S156598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

GREAT AMERICAN INSURANCE COMPANY,

Real Party in Interest.

B201396

(Los Angeles Superior Court No. BC331601)

ANSWER BRIEF ON THE MERITS

After Orders Filed August 28, 2007 and September 12, 2007
In the Court of Appeal, Second Appellate District, Division Three

Jeffrey Isaac Ehrlich #117931
THE EHRLICH LAW FIRM
411 Harvard Avenue
Claremont, California 91711
Telephone: (909) 625-5565
Facsimile: (909) 625-5477

Attorneys for
Brown Winfield Canzoneri Abram Inc.

S156598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BROWN, WINFIELD & CANZONERI, INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, GREAT AMERICAN INSURANCE COMPANY, Real Party in Interest.	B201396 (Los Angeles Superior Court No. BC331601)

ANSWER BRIEF ON THE MERITS

After Orders Filed August 28, 2007 and September 12, 2007
In the Court of Appeal, Second Appellate District, Division Three

Jeffrey Isaac Ehrlich #117931
THE EHRLICH LAW FIRM
411 Harvard Avenue
Claremont, California 91711
Telephone: (909) 625-5565
Facsimile: (909) 625-5477

Attorneys for
Brown Winfield Canzoneri Abram Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

Petitioner in this Court, Great American Insurance Company ("GAIC"), does not contend that the Court of Appeal erred in any respect when it concluded that the writ petition filed by respondent Brown, Winfield & Canzoneri, Inc. ("BWC")[1] presented a case for relief so compelling that it warranted issuance of a peremptory writ in the first instance. Rather, it contends that the notice the court gave of its intent to issue the peremptory writ, as required by *Palma v. U.S. Fasteners, Inc.* (1984) 36 Cal.3d 171, was defective because it contained too much information.

According to GAIC, a *Palma* notice must communicate the appellate court's intent to issue the peremptory writ in the first instance, "*and nothing more.*" (GAIC brief at 2, emphasis in text.) The "more" that GAIC complains of is simply a reasoned legal analysis of the facts and law that caused the appellate court to conclude that the petition stated an entitlement to relief that was so obvious that plenary consideration of the issue was not warranted. GAIC never offers a satisfactory explanation of why it would be improper for an appellate court to explain the basis for the conclusions it has drawn or the actions it proposes to take.

GAIC's thesis is that a suggestive *Palma* notice somehow exerts hydraulic pressure on the trial court to change the order under consideration. As a result, if the real party in interest has chosen not to file a preliminary response to the writ petition, as GAIC elected below, there is a risk that the trial court will change its order and moot the petition before the real party can respond.

GAIC's position confuses both cause and effect. First, even the type of non-suggestive *Palma* notice that GAIC champions would nevertheless communicate to the trial court the fact that the appellate court views the

order under review as deeply flawed. This is inherent in the legal standard for the issuance of a peremptory writ in the first instance. It is therefore the issuance of the notice itself, not its form, which likely causes a trial court to change position.

Second, the writ process in California contemplates that a trial court will be given the opportunity to change its order in response to the manner in which the reviewing court responds to a writ petition. By definition, the "standard" approach to handling a potentially meritorious writ petition — the issuance of an alternative writ — contemplates that the trial court will be given the choice of complying with the writ (that is, changing its order) or showing cause why it has not done so. (Code Civ. Proc. § 1087; *Palma*, 36 Cal.3d at 177.)

GAIC ultimately fails to demonstrate that the appellate court's explanation in its *Palma* notice of why it was considering issuing a peremptory writ in the first instance was improper in any way, had any adverse impact upon it, or represents a practice that should be regulated or curtailed.

STATEMENT OF THE CASE

GAIC's discussion of the factual and procedural background of this case at pages 7 through 13 is accurate and BWC will rely on it in this brief, with one exception. After GAIC's brief was filed, the underlying litigation against BWC settled. Accordingly, the only remaining litigation at issue is the coverage litigation between GAIC and BWC.

---

[1] BWC is now known as Brown Winfield Canzoneri Abram Inc.

ARGUMENT

A. GAIC's objection goes only to the form of the *Palma* notice issued by the Court of Appeal; not to whether the court could properly issue a peremptory writ in the first instance

This Court has cautioned that it is only appropriate for an appellate court to issue a peremptory writ in the first instance in two circumstances: "When petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue" or "where there is an unusual urgency requiring acceleration of the normal process." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1241, citing *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223.)

The former standard is met when the writ petition demonstrates that the trial court committed clear error under well-settled principles of law and undisputed facts. (*Id.*) In the order challenged by GAIC in this proceeding, the Court of Appeal stated that "BWC's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue." (August 28, 2007 Order, p. 3 [Petition for Review, Exhibit A].) This finding goes entirely unremarked in GAIC's opening brief on the merits.

GAIC makes no attempt to defend the propriety of the trial court's order lifting the stay of its declaratory relief action, nor does it challenge the Court of Appeal's finding that the ruling constituted error so plain that BWC's right to relief was obvious.

The most that GAIC says about the merits of the Court of Appeal's choice to proceed by way of a peremptory writ in the first instance is that there was no unusual urgency that required expedited resolution of BWC's writ petition. (GAIC brief at 15.) Even if this were true (and it is not, since allowing GAIC's declaratory-relief action to proceed concurrently with the underlying action against BWC would have been prejudicial to BWC), it is

irrelevant, since no showing of a need for expedited consideration is necessary when a petitioner's right to relief is obvious, as it was here.

Hence, in this proceeding GAIC's sole objection is to the form of the *Palma* notice issued by the Court of Appeal — not to that court's evaluation of the merits of the writ petition or the propriety of the trial court's order lifting the stay.

B. *Palma* neither prescribes the form of the required notice, nor prevents an appellate court from explaining the reasons that it is considering issuing a peremptory writ in the first instance

1. A suggestive *Palma* notice presents no due-process implications

GAIC repeatedly suggests that the issue presented here has due-process implications. For example, on page 3 of its brief, it says that the trial-court reversal of its order lifting the stay within 24 hours of receiving the suggestive *Palma* notice represented "a tragic denial of due process." At page 17, it claims that its due-process rights were violated because the Court of Appeal did not solicit an opposition to the petition. And at page 18 it argues that the practice of issuing a suggestive *Palma* notice "produces the potential effect of denying the real party in interest its due process right to be heard."

Contrary to GAIC's assertions, *Palma* was not a due-process case, and the issuance of a suggestive *Palma* notice does not produce any due-process implications. As this Court explained in *Palma*, the statute authorizing a Court of Appeal to issue a peremptory writ in the first instance is section 1088 of the Code of Civil Procedure[2], which says:

> When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must first be issued; *but if the application is upon due notice and*

> *the writ is allowed, the peremptory may be issued in the first instance.* With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not. (Emphasis added.)

The issue in *Palma* was what constituted "due notice" in the italicized phrase in section 1088. As this Court explained, "We conclude that 'due notice' under section 1088 requires, at minimum, that a peremptory writ . . . not issue in the first instance unless the parties adversely affected by the writ have received notice, from the petition or from the court, that the issuance of the writ in the first instance is being sought or considered. (*Palma*, 36 Cal.3d at 180.) *Palma* did not prescribe the form that the notice must take.

Palma is therefore a "due notice" case; not a due-process case. There, the petition sought issuance of an alternative writ, and upon return thereof, issuance of a peremptory writ. (*Id.*, 36 Cal.3d at 177.) No alternative writ was issued, but the appellate court stayed the trial-court proceedings and then issued a peremptory writ. (*Id.*) Hence, in *Palma*, the real-party in interest never received notice that issuance of a peremptory writ in the first instance was sought by the petitioner, or was being considered by the court.

By contrast, BWC's writ here expressly prayed for issuance of a peremptory writ in the first instance, and only sought the alternative writ in the event that the court did not issue the peremptory writ in the first

---

[2] Unless otherwise indicated, all statutory citations are to the Code of Civil

instance. (BWC petition at p. 11, paras. 2 and 3 of prayer for relief.) And the court's order of August 28, 2007 issued in response to the petition expressly stated that, "the parties to the petition are notified that this court is considering the issuance of a peremptory writ of mandate in the first instance [citing *Lewis* and *Palma*], directing the respondent court to vacate the order entered on July 3, 2007, and to enter an order reinstating the stay pending resolution of [the underlying action.]"

GAIC therefore cannot complain that it did not receive notice that a peremptory writ of mandate might issue. Plainly, it was given the "due notice" required by section 1088, as construed by *Palma*. It therefore has no basis to complain of any due-process violation.

GAIC's complaint is not that it did not receive notice; it is that the trial court acted in response to the August 28, 2007 order within 24 hours, mooting the petition before it could file a formal response. But GAIC cannot claim that it had no opportunity to respond to the argument raised in the writ petition. It admits that it elected for its own purposes not to file a preliminary opposition to BWC's writ as permitted by Rule 8.490(g) of the Rules of Court. It further acknowledges that the Court of Appeal waited 11 days after the petition was filed — one day past the time allotted to GAIC to file a preliminary opposition — before it issued its *Palma* notice. (GAIC brief at 18, 19.) Accordingly, GAIC cannot validly claim to be the victim of a due-process violation.

2. No statute, rule, or prudential reason should bar the use of a suggestive *Palma* notice

GAIC frames the crux of its argument in these terms: "A *Palma* notice should be just that — a notice that the Court is considering the issuance of a peremptory writ in the first instance *and nothing more*." (GAIC brief at 2, emphasis in text.) There is, however, no statute, Court

---

Procedure.

rule, or statement by this Court in any case that supports this proposition. Nor does it appear to have any logical support.

After all, a *Palma* notice is nothing more than a statement by the appellate court that, in its view, the petitioner's right to relief is so clear-cut that it would be appropriate to issue a peremptory writ in the first instance. Hence, given the clearly-articulated standard for when such relief is proper, merely issuing the notice clearly communicates to the trial court the reviewing court's view that the order at issue is patently flawed and the petitioner's right to relief is obvious.

GAIC's quarrel is therefore with the fact that the appellate court chose to explain the basis of its view that the petition satisfies the standard for issuance of the peremptory writ in the first instance. BWC is unaware of any precedent for a claim that a court somehow commits error when it provides a reasoned explanation for its decision.

GAIC assumes that it is the citation of authorities in the suggestive *Palma* notice that causes the trial court to reverse its position, and that if the appellate court merely stated that it was considering issuing a peremptory writ in the first instance the trial court would likely stand pat and allow the writ proceedings to play out. There is simply no reason to believe that this is accurate.

C. The rule advocated by GAIC would not cure the problem it complains of — the trial court reversing its ruling in response to an appellate court's indication that the ruling was erroneous

GAIC's objection to the use of a suggestive *Palma* notice is that it somehow pressures the trial court to change its order, thus mooting the writ proceeding and making the *Palma* notice the functional equivalent of an order issuing the writ. But GAIC's position ignores the reality of writ practice — that when the appellate court uses the "standard" procedure and

issues an alternative writ, the trial court is given the opportunity to change its order in compliance with the alternative writ.

This Court has explained that when an appellate court is considering a petition for a writ of mandate or prohibition it has three options: "(1) deny the petition summarily, before or after receiving opposition; (2) issue an alternative writ or order to show cause; or (3) grant a peremptory writ in the first instance after compliance with the procedure set forth in *Palma* . . . ." (*Lewis*, 19 Cal.4th at 1239, citations omitted.)

The alternative writ commands the trial court to either do the act required to be performed — typically to change its order — or to show cause to the appellate court why it has not done so. (*Id.* at 1240; Civil Code § 1087.) "The respondent court may choose to act in conformity with the prayer, in which case the petition becomes moot." (*Lewis,* at 1240, citing *Palma*, 36 Cal.3d at 177-178.)

In lieu of issuing the alternative writ, a reviewing court can issue an order to show cause, "thus requiring the submission of further argument in support of the respondent's position." (*Lewis* at 1240.) The authors of the Rutter treatise on appellate procedure explain that issuance of an order to show cause allows an appellate court to obtain further briefing on the petition, while avoiding the possibility that the trial court will comply with the alternative writ. (Eisenberg, Horvitz & Wiener, *California Practice Guide — Civil Appeals and Writs* (Rutter 2007 rev.) § 15:157.5, p. 15-74.)

The problem that motivated GAIC's petition to this Court — the trial court changing its ruling in response to an order from an appellate court before GAIC filed its response — was not caused by the appellate courts' use of a suggestive *Palma* notice. Rather, it was a function of how sections 1087 and 1088 of the Code of Civil Procedure allow California courts to issue and respond to writ petitions.

In effect, what GAIC is arguing is that appellate courts must always issue an order to show cause when contemplating issuing a writ, in order to prevent the trial court from changing its order before the real party in interest has an opportunity to file a return to the petition. While this is certainly one available approach, sections 1087 and 1088 do not make it mandatory.

A ruling by this Court instructing appellate courts to issue *Palma* notices that lack any explanation of the basis for the court's thinking would not address the issue complained of by GAIC, and would not prevent trial courts from changing their rulings as the trial court did here. If GAIC wanted an assurance that it would have the opportunity to respond to BWC's petition, all it need have done is file a preliminary opposition as permitted by Rule 8.490(g) of the Rules of Court.

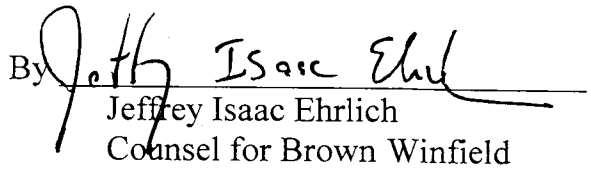
CONCLUSION

GAIC has not shown that the Court of Appeal acted improperly when it issued its suggestive *Palma* notice, or that this Court should adopt any rule restricting the practice.

Dated: June 19, 2008.

Respectfully submitted,

Jeffrey Isaac Ehrlich
THE EHRLICH LAW FIRM

By 
Jeffrey Isaac Ehrlich
Counsel for Brown Winfield
Canzoneri Abram Inc.

Certificate of Word Count
(Cal. Rules of Court, Rule 8.204(c)(1).)

The text of this brief consists of 2,686 words (including footnotes), according to the word count generated by the Microsoft Word word-processing program used to prepare the brief.

Dated: June 19, 2008.

Jeffrey Isaac Ehrlich

Great American Insurance Company v. Brown, Winfield & Canzoneri, Inc.
Supreme Court No.: S156598
Court of Appeal No.: B201396
Superior Court Case No.: BC331601

PROOF OF SERVICE

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: 411 Harvard Avenue, Claremont, California 91711.

On **June 19, 2008**, I served the foregoing documents described as: **ANSWER BRIEF ON THE MERITS** on the interested parties in this action:

PLEASE SEE ATTACHED LIST.

[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

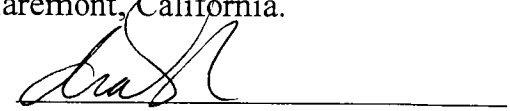
[] BY FACSIMILE ("FAX") a copy was sent by FAX as follows:

[] BY PERSONAL SERVICE I delivered such envelope by hand to the offices listed above.

[] BY FEDERAL EXPRESS OVERNIGHT MAIL/COURIER to expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to the above-listed party.

[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **June 19, 2008,** at Claremont, California.



Isabel Cisneros-Drake

Great American Insurance Company v. Brown, Winfield & Canzoneri, Inc.
Supreme Court No.: S156598
Court of Appeal No.: B201396
Superior Court Case No.: BC331601

SERVICE LIST

Joan E. Cochran, Esq. COCHRAN DAVIS & ASSOCIATES, P.C. 36 Malaga Cove Plaza, Suite 206 Palos Verdes Estates, CA 92074-6813 Telephone: (310) 373-0900 Facsimile: (310) 373-0244	Attorneys for Petitioner GREAT AMERICAN INSURANCE COMPANY
Michael J. Bidart, Esq. Ricardo Echeverria, Esq. SHERNOFF BIDART DARRAS & ECHEVERRIA, LLP 600 South Indian Hill Boulevard Claremont, CA 91711 Telephone: (909) 621-4935 Facsimile: (909) 625-6915	Attorneys for BROWN WINFIELD CANZONERI ABRAM INC.
Clerk, Superior Court Los Angeles County Hon. Elihu M. Berle 111 North Hill Street Los Angeles, CA 90012-3014	
Clerk, Court of Appeal Second Appellate District, Div. 3 North Tower, Floor 2 300 South Spring Street Los Angeles, CA 90013-1213	
California Supreme Court Clerk of the Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Filed Via Overnight Delivery (original plus 13 copies)