SUPREME COURT NO. S240245

IN THE SUPREME COURT OF CALIFORNIA

HAIRU CHEN, et al.,

Plaintiffs and Appellants,

v.

L.A. TRUCK CENTERS, LLC,

Defendant, Respondent, and Petitioner.

SUPREME COURT
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REPLY IN SUPPORT OF PETITION FOR REVIEW

From the Opinion of the Court of Appeal of the State of California,
Second Appellate District, Division Eight, Case No. B265304
on Appeal from The Superior Court of California,
County of Los Angeles, Case No. BC469935
(Hon. J. Stephen Czuleger and Hon. Holly E. Kendig)

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REPLY IN SUPPORT OF PETITION FOR REVIEW

I. INTRODUCTION

Plaintiffs argue against review. But their opposition highlights the need for review to provide clarity to California's trial courts on the correct interest analysis in determining choice of law.

Plaintiffs attack the Petition for Review on five principal grounds. But none supports their argument against review. First, they argue LAT/Buswest contends a choice-of-law ruling should be "written in stone" and – once made – may not be reconsidered or changed. (Answer, pp. 2, 8.) This is not correct. Although a choice-of-law ruling may be subject to reconsideration in rare situations as a case progresses to trial, the parties' relationships to the interested states, and the resulting interests of those states in application of their law, should be tethered to the date of the accident or underlying transaction. Identification of a new potential tortfeasor may change the choice-of-law determination, but the analysis should focus on the relationships of the parties to the interested states on the date of the accident.

Second, plaintiffs assert the Court of Appeal correctly interpreted *Reich v. Purcell* (1967) 67 Cal.2d 551, when it held that only the historical facts of the parties' residences, but not the relevant state interests, should be fixed at the time of an accident. (Answer, pp. 4-7.) This argument ignores the analysis of *Reich v. Purcell* by legal scholars and neither plaintiffs nor the Court of Appeal cite any authority to support this narrow reading of *Reich v. Purcell.*

Third, plaintiffs discount the possibility the Court of Appeal's

decision will lead to gamesmanship and unpredictability in choice of law. (Answer, p. 9 ["There's nothing earth-shattering about the Court of Appeal's ruling. The sky will not fall . . . ."].) But plaintiffs fail to explain how any policy interest is advanced by permitting the choice of law to be shaped by the parties' strategic decisions to add or drop parties. And they offer no reason why this is distinguished from the Court's concerns about forum shopping in *Reich v. Purcell.*

Fourth, plaintiffs contend this case is not appropriate for deciding the issue raised in the Petition for Review because the trial court's initial choice-of-law ruling was incorrect. (Answer, p. 10.) This argument is built on plaintiffs' assertion that Indiana's *lex loci delicti* choice-of-law rule demonstrates it would not apply its own law in this case. (Answer, pp. 12-18.) In support of this contention, plaintiffs argue their position is supported by the "modern" version of the theory of *renvoi.* (Answer, p. 18, fn. 2.) But review is focused on the decision of the Court of Appeal, not the trial court. (Cal. Const., art. 6, § 12(b).) And plaintiffs ignore the rejection of *renvoi* by the legal scholars who developed the governmental interests approach to choice of law. *Renvoi* has never been part of the governmental interest analysis adopted by this Court and, if it were, the Court would not have chosen Ohio law in *Reich v. Purcell.*

Finally, plaintiffs argue the Court of Appeal's decision is consistent with other California authorities and that there is no conflict in the lower courts. (Answer, p. 7.) But the fact that trial courts may have properly interpreted and applied *Reich v. Purcell* does not discount the mischief that will result from the Court of Appeal's decision. Contrary to plaintiffs' suggestion, *Reich v. Purcell's* time-

of-accident rule has been acknowledged or applied in other cases. (See, e.g., *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 108; *Ramirez v. Wilshire Ins. Co.* (1970) 13 Cal.App.3d 622, 629; *Perloff v. Simms Hospital* (D. Mass. 1980) 487 F.Supp. 426, 428-429.)

If anything, plaintiffs' Answer demonstrates the need for review. Should the governmental interest analysis in determining choice of law be based on the parties' relationships to the potentially interested states on the date of an accident or injury? Or, as held by the Court of Appeal and contended by plaintiffs, should a choice-of-law ruling be subject to reconsideration based on changes in the parties or their status through trial or a verdict?

II. THE COURT OF APPEAL'S DECISION CONFLICTS WITH *REICH V. PURCELL*

The Court of Appeal held the time-of-accident rule in *Reich v. Purcell* is limited to the historical facts of the parties' residences and does not otherwise apply to an analysis of state interests. Plaintiffs endorse this interpretation. (Answer, pp. 3-4.) They suggest *Reich v. Purcell's* holding that the parties' residences should be determined as of the date of the accident is only dicta. (Answer, p. 4.) They argue that tethering the parties' relationships with the interested states to the date of the accident would not work in practice because the potential parties or tortfeasors in a case are unknown as of the date of an accident. (Answer, p. 5.) Plaintiffs also contend the Court of Appeal's description of a choice-of-law determination as a motion in limine subject to reconsideration as a case develops, is consistent with

prior decisions of the Court of Appeal. (Answer, pp. 6-7 [citing *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 502; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 90, fn. 6; *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 721, 732].) But none of these cases addressed the time-of-accident rule.

Plaintiffs and the Court of Appeal ignore the scholarly literature that underlies and interprets the decision in *Reich v. Purcell.* This work by legal scholars emphasizes the need for assessing the competing state interests based on the relationships of the parties to the states on the date of an accident or transaction. (See, e.g., Symposium, *Comments on Reich v. Purcell* (1968) 15 UCLA L.Rev. 551, 588-589 & fn. 30 (hereafter *UCLA Symposium*) [comments by Professor Herma Hill Kay; citing Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress* (1964) Sup.Ct.Rev. 89, 92-99].)

The Court's decision in *Reich v. Purcell* to treat the plaintiffs as residents of Ohio meant that California had no interest in application of its law. (*Reich v. Purcell, supra*, 67 Cal.2d at p. 556.) This is not dicta. And plaintiffs' assertion that the rule of *Reich v. Purcell* is somehow isolated (Answer, p. 7 ["Buswest cites no decision from California or any other jurisdiction that conflicts with the Court of Appeal's ruling on this issue."]), is inaccurate and misses the point. As a decision by our Supreme Court, *Reich v. Purcell* is controlling and the Court of Appeal was required to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) To the extent there is confusion over the scope of the time-of-accident rule of *Reich v.*

Purcell, this supports the need for review to clarify whether the choice-of-law calculus should focus on the parties' relationships to the potentially interested states as of the date of an accident or transaction.

As noted in the Petition for Review, the time-of-accident rule was recognized in this Court's decision in *Kearney v. Salomon Smith Barney, Inc., supra*, 39 Cal.4th at p. 108. It was also acknowledged by the Court of Appeal in *Ramirez v. Wilshire Ins. Co., supra,* 13 Cal.App.3d at p. 629. (See also, *Perloff v. Simms Hospital, supra,* 487 F.Supp. at pp. 428-429 [applying rule of *Reich v. Purcell* in determining the plaintiff's relocation to California after discharge from the hospital in a medical malpractice case should be disregarded in the choice-of-law analysis].)[1]

The Court of Appeal's decision rests on its conclusion the trial court should have fully reconsidered its choice-of-law ruling after Forest River/Starcraft settled and, once Forest River/Starcraft was dismissed, Indiana no longer had any interest in the case. (Opn., pp. 14, 20.) These conclusions rest on the assumption the choice-of-law issue is fluid and subject to change based on the addition or dismissal of parties as a case proceeds to trial, and perhaps even until verdict. Here, for example, Forest River/Starcraft was not dismissed until September 8, 2014, three days before the then-scheduled trial date. (Respondent's Appendix, pp. 23, 61, 81.)

The Court of Appeal's decision conflicts with this Court's

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[1] As noted by Professor Kay – and ignored by plaintiffs – the time-of-accident rule is consistent with prior decisions authored by Chief Justice Traynor that "recognized the value of assessing the potentially conflicting interests at the time of the transaction rather than the time of suit." (*UCLA Symposium, supra*, 15 UCLA L.Rev. at p. 589, fn.30 [citing *Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 595; *People v. One 1953 Ford Victoria* (1957) 48 Cal.2d 595, 598-599].)

determination in *Reich v. Purcell* that the parties' relationships with the interested states should be determined as of the date of the accident.

III. THE COURT OF APPEAL'S DECISION OPENS THE DOOR TO UNPREDICTABILITY AND MANIPULATION IN CHOICE OF LAW.

The Court of Appeal's decision describes a choice-of-law motion as a motion in limine subject to reconsideration as a case progresses through trial. (Opn., p. 13.) Plaintiffs discount the possibility this creates opportunities for manipulation or gamesmanship or that it adds an unwarranted element of unpredictability to choice of law. (Answer, pp. 8-10.) They contend that if *Reich v. Purcell* is construed to mean the parties' relationships with the potentially interested states should be linked to the date of the accident, this would mean a choice-of-law ruling, once made, would be immutable. (Answer, pp. 2, 8.) But LAT/Buswest does not contend, and *Reich v. Purcell* did not hold, that a choice-of-law ruling may not be reconsidered if new parties or tortfeasors are identified or new theories of liability are advanced during the progress of a case to trial.

There is no dispute that a choice-of-law ruling should wait until the parties have an opportunity to engage in discovery and identify all potential parties or tortfeasors. This may, in some cases, militate against a choice-of-law ruling until the statute of limitations has expired. But the parties' relationships with the interested states, and the resulting interests of those states in application of their laws,

should be tethered to the date of the accident or, in a commercial case, to the date of the underlying transaction. This provides an element of predictability and reduces the risk of manipulation of choice of law through forum shopping or selective settlements. It helps ensure the factors influencing the choice-of-law decision relate to the underlying facts of the case, not to strategic decisions made by the parties as the litigation progresses to and through trial.

IV. APPELLANTS' ATTACK ON THE TRIAL COURT'S CHOICE-OF-LAW RULING LACKS MERIT AND UNDERSCORES THE NEED FOR REVIEW.

A. Appellants Fail To Explain How The Trial Court's Decision Eliminates The Need For Review.

Plaintiffs assert this case is not the proper vehicle for review because the trial court's "Initial Choice-of-Law Ruling Was Wrong Anyway." (Answer, p. 10.) But the Petition for Review is directed at the decision of the Court of Appeal, which is certified for publication, not at the trial court's ruling. (Cal. Const., art. VI, § 12(b); *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 772.) Plaintiffs' argument that the trial court committed error underscores the need to provide clarification of the choice-of-law calculus under *Reich v. Purcell.*

Plaintiffs argue the trial court found, in its initial and later choice-of-law rulings, that California has no interest in application of its law. (Answer, p. 11.) They also claim the trial court refused to reconsider its initial choice-of-law ruling. (Answer, p. 1.) Although

neither argument appears relevant to the issue presented for review, plaintiffs overstate the record. Although the trial court made references to California having no interest in the litigation, it is more accurate to state that it found California's interest was minimal compared to Indiana's. (2 AA 10:461-462 [any California interest is "subordinate" to the interest of Indiana]; 2 AA 10:462-463 [California "shares the same interest [as Indiana] to protect its resident defendant"].)

In response to plaintiffs' motion in limine seeking a change in the choice-of-law ruling, the trial court did consider the underlying merits of the motion. (2 RT 602-614.) But it found the choice-of-law question "should not change at the last hour before trial because of settlement of certain parties. The parties have prepared for trial based on a definitive ruling by the previous judge. The parties should be able to rely on that ruling in their trial preparation." (2 RT 604.) Plaintiffs fail to offer any reason why the trial court's decision undermines the need for review.

B. Indiana's Choice-Of-Law Rule Is Irrelevant Because *Renvoi* Has No Place In California's Governmental Interest Analysis Where, As Here, The Other State Applies The Rule Of *Lex Loci Delicti*.

Plaintiffs' principal attack on the trial court's choice-of-law ruling is based on their argument that Indiana had no interest in application of its law because its *lex loci delicti* choice-of-law rule would have called for application of Arizona law as the place of the accident. (Answer, pp. 12-17.) This argument rests on the theory of

renvoi, which is alien to California's governmental interest analysis.

Plaintiffs' contention that the trial court erred by refusing to consider Indiana's *lex loci delicti* rule should fail for the fundamental reason that *renvoi* has no place in the governmental interest approach to choice of law. *Renvoi* has been consistently rejected by scholars, including Professor Brainerd Currie, the principal architect of the governmental interest approach. (Currie, *The Disinterested Third State* (1963) 28 Law & Contemp. Probs. 754, 784-785 & fn. 108; see also *UCLA Symposium, supra*, 15 UCLA L.Rev. at p. 589, fn. 31; Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process* (1967) 46 Tex. L.Rev. 141, 172; Comment, *False Conflicts* (1967) 55 Cal. L.Rev. 74, 111, fn. 211.)

Renvoi is a theory that "the rules of a conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well." (Lorenzen, *The Renvoi Doctrine in the Conflict of Laws – Meaning of "the Law of a Country"* (1918) 27 Yale L.J. 509, 511.) *Renvoi* was not part of the interest analysis conducted by the Court when it adopted the governmental interest approach in *Reich v. Purcell*, and it has never been adopted in any later choice-of-law decision by this Court or the Court of Appeal. *Renvoi* ignores the rationale for the governmental interest approach, which seeks to analyze each state's interest in application of its substantive law. A state's choice-of-law rule, particularly a mechanical rule of convenience such as *lex loci delicti*, says little – if anything – about a state's interest in application of its substantive internal law.

In *Reich v. Purcell*, the Court chose Ohio law even though the fatal accident occurred in Missouri. If the Court had applied *renvoi* as argued by plaintiffs here, the result would have almost certainly been different. Ohio then applied the *lex loci delicti* choice-of-law rule. (*Morgan v. Biro Manufacturing Co.* (Ohio 1984) 474 N.E.2d 286, 288 [explaining that prior to 1971, Ohio applied the *lex loci delicti* rule in tort cases].) In other words, Ohio would have applied Missouri law. Under plaintiffs' reading of *renvoi*, Ohio had no interest in application of its law.

Plaintiffs refer to the "modern" *renvoi* doctrine. (Answer, p. 18, fn. 2.) This is an apparent reference to the use of *renvoi* by some courts applying the Second Restatement's most-significant-relationship approach to choice of law. (See LAT/Buswest Respondent's Brief to the Court of Appeal, pp. 24-26.) There may be a basis for employing *renvoi* when the other state applies a governmental interest approach to choice of law. But *renvoi* should have no role in the choice-of-law analysis where – as here – the other state applies the *lex loci delicti* rule. As explained by the New Jersey Supreme Court in applying the governmental interest approach, a *lex loci delicti* rule says nothing about a state's underlying interest in application of its substantive product liability law. It is a rule of convenience designed to achieve simplicity and uniformity. (*Pfau v. Trent Aluminum Co.* (N.J. 1970) 263 A.2d 129, 137; see also Kay, *Theory Into Practice: Choice of Law in the Courts* (1983) 34 Mercer L.Rev. 521, 546.)

In their Reply Brief to the Court of Appeal, plaintiffs relied on and quoted from an article by Professor Russell J. Weintraub to

support application of *renvoi*: " 'If a state would not apply its own law to events outside its borders, for another state to do so would smack of being more Roman that the Romans.' " (Plaintiffs' Reply Brief, p. 18 [quoting Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning* (1986) 65 Tex. L.Rev. 215, 228].) But the full quote from Professor Weintraub demonstrates that *renvoi* has no place in a governmental interests analysis when the other state adheres to the rule of *lex loci delicti*:

> . . . more Roman than the Romans. But a cautionary note should be sounded. Suppose that a state's decision not to apply its own laws is based not on interest analysis but on a territorial rule that sticks a pin in the map without regard to state purposes. In this circumstance, no functional information can be gleaned from that state's choice-of-law rule and it should not be read as a disclaimer of interest in the outcome.

(Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning, supra,* 65 Tex. L.Rev. at p. 228 [citing *Pfau v. Trent Aluminum Co., supra*, 263 A.2d at p. 137].)

V. CONCLUSION

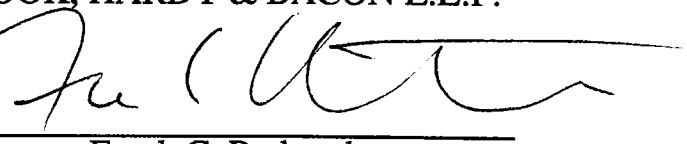
Plaintiffs' Answer demonstrates the need for review. It begs the question presented by the Petition for Review: should the interest analysis in determining choice of law be anchored to the parties' relationships with the potentially interested states on the date of the underlying accident or transaction? Or, as argued by plaintiffs and held by the Court of Appeal, should the interest analysis be subject to reconsideration and change based on the parties' strategic decisions as they litigate a case to and through trial?

LAT/Buswest respectfully requests the Court grant review.

Dated: March 9, 2017

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.



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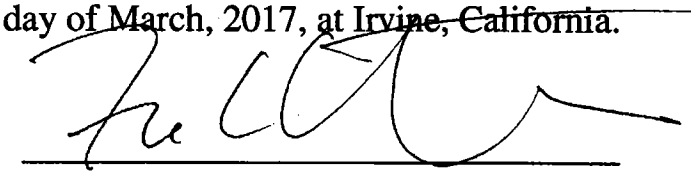
CERTIFICATE OF WORD COUNT

The foregoing Reply in Support of Petition for Review contains 2,993 words (excluding tables and this Certificate). In preparing this Certificate, I relied on the word count generated by Microsoft Word 2010.

Executed this 9th day of March, 2017, at Irvine, California.



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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Suite 1600, Irvine, California 92614.

On March 9, 2017, I served on the interested parties in said action the within:

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Executed on March 9, 2017, at Irvine, California.

Deborah Hohmann
(Type or print name)

D. Hohmann
(Signature)

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