

S273368

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

TRICOAST BUILDERS, INC.,

Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA,

Defendant and Respondent.

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In its petition, plaintiff and appellant TriCoast Builders, Inc. (TriCoast) demonstrated this Court's review of the instant matter is necessary to resolve conflicts in the law regarding a party's constitutional right to a jury trial.

Initially, the majority opinion in the instant matter, *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*), sparked a conflict in the law on whether a showing of actual prejudice is required to obtain reversal of a judgment on the ground the trial court abused its discretion in denying relief from a jury trial waiver. (Pet. pp. 7-11.) On the one hand, *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*) held a judgment is reversible when a trial court abuses its discretion in denying relief from a jury trial waiver, and a party who objects and challenges the order denying relief need not show actual prejudice from the ensuing bench trial. On the other hand, the *TriCoast* majority held that, in addition to demonstrating an abuse of discretion by the denial of relief from a jury trial waiver, a showing of actual prejudice from the ensuing bench trial is required to obtain reversal of a judgment. (Pet. pp. 7-11.) The *TriCoast* majority opinion thus directly conflicts with *Mackovska* on the standard of appellate review, creating the need for this Court to clarify this important question of constitutional law on jury trial rights.

Mackovska and the *TriCoast* majority opinion conflict on a second issue as well. *Mackovska*, following an established line of cases, recognized that a showing of prejudice to the opposing party or the court is necessary for a trial court to deny relief from a jury trial waiver. In contrast, the *TriCoast* majority held that prejudice to the opposing party or the court is merely one factor for the trial court to consider, but is not required to support the denial of relief from a jury trial waiver. This direct conflict also demands this Court's review so that litigants and trial courts have a uniform standard to apply when evaluating a request for relief from a jury trial waiver, with the goal of protecting the constitutional right to a jury trial.

Despite the upheaval in the law created by the *TriCoast* majority opinion, defendant and respondent Daniel Fonnegra (Fonnegra) has filed an answer to the petition for review arguing that no conflicts exist, hence review is unnecessary. (Ans. pp. 8-10.) But Fonnegra misconstrues the issues presented in the petition for review and fails to grapple with the questions of law that have arisen from the conflict between *Mackovska* and the *TriCoast* majority opinion. As the dissent in *TriCoast* stated, “[t]rial by jury is a “right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, [and] should be jealously guarded by the courts.” [Citation.]” (Slip opn. p. 1, dis. opn. of Ashmann-Gerst, J.) This Court should protect that right by granting review in this case.

LEGAL DISCUSSION

I. THIS COURT SHOULD RESOLVE WHETHER A PARTY MUST SHOW PREJUDICE FOR REVERSAL OF A JUDGMENT BASED ON THE ERRONEOUS DENIAL OF RELIEF FROM A JURY TRIAL WAIVER.

In his answer, Fonnegra misconstrues the issue presented in TriCoast's petition, characterizing it as whether "the waiver of the right to a jury trial by a party's failure to post jury fees is to be reviewed under an abuse of discretion standard[.]" (Ans. p. 4.) According to Fonnegra, no dispute exists that the denial of a motion for relief from jury trial waiver is reviewed for an abuse of discretion, as required by Code of Civil Procedure, section 631, subdivision (g).¹ (Ans. p. 9.)

TriCoast agrees that an appellate court reviews the denial of a motion under section 631, subdivision (g), for an abuse of discretion. The issue presented, however, is not about application of the abuse of discretion standard. Rather, the issue is whether, once an abuse of discretion *has been shown* on appeal, the appellant *must also show* actual prejudice from the bench trial held in lieu of a jury trial to obtain reversal of the judgment. Fonnegra does not address the issue presented in TriCoast's petition.

¹ Statutory references are to the Code of Civil Procedure.

Fonnegra instead conflates two separate analyses of prejudice. The first form is prejudice that could result if a trial court grants a party relief from its jury trial waiver. It is potential prejudice to *the non-moving party* or *the court*. (*Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 838-839 (*Simmons*); *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 825 (*Bishop*.) That inquiry of prejudice is the analysis the trial court must undertake *before* the start of trial. A trial court abuses its discretion when it denies relief absent a finding that prejudice would result *to the other party* or *to the court*. (*Simmons*, at pp. 838-839; *Bishop*, at p. 825; see *Mackovska, supra*, 40 Cal.App.5th at p. 10.)

The second form is actual prejudice to a party from the bench trial that ensues after a trial court denies relief from a jury trial waiver. This form is not prejudice that might result to the court or the other party, but rather prejudice suffered *by the moving party* from the bench trial that occurs after the denial of its motion for relief. In other words, this second form is actual prejudice that would require analysis *after* an appellate court determines the trial court abused its discretion in denying relief from a jury trial waiver.²

² Logically, a reviewing court in a judgment appeal would reach an issue of actual prejudice only after determining the trial court abused its discretion by denying relief from the jury trial waiver. That is because actual prejudice from the ensuing bench

As *Mackovska* and the dissent in *TriCoast* both recognized, it is “difficult, if not impossible, ... to show prejudice from the denial of the constitutional right to a jury trial.” (*Mackovska, supra*, 40 Cal.App.5th at p. 16; slip opn. p. 4, dis. opn. of Ashmann-Gerst, J.) And as *Mackovska* explained, “requiring an appellant challenging an order denying a motion for relief from a jury trial waiver to show actual prejudice would essentially leave discretionary mandate review as the only practical remedy[,]” which is “hardly adequate protection for a constitutional right that is such “a basic and fundamental part of our system of jurisprudence [it] should be zealously guarded.”[Citations.]” (*Mackovska*, at pp. 16-17.)

Consequently, *Mackovska* held the same standard of review applies to both writs and appeals: If a party is denied the right to a jury trial, it has the choice of “challeng[ing] the constitutional violation (however it occurred) by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there is no reason to apply a stricter standard on appeal.” (*Id.* at p. 16.) Justice

trial would be of no consequence absent an abuse of trial court discretion. The *TriCoast* majority, however, reversed this analytical sequence, determining *TriCoast* was required to show actual prejudice before evaluating whether the trial court abused its discretion by denying *TriCoast* relief from its jury trial waiver. (Slip. Opn. pp. 6-12.)

Ashmann-Gerst urged the same rule be followed in the instant matter. (Slip opn. p. 4, dis. opn. of Ashmann-Gerst, J.)

Nevertheless, the *TriCoast* majority rejected *Mackovska* and required a showing of actual prejudice to obtain reversal of a judgment on the ground the trial court abused its discretion in denying relief from a jury trial waiver. Under the *TriCoast* majority opinion, a party who either (1) declines to seek writ review of an order denying relief from a jury trial waiver or (2) pursues writ review but has such review denied must show it suffered actual prejudice from the ensuing bench trial to obtain a reversal of the judgment on appeal. (Slip opn. pp. 3-5.) The *TriCoast* majority opinion thus directly conflicts with *Mackovska* by endorsing a dual-track system of appellate review for writs and appeals, and effectively insulates the denial of relief under section 631, subdivision (g), from meaningful appellate review. (Pet. pp. 8-9, 25.)

In short, contrary to Fonnegra's assessment, the issue presented is not whether the denial of relief from a jury trial waiver is reviewed for an abuse of discretion. (Ans. p. 4.) Rather, the issue is whether reversal of a judgment is warranted when an abuse of discretion *has* occurred such that an appellant need not also demonstrate actual prejudice from the ensuing bench trial. Given the direct conflict between *Mackovska* and the *TriCoast* majority opinion on the question of actual prejudice, this Court's

review is necessary to protect the constitutional right to a jury trial.

II. THIS COURT ALSO SHOULD RESOLVE WHETHER PREJUDICE TO THE OPPOSING PARTY OR THE COURT IS REQUIRED FOR THE DENIAL OF RELIEF FROM A JURY TRIAL WAIVER.

Fonnegra’s misconstruction of the issues presented for review also infects his analysis of the abuse of discretion question. As noted, TriCoast agrees that an appellate court reviews the denial of relief from a jury trial waiver for an abuse of discretion. TriCoast also does not seek this Court’s review to rehash a “fact specific fight” over the trial court’s exercise of discretion in the instant matter. (Ans. p. 8.) Rather, TriCoast asks this Court to clarify, as a matter of law, the analysis required of a trial court in evaluating a motion for relief from a jury trial waiver. (Pet. pp. 31-36.)

In this regard, the *TriCoast* majority opinion conflicts with *Mackovska* in a second respect. *Mackovska*, following an established line of authority, recognized that, when a trial court considers a motion for relief from a jury trial waiver, “the crucial question is whether the party opposing relief will suffer any prejudice.” (*Mackovska, supra*, 40 Cal.App.5th at p. 10.) Nevertheless, in direct conflict, the *TriCoast* majority held that “[p]rejudice to the parties is just one of several factors the court

may consider in exercising that discretion” and “disagree[d] with courts that have suggested the opposing party bears the burden of demonstrating prejudice the granting of relief from waiver. [Citations.]” (Slip opn. pp. 13-14.)

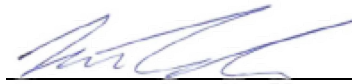
The dissent in *TriCoast*, citing *Mackovska*, recognized that Fonnegra “has not presented any evidence or argument of prejudice.” (Slip opn. p. 6, dis. opn. of Ashmann-Gerst, J.) Despite that failure, the majority concluded the trial court’s denial of relief to TriCoast from its jury trial waiver did not constitute an abuse of discretion. (Slip opn. p. 14.) In so doing, the majority created a direct conflict with *Mackovska*, and the cases it followed, leaving litigants and trial courts without a rule of law to apply on a motion for relief from a jury trial waiver. This Court’s intervention is necessary.

CONCLUSION

For the reasons stated above, and in the petition for review, this Court should grant review of the instant matter to decide the issues presented as necessary to preserve the constitutional right to a jury trial.

DATED: March 31, 2022 **CONNETTE LAW OFFICE**
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504, I certify that the total word count of this Reply to Answer to Petition for Review, excluding covers, table of contents, table of authorities, and certificate of compliance, is 1,826.

DATED: March 31, 2022 **CONNETTE LAW OFFICE**
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PROOF OF SERVICE

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

Executed on March 31, 2022, at Woodland Hills, California.

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STATE OF CALIFORNIA
Supreme Court of California

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