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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TRICOAST BUILDERS, INC.,

Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA,

Defendant and Respondent.

After a Published Opinion by the Court of Appeal
Second Appellate District, Division Two
Appellate Court Case No. B303300

Appeal From Los Angeles Superior Court
Hon. Melvin D. Sandvig
Superior Court No. PC056615

PETITION FOR REVIEW

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ISSUES PRESENTED

This petition presents two important questions of constitutional law on which direct conflicts exist in the decisional authority regarding a party's right to a jury trial:

(1) When a party on appeal from a final judgment after a bench trial challenges the denial of relief from the waiver of the right to a jury trial under Code of Civil Procedure, section 631, subdivision (g)[1], must that party demonstrate actual prejudice to obtain a reversal? In other words, is an abuse of discretion by the trial court sufficient grounds for reversal, as determined by the Second Appellate District, Division Seven, in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*), or, to the contrary, is an additional showing of actual prejudice required, as the majority of the appellate panel decided in the instant matter? Although two lines of authority on this question have existed for four decades, the conflict is now more pronounced given the contrasting opinions in *Mackovska* and the majority in this case.

(2) In determining whether to grant a party relief from the waiver of the right to a jury trial under section 631, subdivision (g), must the trial court find prejudice to either the

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[1] Statutory references are to the California Code of Civil Procedure.

opposing party or the court in order to deny relief from the waiver? In other words, does the trial court abuse its discretion by denying relief from the waiver absent a finding of prejudice, as determined in *Mackovska*, *supra*, 40 Cal.App.5th 1, or, to the contrary, is prejudice just a mere factor informing the trial court's discretion, as the majority decided in the instant matter?

WHY REVIEW SHOULD BE GRANTED

Article I, section 16 of the California Constitution makes the right to a jury trial "an inviolate right" that "shall be secured to all." (Cal. Const. art. I, § 16.) "'The jury as a fact-finding body occupies so firm and important a place in our system of jurisprudence that any interference with its function in this respect must be examined with the utmost care.'" (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1225 (*Monster, LLC*).) This Court's review of the instant matter is critical because the majority opinion represents a significant departure from existing authorities on this vital constitutional right. (*TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*).)[2]

The *TriCoast* majority opinion substantially erodes the constitutional guarantees of this state. It does so in two ways:

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[2] A copy of the slip opinion in this case is attached to this petition. (Cal. Rules of Court, rule 8.504(e)(1)(A).)

First, the majority held a party challenging the denial of relief from a jury trial waiver on appeal from a final judgment must show actual prejudice in order to obtain a reversal. Second, the majority held a trial court can deny relief from a jury trial waiver absent a finding of prejudice to the opposing party or the court from the granting of such relief. Through these holdings, the majority has created conflicts in the case law, which, absent this Court's intervention, will leave litigants and lower courts without uniform standards to evaluate a request for relief and to review the denial of such a request. This Court's review is necessary to prevent uncertainty in the law and the resulting infringement on jury trial rights.

Initially, by imposing on appellants the impractical, if not impossible, burden of demonstrating actual prejudice caused by the denial of relief from a jury trial waiver, the *TriCoast* majority rendered appellate review from final judgment virtually untenable. Although the majority recognized proving actual prejudice would be difficult, if not impossible, for an appellant, it disregarded such concerns, establishing an unworkable rule that will jeopardize jury trial rights. An actual-prejudice requirement places the right to a jury trial in civil cases effectively beyond the reach of meaningful appellate review.

The *TriCoast* majority opinion also entrenched a dual-track system of appellate review for orders denying relief from a jury

trial waiver. By demanding a showing of actual prejudice in a judgment appeal, the majority created a stricter standard of review for appeals than for petitions for extraordinary writ relief, thereby pressing civil litigants into bringing prophylactic writ petitions to avert a dooming standard of review on appeal. The opinion will needlessly generate more writ petitions by making appeals destined for failure. But writ relief is itself discretionary and rarely granted, even under meritorious circumstances. Relying on writ relief, therefore, further erodes appellate review of orders denying relief from a jury trial waiver. This Court's review is necessary and urgent to preserve the well-established right to challenge an order denying relief from a jury trial waiver on appeal from a final judgment.

To understand the conflict of authorities and analytical difficulty in this area of law, the Court need consider only *Mackovska*, *supra*, 40 Cal.App.5th 1, from Division Seven of the Second Appellate District and the dissent of Justice Ashman-Gerst in the instant matter. On the one hand, *Mackovska* held a judgment is reversible upon a showing that relief from a jury trial waiver was denied improperly, and a party who objects to a bench trial and seeks review of the order denying relief – whether by writ petition or appeal from the judgment – is not required to show actual prejudice. On the other hand, the *TriCoast* majority held a party who fails to seek writ review of an order denying

relief from jury waiver must demonstrate actual prejudice when challenging such an order on appeal. Although *Mackovska* temporarily resolved and clarified the confusion that had been brewing in case law for four decades, *TriCoast* upends that resolution.

As the appellate court in *Mackovska* and the dissent in *TriCoast* both recognized, however, it is "difficult, if not impossible, … to show prejudice from the denial of the constitutional right to a jury trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16; slip opn. p. 4, dis. opn. of Ashman-Gerst, J.) For this reason, Justice Ashman-Gerst urged adherence to the rule of law pronounced in *Mackovska* that foregoes any actual prejudice requirement. (Slip opn. p. 4, dis. opn. of Ashman-Gerst, J.)

TriCoast also created a conflict of authority on another dimension in this area of law: the prejudice to the other party that the trial court must find before denying relief from waiver, and who bears the burden of demonstrating such prejudice. On the one hand, *Mackovska*, following a long line of appellate court decisions, held that "[d]enying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (40 Cal.App.5th at p. 10.) On the other hand, the *TriCoast* majority "disagree[d] with courts that have suggested the opposing party bears the burden of demonstrating prejudice

from the granting of relief from waiver." (Slip opn. pp. 13-14.) And, while *Mackovska* recognized that "the crucial question is whether the party opposing relief will suffer any prejudice" (40 Cal.App.5th at p. 10), the *TriCoast* majority held that "[p]rejudice to the parties is just one of several factors the court may consider in exercising that discretion." (Slip opn. p. 14.) In addition to eschewing prejudice to the opposing party, the majority also affirmed the denial of relief absent any showing of prejudice to the trial court, which has in certain instances fulfilled the requirement of prejudice to support the denial of relief.

TriCoast, therefore, has thrown the law regarding relief from a jury trial waiver into disarray. It directly conflicts with *Mackovska*, reigniting the long-standing conflict on the standard of review in a judgment appeal challenging the denial of relief from a jury trial waiver. It also directly conflicts with *Mackovska* and older authorities on the well-established principle that prejudice to the opposing party or the court is crucial to support the denial of relief from a jury trial waiver. This Court should grant review to resolve and clarify the law on these important questions. (Cal. Rules of Court, rule 8.500(b)(1).) Such review is necessary and appropriate to prevent the erosion of constitutional jury trial rights.

FACTUAL AND PROCEDURAL STATEMENT

Plaintiff and appellant TriCoast Builders, Inc. (TriCoast), a general building contractor, initiated this lawsuit against defendant and appellant Nathaniel Fonnegra, the owner of property where TriCoast had performed work. (CT 22.) A jury trial was scheduled to start on September 23, 2019, as reflected in the trial court's minutes. (CT 96.) On the morning of trial, when the trial court called the matter for a jury trial, Fonnegra stated that he decided "over the weekend" to waive his right to a jury trial. (*Ibid*; 2 RT 1.) TriCoast objected because its counsel had prepared for a jury trial and Fonnegra's decision to waive a jury trial the morning it was set to start was unfair. (2 RT 2.) TriCoast made an oral request to proceed by jury trial pursuant to section 631, subdivision (g), and offered to post jury fees that day. (*Id*. at 1.)

Fonnegra, however, sought to have the case proceed with a bench trial on the ground that TriCoast had waived its right to a jury trial by failing to post jury fees within the timeframe specified by section 631, subdivision (d). (2 RT 2.) The trial court agreed with Fonnegra, rejected TriCoast's offer to post fees that day as untimely, and ruled the case would proceed as a bench trial. (*Ibid*.) The trial court stated: "When the fees haven't been paid, and you haven't paid them, the party that did pay them has waived the jury trial, so that's it." (*Ibid*.) Although TriCoast

insisted it had a constitutional right to a jury trial, the trial court remarked TriCoast could seek immediate writ review of the ruling. (*Ibid.*) The trial court then denied TriCoast's oral request to proceed by a jury trial, "find[ing] that [TriCoast] not having paid jury fees, has waived trial by jury." (CT 96.) TriCoast did not seek writ review. After a bench trial, Fonnegra prevailed, and judgment was entered in his favor. (CT 112, 134-35, 138-39.)

TriCoast moved for a new trial. (CT 149-53, 154-60.) In support, TriCoast's counsel submitted a declaration, averring that, "[d]uring four years of pretrial proceedings in this case, [Fonnegra] demanded a jury trial. [TriCoast] did not demand a jury trial or post jury fees. Nonetheless, [TriCoast] was required to prepare for a jury trial as a result of Fonnegra's demand. And, [TriCoast] expended considerable resources in doing so and tailored its opening statement, exhibits, witnesses, and presentation for a jury." (CT 161.) In fact, in the two years leading up to trial, "the [trial] court encouraged [Fonnegra] to waive the jury," but he was not "willing to do so." (*Ibid.*) Thus, when the trial court called the matter for a jury trial, TriCoast "placed its four sets of exhibit books, placed the projector for the jury to follow the exhibits, and reviewed voir dire and opening statement written for the jury." (*Ibid.*) Despite this showing, the trial court denied TriCoast's new trial motion. (CT 181-82.)

TriCoast appealed from the judgment. (CT 183.) TriCoast argued the trial court had abused its discretion by denying relief from the jury trial waiver pursuant to section 631, subdivision (g), and resolving the case through a bench trial. (AOB 10-12.) The Second Appellate District, Division Two, affirmed the judgment in a published and divided opinion. The majority held that, because TriCoast had not sought writ review of the trial court's order denying relief, TriCoast was required, but failed, to demonstrate it suffered actual prejudice from the ensuing bench trial. (Slip opn. pp. 3-5.) The majority also determined that, because TriCoast's offer to post jury fees on the day of trial was untimely, the trial court did not abuse its discretion by denying relief from the jury trial waiver. (*Id*. at p. 5.) This was so, according to the majority, even though the opposing party suffered no prejudice, because prejudice to the opposing party is merely a factor the trial court can consider in exercising its discretion. (*Id*. at pp. 5-6.)

Justice Ashman-Gerst, in dissent, "disagree[d] with the majority's conclusion that 'TriCoast's failure to demonstrate prejudice from proceeding with a court trial after its request for relief from jury waiver was denied supports affirmance of the trial court's order." (Slip opn. p. 4, n.3, dis. opn. of Ashman-Gerst, J.) She also stated that, "[e]ven if TriCoast were required to demonstrate prejudice, the appellate record confirms that it did"

because its counsel "expended considerable resources" preparing for a jury trial and "tailored its opening statement, exhibits, witnesses, and presentation for a jury." (*Id*. at p. 5, n.4, dis. opn. of Ashman-Gerst, J.) In addition, according to Justice Ashman-Gerst, Fonnegra did not show it would suffer prejudice from the granting of TriCoast's request for relief from its jury trial waiver. (*Id*. at pp. 5-6, dis. opn. of Ashman-Gerst, J.)

TriCoast did not file a petition for rehearing in the Court of Appeal.

LEGAL DISCUSSION

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE WHETHER A PARTY MUST SHOW ACTUAL PREJUDICE TO OBTAIN REVERSAL OF A JUDGMENT BASED ON THE ERRONEOUS DENIAL OF RELIEF FROM A JURY TRIAL WAIVER.

A. Improper Denial of Relief From a Jury Trial Waiver Is Reviewable by Both Writ and Appeal.

The California Constitution accords every civil litigant the right to a trial by jury. (Cal. Const. art. I, § 16; *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951 (*Grafton*).) Section 631, subdivision (a), sets forth the Legislature's command that the right toa jury trial shall be "preserved to the parties inviolate." Together, section 631, subdivisions (b) and (f), further provide that waiver of the right to jury trial in civil cases can occur only through one of six enumerated ways, including, as

relevant, a party's failure to timely post jury fees as specified by the statute.

Section 631, subdivision (g), authorizes the trial court to relieve a party from waiver of the jury trial right "in its discretion upon just terms." California's appellate courts have long held that a party can challenge the denial of relief from waiver through either an appeal or extraordinary writ proceeding. (See, e.g., *Monster, LLC*, *supra*, 12 Cal.App.5th at p. 1224 ["[A]lthough the denial of a jury trial is 'reviewable on appeal from the judgment,' review by way of extraordinary writ is 'normally ... the better practice' so as to avoid 'time needlessly expended in a court trial'"]; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 862 (*Van de Kamp*) ["While the better practice is to seek review of such a ruling by writ, saving the time and expense of a court trial if a jury trial improperly was denied, the ruling may be reviewed on appeal from the judgment"]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522-523 (*Selby*) [writ review "would normally appear to be the better practice in the interest of saving the time needlessly expended in a court trial if an erroneous jury-trial denial has occurred. Nevertheless, a denial of a jury trial is also reviewable on appeal from the judgment"].) Thus, a party's decision not to bring an immediate writ petition when a trial court denies relief from waiver does not preclude review in an appeal from the final judgment after a bench trial.

B. Under *Mackovska*, Actual Prejudice Need Not Be Shown to Prevail on Appeal After the Improper Denial of Relief From a Jury Trial Waiver.

Notwithstanding the consensus that orders denying relief from jury trial waiver can be challenged on appeal from the final judgment, California's appellate courts have disagreed in their explication of the appropriate standard of review of such orders. In particular, for four decades now, existing case law has been uncertain and confused as to the effect of a party's decision not to immediately petition for a writ of mandate when the trial court denies relief under section 631, subdivision (g). In *Mackovska, supra,* 40 Cal.App.5th 1, the appellate court tried to resolve the uncertainty and confusion. The majority opinion in *TriCoast*, however, not only has brought back the uncertainty and confusion, but thrown into disarray the applicable standard of review. As such, a direct conflict exists in the law. The time is now for this Court to step in and resolve the conflict so that litigants can make well-informed decisions regarding their constitutional jury trial right and obtain review based on a universal standard, not one dependent upon which panel of the Court of Appeal hears their case.

The conflict in the case law dates back at least to the early 1980's. *Mackovska* acknowledged the broad split of authority concerning the applicable standard of review for a challenge on

appeal from a final judgment to the denial of relief from a jury trial waiver. *Mackovska* recognized "[s]ome cases hold that when a party seeks review of such an order on appeal from the judgment without having filed a petition for writ of mandate challenging the order, the party must show actual prejudice from the denial of a jury trial," while "[o]ther cases hold that the party appealing from the judgment need not make such a showing of prejudice." (*Mackovska, supra,* 40 Cal.App.5th at p. 4 [surveying authorities].)

Mackovska described a line of cases holding that an appellant must show prejudice when challenging on appeal from a final judgment the denial of relief from a jury trial waiver. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 13.) These cases include *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698 (*Gann*), *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357 (*McIntosh*), and *Byram v. Superior Court* (1977) 74 Cal.App.3d 648 (*Byram*) (collectively, the *Gann, McIntosh,* and *Byram* cases). (*Ibid*.) *Mackovska* borrowed from *Gann*'s summary of these authorities:

> Some courts have held that a party should not be able to obtain a reversal on [the ground that relief from jury trial waiver was improperly denied] after judgment without a showing of prejudice occurring in the trial. [Citation.] Although it is difficult to envision

> precisely how one shows prejudice from denial of a jury trial aside from that inherent in deprivation of a constitutional right, the seldom articulated reason for allowing the trial court's determination to stand is that a party should not be able to play "Heads I win. Tails you lose" by waiting until after judgment to seek review of the denial of relief from jury waiver. [Citation.] Thus courts have held that prejudice will not be presumed from the fact that the trial was to the court rather than to the jury. [Citations.] Rather, it is presumed that the party had the benefit of a fair and impartial trial.

(*Mackovska,* at pp. 13-14, quoting *Gann*, at p. 1704.)

The "coin-tossing" metaphor referenced in the *Gann, McIntosh, and Byram* cases, however, has been misunderstood and misconstrued. Originally, *Byram* explained that appellate courts often will affirm a trial court's denial of relief from a jury trial waiver to prevent litigants from engaging in gamesmanship, i.e., playing "'Heads I win, Tails you lose," and objecting to a bench trial only after obtaining an unfavorable result. But *Byram* actually determined that issuing a writ was warranted because that case did not involve gamesmanship "[i]nasmuch as the petitioner sought a jury trial throughout the proceedings and took prompt action" to rectify the waiver. (74 Cal.App.3d at p. 654.) Consequently, no gamesmanship was at issue in *Byram*,

and the appellate court's statement of concern about the possibility of gamesmanship was not relevant to the outcome of the case.

Nevertheless, several years later, *McIntosh* misconstrued *Byram*'s reference to the coin-tossing metaphor in holding that "reversal…*after* trial to the court…would require reversal of the judgment and a new trial" and that prejudice should be required "to overcome the presumption that a fair trial was had." (*McIntosh*, *supra*, 151 Cal.App.3d at p. 363.) *Gann* later cited to *McIntosh*'s and *Byram*'s references to the coin-tossing metaphor to determine a writ of mandate is required "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." (231 Cal.App.3d at p. 1704.) *Gann*, however, did not heed *Byram*'s warning that "it may be difficult … to establish … prejudice[] by the denial of a jury trial" after trial has already taken place and that, even when a party "could establish such prejudice as to warrant reversal of the judgment, such a procedure would be inefficient and time consuming." (*Byram*, *supra*, 74 Cal.App.3d at p. 654.) The coin-tossing metaphor, therefore, was dicta in *Byram* and does not support the later decisions in *McIntosh* and *Gann*.

Mackovska also recognized a conflicting line of authority holding the opposite of the *Gann, McIntosh,* and *Byram* cases,

i.e., the improper denial of jury trial is per se prejudicial, and an appellant from a final judgment need not demonstrate prejudice caused by the denial of relief from a jury trial waiver to obtain reversal. These cases include *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806 (*Boal*), *Simmons v. Prudential Insurance Corporation* (1981) 123 Cal.App.3d 833 (*Simmons*), and *Bishop v. Anderson* (1980) 101 Cal.App.3d 821 (*Bishop*) (collectively, the *Boal, Simmons,* and *Bishop* cases). (*Mackovska, supra,* 40 Cal.App.5th at p. 13.) After studying both lines of authority, *Mackovska* rejected the pronouncements in the *Gann, McIntosh,* and *Byram* cases as non-binding dicta because they either did not involve an appeal from a final judgment (as in *Byram*, which was an original writ proceeding) or were affirmed because the trial court did not abuse its discretion in denying relief (as in *Gann* and *McIntosh*). (*Mackovska, supra,* 40 Cal.App.5th at p. 14.)

Mackovska also deemed the *Gann, McIntosh,* and *Byram* cases unpersuasive for two reasons. First, *Mackovska* scrutinized the "questionable statement that courts cannot presume prejudice from denial of the right to a jury trial because we assume a party had the benefit of a fair and impartial court trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 13.) *Mackovska* recognized "how difficult, if not impossible, it is to show prejudice from the denial of the constitutional right to a jury trial" and

"requiring an appellant challenging an order denying a motion for relief from a jury trial waiver to show actual prejudice would essentially leave discretionary mandate review as the only practical remedy." (*Id*. at p. 16.) *Mackovska* determined requiring a showing of prejudice would be "hardly adequate protection for a constitutional right that is such "'a basic and fundamental part of our system of jurisprudence [it] should be zealously guarded.'"" (*Ibid*.)

Second, *Mackovska* rejected the presumption that, "if courts do not require a showing of actual prejudice, parties will play "'Heads I win, Tails you lose'" and wait until after judgment to challenge a trial court's denial of relief from a jury waiver." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15.) Rather, *Mackovska* held that, when "the party makes a timely request for relief from a jury trial waiver and neither the other party nor the court would suffer prejudice as a result of that request, the concerns [regarding improper gamesmanship] do not exist. The Supreme Court has made clear that such improper gamesmanship arises when a party loses a case after proceeding with a court trial *without objecting to the absence of a jury* and then complains the case was erroneously tried to the court. (See *Taylor v. Union Pac. R.R. Corp*. (1976) 16 Cal.3d 893, 900-901)." (*Ibid*.) Thus, under *Mackovska*, a showing of prejudice is not required on appeal when a party exhibited no sign of improper gamesmanship and

promptly objected to the lack of a jury trial or otherwise sought to rectify a waiver.

Mackovska further relied on this Court's guidance that "any ambiguity or doubt concerning the waiver provisions of section 631 must be 'resolved in favor of according to a litigant a jury trial.'" (*Mackovska*, *supra*, 40 Cal.App.5th. at p. 10, quoting *Grafton*, *supra*, 36 Cal.4th at p. 958.) *Mackovska* thus held that "concluding that the erroneous denial of the right to a jury trial … is reversible per se comports with both the inviolate nature of the right to a jury trial [citations] and the revocability of jury trial waivers under section 631." (*Mackovska*, at p. 16.)

Rather than adopt the misconstrued dicta represented by the *Gann, McIntosh,* and *Byram* cases, *Mackovska* "follow[ed] the line of authority created by *Boal*, *Simmons*, and *Bishop*," holding that an appellant from the final judgment does not need to show prejudice. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 17.) In both *Simmons* and *Bishop*, the appellate courts held "denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial." (*Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; *Bishop*, *supra*, 101 Cal.App.3d at p. 825.) In *Boal*, the appellate court also reversed an order denying relief from a jury trial waiver, holding that, "[s]ince improper denial of jury trial is per se prejudicial, the judgment must be, and is, reversed." (*Boal, supra*, 165 Cal.App.3d at p. 810.)

As *Mackovska* also recognized, "requiring an appellant to show actual prejudice would essentially leave discretionary mandate review as the only practical remedy, hardly adequate protection for a constitutional right that is such 'a basic and fundamental part of our system of jurisprudence [it] should be zealously guarded.'" (40 Cal.App.5th at p. 16.) Even when a request for relief from waiver is meritorious, a court of appeal "would have had the option of denying the writ and waiting to see whether [the petitioner] prevailed at trial." (*Id.,* quoting *Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189, 1205.) Writ relief therefore does not sufficiently safeguard the right to a jury trial. Thus, *Mackovska* held the same standard of review applies to both writs and appeals: If a party is denied the right to a jury trial, it has the choice of "challeng[ing] the constitutional violation (however it occurred) by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there is no reason to apply a stricter standard on appeal." (*Mackovska*, at p. 16.)

C. The Conflicting Majority Opinion in *TriCoast* Muddles the Standard of Review for an Appeal Challenging the Improper Denial of Relief From a Jury Trial Waiver.

Mackovska endeavored to clarify that appellants and writ petitioners stand on equal ground when challenging the improper denial of relief from a jury trial waiver. Notwithstanding that effort, the recent *TriCoast* majority opinion is antithetical to *Mackovska.* In *TriCoast*, the majority held that a "party who fails to seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice when challenging such an order after the trial has been concluded." (Slip opn. p. 3.) By requiring a showing of prejudice from the denial of a jury trial, *TriCoast* creates an irreconcilable conflict with *Mackovska* that cries out for this Court's review. And, as explained, *TriCoast* creates a dual-track system of appellate review, whereby extraordinary writ review, which does not require prejudice, has a more lenient standard of review than an appeal from a final judgment, which, under the *TriCoast* majority opinion, does require prejudice.

In *TriCoast*, the majority noted that *Mackovska* had "rejected the *Byram, McIntosh, and Gann* courts' conclusion that prejudice must be shown by an appellant who failed to seek writ review of an order denying relief from jury waiver." (Slip opn. p. 7.) According to the majority, *Mackovska "*emphasized the

'inviolate nature' of the constitutional right to a jury trial [citation], but conflated denial of the right to a jury trial 'in the first instance,' absent any prior waiver, with denial of a motion for relief from a jury trial waiver [citation]." (*Ibid*.) *Mackovska*, however, did not involve such conflating. In fact, *Mackovska* squarely addressed the distinction between denying the right to a jury trial in the first instance and denying a motion for relief from a jury trial waiver and explained such a distinction was inconsequential to the question of prejudice for the standard of review.

Mackovska cited several authorities holding the improper denial of jury trial is per se prejudicial. (*Mackovska,* 40 Cal.App.5th at p. 15; see, e.g., *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 18 (*Rincon*) ["[d]enial of the right to a jury trial is reversible error per se, and no showing of prejudice is required of a party who lost at trial"], quoting *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493 (*Valley Crest*); see also *Van de Kamp*, *supra*, 204 Cal.App.3d at p. 863 ["Denial of the right to trial by jury is an act in excess of the court's jurisdiction and is reversible error per se"].) *Rincon*, *Valley Crest*, and *Van de Kamp* all addressed a trial court's denial of a jury trial in the first instance, not a trial court's denial of relief from waiver of a jury trial. "For these reasons," *TriCoast*

"disagree[d] with *Mackovska* and agree[d] with the courts in *Byram*, *McIntosh*, and *Gann*," which set forth the law as if it required a showing of prejudice for reversal of a judgment based on the improper denial of review from a jury trial waiver. (Slip opn. p. 9.)

But *Mackovska* did not rely on *Rincon*, *Valley Crest*, and *Van de Kamp* for their holdings related to the denial of a jury trial right in the first instance. As explained, *Mackovska* expressly "follow[ed] the line of authority created by *Boal*, *Simmons*, and *Bishop"* to conclude an appellant from the final judgment does not need to show prejudice. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 17.) In both *Simmons* and *Bishop,* the appellate courts held "denial of a jury trial *after waiver* where no prejudice is shown to the other party or to the court is prejudicial." (*Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839, italics added; *Bishop, supra,* 101 Cal.App.3d at p. 825, italics added.) In *Boal*, the appellate court also reversed an order denying relief from a jury trial waiver, holding that, "[s]ince improper denial of jury trial is per se prejudicial, the judgment must be, and is, reversed." (*Boal, supra*, 165 Cal.App.3d at p. 810.)

Mackovska, therefore, did not conflate denial of a jury trial in the first instance with denial of relief from the waiver of a jury trial. Rather, its express reliance on the *Boal*, *Simmons*, and

Bishop cases demonstrates its holding that prejudice is not required to obtain the reversal of a judgment based on the improper denial of relief from a jury trial waiver is directly supported by those authorities. The majority in *TriCoast* simply was wrong to conclude otherwise.

Furthermore, *Mackovska* expressly addressed the distinction between denial of a jury trial in the first instance and denial of relief from the waiver of a jury trial, deeming it to be inconsequential to whether prejudice must be shown on appeal:

> Concluding that the erroneous denial of the right to a jury trial … is reversible per se comports with both the inviolate nature of the right to a jury trial [citations] and the revocability of jury trial waivers under section 631 [citations]. The construct created (in dicta) by cases like *Gann*, *McIntosh*, and *Byram*, to distinguish between the erroneous denial if a jury trial "in the first instance," before there has been any waiver, and the erroneous denial of a jury trial in the "second instance," after an unsuccessful motion for relief from a jury trial waiver, undermines these principles. [Citation.] Indeed, the consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial. And in either situation, the aggrieved party has the same choice: challenge the constitutional violation (however it

> occurred) by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there is no reason to apply a stricter standard on appeal.

(*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Consequently, the *TriCoast* majority was wrong to fault *Mackovska* for conflating denial of a jury trial "in the first instance" with denial of relief from the waiver of a jury trial and declining to follow *Mackovska*. Indeed, the majority's holding eviscerates the clarity in the law established by *Mackovska* and creates a direct conflict in the decisional authorities on the standard of review applicable in an appeal challenging the improper denial of relief from a jury trial waiver.

D. Justice Ashman-Gerst's Dissent in *TriCoast* Illustrates the Divide in the Caselaw Impacting the Constitutionally Protected Right to a Jury Trial.

As explained, the *TriCoast* majority's opinion that *Mackovska* was based on misguided reasoning, and that *Mackovska* conflated the relevant procedural posture, is incorrect. In her dissent, Justice Ashman-Gerst succinctly explained that the daylight between *Mackovska* and *TriCoast* does not turn on a minor procedural distinction between those

cases. Rather, *Mackovska* and *TriCoast* represent opposing principles. According to Justice Ashman-Gerst:

> "Some cases hold that when a party seeks review of [an order denying relief from a jury waiver] on appeal from the judgment without having filed a petition for writ of mandate challenging the order, the party must show actual prejudice from the denial of a jury trial." [Citation.] "[M]ore recent cases … have affirmed that a party appealing from an order denying a jury trial need not show prejudice." [Citation.] [¶] While the majority sides with the first line of cases, I "agree with the latter line of cases." [Citation.]

(Slip opn. p. 4, dis. opn. of Ashman-Gerst, J.)

Relying on the reasoning of *Mackovska*, Justice Ashman-Gerst further recognized that it is "difficult, if not impossible, … to show prejudice from the denial of the constitutional right to a jury trial." (Slip opn. p. 4, dis. opn. of Ashman-Gerst, J, citing *Mackovska,* 40 Cal.App.5th at p. 16.) Justice Ashman-Gerst further "disagree[d] with the majority's contention that 'TriCoast's failure to demonstrate prejudice from proceeding with a court trial after its request for relief from jury waiver was denied supports affirmance of the trial court's order.' [Citation.] Because we presume that TriCoast received a fair and impartial court trial [citation], it would be nearly impossible for TriCoast to

do so, and the majority does not explain what sort of prejudice could be shown."[3] (Slip opn. p. 4, n.3, dis. opn. of Ashman-Gerst, J.) Given that any doubt concerning a jury trial waiver "must be 'resolved in favor of according to a litigant a jury trial'" (*Grafton*, *supra*, 36 Cal.4th at p. 958), Justice Ashman-Gerst was duly concerned about effectively insulating denial of relief from a jury trial waiver from appellate review.

In sum, Justice-Ashman Gerst succinctly encapsulated the conflict in authorities in this area of law, as well as the practical difficulties that will result for civil litigants in the state if the conflict is not resolved. This conflict, which will lead to the denial of jury trial rights, demands this Court's review.

II. THIS COURT'S REVIEW ALSO IS NECESSARY TO RESOLVE WHETHER A SHOWING OF PREJUDICE TO THE OPPOSING PARTY OR THE COURT MUST SUPPORT THE DENIAL OF RELIEF FROM A JURY TRIAL WAIVER.

As this Court explained in *Grafton*, and appellate courts have held for decades, "because our state Constitution identifies

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[3] According to Justice Ashman-Gerst, "[e]ven if TriCoast were required to demonstrate prejudice, the appellate record confirms that it did. As counsel declared: TriCoast 'was required to prepare for a jury trial a result of Fonnegra's demand. And, [it] expended considerable resources in doing so and tailored its opening statement, exhibits, witnesses, and presentation for a jury." (Slip opn. p. 5, n.4, dis. opn. of Ashman-Gerst, J.)

the right to jury trial as 'inviolate' . . . any ambiguity or doubt concerning the waiver provisions of section 631 must be 'resolved in favor of according to a litigant a jury trial." (*Grafton*, 36 Cal.4th at p. 958; see also *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1467 [same]; *Gann, supra*, 231 Cal.App.3d at pp. 1703-1704 [same]; *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 265 [same]; *Hernandez v. Wilson* (1961) 193 Cal.App.2d 615, 619 [same]; *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 476 [same].) Accordingly, "[c]ourts have held that, given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.'" (*Gann*, at p. 1703; see also *Boal*, *supra*, 165 Cal.App.3d at p. 810 [same]; *Simmons*, *supra*, 123 Cal.App.3d at p. 839 [trial court abused its discretion when party opposing jury trial "expressed no disadvantage, and the court did not articulate any inconvenience to it or find that appellant was 'trifling with justice'"].)

And, as *Mackovska* explained, "the crucial question is whether the party opposing relief will suffer any prejudice if the court grants relief" and "[d]enying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (*Mackovska*, 40 Cal.App.5th at p. 10.)

The prejudice that must be shown from granting relief from the waiver is prejudice from the granting of relief and not prejudice from the jury trial. (*Mackovska,* 40 Cal.App.5th at p. 10, citing *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 411 (*Massie*).) In considering whether the opposing party would suffer prejudice from granting relief, courts consider factors such as "delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." (*Gann*, *supra*, 231 Cal.App.3d at p. 1704.) Prejudice to the court is also a consideration. (*Id*. at p. 1703; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 602.)

On appeal, TriCoast contended that the trial court improperly denied its request for relief from the jury trial waiver because Fonnegra had initially requested a jury trial and would have suffered no prejudice. The *TriCoast* majority dodged this fundamental inquiry, creating a second, irreconcilable conflict with *Mackovska*, *supra*, 40 Cal.App.5th 1. According to the majority, TriCoast's delay in seeking relief from waiver until the day of trial supported the trial court's decision to deny relief. (Slip opn. p. 11.) The majority relied on *Gann* as support for the proposition that courts consider the timeliness of a request for relief. (*Ibid*.) But *Gann*'s reliance on the timing of the request for relief related to its concurrent finding of prejudice, as the opposing parties "alleged prejudice to them in their opposition,

i.e., that to grant relief within five days of trial would work a hardship in their trial preparation." (231 Cal.App.3d at pp. 1704-1705.) Contrary to the majority's conclusion, the timeliness of a request for relief is not considered in a vacuum, but to the extent that it may prejudice the opposing party if the trial court were to grant relief.[4]

The *Tricoast* majority's analysis regarding prejudice to Fonnegra was also flawed because it failed to place the burden of demonstrating prejudice on Fonnegra. Ignoring the possibility that TriCoast had inadvertently failed to post its jury fees, and labelling TriCoast's waiver as "intentional," the majority stated it "disagree[d] with courts that have suggested the opposing party bears the burden of demonstrating prejudice from the granting of relief from waiver." (Slip opn. pp. 13-14.) Disregarding the maxim that "the crucial question is whether the party opposing relief will suffer any prejudice" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10), the majority held that "[p]rejudice to the parties is just one of several factors the court may consider in exercising that discretion." (Slip opn. p. 14.) And, indeed, the majority did not

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[4] Indeed, by definition, any request to post jury trial fees after the waiver of a jury trial based on the failure to post fees in the time specified by statute would be untimely. The *TriCoast* majority opinion, therefore, wrongly would allow the denial of relief from waiver in any case in which a party waived jury trial rights by failing to timely post fees.

consider any prejudice to the court, of which none was demonstrated by either the trial court or Fonnegra. *TriCoast* thus evaded the absence of prejudice to Fonnegra, in direct conflict with *Mackovska*. (See Slip opn. pp. 13-14.)

Justice Ashman-Gerst in dissent also debunked the majority's hollow assertion that denying relief was warranted by the timing of TriCoast's request. She explained, "As the appellate record confirms, the trial court was prepared to start a jury trial that morning. In fact, the trial court's minute order identifies the 'NATURE OF PROCEEDINGS' as a 'JURY TRIAL.' And, the first step the trial court took was to call the matter for a jury trial. Thus, the more likely inference is that up until the moment Fonnegra waived a jury trial, which occurred after the matter was called, even the trial court was prepared for a jury trial." (Slip opn. pp. 5-6, dis. opn. of Ashman-Gerst, J.) These facts demonstrate that neither the trial court nor Fonnegra would have been prejudiced by the granting of relief from the jury trial waiver, yet the majority failed to consider this crucial question in concluding the trial court did not abuse its discretion. *TriCoast*, therefore, muddies the settled waters, as explained in *Mackovska*, that prejudice is the crux of the determination whether to grant relief from a jury trial waiver.

And, as Justice Ashman-Gerst also explained, TriCoast had not engaged in any gamesmanship. "Up until the morning of

trial, it appeared that the matter was going to proceed by jury. Thus, TriCoast expended considerable resources preparing for that jury trial. Only after the matter was called, did Fonnegra waive a jury and move to proceed by way of bench trial. And when the trial court indicated its inclination to grant Fonnegra's motion, TriCoast objected and offered to pay jury fees that day. Based on these facts, '[t]here is no suggestion in the record [that TriCoast] was playing games with his right to a jury trial, and [Fonnegra] does not argue [that it] was.' (*Mackovska*, 40 Cal.App.5th at p. 15)." (Slip opn. pp. 6-7, dis. opn. of Ashman-Gerst, J.)

In sum, the *TriCoast* majority erroneously focused on the timing of the request for relief and concluded "[p]rejudice to the parties is just one of several factors the court may consider in exercising that discretion." (Slip opn. p. 14.) It then erroneously held the trial court did not abuse its discretion in denying TriCoast relief absent a showing of prejudice to Fonnegra or the trial court itself from the granting of relief. Accordingly, after *TriCoast*, a conflict now exists in the law on the critical question of prejudice to the opposing party or the court in the determination whether to grant relief from a jury trial waiver. This Court's intervention is necessary.

CONCLUSION

"A jury trial is an important constitutional right that should be 'zealously guarded by the courts.'" (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 283.) As set forth above, this Court should grant review of the instant matter to protect and preserve that important constitutional right.

DATED: February 28, 2022

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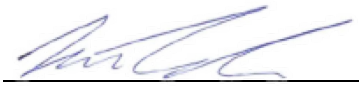

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504, I certify that the total word count of this PETITION FOR REVIEW, excluding covers, table of contents, table of authorities, and certificate of compliance, is 7,174.

DATED: February 28, 2022

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Filed 1/21/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TRICOAST BUILDERS, INC., Plaintiff and Appellant, v. NATHANIEL FONNEGRA, Defendant and Respondent.	B303300 (Los Angeles County Super. Ct. No. PC056615)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Connette Law Office and Michael T. Connette for Plaintiff and Appellant.

Eric Bensamochan for Defendant and Respondent.

Plaintiff and appellant TriCoast Builders, Inc. (TriCoast), brought this action against defendant and respondent Nathaniel Fonnegra in September 2015. The matter was originally set for a jury trial at Fonnegra's request. On September 23, 2019, the day of trial, Fonnegra waived a jury trial. TriCoast made an oral request for a jury trial and offered to post jury fees that day. The trial court ruled that TriCoast waived its right to a jury trial by failing to timely post jury fees and denied TriCoast's oral motion for relief from the waiver. TriCoast did not seek writ review of the trial court's denial of relief from jury waiver, and the matter proceeded to a bench trial at which Fonnegra prevailed.

The Legislature's 2012 amendments to Code of Civil Procedure[1] section 631 provide that a civil litigant may waive their constitutional right to a jury trial by failing to timely deposit jury fees in advance of trial, and the trial court's decision on whether there has been such a waiver is reviewed under an abuse of discretion standard. These provisions are clear and unequivocal. Finding no abuse of discretion in the trial court's order determining a waiver occurred in this case, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Factual background

Fonnegra was the owner of residential property located in Santa Clarita (the property). In May 2014, the property was damaged by a fire. The following month, Fonnegra entered into a contract with TriCoast, a general building contractor, for the

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

provision of construction services, labor, and materials to repair the property. Apparently dissatisfied with TriCoast's work, Fonnegra terminated the contract in July 2015. (*TriCoast Builders, Inc., v. Lakeview Loan Servicing, LLC* (Jan. 26, 2021, B297960) [nonpub. opn.].)

The operative complaint

On September 10, 2015, TriCoast initiated this lawsuit against Fonnegra, certain servicers and subservicers of Fonnegra's loan on the property, a public adjuster, and the new contractor Fonnegra hired after he terminated his relationship with TriCoast. The operative pleading is the second amended complaint, which was filed on March 12, 2018.

Pretrial proceedings and trial

A seven-day jury trial between TriCoast and Fonnegra was scheduled to begin September 23, 2019.[2] On that day, Fonnegra waived jury trial. TriCoast objected, made an oral request to proceed by jury trial, and offered to post jury fees that day. TriCoast argued that its counsel had prepared for a jury trial and Fonnegra's announcement that it was waiving a jury on "the morning of trial" was "unfair."

Noting that TriCoast had never posted jury fees and that the offer to do so on the day of trial was untimely, Fonnegra moved for the case to proceed to a bench trial pursuant to section 631, subdivision (d).

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[2] The other five defendants either prevailed by demurrer and/or summary judgment or settled with TriCoast. Although the appellate record does not indicate whether Fonnegra timely posted jury fees, Fonnegra's counsel represented at oral argument that he did.

The trial court agreed that that TriCoast's request for a jury and offer to post jury fees on the day of trial was untimely and that the matter would proceed as a court trial.

When TriCoast insisted it had a due process right to a jury trial, the trial court indicated that TriCoast could seek writ review: "Well, I mean not that you wouldn't win on a writ. I don't know. I've been taken up on a writ before and it's always come back a court trial." TriCoast did not seek writ review, and the trial court's minute order confirms that TriCoast's oral motion to proceed by jury trial was denied.

Thereafter, counsel and the trial court discussed witness scheduling. The trial court then indicated that it would begin the bench trial immediately, eliminating any witness scheduling issues.

Judgment; motion for new trial; appeal

Following trial, the trial court signed a statement of decision in favor of Fonnegra and against TriCoast. Judgment was entered; TriCoast's motion for a new trial was denied; and this appeal followed.

DISCUSSION

The California Constitution states that "[t]rial by jury is an inviolate right and shall be secured to all," but "[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.) A party waives the right to a jury trial by failing to make a timely deposit of jury fees under section 631, subdivision (f)(5).[3] A court accordingly

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[3] Section 631, subdivision (f)(5) states 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

may refuse a jury trial if jury fees are not deposited as required by section 631, and the litigants are not thereby deprived of any constitutional right. (*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 388 (*Still*).)

If a party has waived the right to a jury trial under section 631, subdivision (g) of that statute gives the trial court discretion to grant relief from such waiver: "The 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." "In exercising its discretion, the trial court may consider delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*).) Prejudice to the court or its calendar are also relevant considerations. (*Ibid.*; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 (*Wharton*); *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 318 (*Glogau*).)

A trial court's discretionary decision to grant or deny relief under section 631, subdivision (g) will not be disturbed absent an abuse of discretion. (*McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363 (*McIntosh*).) "A court does not abuse its discretion

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side of the case has paid that fee." Section 631, subdivision (b) of the statute states: "At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars ($150), unless the fee has been paid by another party on the same side of the case. The fee shall offset the costs to the state of providing juries in civil cases. If there are more than two parties to the case, for purposes of this section only, all plaintiffs shall be considered one side of the case, and all other parties shall be considered the other side of the case. Payment of the fee by a party on one side of the case shall not relieve parties on the other side of the case from waiver pursuant to subdivision (f)."

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, supra*, 231 Cal.App.3d at p. 1704.) As our Supreme Court has stated: "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, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action.'" (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

I. Failure to seek writ review or demonstrate prejudice

A writ of mandate is the proper remedy to secure a jury trial allegedly wrongfully withheld. (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 (*Byram*); see *Gann, supra*, 231 Cal.App.3d at p. 1704; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 603 (*Winston*); *McIntosh, supra*, 151 Cal.App.3d at p. 364.) A party who fails to seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice when challenging such an order after the trial has been concluded. (*Byram*, at p. 653; see *McIntosh*, at p. 363.) The court in *Byram* explained why requiring a showing of prejudice is reasonable in these circumstances: "'Defendants cannot play "Heads I win, Tails you lose" with the trial court.' Reversal 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."

(*Byram*, at p. 653.) While noting that such a showing may be difficult, the court in *Gann* endorsed this view. (*Gann*, at p. 1704.) "[P]rejudice will not be presumed from the fact that the trial was to the court rather than to the jury. [Citations.] Rather, it is presumed that the party [denied relief from a jury waiver] had the benefit of a fair and impartial [court] trial." (*Ibid.*)

The court in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*), rejected the *Byram, McIntosh* and *Gann* courts' conclusion that prejudice must be shown by an appellant who failed to seek writ review of an order denying relief from jury waiver.[4] In doing so, the *Mackovska* court emphasized the "the inviolate nature" of the constitutional right to a jury trial (*Mackovska*, at pp. 12-17), but conflated denial of the right to a jury trial "in the first instance*,"* absent any prior waiver, with denial of a motion for relief from a jury trial waiver (*id.* at p. 16). The two circumstances are not the same. The California Constitution recognizes trial by jury as "an inviolate right," but explicitly states that that right may be

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[4] Other courts have reversed judgments on appeal following the refusal to grant relief from a jury waiver without requiring a showing of actual prejudice. (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 810-811 (*Boal*); *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 823-825 (*Bishop*); see *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 412 (*Massie*).) The courts in these cases do not, however, address the *Byram, Gann* and *McIntosh* line of authority requiring that parties proceed via writ of mandate to challenge the allegedly wrongful denial of a jury trial. In addition, these cases are distinguishable as they all involved inadvertent waiver of a jury trial, not an intentional decision to waive a jury, as was the case here.

waived "as prescribed by statute." (Cal. Const., art. I, § 16.) Section 631 states that a party waives the right to a jury trial by failing to timely deposit jury fees and makes relief from such waiver within the trial court's discretion. (§ 631, subds. (f)(5), (g).) A trial court's discretionary decision to deny relief when jury fees have not been deposited as required by section 631 does not deprive the litigants of any constitutional right. (*Still, supra*, 21 Cal.App.3d at p. 388.) There is no constitutional right to relief from a jury waiver.

The court in *Mackovska* asserted that the principle articulated in *Gann, McIntosh* and *Byram* that courts will not presume prejudice from denial of relief from jury waiver because we assume a party had the benefit of a fair and impartial court trial is based on a faulty "'chain of case law'" that courts have misapplied and adopted. (*Mackovska, supra*, 40 Cal.App.5th at p. 14.) According to *Mackovska*, courts have misapplied and repeated "questionable statement[s]" in "cases that were *tried to a jury instead of the court* after the plaintiffs had waived their right to a jury trial." (*Ibid.*) Of the cases cited in *Mackovska* as support for this assertion, however, only two—*Doll v. Anderson* (1865) 27 Cal. 248 and *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 265 (*Oakes*)—involved claimed error in having a jury trial rather than a court trial, and the court in *Oakes* found there had been no waiver of a jury (*Oakes*, at p. 265).[5] The other cases cited in *Mackovska*, *Glogau, supra*, 107 Cal.App.2d 313 and *Harmon v. Hopkins* (1931) 116 Cal.App. 184, rejected a claim of

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[5] Both parties in *Oakes* had demanded a jury trial at the pretrial conference, and although the plaintiff waived the right to a jury on the day of trial, the defendant did not. (*Oakes, supra*, 267 Cal.App.2d at p. 265.)

presumed prejudicial error because of a court trial rather than a trial by jury, as did *Gann, supra,* 231 Cal.App.3d at pages 1704-1705, *McIntosh, supra*, 151 Cal.App.3d at pages 363-364, and *Holbrook & Tarr v. Thomson* (1956) 146 Cal.App.2d 800, 803, a case not cited in *Mackovska.*

Cases cited in *Mackovska* as support for the premise that no showing of prejudice should be required in a posttrial challenge to denial of relief from jury waiver are inapposite. (See *Mackovska, supra*, 40 Cal.App.5th at p. 15.) The cases cited do not address relief from a prior jury waiver, but denial of the right to a jury trial "'in the first instance.'" (*Id*. at p. 16; see, e.g., *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 18-19 [acknowledging that courts require a showing of prejudice "in the prior waiver context when a party appeals after losing a court trial, rather than seeking immediate writ review of the order denying relief from waiver, . . . [b]ut . . . here, no valid waiver has occurred and a trial court has 'denied [a party] its constitutional right to a [jury] trial in the first instance'"]; *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493 [because no waiver occurred under any of the six means specified in § 631, appellant was denied right to a jury trial in the first instance].) *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 is inapposite because the court in that case held that the plaintiff, whose action was one in equity and not at law, was not entitled to a jury trial in the first instance. (*Id.* at pp. 864-865.)

For these reasons, we disagree with *Mackovska* and agree with the courts in *Byram, McIntosh* and *Gann* that a party who did not seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice

when challenging the order on appeal. Requiring such a showing does not deprive the appellant of the constitutional right to a jury trial (*Still, supra*, 21 Cal.App.3d at p. 388) and is consistent with the public policies of conserving judicial resources and promoting judicial economy by avoiding repetitive litigation—relevant factors in the exercise of a court's discretion under section 631, subdivision (g). (See *Gann, supra*, 231 Cal.App.3d at p. 1704; *Wharton, supra*, 231 Cal.App.3d at p. 104.)

Mackovska, moreover, is distinguishable from this case. The appellant in *Mackovska* initially requested a trial by jury but failed to timely post jury fees. (*Mackovska, supra*, 40 Cal.App.5th at pp. 6-7 & fn. 1.) The trial was subsequently continued and reset as a court trial. (*Id.* at p. 7.) Promptly thereafter, and more than three months before the trial, the appellant posted jury fees and filed a motion for relief from jury waiver. (*Id.* at pp. 7-8.) The court in *Mackovska* noted that the appellant had made "a timely request for relief from a jury trial waiver and neither the other party nor the court would suffer prejudice as a result of that request." (*Id.* at p. 15.) Here, in contrast, TriCoast made no request for a jury trial until the day of the trial, and Fonnegra objected to the untimely request.

TriCoast declined the trial court's invitation to seek writ review when its request for relief from jury waiver was denied. Instead, TriCoast waited until conclusion of the court trial, at which it was unsuccessful, to challenge the trial court's order. On appeal, TriCoast fails to demonstrate how it was prejudiced by a court trial in lieu of a jury trial. TriCoast claimed during oral argument that it had relied on Fonnegra's jury demand and posting of jury fees and was "sandbagged" by Fonnegra's subsequent waiver of a jury. That purported reliance was

unfounded. Section 631, subdivision (b) expressly states that "[p]ayment of the fee by a party on one side of the case shall not relieve parties on the other side of the case from waiver pursuant to subdivision (f)." Subdivision (f) further states that a party waives trial by jury by failing to timely pay the jury fee "unless another party *on the same side of the case* has paid that fee." (§ 631, subd. (f)(5), italics added.)

TriCoast's failure to demonstrate prejudice from proceeding with a court trial after its request for relief from jury waiver was denied supports affirmance of the trial court's order denying relief under section 631, subdivision (g). (*McIntosh, supra*, 151 Cal.App.3d at p. 363; *Byram, supra,* 74 Cal.App.3d at p. 653.)

II. Untimeliness of request

The untimeliness of TriCoast's request also supports the trial court's denial of relief under section 631, subdivision (g). TriCoast did not offer to post jury fees or request a jury until the day of trial, and the trial court denied the request as untimely.

The timeliness of a request for relief from jury waiver is a factor the court may consider when exercising its discretion under section 631, subdivision (g). (*Gann, supra*, 231 Cal.App.3d at p. 1704.) Courts have denied as untimely requests for relief made on or near the day of trial. (See *Still, supra,* 21 Cal.App.3d at pp. 387-388 [no abuse of discretion in denying request for relief from jury waiver made on the morning of trial]; *Sidney v. Rotblatt* (1956) 142 CalApp.2d 453, 455-456 [affirming denial of request for relief made at outset of trial]; see also *Gann, supra*, 231 Cal.App.3d at pp. 1704-1705 [no abuse of discretion in denying request for relief from, jury waiver made five days before

trial].)[6] The trial court did not abuse its discretion by denying TriCoast's request as untimely.

III. Prejudice to Fonnegra

TriCoast contends the trial court improperly denied its request for relief under section 631 because Fonnegra had initially requested a jury trial and would have suffered no prejudice. As support for this contention, TriCoast cites *Boal, supra*, 165 Cal.App.3d 806, in which the court stated: "[I]t is well settled that, in light of the public policy favoring trial by jury, a motion to be relieved of a jury waiver should be granted unless, and except, where granting such a motion would work serious hardship to the objecting party." (*Id.* at p. 809.) That principle, while broadly articulated, has been applied by courts more narrowly—where the party seeking relief mistakenly waived a jury. In *Boal*, for example, the plaintiff had given notice during pretrial proceedings that he desired a jury trial. In subsequent proceedings, the plaintiff was represented by new counsel, who unaware that the client had previously requested a jury trial, mistakenly marked a form indicating jury waiver. (*Ibid.*; see *Tesoro del Valle Master Homeowners Assn v. Griffin* (2011) 200

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[6] *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833 and *Bishop, supra*, 101 Cal.App.3d 821, in which the courts held that denial of a request for relief from jury waiver on the day of trial was an abuse of discretion, are distinguishable. In *Bishop*, the respondent's attorney "candidly admitted" that his client's rights would not be prejudiced by a jury trial. (*Bishop*, at p. 824.) The court in *Simmons* based its reversal in part on the trial court's failure to comply with a statutory mandate in effect at the time that required the court to provide the parties with 10 days' written notice of a jury trial waiver and to continue the trial if necessary to allow the notice to be given. (*Simmons*, at p. 838.)

Cal.App.4th 619, 628, 638 (*Tesoro*) [mistake in late posting of jury fees because of conflicting statutes]; *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810 [plaintiff requested a jury trial in its case management statement but did not timely post jury fees]; *Massie, supra*, 4 Cal.App.4th at p. 412 [untimely posting of jury fees attributable to party's unfamiliarity with local court rule]; *Gann, supra*, 231 Cal.App.3d at p. 1704 ["court abuses its discretion in denying relief where there has been no prejudice to the other party or to the court from an *inadvertent* waiver" (italics added)]; *Wharton, supra*, 231 Cal.App.3d at p. 104 [failure to timely deposit jury fees resulting from confusion concerning the proper amount to be posted]; *Winston, supra*, 196 Cal.App.3d at p. 602 [inadvertent waiver shown where failure to post fees occurred from inconsistency in timing requirement among statutes]; *Byram, supra*, 74 Cal.App.3d at p. 654 [inadvertent waiver when attorney relied on his secretary to deposit jury fee and she failed to do so]; *March v. Pettis* (1977) 66 Cal.App.3d 473, 479-480 [relief provisions of § 631 protect against unknowing waivers, not express waivers].)

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, not the result of any misreading of the statute or court rules. TriCoast's argument that it relied on Fonnegra's jury fee deposit, was duped into believing that a jury trial would occur, and was prejudiced when Fonnegra exercised his right to waive a jury, ignores the statutory requirement that TriCoast, and not Fonnegra, timely pay the $150 jury fee.

Even in cases where the jury waiver was mistaken or inadvertent, we disagree with courts that have suggested the

opposing party bears the burden of demonstrating prejudice from the granting of relief from waiver. (See, e.g., *Tesoro, supra*, 200 Cal.App.4th at p. 639; *Johnson-Stovall, supra*, 17 Cal.App.4th at pp. 811-812; *Massie, supra*, 4 Cal.App.4th at p. 411.) Section 631 imposes no such burden. Rather, the plain language of the statute makes the granting of such relief within the trial court's discretion. (§ 631, subd. (g).) Prejudice to the parties is just one of several factors the trial court may consider in exercising that discretion. (*Gann, supra*, 231 Cal.App.3d at p. 1704.)

IV. Failure to establish abuse of discretion

TriCoast bears the burden of affirmatively demonstrating error by the trial court. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) When reviewing a trial court's order for abuse of discretion, an appellate court presumes that the order is correct. As a general rule, "[a]ll intendments and presumptions are indulged to support [the order] on matters as to which the record is silent, and error must be affirmatively shown." (*Ibid.*)

The record on appeal is sparse. It does not contain the parties' status conference statements, or transcripts or minute orders from any pretrial status conference. We accordingly presume that the trial court's order denying TriCoast's request for relief from jury waiver is correct, indulging all intendments and presumptions in favor of the order, and drawing all reasonable inferences from the facts to support the order. (*Denham, supra*, 2 Cal.3d at p. 564.) TriCoast fails to overcome these presumptions and has not sustained its burden of demonstrating error on the part of the trial court.

DISPOSITION

The judgment is affirmed. Fonnegra shall recover his costs on appeal.

_____
CHAVEZ, J.

I concur:

_____
LUI, P. J.

TriCoast Builders, Inc. v. Fonnegra, B303300
ASHMANN-GERST, J., Dissenting.

Respectfully, I dissent.

Trial by jury is a "'right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, [and] should be jealously guarded by the courts.'" (*Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 103.) Thus, a party seeking relief from a waiver need not show prejudice in order to obtain that relief. "But a party opposing a motion for relief from a jury trial waiver must make a showing of prejudice. Because [respondent Nathaniel Fonnegra (Fonnegra)] did not make that showing, the trial court erred in denying [appellant TriCoast Builders, Inc.'s (TriCoast)] motion." (*Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, 4 (*Mackovska*).)

FACTUAL AND PROCEDURAL BACKGROUND

Trial

Approximately four years after TriCoast initiated this lawsuit against Fonnegra and others, a scheduled jury trial between TriCoast and Fonnegra began.[1] In fact, the trial court's minute order from the first day of trial describes the "NATURE OF PROCEEDINGS" as a "JURY TRIAL." And, at the onset of these proceedings, the trial court called the matter for a jury trial. Thereafter, the trial court's minute order indicates that Fonnegra waived jury trial. TriCoast immediately objected and moved the trial court to proceed by jury trial and to allow

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1 As the majority points out, the other defendants either prevailed by demurrer and/or summary judgment or settled with TriCoast.

TriCoast to post jury fees that day as counsel had prepared for a jury trial. After all, to let TriCoast know "the morning of trial" that Fonnegra was waiving a jury was "unfair."

Noting that TriCoast had never posted jury fees, Fonnegra moved for the case to proceed to a bench trial pursuant to Code of Civil Procedure section 631, subdivision (d).[2]

The trial court stated: "When the fees haven't been paid, and you haven't paid them, the party that did pay them has waived the jury trial, so that's it." The trial court's minute order confirms that TriCoast's oral motion to proceed by jury trial was denied; by not paying jury fees, TriCoast waived its right to a jury.

Later, when counsel and the trial court were discussing witnesses, the trial court asked TriCoast's counsel if he wanted to call his first witness. Counsel replied: "I thought we were going to have a jury trial today, and he was on his way here. He was going to be here at around 11:30." Counsel continued: "[T]he problem is we were told that there wouldn't be a jury when we walked in this morning. We were told that a jury would not be impaneled today."

Judgment

Following trial, judgment was entered in favor of Fonnegra.

Motion for New Trial

TriCoast promptly moved for a new trial, arguing, inter alia, that the trial court erred when it denied TriCoast's motion for a jury trial. In support, TriCoast submitted a declaration from its counsel, who averred: "[d]uring four years of pretrial

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

proceedings in this case, [Fonnegra] demanded a jury trial. [TriCoast] did not demand a jury trial or post jury fees. Nonetheless, [TriCoast] was required to prepare for a jury trial as a result of Fonnegra's demand. And, [TriCoast] expended considerable resources in doing so and tailored its opening statement, exhibits, witnesses, and presentation for a jury." Furthermore, in the two years prior to trial, "the [trial] court encouraged [Fonnegra] to waive the jury" but he was not "willing to do so." And, after the trial court called the matter for a jury trial, TriCoast "had placed its four sets of exhibit books, placed the projector for the jury to follow the exhibits, and reviewed voir dire and opening statement written for the jury."

Appeal

TriCoast's motion for a new trial was denied, and this timely appeal ensued.

DISCUSSION

I. *Standard of review and relevant law*

"When parties elect a judicial forum in which to resolve their civil disputes, article I, section 16 of the California Constitution accords them the right to trial by jury." (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951 (*Grafton*).) "The statute implementing this constitutional provision is section 631. It holds inviolate the right to trial by jury, and prescribes that a jury may be waived in civil cases only as provided in subdivision (d) of its provisions. (§ 631, subd. (a).) Subdivision (d) describes six means by which the right to jury trial may be forfeited or waived, including . . . failure to pay required fees in advance or during trial." (*Grafton*, *supra*, at p. 951.)

"The 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." (§ 631, subd. (g).) The question then becomes what to consider when assessing a trial court's exercise of that discretion. "Some cases hold that when a party seeks review of [an order denying relief from a jury waiver] on appeal from the judgment without having filed a petition for writ of mandate challenging the order, the party must show actual prejudice from the denial of a jury trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 4.) "[M]ore recent cases . . . have affirmed that a party appealing from an order denying a jury trial need not show prejudice." (*Id.* at p. 17.)

While the majority sides with the first line of cases, I "agree with the latter line of cases." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 4.) After all, it is "difficult, if not impossible, . . . to show prejudice from the denial of the constitutional right to a jury trial." (*Mackovska*, *supra*, at p. 16.)[3] Thus, "[t]he trial court should grant a motion for relief of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citations.]" (*Id.* at p. 10; see also *Grafton*, *supra*, 36 Cal.4th at p. 958; *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*); *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 809.)

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[3] For this reason, I disagree with the majority's contention that "TriCoast's failure to demonstrate prejudice from proceeding with a court trial after its request for relief from jury waiver was denied supports affirmance of the trial court's order." (Maj. Opn., at p. 11.) Because we presume that TriCoast received a fair and impartial court trial (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704), it would be nearly impossible for TriCoast to do so, and the majority does not explain what sort of prejudice could be shown.

"Denying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10; see also *Tesoro*, *supra*, 200 Cal.App.4th at pp. 638–639; *Gann v. Williams Brothers Realty, Inc.*, *supra*, 231 Cal.App.3d at p. 1704 ["The court abuses its discretion in denying relief where there has been no prejudice to the other party or to the court from an inadvertent waiver"].) In fact, "[w]hen there is doubt about whether to grant relief from a jury trial waiver, [we] must resolve that doubt in favor of the party seeking a jury trial. [Citations.]" (*Mackovska*, *supra*, at p. 10.)

II. *The trial court abused its discretion in denying TriCoast's motion for relief from the jury trial waiver.*

Certainly TriCoast waived its right to a jury trial by not posting the requisite jury fee timely. But the analysis does not stop there. Rather, we must ask whether the trial court erred in denying TriCoast's motion to be relieved from its waiver. I conclude that it did. Simply put, Fonnegra has not demonstrated any prejudice to him had a jury trial been held.[4]

Urging us to affirm, Fonnegra argues that "[t]here is a fair inference that one reason the trial court granted the request of Fonnegra's counsel [to proceed by way of bench trial] was to aid

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[4] Even if TriCoast were required to demonstrate prejudice, the appellate record confirms that it did. As counsel declared: TriCoast "was required to prepare for a jury trial as a result of Fonnegra's demand. And, [it] expended considerable resources in doing so and tailored its opening statement, exhibits, witnesses, and presentation for a jury." Counsel additionally averred that TriCoast "had placed its four sets of exhibit books, placed the projector for the jury to follow the exhibits, and reviewed voir dire and [the] opening statement written for the jury."

the scheduling of witnesses and streamline the trial. That benefit is enough to justify the court's exercise of its discretion." That supposed inference is unsubstantiated. As the appellate record confirms, the trial court was prepared to start a jury trial that morning. In fact, the trial court's minute order identifies the "NATURE OF PROCEEDINGS" as a "JURY TRIAL." And, the first step the trial court took was to call the matter for a jury trial. Thus, the more likely inference is that up until the moment Fonnegra waived a jury trial, which occurred after the matter was called, even the trial court was prepared for a jury trial.

Regardless, even if I were to accept Fonnegra's contention, it is not enough for TriCoast to have been denied its right to a jury trial; Fonnegra still has not presented any evidence or argument of prejudice. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10 ["the crucial question is whether the party opposing relief will suffer any prejudice if the court grants relief. [Citations.]"].)

Nor is there any indication of "gamesmanship" by TriCoast. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15 ["The Supreme Court has made clear that . . . improper gamesmanship arises when a party loses a case after proceeding with a court trial *without objecting to the absence of a jury* and then complains the case was erroneously tried to the court"].) Up until the morning of trial, it appeared that the matter was going to proceed by jury. Thus, TriCoast expended considerable resources preparing for that jury trial. Only after the matter was called, did Fonnegra waive a jury and move to proceed by way of bench trial. And when the trial court indicated its inclination to grant Fonnegra's motion, TriCoast objected and offered to pay jury fees that day. Based on these facts, "[t]here is no suggestion in the record [that TriCoast]

was playing games with his right to a jury trial, and [Fonnegra] does not argue [that it] was." (*Mackovska*, *supra*, at p. 15.)

I understand the majority's concern about the waste of judicial resources in sending this back for a new trial.[5] But the right to a jury trial is "inviolate" in California, and the failure to conduct one when a party who has that right requests one is reversible error per se. (Cal. Const., art. I, § 16; *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493 ["Denial of the right to a jury trial is reversible error per se, and no showing of prejudice is required of a party who lost at trial"].)

I would remand the matter to the trial court with instructions to allow a new trial by jury.

_____, J.
ASHMANN-GERST

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[5] A writ of mandate would have been the better remedy to secure the right to a jury trial. (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1224.) Nonetheless, the denial of a jury trial is reviewable on appeal from the judgment. (*Ibid.*; see also *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522–523.)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of eighteen (18) years and not a party to the within action. I am a resident of or employed in the county where the mailing took place. My business address is 22708 Mariano Street, Woodland Hills, California 91367-6128.

On February 28, 2022, I served the **PETITION FOR REVIEW**, by enclosing a true and correct copy thereof in a sealed envelope as follows:

[X] **BY FIRST-CLASS U.S. MAIL:** I enclosed the document in a sealed envelope/package addressed to each addressee listed below and placed it for mailing, following our ordinary business practices. I am readily familiar with the mailing practice of my place of employment in respect to the collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business with first-class postage fully prepaid.

The envelope(s) was/were addressed and mailed to all interested parties as follows:

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Chatsworth Superior Court
9425 Penfield Avenue, Department F47
Chatsworth, California 91311
(818) 407-2247

Clerk, California Court of Appeal *Appellate Court*
Second Appellate District
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, California 90013-

TriCoast Builders, Inc. *Client*

[X] **PROOF OF SERVICE OF THE WITHIN PETITION FOR REVIEW BY ELECTRONIC TRANSMISSION to California Supreme Court**, using TrueFiling (https://www.truefiling.com) All interested parties listed below, registered with TrueFiling, will be electronically served through TrueFiling. Pursuant to California Rules of Court, rule 8.212(c), bookmarks have been inserted which correspond to each: 1) topic heading in a brief, 2) section heading in a motion or original proceeding, and 3) exhibit page and a description of each exhibit in an appendix.

Eric Bensamochan [SBN 255482] The Bensamochan Law Firm Inc. 9025 Wilshire Boulevard, Suite 215 Beverly Hills, California 90211-1825 (818) 574-5740 (tel) (818) 961-0138 (fax) eric@eblawfirm.us	*Counsel for Defendant and Respondent Nathaniel Fonnegra*
Michael T. Connette [SBN 180609] Connette Law Office 201 Santa Monica Boulevard, Suite 300 Santa Monica, California 90401-2224 (424) 777-8800 (tel) (424) 777-8840 (fax) mike@connettelaw.com	*Co-Counsel for Plaintiff and Appellant TriCoast Builders, Inc.*

[X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 28, 2022, at Woodland Hills, California.

/s/ Tina Lara
Tina Lara

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-6OVR1CQB**
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Benedon & Serlin, LLP

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