S273368

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
for the 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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

INTRODUCTION

In its opening brief on the merits, plaintiff and appellant TriCoast Builders, Inc. (TriCoast) demonstrated that the majority opinion from the Court of Appeal in this case disrupts settled law. It does so on both the standard of review for an appeal challenging the denial of relief from the waiver of a jury trial under Code of Civil Procedure section 631, subdivision (g),[1] and the scope of the trial court's discretion in evaluating the propriety of relief. (*TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*). First, the majority concluded, contrary to this Court's authority, that even a party who objects to the absence of a jury before trial must show actual prejudice on appeal to obtain a reversal of the judgment based on the improper denial of relief from a jury trial waiver. Second, the majority disregarded well-established law in determining a trial court can deny a party relief from its jury trial waiver without a showing of prejudice to the opposing party or the court. These holdings jeopardize the constitutional right to a jury trial.

In response, defendant and respondent Nathaniel Fonnegra unsuccessfully attempts to defend the *TriCoast* majority opinion. Fonnegra maintains an actual prejudice requirement is justified, but fails to account for this Court's precedents or set forth a

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

coherent view of the law that comports with the purpose and language of section 631, which governs jury trial waivers. Fonnegra also misunderstands the nature of a writ petition by contending that writ relief, notwithstanding its extraordinary nature, is a sufficient safeguard for the constitutional right to a jury. With regard to the trial court's discretion in evaluating a request for relief from a jury trial waiver, Fonnegra disregards decades of case law requiring prejudice to the opposing party or the court to support the denial of relief. As a result, Fonnegra's arguments in defense of the *TriCoast* majority opinion risk a serious erosion of the constitutional right to a jury trial and should be rejected.

In short, the *TriCoast* majority opinion is out of step with long-held views of this Court and the Legislature's direction in section 631 that protect the constitutional right to a jury trial. This Court, therefore, should reverse the opinion.

LEGAL ARGUMENT

I. ACTUAL PREJUDICE IS NOT A REQUIREMENT FOR REVERSAL OF A JUDGMENT FOLLOWING THE IMPROPER DENIAL OF RELIEF FROM A JURY TRIAL WAIVER.

A. In a Judgment Appeal, Reversal Based on the Improper Denial of a Jury Trial Generally Does Not Require a Showing of Actual Prejudice.

This Court long ago held the improper denial of a jury trial results in a "'miscarriage of justice . . . requir[ing] a reversal of the judgment.' [Citation.]" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300 (*Chevrolet Coupe*).) Over the years, appellate courts have applied this Court's pronouncement in cases involving a jury trial waiver.

In line with this Court's authority, a judgment following the improper denial of relief from a jury trial waiver is per se reversible. (E.g., *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 810 (*Boal*) ["improper denial of jury trial is per se prejudicial" after refusal to grant relief from waiver]; *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 825 (*Bishop*) ["denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial"]; *Heim v. Houston* (1976) 60 Cal.App.3d 770, 774 (*Heim*) [improper denial of jury trial

following waiver based on failure to post fees constitutes "miscarriage of justice"]; see *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 476-477 (*Cowlin*) [when, after jury trial waiver, "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"].) The appellate court in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, 13 (*Mackovska*) confirmed this rule of per se reversal, stating "appellants need not show actual prejudice resulting from a trial by the court rather than a jury" to obtain a reversal of the judgment after the improper denial of relief from a jury trial waiver.

B. Contrary to the *TriCoast* Majority Opinion, Actual Prejudice Becomes Relevant Only in Cases Involving Gamesmanship.

Notwithstanding the rule of per se reversal, this Court has adhered to a narrow constraint on a party's ability to challenge the denial of a jury trial in a judgment appeal. That constraint requires a party challenging the denial of a jury on appeal to show actual prejudice from the absence of a jury only if it failed to request a jury in the trial court and, without objection, proceeded 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 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 . . . ." Similarly, in *Taylor v. Union Pac. R. Corp.* (1976) 16 Cal.3d 893, 900 (*Taylor*), this Court held "'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.]" (Italics added.) This Court denounced the tactic of "proceed[ing] to try the case before a judge *without objecting* to the absence of the jury" as akin to "'play[ing] "Heads I win, Tails you lose" with the trial court.' [Citation.]" (*Ibid.*, italics added.) Instead, a party must timely object or request relief from the waiver of a jury before trial, thereby preserving the record for appeal. (See *ibid.*; see also *Smith v. Brannan* (1859) 13 Cal. 107, 115 (*Smith*) ["party [cannot] try his case before a Judge without objection, and after he has lost it complain that the case was not tried by a jury"].)

This Court applied the same principle in *Gonzales v. Nork* (1978) 20 Cal.3d 500, 508-509 (*Gonzales*), a case involving the denial of relief from a jury trial waiver. There, this Court held the appellant needed to demonstrate actual prejudice because he requested relief from his jury trial waiver *after* trial began and *after* "[c]ounsel had argued the special defenses issues to the judge, and had observed his reactions to the argument." (*Id.* at pp. 508-510.) According to this Court, a party's failure to object

before trial creates a requirement for that party to demonstrate actual prejudice on appeal to obtain reversal of the judgment. (*Id.* at pp. 509-510.)

Such objection, however, need not involve pursuing writ relief before trial. In *Mackovska*, *supra*, 40 Cal.App.5th 1, the Court of Appeal relied on this Court's decision in *Taylor* for the proposition that "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." (*Id.* at p. 15, italics added.) But, when a "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 [about improper gamesmanship] . . . do not exist." (*Ibid.*) Accordingly, "the aggrieved party has the same choice: challenge the constitutional violation (however it occurred) by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there is no reason to apply a stricter standard on appeal." (*Id.* at p. 16.) Thus, "[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.)

Notwithstanding this Court's authority and *Mackovska*, as well as older appellate court decisions, the *TriCoast* majority ruled to the contrary. It held that a party's decision to forego a

writ petition before trial and raise the denial of relief from a jury trial waiver as an issue on appeal from the judgment creates a requirement to demonstrate actual prejudice, *even if that party preserved the record* by objecting and requesting relief from the waiver before trial. According to the *TriCoast* majority, "[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.) Although it invoked the coin-tossing metaphor (*ibid.*), the *TriCoast* majority ignored this Court's explanation that such undue gamesmanship occurs only when a party "proceed[s] to try the case before a judge *without objecting* to the absence of the jury" (*Taylor*, *supra*, 16 Cal.3d at p. 900, italics added). Thus, the *TriCoast* majority failed to follow the law.

C. Fonnegra's Arguments in Defense of the *TriCoast* Majority Opinion Are Flawed.

1. Fonnegra does not mention, let alone account for, this Court's precedents.

Echoing the *TriCoast* majority opinion, Fonnegra argues that "a party who declines to seek writ review of an order denying relief from jury waiver, and instead waits until after trial to appeal, must demonstrate actual prejudice from such an order."

(ABOM 13.) But Fonnegra fails to cite – let alone analyze – this Court's precedents, which do not establish an actual prejudice requirement in the absence of gamesmanship.

Contrary to Fonnegra's position, this Court has held only that a party cannot sit on its objection and challenge the absence of a jury for the first time on appeal after trying the case without success. (*Taylor*, *supra*, 16 Cal.3d at p. 900; *Frazure*, *supra*, 21 Cal.2d at pp. 860-861.) Indeed, this Court has invoked an actual prejudice requirement only when a party fails to timely object to a bench trial or seek relief from a jury waiver before trial. (*Gonzales, supra*, 20 Cal.3d at p. 509.) Only failure to apprise the trial court of the desire for a jury constitutes "'play[ing] "Heads I win, Tails you lose" with the trial court. [Citation.]' [Citations.]" (*Taylor*, at p. 900.) Fonnegra's failure to account for this Court's authority defeats his defense of the *TriCoast* majority's imposition of an actual prejudice requirement.

2. Fonnegra unsuccessfully attempts to distinguish denial of relief from waiver from denial of a jury in the first instance.

As explained (OBOM 30, 40), *Mackovska* "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 v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 838-839 (*Simmons*); *Bishop, supra,* 101 Cal.App.3d at p. 825.) Fonnegra argues in response that *Mackovska* "was premised on the mistaken notion that the denial of a motion for relief from intentional jury waiver, in the trial court's discretion, is effectively no different from the denial of a jury trial in the first instance." (ABOM 6; see also ABOM 12, 16.)

Fonnegra's criticism of *Mackovska* is flawed. *Mackovska* did not "conclu[de] [with respect to denial of a jury trial in the first instance and denial of relief from the waiver of a jury trial] that the two are indistinguishable." (ABOM 21.) *Mackovska* also did not equate the two circumstances for all purposes. Instead, *Mackovska* acknowledged the reality that the ultimate deprivation of the same substantive right – a jury trial – occurs whether the right is wrongly denied in the first instance or based on the improper denial of relief from waiver. "[T]he consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial. And in either situation, the aggrieved party has the same choice: challenge the constitutional violation (however it occurred) by writ of mandate or by appeal. Where the aggrieved party has not attempted to game the system by failing to object to a trial by the court, there

is no reason to apply a stricter standard on appeal." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.)

3. Fonnegra unsuccessfully attempts to distinguish inadvertent waivers.

Fonnegra further argues that a party who intentionally waives its right to a jury should be "held to a higher standard than one who inadvertently waives a jury . . . ." (ABOM 24.) Fonnegra's attempt to apply a more lenient rule for inadvertent waivers is at odds with the law.

For example, in *Bishop*, the appellants expressly waived the right to a jury while the respondent expressly requested a jury trial.[2] (*Bishop*, *supra*, 101 Cal.App.3d at p. 823.) Like Fonnegra, the respondent changed his mind, waiving a jury on the day of trial. (*Ibid*.) Like TriCoast, the appellants "immediately requested that the court exercise its discretion and afford them a jury trial," but the trial court declined and ultimately found for the respondent. (*Ibid*.) The appellate court held the denial of relief from the jury trial waiver was an abuse of discretion because "the timeliness of [appellants'] request to withdraw [the] waiver was immediate, prior to the

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[2] The *TriCoast* majority incorrectly stated that *Bishop* "involved inadvertent waiver of a jury trial, not an intentional decision to waive a jury." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 246, fn. 4.)

commencement of trial." (*Id.* at p. 824.) Moreover, under *Bishop*, no showing of actual prejudice was required 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.) The appellate court in *Simmons* reached the same result on similar facts. (*Simmons*, *supra*, 123 Cal.App.3d at pp. 836, 838-839.) There, according to the appellate court, the denial of jury trial was prejudicial even after "appellant expressly waived her right to a jury not once, but twice." (*Ibid.*)

Contrary to Fonnegra's contention, therefore, section 631, subdivision (g), provides for relief from even a deliberate waiver of a jury trial, and the improper denial of relief – if requested before trial – must be reversed on appeal without a showing of actual prejudice. In fact, Fonnegra's manufactured distinction between intentional and unintentional waivers conflicts with the statutory purpose to "grant the parties the right to waive a jury *and not to impose conditions constituting an irrevocable . . . .*" (*Duran v. Pickwick Stages System* (1934) 140 Cal.App. 103, 109, italics added; see also *Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) In addition, under section 631's plain language, waiver of a jury can occur only in one of six enumerated ways. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956 (*Grafton Partners*) ["waiver of the right to jury trial in a civil cause is permitted only as prescribed by statute"].) Four of the six ways are omissions – which can be either inadvertent or intentional – including the

failure to appear at trial, announce a jury is required, post a jury deposit, or post daily jury fees. (§ 631 subd. (f)(1), (4), (5) & (6).) The other two ways are written and oral consent, which by definition must be intentional. (*Id.* at subd. (f)(2) & (3).) The statute thus does not distinguish between inadvertent and intentional waivers to support Fonnegra's argument.

4. Fonnegra, like the *TriCoast* majority, misapplies *Byram.*

Fonnegra also misconstrues *Byram v. Superior Court* (1977) 74 Cal.App.3d 648 (*Byram*), repeating the same mistake of the *TriCoast* majority. Fonnegra cites *Byram*'s statement that, when a party "'play[s] "Heads I win, Tails you lose" with the trial court,'" "[i]t is then reasonable to require a showing of actual prejudice on the record . . . ." (*Id.* at p. 653.) Fonnegra claims that requiring a showing of actual prejudice "is a 'reasonable' response to the very real and damaging consequences wrought by appellant's decision to wait to see how the court trial goes before deciding whether to appeal . . . . " (ABOM 13.)

Although *Byram* referred to the coin-tossing metaphor, it concluded 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.) In other words, *Byram*'s rationale supports the principle that no actual prejudice requirement exists when a party acts promptly before trial to secure a jury. (*Ibid.*; see also *Mackovska*, *supra*, 40 Cal.App.5th at p. 16 ["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"]; *Heim*, *supra*, 60 Cal.App.3d at p. 774 ["Plaintiff's participation in the trial after her request for a jury had been denied does not preclude her from asserting error in the ruling on appeal"].)

Notably, also, *Byram* was a writ proceeding, not an appeal. Thus, the appellate court did not consider whether a party in an appeal from the judgment which, like TriCoast, objects to the absence of a jury before trial should be held to a higher review standard than a writ petitioner. Consequently, although *Byram* refers to the coin-tossing metaphor, it cannot support an actual prejudice requirement in a judgment appeal absent facts demonstrating gamesmanship.

5. Fonnegra relies on cases that fail to recognize a proper record can be made without the filing of a writ petition.

Fonnegra also relies on two cases in which the appellate courts wrongly attached significance to a party's decision not to

seek writ relief. (See ABOM 14, citing *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363 (*McIntosh*) and *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*).) Fonnegra contends these cases support an actual prejudice requirement as a matter of course in a judgment appeal.

Fonnegra, however, misses that *McIntosh* and *Gann* deviated from this Court's authority and tied the notion of gamesmanship to the procedural vehicle used to seek review rather than to the time and place of the party's objection to the jury's absence. (*Taylor*, *supra*, 16 Cal.3d at p. 900; *Frazure*, *supra*, 21 Cal.2d at pp. 860-861.) Given this Court's authority, and TriCoast's request for a jury immediately before trial (2 RT 1-2), Fonnegra's reliance on *McIntosh* and *Gann* cannot support an actual prejudice requirement.

Moreover, *McIntosh* and *Gann* conflict with the well-established authority that a party may challenge the improper denial of relief from a jury trial waiver by way of a writ proceeding or an appeal from the judgment following trial. (E.g., *Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1224; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 862; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522-523.) *McIntosh* and *Gann* also fail to account for the "courts [that] have recognized how difficult, if not impossible, it is to show prejudice from the denial of the constitutional right to a jury trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) As a

result, *McIntosh* and *Gann* do not support Fonnegra's claim for a blanket actual prejudice requirement in a judgment appeal.

6. Fonnegra improperly applies the presumption of a fair trial to a court trial conducted after the denial of a jury.

As TriCoast explained (OBOM 31), *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.) This Court stated in *Doll v. Anderson* (1865) 27 Cal. 248, 251 (*Doll*) that "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." *Mackovska* explained that certain courts have wrongly applied this presumption in reverse, holding that prejudice from a court trial cannot be presumed. (*Mackovska*, at p. 14; see, e.g., *Harmon v. Hopkins* (1931) 116 Cal.App. 184, 188 (*Harmon*) ["[p]rejudice will not be presumed as a consequence of the issues . . . being tried by the court instead of the jury"].)

Fonnegra defends this inverted application, claiming courts like *Harmon* have found "such an assumption [is] appropriate." (ABOM 18-19.) Fonnegra's defense of *Harmon* is unsuccessful, as he contends *Harmon* cited *Doll* for a proposition that is not in *Doll*. (*Ibid*.) *Mackovska*, therefore, correctly recognized the

genesis of the improper presumption of a fair court trial was 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.) Fonnegra, by inverting the presumption of a fair trial, misses that the denial of a jury in and of itself is a "miscarriage of justice." (*Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300.)

7. Fonnegra improperly relies on writ relief as a surefire means to correct the improper denial of relief from a jury trial waiver.

Fonnegra claims TriCoast sought an "unfair tactical advantage" by "declining to seek writ relief" and instead "wait[ing] to see how the court trial goes . . . ." (ABOM 13; see also ABOM 20.) TriCoast's actions, however, do not indicate an attempt to seek a tactical advantage. To the contrary, in the two years leading up to trial, the trial court encouraged Fonnegra to waive the jury, but he was unwilling to do so. (CT 161.) TriCoast thus prepared for a jury trial, tailoring its opening statements, exhibits, and witnesses for a jury trial. (*Ibid*.) As the matter was called for the jury trial, TriCoast's counsel "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*.) When Fonnegra's counsel suddenly

announced that Fonnegra had decided "over the weekend" to waive a jury trial, TriCoast immediately sought relief from its jury trial waiver and offered to post fees.[3] (2 RT 1-2; CT 161.)

TriCoast, therefore, did not "wait and see" the outcome of the trial (ABOM 15), but rather objected and sought relief from waiver immediately upon learning Fonnegra was changing his mind to request a court trial. (2 RT 1-2.) TriCoast did not "simply sit by in silence, take [its] chances on a favorable judgment and then, after an adverse judgment, complain on appeal." (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 511 [record can be preserved for appeal by objecting to jury's absence, filing motion, or pursuing writ relief].) Rather, it took the same position – requesting a jury – both before and after trial.

Fonnegra's position, in effect, is that only a calculated decision to "wait and see" the outcome of the trial can explain the absence of a writ petition. (ABOM 15.) This position, which essentially *requires* TriCoast – or any similarly situated party –

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[3] Fonnegra attempts to downplay the disadvantage to TriCoast by arguing "TriCoast's only real complaint was that it was required to spend resources preparing for a jury trial that it never wanted." (ABOM 26, fn. 3.) That is not so. TriCoast was strategically disadvantaged in its trial preparation because it "tailored its opening statement, exhibits, witnesses, and presentation for a jury" based on Fonnegra's jury trial demand, which remained in place until the morning of the scheduled jury trial. (CT 161.)

to pursue writ relief, rather than appealing from the judgment, is wrong.

First, Fonnegra assumes, without explanation, that it would be feasible and practicable for a party to prepare and file a meaningful writ petition on the morning of trial. He attempts to distinguish this case from *Mackovska* by pointing out that the appellant in *Mackovska* sought relief from waiver two months before trial, while TriCoast moved for relief on the morning of trial. (ABOM 20.) According to Fonnegra, any presumption that TriCoast was "acting diligently and not 'playing games' no longer holds true." (*Ibid.*)

Fonnegra's argument, however, ignores that TriCoast's request for relief on the morning of trial was due to Fonnegra's own waiver of the jury that morning. And, as the *Mackovska* court aptly pointed out, "there [is] no time to file a petition for writ of mandate" on the morning of trial. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) In contrast to Fonnegra's decision to waive a jury, which he made "over the weekend" (2 RT 1), TriCoast's objection to the jury's absence, oral motion for relief (2 RT 2), and later appeal from the judgment did not comprise a tactical plan, but rather served as the only viable course of action in the face of changing circumstances.[4]

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[4] Raising the improper denial of a jury trial in an appeal from the judgment is an established course, as demonstrated by this Court's relatively recent decision discussing whether the

Second, Fonnegra misunderstands the nature of writ relief and assumes that writ petitions are a guaranteed procedural mechanism to correct trial court error. (ABOM 13-15.) But "[e]rror by the trial judge does not of itself insure that a writ petition will be granted." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269 (*Omaha Indemnity*).) "Courts of Appeal are normally reluctant to grant petitions for extraordinary relief. [Citation.]" (*City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803; see also *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657 ["courts generally deny writ relief"].) Indeed, the overwhelming majority of writ petitions are unsuccessful. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241, fn. 3 [as of February 2010, "approximately 94 percent of the petitions seeking writ relief in the Courts of Appeal are denied summarily"]; *Omaha Indemnity*, at p. 1271 ["Approximately 90 percent of petitions seeking extraordinary relief are denied"].)

Mackovska, therefore, recognized that writ relief is "hardly adequate protection for a constitutional right that is such a "'basic and fundamental part of our system of jurisprudence [it]

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denial of a jury trial is even reviewable by writ, or solely on appeal from the judgment. (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 990-993.)

should be zealously guarded.'" [Citations.]"[5] (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Thus, the same standard of review must apply to both writs and appeals so as to not "leave discretionary mandate review as the only practical remedy." (*Ibid*.) Otherwise, requiring actual prejudice – even when a party has objected to the jury's absence before trial – punishes litigants for not pursuing a writ, which is intended solely for extraordinary relief. (*Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 766, fn. 4 ["[u]nlike appeals, which are heard as a matter of right, writ review is deemed extraordinary and is discretionary and rarely granted"].)

Third, Fonnegra's concern with the "costs in time, money and energy on the courts" after reversal of a judgment and remand for a new trial (ABOM 13) is inflated. That is because Fonnegra disregards the strain on resources that will befall the appellate courts if writ petitions are the only avenue to remedy the wrongful denial of relief from a jury trial waiver. The *TriCoast* majority's actual prejudice requirement sets a stricter standard of review for appeals than for writ proceedings and entrenches a dual-track system of review of orders denying relief from a jury trial waiver. (OBOM 43.) Consequently, civil litigants

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[5] Even the trial court 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.)

will be pressed into bringing prophylactic writ petitions to avoid a standard of review that will make it virtually impossible to prevail on appeal. (See *Byram, supra,* 74 Cal.App.3d at pp. 652-653 ["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"].) As a result, the actual prejudice requirement imposed by *TriCoast* will needlessly generate more writ petitions by making judgment appeals destined for failure.

As such, the possibility of writ review cannot serve as the sole basis for effective relief from the improper denial of a jury trial waiver. No punishment in the form of an actual prejudice requirement should attach to a party who objects to the absence of a jury before trial but does not seek writ relief.

II. PREJUDICE TO THE OPPOSING PARTY OR THE COURT IS THE TOUCHSTONE INQUIRY FOR DETERMINING WHETHER TO GRANT RELIEF FROM A JURY TRIAL WAIVER.

A. Fonnegra Cannot Defend the *TriCoast* Majority's Conclusion That Prejudice to the Opposing Party or the Court Is Merely a Factor for Consideration.

Based on the constitutional right to a jury trial, California's courts resolve doubts in favor of affording a party a jury trial and granting relief from waiver. (OBOM 44-45.) As this Court has held, "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.' [Citations.]" (*Grafton Partners*, *supra*, 36 Cal.4th at p. 958.)

Accordingly, "[i]n a motion for relief from waiver of a jury trial, the crucial question is whether the party opposing relief will suffer any prejudice if the court grants relief." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10; *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*) ["'[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"];

Wharton v. Superior Court (1991) 231 Cal.App.3d 100, 104 [same].) Thus, "denying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (*Mackovska*, at p. 10.) Indeed, well over a century ago, this Court held, "as a general rule, a party should be relieved from a stipulation waiving a jury, where the same can be done without injury to the other side, and without disarranging the orderly conduct of the business of the court." (*Ferrea v. Chabot* (1898) 121 Cal. 233, 235, rehg. den. Jul. 21, 1898.)

The *TriCoast* majority did not apply this settled law. Instead, it erroneously concluded that "[p]rejudice to the parties is just one of several factors" the trial court may consider in exercising its discretion on a motion for relief from a jury trial waiver. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) By so ruling, it disregarded the "well-established" principle that "in cases involving failure to make a request or post fees . . . there must be prejudice to the party opposing jury trial" to support the denial of relief from a jury trial waiver. (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810 (*Johnson-Stovall*).)

Fonnegra unsuccessfully tries to defend the *TriCoast* majority's erroneous conclusion. First, he relies on *Gann*, *supra*, 231 Cal.App.3d at page 1704, as did the majority in *TriCoast*. (ABOM 10-11, 26; see *TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) *Gann*, however, does not support relegating prejudice to the opposing party or the court to a mere factor in the trial court's

analysis. Although *Gann* stated that "[a] court does not abuse its discretion where any reasonable factors supporting denial of relief can be found . . . ," it also emphasized that, "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*, at pp. 1703-1704, italics added.) The *TriCoast* majority, therefore, took language from *Gann* out of context. Fonnegra makes the same mistake before this Court.

In addition, Fonnegra, again following the *TriCoast* majority, overlooks the nature of the factors identified in *Gann*. There, the appellate court explained that, "in exercising its discretion, the trial court may consider delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." (*Gann*, *supra*, 231 Cal.App.3d at p. 1704.) Each of those factors, however, bears directly on potential prejudice to the opposing party or the court. Accordingly, a trial court may consider "reasonable factors" to the extent they advance the prejudice determination. (*Ibid.*) In other words, the factors identified in *Gann* were not considered in isolation from the hallmark inquiry of prejudice. *Gann* thus comports with settled law that "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 [or the court].' [Citation.]" (*Id.* at p. 1703.)

Fonnegra also relies on *March v. Pettis* (1977) 66 Cal.App.3d 473 (*March*) to suggest that, when a party seeks relief from an intentional waiver, prejudice to the opposing party or the court is not required for the denial of relief. (See ABOM 28.) Fonnegra is incorrect. "[I]t is well established in cases involving failure to make a request or post fees that there must be prejudice to the party opposing jury trial" to support the denial of relief from a jury trial waiver. (*Johnson-Stovall*, *supra*, 17 Cal.App.4th at p. 810.)

Moreover, in *March*, the appellate court concluded that "relief [from an affirmative jury trial waiver] will be denied where the only reason for the demand appears to be the party's change of mind or where a demand for a jury is being used as a 'pretext to obtain continuances and thus trifle with justice.' [Citations.]" (*March*, *supra*, 66 Cal.App.3d at pp. 477, 480.) Although *March* did not speak in terms of prejudice, its reasoning shows the appellate court denied relief based on trial tactics that would prejudice the opposing party or the court. Indeed, *March* found no abuse of discretion in the denial of relief *because* of "disadvantage to the[] defendants." (*Id.* at p. 480.) *March,* therefore, without being explicit, looked for prejudice to the opposing party and, therefore, cannot support Fonnegra's contention, and the *TriCoast* majority's conclusion, that prejudice

to the opposing party or the court is merely one factor in the trial court's exercise of discretion.

Fonnegra also overlooks *Bishop*, the facts of which closely mirror those in this case:

> Here, respondent failed to articulate any basis to support a finding of prejudice. To the contrary, he candidly admitted that his client's rights would not be prejudiced. Further, no reasonable justification for denial of the jury trial request appears from the record. *The trial by jury had been scheduled for the day that respondent made known his waiver of trial by jury, so there was no possibility of delay from rescheduling.* Appellants offered to tender payment for jury fees, thereby eliminating any problem concerning lack of funds. The timeliness of appellants' request to withdraw his waiver was immediate, prior to the commencement of trial.

(*Bishop*, *supra*, 101 Cal.App.3d at p. 824, italics added.) On these facts, the *Bishop* court concluded "[n]o prejudice to the other party, the court, or its calendar was argued or found. . . . The denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial. [Citation.]" (*Id.* at pp. 824-825.) Similarly, TriCoast should have been afforded relief from its jury trial waiver, as no showing was made of prejudice to Fonnegra or the court from the granting of relief.

In sum, prejudice to the opposing party or the court is the crucial focus in the exercise of discretion whether to grant relief from a jury trial waiver. Courts have discretion to consider a breadth of factors, but not in isolation from the hallmark

prejudice determination. The *TriCoast* majority thus erred by divorcing its analysis from the question of prejudice, and Fonnegra's arguments do not undermine the showing of error.

B. The Burden to Demonstrate Prejudice From the Grant of Relief Must Fall on the Opposing Party.

"[A] party opposing a motion for relief from a jury trial waiver must make a showing of prejudice." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 4; see also *Tesoro*, *supra*, 200 Cal.App.4th at pp. 638-639 ["neither below nor on appeal have [opposing parties] demonstrated any prejudice"]; *Boal*, *supra*, 165 Cal.App.3d. at p. 810 [relief proper when opposing party's "claim of prejudice borders on being frivolous"].) The *TriCoast* majority, however, "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.) The *TriCoast* majority was wrong. (OBOM 49.)

Initially, no presumption exists that, merely because Fonnegra changed his mind and desired a bench trial on the morning of the scheduled jury trial, he would have suffered prejudice by trying the case to a jury. As explained, "[t]he mere fact that trial will be by jury is not prejudice per se." (*Johnson-Stovall, supra,* 17 Cal.App.4th at p. 811.) Rather, ""[t]he prejudice which must be shown from granting relief from the

waiver is prejudice from the granting of relief and not prejudice from the jury trial.'" [Citation.]" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10.) TriCoast, or any party seeking relief from a jury trial waiver, could not reasonably make this showing. Only the opposing party could show that a grant of relief to proceeding with a jury trial would cause it prejudice. Accordingly, Justice Ashmann-Gerst, in her *TriCoast* dissent, pointed out that Fonnegra "has not presented any evidence or argument of prejudice." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 254 (dis. opn. of Ashmann-Gerst, J.).)

Fonnegra cries that this "shifting of burdens is unwarranted and unfair" when a motion for relief is made orally without prior notice on the morning of trial. (ABOM 25.) Fonnegra, however, ignores that TriCoast made its motion orally on the morning of trial because Fonnegra announced just then that he had decided "over the weekend" to waive a jury. (2 RT 1-2.)

Moreover, Fonnegra's characterization of himself as the "unaware, nonmoving party" (ABOM 29) is not in line with the facts. The parties and trial court had long prepared for a jury trial until Fonnegra's waiver on the morning of trial. Justice Ashmann-Gerst explained in dissent:

> As 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 trial.

(*TriCoast*, *supra*, 74 Cal.App.5th at p. 254 (dis. opn. of Ashmann-Gerst, J.).) When the matter was called, TriCoast's counsel "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." (CT 161.) Contrary to Fonnegra's recantation, the need to request relief was thrust onto TriCoast by Fonnegra with no time to prepare a noticed motion – let alone a writ petition. Only Fonnegra could have produced evidence or argument of prejudice to him from proceeding with the scheduled jury trial. He presented none. And, as Justice Ashmann-Gerst explained, even the trial court was prepared for a jury trial, precluding the possibility of prejudice to the court. (*TriCoast*, at p. 254 (dis. opn. of Ashmann-Gerst, J.).)

At bottom, the *TriCoast* majority's decision to place the burden of demonstrating prejudice on the party seeking relief from a jury trial waiver conflicts with the law and the record facts.

CONCLUSION

For the reasons set forth in the opening brief on the merits and above, this Court should reverse the *TriCoast* majority opinion. Its rulings, as to both an actual prejudice requirement and the trial court's exercise of discretion with respect to relief from a jury trial waiver, are erroneous. This Court thus should direct the Court of Appeal to reverse the judgment and remand the matter to the trial court for a jury trial.

DATED: September 1, 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 Reply Brief on the Merits, excluding covers, table of contents, table of authorities, and certificate of compliance, is 6,730.

DATED: September 1, 2022

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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.

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/s/ Tina Lara
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