and suffers from a host of serious health problems, including congestive heart failure, kidney failure, and type II diabetes. Because she may not live long enough to have her day in court if her case is not fast-tracked, Ms. [REDACTED] moved for a preferential trial setting under section 36(a), which provides for expedited trial dates for persons 70 or older who: (1) “ha[ve] a substantial interest in the action as a whole”; and (2) whose “health . . . is such that a preference is necessary to prevent prejudicing the party’s interest in the litigation.” Cal. Code Civ. Proc. § 36(a).

The trial court found that Ms. [REDACTED] had satisfied the health requirement of section 36(a)(2) but concluded that – as one of 376 plaintiffs in the consolidated proceeding – she did not have

“a substantial interest in the action as a whole” under section 36(a)(1). In arriving at that conclusion, the court noted that “this is a complicated issue because it really hasn’t been addressed . . . in a published decision by the appellate courts yet,” that “I think there are good arguments on both sides,” and that “I wish that the Court [of Appeal] would make a determination and give us further guidance.”

The court later entered an order certifying that the meaning of “[a] substantial interest in the action as a whole” “is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation.”

Indeed, there is no published opinion addressing this important question, and trial courts routinely issue orders deciding it differently. Furthermore, there is also no vehicle for *potentially* resolving the uncertainty – apart from this Court issuing a published opinion on a writ petition – because a trial court’s order denying a preference motion is not appealable.

Ms. [REDACTED] accordingly seeks writ relief from the trial court’s order denying her an expedited trial date.

Verified Petition

1. Authenticity of Exhibits

1. All exhibits accompanying this Petition are true and correct copies of documents on file with the Respondent Court, except for Exhibit 12, which is a transcript of the relevant court proceeding. All exhibits are incorporated by reference.

2. The exhibits are organized in one volume.

3. The exhibits are paginated consecutively from page 1 through 172. Citations to the exhibits appear as “(PE [page no.])”.

2. The Parties

4. The Petitioner is [REDACTED] [REDACTED] the lead plaintiff in [REDACTED] *v. PacifiCorp*, 34-2023-00333171.

5. The Respondent is the Superior Court for the County of Sacramento.

6. The Real Party in Interest is PacifiCorp, the lead defendant in the underlying lawsuit.

3. Chronology of Pertinent Events

3.1 The McKinney Fire

7. On July 29, 2022, PacifiCorp’s powerlines started a wildfire now known as the McKinney Fire. It burned more than 60,389 acres, damaged or destroyed over 194 structures, and killed at least four people. (PE 005.)

8. [REDACTED] [REDACTED] is one of hundreds of victims of the fire. (PE 006.)

9. Ms. [REDACTED] was forced to evacuate her home because of the fire. She suffered property damage, evacuation expenses (including alternate living expenses), and emotional distress and other non-economic damages. (PE 026.)

3.2 The McKinney Fire Cases and the Preference Motion

10. To date, 376 victims of the McKinney fire have filed suit against PacifiCorp. All the cases have been consolidated before the Honorable Lauri A. Damrell in Sacramento County Superior Court. (PE 149.)

11. Ms. [REDACTED] filed her complaint on January 17, 2023. (PE 017.) She moved for a trial-setting preference under section 36(a) on April 11, 2023. (PE 018.)

12. Neither Ms. [REDACTED] nor Defendants were able to cite a published opinion of an appellate court interpreting (or defining) “a substantial interest in the action as a whole” under section 36(a)(1). Both parties instead relied on the analysis set forth in the orders of various trial courts, which were sharply divided. In fact, even within the limited number of trial-court orders in large wildfire cases, courts have both granted and denied preference motions after arriving at different interpretations of the meaning of “a substantial interest in the action as a whole.” (*See* PE 149-50 (order denying motion).)

13. On May 4, 2023, the trial court denied the preference motion in a minute order adopting the court’s tentative ruling. (PE 146.) The court concluded that Ms. [REDACTED] health was such that a preference is necessary to prevent prejudicing her

interest in the litigation under section 36(a)(2), but that, “as but one of approximately 375 plaintiffs . . . [she] has failed to demonstrate her ‘substantial interest in the action as a whole’” under section 36(a)(1). (PE 151.)

14. The court recognized, however, that “this is a complicated issue because it really hasn’t been addressed . . . in a published decision by the appellate courts yet.” The court also noted that the various written orders issued by other trial courts were sharply divided and “that I think there are good arguments on both sides.” Finally, the court expressed her “wish that the Court [of Appeal] would make a determination and give us further guidance.” (PE 164.)

15. On May 19, 2023, the court granted Ms. [REDACTED] request for certification under Cal. Code Civ. Proc. § 166.1 with respect to the following question: “What is the meaning of the phrase ‘[a] substantial interest in the action as a whole’ under Cal. Code Civ. Proc. § 36(a)(1)?” (PE 171.)

4. Timeliness of Petition

16. Non-statutory writ petitions filed within 60 days after notice of entry of the challenged order are regarded as timely. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173.)

17. Here, the challenged order was entered on May 4, 2023. This Petition was filed on July 3, 2023, and is therefore timely.

5. Basis for Writ Relief

18. As detailed in the Memorandum of Points & Authorities below, the trial court erred as a matter of law in its May 4, 2023 order.

19. Specifically, the court erred by concluding that because Ms. [REDACTED] was “but one of approximately 375 plaintiffs and necessarily has no interest in the claims of other, unrelated parties for damages arising from the McKinney Fire . . . [she] has failed to demonstrate her “substantial interest in the action as a whole.” (PE 151.)

6. Absence of Other Remedies

20. Writ relief is warranted here because “an order denying trial preference is not a final order and is not appealable.” (*Salinas v. Atchison, Topeka & Santa Fe Ry. Co.* (1992) 5 Cal. App. 4th 1, 9.)

21. And even if this were an appealable order, as a practical matter, it would never be appealed. First, there is the very real possibility that Ms. [REDACTED] could pass away before having her day in court. But even if she lives long enough to take her case to trial, the trial court’s order denying her an expedited trial date would be moot. Accordingly, an order denying a preference motion will never be the subject of a post-judgment appeal.

22. Additionally, the question presented in this petition – the meaning of “a substantial interest in the action as a whole” – is a question of first impression in need of appellate answers. (*See*

Interinsurance Exchange of the Automobile Club v. Superior Court (2007) 148 Cal.App.4th 1218, 1227.)

Prayer

Petitioner prays that this Court grant relief as follows:

1. Either:

a. Issue a preemptory writ of mandate commanding the Respondent Court to vacate its order of May 4, 2023, denying Petitioner's motion for a trial preference, and to enter a new order granting the motion; or

b. Issue an alternative writ commanding the Respondent Court to grant the relief specified in subdivision (1)(a) of this Prayer or to show cause why it should not be ordered to do so, and upon return of the alternative writ, if any, issue a preemptory writ as set forth in subdivision (1)(a) of this Prayer.

2. Award Petitioner her costs associated with this Petition; and

3. Grant such other and further relief as this Court deems just and proper.

Dated: 7/3/23

By: /s/ John C. Lemon

John C. Lemon

██████████ ██████████ ██████████

Counsel for Petitioner

██████████ ██████████

Verification

I, the undersigned, say:

I am one of the attorneys of record for Petitioner in this proceeding. I have read the foregoing “Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief,” and know its contents. The facts alleged in the Petition are within my own personal knowledge or are based upon the documents filed in the Respondent Court.

I declare, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct.

Executed on July 3, 2023, at San Diego, California.

/s/ John C. Lemon

John C. Lemon

Memorandum of Points & Authorities

1. **There is no published opinion interpreting “a substantial interest in the action as a whole,” trial courts vary wildly in their application of this requirement, and writ review is the only mechanism for guidance from the Court of Appeal.**

As the trial court observed, “this is a complicated issue because it really hasn’t been addressed . . . in a published decision by the appellate courts yet.” (PE 164.) Indeed, both parties below relied extensively on the orders of trial courts throughout the state, which are sharply divided. (*Compare* PE 042 – 085 (orders denying preference motions after finding that moving plaintiffs in coordinated cases did not have a substantial interest in the action as a whole) *with* PE 108 – 144 (orders granting preference motions to plaintiffs in consolidated or coordinated cases).)

“[A]n order denying trial preference is not a final order and is not appealable.” (*Salinas v. Atchison, Topeka & Santa Fe Ry. Co.* (1992) 5 Cal. App. 4th 1, 9.) Accordingly, writ review is the only potential vehicle for this Court to “resolve an issue of first impression . . . and to set guidelines for bench and bar.” (*Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1225 (quotations and citations omitted).)

In addition to recognizing that there is a dearth of authority on this question, the trial court expressed its “wish that the Court [of Appeal] would make a determination and give us further guidance.” (PE 164.) To that end, the court certified for

review (under Cal. Code Civ. Proc. § 166.1) the following question:

What is the meaning of the phrase ‘substantial interest in the action as a whole’ under Cal. Code Civ. Proc. § 36(a)(1)?

(PE 170-71.)

- 2. The trial court’s finding that Ms. [REDACTED] does not have “a substantial interest in the action as a whole” because she is merely one of 376 plaintiffs was erroneous as a matter of law.**

2.1 Standard of Review

The interpretation of a statute is a question of law, which this Court reviews de novo. (*Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1301.)

- 2.2 In *Koch-Ash v. Superior Court*, the Court of Appeal held that the right to a preference trial is “mandatory and absolute”; the trial court’s holding here cannot be reconciled with *Koch-Ash* or the long line of cases that have followed it.**

Defendants argued below – and the trial court agreed – that “the phrase substantial interest in the action as a whole . . . allows the court to determine the extent of the moving party’s interest, which determination may be discretionary.” (PE 149 (quotations omitted).) As interpreted by the trial court then, the substantial-interest requirement permits a court to exercise its discretion to deny a preference motion on the basis that the moving plaintiff’s interest is insubstantial relative to the combined interests of all the parties. That interpretation cannot

be reconciled with the seminal case of *Koch-Ash v. Superior Court* (1986) 180 Cal.App.3d 689.

In *Koch-Ash*,¹² of 391 plaintiffs in 47 consolidated cases moved for preference. (*Id.* at 692.) After initially granting those motions, the trial court later stayed the trial based on the court's inherent administrative power" and "authority to regulate its trial calendar." (*Id.* at 693.) The Court of Appeal reversed, holding that the preference-trial right is absolute:

The determinative question presented is whether section 36, subdivision (a), leaves trial courts with discretion to deny preferential trial rights to litigants who qualify under that statute. Here, the trial court claims such discretion to serve judicial economy and to protect defendants from serial trials that might occur if consolidated cases are severed to comply with section 36 preference requirements. We conclude that section 36, subdivision (a), as construed by this court in *Rice v. Superior Court* (1982) 136 Cal. App. 3d 81 is *mandatory and absolute* in its application and does not allow a trial court to exercise the inherent or statutory general administrative authority it would otherwise have.

(*Id.* at 692 (emphasis added).)

And while *Koch-Ash* did not explicitly address the substantial-interest-in-the-action-as-a-whole requirement, its holding – that the right to a trial preference is “mandatory and absolute” – is irreconcilable with the trial court's conclusion here: that a trial court may deny a preference motion if, in its discretion, it finds that the moving plaintiff's interest in the entire case is insubstantial.

Indeed, had there been any question in *Koch-Ash* about whether each of the 12 moving plaintiffs had “a substantial interest in the action as a whole,” the trial court could have made

an adverse finding on that basis in the first instance. Or the Court of Appeal could have remanded the case with instructions to the trial court to reconsider its findings under section 36(a)(1) with respect to whether each moving plaintiff had a substantial interest in the entire pie. It instead granted the plaintiffs' petition for a writ of mandate with instructions to immediately set preference trials, (*id.* at 699-700), in a published opinion referring to the preference-trial right as "mandatory and absolute." (*Id.* at 692.) Neither the trial court nor the Court of Appeal in *Koch-Ash* expressed any concerns whatsoever about whether each of the 12 individual plaintiffs (out of 391) had "a substantial interest in the action as a whole."

Since *Koch-Ash*, no published opinion has suggested that any aspect of the preference-trial right is discretionary for the court. On the contrary, as the Court of Appeal for the Fifth District recently noted, "[a] consistent line of precedent has arisen from writ proceedings involving the provisions of section 36 and superior courts have *no discretion* to avoid the command of section 36 in the interest of efficient management of the court's docket *as a whole*." (*Pabla v. Superior Court* (2023) 90 Cal.App.5th 599 (quotations omitted) (emphasis added).) The *Pabla* court made that observation begrudgingly, lamenting the impact of section 36 on the "overburdened superior courts" but concluded that "until and unless the Legislature determines otherwise, this court is compelled to require respondent to comply with the mandatory provisions of section 36." (*Id.* at 604; *see, e.g., also Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535

(“Where a party meets the requisite standard . . . preference must be granted. No weighing of interests is involved.”).)

2.3 The weight of published opinions and trial-court orders demonstrate that a plaintiff who has suffered damages necessarily has a “substantial interest in the action as a whole.”

The trial court’s conclusion that it may deny a preference motion after making a discretionary finding under section 36(a)(1) is also at odds with the weight of published opinions and trial-court orders that have considered this question.

For example, just last year in *Isaak v. Superior Court*, a trial court found that a single plaintiff in a *coordinated* case did, in fact, have “a substantial interest in the action as a whole,” even though the court ultimately denied the preference motion under its plenary authority as a coordination judge. ((2022) 73 Cal.App.5th 792, 801.)

The *Isaak* court’s sole basis for denying the preference motion was that the special rules for coordinated cases, California Rules of Court, rule 3.504, supersede section 36. (*Id.* at 796-97.) In fact, the trial court “commented at the hearing on the motion that a ruling ‘would not be complicated’ if this were not a coordinated proceeding.” (*Id.* at 796.). It then concluded that Isaak “was in failing health and that he had a substantial interest in the action as a whole” but “that [the court] need not strictly follow section 36 in a coordinated proceeding.” (*Ibid.*)

Again, *Isaak* arose from a coordinated case. The petitioner was but one of presumably hundreds of plaintiffs in the *In re Paraquat Cases* JCCP, which, in turn, was related to a complex

proceeding in Illinois. (*Id.* at 795.) Yet the trial court had no problem finding that Isaak had “a substantial interest in the action as a whole.”

There are numerous other examples of courts concluding that one plaintiff of many nonetheless passes the substantial-interest test. For example, the Pilliod plaintiffs in the enormous Roundup coordinated litigation must have satisfied this requirement because that trial court granted them an expedited trial under section 36(a). (*See Pilliod v. Monsanto Co.* (2021) 67 Cal.App.5th 591, 640 n.31.) And recently, another trial court in Sacramento County Superior Court rejected the notion that an individual plaintiff in a multi-plaintiff case may flunk the substantial-interest test simply by virtue of being one of many. (*Kawa v. Placer Vill.* (March 17, 2023) 2023 Cal. Super. LEXIS 14526, *5 (defendant “fails to provide authority for the proposition that a plaintiff does not have a ‘substantial interest in the case as a whole’ merely because plaintiff is not the sole named plaintiff”).) These are not isolated examples.¹

¹ See, e.g., *Bozman v. 3m Co.* (March 3, 2023) 2023 Cal. Super. LEXIS 15165, *4 (granting preference motion in coordinated asbestos litigation); see also *Adams v. Carrier Corp.* (2022) 2022 Cal. Super. LEXIS 69875 (same); *Apodaca v. Asbestos Cos.* (2022) 2022 Cal. Super. LEXIS 51645 (same); *Johnson v. Altman Stage Lighting Co.* (2022) 2022 Cal. Super. LEXIS 67390 (same); *Lambert v. 3m Co.* (2022) 2022 Cal. Super. LEXIS 76548 (same); *Lazio v. Bowling* (Feb. 24, 2023) 2023 Cal. Super. LEXIS 12014 (same); *Smedley v. 3m Co.* (2022) 2022 Cal. Super. LEXIS 63187 (same); *Adams v. Lapham Co.* (2017) 2017 Cal. Super. LEXIS 68073, *2 (finding substantial interest notwithstanding

Finally, while defendants will undoubtedly direct this Court to three orders denying preference motions in coordinated fire cases (based in part on a finding that the interests of a few plaintiffs in a coordinated case are insubstantial), at least one judge in a coordinated wildfire case has expressly rejected that rationale. (*Rose v. Lawrence* (2017) 2017 Cal. Super. LEXIS 67463.) In *Rose*, the trial court overseeing the coordinated Butte Fire Cases addressed several preference motions and concluded that each individual plaintiff necessarily had a substantial interest in the action as a whole because “[c]omparing each plaintiff to the total number of plaintiffs . . . would diminish the interest of each plaintiff to a level of insignificance, disregarding the legislative intent underlying section 36.” (*Id.* at *12-13.) The court then elaborated that “action as a whole . . . refers to each plaintiff’s individual action” and found that “each plaintiff moving for trial preference has a ‘substantial interest in the action as a whole.’” (*Id.* at *14-15.)

the fact that plaintiff had “but one of many related lawsuits before the court”).

Conclusion

The trial court's interpretation of section 36(a)(1) – that it authorizes a judicial officer to make a discretionary finding that circumvents the mandatory and absolute right to a preference trial – is erroneous as a matter of law. Further, the court's order is not appealable, Ms. [REDACTED] has no means – apart from this writ – to obtain relief, and she will likely suffer irreparable injury if relief is not granted.

She accordingly prays for a writ directing the trial court to vacate its May 4, 2023 order denying her preference motion, to enter an order granting that motion, and to schedule a jury trial within 120 days of the entry of the order.

Dated: 7/3/23

By: /s John C. Lemon

John C. Lemon

[REDACTED]

Counsel for Petitioner

[REDACTED]