S273368

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TRICOAST BUILDERS, INC.

Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA.

Defendant and Respondent.

On review from the Court of Appeal,

Second Appellate District, Division Two

Case No. B303300

Appeal from the Superior Court, Los Angeles County,

Hon. Melvin D. Sandvig

Case No. PC056615

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case turns on two questions, both involving deliberate, tactical decisions of a party: first, whether a party who knowingly and intentionally elects to waive jury has the right to reverse that decision even on the morning of trial, or whether the trial court has reasonable discretion to deny such a request; and second, whether that party's decision not to seek writ relief from the trial court's decision and instead wait to see how the court trial turns out bears reasonable consequences for this decision.

In this case, plaintiff and appellant TriCoast Builders, Inc. ("TriCoast") elected not to post jury fees as was required under the current Code of Civil Procedure, thereby waiving any Constitutional right to a jury trial. When the party that did comply with the statute and pay the fee, defendant and respondent Nathaniel Fonnegra ("Fonnegra"), subsequently waived a jury as well, TriCoast belatedly changed its mind and demanded a jury on the grounds that it was "unfair" for Fonnegra to waive jury too. When the trial court denied TriCoast's demand, but suggested that TriCoast seek a writ of mandate, TriCoast declined to do so and instead proceeded with the court trial. Only after the court issued a verdict adverse to it did TriCoast seek appellate review.

TriCoast's request that this Court reverse the resulting published decision, *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239, in favor of Fonnegra is without merit.

First, the *TriCoast* court correctly concluded that TriCoast, having made the tactical decision not to seek a writ, should

reasonably be required to show that the trial court's decision in some way caused it prejudice beyond simply the lack of a jury trial itself (to which TriCoast was not otherwise entitled, having voluntarily waived it). In this regard the *TriCoast* court followed a line of cases in this state which conclude that such gamesmanship is disfavored, and that the requirement for a showing of actual prejudice is reasonable. TriCoast's insistence that the *TriCoast* court should have disregarded these cases and instead followed a contrary decision, *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, is misplaced, as *Mackovska* was wrongly decided for multiple reasons identified by the *TriCoast* court. In particular, the *Mackovska* decision was premised on the mistaken notion that the denial of a motion for relief from intentional jury waiver, in the trial court's discretion, is effectively no different from the denial of a jury trial in the first instance.

Second, TriCoast erroneously claims that the burden of establishing prejudice should have fallen to Fonnegra, the non-moving, non-waiving party, rather than TriCoast. This argument too fails, as the burden of seeking relief from its own intentional waiver should and did fall on TriCoast.

As the *TriCoast* court correctly concluded, TriCoast bore the burden of establishing that the trial court's decision was an abuse of its discretion. TriCoast failed to do so.

II. FACTUAL AND PROCEDURAL STATEMENT

A. Factual History and TriCoast's Waiver of Jury

As alleged in TriCoast's operative second amended complaint ("2AC"), TriCoast, a construction company, was hired to perform work for Fonnegra at Fonnegra's real property. Clerk's Transcript ("CT") at 040-042. Fonnegra was unhappy with TriCoast's work and terminated TriCoast on or about July 17, 2015. 2AC ¶16; CT at 068. Defendant Whitehouse Construction Inc. was then hired to finish TriCoast's unsatisfactory work. TriCoast alleged it was owed $99,805.05 as a result of this termination. CT at 077:18.

On September 10, 2015, TriCoast filed this lawsuit against Fonnegra as well as a host of other defendants. TriCoast's 2AC asserted claims against Fonnegra and five other defendants for breach of contract, foreclosure of mechanic's lien, an equitable claim for the value of labor and materials furnished, and various theories of tortious interference. 2AC, CT at 065-095.

During the course of the lengthy litigation, all but two of the defendants prevailed either by demurrer or summary judgment and left the case. CT at 011-013; *see also* Minute Order of September 23, 2019, CT at 096.

Although Fonnegra timely posted jury fees (*see TriCoast,* 74 Cal.App.5th at 243, fn 2), at no point in the four years of pre-trial litigation did TriCoast ever post or attempt to post its own jury fees. *Id.* at 248 ("TriCoast did not offer to post jury fees or request a jury until the day of trial.") TriCoast does not contend that this failure was inadvertent, or anything other than a deliberate

decision to avoid paying the fees. *Id.* at 250 ("TriCoast does not claim that it mistakenly waived a trial by jury. Rather, the record indicates that TriCoast's decision not to pay the jury fee was intentional….")

B. Trial Court Decision

A seven-day jury trial was scheduled to begin September 23, 2019. CT at 096. On the morning scheduled for trial, Whitehouse Construction settled for $5,000. CT at 097. Now the sole remaining defendant, Fonnegra exercised his right to waive a jury trial and to instead proceed with a court trial. CT at 096; Reporter's Transcript ("RT") 2 RT 1.

Although acknowledging that TriCoast never timely posted jury fees, TriCoast nevertheless made an oral motion pursuant to Cal. Code of Civil Proc. § 631(g) for relief from its waiver and for permission to post jury fees later that day, contending that Fonnegra's decision to waive a jury was "unfair." 2 RT 2. The trial court found that TriCoast's request was untimely and denied the motion for relief. 2 RT 2. Although the trial court suggested TriCoast could seek immediate writ relief, TriCoast elected to forego that relief and to instead proceed with the court trial. *Id.*

As part of the same hearing, the trial court and the parties discussed witness scheduling for the trial. 2 RT 3-4. The trial court indicated that by beginning a court trial immediately, it could eliminate the witness scheduling issues. *Id.*

A court trial was conducted, in which Fonnegra prevailed. Following trial, a Notice of Entry of Judgment was filed on

October 31, 2019. CT at 142-148. TriCoast filed a Motion for New Trial, which was denied on December 18, 2019. CT at 181-182.

C. The Court of Appeal Affirms

On appeal, TriCoast asserted that the trial court abused its discretion by failing to grant TriCoast's oral motion for relief from its jury waiver on the first morning of trial. The Second Appellate District, Division Two, affirmed the judgment in a published opinion. *TriCoast*, 74 Cal.App.5th at 251.

The majority opinion affirmed that a trial court's decision to grant or deny relief from waiver is not to be disturbed absent an abuse of discretion (*Id.* at 245), and held that TriCoast's failure to demonstrate any prejudice from proceeding with a court trial supported the trial court's decision (*Id.* at 248); that the untimeliness of TriCoast's oral motion on the morning of trial also supported the trial court's decision (*Id.* at 249); that contrary to TriCoast's position, Code of Civ. Proc. § 631 does not require trial courts to grant any and all motions for relief from waiver unless the non-moving party establishes prejudice (*Id.* at 250); and that TriCoast failed to meet its burden on appeal of affirmatively demonstrating error by the trial court (*Id.*)

III. LEGAL ARGUMENT

A. Legal Standard For Relief From Intentional Waiver Of Jury

The California Constitution is clear that "[i]n a civil cause a jury may be waived by the consent of the parties expressed as

prescribed by statute." Cal. Const., art I, § 16. Cal. Code of Civ. Proc. § 631(f)(5) in turn provides that "[a] party waives trial by jury … [b]y failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee." Thus where a party in a civil cause fails to timely post jury fees, that party has no Constitutional right to a jury trial, even where the opposing party did pay the jury fees.

The Constitution itself does not provide any right of a party to withdraw a waiver once made. And Code of Civ. Proc. § 631(g) only states that the trial court "***may***, ***in its discretion*** upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." Cal. Code of Civ. Proc. § 631(g) (emphasis added).

The trial court's decision to exercise such discretion is only subject to reversal where there was an abuse of discretion. *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363 ("As with all actions by a trial court within the exercise of its discretion, as long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, …'") (*quoting Gonzales v. Nork* (1978) 20 Cal.3d 500, 507).

Thus an "abuse of discretion" does not exist "where any reasonable factors supporting denial of relief can be found even if a reviewing court, as a question of first impression, might take a different view." *Gann v. William Bros. Realty* (1991) 231 Cal.App.3d 1698, 1704.

In determining whether to exercise its discretion, a trial court is permitted to consider numerous factors, including but not limited to delay in rescheduling a jury trial, timeliness of the request, prejudice to the litigants and prejudice to the court or its calendar. *Id.*; *see also March v. Pettis* (1977) 66 Cal.App.3d 473, 480.

Once the trial court exercises its discretion, the party appealing that decision bears the burden of affirmatively demonstrating error by the trial court. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 ("The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.") (*quoting Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349).

When reviewing a trial court's order for abuse of discretion, an appellate court presumes that the order is correct. *Id.* at 564 ("[I]t is settled that: 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'")(*quoting* 3 Witkin, Cal.Procedure (1954) Appeal, § 79, pp. 2238-2239).

As discussed in Section II.A above, it is undisputed that TriCoast knowingly failed to timely post its jury fees, and thus

knowingly waived its right to a jury trial. Pursuant to the California Constitution, the plain language of Cal. Code of Civ. Proc. § 631, and long-standing caselaw, the decision to grant or deny relief from this waiver was thus squarely left to the trial court's discretion and cannot be disturbed on appeal unless no "reasonable factors supporting" that decision exist. As discussed in the *TriCoast* opinion and below, TriCoast fails to show the trial court's decision rose to the level of an abuse of discretion.

B. TriCoast's Failure To Demonstrate Prejudice

The primary focus of TriCoast's Opening Brief is the *TriCoast* court's disagreement with the decision in *Mackovska,* 40 Cal.App.5th 1, and the impact of TriCoast's failure to articulate any actual prejudice resulting from the trial court's decision to deny TriCoast's motion for relief. But the court of appeal's conclusions regarding *Mackovska* were correct, particularly where – as here – a party knowingly and voluntarily waived a jury, decided to change that decision at the last moment, and then elected to proceed with the court trial rather than seek writ relief.

1. The Byram, McIntosh *and* Gann *line of authority holds that a tactical decision to see how the court trial turns out before seeking relief warrants a showing of actual prejudice from the trial court's decision*

As articulated in the *TriCoast* decision, multiple courts have long held that a party who declines to seek writ review of an order denying relief from jury waiver, and instead waits until after trial to appeal, must demonstrate actual prejudice from such an order. As articulated in *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654, "[r]eversal of the trial court's refusal to allow a jury trial after a trial to the court would require reversal of the judgment and a new trial. ***It is then reasonable*** to require a showing of actual prejudice on the record to overcome the presumption that a fair trial was had and prejudice will not be presumed from the fact that trial was to the court or to a jury." (emphasis added).

Thus, imposition of this standard where a party makes such an election is a "reasonable" response to the very real and damaging consequences wrought by the appellant's decision to wait to see how the court trial goes before deciding whether to appeal – the fact that judgment must now be reversed and a new trial ordered, with all of its corresponding costs in time, money and energy on the courts and the opposing party.

Moreover, declining to seek writ relief and instead "keeping one's powder dry" until the results of the court trial are known grants the moving party an unfair tactical advantage – they can

wait to see whether they prevail on the bench trial and, if they are unhappy with the result, file an appeal seeking a second bite at the apple, or to use another metaphor favored by the *Byram* court, to play "Heads I win, Tails you lose."

Byram's reasoning was later followed in *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363, where the court found that a party's decision not to seek a writ but to instead "let the case go to trial as nonjury and appeal[] on the jury waiver issue" supported the conclusion that the party "may have been playing the game" of "Heads I win, Tails you lose" referenced in *Byram*, thereby warranting a showing of actual prejudice to justify finding an abuse of discretion.

Later, in *Gann,* 231 Cal.App.3d 1698 at 1704, the court endorsed the *Byram* standard and concluded that as a result of the unfair opportunity gleaned by waiting until after the trial verdict is known to appeal, "writ of mandate is the appropriate vehicle to secure a jury trial allegedly wrongfully withheld without the usual demonstration of prejudice or miscarriage of justice required to obtain a reversal after judgment."

On this point, TriCoast creates a straw man argument by focusing on whether the *Byram, McIntosh* and *Gann* decisions concluded that a writ of mandate was the ***exclusive*** vehicle for seeking relief. *See, e.g.,* Appellant's Opening Brief at 27, 38. But the *TriCoast* decision did not conclude that TriCoast's appeal failed on the procedural grounds that it was an appeal rather than a writ. Instead, what *TriCoast* and each of the above courts concluded is that seeking a writ is the more "appropriate" vehicle,

because of the attendant consequences of a party's failure to proceed via writ. As noted above, a party gains an unfair advantage by making the tactical decision to wait and see how the court trial turns out before electing to appeal the trial court's denial of relief, i.e., it potentially gains two chances to prevail at trial.[1] At the same time, the decision to wait until after trial to appeal necessarily harms both the opposing party and the courts, because of the need for a second trial and attendant costs in time, money and effort. As reflected in those decisions, it is thus "reasonable" to require a party who reaps these advantages and creates these burdens to show that it actually suffered prejudice from the trial court's denial.

2. TriCoast incorrectly relies on Bishop, Simmons, Boal *and* Mackovska *because these cases do not apply where a party knowingly waives a jury trial*

TriCoast contends that the *TriCoast* court's reliance on the *Byram* line of cases – and in fact the cases themselves – were all wrongly decided, and that the Court of Appeal should instead have followed the reasoning found in *Bishop v. Anderson* (1980) 101 Cal.App.3d 821*; Simmons v.* Prudential *Ins. Co.* (1981) 123

[1] This advantage becomes particularly acute if, as TriCoast argues later in its Opening Brief, the standard for reversal of a denial of a motion for relief from a jury waiver is nearly automatic. In other words, TriCoast contends that a party whose motion for relief is denied can nearly always obtain two bites at the apple by deciding to forego writ relief – the court trial, and then if the court trial turns out poorly, an appeal likely resulting in a new jury trial.

Cal.App.3d 833; *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806; and in particular *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, the latter of which explicitly rejected the above reasoning of *Byram*, *McIntosh* and *Gann*. However, these cases are all inapposite to a case in which a party ***knowingly*** waives a jury, seeks to retract that waiver on the eve of trial, and then elects to wait until the conclusion of trial to decide whether to appeal.

The fundamental difference between these two lines of authority is a disagreement over whether the denial of a motion for relief from a knowing, intentional jury waiver in the trial court's discretion is different from the denial of the right to a jury trial in the first instance. According to *Mackovska*, the two are indistinguishable, because "the consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial." *Id.* at 16. Thus, that court concluded that the denial of a motion for relief was effectively a denial of a right to a jury, and requiring the waiving party to show actual prejudice was contrary to "the inviolate nature of the right to a jury trial." *Id.*

But as the court in *TriCoast* pointed out, "[t]he two circumstances are not the same." *TriCoast*, 74 Cal.App.5th at 246. Whereas the Constitution explicitly grants the right to a jury trial, it also explicitly allows that right to be waived. Once waived, the Constitution itself provides no right to get it back. And the applicable statute – Code of Civ. Proc. § 631(g) – is clear

that a jury trial after waiver "may" (not must) be permitted by the trial court, but only ***in its discretion***.

TriCoast's argument also fails because, with the exception of *Mackovska* (discussed below), none of these other cases even addressed the heightened standard articulated in *Byram, Gann* and *McIntosh* regarding actual prejudice, or the distinction between a party who timely seeks relief on a writ as opposed to waiting to see the results of the court trial to decide whether to appeal. Accordingly, these decisions cannot reject reasoning they do not even consider.

Moreover, each of these cases is factually distinct from the present one. The *Bishop* decision involved a unique factual circumstance in which the court concluded that there was no reason for the denial in the record, particularly as the non-moving party "candidly admitted" that there was no prejudice in proceeding with a jury trial, and "no possibility of delay from rescheduling." *Bishop*, 101 Cal.App.3d at 824. Here, there was no such admission by Fonnegra, and the record reflects that there were potential witness scheduling issues which were resolved by proceeding as a court trial, as well as the untimeliness of the request made long after TriCoast initially decided to waive a jury. *Simmons* is inapposite in that it involved the failure of the clerk to abide by a statutory scheme that would have permitted the appellant to demand a jury and pay fees. *Simmons*, 123 Cal.App.3d at 838. And *Boal* is inapposite in that it involved an ***inadvertent*** waiver, which the appellant "promptly" moved to be relieved from upon discovering the error, more than 30 days

before trial was scheduled to begin. *Boal*, 165 Cal.App.3d at 809, fn 1.

With respect to *Mackovska*, the only decision to specifically address the *Byram, Gann and McIntosh* standard, the TriCoast court correctly determined that that decision's rejection of this standard was erroneous and particularly inapplicable to an intentional jury waiver and belated request for relief. Indeed, each of the reasons presented by the court in *Mackovska* are flawed or inapplicable in a case such as the present one.

The court in *Mackovska* first dismissed the *Byram, Gann and McIntosh* decisions as mere dicta. However, this was inaccurate, as the *McIntosh* decision relied in part on the party's failure to seek a writ and the corresponding lack of a showing of actual prejudice to support the conclusion that the trial court did not abuse its discretion. *McIntosh*, 151 Cal.App.3d at 363-364.

The *Mackovska* decision then disagreed with the *Byram, Gann* and *McIntosh* line of cases based on two "presumptions" the court found to be based on a purported misapplication of prior law. *Mackovska*, 40 Cal.App.5th at 14. But the *Mackovska* court's reasoning as to each of these purportedly "faulty" presumptions is itself flawed.

First, the *Mackovska* court disagreed with the premise that courts may assume a party had the benefit of a fair and impartial court trial, because it was purportedly based on cases tried to a jury instead of the court. *Id.* But this statement ignores the intermediate courts' conclusions that such an assumption was appropriate. The *McIntosh* decision relied on *Glogau v. Hagan*

(1951) 107 Cal.App.2d 313, 318-319, which involved a court trial after a jury trial was denied due to waiver. *Glogau* in turn cited *Harmon v. Hopkins* (1931) 116 Cal.App. 184, which was likewise a court trial following a denial of jury trial due to waiver. The *Mackovska* court appears to have then erroneously found that the *Harmon* decision was in turn based on *Doll v. Anderson* (1865) 27 Cal. 248. *Mackovska*, 40 Cal.App.5th at 14. But the *Harmon* court cited *Doll* for the proposition that "[i]t is probably true that the court had the right, notwithstanding such waiver, to submit the case to trial by jury, if he had chosen to do so." *Harmon*, 116 Cal.App. at 188. The opinion does not cite *Doll* for the proposition, set forth later in that section, that "[p]rejudice will not be presumed as a consequence of the issues of fact in a case being tried by the court instead of the jury. On the contrary, the presumption is that the appellants have enjoyed the benefit of a fair and impartial trial, according to the usual modes of procedure under the Constitution and laws of this state."

Moreover, this proposition has been agreed with and followed by not just *Byram, Gann* and *McIntosh*, but numerous other courts over the past several decades, confirming that it is far from a negligent misreading of old cases by a handful of courts. *See, e.g., Holbrook & Tarr v. Thomson* (1956) 146 Cal.App.2d 800; *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 388; *Sidney v. Rotblatt* (1956) 142 Cal.App.2d 453, 456.

The second "faulty presumption" cited by *Mackovska* is that, if a showing of actual prejudice is not required when a party

decides to await the court trial's verdict before deciding to appeal, parties will play "Heads I win, Tails you lose." The *Mackovska* court disregarded such concerns, finding that as long as the waiving party sought relief before the trial court, "the concerns expressed by the court in *Tyler* do not exist." *Mackovska,* 40 Cal.App.5th at 15. But this ignores the specific gamesmanship implicitly recognized in *Byram, Gann* and *McIntosh* – the unfair advantage, and corresponding harm to the court and opposing party, of electing not to proceed via writ and instead waiting to see the outcome of the court trial before appealing, discussed above. The same calculation and unfair advantage that the *Mackovska* court decried as "improper" where a party proceeds without objection at all is also found where a party who, having their objection overruled, decides to proceed with trial rather than seek immediate relief. The game is just played one step later in the process.

Second, the *Mackovska* court found this presumption was inapplicable in the specific situation found in that case, i.e., where the party makes a "***timely*** request for relief from a jury waiver and neither the other party nor the court would suffer prejudice." *Id.* (emphasis added). In *Mackovska*, the request for relief was made only a little over a month after the waiver occurred, and more than two months before trial. *Id.* at 6-8. By contrast where – as here – a party makes such a request long after the waiver occurred and on the eve of trial, the *Mackovska* court's presumption that the moving party was acting diligently and not "playing games" no longer holds true.

The *Mackovska* decision was also flawed in that it relied on several "more recent cases" that purportedly expressed concern regarding the *Byram*, *Gann* and *McIntosh* cases and affirmed that no showing of prejudice was necessary on appeal. *Mackovska*, 40 Cal.App.5th at 17. But the cases cited by the court do not actually challenge the *Byram*, *Gann* and *McIntosh* cases. Indeed, *Brown v. Mortensen*, 30 Cal.App.5th 931 did not involve a motion for relief from a jury waiver at all. *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 19 acknowledged the *Byram* and *McIntosh* cases ***without*** expressing concern about their conclusions, and instead found them inapplicable precisely because it found a difference between the denial of a motion for relief from waiver and the denial of a right to a jury trial in the first instance (as was the case in *Rincon*), in sharp contrast to *Mackovska's* conclusion that the two are indistinguishable. And *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493 involved a determination that there was no waiver at all, without discussion of *Byram*, *Gann* or *McIntosh*.

C. *Mackovska* Permits Parties To Play Games With Jury Waivers Without Consequence

TriCoast contends that the *TriCoast* decision must be reversed because it "muddl[es] the law in numerous ways." Opening Brief at 37. However, each of the purported concerns presented by TriCoast are without merit.

TriCoast's first contention is that the *TriCoast* decision incorrectly identifies writ petitions as the "exclusive" remedy for denial of a motion for relief from jury waiver. Opening Brief at 37-38. But the *TriCoast* decision plainly does not conclude that writs are the exclusive remedy for denials of motions for relief from jury waiver. Were that true, the court would have denied TriCoast's appeal on procedural grounds and moved on. Instead, the decision concluded, consistent with prior opinions, that a writ was the better or "appropriate" vehicle for avoiding the gamesmanship and unfair prejudice to the court and opposing party resulting from a party's decision to wait to decide whether to appeal until after the court trial's verdict is known. Neither *TriCoast* nor *Byram*, *McIntosh* nor *Gann* held that a party was prohibited by law from seeking appellate review, only that the decision to wait to do so holds reasonable consequences.

TriCoast's second contention, that the *Mackovska* court did not conflate denial of a jury in the first instance with denial of a motion for relief after a knowing jury waiver (i.e., a party simply changing its mind for tactical reasons), is also wrong. The *Mackovska* decision states that its conclusion that the erroneous denial of a motion for relief is "reversible per se" – i.e., that no showing of actual prejudice should be required on appeal – was in turn based on the court's conclusion that there should be no distinction between the denial of a jury in the first instance and the denial of a motion for relief after a waiver occurs. *Mackovska*, 40 Cal.App.5th at 16. As explained above, that failure to distinguish between the two situations is itself incorrect, as one

involves a Constitutional right, whereas the other is both permissive and permitted only with the trial court's discretion.

Third, TriCoast complains that, by requiring a showing of actual prejudice, the *TriCoast* decision "renders appellate review from a final judgment virtually useless." Opening Brief at 41. Not so, as the *Byram, McIntosh* and *Gann* line of cases only seek to discourage gamesmanship by asking that a party ***seek*** writ relief, rather than play the game of waiting to see if the trial court turns out to their liking. If writ relief is denied because the appellate court prefers to wait until after trial, the policy of discouraging gamesmanship would still be upheld, and the appellant will have met its obligation to at least try to obtain provisional relief and provide the courts the opportunity to avoid duplicate trials. Moreover, this argument once again conflates a party's Constitutional right to a jury in the first instance with a party's more limited right to seek relief from the trial court if the party later changes its mind – a right which exists only with and to the extent of a trial court's discretion.

Requiring a party who engages in gamesmanship – first by intentionally waiving a jury and then reversing that decision, and second by declining to seek writ relief and instead waiting to see if the court trial verdict is unfavorable – to bear the burden on appeal of showing actual prejudice is "reasonable" and consistent with the Code of Civil Procedure and prior precedent. Removing that rule will only encourage further gamesmanship and create unnecessary burden on courts and parties of repeated trials.

D. An Intentional Waiver For Failure To Pay Jury Fees Is Different From An Inadvertent Waiver

TriCoast's argument also glosses over the policy and statutory reasons why a party who intentionally avoids posting jury fees should be held to a higher standard than one who inadvertently waives a jury and promptly seeks to correct that error.

Prior to 2012, a party seeking a jury only had to make a refundable "deposit" of the initial jury fee 25 days before the initial trial date. As explained by one court, "[t]he only object for the requirement in civil cases that the first day's jury fees must be deposited in advance of the trial date would seem to be that of a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties. In other words, to insure provision being made by the litigants in civil cases for the jury's compensation. Also, possibly to prevent a demand for a jury being used as a pretext to obtain continuances and thus trifle with justice." *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 475-476.

That changed, however, with the 2012 amendment to Code of Civ. Proc. § 631, which now requires a party, with limited exceptions not applicable here, to deposit nonrefundable jury fees on or before the initial case management conference. Code Civ. Proc., § 631(b) & (c).

The legislative purpose of this amendment and the requirement for nonrefundable jury fees to be posted at the beginning of litigation was to raise "continued revenue … for trial courts." *See* Senate Floor Analyses, Sen. Bill No. 1021 (June 27,

2012) pp. 1-2; *accord* Assembly Floor Analysis, Sen. Bill No. 1021 (June 25, 2012) p. 1; bill analyses available online at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120SB1021.)[2]

Accordingly, the public interest and the interests of the courts – specifically, the trial-court funding contemplated by the Legislature – requires the diligent enforcement of the timely posting of jury fees at the outset of the case. If parties are permitted to avoid payment of these early fees with no consequence, safe in the knowledge that they can always obtain relief from the trial court if it later becomes clear a trial will be necessary and the other party will not be paying for the jury, then the purpose of the statute is undermined and the courts will inevitably suffer the consequences.

E. The Non-Moving Party Should Not Bear The Burden On Motions For Relief From Voluntary Jury Waivers

TriCoast finally contends that any motion for relief from a jury waiver should in effect be automatically granted, unless the non-moving party can prove prejudice. This shifting of burdens is unwarranted and unfair, particularly where – as here – the motion for relief is made orally, without prior notice, on the

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[2] This Court has previously held that a request for judicial notice of legislative history materials generally available from published sources is "unnecessary." *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18, *citing Quelimane Co. v. Stewart Title Guaranty Co.* (1988) 19 Cal4th 26, 46, fn. 9.

morning of trial, and where the moving party itself demonstrated no prejudice.[3]

As discussed above, once a party has voluntarily waived its right to a jury, California Code of Civ. Proc. § 631(g) is unequivocal that the party has no "right" to reverse that decision. Instead, a trial court "may" permit a jury trial despite a prior waiver "in its discretion upon just terms." *Id*. The statute does not require a showing of prejudice, nor does it reverse the usual standard of placing the burden upon the moving party. Moreover, prejudice is just one of many factors that may be evaluated in determining whether to exercise discretion. *Gann,* 231 Cal.App.3d at 1704; *March,* 66 Cal.App.3d at 480 ("In exercising its discretion, a court is entitled to consider many factors, including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants.")

TriCoast's position would read entirely new standards and language into the statute, is contrary to the above authority, and

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[3] As is clear from the record, TriCoast's only real complaint was that it was required to spend resources preparing for a jury trial that it never wanted. *See, e.g.,* CT 161 (citing resources expended even though TriCoast "did not demand a jury trial or post jury fees" because Fonnegra was "unwilling" to waive the jury earlier). The record does not show that the lack of a jury trial itself in any way prejudiced TriCoast. Moreover, TriCoast's arguments concerning purported prejudice were all presented in a declaration submitted ***after*** trial. *Id.* At the time TriCoast made its motion for relief to the trial court, it instead focused on whether it had a Constitutional right to insist upon a jury trial, even though it had earlier waived that right. 2 RT 2.

is unsupported by the cases cited in the Opening Brief. TriCoast's reliance on *Tesoro del Valle* is inapposite, as notably, the trial court in that case exercised its discretion to allow a jury trial, and thus the court of appeal was never asked to determine whether denial of such a motion was warranted without a showing of prejudice. Moreover, that case involved an inadvertent waiver, rather than an intentional waiver which a party later sought to change for purely tactical reasons.

Similarly, TriCoast's citation to *Cowlin* is inapposite under today's statutory scheme. *Cowlin*'s decision was based in part on the court's conclusion that the failure to post jury fees was not even a waiver of jury under the statute as it existed at that time, both because such fees were already posted by an opposing party and because the "only object" of such a requirement was "to insure provision being made by the litigants in civil cases for the jury's compensation" and "possibly to prevent a demand for a jury being used as a pretext to obtain continuances." *Id.* at 475-76. Because those factors did not appear to have been present, the court concluded that the claim that jury was waived "is without merit." *Id.* at 475.

The other cases cited by TriCoast similarly are inapplicable to the exercise of the trial court's discretion where there was a knowing waiver. For example, TriCoast cites both *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 811 and *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104, but both held that a trial court abuses its discretion where relief is denied from an ***inadvertent*** waiver. *See Id.*

By contrast, a motion to change an ***intentional*** waiver was squarely addressed in *March,* 66 Cal.App.3d 473. In that case, as here, the plaintiff-appellant voluntarily waived jury, while the defendants requested one. *Id*. at 476. When the defendants subsequently waived a jury, the plaintiff immediately demanded a jury and offered to tender fees. *Id.* That request was denied, and the case proceeded to a court trial. *Id.* The court of appeal subsequently affirmed the denial of the plaintiff's request for relief as being well within the trial court's discretion under such circumstances, even where a jury trial was otherwise anticipated and there appeared to be no danger of delay:

> "[R]elief will be denied where the only reason for the demand appears to be the party's change of mind or where a demand for a jury is being used as a 'pretext to obtain continuances and thus trifle with justice.' … Appellant voluntarily waived a jury, presumably as a matter of trial tactics. No problem of delay was presented, as appellant immediately offered to tender jury fees when the parties who had demanded a jury announced their waiver. But three other parties neither desired nor requested a jury. Considering the disadvantage to these defendants, the trial court denied appellant relief from her waiver. That determination has not been shown to be an abuse of discretion."

Id. at 480 (quoting *Cowlin*, 46 Cal.App.2d at 476) (internal citations omitted).

Finally, TriCoast's insistence on a blanket rule that a non-moving party bears the burden of showing prejudice ignores the circumstances of its own motion – one made orally, without prior notice, as the parties arrived for trial. It would be unfair under such circumstances to place the burden on the unaware, non-moving party to demonstrate prejudice. TriCoast had the benefit of four years of pre-trial litigation to either timely post its fees or to timely ask the trial court for permission to change its mind. Throughout that time, TriCoast knew or should have known that Fonnegra could at any point waive a jury, but TriCoast nevertheless chose to do nothing, presumably in order to avoid having to post jury fees. Having made that decision, it is reasonable to place the burden on TriCoast of showing that Fonnegra's right to waive a jury should have been disregarded by the trial court, acting in its discretion.

For this reason, TriCoast's insistence that the timeliness of its request for relief was irrelevant rings hollow. Although TriCoast may have been relying on Fonnegra's decision to follow the rules and timely post jury fees, that reliance was misplaced, as Fonnegra was well within his rights at any time to withdraw his request for a jury. If TriCoast wished to preserve its right to a jury, it should have posted its own fees, or at least sought relief well in advance of trial. TriCoast's argument also overlooks the witness scheduling issues that the trial court considered and resolved by denying TriCoast's motion and proceeding immediately with a court trial.

IV. CONCLUSION

For the reasons set forth above, TriCoast's arguments are without merit. TriCoast made the tactical decision not to seek a jury. When TriCoast attempted at the last moment to reverse that decision, the trial court acted within its discretion to deny the request. TriCoast then made the further tactical decision not to seek writ relief. Having done so, the *TriCoast* court properly determined that it was reasonable for TriCoast to show actual prejudice from the trial court's denial, which TriCoast failed to do. The *TriCoast* court further correctly concluded that TriCoast bore the burden, as the moving and appealing party, of showing that the trial court should have exercised its discretion in its favor, which it likewise failed to do. Fonnegra respectfully asks that this Court affirm the Court of Appeal's decision.

DATED: July 13, 2022 Respectfully Submitted,

/s/Eric Bensamochan
Eric Bensamochan, Esq.
Attorney for Respondent

Certification of Word Count CRC 8.204

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 7,229 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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