

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

No. C098929

██████████ ██████████
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

**Petitioner's Reply to Return to Petition for Writ of
Mandate, Prohibition, or Other Appropriate Relief**

John C. Lemon (175847)
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Counsel for Plaintiff & Petitioner

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Introduction

Petitioner, [REDACTED] [REDACTED] is a victim of the McKinney Fire, which Defendants, PacifiCorp et al., started by allowing a large tree to lay on one of their powerlines, causing an explosion. Ms. [REDACTED] is also over 70 years old and in failing health. She accordingly moved for a trial-setting preference under section 36(a) of the California Code of Civil Procedure.

The trial court denied that motion, finding persuasive Defendants' argument that, as "merely" one of 376 plaintiffs in the consolidated case, Ms. [REDACTED] did not have a "substantial interest in the action as a whole" under section 36(a)(1).

On July 3, 2023, Ms. [REDACTED] filed a petition for a writ of mandate. On August 7, this Court issued an alternative writ, directing the trial court to "forthwith grant the relief requested . . . or show cause in writing on or before September 6, 2023, why it has not done so." On September 1, the trial court notified this Court and the parties that it would "not be vacating its earlier decision by September 6" because Defendants had requested the opportunity to submit an opposition brief to this Court.

On September 6, 2023, Defendants filed a return to the petition. In that brief, they argue that the requirement that a party moving for preference must have a "substantial interest in the action as a whole" necessarily means that a court must weigh the interests of the single movant against those of every other party in the case, that the seminal case of *Koch-Ash v. Superior Court* (holding that the preference-trial right is "mandatory and

absolute”) is not controlling, and that granting a preference trial will somehow harm every other party in the consolidated case.

Defendants’ argument that the substantial-interest requirement invites a trial court to balance the interests of the movant against every other party in the case is utterly speculative, as they fail to cite any legislative history (or any other authority) in support. It is also predicated on the assumption that “every party has a substantial interest in his or her own claims,” which is not true. Nominal parties are ubiquitous in litigation and the logical interpretation of the substantial-interest requirement is that it was intended to prevent nominal parties from obtaining a trial preference. Defendants’ interpretation would also be the exception that swallows the rule because it would render the “mandatory and absolute” right to a preference trial discretionary in every case where there is more than one plaintiff.

Defendants’ attempt to distinguish *Koch-Ash* is similarly unavailing, as the pertinent facts of that case are virtually identical to this one. Indeed, Defendants’ interpretation of the substantial-interest requirement would effectively overrule *Koch-Ash*, as well as every other case recognizing that the right to a preference trial is “mandatory and absolute.” Finally, Defendants’ claim that granting a preference trial will somehow harm the other parties in the case is utterly fallacious; they point to no evidence in support of this assertion, while at the same time purporting to be concerned about the welfare of other plaintiffs, none of whom opposed Ms. [REDACTED] motion.

This Court should issue a writ directing the trial court to vacate its order denying the motion for preference and enter an order granting it.

Argument

I. Defendants’ interpretation of “substantial interest in the action as a whole” is based on the flawed assumption that every named party to a lawsuit has a substantial interest in his or her own claims; Defendants’ reading would also confer a benefit upon mass tortfeasors that the legislature surely did not intend.

The touchstone of Defendants’ opposition is the assumption that the “plain language” of section 36(a) “requires a comparison between the moving party’s interest in his or her own claims and the interests of other parties in the action.” Defendants cite no legislative history (or any other authority) in support of this claim, but assert that it must be true because “*every* party has a substantial interest in his or her own claims” and the phrase “substantial interest in the action as a whole” cannot be mere surplusage. (Return at 20 (emphasis in original).)

That is simply not accurate. Indeed, California case law is replete with nominal parties who do not have a substantial interest in the cases in which they are named. This occurs frequently where a “nominal California resident sues on behalf of foreign beneficiaries or creditors.” (*Outboard Marine Corp. v. Superior Court* (1976) 59 Cal.App.3d 434, 438 (quotation, citation, and emphasis omitted).) In fact, in *Outboard Marine*, the Court of Appeal identified both a nominal defendant and a

nominal plaintiff in its consideration of a motion to dismiss upon the grounds of *forum non conveniens*. (*Id.* at 436, 440; *see also David v. Medtronic, Inc.* (2015) 237 Cal.App.4th 734, 737 (concluding that the presence of a nominal defendant cannot defeat a *forum non conveniens* dismissal).)

Another recurring example of a nominal party is someone who cannot be joined as a plaintiff, being named instead as a defendant under Code of Civil Procedure § 382. (*See, e.g., Estate of Kuebler v. Superior Court* (1978) 81 Cal.App.3d 500, 504 (“A party who is joined in a wrongful death action as a defendant under § 382 is only nominally a defendant.”); *Romero v. Pacific Gas & Electric Co.* (2007) 156 Cal.App.4th 211, 215 (same).)

Similarly, shareholder derivative suits routinely involve nominal plaintiffs and defendants because “the particular stockholder who brings the suit is merely a nominal plaintiff” and “the corporation . . . must be joined as a nominal defendant.” (*Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1003-04 (ellipsis in original) (quotations and citations omitted); *see, e.g., also Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 995 (same).) And yet another common example is a public official being named as a defendant in a habeas corpus petition or in a suit brought against a government agency. (*See, e.g., Briggs v. Edmund G. Brown, Jr., as Governor* (2017) 3 Cal. 5th 808.)¹

¹ “[H]abeas corpus proceedings . . . are properly viewed as civil actions . . . and not as part of the criminal process itself.” (*In re Barnett* (2003) 31 Cal. 4th 466, 478 n.10.)

And there are myriad others. (See, e.g., *Guenter v. Lomas & Nettleton Co.* (1983) 140 Cal.App.3d 460, 468 (recognizing that complaints may be amended to change or remove a nominal plaintiff); *Pasadena Hosp. Ass’n v. Superior Court* (1988) 204 Cal.App.3d 1031, 1035 (same); *California Union Ins. Co. v. Trinity River Land Co.* (1980) 105 Cal.App.3d 104, 111 (considering whether an insurance company is a nominal plaintiff for purposes of a complaint for declaratory relief); *Immigrant Rights Def. Council v. Alexander* (2018) Cal. Super. LEXIS 31566, *2 (“The Legislature has seen fit to allow parties with *no injury* to sue to enforce the injunctive relief remedies available under this consumer-protection statute, and that is exactly what the *nominal plaintiff* IRDC and its attorney have done.”) (emphasis added).)²

The most logical interpretation of a party with a “substantial interest in the action as a whole” then, is a person – like Ms. [REDACTED] – who has a substantial interest in her own case, rather than someone who is a party in name only.

² In its opposition brief, Defendant accuses Petitioner of violating Rule 8.1115 of the California Rules of Court by relying on unpublished trial-court opinions in her petition. (Return at 25.) That is not true. Rule 8.1115 proscribes citations to “an opinion of a *California Court of Appeal* or *superior court appellate division* that is not certified for publication or ordered published.” (Cal. Rules of Court, Rule 8.1115(a) (emphasis added).) Petitioner cited neither unpublished opinions from the Court of Appeal nor from the appellate division of a superior court; rather, Petitioner cited unpublished trial-court orders, which are not prohibited by the rule.

This interpretation makes even more sense when contrasted with Defendants’ reading, which – by requiring a court to balance the interests of a single plaintiff against all the other parties in the case – would bestow a windfall on mass tortfeasors by effectively removing them from the reach of the statute. Here, Defendants reduce Ms. [REDACTED] “interest in the whole” to a simple percentage, insisting that, as merely one of 376 plaintiffs in this case, her interest is .2%, which is not substantial. (Return at 23.) Accordingly, if there were even more plaintiffs, Ms. [REDACTED] interest would be even less. The obvious upshot of applying Defendants’ ruthless formula is that the more people a tortfeasor harms, the less likely it is that any of his or her victims will qualify for an expedited trial setting under section 36(a). The legislature cannot have intended that perverse result.

II. Defendants’ attempts to assign different meanings to the synonyms “action,” “litigation,” and “case” are entirely speculative and unsupported by the cited authority.

Relying upon *City of San Jose v. Superior Court*, Defendants attempt to buttress their argument that a trial court must weigh an individual’s interest in his or her own claims against all the other parties in the case by parsing the statute and assigning different meanings to words that really mean the same thing. (See Return at 20-21 (citing *City of San Jose* (1993) 5 Cal. 4th 47, 55).)

Specifically, Defendants note that “action,” “litigation,” and “case” are different words and therefore must mean different things. From there, they leap to the conclusion that the term “action” is necessarily “broader than a plaintiff’s own case,” while “litigation” refers to an individual’s own claims. (Return at 21-22.)

As a threshold matter, the notion that “different terms must mean different things” is based on a selective reading of *City of San Jose*, where the state Supreme Court considered the City’s argument that, for purposes of Cal. Evid. Code § 1045, “discipline imposed” was “the equivalent of the ‘conclusions’ of an officer investigating a citizen’s complaint.” (*Id.* at 54-55.) The Court rejected that argument, finding that the terms were “quite different” and referred to “two distinct concepts.” *Id.* at 55. That stands to reason, as the two phrases are nothing alike.

Here, in contrast, Defendants strain to ascribe different meanings to “case,”³ “action,”⁴ and “litigation,”⁵ which all mean the same thing. Unlike the phrases at issue in *City of San Jose*, these words are not “quite different” and do not refer to “distinct

³ “A general term for an action, cause, suit or controversy . . . A judicial proceeding for the determination of a controversy between parties.” (Black’s Law Dictionary 215 (6th ed. 1990).)

⁴ “Term in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law. . . . An ordinary proceeding in a court of justice” (Black’s Law Dictionary 28 (6th ed. 1990).)

⁵ “A lawsuit. Legal action; including all proceedings therein. . . . A judicial contest, a judicial controversy, a suit at law.” (Black’s Law Dictionary 934 (6th ed. 1990).)

concepts.” And the logical reading of the statute is that the legislature used the terms interchangeably, just as anyone else would.

Again, Defendants cite *no* legislative history in support of their arguments. They instead note only that section 36(a) was amended in 1990 and that the word “case” was changed to “action.” From this they divine that this was an “intentional change,” “that the two terms are distinct,” and that “action” is therefore “broader than a plaintiff’s own case.” (Return at 22.) Defendants have spun this argument from whole cloth.

Finally, while *City of San Jose* is factually dissimilar, the Supreme Court’s analysis is nonetheless incisive in one important respect. In rejecting the City’s argument, the Court noted that “[i]f the City’s interpretation were correct, the exception . . . would swallow the rule . . . thus rendering [part of the statute] virtually meaningless.” (*City of San Jose, supra*, 5 Cal. 4th at 55.) That is certainly true here, where Defendants’ interpretation of the statute would eliminate the right to an expedited trial setting in virtually any case where there is more than one plaintiff. That is, the exception would swallow the rule.

III. *Koch-Ash* involved a consolidated proceeding with an almost-identical number of plaintiffs; its holding – that the right to a preference trial is “mandatory and absolute” – controls the outcome here.

In *Koch-Ash v. Superior Court*, 12 of 391 plaintiffs in a consolidated proceeding moved for preference. ((1986) 180 Cal.App.3d 689, 692). After granting those motions, the trial court later reversed itself and stayed the trial(s), claiming that it had the 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.” (*Id.* at 692.) The Court of Appeal reversed, holding that the right to a preference trial is “mandatory and absolute.” (*Ibid.*) *Koch-Ash* controls this case.

First, it bears repeating that *Koch-Ash* arose from a consolidated case, just like this one. Further, the number of plaintiffs was almost identical (391 in *Koch-Ash* versus 376 here). Applying Defendants’ percentage formula to *Koch-Ash*, each movant in that case would have had even less of a percentage interest in “the action as a whole” than Ms. [REDACTED]. Yet neither the trial court (which was obviously concerned about its ability to manage its docket) nor the Court of Appeal (which could have remanded with instructions to the trial court to reconsider

⁶ Again, Defendants assert that, Ms. [REDACTED] as but one of 376, represents just .2% of all plaintiffs. Extending this percentage by one decimal place, Ms. [REDACTED] would actually represent .27% of the plaintiffs in this case, while each plaintiff in *Koch-Ash* would represent .26% of those plaintiffs.

its findings under section 36(a)) viewed the substantial-interest requirement as conferring discretion upon the court to deny the motions.

Instead, the trial court expressly denied the motions in the interest of avoiding “potentially wasteful serial trials.” *Id.* at 698. It is hardly a coincidence that Defendants express the same concerns here, repackaged in the thin veneer of the substantial-interest test. (*See* Return at 24 (a preference trial “would disrupt the efficiencies gained by the consolidated proceeding”); PE 34 (a preference trial would “disrupt this consolidated proceeding”).)

In the simplest terms, the pertinent facts of *Koch-Ash* are virtually identical to this case and the Court of Appeal’s holding cannot be reconciled with the trial court’s ruling here. Further, Defendants’ argument – that the substantial-interest test confers discretion upon a trial court that it otherwise would not have – amounts to an end run on the preference statute and would gut the long line of cases holding that the preference-trial right is “mandatory and absolute in its application.” (*Kline v. Superior Court* (1991) 227 Cal.App.3d 512, 515 (citing *Rice v. Superior Court* (1982) 136 Cal.App.3d 81); *see also Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535 (“Where a party meets the requisite standard for calendar preference under [section 36(a)], preference must be granted. No weighing of interests is involved.”).)

IV. Defendants point to *no* record evidence that a preference trial will prejudice the other parties in this case.

It is hardly a secret that defendants in large tort cases are not usually in favor of accelerated trial dates. That is certainly true here, where Defendants have repeatedly argued – both before this Court and the trial court – that setting a preference trial would somehow disrupt the entire proceeding. (See Return at 24; PE 30, 34-35). This policy concern was addressed by the *Koch-Ash* court, which observed that if “certain exceptions to section 36 are necessary in complex, consolidated actions, [the] remedy lies in persuading the Legislature to amend the absolute language of section 36, subdivision (a) to provide appropriate exceptions.” (*Koch-Ash v. Superior Court, supra*, 180 Cal.App.3d at 699.)

But it also bears mentioning that Defendants’ argument is based on absolutely no evidence. For example, Defendants assert that the other plaintiffs will “have their own distinct interests that conflict with Petitioner’s interests,” (Return at 24), but they fail to articulate what those interests are or how they would conflict. Similarly, Defendants aver that a preference trial “would disrupt the efficiencies gained by the consolidated proceeding, (*ibid.*), but again they fail to explain how that disruption would occur.

Defendants also speculate that “other plaintiffs will be incentivized to file their own preference motions as they suddenly are forced to compete to be the first in line.” (*Ibid.*) But they neither identify a single, additional plaintiff in this case who may

be eligible to file a preference motion, nor explain why such an eligible plaintiff, who has not yet filed a motion, would be motivated to do so now. Ultimately, Defendants assert that “any benefit for the few preference plaintiffs will come at the expense of the hundreds of non-preference plaintiffs,” (*ibid.*), again without offering any insight as to how this presumptive disparity would manifest itself.

Defendants also fail to explain the sudden altruism animating their argument on behalf of other plaintiffs in this case, *none* of whom objected to Ms. [REDACTED] motion. There is simply no evidence whatsoever that granting a preference trial will prejudice any other party in this case. And if other plaintiffs were concerned about that possibility, they would have said so.

Conclusion

Defendants’ contention that the substantial-interest requirement confers upon a trial court the discretion to deny a preference motion in the interests of the non-moving parties is a judicial-economy argument in sheep’s clothing. It is, in fact, indistinguishable from the “wasteful serial trial” rationale rejected by the Court of Appeal in *Koch-Ash*. It is also pure conjecture, based neither on the legislative history nor any other authority. And it would effectively overrule *Koch-Ash* and every other case reaffirming that the right to a preference trial is “mandatory and absolute.”

Ms. [REDACTED] respectfully requests that this Court issue a writ directing the trial court to vacate its order denying her motion for preference and enter an order granting it.

Dated: 9/21/23

By: /s/ John C. Lemon
John C. Lemon

[REDACTED] [REDACTED] [REDACTED]

Counsel for Petitioner

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Certificate of Compliance

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing document was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word-processing program used to generate the brief, is **2,980** words, exclusive of the material that may be omitted under California Rules of Court, rule 8.204(c)(3).

/s/ *John C. Lemon*

John C. Lemon