

Case No. 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/Petitioner.

SUPREME COURT  
**FILED**

OCT 23 2007

Frederick K. Ohnrich, Clerk

Deputy

**REPLY TO ANSWER TO PETITION FOR REVIEW**

After Orders Filed August 28, 2007, and September 12, 2007, in the Court of Appeal  
Second Appellate District, Division Three, Case No. B201396  
(Los Angeles County Superior Court Case No. BC331601)

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I.

**DUE PROCESS IS AN IMPORTANT ISSUE THAT WARRANTS**

**THIS COURT'S REVIEW**

Due process is indisputably an “important” issue for this Court and each of its lower courts. Review of the subject court of appeal orders should be granted because as a matter of practice, in cases not involving any type of emergency, the Second District is issuing “speaking” *Palma* notices that result in a de facto issuance of a writ without affording the real party in interest a meaningful opportunity to respond. GAIC, which was denied due process when the superior court reversed itself within 24 hours of the Court of Appeal’s August 28, 2007, order, respectfully requests that this Court utilize its supervisory powers over the courts of appeal and review the procedure employed by the Second District to ensure that due process is being afforded to its litigants.<sup>1</sup>

In its Answer to the instant Petition, BWC characterizes the series of events depriving GAIC of a meaningful opportunity to respond to the writ petition as “ordinary” and that the August 28, 2007, order constituted in form and substance “a simple alternative writ.” (Answer, p. 1.) However, if the proper alternative writ procedure had been employed, then GAIC

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<sup>1</sup> This Court has a general supervisory power over the procedures utilized by the courts of appeal or other lower courts. (*People v. Pena* (2004) 32 Cal.4th 389, 398-399.)

would have been able to file written opposition and even possibly present oral argument. If what BWC has stated is indeed true, and it is common appellate practice in the Second District where real parties in interest are not being afforded a meaningful opportunity to oppose writ petitions that do not involve exceptional circumstances, then this Court should grant review to analyze whether the Second District is violating litigants' due process rights on a regular basis.

Noticeably absent from BWC's Answer to the instant Petition is any argument that there was an "emergency" or "unusual urgency" that required the court of appeal to act so hastily. This is because there was no such urgency. As of August 28, 2007, the date the speaking *Palma* notice was issued, the instant action had been pending for more than two years.

Moreover, in light of BWC's silence on the issue, it is undisputed that the Second District never requested opposition from GAIC after the speaking *Palma* order was issued. GAIC had an untenable 24-hour window to file opposition to the Second District's August 28, 2007, order, before the superior court reversed itself the next day.<sup>2</sup>

By not issuing an alternative writ, and instead by issuing a

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<sup>2</sup> In reality, GAIC did not have any meaningful opportunity to respond. The Second District's order was faxed to GAIC's counsel late in the day on August 28, 2007. By August 29, 2007, the superior court had already entered an order complying with the court of appeal's directive.

“speaking” *Palma* notice, the Second District effectively granted the writ petition with no opportunity to file opposition at all. The superior court reversed itself on August 29, 2007, within 24 hours of the speaking *Palma* notice.

**A. Under Normal Procedures, The Court of Appeal Would Have Requested Opposition Before Ever Issuing An Alternative Writ**

In its Answer, BWC essentially contends that the Second District’s use of a “speaking” *Palma* notice in this case is no different from issuing an alternative writ and then dissolving the alternative writ when the trial court complies with it. (Answer, pp. 13-16.)

Yet, there is a significant difference from the normal alternative writ process and what happened in the instant action. The difference is that in the procedure used here by the Second District, a speaking *Palma* notice was issued first, before GAIC had an opportunity to file opposition to the writ petition, and then the superior court acted on the *Palma* notice within 24 hours - before GAIC had any meaningful opportunity to respond.

If the Second District had utilized the proper alternative writ procedure, it would have asked GAIC to file opposition first, before issuing an alternative writ. Nothing would have happened - - nothing would have issued from the Second District - - until AFTER it read and considered GAIC’s opposition on the merits.

In *Singer v. Superior Court* ((1999) 70 Cal.App.4th 1315), the Second District actually set forth the correct alternative writ procedure:

“Following a hearing, the court ordered the matter transferred to the municipal court. Plaintiff promptly filed a petition in this court seeking to overturn the trial court’s transfer order. We issued a stay order and requested defendants to file preliminary opposition ‘directed to the issue of Plaintiff’s claim of lost earnings due to wrongful termination as a special employee. (Citations.)’ After receiving and reviewing the requested opposition, we issued an alternative writ “on the ground defendant’s affirmative defense of a special employment relationship creates a potential liability for wrongful termination damages and plaintiff made a prima facie showing of such damages exceeding \$25,000.00.” (*Singer, supra*, 70 Cal.App.4th at p. 1319.) (Emphasis added.)

This same procedure outlined in *Singer* obviously did not take place in the present action. Here, no opposition was requested from GAIC and GAIC did not have a meaningful opportunity to respond to either the writ petition or the Second District’s order.

That is the harm and the difference between the alternative writ and the “speaking” Palma notice type of procedure. The Second District issued the requested relief without giving GAIC its due process right to be heard. If the Second District had utilized the normal alternative writ procedure, GAIC’s due process rights would have been protected because the court would not have issued the alternative writ without considering GAIC’s opposition.

Accordingly, BWC’s contention that the events that took place in the

instant action were “entirely ordinary” to the alternative writ process is disingenuous. The Second District’s concerning departure from the guidelines set forth in *Palma* render this an important issue for this Court’s consideration.

**B. If The Court Of Appeal Had Issued An Alternative Writ, GAIC Would Have Had 30 Days To File Additional Opposition Pursuant to California Rules of Court, Rule 8.490(h)(1) and (2)**

Had the Second District truly issued an alternative writ, as BWC contends happened in form and substance, GAIC would have had an opportunity to submit an opposition. This did not happen.

California Rules of Court, Rule 8.490(h)(1) and (2) provides as follows:

**“(h) Return or opposition; reply**

(1) If the court issues an alternative writ or order to show cause, the respondent or any real party in interest, separately or jointly, may serve and file a return by demurrer, verified answer, or both. If the court notifies the parties that it is considering issuing a peremptory writ in the first instance, the respondent or any real party in interest may serve and file an opposition.

(2) Unless the court orders otherwise, the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance.

Therefore, under California Rules of Court, Rule 8.490(h)(1) and (2), if the court *had* issued an alternative writ, a respondent real party in interest

would have had up to 30 days to file additional opposition.<sup>3</sup> By not issuing an alternative writ, and instead by issuing a speaking *Palma* notice, the court of appeal effectively granted the writ petition without soliciting opposition papers from GAIC.

## II.

### CLARIFICATION OF MONTROSE IS ALSO AN IMPORTANT ISSUE OF LAW THAT MERITS REVIEW

This Court should also grant GAIC's Petition for Review to further clarify the *Montrose* decisions and modify the factors that a trial court can consider when ruling on whether or not to lift a stay of a declaratory relief action while the underlying action is pending. Review of this issue is important because it will settle an uncertainty as to the application of *Montrose I and II* to "stays" in insurance coverage declaratory relief actions, and will avoid the potentially adverse policy consequences concerning an insurer's decision to defend its insured.

Prejudice to the insurer - its delay in having its day in court while at the same time paying for the defense of its insured - *should* be a factor that the trial court may consider in determining whether the declaratory relief action may proceed.

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<sup>3</sup> Code of Civil Procedure section 1089 also provides that the alternative writ has to provide a date "for return", a date by which the responding party could file opposition.

Despite BWC's assertion, there was insufficient overlap between the issues in the legal malpractice action and the issues in the declaratory relief action to institute a stay in the first place. It is undisputed that Azusa made a "claim" against BWC. Whether a claim was made is not an issue in dispute in either the declaratory relief action or the legal malpractice action. The primary issue to be determined in the declaratory relief action is the *date* when Azusa communicated its claim or demand for money damages or services to BWC. GAIC's coverage defenses under the subject insurance policy are related to the *timing* of the claim(s) made by Azusa. (Appx. 5, 6.)

The date Azusa's claim was made is not an issue in the underlying legal malpractice action. The issue in the legal malpractice action is whether BWC's failure to make a motion under Section 1263.240 in the Eminent Domain Proceeding before constructing the improvements constitutes malpractice. (Appx. 83.)

Therefore, the coverage question in the declaratory relief action does not "turn on facts to be litigated in the underlying action." *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 302. In situations as here where it is undisputed that the "classic" situation requiring a stay is not involved, the Court should modify *Montrose* to allow for the delay in

the prosecution of the underlying action to be a factor in determining whether the stay of the declaratory relief action should be lifted.

**III.**

**CONCLUSION**

For the foregoing reasons, Great American Insurance Company respectfully requests that this Court grant review of the issues presented in the instant Petition.

Dated: October 22, 2007

**THOMPSON & ALESSIO, LLP**



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Kris P. Thompson  
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## WORD COUNT CERTIFICATE

I certify that this Reply to Answer to Petition for Review contains 1,722 words, including footnotes, as calculated by the WordPerfect application used to create this document.

Dated: October 22, 2007

  
\_\_\_\_\_  
Jeffrey K. Miyamoto

**Great American Insurance Company v. Brown, Winfield & Canzoneri, Inc.**  
**Supreme Court of California No. S \_\_\_\_\_**  
**Los Angeles Superior Court No: BC 331601**  
**2<sup>nd</sup> Dist. Court of Appeal No.: B201396**

**PROOF OF SERVICE**

I, the undersigned, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, State of California, where the mailing occurs; and my business address is 2550 Fifth Avenue, Suite 600, San Diego, CA 92103.

On October 22, 2007, the foregoing document(s) were served as follows:

**1. REPLY TO ANSWER TO PETITION FOR REVIEW**

on the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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**VIA FEDERAL EXPRESS**

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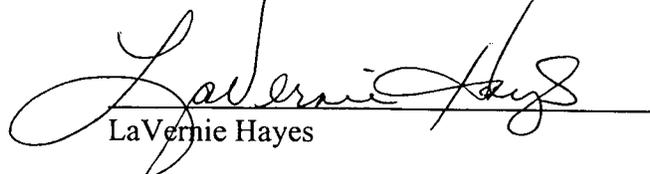
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 BY MAIL. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a(1).

 BY OVERNIGHT DELIVERY. I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier (Federal Express) providing overnight delivery pursuant to Code of Civil Procedure §1013(c).

Executed on October 22, 2007, at San Diego, California.

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

  
LaVernie Hayes