

No. ____
IN THE SUPREME COURT OF THE UNITED STATES

John Berman, Plaintiff, PETITIONER

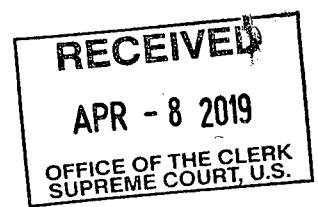
v.

David Modell, Defendant, RESPONDENT

PETITIONER'S APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF
CALIFORNIA

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March 28, 2019



**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT**

To the Honorable Justice Elena Kagan, as Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Petitioner John Berman respectfully requests that the time to file a petition for a writ of certiorari in this matter be extended for 60 days to and including June 24, 2019, since June 23 is a Sunday.

The California Supreme Court denied Berman's petition in this matter on January 23, 2019 (see Attachment A). Berman is filing this application at least ten days before current April 24, 2018 due date. See S. Ct R. 30.2. This Court would have jurisdiction under 28 U.S.C. § 1257(a).

BACKGROUND

This case presents an issue of long-arm, specific jurisdiction (and thus the Due Process Clause of the Fourteenth Amendment) where Petitioner/Plaintiff Berman filed a complaint in the Superior Court of California and alleged an intentional tort by the Defendant, a Maryland resident, who sent communications into California to Berman's California attorney, constituting relevant contacts with California. The Maryland resident's communications stated that he wanted *Berman* to file, *in the Superior Court of California*, a conservatorship petition over Berman's elderly mother, who was a *California resident* for nine months at the time of the communications. Berman's tort action alleged that the Maryland resident, who controlled the mother's finances, withheld financial support for the mother as part of a coercion scheme calculated to force Berman to file the conservatorship petition. The complaint asserted personal jurisdiction under Cal. Code of Civ. Proc. 410.10, California's long-arm statute. The controlling California case—Pavlovich v. Superior

Court 29 Cal.4th 262, 270 (2002), citing Calder v. Jones, 465 US 783 (1984) and surveying case law of other states and the federal regional circuits—concluded that, “courts **must** consider *Calder* in intentional tort cases,” citing the Third Circuit. Pavlovich also concluded: “[W]e are in accord with those California decisions applying the effects test.” Id. 273.

Neither the California trial court nor the appellate court *mentioned Calder*, let alone considered or applied the effects test, in this intentional-tort case. The California Supreme Court summarily denied Berman’s petition for review.

Berman repeatedly explained that case law, particularly in California State courts, has muddled the concepts of so-called “purposeful availment” and “purposeful direction.” Berman pointed out, among other things, that the Ninth Circuit’s opinion in Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004) made this important distinction clear: “[A plaintiff] must establish that [a defendant] **either** purposefully availed itself of the privilege of conducting activities in California, **or** purposefully directed its activities toward California. We often use the phrase “purposeful availment,” in shorthand fashion, to include both purposeful availment and purposeful direction ... but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract. ... A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort.” Id. 803 [Emphasis added].

“Either-or” means, obviously, that a plaintiff need not establish that a defendant sought to avail himself of a California benefit, if the defendant intentionally directs tortious harm into California. Here, [Defendant] “intended to, and did, cause tortious injury to [Berman] in California. *Calder* at 787.

Berman asserted that, despite Schwarzenegger’s making clear the distinction between “availment” and “direction,” this “shorthand availment” notation has gotten so far out of hand so as to reverse the core holdings on intentional torts of both Pavlovich and Calder. Courts now, as did the California trial and appellate courts, are erroneously asking what California “benefit” a tortfeasor is “availing” himself of. Berman stated that nobody cares what an out-of-state tortfeasor’s California “benefit” is, least of all the victim whose California activities have been harmed—in

this case, Berman's ability to take care of his mother in California. Berman also pointed out that even the Calder Court rejected a "benefit" test for a defendant: "Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer [citations omitted] should not be applied to the welder who has no control over and **derives no direct benefit** from his employer's sales in that distant State. Petitioners' **analogy does not wash**. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their **intentional, and allegedly tortious**, actions were expressly aimed at California." Calder, at 789.

In the instant case, the Defendant's plainly intentional and allegedly tortious actions were expressly aimed at Berman's activity of taking care of his mother in California.

Further, the Defendant here *did indeed* seek—and in fact explicitly admitted he wanted—the California benefit of a California conservatorship over Berman's mother, which, on the public record, he made clear was to his benefit. This benefit was *in addition* to Defendant's harmful coercion, specifically targeted at Berman. The Defendant's actions here satisfied *both* "direction" and "availment." In short, the California courts here have made an effective direct reversal of both Calder and Pavlovich, and they have done so under the clearest of circumstances; *none* of the courts, below, *even mentioned* Calder or "effects," which are *mandatory* considerations in an intentional tort action, per Pavlovich.

REASONS FOR GRANTING AN EXTENSION OF TIME

Berman requests additional time of 60 days for the following reasons. Berman's life is effectively consumed in making all efforts he possibly can to regain as much neurological function as possible, in a closing time window, after he was in a high-speed plane crash on January 15, 2018 (NTSB prelim. report CEN18LA077). Berman has double spinal cord and spinal nerve root injuries, with fusion-stabilization hardware in seven cervical vertebrae, five thoracic-lumbar vertebrae,

and in both legs and both ankles (right ankle hardware surgically removed on February 6, 2019).

His diagnosis is "incomplete tetraplegia and superimposed sacral nerve root injuries and right ulnar neuropathy with functional right hemiparesis." (See Attachment B.) This does not describe the full extent of Berman's neurological problems. What were once routine daily tasks now take Berman many times longer.

During January 2018, Berman was in a medically induced coma for two weeks during six surgeries; and then in the hospital for two months; and then in a nursing/rehabilitation home for six months, where he had to relearn to walk, such as he can, from square one.

Berman is playing from behind on all his obligations and is fighting a closing time window for neurological recovery. He is currently simultaneously pursuing multiple routes involving therapies, neurological procedures, and possible surgery, in addition to his daily exercises for negotiating basic walking while maintaining balance.

Berman is also continuing his so-far successful battle against foot and back pain, including neuropathic pain, for which he has taken several successful steps, including the February 6, 2019 hardware removal. He has been successful in his resolution to stay off the Oxycodone opioid, in particular, and eschew all non-standard "medication" and focus on methods for rebuilding the damaged nerve endings and lymphatic capillaries in his feet, the result of the trauma from the crash, so as to make the pain less frequent and diminishing in intensity.

CONCLUSION

For the reasons stated above, Petitioner Berman respectfully requests that the time to file a petition for writ of certiorari in this matter be extended 60 days, from April 24, 2019, to and including June 24, 2019.

March 28, 2019.

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I, John Berman, hereby certify that on this 4th day of April, 2019, I served the document attached to this certificate of service to:

Kyle Montes de Oca at kmo@rhm.legal
Counsel for Defendant/Respondent



John Berman

ATTACHMENT 1

SUPREME COURT
FILED

Court of Appeal, First Appellate District, Division Four - No. A149771 JAN 23 2019

S252839

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA

Deputy

En Banc

JOHN BERMAN, Plaintiff and Appellant,

v.

DAVID MODELL, Defendant and Respondent.

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

CANTIL-SAKUYE

Chief Justice

**Additional material
from this filing is
available in the
Clerk's Office.**