Case No.

B328352

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELAINE HERMAN and JACOB HERMAN,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

COLGATE PALMOLIVE COMPANY et al.,

Real Parties in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Review Sought from an Order of Los Angeles County Superior Court
(J.C.C.P. No. 4674; Superior Court Case No. 22STCV32540)
Laura A. Seigle, Judge

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INTRODUCTION

Respondent court stayed petitioner Elaine Herman's case before even considering whether she was entitled to trial preference under Code of Civil Procedure section 36. Mrs. Herman is 65 years old, was personally and occupationally exposed to asbestos in California while living here, and now suffers from malignant mesothelioma. Undisputed evidence submitted by two physicians—a treating doctor and a mesothelioma expert—established that Herman likely has less than six months to live. Respondent court nevertheless declined to rule on Herman's motion for statutory trial preference and, instead, found that the equities favored staying the case and requiring Herman to file a new action in Connecticut.

Four real parties in interest now oppose writ relief on essentially one ground; the fact that the Hermans are longtime and current residents of Connecticut. Real parties ignore, however, that most of the defendants in the case willingly answered the Hermans' complaint, submitted to respondent court's jurisdiction, and then moved for a stay when Mrs. Herman sought a preferential trial setting based on her declining health. They downplay the incomplete showing as to whether all the defendants are subject to jurisdiction in Connecticut, choosing instead to rely on *Hansen v. Owens-Corning Fiberglass Corp.* (1996) 51 Cal.App.4th 753, an out-of-date, legally incorrect, and factually distinct outlier decision that purports to loosen the threshold suitability requirement for forum non conveniens. Real party Charles B. Chrystal Company also claims that a delay-causing stay and the increased likelihood that Mrs. Herman will die before reaching trial is justified by concerns that California courts are too overburdened to handle the few lawsuits brought by out-of-state mesothelioma victims who were exposed to asbestos while living and working in California.

Real parties cannot dispute that forum non conveniens is an equitable doctrine that, by its statutory terms, is intended to further substantial justice. They identify no actual prejudice caused by having to defend the Hermans' case in California. The Hermans, on the other hand, suffer truly irreparable harm if—during the pendency of the stay—Mrs. Herman dies of mesothelioma while starting her case over in Connecticut. No matter what any defendant argues to justify a forum non conveniens stay in a mesothelioma case, those arguments pale in comparison to the inequities suffered by a terminally-ill plaintiff upon the imposition of a stay. The equities simply do not justify respondent court declining, for reasons of convenience, to exercise its jurisdiction over the Hermans' case. Respondent court should have ruled on the Hermans' motion for trial preference, denied real parties' motion to stay the case, and set the case for trial so that Mrs. Herman had at least a *possibility* of having her day in court.

REPLY ARGUMENT

I.

Real Parties Fail To Reconcile the Extreme Inequities Imposed By the Stay.

In attempting to defend respondent court's ruling, real parties focus almost exclusively on where the Hermans have lived most of their lives. Real parties minimize, or even disregard, that most of Mrs. Herman's personal and occupational exposures to cosmetic talcum powder occurred in California. {Ex. 15; R. 582} They also disregard that the Hermans brought their case in California because most, if not all, of the parties responsible for her injury are subject to jurisdiction here. Real parties have not shown to the contrary, again just emphasizing that the Hermans are Connecticut residents.

The forum non conveniens analysis is, and should be, more nuanced with a bent towards fairness. There are, of course, numerous public and private factors that trial courts may consider when deciding whether to decline the exercise of their jurisdiction in order to serve conveniences. Our Supreme Court explained that these public and private factors are to be "applied flexibly, without giving undue emphasis to any one element." (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 753.) Expressly codified in the statute is the overarching purpose to further the "interest of substantial justice." (Code Civ. Proc., § 410.30.) Real parties never explain how staying a dying plaintiffs' case for anyone's purported convenience serves the purpose of furthering substantial justice.

The Hermans do not seek, as real parties argue, to "graft a preference exception onto the forum non conveniens statute." (Opp. of Colgate and Mary Kay, p. 9.) The forum non conveniens doctrine's origins in equity and the language of section 410.30 already establish that the critical inquiry is the impact a stay would have on the overall goal to serve "substantial justice." From the Hermans' perspective, imposing a stay here has the devastating impact of having to start a new lawsuit during which Mrs. Herman will likely die before having any day in court. Real parties, on the other hand, collect the benefit of that delay and the possibility that Mrs. Herman will die before trial. Stated otherwise, because of the stay, Mrs. Herman will likely receive no measure of justice while real parties will never have to answer to her for their actions. Real parties cite no legal authority, policy, or other rationale establishing that any forum non conveniens stay, under any circumstances, was ever meant to have such a dispositive effect on a litigant's case.

None of the real parties, in any of their oppositions, address the disparity of impact or make any attempt to reconcile the difference between the relative effects of respondent court's ruling. They cannot reconcile the disparate effects of the stay in order to show that imposing it in these circumstances serves the interests of justice as required by equity and the statutory language. More importantly, real parties do not justify why forum non conveniens should so advantage them as opposed to Mrs. Herman. "[I]t is a measure of the virility and flexibility of equitable principles that they may be applied to the end that neither party is permitted to secure an advantage to the prejudice of another . . . ." (*Martinez v. Ford Motor Co.* (2010) 185 Cal.App.4th 9, 18, quoting *Elbert, Ltd. v. Federated etc. Properties* (1953) 120 Cal.App.2d 194, 206.) Real parties fail to show why they should be permitted to secure such an obvious advantage while Mrs. Herman's case is effectively adjudicated against her.

II.

By Relying on *Hansen,* Real Parties Concede They Made An Insufficient Showing As To Connecticut's Suitability.

As noted in *American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, the prevailing view is that any party invoking the forum non conveniens doctrine must show, as a threshold matter, that all defendants are subject to jurisdiction in the proposed alternative forum. (*Id.* at p. 440.) Here, real parties failed to make that showing and, instead, resorted to *Hansen v. Owens-Corning Fiberglass Corp., supra,* 51 Cal.App.4th at p. 753 for the proposition that they did not need to make any such threshold showing. They continue to rely on *Hansen* in defense of respondent court's ruling.

By relying on *Hansen,* of course, real parties concede they did not show that all defendants in this case are subject to jurisdiction in Connecticut. Indeed, respondent court had no choice but to rely on *Hansen* because real parties did not make a full showing as to whether all defendants are subject to jurisdiction in Connecticut. *Hansen*, as respondent court wrote in its ruling, purports to excuse such a showing "in an asbestos case with a large number of defendants" and "allow[s] the other forum to determine whether all defendants are subject to that other forum's jurisdiction." {Ex. 31; R. 773} *Hansen,* for whatever it is worth, involved a case with some 200 some defendants brought by a plaintiff who had never lived in California. (*Hansen, supra,* 51 Cal.App.4th at p. 757.) Real parties and respondent court use *Hansen* as support for the dubious proposition that California trial courts may abdicate to other courts their responsibility to decide whether defendants made the necessary predicate showing to invoke forum non conveniens in California.

This makes no sense, and *Hansen* has no support in other California forum non conveniens decisions. *Hansen* is out-of-date, factually distinguishable, and legally contrary to the *Stangvik* and *American Cemwood* line of cases that puts the burden of proof as to suitability on the moving defendants. It should not be followed or applied, and it is not the "keystone" case that Colgate and Mary Kay say it is. (Opp. of Colgate and Mary Kay, p. 20.) "[N]o other courts in this state or elsewhere, have cited [*Hansen*] for [the] broader interpretation of the suitable alternative forum requirement." (*American Cemwood, supra,* 87 Cal.App.4th at p. 440.) Respondent court's reliance on *Hansen* to excuse real parties from their burdens and to push the threshold suitability analysis off to a Connecticut court is legally incorrect. By resorting to *Hansen*, both respondent court and

real parties conceded there was a distinct shortage of the required proof that all of the defendants in this case be subject to jurisdiction in Connecticut. The lack of evidence as to Connecticut's suitability as a forum for this case required denial of real parties' motion.

CONCLUSION

Real parties and respondent court place far too much emphasis on the Herman's current residence in Connecticut and not enough on the undisputed facts related to Mrs. Herman's condition, prognosis, and personal and occupational exposures to asbestos in California. Imposing a stay in this case does not comport with general equitable principles or the statutory requirement that any equitable remedy serve the interests of substantial justice. Real parties provide nothing to show that staying Mrs. Herman's case—which will almost certainly result in her death prior to having her day in court—furthers substantial justice. Respondent court's decisions to not consider Mrs. Herman's entitlement to trial preference and to excuse real parties from having to show Connecticut is a suitable alternative forum are legally incorrect and abuses of discretion. The Hermans request this Court to issue writ relief, in the first instance, compelling respondent court to vacate its order granting the motions to stay and to enter a new and different order denying those motions.

Respectfully submitted,

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/s/ *Jordan Blumenfeld-James*

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WORD COUNT CERTIFICATION [CRC 8.204(c)]

Counsel for petitioners hereby certifies that this brief contains 1788 words as measured by Microsoft Office word processing software.

Respectfully submitted,

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PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within action; my business address is 225 S. Lake Avenue, Suite 300, Pasadena, California 91101. On May 16, 2023, I caused to be served the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested parties in this action by preparing true copies and delivering them as follows:

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On the date set forth below, I served the foregoing document(s) described as:

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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Executed on May 16, 2023, at Dallas, Texas.

/s/ Chelsea Weeks
Chelsea Weeks