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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

**GERALD BOYD et al.,**

**Petitioners,**

v.

**THE SUPERIOR COURT OF  
ALAMEDA COUNTY,**

**Respondent;**

**3M COMPANY et al.,**

**Real Parties in Interest.**

**A143511**

**(Alameda County  
Super. Ct. No. RG14738647)**

Gerald and Judith Boyd have filed a petition for the issuance of an extraordinary writ commanding the superior court to vacate its October 31, 2014 order denying petitioners' motion for calendar preference pursuant to Code of Civil Procedure<sup>1</sup> section 36, subdivisions (a) and (d), and directing the superior court to grant the motion and schedule a trial of this matter within 120 days of October 31, 2014, in accordance with section 36, subdivision (f). This court requested the submission of prompt opposition to the petition and advised the parties this court was considering the issuance of a peremptory writ in the first instance pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 (*Palma*). Most of the 15 defendants have not opposed the motion in the trial court or before this court, but opposition to the petition has been filed

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

on behalf of three defendants and real parties in interest. Having reviewed the petition, oppositions, and supporting documentation, we shall grant the writ and direct the trial court to schedule trial within 120 days of October 31, 2014.

Gerald Boyd (Boyd) is 71 years old and claims to be dying of mesothelioma due to asbestos exposure. On October 1, 2014, he moved for trial preference, relying primarily on the declaration of his treating physician, Dr. Thierry M. Jahan. The declaration details Dr. Jahan's professional qualifications: a licensed physician, who completed an internal medicine residency at Cedars-Sinai Medical Center/University of California, Los Angeles. Dr. Jahan is the clinical services director of the Division of Hematology/Oncology at the Helen Diller Family Comprehensive Cancer Center and a clinical professor of medicine at the University of California, San Francisco. He specializes in the treatment of various tumors, including mesothelioma. Boyd has been under Dr. Jahan's care since August 26, 2014, and the declaration describes in detail the doctor's professional contacts with Boyd, as well as visits to various specialists and tests that are reflected in the medical record. Boyd originally presented with severe flank pain and was found to have a pleural effusion. In June 2014, a PET/CT scan showed clinical findings "most consistent with mesothelioma." He is not a surgical candidate. A second PET scan in September 2014 revealed an increase in the size of several tumor nodules. Dr. Jahan concludes that Boyd has been suffering from mesothelioma for more than two years. His primary symptoms are chest and back pain. According to Dr. Jahan, "[a]s Mr. Boyd's cancer progresses, he will experience increased pain [and] fatigue and shortness of breath. These symptoms will continue and increase in severity despite intervening pain medications and treatment, and will result in loss of mobility and general disability." His cancer is currently in stage III (out of 4 possible stages). Individuals at stage III can deteriorate very rapidly and die without progression to stage IV. According to Dr. Jahan, "it is [his] professional medical opinion that Mr. Boyd's mesothelioma raises a substantial medical doubt that he will survive more than six months beyond the date of [September 24, 2014]"—i.e., beyond the end of March 2015.

Section 36, subdivision (a), requires trial preference for a person over 70 years of age, who has “a substantial interest in the action as a whole,” and whose health “is such that a preference is necessary to prevent prejudicing the party’s interest in the litigation.” Assuming the elements of the statute are met and there has not been untoward delay by the plaintiff or other extenuating circumstance, this is a mandatory preference. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 696-697.)<sup>2</sup>

There is no question that Boyd is over 70 years old and has a substantial interest in the litigation, which would be prejudiced if he were to die before trial. The declaration of Dr. Jahan is uncontradicted and establishes that there is a substantial medical doubt that Boyd will survive to the July 13, 2015 trial date that the court ordered. The trial court’s view that Dr. Jahan’s declaration is conclusory may justify denial of the motion under section 36, subdivision (d), which is discretionary, but in the absence of contrary evidence, the failure to provide further specificity does not justify denial of the motion under section 36, subdivision (a), which is mandatory.

In opposing the petition, three real parties rely primarily on a September 17, 2014 “progress note” prepared by Dr. Jahan, which states that Boyd is doing reasonably well, able to maintain his activity level and that there had been no recent progression in his symptoms. Also referenced are a July 15, 2014 note stating that Boyd overall was feeling well, with stable weight and good energy, and an August 13, 2014 note stating that he had no symptoms other than anterior lateral chest pain. At the time of his deposition, Boyd testified that he was playing golf twice a week and had only minimal limitations—not being able to climb and trim trees.

Passing the fact that Dr. Jahan presumably was aware of, and took into account, the earlier notes and observations when he signed his declaration on September 24, 2014, there is no evidence that because Boyd is not yet debilitated, his life expectancy is

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<sup>2</sup> In addition, section 36, subdivision (d), grants the court discretion to grant a motion for preference “that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference.”

lengthened. The facts remain that he has a terminal diagnosis of mesothelioma, he is in stage III of that disease, in which rapid deterioration without progression to stage IV may occur, and, in the uncontradicted opinion of his medical expert, his survival beyond six months is subject to substantial medical doubt. Absent any evidence to the contrary, Boyd is entitled to trial preference under section 36, subdivision (a).

Having notified the parties that we might issue a peremptory writ in the first instance, pursuant to *Palma, supra*, 36 Cal.3d 171, we now conclude that petitioners' entitlement to relief is obvious and no useful purpose would be served by plenary consideration of this issue and that there is an unusual urgency, requiring our expediting the normal process. (*Ng. v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.) Therefore, let a peremptory writ of mandate issue, directing the respondent superior court to vacate its October 31, 2014 order, and to grant a new order setting trial in this matter within 120 days of October 31, 2014. This decision shall be final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

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Pollak, J.

We concur:

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McGuinness, P.J.

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Jenkins, J.