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' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. DISCUSSION 3

A. NO COURT HAS OVERRULED NESSBIT, IMPLICITLY OR OTHERWISE 3

B. THIS COURT SHOULD NOT OVERRULE NESSBIT AND DONOHUE 5

1. Under Principles of Stare Decisis, This Court Is Reluctant to Overrule Longstanding Decisions 6

2. Shaw Fails to Establish Any Special Justification Required for this Court to Overrule Nessbit and Donohue 7

a. The Importance of the Jury Trial Right Does Not Justify Overruling Nessbit/Donohue 7

b. Lower Courts' Failure to Follow this Court's Decisions 8

c. Review Via Mandate Is Not Necessarily Efficient, Nor Is Efficiency Adequate Justification to Prefer Writ Relief to Appeal 8

C. SHAW DID NOT DEMONSTRATE AN INADEQUATE REMEDY AT LAW, WHICH WAS REQUIRED FOR ISSUANCE OF THE WRIT 9

D. THIS COURT SHOULD RE-AFFIRM AUTO EQUITY SALES 10

E. SHAW SEEKS BACK PAY, A FORM OF EQUITABLE RELIEF 10

TABLE OF CONTENTS
(continued)

Page

F. SHAW CONCEDES THE PRE-2007 VERSION OF SECTION 1278.5'S PROVIDES FOR ONLY EQUITABLE REMEDIES 11

G. THE AMENDMENT TO SECTION 1278.5, SUBD. (G) DOES NOT MANDATE A JURY TRIAL 11

1. Statutory Construction 11

2. Even if Subdivision (g) Allows the Court to Award Damages, the Statue Is Equitable 12

3. Section 1278.5 Is Part of a Regulatory Statute 13

H. SHAW'S ARGUMENTS REGARDING OTHER EMPLOYMENT LAW STATUTES ARE WITHOUT MERIT 13

I. THIS COURT'S DECISION IN FAHLEN IS INAPPOSITE 14

III. CONCLUSION 14

CERTIFICATE OF WORD COUNT 16

TABLE OF AUTHORITIES

Page

State Cases

Bourhis v. Lord
(2013) 56 Cal. 4th 320 ..... 6, 7

C & K Engineering Contractors v. Amber Steel Co.
(1978) 23 Cal. 3d 1 11

Crouchman v. Superior Court
(1988) 45 Caol.3d 1167 3

Exline v. Smith
(1855) 5 Cal. 112 7

Fahlen v. Sutter Central Valley Hospitals,
58 Cal. 4th 655 (2014) 14

Gardiner v. Roye
(1914) 167 Cal. 238 6

Ginns v. Savage
(1964) 61 Cal.2d 520 4

Golden Gateway Center v. Golden Gateway Tenants Assn.
(2001) 26 Cal. 4th 1013 6

Grafton Partners v. Superior Court
(2005) 36 Cal. 4th 944 4

In re Tobacco II Cases
(2009) 46 Cal. 4th 298 4

Jehl v. Southern Pacific Co.
(1967) 66 Cal. 2d 821 7

Lebrilla v. Farmers Group, Inc.
(2004) 119 Cal. App. 4th 1070 4

TABLE OF AUTHORITIES
(continued)

Page

McHugh v. Santa Monica Rent Control Bd.
(1989) 49 Cal. 3d 348 11

Nessbit v. Superior Court
(1931) 214 Cal. 1 1

People v. Latimer
(1993) 5 Cal. 4th 1203 6

Rose v. Hudson
(2007) 153 Cal. App. 4th 641 10

Security Pacific National Bank v. Wozab (1990)
51 Cal. 3d 991 6

Southern Pac. Transportation Co. v. Superior Court
(1976) 58 Cal. App. 3d 433 12

Thompson v. County of Los Angeles
(2006) 142 Cal. App. 4th 154 5

Van de Kamp v. Bank of America
(1988) 204 Cal. App. 3d 819 13

Statutes

Govt. Code
§ 12965, subd. (b) 13
§ 12965, subd. (c) 13

Health and Saf. Code
§ 1278.5 ..... 2, 10, 13, 14
§ 1278.5, subd. (g) 11, 12

Lab. Code
§ 98.7 14
§ 132a 14

TABLE OF AUTHORITIES

Page

Lab. Code
§ 98.7 14
§ 132a 14
§ 1102.5 13

Federal Cases

Alvarado v. Cajun Operating Co.
(9th Cir. 2009) 588 F.3d 1261 14

First Nat'l Bank v. Warren
(7th Cir. 1986) 796 F.2d 999 9

Stebbins v. Stebbins
(D.C. Cir. 1996) 673 A.2d 184 5

Other States Cases

In re Banschbach
(1958) 133 Mont. 312 4

In re Prudential Ins. Co. of Am.
(Tex. 2004) 148 S.W.3d 124 5

Liberty Life Ins. Co. v. McQueen
(2005) 364 Ark. 367, 219 S.W. 3d 172 5

McClendon v. Wood
(1916) 125 Ark. 155, 158, 188 S.W. 6 5

State ex rel. Gresham v. Delaney
(1942) 213 Minn. 217, 6 N.W.2d 97 5

Stewart v. Taustine
(Ky. App. 1960) 343 S.W.2d 575 5

I.
INTRODUCTION

Petitioner Deborah Shaw in her Answer Brief does not always address Real Parties' arguments. But when she does, her responses are unpersuasive.

Shaw does not settle on a consistent argument concerning the vitality of *Nessbit v. Superior Court* (1931) 214 Cal. 1 and *Donohue v. Superior Court* (1892) 93 Cal. 252 (sometimes referred to collectively as "*Nessbit*"). She argues that this Court and others already have overruled these cases. Then, she claims that the Courts of Appeal were privileged to disregard them. Finally, she asks this Court to overrule them now.

The court below is the only California court to have rejected *Nessbit*'s holding directly. Indeed, even the court below claimed to "harmonize" *Nessbit* with the Court of Appeal's *Byram* decision rather than outrightly refusing to follow *Nessbit*.

Those courts who have, *sub silentio*, contradicted *Nessbit* by holding writ relief is "proper" to address a superior court's denial of jury trial, or that seeking a writ is a "better practice" than appeal, issued the opinions that were wrongly decided – both as a matter of *stare decisis* and on the merits. This Court should re-affirm its decision in *Auto Equity Sales v. Superior Court,* and hold that this Court's decisions, including *Nessbit*, are binding unless or until overruled by this Court, or abrogated by statute. The legislature may change the law as interpreted by this Court; the Courts of Appeal cannot.

Shaw next argues that this Court, the Montana Supreme Court, and the Courts of Appeal have overruled *Nessbit*. Of course, only this Court may overrule its decisions, and it has not even come close to doing so. *Nessbit* comports with the general rule concerning extraordinary writs: a

post-judgment appeal is generally an adequate remedy at law; an adequate remedy at law precludes the writ. Shaw's arguments that subsequent decisions impliedly overruled *Nessbit* are without merit.

Shaw next urges this Court to overrule *Nessbit*. This Court should decline the invitation. *Donohue* is over 100 years old; *Nessbit* has been on the books for over 80 years. This Court is especially reluctant to overrule venerable precedent, absent special circumstances that are not present here.

Shaw does not offer any special circumstances warranting writ review of an alleged error of law, other than the fact that the claimed error concerns whether a jury trial is available. Shaw essentially asks this Court to announce a *per se* rule that writ relief is always available for denials of jury trial. Yet, she makes no factual showing why appeal would have been inadequate in this case. Her Petition for Writ of Mandate below made only a conclusionary allegation of inadequacy. She does not address Real Parties argument that she did not justify writ relief in her Petition under *any* circumstances.

As a matter of policy, too, the Court should maintain the general rule that appeal of alleged errors of law is an adequate remedy at law, ordinarily precluding mandate. An aggrieved party always can argue that a Court of Appeal's early intervention would correct error before a trial. If this Court adopts Shaw's argument, virtually all interlocutory orders involving issues that may affect the outcome of a trial would be reviewable via writ. That is not wise policy, as the courts have consistently held. Therefore, absent a Petition for Writ presenting some extraordinary, case-specific reason, the rule should remain: an appellate court should review a jury trial determination via appeal.

On the merits, there is no jury trial available under Health and Saf. Code section 1278.5. Again, Shaw ignores or glosses over several of Real Parties' arguments. After conceding the statute is "unclear," she gives only

cursory treatment to statutory construction issues. She does not even address the point that section 1278.5 is a regulatory statute designed to help government regulators police hospitals, a hallmark of equitable claims.

Shaw's principal argument boils down to this: because she seeks damages in her Complaint, the statute must afford her a jury trial. But that argument takes her only so far. Only the "court" can authorize damages under the statute, and only as an alternative to the restitutionary remedies listed therein. The types of damages available are subject to the court's determination of what is "warranted." When a statute gives a court broad discretion to fashion a remedy, the court does so as a chancellor in equity, and the availability of damages does not change the claim into an action at law.

In sum, the Court of Appeal erred in granting the writ, as a matter of *stare decisis*, as a matter of the proper standard of proof in original proceedings, and because the trial court's ruling was correct. Therefore, this Court should reverse the decision of the Court below.

II.
DISCUSSION

A. NO COURT HAS OVERRULED NESSBIT, IMPLICITLY OR OTHERWISE

Shaw argues this Court overruled *Nesbitt v. Superior Court* (1931) 214 Cal.1, in *Crouchman v. Superior Court* (1988) 45 Caol.3d 1167. *See* Answer Brief p. 4. *Crouchman* does not discuss the availability of writ relief at all. The Court of Appeal in that case actually denied the writ – twice. *Id.* at p. 1171. This Court ultimately held that the superior court *properly* denied a jury trial in a small claims case that the losing party appealed to the superior court. *Id.* at p. 1170 ("the Court of Appeal correctly held that the appealing defendant has no right to trial by jury.")

Nor did this Court in *Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, consider whether a plaintiff denied a jury trial has an adequate remedy at law via appeal. This Court did not overrule *Nessbit* by deciding *Crouchman* or *Grafton Partners*. *See In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 323 (quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ("an opinion is not authority for a proposition not therein considered").)

Shaw then string-cites several Court of Appeal decisions, arguing "the holding in *Nessbit* generally has been ignored by numerous Courts of Appeal . . . ." (Answer Brief at p. 3). But the Courts of Appeal are not privileged to "ignore" this Court's binding precedent. *See Auto Equity Sales v. Superior Court* (1962) 57 Cal. 2d 450, 455 ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.").

And this Court is not bound by the lower courts' decisions, especially ones that contradict this Court's holdings. *See Grafton Partners*, *supra*, 36 Cal. 4th at p. 963 ("we have declined to consider reliance upon Court of Appeal decisions when we are called upon to determine for the first time whether those decisions were correct.").

Shaw next argues (Answer Brief p. 3) that the Montana Supreme Court in *In re Banschbach* (1958) 133 Mont. 312, declined to follow *Nessbit*. But that does not mean that *Nessbit* is wrongly decided, and it certainly does not mean *Nessbit* is not good law *in California*. *See Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal. App. 4th 1070, 1077 (decisions of other states' courts may be merely persuasive authority, depending on the point involved).

Shaw neglects to mention that several other states' courts have held just as *Nessbit* and *Donohue* did: denial of jury trial is reviewable via appeal, rather than via writ. *See, e.g., Liberty Life Ins. Co. v. McQueen*

(2005) 364 Ark. 367, 371 & n.1, 219 S.W. 3d 172, 175 (quoting *McClendon v. Wood* (1916) 125 Ark. 155, 158, 188 S.W. 6 ("the act of the court in proceeding to trial without allowing a jury, if erroneous, constitutes only an error or an irregularity which must be corrected by appeal."); *Stebbins v. Stebbins* (D.C. Cir. 1996) 673 A.2d 184, 191 ("a party denied his right to a jury trial suffers no especially great hardship -- certainly none greater than any of the myriad other errors that may prejudice a party during trial court proceedings"); *Stewart v. Taustine* (Ky. App. 1960) 343 S.W.2d 575, 576 (denial of jury trial; "petitioner is not entitled to the relief sought because he has a remedy by appeal, and has failed to show that he will suffer irreparable injury."); *State ex rel. Gresham v. Delaney* (1942) 213 Minn. 217, 219, 6 N.W.2d 97 ("Ordinarily, where a party has an adequate remedy by appeal, a writ of mandamus should be denied. The denial of a trial by jury falls within this rule."); *State ex rel. Garton v. Fulton* (1929) 118 Neb. 400, 410 ("the action of the county court in refusing to award the relator a jury trial cannot be reviewed in a mandamus proceeding."); *but see, e.g., In re Prudential Ins. Co. of Am.* (Tex. 2004) 148 S.W.3d 124 (mandamus lies for denial of jury trial in civil case).

In sum, *Nessbit*'s rule cannot be written off as an anachronism or outlier, as Shaw argues.

B. THIS COURT SHOULD NOT OVERRULE NESSBIT AND DONOHUE

Shaw also asks this Court to expressly overrule *Nessbit* and *Donohue*. However, Shaw fails to articulate the applicable legal standards, or offer an argument supported by adequate legal authorities. Therefore, she forfeits the argument. *E.g., Thompson v. County of Los Angeles* (2006) 142 Cal. App. 4th 154, 172 (court treats as forfeited arguments unsupported by authority or reasoned argument). Even if she does not forfeit the point, this Court should decline her invitation.

1. Under Principles of *Stare Decisis*, This Court Is Reluctant to Overrule Longstanding Decisions.

The "doctrine of *stare decisis* teaches that a court usually should follow prior judicial precedent even if the current court might have decided the issue differently if it had been the first to consider it." *Bourhis v. Lord* (2013) 56 Cal. 4th 320, 327. The rule is "based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system . . . ." *People v. Latimer* (1993) 5 Cal. 4th 1203, 1212 (citations and internal quotation omitted).

Of note, "the [*Nessbit/Donohue*] rule has been the law for [more than] a century. The principle of *stare decisis* weighs heavily against a departure from such precedent." *Security Pacific National Bank v. Wozab* (1990) 51 Cal. 3d 991, 1000 (citing *Gardiner v. Roye* (1914) 167 Cal. 238, 242.) Thus, this Court in *Bourhis* refused to overrule 40-year old precedent, noting: "[i]f the rule does create serious problems, the Legislature may change it any time it wishes . . . ." *See also Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal. 4th 1013, 1022 (plurality opn.) (declining to overrule 20 year-old precedent under principles of *stare decisis*).

Nessbit is consistent with the longstanding, general rule that, absent extraordinary circumstances warranting a writ, appellate courts review errors of law at the end of a case, even ones that could result in reversal and re-trial. The Court in *Nessbit*, following its earlier decision in *Donohue*, applied this general rule to trial courts' rulings on whether a claim sounds in equity or law.

In sum, ruling on whether a jury trial is available presents a question of law. Claimed errors of law are reviewed via appeal. Parties claiming an erroneous denial of jury trial therefore have an adequate remedy at law via

appeal. Shaw provides no sound factual or legal basis for this Court to depart from this general rule.

2. Shaw Fails to Establish Any Special Justification Required for this Court to Overrule *Nessbit* and *Donohue*

This Court recently stated: courts "should be reluctant to overrule precedent and should do so only for good reason." *Bourhis*, 56 Cal. 4th at p. 327.

Shaw does not provide any "good reason" to overrule *Nessbit* and *Donohue* . Shaw's essential arguments are: (1) the right to jury trial is of critical importance, justifying issuance of the writ, (2) lower courts have ignored *Nessbit/Donohue,* and (3) writ relief is more efficient, because an appellate court can correct an erroneous denial of jury before trial.

a. The Importance of the Jury Trial Right Does Not Justify Overruling *Nessbit/Donohue*

The importance of the constitutional right to jury trial in appropriate civil cases dates back to the beginning of California's history. *See Exline v. Smith* (1855) 5 Cal. 112, 113 ("The right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the State."). Thus, the jury trial right in civil cases existed when this Court decided *Nessbit* in 1931, and *Donohue* decades before then. The fact that a trial court's ruling of law concerns a jury trial is not in and of itself a special circumstance, or this Court would have said so in *Nessbit.* There has been no change in the law warranting a departure from *Nessbit*'s settled rule. Therefore, Shaw's reference to *Nessbit* as a relic that should be cast upon the "legal scrap heap," *see Jehl v. Southern Pacific Co.* (1967) 66 Cal. 2d 821, 829, is off the mark.

b. Lower Courts' Failure to Follow this Court's Decisions

Some lower courts' failure to follow *Nessbit* is not a sufficient justification to overrule it, for the reasons stated above. The Courts of Appeal should not have done so.

c. Review Via Mandate Is Not Necessarily Efficient, Nor Is Efficiency Adequate Justification to Prefer Writ Relief to Appeal

As for Shaw's argument that review via mandate is more efficient, as Real Parties argued in the Opening Brief, that is not the case. (*See* Opening Brief pp. 11-13). This Court should not open the door to more interlocutory review of trial courts' legal rulings, as the federal Court of Appeals for the Seventh Circuit explained some time ago:

> The request presents all of the vices of an interlocutory appeal. The trial, which was to have been held in April 1986, has been blocked. The district court's trial calendar has been disrupted; it is not easy to schedule (and then reschedule) a five-week trial. Witnesses have had to rework their plans and do not know when they must appear. Meanwhile we are asked to decide some abstract questions about the characterization of banking transactions and the availability of prejudgment interest under Wisconsin (maybe federal) law. We do not have a complete record on which to resolve them, we do not have the views of the district court, and we do not know whether their resolution is important to the case. Perhaps the FDIC will fail to prove that the borrowers misled the American City Bank or that the Bank of Waukesha was responsible for their conduct. In that event none of today's disputes matters. If the FDIC does prove its claims, however, the trial is sure to present still other issues that will bring this case to us a second time.

First Nat'l Bank v. Warren (7th Cir. 1986) 796 F.2d 999, 1001.

The same considerations apply to the present case.

1. Trial in this case was about to commence in March 2014. Instead, the trial and appellate courts stayed trial pending resolution of the writ petition. Even without review by this Court, the trial was delayed at least six months.

2. Once trial resumes, the superior court will have to reschedule it.

3. Witnesses will have to "re-work their plans and do not know when they must appear." Memories will fade, people will move away and otherwise could be unavailable.

4. Shaw might have won her trial on her common law, *Tameny* claim before a jury, in which case "none of today's disputes matters."

5. Either party may have reasons to seek post-trial appellate review on other issues, guaranteeing a second trip to the Court of Appeal.

Thus, there is no "good reason" to create a special category of legal error for which mandate is "preferred" over appeal. There are too many reasons why writ review could do more harm than good.

C. SHAW DID NOT DEMONSTRATE AN INADEQUATE REMEDY AT LAW, WHICH WAS REQUIRED FOR ISSUANCE OF THE WRIT

Shaw does not address Real Parties' argument that she failed in her Petition for Writ of Mandate to demonstrate *in this case* an inadequate remedy at law. Opening Brief at pp. 9-10.

Shaw did not establish that appeal would be inadequate. She made nothing but a bare assertion that her remedy at law was inadequate. The

trial was in progress. She did not point to any special facts requiring expedited review of her claim. She would have had a jury trial on her *Tameny* claim regardless of the trial court's treatment of her claim under Health and Saf. section 1278.5.

Based on the foregoing, for Shaw to prevail under the facts of this case, this Court must hold that a ruling on the availability of jury trial is an alleged error of law that is *per se* different from the host of other errors that the courts of appeal review via post-judgment appeal. The Court should not carve out such a *per se* exception under the facts of this case.

D. THIS COURT SHOULD RE-AFFIRM AUTO EQUITY SALES

Shaw at times suggests the Courts of Appeal disregarded *Nessbit* as wrongly decided. If so, this Court should not authorize lower courts to ignore this Court's decisions on that basis. This Court should re-affirm what the Courts of Appeal generally understand as the law: this Court's decisions bind the Courts of Appeal unless and until this Court (or the legislature) decides to overrule them. *See, e.g., Rose v. Hudson* (2007) 153 Cal. App. 4th 641, 652 ("Insofar as Rose thinks [*Coscia v. McKenna & Cuneo* (2001) 25 Cal. 4th 119] was wrongly decided, the argument fails, as we are bound to follow the precedent of the California Supreme Court."). A different rule will undermine the purpose for *stare decisis*: to ensure certainty and orderly development of the law.

E. SHAW SEEKS BACK PAY, A FORM OF EQUITABLE RELIEF

Shaw claims, in bold and italics, "The prayer does not request any equitable relief." Answer Brief p. 6; *see also id.* p. 29. *Au contraire.* Shaw's prayer contains a request for back pay. As Real Parties argue, back pay is a form of restitution, an equitable remedy. Opening Brief p. 19. *See*

also McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 360 ("'remedies such as backpay . . . are 'exclusively corrective and equitable in kind.'" (citation omitted)).

Moreover, as Real Parties also argued in the Opening Brief, the prayer is not dispositive of the claims' character. *Id.* pp. 24-25. Shaw does not distinguish these cases or address this argument.

F. SHAW CONCEDES THE PRE-2007 VERSION OF SECTION 1278.5 PROVIDES FOR ONLY EQUITABLE REMEDIES

Shaw concedes: "No one disputes that the remedies under the initial version of section 1278.5 provided equitable relief." (Answer Brief p. 18.) When a statute exclusively provides for equitable relief, 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.").

As such, Shaw's only remaining argument on the merits is that the 2007 amendment to section 1278.5, subd. (g), in which the legislature added the phrase: "or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law," implicitly conferred a right to jury trial. She cannot prevail on this argument for several reasons, as discussed below.

G. THE AMENDMENT TO SECTION 1278.5, SUBD. (G) DOES NOT MANDATE A JURY TRIAL

1. Statutory Construction

Real Parties argued that the 2007 addition to subdivision (g) is limited to equitable remedies under principles of statutory construction . *See* Opening Brief pp. 20-23. Shaw concedes that the express language of subdivision (g) is "at best," unclear. Answer Brief p. 31. However, she

otherwise dismisses the argument without providing legal authorities. (*see* Answer Brief p. 23) This Court should apply the statutory construction principles as argued in the Opening Brief.

2. Even if Subdivision (g) Allows the Court to Award Damages, the Statue Is Equitable

Shaw claims "the court is not acting as a chancellor." Answer Brief p. 31. But she fails to distinguish the cases in which courts may award monetary damages even though they are sitting as courts of equity. *See* Opening Brief at 23-24. Shaw simply contradicts Real Parties' assertion that the superior court must act as a chancellor to determine whether "any remedy" in lieu of the listed ones is "warranted."

Shaw's premise appears to be that if damages are available under the statute, she is automatically afforded a jury trial. For example, quoting the Court of Appeal's opinion at length, she emphasizes that the amendments to the statute authorize legal remedies. (Answer Brief p. 21).

Even assuming *arguendo* that the added language to subdivision (g) permits damages as a remedy, Shaw's argument fails. Subdivision (g) of section 1278.5 does not permit a jury to simply award damages. The statutory text says that the *court* must deem a remedy to be "warranted." The court also must determine whether such additional or different remedies are warranted *in lieu* of the listed, restitutionary remedies. Opening Brief p. 29.

Thus, given "the wide range of equitable and legal relief authorized by [section 1278.5, subd. (g)], it would be an impossible task for a jury to determine the appropriate relief and to resolve the rights, equities, and interests of all of the parties." *Southern Pac. Transportation Co. v. Superior Court* (1976) 58 Cal. App. 3d 433, 438 (holding "it is the function of the court and not the jury to be the trier of fact in a good faith improver action."). *See also Van de Kamp v. Bank of America* (1988) 204 Cal. App.

3d 819, 865 (no jury trial where "the only way in which the remedy of damages could be afforded was by the application of equitable principles . . . .").

3. Section 1278.5 Is Part of a Regulatory Statute

Real Parties argued that section 1278.5's inclusion within regulatory provisions support the conclusion that the statute sounds in equity. *See* Opening Brief pp. 26-28. Shaw does not address the argument. For the reasons previously argued, a statute designed to assist an agency in its enforcement efforts as part of a regulatory scheme sounds in equity.

H. SHAW'S ARGUMENTS REGARDING OTHER EMPLOYMENT LAW STATUTES ARE WITHOUT MERIT

Shaw claims that section 1278.5 is akin to Lab. Code section 1102.5. See Answer Brief p. 35. Shaw does not cite to section 1105, which provides: "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." Thus, section 1102.5 expressly allows for recovery of "damages," and without involvement of "the court."

Shaw also argues that the Fair Employment and Housing Act's anti-retaliation provision is on all-fours with section 1278.5. However, the FEHA does not specify or limit the remedies that may be awarded under Govt. Code section 12965, subd. (b). Rather, the FEHA contains a specific, subdivision authorizing the court to fashion equitable relief that is separate and apart from what the aggrieved party may recover in a civil action. See Id § 12965, subd. (c) (listing equitable relief the court may award to effectuate the FEHA's purposes). Where, as here, an employment law, anti-retaliation statute provides for equitable remedies, there is no right to a jury trial. *See Alvarado v. Cajun Operating Co.* (9th Cir. 2009) 588 F.3d

1261, 1269 ("Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.").

Shaw argues that sections 98.7 and 132a of the Labor Code are inapposite because they expressly provide for relief via administrative agencies. Answer Brief pp. 33-34. Shaw misses the point. The retaliation claims in each of these statutes are restitutionary in nature. The agencies that administer these statutes are permitted to do so without a jury because anti-retaliation laws serve the agencies' regulatory purpose.

I. THIS COURT'S DECISION IN FAHLEN IS INAPPOSITE

Shaw argues throughout her brief that this Court's recent decision in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal. 4th 655, somehow supports her claim. *E.g.*, Answer Brief p. 22. This Court in *Fahlen* "limited the issue to that raised in the petition, *i.e.*, whether, before a physician may commence a civil suit alleging that a hospital's quasi-judicial decision to terminate the physician's staff privileges was wrongfully retaliatory under section 1278.5, the physician must first prevail in an administrative mandamus proceeding to set the decision aside." *Id.* at 666. The Court expressly declined to rule on what remedies are available under the statute, which is the central focus here. *Id.* at 662 ("Such matters, however, are beyond the scope of the narrow question before us . . . ."). This Court even "*stressed*" the limited nature of its review at the end of the opinion, immediately after discussing possible remedies. *Id.* at 685 ("these matters are beyond the scope of the narrow issue on which we granted review . . . .").

In sum, *Fahlen* is entirely inapposite to the question of whether section 1278.5 is legal in character and, therefore, must be tried to a jury.

III.
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: March 19, 2015

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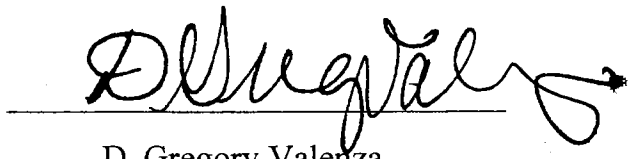
CERTIFICATE OF WORD COUNT

Counsel for Real Parties in Interest certifies that Real Parties' Opening Brief is 4,255 words, based on the word count produced by the word processing software used to prepare the brief.

Date: March 19, 2015



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 March 19, 2015, I served the attached REAL PARTIES IN INTERESTS' REPLY BRIEF in this action by placing a true and correct copy thereof, enclosed in sealed envelope(s) addressed as follows below:

[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.

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct; executed on March 19, 2015, at San Francisco, California.

Carolyn Angel