

**S230899**

Case No. **S** \_\_\_\_\_

**IN THE SUPREME COURT OF CALIFORNIA**

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**BARRY S. JAMESON,**  
PLAINTIFF AND PETITIONER,

v.

**TADDESE DESTA,**  
DEFENDANT AND RESPONDENT.

SUPREME COURT  
FILED

DEC - 1 2015

Francis M. Maguire, Clerk  
Deputy



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After a Decision by the Court of Appeal for the Fourth District, Division One  
Case No. D066793  
Affirming a Judgment of the Superior Court of San Diego County  
The Honorable Joel M. Pressman  
Superior Court No. GIS9465

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**PETITION FOR REVIEW**

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KIRKLAND & ELLIS LLP  
Michael Shipley, SBN 233674  
Sierra Elizabeth, SBN 268133  
333 South Hope Street  
Los Angeles, CA 90071  
Tel: (213) 680-8400  
Fax: (213) 680-8500

*Attorneys for Plaintiff and Petitioner  
Barry S. Jameson*

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KIRKLAND & ELLIS LLP

Michael Shipley, SBN 233674

Sierra Elizabeth, SBN 268133

333 South Hope Street

Los Angeles, CA 90071

Tel: (213) 680-8400

Fax: (213) 680-8500

*Attorneys for Plaintiff and Petitioner*

*Barry S. Jameson*

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## PETITION FOR REVIEW

In 2002, Barry Jameson—an indigent *pro se* plaintiff—sued Defendant Tadesse Desta for providing negligent medical treatment while Jameson was in prison. On three separate occasions over ten years, the San Diego County Superior Court dismissed Jameson’s case. Each time, however, the Court of Appeal reversed. *Twelve years* after filing his complaint, Jameson was led to believe he had finally secured his right to bring his case to trial. But yet again, the superior court prevented his claims from reaching a jury. It granted Desta’s oral motion for nonsuit based only upon Jameson’s opening statement.

This time, however, the superior court’s actions deprived Jameson of even effective recourse to a fourth trip to the Court of Appeal. A few days before the commencement of trial, the trial court issued a minute order informing Jameson that an official reporter would not be present for his trial, invoking the San Diego Superior Court’s policy of categorically refusing to provide official reporter services for civil trials. Instead, under that policy, Mr. Jameson was required to secure and pay for the services of a private reporter *pro tempore*—services he clearly could not afford.

At the outset of his case, Jameson had been granted a fee waiver under Government Code section 68631. Under recently enacted Government Code section 68086, subdivision (b)—which requires that reporters’ fees “shall be waived for a person who has been granted a fee waiver under [Government Code] section 68631”—he was entitled to an official reporter free of cost. But through its policy, the trial court rendered the benefit of section

68086, subdivision (b) nugatory. What the Legislature gave, the superior court took away.

The Court of Appeal affirmed. (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, Slip. Op. at 14–15 (*Opinion*).)<sup>1</sup> It compounded the superior court’s error by holding that Government Code section 68086, subdivision (b) “does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case.” (*Ibid.*) The court ruled that under such circumstances, every litigant, even an indigent one, must arrange and pay for the services of a private reporter *pro tempore*, under California Rules of Court, rule 2.956. (*Ibid.*) Because Mr. Jameson suffered the arbitrary misfortune of filing his action in a county that—through no fault of his own—categorically refuses to provide an official reporter for civil trials, the Court of Appeal held that he forfeited any appeal of the nonsuit for want of a proper reporter’s transcript to provide a record on appeal. (*Id.* at 17–18.)

#### ISSUES PRESENTED FOR REVIEW

The issues presented for this Court’s review are:

1. Jameson has been granted a fee waiver under Government Code section 68631. Did the Court of Appeal err by permitting the trial court’s policy to never provide official reporters in civil trials to absolve the court of its obligation under Govern-

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<sup>1</sup> The opinion of the Court of Appeal, District Four, Division One, is appended to this Petition as Exhibit A. (*See* Cal. Rules of Court, rule 8.500(b)(4).)

ment Code Code § 68086 subdivision (b) to waive reporter's fees for fee waiver litigants?

2. Legislatively established policy and longstanding precedent from this Court requires courts to exercise their discretion in a manner that protects the rights of indigent litigants with colorable claims to access the courts to redress their grievances. Did the Superior Court abuse that discretion by adopting a court reporter policy that has the practical effect of categorically denying all indigent litigants access to court reporters, and thus their practical ability to make a record for appeal?

### THE IMPORTANCE OF THE ISSUES

This case presents a legal question of profound importance to the administration of justice in California. (*See* Cal. Rules of Court, rule 8.500(b)(1).) Each year, thousands of indigent litigants seek civil redress in California's courts. Already, the odds are stacked against them: unable to afford a lawyer, they face represented litigants and often complex and burdensome court rules alone.

In 2013, the Legislature amended the statutes governing court reporter fees to require that court reporters' fees "shall be waived for a person who has been granted a fee waiver under Section 68631" consistent with long-standing California law designed to ensure "access to the courts without regard to [a person's] economic means." (Gov't Code, § 68086, subd. (b) (hereinafter section 68086(b); Gov't Code § 68630.)) The Court of Appeal's decision in this case, however, rendered that statute almost a nullity—holding that it requires waiver of the reporter's fee *only if there is already an official reporter present*. (*Opinion* at 14–15).

That ruling arbitrarily imperils the right of appeal for a huge swath of indigent litigants and presents an exceptionally significant issue for this Court's review. Moreover, by preventing fee-waiver litigants from effectively appealing adverse rulings for no reason other than their inability to pay a court reporter's appearance fee, the Court of Appeal's decision runs afoul of longstanding precedent of this Court obligating the courts of this state to exercise their discretion in favor of protecting access to the courts by indigent persons. Only the intervention of this Court can prevent the Court of Appeal's published decision from becoming an insurmountable obstacle for poor and imprisoned litigants to access the appellate process.

This Court should grant review.

#### STATEMENT OF THE CASE

##### **I. Jameson's Thirteen-Year Odyssey through the Courts.**

Jameson has been nothing if not tenacious. In 2002, he sued Desta, a prison doctor, in San Diego Superior Court, alleging negligent medical treatment for Hepatitis C while Mr. Jameson was incarcerated. (*Opinion* at 4.) The operative counts of his complaint litigated by the parties allege breach of fiduciary duty through lack of informed consent as well as professional negligence. (*Id.* at pp. 4-5.)

Over the next thirteen years, Jameson's case followed a circuitous but regular pattern. The superior court would find some reason to dismiss his case, only to be reversed by the Court of Appeal.

In 2005, the superior court dismissed Jameson's complaint for lack of diligent service, despite that three years earlier, Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Jameson v. Desta* (July 2, 2007, D047284), 2007 WL 1885104 at \*6 opn. mod. July 26, 2007 [nonpub. opn.] (*Jameson I* ).) The Court of Appeal reversed in an unpublished opinion. (*Id.* at p. 9.)

On remand, the superior court again dismissed when Jameson—still incarcerated—failed to appear at a telephonic case management conference, despite evidence that his nonappearance resulted from prison officials denying him access to the telephone. The Court of Appeal again reversed, holding that the superior court had abused its discretion by denying Jameson of "meaningful access to the courts." (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 684 (*Jameson II* ).)

On further remand, the superior court granted summary judgment in favor of Desta, finding that Jameson had not raised triable issues related to causation. Yet again, the Court of Appeal reversed. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144 (*Jameson III* ).) On the merits, it ruled that Desta had not met his initial burden on Jameson's implied consent claim and that Jameson had sufficiently raised triable issues as to causation on his negligence claim. (*Id.* at pp. 1164–74.) The Court of Appeal further determined that the trial court improperly permitted Desta's lawyer to take an *ex parte* deposition of Jameson's medical expert, over Jameson's objections. (*Id.* at pp. 1174–76.) The court noted that the trial judge's statements in overruling Jameson's

objections were “entirely inconsistent with [the] mandate” “that an indigent incarcerated litigant has a right to prosecute a bona fide civil action on his own behalf and to be afforded meaningful access to the courts in doing so, and that the trial courts are to ensure that this right is protected.” (*Id.* at p. 1176.) The court was sufficiently concerned by the superior court’s comments that it found it necessary to “remind the trial court of its obligation to ‘ensure indigent prisoner litigants are afforded meaningful access to the courts’[.]” (*Id.* at p. 1149.)

Finally, with the case before it a fourth time, the superior court set the matter for jury trial on April 21, 2014. (*See* RA 232.) A minute order reflecting a hearing on April 18, 2014—with Jameson appearing by telephone—states that the court notified the parties that “the Court no longer provides a court reporter and that the parties have to provide their own court reporters for trial.”<sup>2</sup> (*Ibid.*) After trial was continued twice to address pending motions (RA 250–51, 252–53) a civil jury trial commenced on April 28, 2014. (RA 254.)

After a one-hour-long jury selection process, Jameson, *pro se* and appearing via telephone from prison, gave his opening statement. (RA 257.) No court reporter, official or otherwise, was present to transcribe the proceedings.<sup>3</sup> After he gave his own

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<sup>2</sup> The hearing itself was not reported. (RA 231.) This is the record’s only reference that the superior court would not be providing a reporter.

<sup>3</sup> Mr. Jameson’s *pro se* opening brief to the Court of Appeal asserted that at the beginning of trial, Defendant indicated that he would not be having the trial reported. (Jameson’s Appellant’s

opening statement, Desta moved for nonsuit. (RA 257, *see Opinion* at 6.) The superior court granted the motion, dismissing the case for a fourth time, ruling that “Jameson did not establish causation in his opening statement,” (RA 257, *see Opinion* at 16), in significant tension with the appellate court’s most recent ruling in *Jameson III*. (*Cf. Jameson III, supra*, 215 Cal.App.4th at p. 1168 [holding that “Jameson raised a triable issue of fact with respect to both the standard of care and causation.”].) Judgment was entered on July 31, 2014. (RA 259–60.)

## II. The San Diego Superior Court’s “No Official Reporters” Policy.

“At a hearing 10 days prior to the commencement of the jury trial, the trial court informed the parties that ‘the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial.’” (*Opinion* at 11 [quoting RA 232].)<sup>4</sup> Indeed, since 2013, as a matter of official court policy, the San Diego Superior Court has not provided official court reporters in civil, family, or probate matters, including all civil trials. (*See* S.D. Super. Ct. Form ADM-317, *Policy Re-*

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Br. at p. 42.) Jameson’s brief stated that he orally objected to the court’s refusal to provide a reporter at that time, but that his objections were overruled. (*Ibid.*) The trial court’s minute order does not reflect any objection or ruling on it (RA 256–257) and without a transcript, there is no way to know what was said.

<sup>4</sup> The hearing occurred on April 18, 2014, which was only three days before the scheduled onset of the trial. (*See* RA 232.) As noted, after two continuances, jury selection began on April 28, 2014, which was ten days after the trial court’s admonishment about the lack of official reporters.

garding *Normal Availability and Unavailability of Official Court Reporters*.)<sup>5</sup> The policy affords no exceptions for indigent litigants, even when they have qualified for a fee waiver and no other way to pay for a record. (See S.D. Super. Ct. Form ADM-315, *Official Reporter Pro Tempore Policy* at 2.)<sup>6</sup> It specifically states: “In cases where the court no longer provides court reporters, indigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver. *Fee waivers apply only to fees charged by the court. They do not apply to court reporter fees and costs in cases where the court is not providing the court reporter.* Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services.” (*Ibid.* [emphasis added].) By outsourcing *all* civil trial reporting to private reporters, the court has rendered it effectively *impossible* for an indigent civil litigant to create a trial record, fee waiver or not.

San Diego’s policy is not unusual. Millions of Californians face similar no-official-reporter policies. Among the counties that, like San Diego, do not provide official reporters for most civil proceedings are Los Angeles, San Francisco, Alameda, Fresno, Kern, and Ventura. (See Reed Smith LLP, *Survey of Court Reporter Policies* (2014).<sup>7</sup>) On the other hand, had they filed in Santa Clara,

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<sup>5</sup> Attached as Ex. B, per Rule of Court, rule 8.500(e)(1)(C).

<sup>6</sup> Attached as Ex. C, per Rule of Court, rule 8.500(e)(1)(C).

<sup>7</sup> Available at [http://www.reedsmith.com/files/uploads/alert-attachments/alert14228\\_attach.pdf](http://www.reedsmith.com/files/uploads/alert-attachments/alert14228_attach.pdf)



San Mateo, or Orange Counties, the court would provide a reporter, at least for trial. (*Ibid.*)

Or if they lived in other states, they might at least be entitled to an official electronic recording. (*See generally* National Center for State Courts (2013) *Making the Record: Utilizing Digital Electronic Recording* at p. 7 [noting that some states rely almost exclusively on electronic recording, while others use it in at least some cases where official reporters are unavailable].)<sup>8</sup> But California law prohibits the use of electronic recordings in lieu of live transcripts in unlimited civil cases, even as a last resort when no reporter is available. (*See California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 33 (CCRA) [invalidating former Cal. Rules of Court, rules 33(e), 891, 892, and 980.3, which permitted electronic recording of trial court proceedings, as inconsistent with statute]). And if there were federal jurisdiction, a federal court would provide *in forma pauperis* litigants with a transcript upon certification that the appeal was not frivolous and the transcript was necessary for appeal. (*See* 28 U.S.C. §§ 753(f) & 1915(c).)

But Jameson—like indigent San Diegans, Angelenos, San Franciscans, Fresnans, and many more Californians—was out of luck. Incarcerated and indigent, he could not afford to pay for the services of a private reporter *pro tempore*, the only permissible

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<sup>8</sup> Available at <http://www.ncsc.org/Services-and-Experts/Court-reengineering/~media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx>

way under the trial court's policy for him to make an adequate record for appeal.

### III. The Published Opinion of the Court of Appeal.

Jameson timely appealed the judgment of nonsuit, as well as several other orders of the trial court. (AA 1207–09.) On the nonsuit, Jameson argued that the trial court erred in ruling that based on his opening statement, he could never establish causation. (*Opinion* at 17–18.) Jameson's arguments included several claims of error related to the trial court's decision, such as its refusal to permit Jameson to admit his own expert's testimony by deposition, its refusal to permit Jameson to establish causation by relying on Desta's expert or the doctrine of *res ipsa loquitur*, and various issues regarding the trial court's approved jury instructions. (*Ibid.*)

The Court of Appeal, however, declined to reach the merits of these arguments, finding that "none of [them are] cognizable in the absence of a reporter's transcript." (*Id.* at 18.) Citing an earlier case, the court explained that "a[n] appellant who fails to provide a reporter's transcript on appeal is precluded 'from raising any evidentiary issues on appeal.'" (*Opinion* at 17 [quoting *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657].) "Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (*Ibid.*) As "the record on appeal does not contain a reporter's transcript[,] Jameson is therefore precluded from obtaining a reversal of the trial court's ruling granting Desta's motion for nonsuit." (*Id.* at p. 18.)

As to why he lacked the record he needed to preserve his appeal, Jameson argued: (1) that the trial court erred by “waiting until trial started to disallow a court reporter”—depriving him of an opportunity to make a record on the issue—and (2) that Code of Civil Procedure section 269(a)(1) and section 68086(b)—which requires that a court reporter’s fee “shall be waived for a person who has been granted a fee waiver under Section 68631”—required the court to provide him with an official reporter free of charge. (Jameson’s Appellant’s Br. at 43.)

The Court of Appeal rejected these arguments. On the timing, the court found that the admonition reflected in the court’s April 18, 2014 minute order was adequate, particularly because Jameson’s brief had not specifically argued that the trial court did not properly follow Rule of Court, rule 2.956, which addresses the court’s obligation to provide notice of the unavailability of official reporters. (*Opinion* at 14 & n.10.) And as to Jameson’s right to a free reporter, the court held that section 68086(b) applies only to a waiver of fees for official reporters. (*Id.* at p. 14.) According to the court, it does not, however, require a free reporter when the superior court does not provide official reporters, and instead requires parties to secure the services of private reporters *pro tempore*. (*Id.* at p. 15.) Relying on Rule of Court, rule 2.956(c) and the superior court’s official policy, the court held that “it is a ‘party’s responsibility to pay the reporter’s fee’ where an official court

reporter is not provided by the court,” even when that party is an indigent litigant who has been granted a fee waiver. (*Ibid.*)<sup>9</sup>

Rejecting Jameson’s other arguments, the Court of Appeal affirmed the judgment in full in an unpublished opinion issued on October 14, 2015. (*Id.* at p. 21.) On October 20, 2015, the acting presiding justice on the panel ordered the opinion certified for publication. (*Id.* at p. 22.)<sup>10</sup> The court’s decision became final on November 19, 2015. (Cal. Rules of Court, rule 8.264(b)(3).) This petition is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

#### REASONS FOR GRANTING REVIEW

The Court of Appeal’s published opinion in this case sanctions a categorical “no official reporters” policy that effectively precludes indigent litigants like Jameson from appealing adverse judgments arising from their civil trials. Moreover, the decision is contrary to the express Legislative policy of this state, the statutory authority permitting waiver of reporters’ appearance fees for indigent litigants, and nearly a century of precedent from this Court and the Court of Appeal requiring California’s courts to exercise their discretion with utmost solicitude for the rights of indigent persons and prisoners to access the courts, including appellate courts, to redress their grievances.

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<sup>9</sup> Neither rule 2.956 nor the superior court’s policies were expressly addressed in Desta’s appellate briefing. (See Desta’s Respondent’s Br. at p. 50–53; *cf. People v. Alice* (2007) 41 Cal.4th 668, 671.)

<sup>10</sup> Because he believed it to be futile, Mr. Jameson did not request rehearing in the Court of Appeal. (*Accord* Cal. Rules of Court, rule 8.504(b)(3).)

Review in this case is thus merited. The Court's intervention is necessary, both to secure the uniformity of decisional law regarding the rights of access to civil appeals and because the case presents an issue of profound importance that has heretofore been unresolved by this Court. (Cal. Rules of Court, rule 8.500(b)(1).)

**I. Unless This Court Grants Review, Indigent Civil Litigants Will Lose the Right to Meaningfully Appeal Adverse Judgments in Civil Trials.**

The Court of Appeal's key holding is that Government Code section 68086(b) "does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court." (*Opinion* at 14–15.) When that ruling is combined with the Superior Court's policy of *never* providing official reporters for civil trials, and the settled rule that the lack of a reporter's transcript precludes appellate review of most civil trial decisions,<sup>11</sup> the upshot is that indigent civil litigants in San Diego effectively forfeit any right to appeal an adverse judgment rendered after a civil trial.

And that result would not be limited to San Diego. Among the counties that, like San Diego, either never or rarely provide official reporters for civil trial proceedings, are Los Angeles, San Francisco, Alameda, Fresno, Kern, and Ventura. (*See Reed Smith LLP, supra, Survey of Court Reporter Policies.*) If these litigants lived in Santa Clara, San Mateo, or Orange Counties, they would

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<sup>11</sup> See generally *Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 186 [collecting cases].

have reporters, at least for trial. (*Id.*) But in most of the State's largest cities—where indigent Californians are most likely to live—the Court of Appeal's decision means that if they are too poor to pay reporters' fees, they are too poor to appeal. In short, the Court of Appeal's published decision locks the doors of the appellate courts of this state to indigent Californians.

## **II. The Court of Appeal's Decision Conflicts with California's Strong Policy of Ensuring Equal Access to Justice for Indigent and Imprisoned Civil Litigants.**

California law recognizes that poor and imprisoned litigants have a fundamental right to access the courts, including the appellate process. The Courts of this state are required to exercise their discretion in crafting their procedures to vindicate the right of access. Although the trial court in this case had means within its discretion to ensure that Jameson could have a reporter present at his trial to create a record for appeal, it took no steps to preserve Jameson's access to the appellate process. Indeed, it has essentially tied its own hands by enacting a court policy that makes it practically *impossible* for fee-waiver litigants to obtain court reporting services at their civil trials. In doing so, it has run afoul of the clear policies of this state and abused its discretion in denying Jameson access to the courts.

### **A. California State Law Requires Courts to Exercise Their Discretion in Favor of Ensuring Indigent Litigants' Rights of Access to Justice.**

"Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all people enjoy this right." (California Commission on Access to Justice (October 2002) *The Path to Equal Justice: A*

*Five-Year Status Report on Access to Justice in California* Finding A, page 36; see also *Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 179.) In 2009, the California Legislature declared as the policy of this state, “[t]hat our legal system cannot provide ‘equal justice under law’ unless all persons have access to the courts without regard to their economic means.” (Gov’t Code, § 68630, subd. (a)). “California law and court procedures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees.” (*Ibid.*) “Providing access to justice for self-represented litigants is a priority for California courts.” (Cal. Rules of Court, rule 10.960(b)).

Indeed, California law specifically affords prisoners “a statutory right to initiate civil actions.” (*Jameson II, supra*, 179 at p. 678 [citing Penal Code, § 2601(d)].) “In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action.” (*Ibid.* [quoting *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792 (*Wantuch*)].)

These policies have a proud lineage in the decisions of this Court. Nearly a century ago, the Court held that California courts had the inherent equitable power to recognize the right of an indigent person to litigate *in forma pauperis* and bring actions without paying filing fees. (*Martin v. Superior Court* (1917) 176 Cal. 289, 296 (*Martin*); see also *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1436 (*Baltayan*) (conc. opn. of Johnson, J.). [“Nearly 85 years ago, in *Martin v. Superior Court*, the California Supreme Court proclaimed poverty could not be al-

lowed to deny anyone access to this state's courts" (footnote omitted].) Through the next seventy years, the Court extended that right in various respects.

Two years after *Martin*, the court held that an indigent could obtain a waiver of statutorily mandated jury fees, even though the statute afforded no express exception. (*Majors v. Superior Court* (1919) 181 Cal. 270, 274 (*Majors*)). Later decisions followed suit for other fees. (*Conover v. Hall* (1974) 11 Cal.3d 842, 851 [power to waive statutorily required undertaking to obtain preliminary injunction]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*) [power to waive appellate filing fees]).<sup>12</sup>

*Ferguson* is most closely on point. There, the question presented was the "inherent power of an appellate court to waive its own filing fees to accommodate indigent civil litigants[.]" (*Ferguson, supra*, 4 Cal.3d at p. 654.) The Court determined that California courts possess such authority. In reaching that conclusion, the court relied on both the fact that common law courts historically "possessed and exercised the power to permit indigents to appeal in forma pauperis," and *Martin's* reasoning that statutes generally permitting the collection of fees should not be read to divest courts of the power to permit parties to proceed *in forma pauperis*. (*Id.* at pp. 654-56.) *Ferguson* did not, however, reach the issue of whether an *in forma pauperis* litigant had the right

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<sup>12</sup> Cf. *Jara v. Mun. Court* (1978) 21 Cal.3d 181, 186 [4-3 decision holding that small claims courts were not required to provide interpretive services because other resources were available to protect their ability to participate in the small claims process].



to obtain a free transcript on appeal. (*Id.* at pp. 653–54; *see also Jara, supra*, 21 Cal.3d at p. 184 [recognizing that *Ferguson* did not reach the issue].) The court did, however, express some skepticism about the accuracy of historical analysis from a 1930 Court of Appeal decision that declined to grant a writ ordering a trial court to afford a free transcript to an indigent plaintiff. (*Ferguson*, at pp. 653–54. [“Although [*Rucker v. Superior Court* (1930) 104 Cal.App. 683] without citation of authority, questioned whether at common law the right to sue *in forma pauperis* extended to appeals or writs of error, several English cases prior to 1850 (when the common law was incorporated into our jurisprudence) had expressly recognized such a right.”].)<sup>13</sup>

On several occasions, the Court has also acted to protect the rights of indigent persons to obtain *in forma pauperis* status

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<sup>13</sup> *Rucker* and its progeny (*see City of Rohnert Park v. Superior Court* (1983) 146 Cal.App.3d 420, 427 [collecting cases]) have no bearing on Jameson’s appeal in this case because Jameson’s appeal addresses only the issue of the *court reporter’s appearance fee*, not the actual costs of preparing an appellate transcript. “[C]ourt reporter fees are entirely different expense than transcription fees and must be paid whether parties order transcripts or not[.]” 7 Witkin, *California Procedure* (2015 online ed.) Judgment, § 135, p. 670 [citing *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 58].)

The state maintains a Transcript Reimbursement fund to assist indigent appellants in paying transcript fees. (*See* Bus. & Prof. Code, § 8030.6.) That fund, however, compensates for *transcript preparation fees*, not the *court reporter appearance fees* at issue in this case. (*Ibid.*) Under the Court of Appeal’s reasoning, Jameson will never be able to apply for Transcript Reimbursement because he was financially unable to secure the attendance of a reporter in the first place.

in the face of challenges to their indigency. (See *Earls v. Superior Court* (1971) 6 Cal.3d 109, 117; *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165 (*Isrin*.) In particular, these cases rejected rules that have “the practical effect of restricting an indigent’s access to the courts because of his poverty[.]” (*Isrin*, *supra*, 63 Cal.2d at 165.). Such rules “contravene[ ] the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis.” (*Ibid.*)

And with respect to prisoner litigants, the Court has held—and subsequently reaffirmed—that “as a matter of due process and equal protection under both the federal and California Constitutions an indigent prisoner who is a defendant in a bona fide legal action threatening his interests is entitled to access to the courts to be heard in his defense.” (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 200 (*Yarbrough*) [quotation omitted]; see also *Payne v. Superior Court* (1976) 17 Cal.3d 908, 924 (*Payne*). Because access is a fundamental right, “[t]he state has the burden of demonstrating a compelling state interest to justify the infringement.” (*Payne*, *supra*, 17 Cal.3d at p. 919.)<sup>14</sup>

Ultimately, the Court determined that only a compelling interest may justify denial of a prisoner’s right of access to the

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<sup>14</sup> *I.e.*, the right of court access for prisoners is a matter of strict scrutiny. (See generally *In re Marriage Cases* (2008) 43 Cal.4th 757, 784 [explaining standard]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 (*Serrano*) [classification by wealth, when used as the basis of denying fundamental interests, subject to strict scrutiny].)

courts. (*See id.* at pp. 919–22 [rejecting various interests such as safety and rehabilitation as non-compelling]; *see also Earls, supra*, (1971) 6 Cal. 3d at pp. 113–14 [“[T]he broad policy of discouraging frivolous litigation and providing financial support for the judiciary does not justify depriving indigents of access to the courts[.]”). Trial courts are thus required to exercise their discretion in as informed a manner as possible to effectuate the prisoner’s right of access to the courts. (*Yarborough, supra*, 39 Cal. 3d at p. 207.) At least in some cases where an imprisoned litigant is the defendant in civil litigation, that may require the appointment of counsel. (*Ibid.*)

*Yarborough* is essentially the Court’s last word on these issues.<sup>15</sup> But in the ensuing years, a number of Court of Appeal cases have examined the line of cases running from *Martin* to *Yarborough*, applying them in novel contexts. These cases generally stand for the proposition that trial courts must exercise their discretion in favor of preserving the rights of indigent and imprisoned litigants to access the courts.<sup>16</sup>

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<sup>15</sup> On several occasions, the Court, in other contexts, has more recently referenced the right of access to the courts by indigent litigants. (*See Silverbrand v. Cnty. of Los Angeles*, (2009) 46 Cal.4th 106, 121 (*Silverbrand*) [extending prison mailbox rule to civil cases]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1353 (*Elkins*) [invalidating local rule requiring direct testimony in family law cases to be provided by declaration].)

<sup>16</sup> *See Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 436 [requiring implied indigent-litigant exception to Code Civ. Proc., § 1030’s requirement that out-of-state plaintiff post costs bond]; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1485 (*Apollo*) [trial court abused its discretion in granting summary judgment

*Wantuch, supra*, 32 Cal.App.4th 876, is particularly instructive. There, an indigent prisoner had sued his defense attorney for malpractice in his criminal case. (*Id.* at p. 790.) He requested appointment of counsel, but was denied. (*Id.* at p. 791.) A year into “actively participat[ing] in the prosecution of the action,” plaintiff failed to appear at a status conference. (*Ibid.*) His case was dismissed for lack of diligent prosecution, and an \$82,000 judgment was entered against him on the defendant’s cross-claim. (*Ibid.*)

The Court of Appeal recognized that the case fundamentally implicated the right of prisoners to access the courts. (*Id.* at p. 792.) It began its analysis by explaining that this Court had previously held in *Yarbrough* and *Payne* that an “indigent prisoner who is a *defendant* in a bona fide civil action threatening his or her personal or property interests has a federal and state constitutional right, as a matter of due process and equal protection, of

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without ensuring prisoner plaintiff rights of access were vindicated]; *Jameson II, supra*, 179 Cal.App.4th at p. 864 [trial court abused its discretion in dismissing Jameson’s case due to nonappearance on telephonic hearing that was not prisoner’s fault]; *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 642 (*Hoversten*) [trial court abused its discretion by failing to consider means by which imprisoned father could meaningfully participate in hearing concerning visitation rights]; *Wantuch, supra*, 32 Cal.App.4th at p. 794 [similar facts as *Jameson II*]; see also *Garcia v. Santana* (2009) 174 Cal.App.4th 464 (opn. of Zelon, J., for the court, joined by Woods, J., conc. in judgment) [relying on right of access cases in holding that trial court could exercise its discretion to give a zero dollar attorney fee award against an indigent litigant]; *Baltayan, supra*, 90 Cal.App.4th at 1436 (conc. opn. of Johnson, J.) [same holding as *Alshafie*].

meaningful access to the courts in order to present a defense. (*Ibid.*) For similarly situated *plaintiffs*, the court explained that the *statutory* right to initiate actions currently codified in Penal Code section 2601, subdivision (d)<sup>17</sup> was of similar dimension, and carried with it “a right of meaningful access to the courts to prosecute the action.” (*Ibid.*)<sup>18</sup> It followed that “[a] prisoner may

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<sup>17</sup> At the time, the relevant provision was codified at subdivision (e). (*See Wantuch, supra*, 32 Cal.App.4th at p. 792 fn.3.)

<sup>18</sup> The full extent of an indigent and imprisoned plaintiff’s *constitutional* rights to access the appeals process has never been fully explored in California. (*See Ferguson, supra*, 4 Cal.3d at p. 657 fn. 6 [declining to reach equal protection and due process questions].) Given the long-recognized fundamentality of the right of access to the courts, (*see generally In re Allison* (1967) 66 Cal.2d 282, 288) and this Court’s recognition that wealth is a suspect classification when it comes to access to fundamental rights, (*see Serrano, supra*, 5 Cal.3d at 597) there can be little doubt that there are substantial state constitutional interests at play. And given the sheer arbitrariness of effectively limiting access to the appellate process based on an appellant’s poverty and the county in which he filed his complaint, the superior court’s policy raises substantial federal equal protection and due process concerns as well. (*See Lindsey v. Normet* (1972) 405 U.S. 56, 77 [“When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.”]; *Adsani v. Miller* (2d Cir. 1998) 139 F.3d 67, 77 [“[P]rinciples of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants.”].) Although Jameson’s appeal is likely resolvable on narrower non-constitutional grounds, the fact that denial of his right to access implicates serious constitutional questions is cause enough to construe his statutory and common law rights broadly, and any infringements on them as narrowly as possible. (*See Elkins, supra*, 41 Cal.4th at 1357 [explaining that the rule of avoiding constitutional questions “directs that if reasonably possible, statuto-

not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests.” (*Ibid.*) “Meaningful access to the courts is the ‘keystone’ of an indigent prisoner’s right to defend against and prosecute bona fide civil actions.” (*Ibid.*)

If those two criteria—indigency and a bona fide action—are met, courts are obligated to ensure that meaningful access is preserved. (*Ibid.*) “A prisoner does not have the right to any particular remedy.” (*Id.* at p. 793.) Relying on the analysis in *Yarbrough*, however, the court held that a trial court must take all of the appropriate facts into account and fashion an “appropriate remedy to secure access in the exercise of its sound discretion.” (*Id.* at pp. 793–94.)

As the Court of Appeal would later explain in *Apollo* “[g]enerally, a trial court has discretion to choose among [various] remedies in safeguarding a prisoner litigant’s right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests. (*Apollo, supra*, 167 Cal.App.4th at pp. 1483–84 [citing *Yarbrough, supra*, 39 Cal.3d at pp. 200–201 and *Wantuch, supra*, 32 Cal.App.4th at pp. 793–794].) But “a trial court does *not have discretion to choose no remedy* in cases where the prisoner’s civil action is bona fide and his or her access to the courts is being impeded.” (*Id.* at p. 1484; *see also Jameson II, supra*, 179 Cal.App.4th at p. 683 [quoting language].)

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ry provisions should be interpreted in a manner that avoids seri-

Choosing no remedy is precisely what occurred in Jameson's case. The court was faced with claims from an indigent prisoner. The claims were sufficiently bona fide to merit three prior reversals on appeal, including the reversal of a summary judgment on the *identical issue on which the trial court granted defendant's nonsuit*. (*Jameson III, supra*, 215 Cal.App.4th at p. 1164.) But the trial court in this case did *nothing at all* to ensure that Jameson had meaningful access to the appellate process following the fourth dismissal of his case. It instead relied on its policy of *never* providing official reporters in civil trials to deny him any effective access at all.

**B. State Law Afforded the Trial Court in This Case Ample Discretion to Protect Jameson's Right to Access the Civil Appeal Process.**

It did not have to happen this way. Nothing in the state law addressing the compensation of court reporters prohibited the superior court from having Jameson's trial reported with an appearance fee waiver.

"For more than a century, state law has provided that the official record of superior court proceedings be taken down in shorthand." (*CCRA, supra*, 39 Cal.App.4th at p. 18.) "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceed-

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ous constitutional questions." (quotation omitted)].).

ings.” (Code Civil Proc., § 273(a).) The Code of Civil Procedure sets out California’s strong policy that every case should be transcribed in order to preserve a record of proceedings:

An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer, in the following cases: (1) In a civil case, on the order of the court or at the request of a party . . . .

(Code Civ. Proc., § 269(a).)

“[S]ection 269 *requires* that superior court proceedings be taken down by an official shorthand reporter if a request is made.” (*CCRA, supra*, 39 Cal.App.4th at p. 27 [emphasis original]). The mandatory nature of the provision was made clear in *CCRA*, which held that state law prohibits using electronic recording in lieu of a court reporter in unlimited civil cases. (*CCRA, supra*, (1995) 39 Cal.App.4th 33–34 (invalidating Rule of Court that would have authorized electronic recordings as records of proceedings, as inconsistent with Code Civ. Proc., § 269 and other statutes]). Thus, in this State, absent legislative reform, the only way a superior court can fulfil its duties under section 269(a) is to ensure that reporters, either full-time or pro tempore, are available upon request.

“The Government Code also addresses matters pertaining to official reporting of superior court proceedings. The fees and costs of an official reporter are set forth [in section 68086].” (*CCRA, supra*, 39 Cal.App.4th at p. 28; *see also* 7 Witkin, Califor-



nia Procedure (2015 online ed.) Judgment, § 135, p. 670 [summarizing reporting fees].) Interestingly, while section 68086 anticipates the parties incurring fees for both official reporters and reporter's *pro tempore*, the statute says nothing about when the court may permissibly decline to provide an official reporter. Subdivision (a) of section 68086 addresses the calculation and allocation of appearance fees for official court reporters. (Gov't Code, § 68086, subd. (a).) Subdivision (b) states that "[t]he fee shall be waived for a person who has been granted a fee waiver under Section 68631." (*Id.*, subd. (b); *see also* Cal. Rule of Court, rule 3.55(7) [fee waiver includes waiver of "Reporter's fees for attendance at hearings and trials, if the reporter is provided by the court"].) Subdivision (c) provides that official reporter costs are recoverable as costs by a prevailing party. (Gov't Code, § 68086, subd. (c).) And subdivision (d) empowers the judicial council to adopt rules to ensure "(1) That parties are given adequate and timely notice of the availability of an official court reporter[;] (2) That if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official *pro tempore* reporter, the costs therefor recoverable as provided in subdivision (c)[; and] (3) That if the services of an official *pro tempore* reporter are utilized pursuant to paragraph (2), no other charge shall be made to the parties. (*Id.*, subd. (d).)

Rule of Court, rule 2.956 carries out the instructions of section 68086(d). (Cal. Rule of Court, rule 2.956(a).<sup>19</sup>) Like section 68086, it does not actually dictate when or in what circumstances superior courts should or should not make official reporters available in civil matters. Instead, the rule is addressed only to the methods by which the courts must *give notice* of the unavailability of official reporters and the steps parties may take if they are unavailable. (*Id.*, subs. (a)–(d).)

In particular, the rule requires only that trial courts adopt and post local policies “enumerating the departments in which the services of official court reporters are normally available, and the departments in which the services of official court reporters are not normally available during regular court hours. If the services of official court reporters are normally available in a department only for certain types of matters, those matters must be

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<sup>19</sup> The text of the rule is out of date. Subdivision (a) states that the “rule is adopted solely to effectuate the statutory mandate of Government Code sections 68086(a)-(b) and must be applied so as to give effect to these sections.” (Cal. Rules of Court, rule 2.956(a).) The rule was adopted in 1994 and last amended in 2007, before the 2013 bill that enacted the current version of section 68086, including adding the language in subdivision (b) regarding fee waivers. (*See* Stats. 2013, ch. 454 § 1.) The reference to “sections 68086(a)-(b)” refers to the version of the statute in place in 2007, in which subdivisions (a) and (b) contain requirements that are similar in all pertinent respects to subdivisions (a) and (d) in the current version of the statute. (*See* Gov’t Code, § 68086 (2007).) In its current version, the rule may be in conflict with section 68086(b), in that it does not account for waiver of reporters’ fees. It does not appear, however, that the Court needs to resolve that issue in this case.

identified in the policy.” (Cal. Rules of Court, rule 9.256(b)(1).) The policy must be published, either in a local newspaper, by sending it to parties, or by local rule. (*Id.*, subd. (b)(2).)

When all courtrooms do not normally “have the services of official court reporters available for civil trials, the court must require that each party file a statement before the trial date indicating whether the party requests the presence of an official court reporter.” (*Id.*, subd. (b)(3).) “If a party requests the presence of an official court reporter and it appears that none will be available, the clerk must notify the party of that fact as soon as possible before the trial.” (*Ibid.*)<sup>20</sup> For non-trial matters, the unavailability of an official reporter needs only to “be noted on the court’s official calendar.” (*Id.*, subd. (b)(4).)

And when an official reporter is not available for a civil trial or hearing, “a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter.” (*Id.*, subd. (c).) “It is that party’s responsibility to pay the reporter’s fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law.” (*Ibid.*) In cases where a party provides a reporter and pays his or her at-

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<sup>20</sup> As noted, *ante* at note 3, the record does not reflect that the trial court complied with this notice requirement having given only an oral indication (reflected only in a terse minute order) three days before the scheduled beginning of trial. (RA 231.) The court did not solicit a statement from Jameson regarding whether he demanded an official reporter, as required under Rule of Court, rule 2.956(b)(3).

tendance fee, the parties will not be charged the ordinary official reporter's fee in section 68086, subd. (a). (*Id.*, subd. (d).)

In sum, these two key provisions—section 68086 and Rule 2.956—are entirely silent regarding when and how trial courts may decline to provide an official reporter, whose fee is waivable for indigent litigants under section 68086(b). Nor do any of the other myriad statutes governing court reporters address this issue. (*See* Gov't Code, §§ 69941, 70043, 70044, 70048 [addressing appointment and compensation of official reporters and reporters *pro tempore*, including specifically in San Diego County]). It is thus clear that these laws vest the superior courts of California with substantial discretion in deciding the circumstances in which an official reporter will be provided in a civil action.

But discretion must not be abused. As the prior section explained, a trial court abuses its discretion when it fails to act to protect indigent litigants' rights of access to the courts. That is particularly the case given section 68086(b)'s requirement that reporter fees shall be waived for indigent litigants.

**C. Local Court Rules and Policies That Cabin the State-Granted Discretion of Superior Courts to Protect the Rights of Indigent Litigants Are Invalid.**

In addition to section 68086 and Rule 2.956, the Court of Appeal also relied upon the San Diego Superior Court's official "no official reporters for civil trials" policy. (*Opinion* at 15.) But given the superior court's discretion to determine when to provide official reporters, the court's policy is irreconcilable with settled state law requiring trial courts to exercise their discretion in favor of ensuring the right of indigent litigants to access the courts.

“A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law.” (*Elkins, supra*, 41 Cal.4th at p. 1351.)<sup>21</sup> “Reviewing courts have not hesitated to strike down local court rules or policies on the ground they are inconsistent with statute, with California Rules of Court promulgated by the Judicial Council, or with case law or constitutional law.” (*Ibid.*) Moreover, court rules cannot be used to completely frustrate the purpose of higher authorities, such as by sanctioning loopholes that would render state-imposed requirements meaningless. (*In re Robin M.* (1978) 21 Cal.3d 337, 347.) And when a trial court is permitted by statute to broadly exercise its discretion and account for a full range of factors in rendering a decision, a court rule that purports to cabin that discretion is invalid. (*People v. Hall* (1994) 8 Cal.4th 950, 963; *see also Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 168; *Cortez v. Bootsma* (1994) 27 Cal.App.4th 935, 938; *cf. Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1275 [local rule purporting to limit trial court’s discretion recognized as valid because it contained a savings clause permitting deviation from the rule if “otherwise determined by the court”].)

The superior court’s rule cannot stand under these standards. By categorically refusing to provide official reporters in civil

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<sup>21</sup> Superior Court policies are afforded the same treatment as local rules. (*See Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 504.)

trials—specifically including trials for indigent litigants with fee waivers (see Ex. B, at 2)—the policy renders section 68086(b) meaningless. Worse, it constitutes an abdication of the trial court’s discretion to take necessary measures to ensure that the fundamental and statutory rights of indigent and prisoner litigants like Jameson to access the courts are meaningfully preserved. The superior court has effectively determined to “choose no remedy” as a collective body. (*Accord Apollo, supra*, 167 Cal.App.4th at pp. 1483–84.) In the face of overwhelming authority, the policy cannot be permitted to stand.

This Court has repeatedly rejected the proposition that deprivations of indigents’ access to the courts can be justified by the budgetary concerns that animate the superior court’s policy. (*Earls, supra*, 6 Cal.3d at pp. 113-14; *Ferguson, supra*, 4 Cal.3d at p. 657.) As the Court more recently observed in *Elkins*, “[a] common theme in the appellate decisions invalidating local rules, and one that also appears in the present case, is that a local court has advanced the goals of efficiency and conservation of judicial resources by adopting procedures that deviated from those established by statute, thereby impairing the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding.” (*Elkins, supra*, 41 Cal.4th at p. 1353.)

The Court has not hesitated to strike down court rules and policies far less chilling of the right to access to the courts than the superior court’s policy here. (*See id.* at p. 1354. [striking local rule requiring direct testimony to be presented by declaration in

family law cases as inconsistent with the evidence code and unnecessarily burdensome on often unrepresented family court litigants); *People v. Pena* (2004) 32 Cal.4th 389, 403 [striking appellate court's practice of soliciting waivers of oral argument by suggesting to the parties that the panel had already made its decision and that argument would be unhelpful as inconsistent with the right to oral argument on appeal].) Under the circumstances, the superior court's policy of refusing to provide official reporters in civil trials is invalid to the extent it denies indigent litigants access to the courts.

#### CONCLUSION

Because the question presented in this appeal is exceptionally important to the rights of poor and imprisoned Californians to effectively vindicate their rights and because the trial court's decision and its policy are anathema to the venerable rules in this state that put a thumb on the scale of the right to access, the Court should grant review.

Dated: November 30, 2015

Respectfully Submitted,

KIRKLAND & ELLIS LLP

By: 


Michael J. Shipley

*Attorney for Barry Jameson*

**CERTIFICATE OF WORD COUNT**

I, Michael Shipley, hereby certify that in accordance with California Rules of Court 8.504(d), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief, including footnotes, is 8,333 words.

Dated: November 30, 2015



Michael Shipley  
KIRKLAND & ELLIS LLP



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BARRY S. JAMESON,

Plaintiff and Appellant,

v.

TADDESE DESTA,

Defendant and Respondent.

D066793

(Super. Ct. No. GIS9465)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M.

Pressman, Judge. Affirmed.

Barry S. Jameson, in pro. per., for Plaintiff and Appellant.

La Follette, Johnson, De Haas, Fessler, & Ames, James J. Wallace II, Russell M.

Mortyn, and David J. Ozeran for Defendant and Respondent.

I.

INTRODUCTION

In 2002, Barry S. Jameson filed a complaint against Dr. Taddesse Desta asserting numerous claims stemming from Desta's allegedly negligent medical treatment of

Jameson's hepatitis while Jameson was incarcerated at the Richard J. Donovan Correctional Facility (Donovan). In three separate prior appeals, this court reversed judgments in favor of Desta, and remanded the matter for further proceedings. (See *Jameson v. Desta* (2013) 215 Cal.App.4th 1144 (*Jameson III*), *Jameson v. Desta* (2009) 179 Cal.App.4th 672 (*Jameson II*), and *Jameson v. Desta* (July 2, 2007, D047824) opn. mod. July 26, 2007 [nonpub. opn.] (*Jameson I*.)

On remand from *Jameson III*, Jameson filed a motion for summary judgment and/or adjudication. The trial court denied the motion in its entirety and set the matter for trial. After the parties provided opening statements at an unreported jury trial, Desta orally moved for nonsuit. The trial court granted the motion and entered judgment in favor of Desta.

On appeal, Jameson contends that the trial court erred in denying his motion for summary judgment, and in granting Desta's motion for nonsuit. Jameson also claims that the trial court erred in failing to have the trial proceedings recorded by a court reporter. Jameson further claims that the trial court displayed bias and prejudice throughout the proceedings and that the court's rulings denied him a fair trial. Finally, Jameson maintains that the trial court's cumulative errors resulted in a denial of due process.

We conclude that the trial court properly denied Jameson's motion for summary judgment and/or adjudication because Jameson did not establish that he is entitled to judgment as a matter of law on any of his claims. We also conclude that the trial court did not err in failing to have the trial proceedings recorded by a court reporter. In

addition, we conclude that Jameson cannot demonstrate that the trial court erred in granting Desta's motion for nonsuit, because the record on appeal does not contain a reporter's transcript. Finally, we reject Jameson's contentions that the trial court displayed bias or prejudice throughout the proceedings and that the cumulative error doctrine requires reversal. Accordingly, we affirm the judgment.<sup>1</sup>

This court is fully aware that Jameson's incarceration and his financial circumstances have made it difficult for him to pursue his claims in court.<sup>2</sup> This case aptly demonstrates that civil justice is not free. While this court is sympathetic to the plight of litigants like Jameson whose incarceration and/or financial circumstances present such challenges, the rules of appellate procedure and substantive law mandate that we affirm the judgment in this case.<sup>3</sup>

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<sup>1</sup> Approximately one week prior to the commencement of the jury trial, Desta filed a motion to dismiss on the ground that Jameson had failed to bring the matter to trial within five years, as required under Code of Civil Procedure section 583.310. The court took the issue under submission. After the parties presented opening statements, the court granted both the motion for nonsuit and the motion to dismiss. In light of our affirmance of the judgment on the ground that Jameson has failed to demonstrate that the court erred in granting the motion for nonsuit, we need not address whether the trial court properly granted Desta's motion to dismiss.

<sup>2</sup> Expert witness fees and court reporter fees are among the expenses that Jameson asserts he was unable to bear due to his indigence.

<sup>3</sup> Jameson also contends that in the event the matter is remanded, evidence of his prior felony conviction should be excluded at trial, certain motions in limine should be reconsidered or denied, and a change of venue granted. In light of our affirmance of the judgment, we need not consider these contentions.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The operative allegations in Jameson's complaint*<sup>4</sup>

In April 2002, Jameson filed a complaint alleging eight causes of action, including breach of fiduciary duty (lack of informed consent); professional negligence; general negligence; failure to train; battery; violation of civil rights; intentional infliction of emotional distress; and violation of due process against a number of defendants including Desta and officials of the California Department of Corrections and Rehabilitation (Department).<sup>5</sup> Jameson's claims of breach of fiduciary duty and professional negligence against Desta are the sole remaining causes of action and the only claims at issue in this appeal.

In his complaint, Jameson alleged that he had been suffering from hepatitis and that Desta negligently prescribed interferon for Jameson while Jameson was incarcerated at Donovan and Desta was performing services as a physician for the Department. Jameson further alleged that the interferon caused him to suffer serious physical injuries, including irreversible damage to his eyesight. With respect to his breach of fiduciary duty claim, Jameson alleged in part:

"Desta breached his fiduciary duty as a doctor when he started [Jameson] on Alpha-2B Interferon, when [Jameson] had no detectable viral count. [The Department's] written

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<sup>4</sup> Our description of this portion of the factual and procedural background is drawn from our opinion in *Jameson III*.

<sup>5</sup> Desta is the only respondent in this appeal.

policy . . . clearly states if a person has a viral count that does not exceed 3,499, a person is not to be given interferon treatment. Moreover, such treatment is to be reviewed every six (6) months to review whether such treatment should be continued. . . . Desta simply continued [Jameson] on treatment [Jameson] should never have been on with deliberate indifference and a reckless disregard for the rights[,] health and safety of [Jameson], causing irreparable injury. . . . This second six months aggravated the injuries to [Jameson] unnecessarily.

"Desta held a position of trust with [Jameson], causing [Jameson] to rely on Desta's statements and recommendation that [Jameson] begin treatment and stay on it. It is only through [Jameson's] research of his own medical file and hepatitis literature that even as a layman he easily discovered the mistaken or malicious prescription by Desta that resulted in such damage." (*Jameson III, supra*, 215 Cal.App.4th at pp. 1150-1151.)

On his professional negligence cause of action, Jameson alleged that Desta had been "professionally negligent in his treatment of [Jameson], and there existed a physician-patient relationship." (*Jameson III, supra*, 215 Cal.App.4th at p. 1151.)

Jameson also alleged the following:

"Due to Desta's professional negligence and failure to exercise the proper degree of knowledge and skill in diagnosing, treating and monitoring any such treatment, [Jameson] suffered and suffers extreme migraine headaches, vision loss, weight loss, depression and severe emotional duress. [Jameson] suffered such due to Desta ordering that [Jameson] take interferon treatment that [Jameson] did not need and local regulations precluded or excluded [Jameson] from taking. [Jameson] and Desta shared a position of trust, and Desta acted in the capacity of a 'specialist' in the field of [h]epatology.

"[Jameson's] liver condition never showed what is called a 'viral count,' and at all times relevant to this matter, [Jameson's] viral count was undetectable. Therefore, [Jameson] should have never been subjected to what amounted to cancer treatment and all the suffering that is attached thereto." (*Id.* at p. 1151.)

B. *Proceedings on remand from Jameson III*

In November 2013, on remand from *Jameson III* in which this court reversed the trial court's granting of summary judgment in favor of Desta, Jameson filed a motion for summary judgment and/or adjudication on the two remaining claims in the action, breach of fiduciary duty and professional negligence. The trial court denied the motion in its

entirety. In its order denying the motion, the court indicated that there were numerous triable issues of fact and that "this case should proceed to trial."

In April 2014, the trial court commenced a jury trial. After the parties presented opening statements at the unreported jury trial, Desta orally moved for nonsuit. The trial court granted the motion for nonsuit and entered judgment in favor of Desta. Jameson timely appeals.

### III.

#### DISCUSSION

- A. *The trial court properly denied Jameson's motion for summary judgment and/or summary adjudication*

Jameson claims that the trial court erred in denying his motion for summary judgment and/or adjudication.

1. *Governing law*

" 'A motion for summary judgment shall be granted when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [Citation.] . . . A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. [Citation.] Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Jameson III, supra*, 215 Cal.App.4th at p. 1163.)

On appeal, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' " (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143, quoting *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222–223.)

2. *Factual and procedural background*

As noted above, in November 2013, Jameson filed a motion for summary judgment and/or adjudication. In his brief in support of the motion, Jameson contended that undisputed evidence demonstrated that Desta treated Jameson for hepatitis after Jameson was already cured, that Desta was professionally negligent and breached his fiduciary duty to Jameson in the manner by which he treated Jameson, and that Desta caused Jameson to suffer damages. Jameson claimed that he was therefore entitled to

judgment as a matter of law on his breach of fiduciary duty and professional negligence causes of action.

In the alternative, Jameson requested that the trial court grant summary adjudication with respect to several "issues," including whether Desta failed to inform Jameson of treatment options, whether Desta breached his fiduciary duty to Jameson, whether Desta had been professionally negligent, and whether newly discovered evidence and "law of the case" demonstrated that Desta caused Jameson to suffer damages.<sup>6</sup>

Desta filed an opposition in which he contended that the trial court should deny the motion for summary judgment and/or adjudication for several reasons, including that there were numerous issues of material fact.

After further briefing, the trial court denied Jameson's motion in its entirety.

Among the numerous grounds upon which the court denied the motion was the following:

"As to the request for summary judgment, the Court first notes that [Jameson] has not established with evidence damages and thus summary judgment would not be proper in any event. As to the 'issues' identified for adjudication, the Court further notes that [Jameson] is seeking adjudication of 'issues' and not 'causes of action' as required under

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<sup>6</sup> Jameson phrased the issues as follows: "[T]here is no admissible evidence to defend plaintiff Jameson's claim defendant Desta failed to inform of treatment options"; "there is no admissible evidence nor defense against plaintiff's claim defendant Desta violated his fiduciary duty by subjecting plaintiff Jameson to six unnecessary months of interferon injections"; "there is no admissible evidence nor defense against plaintiff Jameson's claim that defendant Desta was professionally negligent when he subjected Jameson to six unnecessary months of interferon injections"; and "the documentary evidence Jameson obtained after the recent dismissal in the superior court . . . and the law of the case doctrine clearly show defendant Desta caused and contributed to plaintiff Jameson's damages."



[Code of Civil Procedure section] 437c, [subdivision] (f). Summary adjudication must completely dispose of a cause of action or defense."

### 3. *Application*

We begin our analysis by examining the allegations in Jameson's complaint. (See *Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1138 [first step in an appellate court's review of a summary judgment is "identifying the issues framed by the complaint"].) In his breach of fiduciary duty claim, Jameson alleged that Desta's actions caused "pain, suffering, emotional distress, and impairment of enjoyment of life to [Jameson]." Similarly, in his professional negligence cause of action Jameson contended that Desta caused him "pain, suffering, and emotional distress for no medical reason." Damages are an essential element of both breach of fiduciary duty and professional negligence. (See *Jameson III, supra*, 215 Cal.App.4th at pp. 1164, 1166 [outlining elements].) Thus, in order to be entitled to summary adjudication of either cause of action, Jameson was required to establish *as a matter of law* the *amount* of damages to which he was entitled. (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 243 ["summary judgment or adjudication improper where *amount* of damages raises factual issue" (italics added)].)

Jameson did not attempt to establish the *amount* of damages to which he was entitled with respect to either his breach of fiduciary duty or professional negligence

causes of action in his motion for summary judgment and/or adjudication.<sup>7</sup> Jameson therefore failed to establish, as a matter of law, this element of his claims, as would be required in order for the trial court to grant him summary adjudication on either cause of action. (See *Paramount Petroleum Corp. v. Superior Court*, *supra*, 227 Cal.App.4th at p. 243.) Thus, Jameson was not entitled to summary judgment or summary adjudication with respect to either his breach of fiduciary duty cause of action or his professional negligence cause of action. In addition, to the extent the "issues" as to which Jameson sought adjudication were distinct from these two causes of action, Jameson was not entitled to summary adjudication with respect to such issues because these issues would not " 'completely dispose[] of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.' " (*Jameson III*, *supra*, 215 Cal.App.4th at p. 1163.)

Jameson contends that the trial court should have granted his motion for summary judgment and/or adjudication because Desta failed to file proper responsive opposition papers to the motion. This argument is unpersuasive because Jameson did not carry his

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<sup>7</sup> As noted in the text, with respect to both his breach of fiduciary duty and professional negligence causes of action, Jameson sought noneconomic damages for pain and suffering. In light of the nature of these damages, it is highly doubtful that *any* plaintiff could establish *as a matter of law* the amount of noneconomic damages to which he or she was entitled. "The amount of noneconomic damages to award for pain and suffering is a subjective determination that is particularly *within the discretion of the jury*." (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1416, italics added; see also *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d at 889, 893 [noneconomic damages "represent[] a detriment which can be translated into monetary loss only with great difficulty," and "*the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence'*" (italics added)].)

initial burden of demonstrating that he was entitled to summary judgment or summary adjudication. Any deficiencies in Desta's opposition papers were therefore immaterial. (See, e.g., *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086 [trial court may not grant *unopposed* motion for summary judgment "without first determining that the moving party has met its initial burden of proof"].)

Accordingly, we conclude that the trial court properly denied Jameson's motion for summary judgment and/or summary adjudication.

B. *The trial court did not err in failing to have the trial proceedings recorded by a court reporter*

Jameson contends that the trial court erred in failing to have the trial proceedings recorded by a court reporter.

1. *Factual and procedural background*

At a hearing 10 days prior to the commencement of the jury trial, the trial court informed the parties that "the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial."<sup>8</sup>

The jury trial was not reported and there is no indication in the record that either party sought to provide a court reporter for the trial.

2. *Governing law*

Government Code section 68086 provides in relevant part:

"The following provisions apply in superior court:

"(a) In addition to any other fee required in civil actions or cases:

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<sup>8</sup> We quote from the minute order for the hearing.

(1) For each proceeding anticipated to last one hour or less, a fee of thirty dollars (\$30) shall be charged for the reasonable cost of the court reporting services provided at the expense of the court by an official court reporter pursuant to Section 269 of the Code of Civil Procedure.

"[¶] . . . [¶]"

(2) For each proceeding lasting more than one hour, a fee equal to the actual cost of providing that service shall be charged per one-half day of services to the parties, on a pro rata basis, for the services of an official court reporter on the first and each succeeding judicial day those services are provided pursuant to Section 269 of the Code of Civil Procedure.

"[¶] . . . [¶]"

"(b) The fee shall be waived for a person who has been granted a fee waiver under Section 68631.

"(c) The costs for the services of the official court reporter shall be recoverable as taxable costs by the prevailing party as otherwise provided by law.

"(d) The Judicial Council shall adopt rules to ensure all of the following:

"(1) *That parties are given adequate and timely notice of the availability of an official court reporter.*

"(2) *That if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefor recoverable as provided in subdivision (c).*

"(3) *That if the services of an official pro tempore reporter are utilized pursuant to paragraph (2), no other charge shall be made to the parties.*" (Italics added.)

California Rules of Court, rule 2.956, contains provisions governing notice concerning the availability of official court reporters.<sup>9</sup> Rule 2.956 provides in relevant part:

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<sup>9</sup> All subsequent rules references are to the California Rules of Court.

Rule 2.956 provides in relevant part:

"(b) Notice of availability; parties' request

"(1) *Local policy to be adopted and posted*[:] Each trial court must adopt and post in the clerk's office a local policy enumerating the departments in which the services of official court reporters are normally available, and the departments in which the services of

"(c) Party may procure reporter[:]. *If the services of an official court reporter are not available for a hearing or trial in a civil case, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter. It is that party's responsibility to pay the reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law.*" (Italics added.)

### 3. *Application*

Government Code section 68086 and rule 2.956 clearly indicate that an official court reporter may not be available for a case. The statute and the rule further provide that, to the extent an official court reporter is unavailable, a party may arrange for the presence of a court reporter and that the costs of paying such reporter may potentially be recoverable by the prevailing party.

In this case, the record indicates that the trial court informed the parties of the unavailability of an official court reporter 10 days prior to the commencement of the jury trial. Further, there is nothing in the record indicating that Jameson attempted to "arrange

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official court reporters are not normally available during regular court hours. If the services of official court reporters are normally available in a department only for certain types of matters, those matters must be identified in the policy.

"(2) *Publication of policy*[:]. The court must publish its policy in a newspaper if one is published in the county. Instead of publishing the policy, the court may:

"(A) Send each party a copy of the policy at least 10 days before any hearing is held in a case; or

"(B) Adopt the policy as a local rule.

"(3) *Requests for official court reporter for civil trials and notices to parties*[:]. Unless the court's policy states that all courtrooms normally have the services of official court reporters available for civil trials, the court must require that each party file a statement before the trial date indicating whether the party requests the presence of an official court reporter. If a party requests the presence of an official court reporter and it appears that none will be available, the clerk must notify the party of that fact as soon as possible before the trial. If the services of official court reporters are normally available in all courtrooms, the clerk must notify the parties to a civil trial as soon as possible if it appears that those services will not be available."

for the presence of a certified shorthand reporter to serve as an official pro tempore reporter." (Gov. Code, § 68086; rule 2.956.) Therefore, the trial court did not err in failing to have the proceedings transcribed by a court reporter.

Jameson appears to suggest that the trial court failed to inform him in a timely manner of the unavailability of a court reporter. We reject this argument because Jameson presents no argument that the trial court failed to comply with rule 2.956 governing notice of the unavailability of an official court reporter.<sup>10</sup> Further, the record indicates that the court informed Jameson of this fact 10 days prior to the commencement of the jury trial and Jameson presents no argument this was an insufficient amount of notice.

Jameson also appears to suggest that the trial court erred in failing to provide a court reporter because he had obtained a fee waiver pursuant to Government Code section 68631. Government Code section 68086, subdivision (b) provides that the official court reporter fee will be waived for a person who has been granted a fee waiver pursuant to Government Code section 68631. The statute does not mandate that a trial

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<sup>10</sup> Specifically, Jameson does not claim that the trial court erred in failing to "require that each party file a statement before the trial date indicating whether the party requests the presence of an official court reporter." (Rule 2.956(b).) Further, Jameson does not contend that the court's provision of 10 days' notice concerning the unavailability of an official court reporter failed to comply with the requirement that the "the clerk . . . notify the party of [the unavailability of an official court reporter] as soon as possible before the trial." (*Ibid.*)

court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case.

Further, rule 2.956 states that it is a "party's responsibility to pay the reporter's fee" where an official court reporter is not provided by the court. In addition, San Diego Superior Court policy provides that "Official court reporters are *not* normally available in civil . . . matters" (italics added), and states that, "[p]arties, *including those with fee waivers*, are responsible for all fees and costs related to court reporter services" where an official court reporter is not provided by the court. (Italics added.) (See [http://www.sdcourt.ca.gov/portal/pageid=55,1839949&\\_dad=portal&\\_schema=PORTAL](http://www.sdcourt.ca.gov/portal/pageid=55,1839949&_dad=portal&_schema=PORTAL)> [as of Oct. 2, 2015].)<sup>11</sup> Thus, Jameson's fee waiver did not mandate that the trial court provide him with the services of a court reporter free of charge. Accordingly, we conclude that the trial court did not err in failing to have the trial proceedings recorded by a court reporter.

C. *Jameson has failed to demonstrate that the trial court erred in granting Desta's motion for nonsuit*

Jameson contends that the trial court erred in granting Desta's motion for nonsuit.

1. *Factual and procedural background*

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<sup>11</sup> The Superior Court of San Diego County, Local Rule 5.1.8 provides that "The court's policy regarding the availability and unavailability of official court reporters can be read in full on the court's [Web] site."

According to a minute order in the respondent's appendix, after the parties presented opening statements, Desta made a motion for nonsuit. The minute order indicates that the trial court granted the motion, as follows:

"The court . . . GRANTS the non-suit . . . Mr. Jameson did not establish causation in his opening statement. The court allowed all of [Jameson's] exhibits into evidence as requested. The court finds that Mr. Jameson did not have an expert available. [¶] The Court finds that it's clear that the plaintiff cannot establish [a] causal connection between [the] treatment [of] Dr. Desta and alleged damages. [¶] The Court states that [Jameson] had not established [that] Dr. Cooper was unavailable and even in the deposition Dr.

Cooper gave no opinion on causation or damages.[<sup>12</sup>] It is clear, that no matter how far the Court allowed [Jameson] to go in trial that he could not overcome these issues. The court GRANTS the non-suit on all causes of action. [¶] The Court finds that there is no basis upon which a jury could find for [Jameson]: [¶] . . . [¶] That [Jameson] has not presented any evidence that a jury could find for [Jameson] that Dr. Desta did not meet the standard of care and causal damage to [Jameson]; nor breached any fiduciary duty."

## 2. *Governing law*

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) A defendant

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<sup>12</sup> Jameson offered a declaration from Dr. Allen D. Cooper in support of his motion for summary judgment. Desta offered excerpts of Dr. Cooper's deposition in support of his motion for summary judgment. (See *Jameson III, supra*, 215 Cal.App.4th at pp. 1157-1160.) In *Jameson III*, this court stated that Dr. Cooper's deposition testimony concerning causation and damages was "ambiguous" and rejected Desta's contention that he was entitled to summary judgment on the ground that the excerpts from the deposition conclusively established that Dr. Cooper had no opinion as to causation and damages. (*Ibid.*) However, the *Jameson III* court *did not state* that Dr. Cooper's deposition in fact contained opinions as to causation and damages sufficient to establish Jameson's claims. (*Ibid.*)



may move for nonsuit after the plaintiff's opening statement or at the close of the plaintiff's evidence. (Code Civ. Proc., § 581c, subdivision (a).)<sup>13</sup>

An appellant who fails to provide a reporter's transcript on appeal is precluded "from raising any evidentiary issues on appeal." (*Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657.) Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript. (*Ibid.* ["Since the reversal of a nonsuit requires the review of the evidence presented to the trial court, and a reporter's transcript was not provided, we do not reach the merits of [appellant's] claim".])

### 3. *Application*

As noted previously, the record on appeal does not contain a reporter's transcript. Jameson is therefore precluded from obtaining a reversal of the trial court's ruling granting Desta's motion for nonsuit. (See *Hodges v. Mark, supra*, 49 Cal.App.4th at p. 657.)

While Jameson raises several arguments in support of reversal of the nonsuit, including contentions concerning the availability of Dr. Cooper, whether the trial court erred in failing to take judicial notice of this court's prior opinions in this case, whether the trial court erred in excluding Dr. Cooper's declaration and deposition, whether the

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<sup>13</sup> Code of Civil Procedure section 581c, subdivision (a) provides in relevant part: "Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant . . . may move for a judgment of nonsuit."

trial court erred in precluding Jameson from relying on Desta's expert, whether the doctrine of res ipsa loquitur applies in this case, and whether the trial court improperly refused to consider jury instructions setting forth Jameson's theories of the case, none of these contentions is cognizable in the absence of a reporter's transcript.

Jameson also suggests that the trial court did not grant Desta's motion for nonsuit as to Jameson's "failure to inform claim." The minute order states that the trial court granted the motion as to "all causes of action." Thus, Jameson is not entitled to "proceed on the failure to inform claim."

Accordingly, we conclude that Jameson has failed to demonstrate that the trial court erred in granting Desta's motion for nonsuit.

D. *The record does not indicate that the trial court displayed bias or prejudice throughout the proceedings*

Jameson contends that the trial judge displayed bias and prejudice throughout the proceedings, and that this resulted in his being denied a fair trial. Although it not entirely clear from his brief, Jameson appears to contend that the trial judge erred in denying Jameson's motion to disqualify the judge pursuant to Code of Civil Procedure section 170.1 and that the judge's rulings violated his due process right to an impartial judge.

1. *Governing law*

a. *Review of a trial court's ruling on a motion to disqualify is not cognizable on appeal*

Code of Civil Procedure section 170.3, subdivision (d) provides in relevant part:

"The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding."

In *People v. Panah* (2005) 35 Cal.4th 395 (*Panah*), the Supreme Court reiterated that Code of Civil Procedure section 170.3, subdivision (d) provides the exclusive method by which a party may seek appellate review of a judicial disqualification motion: "As we have repeatedly held, the statute means what it says: Code of Civil Procedure section 170.3, subdivision (d) provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory." (*Panah, supra*, at p. 444.)

2. *A party may claim on appeal that a trial judge violated the party's right to an impartial judge*

"[N]otwithstanding the exclusive-remedy provision of Code of Civil Procedure section 170.3, 'a [party] may assert on appeal a claim of denial of the due process right to an impartial judge.'" (*Panah, supra*, 35 Cal.4th at p. 445, fn. 16.) "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242.)

3. *Application*

Jameson appears to contend that the trial judge erred in denying his October 2013 motion to disqualify the trial judge pursuant to Code of Civil Procedure section 170.1. This claim is not cognizable on appeal. (*Panah, supra*, 35 Cal.4th at pp. 444-445.)

Jameson also appears to claim that the trial judge violated his due process right to an impartial judge by repeatedly ruling against Jameson with respect to various motions,

including a May 2013 motion for change of venue, an October 2013 motion for judgment on the pleadings, and the motion for summary judgment or adjudication addressed in part III.A., *ante*. "The mere fact that the trial court issued rulings adverse to [Jameson] on several matters in this case, even assuming one or more of those rulings were erroneous, does not indicate an appearance of bias, much less demonstrate actual bias. (See *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59–60 . . . ["While we conclude the court erred in several respects, the leap from erroneous rulings to the appearance of bias is one we decline to make.'])" (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 674.)

In any event, Jameson has not demonstrated that the trial court erred in denying any of the motions. With respect to the motion for a change of venue, a trial court has discretion in determining whether to grant such a motion (see, e.g., *Ford Motor Credit Co. v. Superior Court* (1996) 50 Cal.App.4th 306, 308), and there is nothing in either Jameson's brief or in the record demonstrating that the court abused its discretion in denying the motion.<sup>14</sup> The motion for judgment on the pleadings that Jameson references in his brief is clearly without merit because Jameson failed to demonstrate that Desta's answer did "not state facts sufficient to constitute a defense to the complaint," as would be required in order for Jameson to be entitled to judgment on the pleadings. (Code Civ. Proc., § 438, subd. (c)(1)(A).) Finally, the motion for summary judgment

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<sup>14</sup> "An order granting or denying a motion to transfer venue is reviewable only by petition for writ of mandate." (*K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 496, fn. 6.)

and/or adjudication was also clearly without merit for the reasons stated in part III.A.,  
*ante*.

We have carefully reviewed the record and conclude that it does not indicate that the trial court displayed bias or prejudice against Jameson. Accordingly, we reject Jameson's contention that the trial court violated his right to an impartial judge.

E. *The cumulative error doctrine does not apply*

Jameson contends that the trial court's cumulative errors denied him due process and a fair trial. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) In light of our conclusion that Jameson has not demonstrated any individual errors, the cumulative error doctrine does not apply. (See, e.g., *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1246 ["Since there is no error in these individual rulings, there is, of course, no cumulative error"].)

IV.

DISPOSITION

The judgment is affirmed. Desta is entitled to recover costs on appeal.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.

Filed 10/20/15

CERTIFIED FOR PUBLICATION  
COURT OF APPEAL, FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

BARRY S. JAMESON,  
  
Plaintiff and Appellant,  
  
v.  
  
TADDESE DESTA,  
  
Defendant and Respondent.

D066793

(Super. Ct. No. GIS9465)

ORDER CERTIFYING OPINION  
FOR PUBLICATION

THE COURT:

The opinion filed October 14, 2015, is ordered certified for publication.

NARES, Acting P. J.

Copies to: All parties



## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

### POLICY REGARDING NORMAL AVAILABILITY AND UNAVAILABILITY OF OFFICIAL COURT REPORTERS

Official court reporters are normally available in felony criminal cases and juvenile matters during regular court hours. Official court reporters are not normally available in civil, family, or probate matters with exceptions listed below.

- **Family Law Matters:** Official court reporters are not normally available in family law matters, with the exception of Family Support Division (FSD) matters, Domestic Violence Restraining Order hearings, Contempt hearings, and Request for Order hearings of 40 minutes or less.
- **Probate Matters:** Official court reporters are not normally available in probate matters with the exception of Conservatorship Appointment hearings.

The San Diego Superior Court provides electronic recording services in infraction and misdemeanor proceedings. The court may electronically record limited civil proceedings, including unlawful detainers, collections, and small claims, *if* recording equipment is available.

**Parties may privately arrange for the appointment of a court-approved official court reporter pro tempore without a stipulation for civil, family, and probate matters.** A list of court-approved certified shorthand reporters (SDSC Form #ADM-321), including names and contact information, who can be privately arranged and appointed as an official court reporter pro tempore without stipulation of the parties, is posted on the court's website. Also posted on the website are the policies for court reporters to be approved for the list (SDSC Form #ADM-313), and for arranging for the appointment of a reporter (SDSC Form #ADM-315).

**Parties may privately arrange for the appointment of a reporter not on the court-approved list, by stipulation and order for civil, family, and probate matters.** Parties may, by stipulation, arrange for the appointment of a certified shorthand reporter who is not on the court-approved list to serve in a proceeding as an official court reporter pro tempore where an official court reporter is not normally available. The court's policy for arranging for a reporter who either is or is not on the court-approved list (SDSC Form #ADM-315), and other necessary forms and information, can be found on the court's website.

**Parties, including those with fee waivers, are responsible for all fees and costs related to court reporter services arranged under the foregoing provisions.**

The reporting notes of all certified shorthand reporters are the official records of the court and shall be kept by the reporter taking the notes in a place designated by the court, or, upon order of the court, delivered to the clerk of the court (Gov. Code § 69955(a)). The court's policy for providing the court with electronic notes (SDSC Form #ADM-319) is posted on the court's website.

All forms, policies, and additional information can be found on the court's website at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov).



## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

### OFFICIAL REPORTER PRO TEMPORE POLICY

#### I. Purpose

Parties have the right to arrange, at their own expense, for the presence of court reporters if the services of an official court reporter are not available for a proceeding (Gov. Code § 68086 & Cal. Rules of Court [CRC], rule 2.956). This document establishes policy for party(ies) arranging for a court reporter when an official reporter is not normally available and establishes requirements for qualifying as an official reporter pro tempore.

#### II. Policy

- A. If the services of an official court reporter are not available for a proceeding, a party may privately arrange for court reporter services at their expense, pursuant to Gov. Code § 68086 and CRC 2.956. This includes cases where a proceeding continues to or past the date for which a reporter is no longer normally available.
- B. Parties must make arrangements for reporters *in advance of the proceeding* to ensure the proceedings will be reported. Advance notice to the court of an intention to do so is not required.
- C. Parties may arrange for their own reporter, or may select from the *Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-321) (List).
  1. Court-Approved List
    - a. As a service to court users, the court will establish and maintain a list of court-approved official reporters pro tempore who have met the requirements and qualifications established by the court. (See *Policy for Court-Approved List of Official Reporters Pro Tempore* SDSC Form #ADM-313.)
    - b. Parties are not obligated to select a reporter from this List. It is provided as a courtesy.
  2. Appointment as an Official Reporter Pro Tempore for a Proceeding:
    - a. Reporters must complete and sign sections 1, 2, and 3 of the *Appointment as Official Reporter Pro Tempore* (SDSC Form #ADM-316).
    - b. All parties present at the proceeding must complete and sign the stipulation portion of the *Appointment as an Official Reporter Pro Tempore* (SDSC Form #ADM-316) stipulating to the court appointing an official reporter pro tempore. If the reporter is on the List, the stipulation is not required. Parties appearing through Court Call or otherwise by telephone may stipulate orally, which stipulation should be noted in a minute order.
    - c. The *Appointment as an Official Reporter Pro Tempore* (SDSC Form #ADM-316) must be completed by all parties and provided to the court before the proceeding commences.
    - d. The Judicial Officer in the courtroom must order the reporter appointed as an official reporter pro tem, using the *Appointment of Official Reporter Pro Tempore* (SDSC Form #ADM-316), before she or he may report the proceeding.
- D. This policy will be posted on the court's website at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov).





E. Official Reporter Pro Tempore Requirements

By signing the *Appointment as Official Reporter Pro Tempore* (SDSC Form #ADM-316), the reporter agrees to the following:

1. Is not a regular employee of the court. Note: "Per Diem" reporters, who have an Independent Contractor Agreement with the court, are not considered regular employees.
2. Has a valid, current California Certified Shorthand Reporter License and will maintain current contact information with the court.
3. All fees for reporting services, including appearance and real-time fees, are the responsibility of the party or parties who arranged the reporter services and may not be charged to the court.
4. To comply with statutes and rules applicable to official reporters pro tempore, including the duty to timely prepare transcripts, including those for appeals, in the proper form.
5. To follow directions from the court, and to be subject to the jurisdiction of the court to the same extent as an official reporter.
6. To be available for immediate (within 30 minutes) read-back of notes.
7. To be in good standing with the Court Reporters Board of California.
8. To comply with the court's requirements regarding uploading electronic notes as stated in *Official Reporter Pro Tempore Electronic Notes Upload/Archiving Policy* (SDSC Form # ADM-319), including uploading each day's stenotype notes to the court's vendor (ACORN) by 1:30 p.m. the next business day, or in the case of illness or emergency, as soon as practicable thereafter.

F. Additional Information for Parties

1. Only One Official Record

There can only be one official record of court proceedings, and only a reporter appointed by the court may report a court proceeding (CCP § 273; Gov. Code §§ 70043, 70044; *Redwing v. Moncravie*, (1934) 138 Cal. App. 432, 434). Only one reporter will be allowed to report a court proceeding at any given time. If the parties cannot agree on a reporter, the judicial officer will make the selection.

2. Payment for Official Reporter Pro Tempore Services

CRC 2.956(c) provides that the party arranging for an official reporter pro tempore is responsible for paying the reporter's fees. These expenses may be recoverable as part of a party's costs as provided by law (Gov. Code § 68086(a)(4)).

3. Indigent Litigants

In cases where the court no longer provides court reporters, indigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver. Fee waivers apply only to fees charged by the court. They do not apply to court reporter fees and costs in cases where the court is not providing the court reporter. Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services.

4. Transcripts

a. Copies of transcripts may be ordered to be lodged with the court. Any party who orders proceedings transcribed by the official reporter pro tempore may be ordered to lodge a copy of the transcript with the court (CCP § 128(a)).

b. Transcripts produced by an official reporter pro tempore will be treated, for court purposes, identically to transcripts prepared by official reporters. Reporting notes of an official reporter pro tempore are official records of the court (Gov. Code §69955(a)). The notes of official reporters pro tempore, when transcribed and certified, are prima facie evidence of the testimony and proceedings (CCP § 273(a)).

- c. Original and certified transcripts are admissible as evidence to the extent otherwise permitted by law. Transcripts prepared by a privately retained certified shorthand reporter appointed by the court as an official reporter pro tempore are admissible as evidence to the extent otherwise permitted by law (CCP § 273(a)).
  - d. Unofficial transcripts prepared by other than official court reporters or official court reporters pro tempore are not admissible (CCP § 273(b); *Redwing v. Moncravie* (1934) 138 Cal. App. 432, 435; *Reid v. Reid* (1887) 73 Cal. 206; *Estate of Benton* (1901) 131 Cal. 472 at 472-480.)
5. Reimbursement of Advanced Fees  
Fees lodged prior to the date this policy becomes effective for an official reporter in advance of the proceeding where a reporter will no longer be available will be returned to the party that lodged them, upon request to the court.

G. Forms and Additional Information

- 1. *Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-321)
- 2. *Policy for Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-313)
- 3. *Appointment of Official Reporter Pro Tempore* (SDSC Form #ADM-316)
- 4. *Official Reporter Pro Tempore Electronic Notes Upload/Archiving Procedure* (SDSC Form #ADM-319)
- 5. *Guide for Official Reporters Pro Tempore* (SDSC Form #ADM-318)

These forms, and additional information, are available on the court's website: [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov).

**PROOF OF SERVICE**

I, Amy D. Palafox, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Kirkland & Ellis LLP, 333 South Hope St., 29th Floor, Los Angeles, California 90071.

On November 30, 2015, I served the documents listed below on the interested parties in this action as follows:

**PETITION FOR REVIEW**

**[Overnight Courier/Federal Express]** By placing the document(s) listed above in a sealed overnight courier envelope and taking such packages to the nearest Federal Express office located at 330 S. Hope Street, Los Angeles, California 90071, with charges thereon fully prepaid in the ordinary course of business.

***Pursuant to Cal. Rule of Court, Rule 8.25(b)(3)  
Original + 13 Paper Copies for Filing:***

**Clerk of the Supreme Court  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797  
Clerk's Office: (415) 865-7000**

*Service of 1 Paper Copy:*

In the Court of Appeal, State of California  
Fourth District, Division One  
750 B Street, Suite 300  
San Diego, CA 92101  
Clerk's Office: (619) 744-0760

*Service of 1 Paper Copy:*

California Superior Court, County of San Diego  
Hall of Justice Courthouse  
330 West Broadway  
San Diego, CA 92101  
Hon. Joel M. Pressman, Judge, Department 66

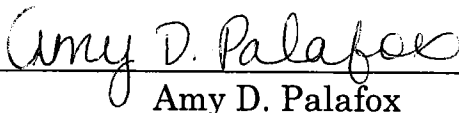
*Service of 1 Paper Copy:*

James J. Wallace II  
Russell M. Mortyn  
David J. Ozeran  
LA FOLLETTE, JOHNSON, DE HAAS, FESLER & AMES  
501 West Broadway, Suite 800  
San Diego, CA 92101  
Telephone: (619) 400-4977  
Facsimile: (619) 400-4979

*Counsel for Respondent Taddese Desta, M.D.*

(STATE) I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2015, at Los Angeles, California.

  
\_\_\_\_\_  
Amy D. Palafox