Filed 1/30/19 Ellis v. Superior Court CA1/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| DAVID ELLIS, et al.,<br>Petitioners,<br>v.<br>SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO,<br>Respondent;<br>FRICTION MATERIALS, INC., et al.,<br>Real Parties in Interest. | A155248<br><br>(San Francisco County Super. Ct. No. CGC-16-276487) |

David Ellis, plaintiff in this personal injury asbestos action,[1] petitions for a writ of mandate directing the trial court to vacate its August 2018 order denying his motion for trial preference under Code of Civil Procedure section 36, subdivision (a) (section 36(a)). Ellis contends the trial court abused its discretion when it ruled that he had not met his burden of proof under section 36(a). We agree. Ellis presented undisputed and convincing evidence that met this burden of proof. Therefore, the trial court had the mandatory duty to grant him trial preference. We shall issue a peremptory writ of mandate Ellis requests.

[1] Ellis's wife was also named as a plaintiff, but one of the returns states that she passed away shortly before the complaint was filed.

## BACKGROUND

Ellis alleges that he developed asbestos-related metastatic kidney cancer and pleural disease from his exposure to asbestos-containing products or materials. Since he first filed this case in January 2016, the court has set and then continued the trial on four different occasions due to a lack of available courtrooms.

In July 2018, prior to his fifth scheduled trial date, Ellis filed a motion for preference under section 36(a). Section 36 requires a trial court to grant a trial preference and set the case for trial within 120 days if the moving party is over 70 years old, has a substantial interest in the case and his or her health is such that a preference is necessary to avoid prejudicing his or her interest in the litigation. (§ 36 (a), (f).) Ellis proffered three declarations in support of his motion: by Ellis himself, by his counsel David R. Donadio and by Richard A. Levy, M.D., a cardiologist and internist who reviewed Ellis's medical records and declaration, and in 2016 had examined Ellis and prepared a worker's compensation report about his condition. These declarations discussed Ellis's diagnoses, symptoms, medication, side effects, current condition and expected continued deterioration.

Ellis stated in his declaration that he was 75 years old, suffered from cancer in his pancreas, cancer in his right kidney for which further surgery was not an option, and had been diagnosed with vascular disease, heart arrhythmia, chronic obstructive pulmonary disease, asbestos-related pleural disease and post-traumatic stress disorder (PTSD). He was undergoing chemotherapy, which required him to take a drug, Axitinib. This treatment caused him to suffer severe and uncontrollable bowel movements for days at a time, dehydration, migraine headaches and nausea. To help his nausea, he took another drug, Prochlorperazine, that caused him to experience drowsiness, dizziness, and involuntary movements or tremors, which were intensifying as he continued to take the medication. These intensifying symptoms affected his "abilities to focus, remain alert, and concentrate on conversations and what [was] occurring around [him]." He was also suffering from more frequent PTSD episodes that required him to take a medication, Trazadone, that caused side effects that also affected his ability to concentrate and remain

alert. He thought there had been "a definite recent and continuous decline" in his cognitive and physical abilities as a result of his conditions and symptoms. He thought he could still effectively participate in his trial, but that it would be difficult for him to do so.

Dr. Levy stated in his declaration that, based on his 2016 examination of Ellis, and his review of Ellis's medical records and Ellis's declaration, he thought Ellis's physical condition was deteriorating and already impairing his ability to effectively participate in a trial. Dr. Levy stated, "It is my medical opinion that due to Mr. Ellis's recurring metastatic kidney cancer, the symptoms that he suffers from his disease, and advanced age, his ability to participate in his trial is already impaired and will continually decline further as time passes." After stating that his age and weakened conditions made Ellis particularly susceptible to additional complications and that his life expectancy had been significantly shortened, Dr. Levy wrote, "Mr. Ellis . . . is only going to get weaker based on the natural progression of cancer. David Ellis had undergone palliative treatment with no clear improvement. For Mr. Ellis to effectively participate and assist in his trial, so that his interests will not be prejudiced, it is imperative that the trial be held as soon as possible."

Two of the defendants, Temporary Plant Cleaners, Inc. (TPC) and Friction Materials, Inc. (FM) opposed Ellis's trial preference motion, although FM's failure to comply with a local rule led the trial court not to consider its opposition. TPC argued Ellis's showing was insufficient because Dr. Levy was a consulting cardiologist and internal medicine specialist rather than an oncologist who regularly saw Ellis, and that his opinions thus lacked foundation and should not be considered; that plaintiff himself was unqualified to opine about the likely effects of his current ailments on his ability to participate at trial; and that the Donadio declaration was "layered hearsay" in that it was based on the Levy declaration and, therefore, was inadmissible. Thus, TPC argued, "[t]here is no admissible evidence establishing that Plaintiff's life expectancy is reduced such that a preferential trial date would be warranted under [section 36(a)]."

The trial court heard argument on the motion and, after examining the evidence, denied it. The court had "no reason to disbelieve Mr. Ellis with regard to his medical condition." The trial court also did not express any doubts about Dr. Levy's credibility. However, it found his declaration "wanting" for two reasons. First, it concluded from Dr. Levy's curriculum vitae that he was a cardiologist, not an oncologist, that nothing in his educational or professional background related "to the treatment of cancer" and that "every single one of his activities, publications, papers, they are all related to cardiovascular medicine." Second, the records listed in an Exhibit B as considered by Dr. Levy in his 2016 examination of Ellis were undated and, therefore, the court had "no idea whether these relate to what kind of treatment was received." Also, the court found that, although Ellis was "certainly . . . sick," he was not as ill as the plaintiff in a case decided by our colleagues in Division Four of this court, *Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 532 (*Fox*), which we discuss further below. For these reasons, the court ruled that Ellis had not met his burden of proof and denied the motion.

Shortly thereafter, Ellis filed a petition for writ of mandate in this court asserting that the trial court's denial of the motion was erroneous and would cause prejudice that could not be corrected on appeal. Ellis requested that we issue a writ directing the trial court to set a trial date with preference within 120 days. After seeking and receiving opposition from the real parties in interest, we issued the alternative writ.

After hearing further from the parties, the trial court declined to follow the mandate, stating that it was "allowing [FM] to file the return under [Code of Civil Procedure section] 166.1."[2] FM had filed a return the preceding day, and TPC thereafter submitted a letter informing this court that the trial court had not complied with our alternative writ and incorporating its earlier-filed brief in opposition as its return.

[2] Code of Civil Procedure section 166.1 permits a court to indicate in any interlocutory order "a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

## DISCUSSION

### I.

### *Legal Standards*

As we have discussed, section 36(a) entitles a party to a civil action who is over 70 years of age to a trial preference if that party shows and the trial court finds he or she has a substantial interest in the action and his or her health is such that a preference is necessary to avoid prejudicing that interest.[3] Some of the other grounds for preference stated in Code of Civil Procedure section 36 are discretionary (see § 36, subds. (d), (e)), but section 36(a) is "*mandatory*." (*Fox*, *supra*, 21 Cal.App.5th at p. 533, italics added.) Thus, if the court finds (1) the party has a substantial interest in the action and (2) his or her health is such that a preference is necessary to avoid prejudicing that interest, "the court *shall* grant [the preference]." (§ 36(a), italics added.)

Whether the moving party makes a showing sufficient for these two findings is the only relevant consideration in deciding whether to grant a preference under section 36(a). The court is neither required nor permitted to weigh the interests of other parties (*Fox*, *supra*, 21 Cal.App.5th at p. 535); "[m]ere inconvenience to the court or to other litigants is irrelevant." (*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085.) "Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under subdivision (a) of section 36. The trial court has no power to balance the differing interests of opposing litigants in applying the provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations." (*Id.* at pp. 1085–1086; *Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1204–1205, 1206 [trial court had no discretion to strike balance between plaintiff's

---

[3] Section 36(a) states: "(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:

"(1) The party has a substantial interest in the action as a whole.

"(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation."

right to section 36(a) preference and interest of court in efficiency].) The same is true regarding court congestion and limited court resources; neither is grounds for denying the preference. (*Sprowl v. Superior Court* (1990) 219 Cal.App.3d 777, 780–781.)

Further, the Legislature has mandated that a party moving for trial preference under section 36(a) may do so by providing a minimal amount of evidentiary support. Code of Civil Procedure section 36.5 provides that "the medical diagnosis and prognosis" of the party seeking a preference under section 36(a) may be established through the affidavit "signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party."[4] (Accord, *Fox*, *supra*, 21 Cal.App.5th at p. 534, citing Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 12:247.1, p. 12(I)-44 [attorney declaration under section 36.5 "can consist entirely of hearsay and conclusions"].)

"[T]he denial of a section 36 motion is reviewable for abuse of discretion." (*Fox*, *supra*, 21 Cal.App.5th at p. 533.) "Under an abuse of discretion standard of review, the 'trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.] A 'court abuses its discretion " 'where no reasonable basis for the action is shown.' " ' " (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 790.)

## II.

## *Analysis*

The trial court denied Ellis's motion because it concluded he did not meet his burden of proof for three reasons: he relied on the declaration of a cardiologist, Dr. Levy, rather than an oncologist to prove he would increasingly be unable to effectively

---

[4] This can be contrasted with the requirement under subdivision (d) of section 36 of the Code of Civil Procedure, which gives courts the discretion to grant preference to a party whose illness raises a "substantial medical doubt of survival of that party beyond six months," that the motion be "accompanied by clear and convincing medical documentation."

participate in his trial because of his cancer disease and related symptoms; Dr. Levy's 2016 examination of Ellis included a review of records that were too vaguely described to be considered by the court; and Ellis's medical condition is significantly less serious than that of the plaintiff discussed in *Fox*. The court overlooked undisputed, convincing evidence that directly contradicted each of these reasons. When this evidence is considered, it is clear the trial court had no reasonable basis to deny Ellis's motion for trial preference under section 36(a). Other arguments by the defendants are also unpersuasive.

**A. Dr. Levy's Expertise**

Regarding Dr. Levy, the trial court started from the premise that "[a]ll of his professional activities, I dare to say, certifications, practice, license, training, special studies, professional activities, medical device, pharmaceutical, clinical counseling, all relate to cardiology." This characterization is inaccurate because it ignores a significant part of Dr. Levy's expertise: while he had a specialty in cardiology, he was extensively trained and had decades of experience in the practice of internal medicine.[5] In its first paragraph, Dr. Levy's declaration states that he is "Board Certified in *Internal Medicine and* Cardiovascular Disease." (Italics added.) The second paragraph states that since 1979, his "practice has involved General Cardiology-Primary and Secondary Prevention, *and Internal Medicine*." (Italics added.) His CV reflects the same two board certifications, a residency and internship in *internal medicine* and that he practiced in *both areas.* More specifically, it lists the groups with which he practiced and the dates of those affiliations, and shows that during periods spanning from 1980 to the date of his declaration his practice included *internal medicine* as well as cardiology.

[5] "Internal medicine" is "a branch of medicine that deals with the diagnosis and treatment of diseases not requiring surgery" (<https://www.merriam-webster.com/dictionary/internal%20medicine> [as of January 30, 2019]). The Merriam-Webster Medical Dictionary defines it similarly (<http://www.merriam-webster.com/dictionary/internal%20medicine#medicalDictionary> [as of January 30, 2019]). As these definitions attest, it is a broad specialty.

Further, Dr. Levy's curriculum vitae shows he was certified as a qualified medical examiner for the State[6] and served as a medical examiner for workers' compensation cases, including a matter for which he examined Ellis, reviewed Ellis's medical records and issued a 2016 report. Finally, his curriculum vitae showed Dr. Levy's pharmaceutical research was not limited to cardiology and included research on the efficacy or effect of various drugs on patients with conditions such as hypertension, renal function, diabetic nephropathy, and gastrointestinal bleeding and ulcer disease. The trial court overlooked entirely Dr. Levy's extensive training, certification and long-time practice in internal medicine.[7] The court also overlooked that Ellis's cognitive and physical problems were not all directly from his cancer, but also included symptoms caused by three medications he was taking to combat the effects of chemotherapy, nausea and PTSD. (See, e.g., *Cross v. Superior Court* (2017) 11 Cal.App.5th 305, 327 [nature and properties of drugs prescribed, their potential complications, and precautions that should be taken by a physician who prescribes them are within the training and experience of a physician with a specialty in internal medicine].)

---

[6] A "Qualified Medical Evaluator," or QME, is a physician licensed by the state and appointed by the Administrative Director of the Workers' Compensation Division of Industrial Relations based on, among other things, passing an examination demonstrating competence in evaluating medical-legal issues in the workers' compensation system. (Cal. Code Regs., tit. 8, § 1(z); Labor Code, § 139.2.)

[7] The court also disregarded the longstanding and "unmistakable general trend . . . toward liberalizing the rules relating to the testimonial qualifications of medical experts." (*Brown v. Colm* (1974) 11 Cal.3d 639, 645.) While "[s]ome early cases were unbending in requiring expertise as to the precise injury involved in the litigation, as, e.g., not permitting an autopsy surgeon to testify on urology [citation] . . . [o]ther authorities . . . have permitted variations, as, e.g., a pathologist was qualified to testify as to causes of aseptic necrosis [citation]; an expert in otolaryngology to testify regarding plastic surgery [citation]; a homeopathic physician and surgeon to testify on the degree of care required of a physician educated in the allopathic school of medicine [citation]; a pathologist and professor of pathology to testify on the subject of gynecology." (*Id*. at p. 646; see *People v. Catlin* (2001) 26 Cal.4th 81, 131 ["Qualifications other than a license to practice medicine may serve to qualify a witness to give a medical opinion"]; *Chavez v. Glock* (2012) 207 Cal.App.4th 1283, 1319 [work in a particular field is not an absolute prerequisite to qualification as an expert in that field].)

**B. The Bases for Dr. Levy's 2016 Evaluation of Ellis's Condition**

Regarding the court's concern that Dr. Levy's 2016 examination of Ellis included a review of records that were too vaguely described to be considered by the court, this also overlooked some of the record. While Exhibit B only vaguely describes the records Dr. Levy reviewed, his 2016 report and his declaration identifies and discusses a number of the extensive records and tests he administered and/or considered in determining Ellis's condition. Dr. Levy examined Ellis two years before Ellis's motion, on April 19, 2016. He states in his 2016 report that he reviewed two binders of records, including records of medical examinations, CT scans, chest x-rays, an echocardiogram, blood tests, urinalysis, pulmonary function tests, an exercise test, breathing tests and heart rate tests pertaining to Ellis's cancer and other conditions dating from 2002 through April 2016. He interviewed Ellis about his medical history, reviewed Ellis's responses to a questionnaire, and performed a physical examination of Ellis. Based on his observations and his review of this information, he described Ellis's illnesses and medical problems, including his asbestos-related pleural disease, chronic obstructive pulmonary disease/emphysema, recurrent bronchitis and pneumonia, renal cell cancer spreading to pancreas, hypertension, elevated cholesterol, aortic calcification and arrhythmias and other less serious medical problems. There is nothing vague about the documentary or other bases for these conclusions.

Further, in preparing his 2018 declaration, Dr. Levy reviewed Ellis's declaration describing his current chemotherapy regimen and other medications, their side effects, and his current condition. Medical records indicated the chemotherapy medication, Axitinib, had been prescribed for daily use in an attempt to slow the growth of the tumors on Ellis's kidney and pancreas, and Dr. Levy stated the treatment was "purely palliative and not considered curative" and Ellis's "kidney cancer will inevitably worsen." Indeed, medical records Dr. Levy reviewed showed that after each of Ellis's surgeries, his cancer returned or further metastasized, from his left kidney to his right kidney and from his kidneys to his pancreas. By 2018, after Ellis had been taking the chemotherapy drug for about two years, CT scans revealed increases in his cancerous nodules.

In short, when considering the record as a whole, Ellis established that Dr. Levy had extensive experience as an internist, and that he had thoroughly considered pertinent medical records and his own examination of Ellis. Based on these facts that the trial court overlooked, there can be no question that Dr. Levy was competent to opine that, due to Ellis's kidney cancer, advanced age and the symptoms he suffered from because of his disease—which Ellis described as difficulty concentrating and staying alert, drowsiness, dizziness, and involuntary movements or tremors that were intensifying as he continued to take the medication—"his ability to participate in his trial is already impaired and will continually decline further as time passes." Further, Dr. Levy's opinion was undisputed, and it is convincing. It was unreasonable to disregard it.

**C. The Comparison of Ellis's and Fox's Conditions**

Also, the court's conclusion that Ellis's medical condition was significantly less serious than that of the plaintiff discussed in *Fox* is not supported by the record. In *Fox*, the moving plaintiff alleged she had sustained injuries because of her exposure to asbestos many years earlier. Through her own and her attorney's declaration she showed she was suffering from metastasized cancer, asbestos-related pleural disease and other serious heart- and lung-related ailments, was undergoing chemotherapy that had severe side effects, that those side effects impaired her stamina and her ability to focus and concentrate and that continued chemotherapy would worsen those difficulties. (*Fox, supra,* 21 Cal.App.5th at p. 532.) The *Fox* court disagreed with the defendant's argument that "more medical details, including some indication of her 'life expectancy,' " were required, observing that "on this record we see no genuine dispute that [plaintiff] is very sick. It is uncontroverted she suffers from stage IV lung cancer and severe coronary artery disease, among other ailments. She is undergoing chemotherapy treatment, but is in constant discomfort and has difficulty performing basic life functions. And critically, her mental state has deteriorated to a point where she becomes confused and forgetful. All told, the evidence shows that while [plaintiff] is currently able to participate in a trial, she has good reason for concern that will not be the case for much longer as her health

deteriorates. In the face of this uncontroverted showing, we think it was error to deny her preference on the trial calendar." (*Fox, supra*, 21 Cal.App.5th at p. 535.)

There are so many factual parallels between this case and Fox that the trial court could not reasonably conclude Ellis was significantly less ill than Fox. Both are asbestos cases involving plaintiffs with serious and advanced cancer diagnoses, in *Fox*, stage IV lung cancer that had metastasized to Fox's femur, clavicle and spine, and in Ellis's case metastatic kidney cancer that has spread to both kidneys and the pancreas and—despite three surgeries to remove one kidney entirely and portions of the other kidney and his pancreas—has recurred in the remaining parts of those organs. (*Fox*, *supra*, 21 Cal.App.5th at p. 532.)

Fox suffered and Ellis suffers from several other conditions. Fox suffered from asbestosis, asbestos-related pleural disease, severe coronary artery disease and anemia (*Fox, supra,* 21 Cal.App.5th at p. 532). Ellis suffers from asbestos-related pleural disease, vascular disease, heart disease, hypertension, chronic obstructive pulmonary disease and post-traumatic stress disorder.

Fox was treated with chemotherapy that produced severe side-effects, including whole body aches, pain, severe abdominal and bowel complications, nausea and vomiting, dehydration, drowsiness, extreme weakness and fatigue. (*Fox*, *supra*, 21 Cal.App.5th at p. 532.) As her attorney explained, she also suffered from " ' "chemo brain" or a fogginess in thought process that impairs her ability to focus, concentrate and effectively communicate.' " (*Ibid*.) Similarly, Ellis suffers from "increasing fatigue and weakness," "loss of appetite, dizziness, daytime drowsiness, . . . and difficulty sleeping." He is taking a chemotherapy drug (Axitinib) that "causes brutal side effects, including severe and uncontrollable bowel movements that last for several days at a time," preventing him from leaving home for very long and causing dehydration. The chemotherapy drug also causes migraine headaches and nausea. These side effects, he says, "impact every part of my life" and are "wearing me down resulting in a continual decline in my physical and mental health." To address his nausea, Ellis takes another drug (Prochlorperazine) that causes him to experience "drowsiness, dizziness and

involuntary movements or tremors," all of which he states are "intensifying as I continue to take the medication." He states that these symptoms "affect my abilities to focus, remain alert, and concentrate on conversations and what is occurring around me." He also has difficulty sleeping and suffers PTSD episodes at night, for which he is prescribed another medication (Trazadone) that causes him to experience headaches and drowsiness that also affect his "already low energy level, ability to focus, concentrate and remain alert." There has been "a definite recent and continuous decline," he states, "in my cognitive abilities as well as my physical abilities."

Finally, Fox's cancer was responding to the chemotherapy and was in partial remission. (*Fox*, *supra*, 21 Cal.App.5th at p. 532.) Ellis's chemotherapy drug slowed the growth of his cancer but did not stop it, and he was told he would need to take the drug for the rest of his life. Further surgery was not an option.

In short, like Fox, there is ample, undisputed evidence that Ellis is "very sick," suffers from advanced and incurable cancer and other serious ailments, and that the symptoms of his disease and side effects of his medications interfere with "every part of [his] life." Like Fox, he has experienced a reduced ability to focus, remain alert and concentrate and a "definite recent and continuous decline in [his] cognitive abilities." In short, the evidence indicates that Ellis, no less than Fox, has "good reason" for his expressed concern that he will "not be able to participate at all in my trial" if his case is not set for trial soon. (*Fox*, *supra*, 21 Cal.App.5th at p. 535.)

**D. Other Arguments by Defendants**

Defendants criticize *Fox*[8] and devote much of their briefing on attempts to distinguish it, arguing unlike in that case, the trial court here did not apply an incorrect legal standard.[9] We agree that the trial court here was aware of the *Fox* decision and did

[8] FM contends "the already low evidentiary threshold required by Section 36(a) apparently disappears completely in light of *Fox v. Superior Court*" and urges us to provide "guidance" on the evidentiary standards under section 36(a).

[9] The *Fox* court addressed and disposed of several legal arguments the defendant had raised in the trial court or on appeal. First, the court rejected the defendant's

not purport to impose a clear and convincing standard of proof as the trial court had in *Fox*. It recognized the issue it was required to decide was whether Ellis's "health is in a sufficient condition where the Court should grant the motion for preference." But as we have discussed, the court overlooked undisputed evidence by a competent medical expert that Ellis would be prejudiced in his ability to effectively participate at trial if the court did not grant his motion.

Also, FM has characterized Ellis's motion as an unfair attempt to " 'cut the line.' " This too is not supported by the record. Ellis waited over two years while his trial date was set and continued four times, and only then sought a preference. During that period, he experienced a variety of "brutal" side effects and symptoms that, according to Dr. Levy and his attorney, impair his ability to participate in his trial. Ellis met his burden of proof and was entitled to preference under section 36(a). The trial court's denial of a preference to Mr. Ellis was an abuse of discretion.

---

contention that the preference should be denied because the plaintiffs had "failed to support their claimed need for preference by clear and convincing proof," because no such evidentiary standard applies to mandatory preference motions under section 36(a). (*Fox, supra,* 21 Cal.App.5th at pp. 533–534.) It likewise rejected the defendant's fallback position that the motion should be denied "because the [plaintiffs] had not offered a physician's declaration attesting to [the plaintiff's] prognosis in more detail than [their attorney's] declaration provided." (*Id*. at p. 534.) Both arguments, the court opined, erroneously "conflated subdivisions (a) and (d)" of section 36. (*Fox*, at pp. 533, 534.) Regarding the nature of the proof required, the court observed: "The standard under subdivision (a), unlike under subdivision (d), which is more specific and more rigorous, includes no requirement of a doctor's declaration. To the contrary, a motion under subdivision (a) may be supported by nothing more than an attorney's declaration 'based upon information and belief as to the medical diagnosis and prognosis of any party.' " (*Id*. at p. 534.)

## DISPOSITION

Let a peremptory writ of mandate issue, directing the respondent superior court to vacate its order denying Ellis's motion for trial preference under section 36(a) and to issue a new order setting trial in this matter within 120 days of this opinion. To prevent frustration of the rights of the petitioner and promote the interests of justice, this decision shall be final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A); *Swaithes v. Superior Court*, *supra*, 212 Cal.App.3d at p. 1090.) Petitioner shall recover his costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

*Ellis v. Superior Court* (A155248)