2ND CIVIL NO. B321792

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION

TERRENCE J. OSMAN DBA 1911 BUILDERS

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Respondent.

MIA TRETTA, though her guardian ad litem,
Tiffany Shepis-Tretta,
Real Party in Interest

Superior Court of California, County of Los Angeles,
Case No. 20STCV48910
Hon. STEPHEN P. PFAHLER, Presiding Judge

Preliminary Opposition to Petition for Writ of Mandate

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with rules 8.208 and 8.488 of the Rules of Court, the undersigned, as counsel of record for Real Party in Interest Mia Tretta, though her guardian ad litem, Tiffany Shepis-Tretta, certifies that he knows of no person or entity other than those listed in the caption with a financial interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: August 4, 2022

Richard Schoenberger

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I. INTRODUCTION

The writ petition filed by Terrence J. Osman d/b/a 1911 Builders (hereinafter "Petitioner" or "Osman") asks this Court to grant extraordinary relief because the Petitioner "faces potential liability and expense in this matter," and because he fears "the natural sympathy any juror would feel for Plaintiff [Mia Tretta]." (Pet. at 6.) These concerns fall far short of establishing the threshold requirements for writ review, which include a lack of adequate remedy in the normal course of litigation and the threat of irreparable harm absent writ relief. Real Party in Interest Mia Tretta (hereinafter "Plaintiff" or "Tretta") submits this preliminary opposition in order to correct the factual and legal misstatements in Osman's Petition, to explain why the threshold requirements for writ review are entirely absent here, and to demonstrate why the trial court properly denied the Petitioner's motion for summary judgment.

This personal injury case involves the Petitioner's sale of a "ghost gun kit," from which fully functioning, lethal firearms known as "ghost guns" can be easily assembled. The Petitioner distributes these ghost gun kits without taking any reasonable steps to prevent legally prohibited individuals from buying them.

He sold one such ghost gun kit—so-named because they lack serial numbers and are thus very difficult to trace—to Mark Berhow, a man prohibited by law from possessing firearms. Mr. Berhow's sixteen-year-old son later took the assembled firearm to his high school and used it to shoot then fifteen-year-old Plaintiff Mia Tretta in the stomach, murder two of her friends, and wound two other children.

In January 2022, the Petitioner moved for summary judgment, relying almost exclusively on the argument that he did not owe a duty of care to the Plaintiff because the product he sold was not a firearm under federal or state law. (Petitioner's Appendix of Exhibits (Pet. AE), vol. 1, Ex. 1, pp. 5-24.) In response, Tretta argued that, whether or not the product at issue was a firearm, the Petitioner owed her the ordinary duty of care. regardless of any statutory violations. And, in any case, the Petitioner's actions *did* violate both state and federal firearms laws. In June 2022, the trial court denied Petitioner's motion for summary judgment in its entirety, rejecting his argument that he did not owe a duty of care to the Plaintiff. The case is now set to proceed to trial in January 2023, in the normal course of litigation.

While the Petitioner relies on the "emotional nature of firearms issues [and] the natural sympathy any juror would feel for the Plaintiff" as the basis for his Petition, the fact is that this is straight-forward personal injury case, just like the thousands of other personal injury cases with sympathetic plaintiffs that are filed in this State every year. The existence of a duty is the only legal issue subject to the Petitioner's motion for summary judgment, which was correctly denied by the trial court for failure to meet his burden. And the Petition fails to identify *a single case* supporting any of Osman's legal arguments on the merits. This absence of conflicting trial court interpretations of the relevant law in this case indicates the inappropriateness of writ relief. (See *Omaha Indemnity Co. v. Superior Court (Greinke)* (1989) 209 Cal.App.3d 1266, 1273.)

That Petitioner faces "potential liability and expense in this matter," does not mean he is irreparably harmed or without legal remedy. *(*See *Los Angeles Gay & Lesbian Center v. Superior Court (Bomersheim)* (2011) 194 Cal.App.4th 288, 299-300 ["Conditions prerequisite to the issuance of a writ are a showing there is no adequate remedy at law . . . and the petitioner will suffer an irreparable injury if the writ is not granted"].) Rather, it means

he'd prefer not to go to trial. And a defendant who'd like to avoid trial has perhaps the most ordinary argument of all.

Here, the Petitioner faces no irreparable harm and has an adequate remedy at law: an appeal after final judgment. "A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1269; accord, *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1221.) Plaintiff thus respectfully requests that the Court deny the Petition for Writ of Mandate.

II. BACKGROUND

At 7:30 A.M. on November 14, 2019, then 15-year-old Plaintiff Mia Tretta, a high school freshman, arrived on the quad of Saugus High School and walked over to see her best friend, 14-year-old Dominic Blackwell. (Pet. AE, vol. 1, Ex. 2, p. 136; vol. 2, Ex. 2, p. 186.) Unbeknownst to them, at the same time, a 16-year-old fellow student Nathaniel Berhow (the "Shooter") walked onto the quad with an unmarked, 1911-style "Officer Frame" ghost gun, and opened fire. (Pet. AE, vol. 1, Ex. 2, p. 137; vol. 2, Ex. 2, pp. 203-04.) Dominic and another student, Gracie Ann Muehlberger, were killed; Mia was shot in the stomach; and two

other children were wounded. (Pet. AE, vol. 1, Ex. 2, p. 138; vol. 2, Ex. 2, pp. 203-04.) Mia was airlifted to a hospital where she spent the next six days recovering from a gunshot wound and subsequent surgery. (Pet. AE, vol. 1, Ex. 2, p. 138; vol. 2, Ex. 2, p. 187.) She survived but continues to suffer both physical pain and psychological repercussions. (*Id.*) After killing two students and seriously injuring three others, the Shooter took his own life with the last round in the gun. (Pet. AE, vol. 1, Ex. 2, p. 138; vol. 2, Ex. 2, pp. 203-04.)

The Petitioner, operating as the online business 1911Builders.com, sells to anybody with a credit card build-it-yourself gun kits from which fully functioning, lethal firearms known as ghost guns can be easily assembled. (Pet. AE, vol. 1, Ex. 2, p. 142; vol. 2, Ex. 2, pp. 304-05, 307.) The Petitioner distributes these ghost gun kits without taking any reasonable steps to prevent legally prohibited individuals from buying them. (*Id.*; *see also* Pet. AE, vol. 2, Ex. 2, p. 283.) He sold one such ghost gun kit on August 6, 2016, to Mark Berhow (the "Shooter's Father"), a man prohibited by law from possessing firearms. (Pet. AE, vol. 1, Ex. 2, p. 139; vol. 2, Ex. 2, pp. 328-29.) Between 2013 and 2015, the Shooter's Father had numerous contacts with law

enforcement, including an arrest stemming from physical abuse of his daughter and a psychiatric episode during which the Shooter's Father was found wandering the street in his underwear intoxicated, demanding firearms from a neighbor. (Pet. AE, vol. 1, Ex. 2, p. 139; vol. 2, Ex. 2, pp. 206-07.) Following the latter incident, police took the Shooter's Father to a psychiatric hospital for a review pursuant to California Welfare and Institutions Code section 5150, rendering him a prohibited possessor of firearms. (Pet. AE, vol. 1, Ex. 2, p. 140; vol. 2, Ex. 2, pp. 236-41.) The police thereafter confiscated and destroyed 42 guns from his home. (Pet. AE, vol. 1, Ex. 2, p. 140; vol. 2, Ex. 2, pp. 242-58.)

The Shooter was able to obtain the ghost gun because the Petitioner negligently sold an easy-to-assemble gun kit to his father, even though the Shooter's Father was at the time of his purchase prohibited by law from possessing firearms. (Pet. AE, vol. 2, Ex. 2, pp. 236-41, 328-29.) As a marketing strategy, the Petitioner touts the ease with which his kits can be converted to usable firearms. (Pet. AE, vol. 1, Ex. 2, p. 144; vol. 2, Ex. 2, p. 358.) The Petitioner does not do any investigation, background checks or otherwise, into the purchasers of his ghost gun kits

before selling them. (Pet. AE, vol. 1, Ex. 2, p. 142; vol. 2, Ex. 2, pp. 304-05, 307.) He does not request that they identify whether they have a criminal history or whether they are prohibited by law from owning firearms. (*Id.*) Nor does the Petitioner inscribe serial numbers, or markings identifying the weapons as 1911Builders, rendering the firearms difficult to trace and more attractive to purchasers who are prohibited from owning firearms. (Pet. AE, vol. 1, Ex. 2, p. 142; vol. 2, Ex. 2, pp. 282-83, 351.) Plaintiff seeks recompense for her injuries by bringing causes of action for negligence, negligent entrustment, and public nuisance.[1]

On January 13, 2022, the Petitioner moved for summary judgment. (Pet. AE, vol. 1, Ex. 1, pp. 5-7.) His motion raised one primary ground for granting summary judgment: that he did not owe a duty of care to the Plaintiff because the ghost gun kit was not a firearm.[2] (Pet. AE, vol. 1, Ex. 1, p. 6.) On June 29, 2022, the

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[1] All of Plaintiff's claims reference federal and California law as it existed at the time of the sale in question. Contrary to Petitioner's claims, Plaintiff does not rely on any subsequent changes.

[2] The motion for summary judgment contained a second argument with regard to the public nuisance claim only, which was that Petitioner's behavior was not a "substantial factor" in creating a public nuisance. (Pet. AE, vol. 1, Ex. 1, pp. 22-24.)

trial court heard oral arguments and denied the Petitioner's motion for summary judgment in its entirety in a written order. (Pet. AE, vol. 3, Ex. 4, pp. 489-93.) The court rejected Petitioner's arguments based on both the federal and state definitions of "firearm." (Pet. AE, vol. 3, Ex. 4, pp. 492-93.) The court held that Petitioner owed Plaintiff a duty and found triable issues of material fact on the causation question. (Pet. AE, vol. 3, Ex. 4, p. 493.) Trial is set for January 9, 2023. (*Id.*)

III. FACTS MISSTATED OR NOT ADDRESSED IN PETITION

A. The Petitioner Misstates the Nature of Plaintiff's Claims

The Petition, and the motion for summary judgment on which the Petition is based, rest almost entirely on a misunderstanding of Plaintiff's complaint. The motion repeatedly contends that he "did not owe any legal duty to Plaintiff relating to the sale of the [ghost gun kit]" because the kit "does not meet the definition of 'firearm'" (Pet. AE, vol. 1, Ex. 1, p. 17.) According to the Petitioner, "[i]f the [kit] does not meet the definition of a 'firearm,' Plaintiff's Complaint fails as a matter of law." (Pet. AE,

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Petitioner does not raise this second argument in his Petition as a ground for mandamus relief.

vol. 1, Ex. 1, p. 12; *see also* Pet. at 7.) This is wrong. Of Plaintiff's causes of action (for ordinary negligence, negligent entrustment, and public nuisance) not one requires proving that the Petitioner's ghost gun kits meet the statutory definition of "firearm," because such causes of action do not require proving any statutory violations at all.[3]

The complaint does contain allegations of statutory violations—like those implicating the restrictions on the sale of "firearms" under the Gun Control Act—because these violations give rise to a *presumption* of negligence pursuant to a theory of negligence per se, not because such allegations are necessary to Plaintiff's causes of action. By marketing and selling all the parts and tools necessary to construct a lethal instrumentality to all comers, regardless of age or prohibited status, the Petitioner owed Plaintiff a duty of care mandated by the law of negligence. Thus, even *if*, contrary to the court's ruling, the Petitioner had

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[3] The Petitioner appears to conflate the concept of negligence with negligence per se. The law of negligence mandates that the Petitioner owed Plaintiff a duty of care, regardless of whether he violated a statute in selling the ghost gun kit to the Shooter's father. (See Civ. Code, § 1714, subd. (a) ["Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care"].)

met his burden of showing that the ghost gun kit he sold was not a "firearm" under federal law, such a showing would not completely dispose of any of Plaintiff's causes of action. (See Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action."].)

B. The Petitioner Provides an Incomplete Statement Regarding the Court's Holding in Denying Summary Judgment

While the Petitioner is correct that the trial court found that the ghost gun kits he sells qualify as "firearms" under California law, (Pet. at 15 ¶ 23), that was not the only basis for the trial court's denial of summary judgment.

On the issue of whether the Petitioner's ghost gun kits are firearms under federal law, Osman offered evidence in the trial court, as here, that it takes him "a minimum of eight (8) hours" of assembly before it can be used as a firearm. (Pet. AE, vol. 3, Ex. 4 [Order], p. 492.) Just as he does in this Petition, Osman offered no legal citations to tie this factual assertion to a legal conclusion that his ghost gun kits are not "readily convertible" to expel a projectile, which would qualify them as firearms under federal

law.[4] The court therefore found that the Petitioner had failed to meet his initial burden for summary judgment. (Pet. AE, vol. 3, Ex. 4 [Order], p. 492 ["Given the lack of argument or specific address regarding the language 'may readily be converted to expel a projectile,' as provided in the federal statute . . . [Petitioner] therefore fails to shift the burden regarding a firearm under federal law"].)[5] This was the court's primary finding. Only after establishing this failure on the part of the Petitioner did the court turn to California law.

C. By the Petitioner's Own Admission, His Ghost Gun Kits Meet the Definition of a "Firearm" Because They are Designed to Expel a Projectile by the Action of an Explosive

In his deposition, the Petitioner admitted facts regarding his ghost gun kits that qualify them as "firearms" under relevant federal and state definitions. Under federal law, a firearm is defined, in relevant part, as "any weapon (including a starter gun) which will or is *designed to* or *may readily be converted* to

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[4] Under federal law, a "firearm," is defined, in relevant part, as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive," 18 U.S.C. § 921(a)(3).

[5] Moreover, Plaintiff offered contrary evidence establishing a triable issue of material fact on the "readily convertible" question. (Pet. AE, vol. 2, Ex. 2, p. 282.)

expel a projectile by the action of an explosive." (18 U.S.C. § 921(a)(3), emphasis added.) The California definition is substantially similar, defining a firearm, in part, as "a device, *designed* to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion," (Pen. Code, § 16520, subd. (a), emphasis added), and "the unfinished frame or receiver of a weapon that can be *readily converted* to the functional condition of a finished frame or receiver," (*id.*, § 16520, subd. (g), emphasis added). As the trial court acknowledged, Osman "admits in deposition that the properly completed 'kit' will allow for the creation of a fully functioning firearm capable of expelling a bullet." (Pet. AE, vol. 3, Ex. 4, p. 492 [citing vol. 2, Ex. 2, pp. 299-303 (Osman Depo.)].) Indeed, the Petitioner's own advertisements emphasize that the ghost gun kits are readily convertible into firearms, stating "it's never been easier" to assemble the ghost gun kits into their designed use, as a 1911-style "Officer Frame" ghost gun. (Pet. AE, vol. 2, Ex. 2, p. 358.)

D. The Petitioner's Ghost Gun Kits Were Sold with the Option of Purchasing the Necessary Tools for Assembly as Part of the Kit

The Petitioner states that his ghost gun kits "cannot be fired until they are machined and further assembled using tools

that are not sold as part of the kit." (Pet. at 11 ¶ 9.) This is not always true. As Plaintiff's evidence shows, the Petitioner offered customers the option of purchasing the necessary tools, apart from a common drill, to assemble the kit. (Pet. AE, vol. 1, Ex. 2, p. 152.) Osman admitted this much in his own deposition. (Pet. AE, vol. 2, Ex. 2, pp. 299-300 ["Q: It is true, is it not, Mr. Osman, that one could order a – from 1911 Builders the parts and the tools necessary to complete a fully operational firearm? A: Yes, we sell all the parts and tools"].)

E. The Petitioner's Incomplete Submission to the ATF Is Irrelevant to the Question of Whether His Ghost Gun Kits are Firearms

When the trial court considered Petitioner's full ghost gun kit, it found that California law "clearly renders the kit a firearm for purposes of determining firearm liability." (Pet. AE, vol. 3, Ex. 4 [Order], p. 492.) The Petitioner's submission of *part* of a ghost gun kit one year *after* selling a kit to the Shooter's father is irrelevant to this case. Nonetheless, Plaintiff will correct the record for clarity.

The Petitioner repeatedly attempts a sleight of hand regarding the letter he received from the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and

Explosives ("the ATF"). (Pet. at 12-13 ¶¶ 11-13.) Osman submitted a *part* of the ghost gun kit—the frame—to the ATF on September 15, 2017, one year *after* the August 17, 2016, sale in this case. (Pet. AE, vol. 1, Ex. 1, p. 49-50, 52-59; *see also* vol. 2, Ex. 2, p. 353 [full ghost gun kit].) The ATF's determination regarding a stand-alone frame does not answer the question as to whether the *full* ghost gun kit is "designed to or readily convertible" to fire a projectile, meeting the definition of a firearm.

Another ghost gun seller tried this same tactic (an incomplete submission), and when the ATF discovered that the frame was sold as a part of a complete kit, it wrote back:

> Clearly the submitted sample is simply a component of a larger product. . . . [The ATF] will not render a classification on a partial product submission. In order to receive an evaluation and classification of your product, please submit the complete Polymer80 Model [] Standard Pistol Frame Kit being marketed by your client.

(Pet. AE, vol. 2, Ex. 2, p. 391, underlining in original.)[6]

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[6] Additionally, the ATF rescinded all of its prior determination letters, including the one the Petitioner relies on here, in April 2022. (87 Fed.Reg. 24741.) Thus, the ATF letter no longer has any force or effect, and thus should not have any bearing on the Court's analysis, as the trial court correctly found. (Pet. AE, vol. 3, Ex. 4, p. 492.)

IV. THE PETITIONER HAS FAILED TO DEMONSTRATE WHY EXTRAODINARY RELIEF IS NECESSARY

In order to demonstrate entitlement to mandamus relief, a petitioner must show that he has no adequate remedy at law, and he will suffer an irreparable injury if the writ is not granted. (*Los Angeles Gay & Lesbian Center, supra*, 194 Cal.App.4th at pp. 299-300.) This is why "[a]pproximately 90 percent of petitions seeking extraordinary relief are denied." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1271.) This Petition should meet a similar fate because the Petitioner has entirely failed to establish these requirements.

As a threshold matter, Petitioner has not engaged with the applicable factors for evaluating whether extraordinary writ relief is appropriate. (See *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 218-21 (*Roden*).) He states, several times, that he will be "irreparably harmed," with no further explanation. (Pet. at 9, 16.) Simply saying you will be irreparably harmed, though, does not make it so. The California Supreme Court has held this for more than 70 years: "Although petitioner alleges that he had 'no other plain, speedy, or adequate remedy' and that unless a writ of mandate is issued he 'will suffer great and irreparable harm and injury,' it is obvious that such general

allegations, without reference to any facts, are not sufficient to sustain his burden of showing that the remedy of appeal would be inadequate." (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370, citation omitted.)

The often-cited *Omaha Indemnity* case provides the relevant factors, gleaned from California Supreme Court decisions, for evaluating the appropriateness of a writ:

> (1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue;
>
> (2) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action;
>
> (3) conflicting trial court interpretations of the law require a resolution of the conflict;
>
> (4) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case;
>
> (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and
>
> (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal.

(*Omaha Indemnity, supra*, 209 Cal.App.3d at pp. 1273-74, citations omitted and paragraphing altered for clarity; see also *Roden, supra*, 130 Cal.App.4th at pp. 218-21 [applying *Omaha*

factors]; *Science Applications Internat. Corp. v. Superior Court (Dept. of General Services)* (1995) 39 Cal.App.4th 1095, 1100-02 [same]; *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Employee Relations Bd.* (2005) 35 Cal.4th 1072, 1082 [citing favorably *Omaha* reasoning].)

Regarding the first factor, there is no constitutional issue, never mind a "significant and novel" constitutional issue, presented in this case. And the writ petition is based exclusively on the question of whether the seller at issue owed a duty of care to the Plaintiff – a question that is present in every negligence case. This is simply not the kind of issue that is of widespread interest to the public, such that it warrants mandamus relief. The second *Omaha* factor is not met, either, as the Petitioner had a full and fair opportunity to present his best arguments for summary judgment. The Petitioner has not identified *any* conflicting trial court interpretations of the law, thus failing to satisfy the third *Omaha* factor. For reasons discussed in Section V below, the fourth factor, a clearly erroneous trial court order, is not present here either.

The fifth *Omaha* factor is met when "the party seeking the writ lacks an adequate means, such as a direct appeal, by which

to attain relief." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1274.) "Generally the availability of an appeal constitutes an adequate remedy at law precluding writ relief." (*Phelan, supra*, 35 Cal.2d at p. 366.) Here, the Petitioner has access to a direct appeal after trial, which is the normal course of litigation. (See *Internat. Ins. Co. v. Superior Court (Rhone-Poulenc Basic Chemicals Co.)* (1998) 62 Cal.App.4th 784, 788 ["an order denying summary adjudication is reviewable on appeal from the final judgment"].) For the same reason, the Petitioner will not be harmed in a way that cannot be corrected on appeal, thus failing to satisfy the sixth and final *Omaha* factor. If that were the case, then every order denying summary judgment would be reviewable as of right, not via extraordinary relief. (See *Internat. Ins. Co., supra*, 62 Cal.App.4th at p. 788 [appellate courts "seldom use extraordinary writs to review interlocutory summary adjudication orders (grants or denials)"].)

The cases Petitioner cites in support of mandamus relief here are easily distinguishable and, in fact, highlight why extraordinary relief is inappropriate here. In *Rehamani v. Superior Court (Ericsson)* (2012) 204 Cal.App.4th 945, the court granted the writ petition to avoid the prospect of duplicate trials

when some, but not all, claims were dismissed at summary judgment. (*Id.* at pp. 948-50 ["We grant writ review here to obviate a duplicative expenditure of resources for the courts and the parties, because any reversal of the judgment on appeal would require a second trial on claims that arise out of the same facts and overlap with the issues in those causes of action that have withstood the summary adjudication motion"].) No such prospect presents here, as Petitioner's motion was denied in its entirety.

Roberts v. Superior Court (Weist) (1973) 9 Cal.3d 330, involved a different type of writ applicable to discovery matters involving privilege questions. (*Id.* at p. 336 ["prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases"].) Its reasoning is inapplicable here. And *Babb v. Superior Court (Huntington)* (1971) 3 Cal.3d. 841, noted its "extreme reluctance" to employ a writ to fix a trial court error allowing a malicious prosecution as a cross-claim, a posture that violated the "hornbook law" of such an action:

> 'In most . . . cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment.' However, upon occasion our attention is drawn to instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ. The instant action, with its potential for throwing open the courtroom doors to malicious prosecution cross-actions, is such a case. Accordingly, although we grant relief to these petitioners, we emphasize that this court will hereafter refuse to entertain petitions for prerogative writs to review rulings on pleadings unless the circumstances are as indicated above.

(*Id.* at p. 851, alteration in original, citations omitted.) The Petitioner here does not put forth an analogous argument demonstrating that the trial court similarly let a negligence claim lie in a posture where it structurally could not.

Petitioner also cites *Pacific Gas & Electric Co. vs. Superior Court (Butte Fire Cases)* (2018) 24 Cal.App.5th 1150, a massive, consolidated action of more than 2,050 claims against the electric company for the devastating 2015 fire that consumed more than 70,868 acres and damaged hundreds of structures. In that case, the court issued a writ of mandate reversing a denial of summary judgment on the issue of punitive damages under a specific provision of the civil code. (*Id.* at p. 1154.) It should go without saying that an issue will be of "widespread interest" if it involves

a state utility company's role in starting a massively destructive wildfire that impacted over 2,050 plaintiffs—a completely opposite scenario than the one presented here, involving one plaintiff and one self-described "sole proprietor." (Pet. at 6.)

Because the Petitioner has failed to show why extraordinary relief should issue in this case, his petition should be denied.

V. THE TRIAL COURT CORRECTLY FOUND THE PETITIONER DID NOT ESTABLISH HIS RIGHT TO SUMMARY JUDGMENT

Even if the Petitioner had established the threshold requirements for mandamus relief—which he has not—such extraordinary relief would not be warranted here because the trial court correctly applied the summary judgment standard and held the Petitioner to his "burden of persuasion." (See *Aguilar v. Atlantic Richfield Co.* (2011) 25 Cal.4th 826, 850; *see also Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443 ["A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action"].) The standard is the same here. (See *Blue Shield of Cal. Life & Health Ins. Co. v.*

Superior Court (Kawakita) (2011) 192 Cal.App.4th 727, 732 ["the appellate court must review a summary judgment motion by the same standards as the trial court"].)

The Petitioner admits that Plaintiff's negligence and public nuisance claims rise and fall together. (Pet. at 25-26, citing *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.) Accordingly, the only issue is whether the Petitioner met his burden of showing that the element of duty cannot be established, which he has not. In this case, three separate sources of duty exist: (i) the ordinary, general duty of care (see Civ. Code, § 1714, subd. (a)); (ii) statutory-based duties stemming from federal firearms law (see, e.g., 18 U.S.C. § 922; 26 U.S.C. § 5842); and (iii) statutory-based duties stemming from state firearms laws (see, e.g., Pen. Code, §§ 31900, *et seq*.) In its decision, the trial court declined to address whether the Petitioner owed the Plaintiff an ordinary duty of care,[7] and addressed first the question of whether the ghost gun kit at issue qualified as a firearm under federal law.

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[7] As discussed in Section VI below, the existence of an order duty of care provides an additional ground to support the trial court's ultimate decision to deny the motion for summary judgment.

As discussed above, under federal law, a "firearm" is defined, in relevant part, as "any weapon (including a starter gun) which will or is designed to or *may readily be converted to expel a projectile* by the action of an explosive." 18 U.S.C. § 921(a)(3), emphasis added. The trial court noted that Petitioner had entirely failed to address what "may readily be converted to expel a projectile" meant. (Pet. AE, vol. 3, Ex. 4 [Order], p. 492.) Thus, the trial court held that the Petitioner had not met his initial burden regarding the definition of a firearm under federal law. (*Ibid.*) The Petitioner does not acknowledge this critical aspect of the trial court's ruling in his petition. Instead, he states that the court declined to analyze the language of the federal statute (Pet. at 26), and that is correct—but the court only declined to do so because the Petitioner failed to produce evidence shifting the burden to the Plaintiff on this point. Tretta's claims survive for this reason, alone. Consequently, the trial court did not err in denying the summary judgment motion.

Moreover, the trial court's ruling went on and, in the alternative, addressed two parts of the California definition of firearms, which provide additional support for the existence of a duty in this case: 1) whether the Petitioner's ghost gun kits are

"device[s] designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion," (Pen. Code, § 16520, subd. (a), "the design prong"); and 2) whether the ghost gun kits are "the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver," (*id.*, § 16520, subd. (g), "the readily converted prong").

Regarding the "design" prong, the Court cited to the Petitioner's own deposition testimony to find that the ghost gun kits are designed to be used as a weapon that expels a projectile. (Pet. AE, vol. 3, Ex. 4, pp. 492-93 [citing vol. 2, Ex. 2, p. 300 (Osman Depo.): "Q: Someone who is competent to put together the parts with the tools will have a fully operational firearm when they're done, true? A: Yes"].) The Petitioner has not addressed the "design" prong in his petition or offered any explanation as to why he believes the trial court's finding was incorrect.[8]

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[8] The federal definition of a "firearm" includes a design prong as well: "any weapon (including a starter gun) which will or *is designed to* or may readily be converted to expel a projectile by the action of an explosive[.]" (18 U.S.C. § 921(a)(3), emphasis added.) The same evidence the trial court credited for

As for the "readily converted" prong of the California definition of a firearm, the Petitioner argues, without citing any authority, that as a matter of law, the ghost gun kits are not readily convertible because it takes Osman himself eight hours to assemble the gun. (Pet. at 24.) The court declined to adopt the Petitioner's argument, instead finding "a basis of duty imposed on [Petitioner] based on the sale of said readily convertible kits into an operable firearm. It is reasonable and entirely foreseeable that that [sic] customers of the kits make purchases of the subject kit for purpose of evading purchase bans and/or owning a non-registered firearm." (Pet. AE, vol. 3, Ex. 4, p. 493, citing *Ileto v. Glock Inc.* (9th Cir. 2003) 349 F.3d 1191, 1204-05.) The Petitioner cites no case law or authority for his position that an assembly time of less than one-half day means, as a matter of law, the assembled product is not "readily converted," under California law, into its intended final use.

In short, the Petitioner has not presented any evidence or cited to any case law demonstrating that the trial court erred in denying his summary judgment motion.

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establishing the ghost gun kits meet the California definition of a firearm establish that the kits meet the federal definition as well.

VI. THE TRIAL COURT'S RULING DENYING SUMMARY JUDGMENT IS SUPPORTED BY MULTIPLE ADDITIONAL THEORIES

Not only has the Petitioner failed to demonstrate that the trial court erred, he has also failed to establish that as a matter of law, Plaintiff's additional sources of duty have no merit. The trial court did not address these, but they provide further support for its decision. "[I]t is a settled appellate principle that if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning." (*Young v. Cal. Fish & Game Comm'n* (2018) 24 Cal.App.5th 1178, 1192-1193; *see also Blue Shield of Cal. Life & Health Ins. Co., supra*, 192 Cal.App.4th at p. 732 ["we are not bound by the trial court's stated reasons and review only the ruling, not its rationale," citation omitted].) As the Supreme Court explained more than 120 years ago,

> [n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.

(*Davey v. S. Pac. Co*. (1897) 116 Cal. 325, 329.) Here, there are multiple additional reasons beyond those given by the trial court to uphold the denial of summary judgment.

A. All of Plaintiff's Claims Survive Whether or Not the Petitioner's Ghost Gun Kits Meet the Definitions of a "Firearm"

First, putting aside both the federal and state definitions of a "firearm," and whether the Petitioner's ghost gun kits qualify as a firearm, all of Plaintiff's claims survive. The Petitioner owed a duty of care to Plaintiff regardless of any statutory violations he may have also committed, and regardless of whether his ghost gun kits were "firearms." As California courts have often explained, "the general rule is and should be that, *in the absence of statute or some compelling reason of public policy,* where there is negligence proximately causing an injury, there should be liability." (*Self v. Self* (1962) 58 Cal.2d 683, 689, emphasis added; see also *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 711.) While a statute (or public policy) may create an *exception* to the general duty set forth in Civil Code section 1714, a statute is not necessary to establish the duty in the first place. The existence of a duty of ordinary care is the default.

Pursuant to Civil Code section 1714, subdivision (a), "[e]veryone is responsible not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her

property or person." "In other words, each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances." (*Garcia v. Becker Bros. Steel Co.* (2011) 194 Cal.App.4th 474, 482, citing *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) This is true even where a third party caused the harm – so long as that third party's conduct was foreseeable. (See *Lugtu v. Cal. Highway Patrol* (2001) 26 Cal.4th 703, 716 ["It is well established that one's general duty to exercise due care includes not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct . . . of a third person," citations omitted]; *see also Melton, supra*, 183 Cal.App.4th at p. 531.)

The Petitioner has failed to identify any statutory or public policy basis for creating an exception to the general duty of care in this case. The Petitioner sold an all-parts-included, gun building kit, along with tools and instructions necessary to construct a fully operational firearm, without conducting any type of background check, to a man prohibited by law from possessing such a firearm. Without this sale by the Petitioner,

the shooter, who was a minor, would not have had access to the gun he used to shoot Plaintiff.

B. The Petitioner Also Violated Additional Statutes that Support a Finding of Negligence Per Se

As described above, even though Plaintiff need not establish any statutory violations to prove her causes of action, her allegations regarding "firearms" are not the only statutes the Petitioner violated. Plaintiff also alleges a violation of California's Unsafe Handgun Act ("CUHA"), Pen. Code, § 31900, *et seq*., which gives rise to a presumption of negligence under the doctrine of negligence per se.

CUHA establishes safety standards for all handguns manufactured, imported, and sold in the State. The operative phrase of CUHA provides that, "[a] person who manufactures or *causes to be manufactured* . . . an unsafe handgun shall be punished by imprisonment in a county jail not exceeding one year." (Pen. Code, § 32000, subd. (a), emphasis added.) By including the phrase "causes to be manufactured," the legislature plainly sought to prohibit more than the direct manufacture of unsafe handguns; it also sought to target those that provide all the parts and instructions to build an unsafe handgun. In that

vein, Plaintiff alleges that by providing all the necessary parts, tools, and instructions, the Petitioner caused to be manufactured unsafe handguns.

One of the CUHA safety standards requires that, before being sold, all handguns must be tested and approved by the California Department of Justice ("CDOJ") and placed on the State's "roster." (See Pen. Code, § 32015.) Another safety standard mandates that handguns must have certain safety features, such as a chamber load indicator ("CLI"), a magazine disconnect mechanism ("MDM"), and microstamping capability. (*Id.*, § 31910, subd. (b).) At his deposition, the Petitioner conceded that his kits have never been submitted to CDOJ for testing. (Pet. AE, vol. 2, Ex. 2, p. 309.) Nor do his kits have CLIs, MDMs, or microstamping capability. (Pet. AE, vol. 2, Ex. 2, p. 282.) The Petitioner does not, and cannot, dispute that his kits, once assembled, are "firearms" under California law (and are not on California's approved guns roster and do not have CLIs, MDMs, microstamping, or meet any other CUHA requirements) and are, therefore, "unsafe handguns" that are illegal in the State. Nor does he dispute that he caused to be manufactured such handguns.

Thus, the trial court's denial of the Petitioner's motion for summary judgment was correct for an additional reason: even if he had met his burden of showing the kits are not "firearms," this would not entirely dispose of Plaintiff's negligence cause of action because there are multiple other bases on which to find that the Petitioner owed the Plaintiff a duty in this case. For this reason, too, the Petition should be denied.

VII. CONCLUSION

This Court should deny the Petitioner's bid for extraordinary relief in this straight-forward negligence case. "If the rule were otherwise, in every ordinary action a defendant whenever he chose could halt the proceeding in the trial court by applying for a writ of prohibition [or mandate] to stop the ordinary progress of the action toward a judgment until a reviewing tribunal passed upon an intermediate question that had arisen." (*Omaha Indemnity, supra*, 209 Cal.App.3d at p. 1271, citing *Mitchell v. Superior Court* (1958) 50 Cal.2d 827, 833-834 (conc. opn. of McComb, J.).) The Petitioner has failed to establish any irreparable harm that would result from him facing trial in this case, or that the trial court erred in denying his

motion for summary judgment. Thus, the Petitioner has not demonstrated that he is entitled to a writ of mandate.

Respectfully submitted,

Dated: August 4, 2022

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CERTIFICATE OF WORD COUNT

I certify pursuant to Rules of Court, rule 8.204(c), that the word count of this brief is 7,131 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: August 4, 2022

Richard Schoenberger

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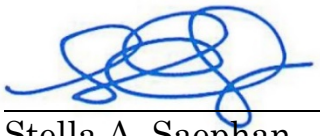

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