Case No. S221530

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Deborah Shaw,
Petitioner,

vs.

Superior Court of the State of California,
Respondent,

THC – Orange County, Inc., a California corporation; Kindred Healthcare Operating, Inc., Kindred Hospitals West, LLC, Kindred Healthcare Inc.,
Real Parties in Interest.

Court of Appeal, 2d Dist., Div. 3,
Case No. B254958
Los Angeles County Superior Court Case No. BC493928
Honorable Alan S. Rosenfield

REAL PARTIES IN INTERESTS' OPENING BRIEF

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I.
ISSUES PRESENTED

The instant case is before this Court after the Court of Appeal issued a published opinion, granting Plaintiff / Petitioner Deborah Shaw's ("Shaw") Petition for Writ of Mandate.[1] The Court of Appeal held, in a case of first impression, that a claim under California Health and Safety Code, section 1278.5, is tried to a jury rather than the Court.

Before reaching the merits, however, the court below overruled Real Parties in Interests'[2] Demurrer to Shaw's Petition for Writ of Mandate. Real Parties based their Demurrer on this Court's unambiguous holdings, to wit: mandate is not an available remedy when a party is denied a jury trial, because the party has an adequate remedy at law, i.e., appeal from the judgment. After overruling Real Parties' Demurrer, the Court of Appeal erroneously held that a jury trial is available under Health and Safety Code section 1278.5 and issued a writ of mandate.

In their Petition for Review, Real Parties in Interest submitted the following issues for resolution in this Court, reproduced here:

1. Are this Court's holdings in *Nessbit v. Superior Court* (1931) 214 Cal. 1 ("mandate is not the proper remedy to test the right to a jury trial" because "the petitioner has a sufficient remedy in the ordinary course of law by appeal"), and *Donohue v. Superior Court* (1892) 93 Cal. 252, binding on the Courts of Appeal, and, if so, must a Court of Appeal sustain

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[1] The Court of Appeal's slip opinion is attached to the Petition for Review and reported at *Shaw v. Superior Court* (2014) 229 Cal. App. 4th 12.

[2] Real Parties in Interest, Defendants below, are THC – Orange County, Inc., Kindred Healthcare Operating, Inc., Kindred Hospitals West, LLC, Kindred Healthcare Inc. ("THC" or "Real Parties").

a demurrer to a petition for writ of mandate because the plaintiff has an adequate remedy at law?

2. Does a court of appeal violate *Auto Equity Sales v. Superior Court* (1962) 57 Cal. 2d 450, and therefore exceed its jurisdiction, by declining to follow a binding decision of this Court, and instead following a sister Court of Appeal's contrary decision, which neither cited nor distinguished this Court's prior decision?

3. Does an employee's cause of action for retaliation under Health and Safety Code section 1278.5 sound in equity, and therefore is properly tried to the court rather than a jury, given there was no analogous claim in existence as of 1850, the gist of an action under that statute is the equitable claim for restitution, the statute aids the state's regulation of health care facilities, and the statute's remedies invoke traditional equitable remedies as well as the trial court's broad equitable powers?

II.
INTRODUCTION

A. BACKGROUND AND PROCEDURAL HISTORY

Real Party in Interest THC-Orange County, Inc. (dba Kindred Hospital – Los Angeles) employed Plaintiff / Petitioner Deborah Shaw as a Human Resources Coordinator.[3] After THC-Orange County discharged Shaw for performance reasons, she filed a lawsuit for wrongful termination in violation of public policy and violation of Health and Safety Code section 1278.5. She claims she was discharged for reporting that nurses were working with expired licenses, and that professional staff had not properly completed clinical competencies. *See* Slip Op. at pp.2-3, *Shaw*, 229 Cal. App. 4th at p.16.

[3] These background facts and history are taken from the Court of Appeal's slip opinion, attached to the Petition for Review.

During pre-trial hearings, Respondent Superior Court ruled that the section 1278.5 claim is equitable in nature and, therefore, would be tried to the court rather than a jury. The trial court also certified that issue for resolution by the Court of Appeal under Civil Procedure Code section 166.1. *See* Slip Op. at pp. 4-5, Shaw, 229 Cal. App. 4th at p.17.[4]

Shaw filed a Petition for Writ of Mandate on or about March 17, 2014. The Court of Appeal issued an Order to Show Cause on April 17, 2014. Real Parties filed a Demurrer and Return on or about May 13, 2014. The Court of Appeal held oral argument on June 15, 2014, and issued its opinion on August 21, 2014.

Real Parties timely Petitioned this Court for review. This Court granted review on November 12, 2014.

B. THE COURT OF APPEAL ERRONEOUSLY OVERRULED REAL PARTIES' DEMURRER TO PLAINTIFF'S WRIT PETITION

This Court twice has ruled, without any qualification, that a party's right to a jury trial in a civil action presents a question of law, reviewable via appeal rather than via mandate. *See Nessbit v. Superior Court*, (1931) 214 Cal. 1; *Donohue v. Superior Court* (1892) 93 Cal. 252.

The Court of Appeal's decision in the instant case is the first to expressly decline to follow these cases. The Court below acknowledged, "*Nessbit* has not been reversed." Slip Op. p. 6, *Shaw*, 229 Cal. App. 4th at

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[4] Section 166.1 provides in part: "Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." However, that section "does not change existing writ procedures or create a new level of appellate review." *See Bank of America Corp. v. Superior Court* (2011) 198 Cal. App. 4th 862, 869 (internal quotation omitted).

p. 18. Yet, the Court of Appeal instead decided to follow the Third District's decision in *Byram v. Superior Court* (1977) 74 Cal. App. 3d 648, 654. The *Byram* court held, directly contrary to *Nessbit* and *Donohue*: "A writ of mandate is a proper remedy to secure the right to a jury trial . . . ." But the *Byram* court announced this rule without citing, distinguishing, or explaining *Nessbit*.

The Court of Appeal in the instant case wrote that *Nessbit* and *Byram* could be "harmonized." Slip Op., p. 6, *Shaw*, 229 Cal. App. 4th at p. 18. That is not so. This Court in *Nessbit* and *Donohue* held *without qualification* that the question of whether a jury trial is available is not reviewable by writ, because the denial of trial by jury presents a question of law adequately addressable on appeal. *Byram* reached the opposite conclusion, apparently without considering *Nesbitt* or *Donohue*. The *Byram* court did not hold writ review was "sometimes" available in an appropriate case, but rather, categorically announced that a writ is "proper." This Court in *Nessbit* and *Donohue* did not rule that writ review is sometimes available instead of post-judgment appeal. *Byram* and this Court's precedent therefore directly conflict.

The Court below, presented with a holding of this Court and a contrary holding of *Byram*, a sister court, was not authorized to follow *Byram*. Unless the Legislature abrogates or this Court overrules its decisions, they bind the Courts of Appeal. *See generally Auto Equity Sales v. Superior Court* (1962) 57 Cal. 2d 450.

Moreover, *Byram* is based on cursory and flawed reasoning. The Court's rationale that the writ is justified because post-judgment review is "inefficient and time consuming" is contrary to settled law, and would justify writ review of almost any material pre-trial order. *Byram*'s justification that aggrieved parties may not be able to demonstrate prejudice on appeal is also incorrect, as the wrongful denial of a jury trial is

reversible without a showing of actual prejudice. Moreover, in this case, Plaintiff *will* have a jury trial on her common law, "*Tameny*" claim, which the trial court will hear simultaneously with the statutory claim. The writ proceeding below interrupted a trial that would have started in March 2014 and ended before April 1. The outcome of that trial may well have determined whether post-judgment appeal was desirable or warranted by either side. Therefore, the writ was not necessarily more efficient or time-thrifty than allowing the case to go to trial.

C. THE COURT OF APPEAL ERRONEOUSLY CONCLUDED HEALTH AND SAFETY CODE SECTION 1278.5 PROVIDES A RIGHT TO A JURY TRIAL

The Court of Appeal's decision regarding the right to jury trial under Health and Safety Code section 1278.5 also was erroneous. The California Constitution does not preserve a right to a jury trial for claims that sound in equity. Section 1278.5, a "whistleblower retaliation" claim, is equitable in nature.

The availability of a jury trial depends on the "gist" of the claim. The "gist" of section 1278.5 is the equitable claim for restitution. The statute's text, legislative history, and even its placement within the Health and Safety Code's regulatory provisions, demonstrate the law vests the "*court*," not a jury, with significant discretion to award equitable relief. The statute, applicable to hospital facilities and their employees, is based on a similar provision applicable to long-term care facilities, which does not provide for a private right of action, much less a jury trial.

Relying on a 2007 amendment to section 1278.5 and some ambiguous legislative history, the Court of Appeal held that section 1278.5 sounds in law rather than equity, affording Plaintiff a jury trial. The Court of Appeal focused on a "catch-all" added to the law's remedies provision.

The Court of Appeal's decision is incorrect. The amendments to section 1278.5 expanded the statute's scope, including the remedies available and the class of plaintiffs protected, But these remedies remain equitable in nature. The trial court's equitable power includes the discretion to award legal damages when the court deems them to be warranted.

Therefore, even if the Court of Appeal had authority to reach the merits of Shaw's Petition for Writ of Mandate, it discharged its Order to Show Cause and denied the Petition.

III.
DISCUSSION

A. THE COURT OF APPEAL ERRED BY OVERRULING REAL PARTIES' DEMURRER TO SHAW'S PETITION FOR WRIT OF MANDATE AS A MATTER OF STARE DECISIS

1. This Court Has Twice Ruled that Writ Review of a Jury Trial Ruling Is Not Available, Because an Adequate Remedy at Law Exists

As stated, Shaw filed a Petition for Writ of Mandate in the Court of Appeal to overturn the trial court's ruling that no jury trial is available under Health and Saf. Code section 1278.5. Real Parties demurred to that Petition, citing this Court's ruling in *Nessbit v. Superior Court of Alameda County* (1931) 214 Cal. 1, 7 (emphasis added).

Here is what this Court wrote in *Nessbit*:

> This court and the District Court of Appeal have *squarely held* in numerous civil and criminal actions and proceedings not amounting to a felony *that mandate is not the proper remedy to test the right to a jury trial. That is a question of law which the superior court has jurisdiction to hear and determine, and if error has been or shall be committed in determining that question, the petitioner has a sufficient remedy in the ordinary course of law by appeal.*

Nessbit 214 Cal. 1, 7 (emphasis added).

This Court's opinion in *Nessbit* is based on an earlier decision in *Donohue v. Superior Court* (1892) 93 Cal. 252, from which the above language is quoted. *Id.* at p. 253.

Real Parties, in their Demurrer to Shaw's Petition for Writ of Mandate, cited both of these decisions to the Court of Appeal. The Court of Appeal acknowledged *Nessbit*, but stated that this Court *in Nessbit* "did not conclude that no case in which a jury trial was denied would ever be appropriate for writ review." Slip Op. at p.7, *Shaw*, 229 Cal. App. 4th at p. 19.

Instead, the Court below decided to follow *Byram v. Superior Court* (1977) 74 Cal. App. 3d 648. In *Byram*, the court considered whether the plaintiff had waived his right to a jury trial by failing to deposit jury fees, not whether a statute afforded him a right to jury trial. After the superior court denied relief, he sought a writ from the Court of Appeal. Without citing or distinguishing *Donohue* or *Nessbit*, the Court of Appeal in *Byram* simply stated: "A writ of mandate is a proper remedy to secure the right to a jury trial." *Id* at 654. That holding plainly contradicts this Court's decisions discussed above, in which this Court held exactly the opposite.

2. The Court Below Erred By Choosing to Follow a Sister Court's Ruing and Declining to Follow *Nessbit* and *Donohue*

In *Auto Equity Sales v. Superior Court* (1962) 57 Cal. 2d 450, this Court held: "the appellate department of the superior court *exceeded its 'jurisdiction,'* as that term is used in connection with the writ of certiorari, in refusing to follow a rule established by a court of superior jurisdiction" *Id.* at p. 455 (emphasis added). That is because "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." *Id. Auto Equity Sales* equally applies to the Court of

Appeal, which must follow this Court's decisions. *See McClung v. Employment Development Dept.* (2004) 34 Cal. 4th 467.

The Courts of Appeal are not in any respect bound to follow sister courts' decisions. *See Sarti v. Salt Creek Ltd.* (2008) 167 Cal. App. 4th 1187, 1193 (no "horizontal *stare decisis*" among the courts of appeal). This Court's statement in *Nessbit* that there is an adequate remedy at law via appeal is a holding. The Courts of Appeal must follow this Court's holdings, even if they were issued long ago, or if later developments in the law could warrant this Court's re-examination. *See, e.g., Santa Monica Mun. Employees Ass'n v. City of Santa Monica* (1987) 191 Cal. App. 3d 1538, 1546 ("unless and until the Legislature or the California Supreme Court decides to reject the determination that current City employees can be given preference for vacancies, we are bound by that court's determination.").

Therefore, the Court below acted in excess of its jurisdiction, *Auto Equity Sales*, 57 Cal. 2d at p. 455, by following *Byram* and overruling the Demurrer.

B. THE COURT OF APPEAL ERRED BY OVERRULING REAL PARTIES' DEMURRER TO SHAW'S WRIT PETITION, BECAUSE SHE HAD AN ADEQUATE REMEDY AT LAW

1. The Writ of Mandate Does Not Lie Because the Trial Court's Interpretation of a Statute as Equitable Is a Question of Law Reviewable Via Appeal

The general rule is that where, as here, a litigant may appeal, after trial, a superior court's allegedly erroneous ruling, that litigant has an adequate remedy at law, ordinarily precluding issuance of the writ. *See* Civ. Proc. Code § 1086 ("The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."); *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 913 ("an appeal is normally presumed to be an adequate remedy at law, thus

barring immediate review by extraordinary writ ."); *Andrews v. Police Court of Stockton* (1943) 21 Cal. 2d 479, 480 ("The writ of mandate will not issue solely to serve the purpose of a writ of review in order to pass upon claimed errors which are properly reviewable by means of an appeal." (quoting *Petaluma etc. District v. Superior Court*, (1924) 194 Cal. 183, 184.)); *Lincoln v. Superior Court of Los Angeles County* (1943) 22 Cal. 2d 304, 311 ("We reaffirm that 'Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise.'").

As stated, the denial of a jury trial is reviewable via a post-judgment appeal. *Nessbit*, 214 Cal. at 7; *Martin v. County of L.A.* (1996) 51 Cal. App. 4th 688, 698. *Nessbit* therefore applies the above general rule to the superior court's denial of a jury trial: it is reviewable via appeal and, therefore, not via writ. *See also Widney v. Superior Court of Los Angeles County* (1927) 84 Cal. App. 498, 499; *Mechler v. Superior Court of Alameda County* (1927) 85 Cal. App. 353, 354.

2. Shaw Failed in Her Petition to Establish that Appeal from the Judgment Is an Inadequate Remedy at Law

The litigant seeking review via writ of mandate is required to establish the absence of an adequate remedy at law. Civ. Proc. Code § 1086. "The burden, of course, is on the petitioner to show that [s]he did not have such a remedy." *Phelan v. Superior Court of San Francisco* (1950) 35 Cal. 2d 363, 366.

Shaw in her verified Petition for Writ of Mandate averred: "Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law." *See* Petition for Writ of Mandate Etc. p. 6, ¶ 8. She also alleged: "If a demand for a jury trial is refused, the demanding party must seek appellate review by writ of mandate." *Id.*, p. 6. And finally, "Petitioner will be unable to obtain a fair trail because the denial of the right to jury trial is not appealable." *Id.*

The Court of Appeal erred by issuing the writ based on this showing, particularly given *Nessbit*'s unambiguous holding. Shaw did not sustain her burden to prove that post-judgment appeal of Respondent Court's ruling is inadequate. First, as this Court in *Phelan* noted, "general allegations, without reference to any facts, are not sufficient to sustain his burden of showing that the remedy of appeal would be inadequate." *Id.* at p. 370.

Second, Shaw's verified allegations that "the denial of the right to jury trial is not appealable," is without merit. Even courts that have allowed the writ recognize that the denial of a jury trial is indeed appealable from the judgment.

Shaw did not demonstrate any special reason why a post-judgment appeal is inadequate. She therefore did not plead and prove the necessary requirements for writ relief. Therefore, the Court of Appeal erred in granting Shaw's Petition.[5]

3. *Byram v. Superior Court* and Other Cases Allowing Writ Relief for Denial of Jury Trial Are Erroneous or Distinguishable.

The Court below is the first expressly to hold that *Nessbit* does not preclude issuance of a writ in cases involving the denial of a jury trial. As stated, the Court of Appeal principally relied on *Byram v. Superior Court* (1977) 74 Cal. App. 3d 648.

Byram involved a waiver of the right to jury trial via failure to timely deposit jury fees. *Id.* at 650. The Court of Appeal, without analysis, held as follows:

> A writ of mandate is a proper remedy to secure the right to a jury trial. (*See Turlock Golf etc. Club v. Superior Court*, *supra*, 240 Cal.App.2d at p. 695.) After a trial to the court it may be

[5] Real Parties raised this issue below in their Demurrer and Return to the Petition for Writ of Mandate, pp. 4-5.

> difficult for the petitioner to establish that he was prejudiced by the denial of a jury trial. In addition, even if he could establish such prejudice as to warrant reversal of the judgment, such a procedure would be inefficient and time consuming.

Id. at p. 654.[6]

Putting aside that *Byram* failed to follow (or even mention) *Nessbit* or *Donohue*, the Court's decision is flawed. The reasoning that a party denied jury trial may not be able to prove prejudice on appeal is incorrect. "The denial of the right to jury trial is reversible error per se." *Martin*, 51 Cal. App. 4th at p. 698. Therefore, "[n]o showing of actual prejudice is required." *Ibid.*

Byram's second point is that post-judgment appeal is "inefficient and time consuming." This Court did not so hold in *Nessbit*, when it decided that post-judgment appeal is sufficient. In any event, post-judgment appeal is not rendered an "inadequate remedy at law" under Civ. Proc. Code section 1086 because appeal is "inefficient and time consuming." *All* meritorious post-trial appeals based on pre-trial rulings are to some extent inefficient (in that one must wait until after trial for review), and take more time, as compared to immediate writ review. The appellate courts understandably are loath to routinely consider interlocutory orders via writ

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[6] Other Courts of Appeal also have held that the denial of jury trial based on waiver is reviewable via writ, but without mentioning or distinguishing this Court's decisions in *Nessbit* or *Donohue*. *See, e.g., Johnson-Stovall v. Superior Court* (1993) 17 Cal. App. 4th 808, 812; *Winston v. Superior Court* (1987) 196 Cal. App. 3d 600, 603 ("When a trial court has abused its discretion in denying relief from a waiver of jury trial, a writ of mandate prior to the trial is the proper remedy."); *Selby Constructors v. McCarthy* (1979) 91 Cal. App. 3d 517, 522 (holding a " ruling denying a party's claim to trial by jury is reviewable by writ."); *Turlock Golf & Country Club v. Superior Court* (1966) 240 Cal. App. 2d 693.

to avoid disrupting the normal flow of appellate work. *See generally Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal. App. 3d 1266 ("Were reviewing courts to treat writs in the same manner as they do appeals, these courts would be trapped in an appellate gridlock.").

Precisely for that reason, courts have long held that writ relief is not justified on the basis that appeals involve expense and take more time than petitions for writ relief. *See Mitchell v. Superior Court of Los Angeles County* (1950) 98 Cal. App. 2d 304, 305 ("The most petitioner shows in this regard is that an appeal will take time and cost money. This is insufficient."); *Lohr v. Superior Court of Los Angeles County* (1952) 111 Cal. App. 2d 231, 235 (same); *Carton Corp. v. Superior Court of Alameda County* (1926) 76 Cal. App. 434, 437-438 ("the remedy by appeal is not inadequate because ordinarily it requires more time in its pursuit than either a proceeding in prohibition or mandamus . . . .").

Moreover, Shaw's waiting for the end of the lawsuit to appeal would not be "inefficient." Shaw's common law claim for wrongful termination in violation of public policy is a claim at law, and will be tried to a jury concomitantly with her section 1278.5 claim. *See* Slip Op. p. 5, n.7, *Shaw*, 229 Cal. App. 4th at p. 17. The trial court will be bound by the jury's factual findings on that claim. *See Hoopes v. Dolan* (2008) 168 Cal. App. 4th 146, 159 ("jury's factual findings on legal causes of action should bind the trial court when granting ancillary equitable remedies based on the same facts . . . ."). Thus, if the jury finds in Shaw's favor on retaliation in the context of the common law claim, appeal of the jury trial ruling will be unnecessary. If the jury finds Shaw's employer fired her for legitimate reasons, then section 1278.5 would provide no assistance to her.

To be sure, there are circumstances under which courts will issue writs even when a legal issue is reviewable via appeal. *See, e.g., Babb v. Superior Court* (1971) 3 Cal. 3d 841, 851 ("upon occasion our attention is

drawn to instances of such grave nature or of such significant legal impact that we feel compelled to intervene through the issuance of an extraordinary writ."); *Holtz v. Superior Court of San Francisco* (1970) 3 Cal. 3d 296, 302 ("a ruling which deprives a party of the opportunity to plead his cause of action or defense . . . ."). However, Shaw made no showing of any special facts or circumstances that would warrant departure from the general principle that review by appeal is an adequate remedy.

Finally, *Byram* is distinguishable because *Byram* concerned a "waiver" of jury trial. The courts "zealously guard" against waiver of the right to jury trial. *See Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 956 (collecting cases; holding no jury waiver except as provided by statute). But this Court has distinguished the line of cases addressing *waiver* of a jury trial right from those deciding whether a jury trial is *available* for a cause of action in the first place. *See Franchise Tax Bd. v. Superior Court* (2010) 51 Cal. 4th 1006, 1018 n. 12.[7] Therefore, even if the courts' vigilance to avoid waivers support writ relief in waiver cases, the instant case does not involve waiver.

In sum, the Court of Appeal erred in granting Shaw's Petition for Writ of Mandate. This Court's decision in *Nessbit* is controlling. *Nessbit* remains good law because, most importantly, this Court has not overruled it. Moreover, Shaw indeed has an adequate remedy at law, via appeal, to address the superior court's ruling on whether a jury trial is available. Shaw did not in her Petition for Writ of Mandate establish any entitlement

[7] Although this Court in *Franchise Tax Bd.* granted review of a writ, the issue was whether the trial court erred by refusing to *strike* a jury demand, not whether the court erred by ruling against a jury trial because of the nature of the claim. Moreover, the Court did not consider whether writ relief was appropriate, presumably because the parties did not address the issue. *See Ginns v. Savage* (1964) 61 Cal. 2d 520, 524 (an opinion is not authority for a legal proposition not addressed by the court).

to relief that would justify a departure from *Nessbit*, or the general rule that a post-judgment appeal is an adequate remedy at law.

Therefore, this Court should reverse the Court of Appeal's decision to overrule Real Parties' Demurrer to the Petition for Writ of Mandate. Alternatively, this Court should decide (1) whether *Nessbit* remains good law (2) whether writ review is available for cases in which superior courts rule on whether a jury trial is available and (3) reach the merits of whether there is a jury trial under Health and Saf. Code section 1278.5. *See Bowles v. Superior Court* (1955) 44 Cal. 2d 574, 582 ("Even though we may disagree with the determination of the District Court of Appeal as to the existence of another adequate remedy, it does not follow that we must refuse to allow the use of the writ to test the jurisdiction of the trial court.").

C. STANDARD OF REVIEW FOR DENIAL OF JURY TRIAL IS DE NOVO

This Court reviews *de novo* a trial court's ruling on whether a jury trial is required for a given cause of action. *See Caira v. Offner* (2005) 126 Cal. App. 4th 12, 23.

D. THE RIGHT TO A JURY TRIAL IS LIMITED TO ACTIONS AT LAW THAT EXISTED WHEN THE STATE ADOPTED THE CONSTITUTION IN 1850

Article 1, Section 16 of the California Constitution provides, in pertinent part: "Trial by jury is an inviolate right and shall be secured to all . . . ." Cal. Const., Art. I § 16. Civil Procedure Code section 592 also recognizes the right to trial by jury:

> In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a

> jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

Ibid. Section 592 does not expand the scope of the Constitution's protection. *See Franchise Tax Bd, supra*, 51 Cal. 4th at 1010 fn.3 ; *Crouchman v. Superior Court*, 45 Cal. 3d 1167, 1174 (1988).

As this Court recently explained, "the state constitutional right to a jury trial 'is the right as it existed at common law in 1850, when the Constitution was first adopted, "and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact."'" *Franchise Tax Bd.*, 51 Cal. 4th at 1010 (citations omitted). The Court continued, quoting from several prior decisions:

> "As a general proposition, '[T]he jury trial is a matter of right in a civil action at law, but not in equity.' [Citations.]" . . . . "[I]f the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial." And "if a proceeding otherwise identifiable in some sense as a 'civil action at law' did not entail a right to jury trial under the common law of 1850, then the modern California counterpart of that proceeding will not entail a constitutional right to trial by jury. [Citations.]"

Ibid. (internal citations omitted); *see Am. Motorists Ins. Co. v. Superior Court* (1998) 68 Cal. App. 4th 864, 871 ("[i]f the action is essentially one in equity and the relief sought depends upon the application of equitable doctrines, the parties are not entitled to a jury trial.").

"Our state Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted." *Crouchman v. Superior Court, supra*, 45 Cal. 3d at p. 1175 (citing *C & K Engineering, supra*, 23 Cal. 3d at pp. 8-9.)). *See County of Sacramento v. Superior Court* (1974) 42 Cal. App. 3d 135, 140 ("The right to trial by jury in any particular proceeding is determined by whether the right existed at common law in 1850 when the [state] Constitution became the law of the State of California.").

"Thus, the scope of the constitutional right to jury trial depends on the provisions for jury trial at common law. The historical analysis of the common law right to jury often relies on the traditional distinction between courts at law, in which a jury sat, and courts of equity, in which there was no jury." *Ibid.* If "a proceeding otherwise identifiable in some sense as a 'civil action at law' did not entail a right to jury trial under the common law of 1850, then the modern California counterpart of that proceeding will not entail a constitutional right to trial by jury." *Id.* at p. 1174.

E. THE EMPLOYMENT LAW CLAIM FOR RETALIATION WAS UNKNOWN TO THE COMMON LAW IN 1850

The section 1278.5 claim is a creature of statute, rather than common law. Therefore, the statutory claim did not exist at common law at 1850.

To Real Parties' knowledge, there was no retaliation or "whistle blower" claim similar to section 1278.5 under the common law as it existed in 1850, either. Rather, until relatively recently, employers had an unfettered right to end employment "at will." *See, e.g., Union Labor Hospital Asso. v. Vance Redwood Lumber Co.* (1910) 158 Cal. 551, 555 ("These views touching the arbitrary right of the employee to labor or to refuse to labor, and the reciprocal arbitrary right of the employer to employ or discharge labor, without regard in either case to the actuating motives, are propositions settled beyond peradventure."). *See also Tameny v.*

Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172 ("Under the traditional common law rule . . . an employment contract of indefinite duration is in general terminable at 'the will' of either party."). *Tameny*, decided in 1980, is the first decision of this Court to recognize a tort claim for wrongful termination.

Moreover, *in Campbell v. Regents of University of California* (2005) 35 Cal. 4th 311, 328, this Court noted that Labor Code section 1102.5, a "whistleblower" statute, created a right that did not exist at common law. Section 1278.5 therefore creates a right that did not exist in 1850.

F. THERE IS NO RIGHT TO A JURY TRIAL WHERE, AS HERE, THE "GIST" OF AN ACTION IS EQUITABLE RATHER THAN LEGAL

As there was no common law "whistle-blower" claim in 1850, the question becomes whether the "gist" of the statutory claim at issue is legal or equitable. "It is a general proposition, not an absolute rule, that the right to a jury trial attaches when the 'gist' of the action is legal. *Franchise Tax Bd.*, 51 Cal. 4th at 1011. The "court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action." *Id.* at 1010-11. Conversely, then, when the "gist" of an action is equitable rather than legal, there is no right to a jury trial. *See C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 9 ("if the action is essentially one in equity and the relief sought "depends upon the application of equitable doctrines," the parties are not entitled to a jury trial.").

The Court of Appeal below held:

> The gist of Shaw's action is the statutory violation; although it could also be viewed as an action for breach of a term implied (by statute) into her employment contract, or an action for damages for personal injury. At common law,

> each of these classes of actions was triable by jury.

Slip op. at p.17, *Shaw v. Superior Court*, 229 Cal. App. 4th at 25.

In fact, Shaw's lawsuit includes both a statutory and common law component. She sues not only for common law wrongful termination, for which she is entitled to a jury trial, but also for a statutory "whistle-blower" violation under section 1278.5.

As discussed below, contrary to the Court of Appeal's decision, the "gist" of Shaw's statutory action is a claim for restitution, a claim in equity. The remedies available under the statute are restitutionary and equitable. Section 1278.5 is a regulatory, remedial law. The nature of analogous whistleblower-type claims is equitable. Additionally, there is nothing in the statute's text or legislative history demonstrating that the Legislature authorized a jury trial.

G. THE GIST OF SECTION 1278.5 IS THE EQUITABLE CLAIM FOR RESTITUTION

1. The Enumerated Remedies Available Under Section 1278.5 Establish the Action Is One for the Equitable Claim for Restitution

Health and Saf. Code section 1278.5, subd. (g), provides, in pertinent part:

> An employee who has been discriminated against in employment pursuant to this section shall be entitled to *reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer*, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.

Ibid. (emphasis added).

The statute's listed remedies are forms of restitution. A claim for "reimbursement" in essence is a claim for restitution. *Am. Motorists Ins. Co., supra*, 68 Cal. App. 4th at p. 874 ("the carrier's right to reimbursement for allegedly excessive or unnecessary fees and costs is a claim for equitable restitution, not a claim for damages.").

Reinstatement and back pay are also forms of equitable restitution. *Grayson v. Wickes Corp.* (7th Cir. 1979) 607 F.2d 1194, 1196 ("an award of back pay is an integral part of the equitable remedy of reinstatement."). Shaw herself conceded below "reinstatement is an equitable remedy." Petition for Writ of Mandate. p.14, n.2.

Even the statute's unique costs provision is restitutionary.[8] Section 1278.5 provides for "reimbursement for . . . the legal costs associated with pursuing the case." That language provides for restitution of the amount the plaintiff expends – another restitutionary remedy. *See Clark v. Superior Court* (2010) 50 Cal. 4th 605, 615 ("restitution in a private action brought under the unfair competition law is measured by what was taken from the plaintiff."). In contrast, when a statute provides for "reasonable attorney's fees," the fees typically belong to the *attorneys* rather than the party. *See, e.g., Flannery v. Prentice* (2001) 26 Cal. 4th 572, 575 ("absent proof on remand of an enforceable agreement to the contrary, the attorney fees awarded in [a FEHA] case belong to the attorneys who labored to earn them."); *Lindelli v. Town of San Anselmo* (2006) 139 Cal. App. 4th 1499, 1509-1510 ("Attorney fees awarded pursuant to section 1021.5 belong, absent an enforceable agreement to the contrary, to the attorneys.").

The Court of Appeal stated that the attorney's fees language, differing from the usual statutory language (e.g., "reasonable attorney's

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[8] Research discloses no California statute other than section 1278.5 that employs the term "legal costs associated with pursuing the case."

fees,"), was irrelevant to the analysis. Slip Op. at p.4 n.5, *Shaw*, 229 Cal. App. 4th at p.17 n.5. But the language "reimbursement ... of legal costs" is directly relevant to the statute's restitutionary character. The Court of Appeal erred by disregarding this restitutionary provision in its analysis because courts consider the remedies that a statute *authorizes* to determine the gist. *See DiPirro v. Bondo Corp.* (2007) 153 Cal. App. 4th 150, 180 ("we look to the *essence of the rights conferred* and the relief sought . . . ."(emphasis added).).

2. The Statute's "Any Remedy" Language Is Limited As a Matter of Statutory Construction

After listing the remedies discussed above, section 1278.5, subd. (g) provides for "any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law." *See* Health & Saf. Code § 1278.5, subd. (g). Contrary to the Court of Appeal's analysis, this provision is equitable in nature as a matter of statutory construction, and as a matter of equity jurisprudence.

The statute's express inclusion of only restitutionary remedies limits the scope of the final phrase "or any remedy deemed warranted by the court" to equitable remedies. Where, as here, a statute prescribes a list of specific remedies, courts apply the canons of statutory construction "*ejusdem generis*," "*expressio unius est exclusio alterius*," and "*noscitur a sociis*," to more general language.[9] *See, e.g., Dyna-Med, Inc. v. Fair*

[9] "*Ejusdem generis*" means "'where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.'" *Dyna-Med*, 47 Cal. 3d at 1391 n.12 (quoting *Sears, Roebuck & Co.*, 25 Cal. 3d at 331, n.10). "*Expressio unius est exclusio alterius*" means: "'the expression of certain things in a statute necessarily involves exclusion of other things not expressed. . . .'" *Dyna-Med*, 43 Cal. 3d at 1391 n.13 (quoting *Henderson v. Mann Theatres Corp.*

Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1390-1391. *See also* Civ. Code § 3534 ("Particular expressions qualify those which are general."); *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1160 (construing Unruh Civil Rights Act and relying on same canons of statutory construction), *overruled on other grounds*, *Munson v. Del Taco, Inc.* (2009) 46 Cal. 4th 661, 664.

In *Dyna-Med*, for example, this Court interpreted a section of the Fair Employment and Housing Act, Govt. Code section 12970, subd. (a). The statute at the time provided:

> If the commission finds that a respondent has engaged in any unlawful practice under this part, it . . . shall issue and cause to be served on the parties an order requiring such respondent . . . to take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, *in the judgment of the commission, will effectuate the purposes of this part* . . . .

See Dyna-Med, 43 Cal. 3d at 1385 (quoting then-Govt. Code § 12970, subd. (a) (emphasis added)).

The Fair Employment and Housing Commission argued the phrase "including but not limited to," and the statute's reference to remedies that "in the judgment of the commission," would "effectuate the purposes of" the FEHA, expanded the remedies available under the statute, and

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(1976) 65 Cal. App. 3d 397, 403). "*Noscitur a sociius*" means: "'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.'" *Dyna-Med*, 43 Cal. 3d at 1391 n.14 (quoting *People v. Stout* (1971) 18 Cal. App. 3d 172, 177 (quoting *Vilardo v. County of Sacramento* (1942) 54 Cal. App. 2d 413, 420).).

authorized the FEHC to award punitive damages. This Court, applying the canons of construction discussed above, held that the "including but not limited to" language was restricted by the specifically listed items. *See Dyna-Med*, 43 Cal. 3d at 1391 ("Their application here to limit the commission's authority to the ordering of corrective, nonpunitive action is consistent with both the remedial purpose of the Act and the ordinary import of the statutory language.").

Soon thereafter, this Court applied the same statutory construction principles to hold that the Commission did not have authority to award *compensatory* damages, such as monetary damages for emotional distress:

> In authorizing the Commission to take such action, "including, but not limited to," the enumerated remedies, the Legislature *intended to authorize the Commission to fashion such other corrective or equitable remedies as, in its expertise, it may devise to eliminate the discriminatory practice and make the employee whole in relation to the employment* . . . but that the Legislature did not, by contrast, intend to authorize the Commission to adjudicate noneconomic general damage claims traditionally awarded in judicial actions between private parties.

Peralta Community College Dist. v. Fair Employment & Housing Com. (1990) 52 Cal. 3d 40, 56 (emphasis added).

The listed remedies in Govt. Code section 12970 therefore limited the language "including, but not limited to." The same analysis applies here. In passing the 2007 amendment to section 1278.5, the Legislature authorized the court to award remedies other than the specifically specified, restitutionary, remedies. However, the general language is circumscribed by the listed, equitable remedies. It would be absurd to construe section

1278.5, subd. (g), to mean that the phrase "any remedy deemed warranted by the court," means that a court may impose any remedies whatsoever, contained in any law, regardless of its relationship to section 1278.5. For example, may the court rely on subdivision (g) to award meal period premium pay (Lab. Code section 227.6), or "waiting time" penalties under Lab. Code section 203 as a remedy for retaliation in violation of section 1278.5? The answer must be "no."

3. Even if Section 1278.5, subd. (g)'s Is a "Catch-All" Remedy, It Vests the Court With Equitable Power to Fashion Remedies as a Chancellor

Even if subdivision (g) empowers the trial to award any remedy available under California law, the trial court's discretion to decide whether do so is equitable. A "court of equity may exercise its full range of powers 'in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved.'" *Fletcher v. Sec. Pac. Nat'l Bank* (1979) 23 Cal. 3d 442, 452.

The Court of Appeal rejected the trial court's conclusion that "since the statutory language provides that the remedy is to be chosen 'by the court,' this is not a determination left to a jury." Slip Op. at p.10, n.11, *Shaw v. Superior Court*, 229 Cal. App. 4th at p. 21 n.11. However, the trial court was correct. Contrary to the Court of Appeal's conclusion, the Legislature's reference to the "court" is significant. *See County of Sacramento v. Superior Court, supra*, 42 Cal. App. 3d at p. 139. Moreover, "the fact that damages is one of a full range of possible remedies does not guarantee . . . the right to a jury. . . ." *C & K Engineering Contractors, supra*, 23 Cal. 3d at p. 9. Section 1278.5's plain language requires the "court" in its discretion to determine if remedies other than those listed in subdivision (g) are "warranted." That statutory language requires *the court*

to decide (1) that the listed remedies are inadequate, (2) what remedies are available, and (3) an appropriate award.

Thus, even if Shaw invoke the trial court's power to award alternative remedies under subdivision (g) (e.g., compensatory damages), the trial court's discretion to award alternative remedies *itself* is equitable in nature. *See Fletcher v. Sec. Pac. Nat'l Bank*, supra, 23 Cal. 3d at p. 452 The discretion that the statute vests in the trial court to choose whether alternative remedies are "warranted" is a hallmark of an equitable claim. *See DiPirro*, 153 Cal. App. 4th at p.182 (a highly discretionary calculation that takes into account multiple factors [] is the kind of calculation traditionally performed by judges rather than a jury.").

The seemingly expansive language contained in section 1287.5, subd. (g), must be tethered to the statutory scheme to avoid an illogical and unfair construction of subdivision (g). And, as the courts recognize, only the trial court sitting as a chancellor in equity has the training, discretion and wisdom to know where to draw the line. *See ibid.*

4. Shaw's Prayer in Her Complaint Does Not Determine the Gist of the Action

The Court of Appeal noted that Shaw does not seek reinstatement in her Complaint, and her Complaint's prayer requests damages. The Court of Appeal placed undue reliance on Plaintiff's Complaint.

This Court has observed, "a prayer for damages does not convert what is essentially an equitable action into a legal one for which a jury trial would be available. " *C & K Engineering Contractors*, 23 Cal. 3d at p. 11. *See DiPirro*, 153 Cal. App. 4th at p. 184 ("The 'incidental award of monetary damages by a court in the exercise of its equitable jurisdiction does not convert the proceeding into a legal action.'" (quoting *Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal. App. 3d 243, 259). Rather, the analysis "begins . . .with the historical analysis, not the pleadings . . . ."

DiPirro, supra, 153 Cal. App. 4th at 179 (quoting *Wisden v. Superior Court* (2004) 124 Cal. App. 4th 750, 757).

As stated above, in addition to the relief Shaw seeks, courts consider the remedies that a statute *authorizes* to determine the gist. *See id.* at 180 ("we look to the *essence of the rights conferred* and the relief sought . . . ."(emphasis added).). Therefore, the "fact that damages are sought does not guarantee the right to a jury." *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal. App. 3d 462, 473. *See also Paularena v. Superior Court* (1965) 231 Cal. App. 2d 906, 911-912 ("Whether a cause of action is in law or equity . . . is not fixed by the prayer or the title. (citations omitted)). The plaintiff does not create remedies in her pleadings that are not authorized by the underlying law. *See, e.g., Gold v. Los Angeles Democratic League* (1975) 49 Cal. App. 3d 365, 373 ("Ordinarily, where a statute . . . creates an obligation and also provides a remedy for breach of that obligation, the statutory remedy so provided is exclusive . . . ." (citation omitted)).

Finally, even if Shaw's prayer is limited to damages, that does not entitle her to a jury trial. The only way one may obtain damages under section 1278.5 is if the "court" decides that remedies in addition to those specified in the law are "warranted." As the Court of Appeal has held: "'[a]n action is one in equity where the only manner in which the legal remedy of damages is available is by application of equitable principles.'" *Interactive Multimedia Artists v. Superior Court* (1998) 62 Cal. App. 4th 1546, 1555 (citation omitted). *See also DiPirro*, 153 Cal. App. 4th at p. 182.

Shaw's prayer for remedies at law in her Complaint (such as compensatory damages) does not mandate a jury trial on her section 1278.5 claim. Moreover, Shaw in this case asserts not only a section 1278.5 claim, but also a common law claim for wrongful termination in violation of

public policy. Because tort damages are automatically available under the common law wrongful discharge claim, *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 176 ("an employee's action for wrongful discharge is *ex delicto* and subjects an employer to tort liability."), Ms. Shaw may seek compensatory and punitive damages - and a jury trial - based on her *Tameny* claim for wrongful termination in violation of public policy.

H. SECTION 1278.5 IS EQUITABLE BASED ON THE STATUTORY SCHEME.

1. Section 1278.5 Is Part of a Regulatory Scheme

Section 1278.5 is contained in the same Chapter (2) and Article (3) of the Health and Safety Code as section 1276.5. The Court of Appeal discussed section 1276.5 as follows in another case:

> section 1276.5 is contained in an Article of the Health and Safety Code entitled "Regulations." With limited exceptions, each statute contained in the article directs the DHCS (or another state agency) to prioritize existing regulations, adopt new regulations or standards, enforce regulations, or ensure that certain health care providers operate in compliance with appropriate license requirements and agency rules and regulations. Notably, the first statute contained in the article, section 1275, begins with the following mandate: "The state department shall adopt, amend, or repeal ... any reasonable rules and regulations as may be necessary or proper to carry out the purposes and intent of this chapter and to enable the state department to exercise the powers and perform the duties conferred upon it by this chapter, not inconsistent with any statute of this state."

Alvarado v. Selma Convalescent Hospital (2007) 153 Cal. App. 4th 1292, 1304.

Like section 1276.5 at issue in *Alvarado*, section 1278.5 itself is part of the California Department of Health Care Service's licensing/regulatory statutory scheme. Thus, the stated purpose of section 1278.5 focusses on regulation of patient care standards rather than employment law:

> to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and *are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.*

Id. § 1278.5, subd. (a) (emphasis added).

Patients and non-employer physicians are protected from retaliation for reporting patient care conditions, just as employees are. *Id.* § 1278.5, subd. (b)(1), (c). And the law applies to health care establishments regardless of whether they "employ" the person making the report. *Id.* § 1278.5, subd. (b)(1) and (2). The penalties available under the statute may be recovered in an administrative proceeding. *Id.* § 1278.5, subd. (b)(3).

Thus, section 1278.5 is contained within a regulatory set of statutes. It is a remedial statute, intended to further the public interest in adequate patient care. The "gist" of a claim under a regulatory, remedial statute is

equitable. *See DiPirro, supra*, 153 Cal. App. 4th at 180 (holding Prop. 65 is a remedial statute and creates an equitable cause of action tried to the court).

In *DiPirro*, the Court of Appeal examined whether Health and Saf. Code section 25249.7 conferred on the plaintiff the right to a jury trial. That statute is part of the Safe Drinking Water and Toxic Enf. Act of 1986 (referred to as Prop. 65). Deciding that claims under Prop. 65 sound in equity, the Court noted: "The essential character and purpose of the Act is equitable. Proposition 65 is " 'a remedial statute intended to protect the public' . . . . " *Id.* at p.180. The same analysis applies here.

2. The Legislature Intended Section 1278.5 to Extend to Hospital Workers the Protections Applicable to Long Term Care Facilities' Employees Under Section 1432, Under Which There Is No Private Right Of Action and No Jury Trial

The California Nurses Association proposed Section 1278.5 to extend to hospital workers the protections contained in Health and Saf. Code section 1432.[10] *See* Sen. Com. on Health & Human Services Analysis of Sen. Bill 97, mem. prepared for hearing date of Mar. 10, 1999; Assem. Com. on Appropriations, hearing date Jun. 23, 1999.) (Section 1432 applies to long-term care facilities rather than hospitals.)

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[10] Section 1432, subd. (a) provides: "No licensee shall discriminate or retaliate in any manner against any complainant, or any patient or employee in its long-term health care facility, on the basis or for the reason that the complainant, patient, employee, or any other person has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity relating to care, services, or conditions at that facility. A licensee who violates this section is subject to a civil penalty of no more than ten thousand dollars ($10,000), to be assessed by the director and collected in the manner provided in Section 1430."

Yet, section 1432 does not expressly confer a private right of action. *See* Health and Saf. Code § 1432, subd. (a) (quoted *supra*, n. 1). Moreover, the exclusive remedy for retaliation under section 1432 is a civil penalty, assessed and collected by an agency. *Ibid.* Thus, section 1278.5 is not based on common law civil actions for retaliation, but rather laws authorizing administrative proceedings.

3. The Legislative History Does Not Evince an Intent to Allow a Jury Trial

The Court below noted that the *pre*-2007-amendment version of section 1278.5 conferred only equitable remedies. Slip Op. at p. 10, *Shaw*, 229 Cal. App. 4th at p. 21 (the pre-amendment remedies "appear to be equitable only."). The Court then held that a 2007 amendment to the statute, adding "any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law," is a remedy at law. *See* Slip Op. at p.14, *Shaw*, 229 Cal. App. 4th at p. 20 (quoting Health and Saf. Code § 1278.5, subd. (g) (emphasis added),). The Court of Appeal relied on some legislative history explaining the 2007 amendments to Section 1278.5.

Contrary to the Court of Appeal's analysis, the legislative history supports the conclusion that the statue sounds in equity, not law. As discussed above, the 2007 amendment confers upon the trial court – not a jury – broad powers to fashion remedies. The Legislature vested in the *court* the discretion to determine whether to "fashion whatever remedy would fit the retaliatory act." The September 5, 2007, bill analysis, on which the Court of Appeal relied states: the plaintiff "is entitled to any remedy deemed *warranted by the court in lieu of* reinstatement, reimbursement for lost wages," etc. *See id.* (emphasis added).

As stated above, under section 1278.5, the court is sitting as a chancellor in equity. "The flexible equitable powers of the modern trial

judge derive from the role of the trained and experienced chancellor and depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury." *A-C Co. v. Security Pacific Nat. Bank, supra*, 173 Cal. App. 3d at p. 473. *See also DiPirro, supra*, 153 Cal. App. 4th at p. 182. The court in *A-C Co.* held that the trial court erred by submitting to a jury an equitable claim for promissory estoppel, even though the plaintiff sought damages for breach of contract.

Here, it is up to the trial court to decide whether the listed remedies in section 1287.5, subd. (g) are adequate, or whether the court must "fashion whatever remedy would fit the retaliatory act." The trial court's discretion to fashion a remedy when the listed remedies do not "fit" the plaintiff's claim militates against a jury trial.

I. THE "GIST" OF EMPLOYMENT LAW RETALIATION CLAIMS GENERALLY IS EQUITABLE

The Court of Appeal held that analogous anti-retaliation and whistle-blower statutes are "irrelevant" to the analysis of whether section 1278.5 sounds in equity. Slip Op. at p. 17, n. 14, *Shaw v. Superior Court*, 229 Cal. App. 4th at p. 25 n. 14. The Court's conclusion is erroneous, as courts consider whether the "gist" of an action is equitable based on analogous claims. The Court of Appeal erred by refusing to consider those statutes in its analysis of the "gist" of a section 1278.5 claim. And as shown below, the essence of a whistleblower law is equitable.

1. Section 1278.5's Remedies Mirror Other California Statutes Providing for Administrative Relief Without a Jury

Labor Code section 132a, subd. (1) contains language nearly identical to Section 1278.5, subd. (g):

> Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication . . . is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). *Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.*

Ibid. (emphasis added). Yet, there is no right to a jury trial for violation of section 132a. *See Western Elec. Co. v. Workers' Compensation Appeals Bd. (Smith)* (1979) 99 Cal. App. 3d 629, 640 ("Nor, contrary to Western's contention, was it entitled to a jury trial on Smith's petition for increased compensation under section 132a."). Rather, claims for violation of Lab. Code section 132a are tried to the Workers' Compensation Appeals Board, without a jury. *See* Lab. Code § 132a, subd. 4 ("Proceedings for increased compensation as provided in paragraph (1), or for reinstatement and *reimbursement for lost wages and work benefits*, are to be instituted by filing an appropriate petition with the appeals board . . . ") (emphasis added)).

Labor Code section 98.7 employs similar language:

> If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, *reimbursement of lost wages* and interest thereon . . . .

Thus, the Labor Commissioner awards "reimbursement of lost wages" and "reinstatement" under section 98.7, without a jury.

2. Federal Law Retaliation Claims Awarding Reinstatement and Back Pay Sound in Equity

A statutory claim for "retaliation" is not inherently legal in character under federal law, either. For example, Title VII of the Civil Rights Act of 1964 prohibits retaliation. *See* 42 U.S.C. § 2000e-3.[11] Yet, that statute as originally enacted did not afford employees a jury trial under the Seventh Amendment to the U.S. Constitution.[12] That is because the remedies were equitable. *See Shah v. Mt. Zion Hospital & Medical Center* (9th Cir. 1981) 642 F.2d 268, 272 ("Jury trials are not available in Title VII cases because the remedies available are equitable in nature.").[13] As discussed in n.12 below, Congress later amended that law to expressly authorize jury trials.

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[11] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

[12] "In Suits at common law . . . the right of trial by jury shall be preserved . . . ." U.S. Const. Amend. VII.

[13] 42 U.S.C. § 2000e-5(g) originally provided: "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ." *See* Title VII of the Civil Rights Act of 1964, § 706(g), 88 P.L. 352, 78 Stat. 241, codified at 42 U.S.C. § 2000e-5. Congress later passed the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1072, which, *inter alia*, modified that section to authorize recovery of compensatory and punitive damages, and to authorize jury trials. *See* id. § 102 (codified at 42 U.S.C. § 1981a); *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 252 (discussing Civil Rights Act of 1991's jury trial provision).

Title VII's equitable remedies were based on the National Labor Relations Act, 29 U.S.C. § 160(c), *Landgraf*, 511 U.S. at 253 , which also does not require a jury trial. *See NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 48-49 (holding no jury trial under NLRA: "reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement . . . .").

Similarly, the federal Sarbanes-Oxley Act, initially enacted in 2002, prohibits retaliation against employees who engage in protected activity related to fraud by public corporations. *See* 18 U.S.C. § 1514A(a). The statute provides for remedies including " reinstatement," "back pay," and "compensation for any special damages sustained as a result of the discrimination . . . ." *Id.* § 1514A(c). But the majority of courts have found that law did not require a jury trial under the Seventh Amendment. *See, e.g., Schmidt v Levi Strauss & Co.* (N.D. Cal. 2008) 621 F. Supp. 2d 796; *Walton v Nova Info. Sys.* (E.D. Tenn. 2007) 514 F. Supp. 2d 1031. Congress later amended Sarbanes-Oxley to expressly provide for a jury trial, just as Congress amended Title VII in 1991. *See* P.L. 111-203, Title IX, Subtitle B, §§ 922(b), (c), 929A, 124 Stat. 1848, 1852 (2010).

In sum, section 1278.5 is analogous to other anti-retaliation laws for which there is no inherent right to a jury trial. Section 1278.5 is a regulatory, remedial statute allowing restitution. If there are no jury trials guaranteed for analogous claims, that confirms that the "gist" of a section 1278.5 claim is equitable. If Shaw believes she is entitled to a jury trial under section 1278.5, her remedy is with the Legislature.

IV.
CONCLUSION

This Court should hold the Court of Appeal exceeded its jurisdiction by granting Shaw's Petition for Writ of Mandate; decide whether *Nessbit* and *Donohue* remain good law in future cases; hold that there is no jury trial available under Health and Saf. Code section 1278.5; and, therefore, reverse the Court of Appeal's decision below.

Dated: January 12, 2015

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CERTIFICATE OF WORD COUNT

Counsel for Real Parties in Interest certifies that Real Parties' Opening Brief is 10,397 words, based on the word count produced by the word processing software used to prepare the brief.

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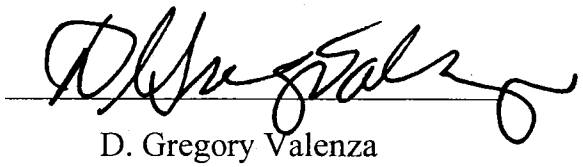

D. Gregory Valenza

CERTIFICATE OF SERVICE

I, Carolyn Angel, declare that I am employed with the law firm of Shaw Valenza LLP, whose address is 300 Montgomery St., Ste. 788, San Francisco, California 94104; I am over the age of eighteen (18) years and am not a party to this action. On January 12, 2015, I served the attached REAL PARTIES IN INTERESTS' OPENING BRIEF in this action by placing a true and correct copy thereof, enclosed in sealed envelope(s) addressed as follows below:

[X] BY OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package provided by an overnight delivery carrier, Fedex, and addressed to the persons at the addresses list below. I placed the envelopes or packages for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery.

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[X] BY MAIL: United States Postal Service by placing sealed envelopes with the postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

California Court of Appeal
Second Appellate District
Division Three
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013
Tel: (213) 830-7000

Los Angels County Superior Court
Central District
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012
Tele: (213) 974-5195

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct; executed on January 12, 2015, at San Francisco, California.

Carolyn Angel

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