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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TRICOAST BUILDERS, INC.,

Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA,

Defendant and Respondent.

On Review from the Court of Appeal,
Second Appellate District, Division Two
Case No. B303300

After an Appeal from the Superior Court of Los Angeles County
Hon. Melvin D. Sandvig
Case No. PC056615

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) When a party on appeal from a final judgment after a bench trial challenges the denial of relief from the waiver of the right to a jury trial under Code of Civil Procedure section 631, subdivision (g)[1], must that party demonstrate actual prejudice to obtain a reversal?

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

INTRODUCTION

In this case, the defendant posted jury fees and requested a jury trial. The plaintiff did not post its jury fees, amounting to a waiver of its jury trial rights under section 631, subdivision (f)(5). The trial court scheduled a jury trial based on the defendant's request, and the parties prepared the case for a jury trial. On the morning of the scheduled jury trial, the defendant changed his mind and waived his jury trial right. Plaintiff requested relief from its jury trial waiver, offering to post fees that day. The trial court rejected that request. This was so even though the defendant made no showing of prejudice from proceeding with a

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

jury trial, and the trial court did not suggest that it would be prejudiced from going forward with the scheduled jury trial. By contrast, plaintiff demonstrated that switching to a bench trial on the morning of the scheduled jury trial was unfair because it had prepared for a jury trial. The trial court nevertheless went ahead with a bench trial and found in favor of the defendant.

After entry of judgment and denial of plaintiff's motion for new trial, plaintiff appealed. The Second District, Division Two, in a divided opinion, affirmed the judgment, concluding the trial court had not abused its discretion by denying plaintiff's request for relief from its jury trial waiver. (*TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*).) In so doing, the majority failed to follow this Court's authority protecting the constitutional right to a jury trial and upset settled law on both the standard of review for an appeal challenging the denial of relief from waiver and the scope of the trial court's discretion in evaluating the propriety of relief. The opinion cannot stand on either ground.

With respect to the standard of review, under this Court's authority, the erroneous denial of a jury trial is a miscarriage of justice that, in the absence of any gamesmanship, is prejudicial per se and requires reversal of a judgment. The Second District, Division Seven in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*), based on this Court's authority, held that, when a trial court abuses its discretion in

denying relief from a jury trial waiver, a litigant in an appeal from the judgment following the ensuing bench trial need not demonstrate actual prejudice to obtain a reversal. The *TriCoast* majority, however, relied on several errant cases and concluded the opposite, imposing an actual prejudice requirement and thereby creating a direct conflict in the law.

The *TriCoast* majority was wrong. It is out of step with this Court's authority, which holds the denial of a jury trial constitutes a miscarriage of justice and a showing of actual prejudice is not required in the absence of gamesmanship. Moreover, by requiring a showing of actual prejudice on appeal, the *TriCoast* majority perpetuated a dual-track standard of appellate review that will needlessly generate more writ petitions and simultaneously insulate erroneous decisions from appellate review. Although *Mackovska*, after reviewing the case law, served to clarify that actual prejudice is not a requirement in a judgment appeal, the *TriCoast* majority upset this clarification. Justice Ashmann-Gerst in dissent recognized the majority's disturbance of the law and the constitutional problems with an actual prejudice requirement. This Court, therefore, should protect the inviolate right to a jury trial by confirming the lack of an actual prejudice requirement.

As to the scope of the trial court's discretion in determining the propriety of granting relief from a jury trial waiver, the *TriCoast* majority also was wrong. Case law has long established

that a trial court abuses it discretion by denying relief from a jury trial waiver in the absence of prejudice to the other party or the court itself, and *Mackovska* reinforced this principle. Nevertheless, the *TriCoast* majority contradicted this well-established law in failing to analyze whether a grant of relief would prejudice either the other party or the court. For this reason too, this Court should protect the constitutional right to a jury trial by confirming that a trial court abuses its discretion in denying relief from a jury waiver in the absence of prejudice to the other party or the court.

In short, *Mackovska* clarified that no actual prejudice requirement exists for a litigant challenging the denial of relief from a jury trial waiver in a judgment appeal and applied settled authority requiring prejudice to the other party or the court before a trial court can exercise its discretion to deny relief. The *TriCoast* majority nevertheless created havoc in these areas of the law. To settle the law and protect the constitutional right to a jury trial, this Court should reverse the majority's decision and direct the Court of Appeal to send the matter back to the trial court for a jury trial.

FACTUAL AND PROCEDURAL STATEMENT

Plaintiff and appellant TriCoast Builders, Inc. (TriCoast), a general building contractor, initiated this lawsuit against defendant and appellant Nathaniel Fonnegra, the owner of real

property where TriCoast had performed work. (CT 22-28, 39-48.) A jury trial was scheduled to start on September 23, 2019, as reflected in the trial court's minutes. (CT 96.) On that morning, when the trial court called the matter for a jury trial, Fonnegra stated that he had decided "over the weekend" to waive his right to a jury trial. (*Ibid*; 2 RT 1.) TriCoast objected because its counsel had prepared for a jury trial and Fonnegra's decision to waive a jury trial the morning it was set to start was unfair. (2 RT 2.) TriCoast made an oral request pursuant to section 631, subdivision (g), to proceed by a jury trial and offered to post jury fees that day. (2 RT 1.)

Fonnegra, however, sought to have the case proceed with a bench trial on the ground that TriCoast had waived its right to a jury trial by failing to post jury fees within the timeframe specified by section 631, subdivision (d). (2 RT 2.) The trial court agreed with Fonnegra, rejected TriCoast's offer to post fees that day as untimely, and ruled the case would proceed by a bench trial. (*Ibid*.) The trial court stated: "When the fees haven't been paid, and you haven't paid them, the party that did pay them has waived the jury trial, so that's it." (*Ibid*.) Although TriCoast insisted it had a constitutional right to a jury trial, the trial court remarked TriCoast could seek immediate writ review of the ruling. (*Ibid*.) The trial court then denied TriCoast's oral request to proceed by a jury trial, "find[ing] that [TriCoast] not having paid jury fees, has waived trial by jury." (CT 96.) TriCoast did not

seek writ review. After a bench trial, Fonnegra prevailed, and judgment was entered in his favor. (CT 112, 134-135, 138-139.)

TriCoast moved for a new trial based in part on the denial of a jury. (CT 149-150, 154-160.) In support, TriCoast's counsel submitted a declaration, averring that, "[d]uring four years of pretrial proceedings in this case, [Fonnegra] demanded a jury trial. [TriCoast] did not demand a jury trial or post jury fees. Nonetheless, [TriCoast] was required to prepare for a jury trial as a result of Fonnegra's demand. And, [TriCoast] expended considerable resources in doing so and tailored its opening statement, exhibits, witnesses, and presentation for a jury." (CT 161.) In fact, in the two years leading up to trial, "the [trial] court encouraged defendants to waive the jury," but "none were willing to do so." (*Ibid.*) Accordingly, when the trial court called the matter for a jury trial, TriCoast "placed its four sets of exhibit books, placed the projector for the jury to follow the exhibits, and reviewed voir dire and opening statement written for the jury." (*Ibid.*) Despite this showing, the trial court denied TriCoast's new trial motion. (CT 181-182.)

TriCoast appealed from the judgment. (CT 183.) TriCoast argued the trial court had abused its discretion by denying relief from the jury trial waiver pursuant to section 631, subdivision (g), and resolving the case through a bench trial. (AOB 10-12.) The Second Appellate District, Division Two, affirmed the judgment in a published and divided opinion. (*TriCoast*, *supra*,

74 Cal.App.5th 239.) The majority held that, because TriCoast had not sought writ review of the trial court's order denying relief, TriCoast was required, but failed, to demonstrate it suffered actual prejudice from the ensuing bench trial. (*Id.* at pp. 245-246.) The majority also determined that, because TriCoast's offer to post jury fees on the day of trial was untimely, the trial court did not abuse its discretion by denying relief from the jury trial waiver. (*Id.* at pp. 248-249.) This was so, according to the majority, even though the opposing party had suffered no prejudice, because prejudice to the opposing party is merely "one of several factors" the trial court can consider in exercising its discretion. (*Id.* at p. 250.)

Justice Ashmann-Gerst, in dissent, "disagree[d] with the majority's conclusion that 'TriCoast's failure to demonstrate prejudice from proceeding with a court trial after its request for relief from jury waiver was denied supports affirmance of the trial court's order.' [Citation.]" (*TriCoast*, *supra*, 74 Cal.App.5th at p. 253, fn. 3.) Justice Ashmann-Gerst also stated that, "[e]ven if TriCoast were required to demonstrate prejudice, the appellate record confirms that it did" because its counsel "'expended considerable resources'" preparing for a jury trial and "'tailored its opening statement, exhibits, witnesses, and presentation for a jury.'" (*Id.* at p. 254, fn. 4.) In addition, according to Justice Ashmann-Gerst, Fonnegra did not show he or the court would suffer prejudice from affording TriCoast relief from its jury trial

waiver, demonstrating an abuse of discretion by the trial court in denying such relief. (*Id*. at p. 254.)

TriCoast filed a petition for review of the Court of Appeal's opinion, which this Court granted on April 27, 2022.

LEGAL DISCUSSION

I. AN APPELLANT CHALLENGING THE DENIAL OF RELIEF FROM A JURY TRIAL WAIVER NEED NOT DEMONSTRATE ACTUAL PREJUDICE FROM A BENCH TRIAL TO REVERSE THE JUDGMENT.

A. Section 631, Subdivision (g), Governs Relief From Jury Trial Waivers, and Any Doubt Over Granting Relief Must Be Resolved in Favor of Protecting the Inviolate Right to a Jury Trial.

The California Constitution accords every civil litigant the right to a trial by jury. (Cal. Const. art. I, § 16.) Section 631, subdivision (a), sets forth the Legislature's command that the right to a jury trial shall be "preserved to the parties inviolate." In that regard, waiver of the right to jury trial in civil cases can occur only through one of six enumerated ways (§ 631, subd. (f)), including, as relevant, by failing to timely post jury fees as specified by the statute (*id*. at subds. (b), (c) & (f)(5)). (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956

(*Grafton Partners*) ["[W]aiver of the right to jury trial in a civil cause is permitted only as prescribed by statute"].)

Section 631, subdivision (g), authorizes the trial court to relieve a party from a jury trial waiver "in its discretion upon just terms." California's courts for decades have held that properly safeguarding the constitutional guarantee of a jury trial requires courts to resolve doubts concerning the propriety of granting relief in favor of the right to a jury. As this Court long ago explained, doubts in construing section 631 "should be resolved in favor of according to a litigant a jury trial." (*Loranger v. Nadeau* (1932) 215 Cal. 362, 368, overruled on other grounds in *Reich v. Purcell* (1967) 67 Cal.2d 551, 555.) This Court later recognized "the right to trial by jury is so important that it must be 'zealously guarded' in the face of a claimed waiver" such that section 631, subdivision (g), consistently has been interpreted to "resolve doubts in interpreting the waiver provisions . . . in favor of a litigant's right to jury trial." (*Grafton Partners, supra,* 36 Cal.4th at p. 956.)[2]

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[2] California's appellate courts consistently have followed this principle. (See, e.g., *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1467; *Hernandez v. Wilson* (1961) 193 Cal.App.2d 615, 619; *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 476 (*Cowlin*).)

B. The Erroneous Denial of a Jury Trial Results in a Miscarriage of Justice That Appellate Courts Must Correct, Whether Through Writ Relief or on a Judgment Appeal.

Along with the long-standing principle for resolving doubts in favor of granting relief from a jury trial waiver, this Court has held "'[t]he denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and *requires a reversal* of the judgment.' [Citation.]" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300 (*Chevrolet Coupe*), italics added.) In other words, the erroneous denial of a jury trial is per se reversible.

Appellate courts have applied this rule in the context of a litigant improperly denied a jury in the first instance. (E.g., *Union Oil Co. of California v. Hane* (1938) 27 Cal.App.2d 106, 110 ["denial of the right to trial by jury to a party entitled thereto is a miscarriage of justice" and "requires a reversal of the judgment of the trial court"].) They have also applied the rule in the context of a party wrongly denied relief after a jury trial waiver. (E.g., *Cowlin, supra*, 46 Cal.App.2d at pp. 476-477 ["Where as here the right to trial by jury is denied to one justly entitled thereto such denial amounts to a miscarriage of justice and a reversal of the judgment is required"].)

Although the resulting miscarriage of justice from the denial of a jury trial must be remedied on appeal, courts also have explained that an extraordinary writ sometimes can provide a more optimal way to correct the error. Thus, "[a writ] is a proper remedy [in certain circumstances] to test a litigant's right to a jury trial. [Citations.] While the illegal denial of a jury would constitute cause to reverse any judgment . . . it would be inefficient and, indeed, unconscionable to refuse to ascertain [a party's] right to a jury trial [through a pre-trial writ proceeding]." (*Turlock Golf & Country Club v. Superior Court* (1966) 240 Cal.App.2d 693, 695.)

The pursuit of writ relief, however, is permissive and not required. In *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 991, this Court acknowledged that "California appellate decisions have uniformly *permitted* a trial court denial of a request for jury trial to be reviewed prior to trial by a petition for writ of mandate or prohibition." (Italics added.) As this Court recognized, obtaining reversal of the judgment after a bench trial "'would be inefficient and time consuming.' [Citations.]" (*Ibid.*, fn. omitted.) Accordingly, California courts have long held that a party can challenge the denial of relief from a jury waiver through an appeal from the judgment or an extraordinary writ before trial. (See, e.g., *Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1224 (*Monster*) ["[A]lthough the denial of a jury trial is 'reviewable on appeal from the judgment,' review by way of

extraordinary writ is 'normally . . . the better practice' so as to avoid 'time needlessly expended in a court trial'"]; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 862 (*Van de Kamp*) [same]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522-523 (*Selby*) [same].)

C. A Narrow Exception to the Rule of Automatic Reversal Exists When a Party's Claim of Error Reveals Undue Gamesmanship.

Notwithstanding the importance of granting relief from a jury trial waiver, and the right to seek review by either writ or appeal, this Court has imposed a narrow limitation on these principles. In that regard, a litigant cannot challenge the denial of a jury trial for the first time on appeal after failing to request a jury and, without objection, proceeding with a bench trial. For example, in *Frazure v. Fitzpatrick* (1943) 21 Cal.2d 851, 860-861 (*Frazure*), this Court rejected a challenge to the denial of a jury trial because, after the trial "court announced that it was ready to receive evidence on the counterclaim[,] [a]ppellant's attorney then proceeded without objection to put on his evidence" and "[n]o demand was made for a jury with respect thereto . . . ."

Three decades later, in *Taylor v. Union Pac. R. Corp.* (1976) 16 Cal.3d 893 (*Taylor*), this Court expanded on the effect of a litigant's failure to request a jury or otherwise object to a bench trial. This Court acknowledged the "general rule" that relief from

waiver is "in the discretion of the trial court" but rejected a claim of error because, in the midst of a jury trial, plaintiffs notified the clerk of their desire to waive their jury right and then tried the remainder of the case to the court, only later arguing on appeal that the denial of a jury trial was improper. (*Id*. at pp. 895, 898, 900-901.) "'[A] party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury. [Citation.]' [Citations.]" (*Id*. at p. 900.) Thus, "[a]s stated in [*Tyler v. Norton* (1973) 34 Cal.App.3d 717, 722 (*Tyler*)], wherein defendants proceeded to try the case before a judge without objecting to the absence of a jury, 'Defendants cannot play "Heads I win, Tails you lose" with the trial court.' [Citation.]"[3] (*Ibid*.) Litigants, therefore, cannot remain silent and seek relief from a jury trial waiver for the first time on appeal after trying their case to the court without success.

This Court similarly ruled in *Gonzales v. Nork* (1978) 20 Cal.3d 500 (*Gonzales*). There, defendant waived his right to a jury trial and subsequently commenced trial of his special defenses to the court. The next morning, defendant moved for relief from the jury waiver, which the trial court denied. This Court observed that "circumstances had changed" by the time defendant moved for relief because "[c]ounsel had argued the

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[3] For ease of reference, this brief will refer to this excerpt from *Tyler*, *supra*, 34 Cal.App.3d at page 772 as the coin-tossing metaphor.

special defense issues to the judge, and had observed his reactions to the argument." (*Id*. at p. 508.) Accordingly, defendant "failed to excuse his delay in seeking relief from jury waiver until after argument on the special defenses and failed, likewise, to demonstrate prejudice arising from the denial of his request." (*Id*. at p. 509.) Thus, this Court recognized that, when a party remains silent and delays the request for a jury until after the trial has commenced, a requirement arises to show actual prejudice on appeal.

In line with this Court's rulings, appellate courts repeatedly have made deterrence of improper gamesmanship a focal point in evaluating claims of error regarding the denial of relief from a jury trial waiver. Initially, in *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 653 (*Byram*), the appellate court found error in the denial of relief from a jury trial waiver. Whereas the facts in *Taylor* and *Gonzales* indicated gamesmanship, the *Byram* court noted the inadvertent nature of the waiver and the appellant's prompt request for relief, absent any gamesmanship. (*Ibid.*) *Byram* then found an abuse of discretion in the denial of relief because the appellant "took prompt action" upon learning of the waiver, the opposing parties "did not establish that any prejudice would result from allowing a jury trial, and the court did not base its decision upon necessities for the smooth functioning of the proceedings before it . . . ." (*Id*. at p. 654.)

Though the *Byram* court found no gamesmanship in that case, it also recognized, as this Court has articulated, that facts demonstrating gamesmanship may require a showing of actual prejudice for reversal on appeal. In cases of gamesmanship, under the coin-tossing metaphor, the *Byram* court stated that "[r]eversal of the trial court's refusal to allow a jury trial after a trial to the court would require reversal of the judgment and a new trial. It is then reasonable to require a showing of actual prejudice on the record to overcome the presumption that a fair trial was had and prejudice will not be presumed from the fact that trial was to the court or to a jury." (*Byram*, *supra*, 74 Cal.App.3d at p. 653.) Thus, *Byram* recognized the coin-tossing metaphor as a punchy justification for the narrow exception to the general rule that the improper denial of relief from a jury trial waiver is prejudicial per se and requires reversal: actual prejudice must be shown only when a party waits until after losing at trial to challenge the denial of a jury. (*Ibid*.)

In accordance with this Court's holdings, *Byram* rejected an actual prejudice requirement when the appellant has "acted promptly to secure a jury trial and the trial has not yet been held, and the adverse party made no attempt to oppose the request for relief from waiver of a jury trial . . . ." (*Byram*, *supra*, 74 Cal.App.3d at p. 653.) In such circumstances, *Byram* explained, "to refuse to allow a jury trial would not be consistent with the often-stated language in the decisions that the general rule is in

favor of allowing a jury trial." (*Ibid.*) Furthermore, even "arguing that no prejudice results from the denial of a jury trial . . . overlook[s] the fundamental importance of the constitutional right to a jury trial in our system of jurisprudence." (*Id.* at p. 654.)

For these reasons, *Byram* held "the denial of a jury trial after waiver where no prejudice is shown to the other party or to the court *is prejudicial*." (*Byram*, *supra*, 74 Cal.App.3d at p. 654, italics added.) Improper denial of a jury trial under such circumstances, therefore, is per se prejudicial to the party seeking relief. In other words, a party need not show actual prejudice from the denial of a jury trial when that party sought quickly to remedy the waiver and otherwise "took prompt action" before the start of the ensuing bench trial. (*Ibid.*)

Following *Byram*, other appellate courts have not imposed an actual prejudice requirement absent facts revealing gamesmanship. For example, in *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 823 (*Bishop*), appellants expressly waived their right to a jury, but respondent requested a jury trial. Like Fonnegra in this case, respondent changed his mind and waived his right to a jury trial on the day set for trial. (*Ibid.*) Appellants "immediately requested that the court exercise its discretion and afford them a jury trial," and "[c]ounsel for respondent indicated that his client's rights would not be prejudiced by a jury trial." (*Ibid.*) The appellate court held the denial of relief was an abuse

of discretion as "the timeliness of appellants' request to withdraw [the] waiver was immediate, prior to the commencement of trial" and "[n]o prejudice to the other party, the court, or its calendar was argued or found." (*Id.* at p. 824.) Moreover, no need existed for a showing of actual prejudice from the ensuing bench trial because "[t]he denial of a jury trial after waiver where no prejudice is shown to the other party or to the court *is prejudicial*." (*Id.* at p. 825, italics added.)

Another appellate panel reached the same conclusion in *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 835 (*Simmons*). There, like *Bishop*, appellant expressly waived his right to a jury, while respondent requested a jury trial. (*Ibid.*) Then, on the day set for the jury trial, respondent waived his right to a jury. (*Ibid.*) Appellant requested a jury that day and demonstrated he had deposited jury fees two weeks previously. (*Ibid.*) On these facts, "squarely within the holding of [*Bishop*]," *Simmons* held that "neither the court nor respondent articulated any prejudice or inconvenience to the parties or to the court" and that "'[t]he denial of a jury trial after waiver where no prejudice is shown to the other party or to the court *is prejudicial*.' [Citations.]" (*Id.* at pp. 838-839, italics added.)

The appellate court likewise decided in *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806 (*Boal*). There, a new attorney mistakenly waived a jury, and "[w]hen the attorneys actually assigned to that case discovered the error they promptly

moved to be relieved of that waiver." (*Id*. at p. 809.) After the trial court denied relief, the appellate court, finding the defendant's argument it would have been prejudiced by a jury trial "borders on being frivolous," held the "improper denial of jury trial is per se prejudicial" requiring reversal of the judgment. (*Id*. at pp. 809-810.) In other words, a showing of actual prejudice is not required on appeal when the denial of a jury trial is erroneous.

In sum, this Court's authority, later expanded on by the line of cases from *Byram* through *Bishop, Simmons,* and *Boal*, establishes the denial of relief from jury waiver is per se prejudicial, and no showing of actual prejudice is required absent facts demonstrating gamesmanship.

D. Other Appellate Courts Have Wrongly Attached Significance to a Party's Decision Not to Seek Writ Relief.

As explained, *Byram*, as well as *Bishop, Simmons,* and *Boal,* in conjunction with this Court's decisions, consistently applied the rule that, absent gamesmanship, the erroneous denial of relief from a jury waiver is reversible per se. Other appellate courts, however, wrongly have given significance to a party's decision not to pursue a writ petition in the midst of preparing for trial.

For example, the appellate court in *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357 (*McIntosh*) required the defendant to

show actual prejudice from a bench trial. This was because the defendant had been "playing games all along with this idea of a jury trial" with notice of plaintiff's waiver "for a year in advance" by "wait[ing] until the parties were sent out to a nonjury trial department" and then demanding a jury trial. (*Id*. at pp. 362, 364, fn. 2.) In rejecting the claim of error, *McIntosh* recognized the defendant "ha[d] made no suggestion of any prejudice occurring in his trial, as [was] his burden at [that] point." (*Ibid*.)

Referring to the coin-tossing metaphor, *McIntosh* observed that, "[j]ust as criminal defendants often play the game known as 'waive the lawyer,' civil litigants sometimes joust by 'waiving the jury.' [Citation.]" (*McIntosh*, *supra*, 151 Cal.App.3d at pp. 363-364.) "This practice is so prevalent it has been coined as the game of 'Heads I win, Tails you lose.' [Citation.]" (*Ibid*., fn. omitted.) Noting the appearance of gamesmanship, the appellate court determined the defendant "may have been playing the game" because, "[a]lthough [his] request for a jury trial was denied, he did not file a petition for writ of mandate. Instead, he let the case go to trial as nonjury and appealed on the jury waiver issue." (*Id*. at p. 364.) Thus, in line with this Court's authority, as well as subsequent appellate court decisions, *McIntosh* recognized gamesmanship is the analytical backdrop to requiring a showing of actual prejudice from an ensuing bench trial.

McIntosh, however, went astray when it failed to appreciate that the defendant had moved for a jury trial

immediately before trial. This failure contradicted this Court's holdings that "'a party cannot *without objection* try his case before a court without a jury, lose it and then complain that it was not tried by jury. [Citation.]' [Citations.]" (*Taylor, supra*, 16 Cal.3d at p. 900, italics added; see also *Frazure, supra*, 21 Cal.2d at pp. 860-861 [challenging jury waiver precluded when appellant "proceeded without objection to put on his evidence" and "[n]o demand was made for a jury"].)

McIntosh also undermined the reasoning of *Byram*, which turned on the plaintiff's prompt actions to secure a jury after learning of the waiver. (*Byram*, *supra*, 74 Cal.App.3d at p. 654.) Although *Byram* and *McIntosh* both addressed a party's silence in the face of jury trial waiver, *McIntosh* wrongly relied on a party's failure to bring a writ petition to remedy the denial of a jury trial waiver. (*McIntosh*, *supra*, 151 Cal.App.3d at p. 364.) In contrast, *Byram*'s analysis did not turn on the bringing of a writ petition, but rather focused on plaintiff's "prompt action" upon learning of the waiver. (*Byram*, at p. 654.) *Byram* acknowledged a writ of mandate is "a proper remedy" to secure the right to a jury trial because, "[a]fter a trial to the court it may be difficult for [an appellant] to establish that he was prejudiced by the denial of a jury trial," and that, "even if he could establish such prejudice as to warrant reversal of the judgment, such a procedure would be inefficient and time consuming." (*Ibid*.)

Although *Byram* and *McIntosh* identified a writ petition as an appropriate way to remedy a jury waiver, *Byram* did not define a writ petition as the exclusive remedy to secure a jury trial following the denial of relief from a waiver. (*Byram*, *supra*, 74 Cal.App.3d at p. 654.) Nor did *Byram* conclude failing to seek writ relief would adversely affect the standard of review on appeal. (*Ibid*.) Indeed, the law is to the contrary, allowing a party to challenge the denial of jury trial either through an appeal or a writ proceeding. (See, e.g., *Monster*, *supra*, 12 Cal.App.5th at p. 1224; *Van de Kamp*, *supra*, 204 Cal.App.3d at p. 862; *Selby*, *supra*, 91 Cal.App.3d at pp. 522-523.) *McIntosh*, nevertheless, incorrectly relied on *Byram* to find a writ of mandate as "the proper remedy" for denial of a jury trial. (*McIntosh*, *supra*, 151 Cal.App.3d at p. 364.)

Unfortunately, *McIntosh*'s analytical misstep was repeated in *Winston v. Superior Court* (1987) 196 Cal.App.3d 600 (*Winston*), and later compounded in *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698 (*Gann*). In *Winston*, the appellate court held that, "[w]hen 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." (*Winston*, at p. 603.) Later, in *Gann,* the appellate court pointed to *McIntosh* in stating that "[s]ome courts have held that a party should not be able to obtain a reversal [based on a trial court's denial of relief from waiver] without a showing of prejudice occurring in

the trial." (*Gann*, at p. 1704.) *Gann* then referenced the coin-tossing metaphor to conclude that a "writ of mandate is the appropriate vehicle to secure a jury trial allegedly wrongfully withheld without the usual demonstration of prejudice or miscarriage of justice required to obtain a reversal after judgment." (*Ibid*.)

McIntosh, Winston, and *Gann*, therefore, are problematic for two reasons. First, in contrast to *Byram*, those cases relied on an appellant's failure to seek writ relief and, consequently, are out of step with this Court's more general focus on a party's silence in the face of a bench trial. Second, those cases contradict the long line of decisions holding that a party can challenge the denial of relief from a jury trial waiver by way of a writ proceeding or appeal.

E. *Mackovska* Clarified That Demonstrating Actual Prejudice From a Bench Trial Is Not a Requirement to Remedy the Erroneous Denial of Relief From a Jury Trial Waiver.

1. *Mackovska*'s clarification resolved the decades-old conflict in appellate court authorities.

Decades after the confusion created by *McIntosh, Winston,* and *Gann,* the importance of preserving a challenge to the

erroneous denial of a relief from a jury trial waiver by way of appeal was clarified in *Mackovska*, *supra*, 40 Cal.App.5th 1. There*,* the appellate court recognized that, "[a]lthough 'review by way of extraordinary writ is "normally . . . the better practice,"' the 'denial of a jury trial is "reviewable on appeal from the judgment."' [Citations.]" (*Id*. at p. 13.) Drawing upon the decisions in *Bishop*, *Simmons*, and *Boal, Mackovska* also concluded that "'improper denial of a jury trial is per se prejudicial.' [Citations.]" (*Ibid*.)

Mackovska noted, however, the broad split of authority concerning the applicable standard of review when a litigant challenges the denial of relief from jury waiver in an appeal from a final judgment. In describing this split of authority, *Mackovska* acknowledged "[s]ome cases hold that when a party seeks review of such an order on appeal from the judgment without having filed a petition for writ of mandate challenging the order, the party must show actual prejudice from the denial of a jury trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 4.) *Mackovska'*s description of these authorities borrowed from a summary in *Gann*, which was premised on *McIntosh*'s misreading of *Byram* and the coin-tossing metaphor:

> "Some courts have held that a party should not be able to obtain a reversal on [the ground that relief from jury trial waiver was improperly denied] after

> judgment without a showing of prejudice occurring in the trial. [Citation to *McIntosh*.] Although it is difficult to envision precisely how one shows prejudice from denial of a jury trial aside from that inherent in deprivation of a constitutional right, the seldom articulated reason for allowing the trial court's determination to stand is that a party should not be able to play 'Heads I win. Tails you lose' by waiting until after judgment to seek review of the denial of relief from jury waiver. [Citation to *McIntosh*.] Thus courts have held that prejudice will not be presumed from the fact that the trial was to the court rather than to the jury. [Citations to *McIntosh* and *Byram*.] Rather, it is presumed that the party had the benefit of a fair and impartial trial."

(*Id*. at pp. 13-14.)

After studying this line of cases, *Mackovska* explained that "[n]either *Gann* nor *McIntosh* nor *Byram* supports the proposition that an appellant must show actual prejudice following the improper denial of relief from a jury waiver." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 14.) *Mackovska* then "follow[ed] the line of authority created by *Boal*, *Simmons*, and *Bishop*" and rejected the argument that a party who did not seek writ relief had to show actual prejudice. (*Id.* at p. 17.) *Mackovska* thus held that, "[a]s in cases considered on a petition for writ of

mandate . . . appellants need not show actual prejudice resulting from a trial by the court rather than a jury." (*Id.* at p. 13.)

2. *Mackovska*'s clarification debunked two faulty presumptions that led prior courts to require a showing of actual prejudice.

Mackovska observed that the prior appellate court decisions purporting to require an appellant to show actual prejudice from the erroneous denial of relief from a jury trial waiver rest on two problematic presumptions.

The first faulty presumption is that trial courts will always give litigants a fair and impartial trial such that they suffer no prejudice from being deprived of a jury. *Mackovska* scrutinized the "questionable statement that courts cannot presume prejudice from denial of the right to a jury trial because we assume a party had the benefit of a fair and impartial court trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 14.) As *Mackovska* explained, a presumption of fairness "arises from cases that were *tried to a jury instead of the court* . . . ." (*Ibid*.) As a result, appellate courts requiring a showing of actual prejudice in an appeal after the erroneous denial of relief from a jury trial waiver incorrectly applied the presumption of a fair trial in reverse. Although a presumption of fairness arises after a jury trial, no such similar presumption applies to a bench trial.

As *Mackovska* recognized, the genesis of the improper presumption is a "'chain of case law' [citation] dating back to 1931 [that] has misapplied and adopted" this Court's authority. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 14.) In *Doll v. Anderson* (1865) 27 Cal. 248, 251 (*Doll*), this Court stated "it would not be presumed that any injury had accrued to the plaintiff in consequence of the issues . . . being tried *by a jury instead of the court*." (Italics added.) In 1931, *Doll* was misread in *Harmon v. Hopkins* (1931) 116 Cal.App. 184, 188 (*Harmon*), which cited *Doll* for the opposite proposition, i.e., that "[p]rejudice will not be presumed as a consequence of the issues . . . being tried *by the court instead of the jury*." (Italics added.) *Harmon*'s misreading of *Doll* unfortunately was repeated in *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 318-319 (*Glogau*), which cited *Harmon* in stating that "prejudice cannot be presumed from the fact that appellants did not try their case to a jury." *McIntosh* later adopted this misreading as well and cited *Glogau* in stating that "[p]rejudice *by a nonjury trial* cannot be presumed . . . ." (*McIntosh*, *supra*, 151 Cal.App.3d at p. 363, italics added; see also *Holbrook & Tarr v. Thomson* (1956) 146 Cal.App.2d 800, 803, citing *Harmon*, at p. 180 and *Glogau*, at p. 318.)

A similar misreading of *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231 (*Oakes*) occurred in *Byram,* and later was adopted by *McIntosh* and *Gann*. Following *Doll*, the appellate court in *Oakes* held "[t]here is no presumption that prejudice

results merely because the case is *tried to a jury*." (*Oakes*, at p. 265, italics added.) *Oakes* then rejected the defendant's claim that he had been prejudiced by the trial court's decision to hold a jury trial after plaintiff initially failed to request a jury. (*Id*. at pp. 264-265.) *Byram*, however, miscited *Oakes* to conclude that "prejudice will not be presumed from the fact that trial was *to the court or to a jury*." (*Byram*, *supra*, 74 Cal.App.3d at p. 653, italics added.) *McIntosh* also adopted this misreading in *Byram* (*McIntosh*, *supra*, 151 Cal.App.3d at p. 363), as did *Gann* to hold that "prejudice will not be presumed from the fact that the trial was *to the court rather than to the jury*" (*Gann*, *supra*, 231 Cal.App.3d at p. 1704, italics added).

Mackovska's rejection of a presumption in favor of a fair bench trial also recognizes "[t]he right to trial by jury is a basic and fundamental part of our system of jurisprudence" that "should be zealously guarded by the courts." (*Byram*, *supra*, 74 Cal.App.3d at p. 654.) To presume a litigant deprived of a jury nonetheless had a fair trial contravenes this Court's holding that "[t]he denial of a trial by jury to one constitutionally entitled thereto constitutes a miscarriage of justice and requires a reversal of the judgment." (*Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300; see also *Cowlin*, *supra*, 46 Cal.App.2d at p. 476 [denial of relief from waiver when litigant was "justly entitled" to jury trial is miscarriage of justice requiring reversal of judgment].) Such a presumption also contradicts the holdings in *Boal*, *Simmons*, and

Bishop that the improper denial of relief from jury waiver is per se prejudicial. (*Boal, supra,* 165 Cal.App.3d at pp. 809-810; *Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; *Bishop, supra,* 101 Cal.App.3d at p. 825.) And it fails to acknowledge that even "arguing that no prejudice results from the denial of a jury trial . . . overlook[s] the fundamental importance of the constitutional right to a jury trial in our system of jurisprudence." (*Byram*, at p. 654.)

The second faulty presumption *Mackovska* scrutinized was the notion that, "if courts do not require a showing of actual prejudice, parties will play '"Heads I win, Tails you lose"' and wait until after judgment to challenge a trial court's denial of relief from a jury waiver." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15.) But, as this Court already has explained, justification for the coin-tossing metaphor is lacking when the facts do not show gamesmanship by the litigant seeking relief from a jury trial waiver.

The coin-tossing metaphor, as discussed, originated in *Tyler*, in which the defendants did not assert any error in proceeding without a jury until two days in to a bench trial. (*Tyler, supra,* 34 Cal.App.3d at p. 722; see *Mackovska*, *supra*, 40 Cal.App.5th at p. 15.) Thus, since its inception, the coin-tossing metaphor has been directly linked to a party's gamesmanship such that it serves as a narrow restriction on the

general rule that improper denial of relief from a jury trial waiver is per se prejudicial and requires reversal.

In *Taylor*, this Court affirmed *Tyler*'s justification for the coin-tossing metaphor and its concern with litigants who remain silent and proceed to try their case to the court, only to later claim error on appeal. (*Taylor*, *supra*, 16 Cal.3d at p. 900.) *Byram*, too, rejected application of the coin-tossing metaphor in the absence of gamesmanship, holding that, "[w]hen . . . the litigant *acted promptly to secure a jury trial* and the trial has not yet been held, and the adverse party made no attempt to oppose the request for relief from waiver of a jury trial, to refuse to allow a jury trial would not be consistent with the often-stated language in the decisions that the general rule is in favor of allowing a jury trial." (*Byram, supra,* 74 Cal.App.3d at p. 653, italics added; see also *Boal*, *supra*, 165 Cal.App.3d at p. 809 ["[w]hen the attorneys . . . discovered the error they promptly moved to be relieved of that waiver"]; *Simmons*, *supra*, 123 Cal.App.3d at p. 835 [when respondent waived jury on the day set for trial, appellant requested a jury and demonstrated he had deposited jury fees two weeks previously]; *Bishop*, *supra*, 101 Cal.App.3d at p. 824 ["timeliness of appellants' request to withdraw [the] waiver was immediate, prior to the commencement of trial"].)

These authorities, as recognized by *Mackovska*, are in line with this Court's pronouncement on the coin-tossing metaphor:

"Where . . . the party makes a timely request for relief from a jury trial waiver and neither the other party nor the court would suffer prejudice as a result of that request, the concerns expressed by the court in *Tyler* do not exist. The Supreme Court has made clear that such improper gamesmanship arises when a party loses a case after proceeding with a court trial *without objecting to the absence of a jury* and then complains the case was erroneously tried to the court." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15, citing *Taylor*, *supra*, 16 Cal.3d at pp. 900-901; cf. *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 511 [after denial of jury trial, "[party] may not simply sit by in silence, take his chances on a favorable judgment and then, after an adverse judgment, complain on appeal"].)

In sum, under *Mackovska*, a showing of actual prejudice is not required on appeal – even when a litigant has not pursued writ relief – if that party did not engage in gamesmanship and promptly objected to the absence of a jury or otherwise sought to rectify a waiver before the trial. When "[t]he court has wrongfully denied a party its constitutional right to a jury trial[,] . . . the aggrieved party has the same choice: challenge the constitutional violation . . . by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there is no reason to apply a stricter standard on appeal." (*Mackovska*, *supra*, at

40 Cal.App.5th at p. 16.) Cases requiring an appellant – in the absence of gamesmanship – to show actual prejudice from the erroneous denial of a relief from a jury trial waiver to obtain reversal of the judgment cannot be harmonized with the constitutional right to a jury trial.

F. The *TriCoast* Majority Opinion, in Conflict with *Mackovska*, Muddles the Law and Creates an Improper Dual-Track Standard of Review.

Mackovska endeavored to clarify that appellants and writ petitioners stand on equal ground when challenging the improper denial of relief from a jury trial waiver. Notwithstanding that effort, the *TriCoast* majority opinion is antithetical to *Mackovska*. In *TriCoast*, the majority held that a "party who fails to seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice when challenging such an order after the trial has been concluded." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 245.) By requiring a showing of actual prejudice from the denial of a jury trial, *TriCoast* creates an irreconcilable conflict with *Mackovska*, muddling the law in numerous ways.

First, as explained, California courts have long held that a party can challenge the denial of relief from a jury waiver through either an appeal from the judgment or an extraordinary writ before trial. (See, e.g., *Monster, supra*, 12 Cal.App.5th at

p. 1224; *Van de Kamp*, *supra*, 204 Cal.App.3d at p. 862; *Selby*, *supra*, 91 Cal.App.3d at pp. 522-523.) In *TriCoast*, however, the majority opinion incorrectly identified writ petitions as the exclusive remedy, stating "[a] writ of mandate is *the* proper remedy to secure a jury trial allegedly wrongfully withheld." (*TriCoast, supra*, 74 Cal.App.5th at p. 245, italics added.) *TriCoast*'s flawed description of the law contravenes the well-established authority permitting challenges through appeals.

Indeed, *TriCoast* premised its incorrect holding on *McIntosh, Winston,* and *Gann* (*TriCoast*, *supra*, 74 Cal.App.5th at p. 245), which misunderstood and misapplied this Court's authority. As discussed, *McIntosh, Winston,* and *Gann* are problematic because they improperly focused on the lack of a writ petition rather than on a party's decision to remain silent in the face of a bench trial. (*Taylor, supra*, 16 Cal.3d at p. 900 ["a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury"].) By following *McIntosh, Winston,* and *Gann,* the majority in *TriCoast* undermined the clarity provided by *Mackovska* that a litigant deprived of a jury may challenge the constitutional violation of the right to a jury trial by writ of mandate or appeal and that, absent gamesmanship, no stricter review standard should apply on appeal. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.)

Second, the *TriCoast* majority noted that *Mackovska* had "rejected the *Byram*, *McIntosh*, and *Gann* courts' conclusion that

prejudice must be shown by an appellant who failed to seek writ review of an order denying relief from jury waiver." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 246, fn. omitted.) According to the *TriCoast* majority, *Mackovska* "emphasized the 'inviolate nature' of the constitutional right to a jury trial [citation], but conflated denial of the right to a jury trial 'in the first instance,' absent any prior waiver, with denial of a motion for relief from a jury trial waiver [citation]." (*Ibid.*) *Mackovska*, however, did not involve such conflating. In fact, *Mackovska* squarely addressed the distinction between denying the right to a jury trial in the first instance and denying a motion for relief from a jury trial waiver and explained such a distinction was inconsequential to the question of prejudice for the standard of review.

In that regard, *Mackovska* cited several authorities holding the improper denial of jury trial is per se prejudicial. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15; see, e.g., *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 18 (*Rincon*) ["Denial of the right to a jury trial is reversible error per se, and no showing of prejudice is required of a party who lost at trial" (quoting *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493 (*Valley Crest*))]; see also *Van de Kamp*, *supra*, 204 Cal.App.3d at p. 863 ["Denial of the right to trial by jury is an act in excess of the court's jurisdiction and is reversible error per se"].) *Rincon*, *Valley Crest*, and *Van de Kamp* all addressed a trial court's denial

of a jury trial in the first instance, not a trial court's denial of relief from waiver of a jury trial. "For these reasons," the *TriCoast* majority "disagree[d] with *Mackovska* and agree[d] with the courts in *Byram*, *McIntosh*, and *Gann*," which incorrectly presume the law requires a showing of actual prejudice to reverse a judgment based on the improper denial of review from a jury trial waiver. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 247.)

But *Mackovska* did not rely on *Rincon*, *Valley Crest*, and *Van de Kamp* for their holdings related to the denial of a jury trial right in the first instance. As explained, *Mackovska* expressly "follow[ed] the line of authority created by *Boal*, *Simmons*, and *Bishop*" to conclude an appellant need not show actual prejudice because the erroneous denial of relief from a jury trial waiver is per se prejudicial. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 17; see *Boal*, *supra*, 165 Cal.App.3d at pp. 809-810; *Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; *Bishop*, *supra*, 101 Cal.App.3d at p. 825.) Contrary to the holding of the *TriCoast* majority, *Mackovska* did not conflate denial of a jury trial in the first instance with denial of relief from the waiver of a jury trial.

Besides, *Mackovska* expressly addressed the distinction between denial of a jury trial in the first instance with denial of relief from the waiver of a jury trial and deemed it to be inconsequential to whether prejudice must be shown on appeal: "Concluding that the erroneous denial of the right to a jury trial

. . . is reversible per se comports with both the inviolate nature of the right to a jury trial [citations] and the revocability of jury trial waivers under section 631 [citations].” (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Furthermore, a “construct created . . . to distinguish between the erroneous denial of a jury trial ‘in the first instance,’ before there has been any waiver, and the erroneous denial of a jury trial in the ‘second instance,’ after an unsuccessful motion for relief from a jury trial waiver, undermines these principles.” (*Ibid*.) As a result, “the consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial.” (*Id*. at p. 16.)

Third, by imposing on appellants the impractical, if not impossible, burden of demonstrating actual prejudice caused by the denial of relief from a jury trial waiver, *TriCoast* renders appellate review from a final judgment virtually useless. *Mackovska* observed “how difficult, if not impossible, it is to show prejudice from the denial of the constitutional right to a jury trial” and reasoned that “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.” (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.)

In addition to the difficulty of showing actual prejudice, writ relief is rarely granted. Thus, even if a request for relief from

waiver is meritorious, any appellate court "'would have had the option of denying the writ and waiting to see whether [a writ petitioner] prevailed at trial.'" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16, quoting *Villano v. Waterman Convalescent Hospital, Inc.* (2010) 181 Cal.App.4th 1189, 1205.) For this reason, writ relief provides "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."' [Citation.]" (*Mackovska*, at p. 16.) *Mackovska* therefore concluded the same standard of review must apply to both writs and appeals so as to not "leave discretionary writ relief as the only practical remedy."[4] (*Ibid.*)

Although the *TriCoast* majority recognized proving actual prejudice would be difficult, if not impossible, for an appellant, it disregarded such concerns. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 246.) Instead, it established an unworkable rule that infringes on constitutional jury trial rights. An actual prejudice requirement places the right to a jury trial in civil cases effectively beyond the reach of meaningful appellate review. In contrast, Justice Ashmann-Gerst, in dissent and relying on *Mackovska*, rejected an actual prejudice requirement, giving

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[4] The trial court here acknowledged the practical difficulty of obtaining writ relief, commenting to TriCoast's counsel, "I've been taken up on a writ before and it's always come back a court trial." (2 RT 2.)

credence to the reality that it is "'difficult, if not impossible, . . . to show prejudice from the denial of the constitutional right to a jury trial.' [Citation.]" (*Id.* at p. 253, fn. omitted; cf. *Byram*, *supra*, 74 Cal.App.3d at pp. 652-653 ["Considering the preference in favor of granting a jury trial, it would be inappropriate to set a standard of review which would effectively prevent appellate review of the trial court's refusal to allow a jury trial"].)

Moreover, *TriCoast* entrenches a dual-track system of appellate review for orders denying relief from a jury trial waiver. By demanding a showing of actual prejudice in a judgment appeal, *TriCoast* creates a stricter standard of review for appeals than for writ proceedings, thereby pressing civil litigants into bringing prophylactic writ petitions to avert a dooming standard of review on appeal. *TriCoast*'s rule will needlessly generate more writ petitions by making appeals destined for failure. But, as *Mackovska* observed, writ relief is itself discretionary and rarely granted even under meritorious circumstances. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Relying on writ relief, therefore, allows an order denying relief from a jury trial waiver to evade meaningful appellate review.

In short, this Court's long-held precedents establish that, unless facts demonstrate gamesmanship, an appellant need not show actual prejudice from the erroneous denial of relief from a jury trial waiver to obtain reversal of the judgment. Although several appellate court decisions over the years have gone astray,

Mackovska clarified the law. The *TriCoast* majority, however, upset that clarification. As a result, this Court should protect the inviolate right to a jury trial by confirming the lack of an actual prejudice requirement.

II. A TRIAL COURT SHOULD EXERCISE ITS DISCRETION TO GRANT RELIEF FROM A JURY TRIAL WAIVER ABSENT PREJUDICE TO THE OTHER PARTY OR THE COURT.

A. Based on Constitutional Guarantees, Relief From a Jury Trial Waiver Must Be Granted Absent Prejudice to the Other Party or the Trial Court.

As established, California's courts have long held that doubts in determining whether to grant relief from a jury trial waiver must be resolved in favor of protecting a litigant's right to a jury trial. (*Grafton Partners, supra,* 36 Cal.4th at p. 958 ["because our state Constitution identifies the right to jury trial as 'inviolate' [citation], any ambiguity or doubt concerning the waiver provisions of section 631 must be 'resolved in favor of according to a litigant a jury trial'"]; *Loranger*, *supra*, 215 Cal. at p. 368; *Cowlin*, *supra*, 46 Cal.App.2d at p. 476 ["Whenever a doubt exists as to the propriety of granting relief from such waiver of jury trial such doubt, by reason of the constitutional

guarantee, should be resolved in favor of according a litigant a trial by jury"]; *Byram*, *supra*, 74 Cal.App.3d at p. 652 ["general rule that any doubts should be resolved in favor of allowing a jury trial"]; *March v. Pettis* (1977) 66 Cal.App.3d 473, 480 (*March*) [constitutional guarantee requires resolving doubts in favor of granting relief from jury trial waiver].)

Based on this principle, in ruling on a litigant's request for relief from a jury waiver, courts have consistently focused on the potential prejudice that may result to other parties or the court from the grant of relief. For example, in *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619 (*Tesoro*), the appellate court held that, "[i]n exercising such discretion [whether to grant relief from a jury trial waiver], courts are mindful of the requirement to 'resolve doubts in interpreting the waiver provisions of section 631 in favor of a litigant's right to jury trial.' [Citation.]" (*Id.* at p. 638, quoting *Grafton Partners, supra,* 36 Cal.4th at p. 956.) "Accordingly, '[w]here the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citation.] A trial court abuses its discretion as a matter of law when . . . "relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver." [Citations.] [Citations.]' [Citation.]" (*Ibid.*)

Mackovska is in accord. There, the appellate court confirmed the need to resolve doubts in favor of a litigant's right

to a jury trial is inexorably linked with the requirement of granting relief from a jury trial waiver in the absence of prejudice to the other party or the court. Hence, "[t]he trial court should grant a motion for relief of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citations.] When there is doubt about whether to grant relief from a jury trial waiver, the court must resolve that doubt in favor of the party seeking a jury trial. [Citations.]" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10.) Accordingly, "the crucial question is whether the party opposing relief will suffer any prejudice if the court grants relief" and "[d]enying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (*Ibid*.)

Tesoro and *Mackovska* are aligned with numerous cases holding that the denial of relief from a jury trial waiver is erroneous absent prejudice to the other party or the court. For example, in *Cowlin,* the appellate court affirmed the grant of relief because nothing in the record suggested "that by proceeding with the case as a jury trial the proceedings would have been delayed or that [the other party] would have been injured in any manner." (*Cowlin*, *supra*, 46 Cal.App.2d at p. 476; see also *Byram*, *supra*, 74 Cal.App.3d at p. 652 [refusal to grant relief usually justified "in terms of prejudice to the other party or the orderly conduct of the business before the court"]; *March*, *supra*, 66 Cal.App.3d at p. 480 [in "exercising its discretion, a court is

entitled to consider [factors], including the possibility of delay in rescheduling the trial for a jury, lack of funds, timeliness of request and prejudice to all the litigants"].)

Some reviewing courts have looked for the trial court's exercise of discretion to demonstrate reasonableness. (E.g., *Gann*, *supra*, 231 Cal.App.3d at p. 1704 ["[a] court does not abuse its discretion where any reasonable factors supporting denial of relief can be found"]; see also *Gonzales*, *supra*, 20 Cal.3d at p. 507; *Bishop*, *supra*, 101 Cal.App.3d at p. 824; *March*, *supra*, 66 Cal.App.3d at p. 480.) Nevertheless, the focus, and critical factor, remains potential prejudice to the other party or the court. "Where the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted." (*Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 (*Wharton*).)

Indeed, "given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citation.]" (*Gann*, *supra*, 231 Cal.App.3d at p. 1703; *Boal*, *supra*, 165 Cal.App.3d at p. 809 [same].) In fact, "'[a] trial court abuses its discretion as a matter of law when " . . . relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver." [Citations.]'" (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810; see also *Wharton*, *supra,* 231 Cal.App.3d

at p. 104.) In other words, even when considering the reasonableness of a trial court's exercise of discretion, the touchstone question is whether granting relief might prejudice the other party or the court. (*Boal*, *supra*, 165 Cal.App.3d at p. 809 [relief from waiver should be granted "unless, and except" granting relief would work serious hardship to the objecting party]; *Bishop*, at p. 824 ["critical factor" is prejudice to other parties].)[5]

B. The Conflicting *TriCoast* Majority Opinion Cannot Stand Because It Muddles the Scope of a Trial Court's Discretion on a Request for Relief From a Jury Trial Waiver.

On appeal, TriCoast contended the trial court improperly had denied its request for relief from the jury trial waiver because Fonnegra initially requested a jury trial and would have suffered no prejudice. (2 RT 2.) The *TriCoast* majority dodged this

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[5] One appellate court appeared to permit the denial of relief from a jury trial waiver based, not only on potential prejudice to the opposing party or the court, but also due to a party's pretext to cause delay through continuances and to "trifle with justice." (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1176.) Other appellate courts do not seem to have followed this reasoning, except to the extent that seeking repeated continuances or otherwise "trifling with justice" fits into the analysis of prejudice to the other party or the court.

fundamental inquiry of prejudice, and its opinion is incorrect for several reasons.

First, disregarding the maxim that "the crucial question is whether the party opposing relief will suffer any prejudice" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10), the *TriCoast* majority held that "[p]rejudice to the parties is just one of several factors the court may consider in exercising that discretion." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) The majority also did not consider prejudice to the court, of which none was demonstrated by either the trial court or Fonnegra. *TriCoast* thus evaded the absence of prejudice to Fonnegra or the court.

Second, the *TriCoast* majority's analysis is flawed because it failed to place the burden of demonstrating prejudice from granting relief on Fonnegra. The *TriCoast* majority stated that, "[e]ven in cases where the jury waiver was mistaken or inadvertent, [it] disagree[d] with courts that have suggested the opposing party bears the burden of demonstrating prejudice from the granting of relief from waiver." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) But only the opposing party would have evidence or argument to show that proceeding by way of a jury trial would cause it to suffer prejudice.

Third, according to the majority, TriCoast's delay in seeking relief from waiver until the day of trial supported the denial of relief. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 248-249.) The majority relied on *Gann* as support for the proposition that

courts can consider the timeliness of a request for relief. (*Ibid.*) But *Gann*'s reliance on the timing of the request for relief was linked to its concurrent finding of prejudice, as the opposing parties "alleged prejudice to them in their opposition, i.e., that to grant relief within five days of trial would work a hardship in their trial preparation." (*Gann*, *supra*, 231 Cal.App.3d at pp. 1704-1705.) Contrary to the *TriCoast* majority's conclusion, the timeliness of a request for relief is not considered in a vacuum, but to the extent that it may prejudice the opposing party or the court if the case were to proceed as a jury trial.[6]

In dissent, Justice Ashmann-Gerst debunked the majority's hollow assertion that the timing of TriCoast's request for relief justified its denial. Justice Ashmann-Gerst explained, "[a]s the appellate record confirms, the trial court was prepared to start a jury trial that morning. In fact, the trial court's minute order identifies the 'NATURE OF PROCEEDINGS' as a 'JURY TRIAL.' And, the first step the trial court took was to call the matter for a jury trial. Thus, the more likely inference is that up until the moment Fonnegra waived a jury trial, which occurred after the matter was called, even the trial court was prepared for a jury

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

trial." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 254.) Justice Ashmann-Gerst, therefore, concluded, Fonnegra "has not presented any evidence or argument of prejudice." (*Ibid*.)

The facts in *TriCoast* demonstrated that neither the trial court nor Fonnegra would have been prejudiced by the granting of relief from the jury trial waiver. Yet, the majority failed to consider this crucial question in concluding the trial court had not abused its discretion. *TriCoast*, as a result, muddies the settled waters, as explained in *Mackovska*, that prejudice is the crux of the determination whether to grant relief from a jury trial waiver. Accordingly, because *TriCoast* upends the legal landscape on the critical question of prejudice to the opposing party or the court in the determination whether to grant relief from a jury trial waiver, the decision cannot stand. In accord with this Court's authority, and a long line of appellate court decisions, prejudice to the other party or the court must be demonstrated for the trial court to exercise its discretion to deny relief from a jury trial waiver.[7]

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[7] Logically, a reviewing court in a judgment appeal would reach an issue of actual prejudice only after determining the trial court had abused its discretion by denying relief from a jury trial waiver. The *TriCoast* majority reversed this analytical sequence, determining TriCoast was required to show actual prejudice before evaluating the question of abuse of discretion. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 245-250.) In this brief, we addressed the issues in the same order as the *TriCoast* majority, but, in any case, the *TriCoast* majority was wrong on both accounts.

CONCLUSION

"A jury trial is an important constitutional right that should be '"zealously guarded by the courts."' [Citation.]" (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 283.) In that regard, and for the reasons set forth above, this Court should reverse the *TriCoast* majority's opinion that (1) actual prejudice must be demonstrated on appeal to obtain reversal of a judgment when challenging the denial of relief from a jury trial waiver; and (2) prejudice to the opposing party is merely one factor that courts may consider in deciding whether to grant relief from a jury trial waiver. This Court should direct the Court of Appeal to reverse the judgment and remand the matter to the trial court for a jury trial.

DATED: June 13, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that the total word count of this Opening Brief on the Merits, excluding covers, table of contents, table of authorities, and certificate of compliance, is 11,101.

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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 June 13, 2022, at Woodland Hills, California.

/s/ Tina Lara
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