S273368

IN THE SUPREME COURT OF CALIFORNIA

TRICOAST BUILDERS, INC.,
Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B303300

APPLICATION OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT NATHANIEL FONNEGRA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT NATHANIEL FONNEGRA

Pursuant to California Rules of Court, rule 8.520(f)(1), the Association of Southern California Defense Counsel (ASCDC) requests permission to file the attached amicus curiae brief in support of defendant and respondent Nathaniel Fonnegra.[1]

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It is comprised of over 1,100 leading attorneys in California. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae in cases involving issues of vital significance to its members. ASCDC has appeared as amicus curiae in numerous cases before this Court addressing important procedural issues involved in civil cases. (See, e.g., *Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, 850 [application of minority tolling for statute of limitation purposes under Code of Civil Procedure section 12]; *Conservatorship of O.B.* (2020)

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3)(A).) No person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See *id.*, rule 8.200(c)(3)(B).)

9 Cal.5th 989, 994–995 [application of clear and convincing standard on appeal]; *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 537–538 [summary judgment statute].)

ASCDC's members recognize the need for clearly established rules governing the statutory waiver of jury trials in civil actions. Through this proposed amicus brief, ASCDC provides additional reasons to reaffirm the rule set forth in the Court of Appeal's decision in *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*). This amicus brief provides a closer look at the statutory language and legislative history of Code of Civil Procedure section 631 (section 631). It also addresses the long-standing split of authority as to whether a trial court's discretionary decision to deny relief from a statutory waiver of a jury trial constitutes a structural error requiring automatic reversal. ASCDC provides supplemental arguments supporting respondent Fonnegra and the Court of Appeal, while rebutting the arguments against them advanced by TriCoast.

Accordingly, ASCDC requests that this Court accept and file the attached amicus curiae brief.

September 29, 2022

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AMICUS CURIAE BRIEF

INTRODUCTION

This case presents an issue of statutory interpretation: whether prejudice to the nonmoving party or the court is required before a trial court can deny discretionary relief from a jury waiver under Code of Civil Procedure section 631. Nothing in the plain language of the statute *requires* a showing of prejudice and the legislative history demonstrates the Legislature's express intent to amend the statute to make it more difficult, not easier, to obtain discretionary relief under section 631.

This case also presents a secondary issue of appellate procedure: when an appellate court concludes that there *is* an abuse of discretion from the denial of a request for relief from a jury waiver under section 631, is that a structural error requiring a new trial or is it subject to the traditional and presumed rule that an appellant must also demonstrate prejudice.

Unfortunately for this Court, the two issues have been addressed in the wrong order. TriCoast first asks this Court to consider whether it must demonstrate actual prejudice on appeal following a bench trial before the appellate court considers the predicate issue of whether the trial court abused its discretion by denying TriCoast discretionary relief under section 631. This puts the cart before the horse.

Ordinarily, appellate courts determine whether there is error before addressing whether that error requires reversal. Here, before the Court can reach the question of whether upholding a statutory waiver amounts to structural error

requiring per se reversal, the Court should first determine if there was error at all. The first step is to evaluate whether the trial court abused in discretion in denying TriCoast's request for relief from its jury trial waiver under subdivision (g) of section 631. Contrary to TriCoast's dire language, the trial court acted well within its discretion in denying TriCoast relief under that statute. Indeed, TriCoast did not even seek review on the question of whether the trial court abused its discretion under section 631—as opposed to the distinct issue of whether the trial court applied the wrong legal standard, i.e., whether there must be prejudice to the nonmoving party to justify a denial of a request for relief from waiver. Without a showing of error, there is no need for this Court to address the admittedly difficult structural error issue.

Here, the trial court properly exercised its discretion and upheld TriCoast's waiver under section 631. The clear statutory language provides that a trial court *may* exercise its discretion to allow a jury trial where a party has waived its right under section 631. (§ 631, subd. (g).) The trial court elected not to exercise that discretion given TriCoast's untimely request for a jury trial on the day of trial without having paid the statutorily mandated jury fees—which it had the opportunity to do for years. Contrary to TriCoast's assertions, the statute does not *require* the trial court to find prejudice in order to enforce the waiver. The exercise of the trial court's discretion allows the court to consider a range of variables including but not limited to the litigant's delay in requesting relief, the court's docket, inconvenience to

witnesses and parties, and gamesmanship. Here, the trial court did not abuse its discretion in declining to relieve TriCoast from its statutory waiver.

The legislative history to section 631 supports the Court of Appeal's ruling in this regard. Under prior versions of the statute, a party that waived its right to a jury trial had an absolute right to "pick up" the jury fees and have a jury trial if the opposing party decided to waive a jury. The Legislature made a deliberate decision to eliminate this right and make it more difficult for parties like TriCoast to demand a jury trial when they have not complied with the statutory requirements for requesting a jury. The Legislature did so precisely to avoid the last minute demand for a jury trial like the one made by TriCoast in this case.

Even if the Court finds error, the trial court's denial of relief from a statutory waiver does not amount to structural error requiring reversal per se. TriCoast asserts that the Court of Appeal opinion upsets settled law and creates "havoc" for both the standard of review on appeal and the scope of the trial court's discretion (OBOM 8, 10; RBOM 7), but in reality *TriCoast* follows a long line of cases that have concluded that the denial of relief from a statutory waiver of the right to a jury trial is not structural error, and thus, a litigant must demonstrate actual prejudice. TriCoast asks this court to follow a competing line of cases, including *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*), which incorrectly conflate the denial of a litigant's right to a jury trial *in the first instance*

with a litigant's waiver of that right pursuant to statute. A party can waive its right under section 631, and the statute grants the trial court discretion to permit relief from that waiver. Simply because the right to a jury trial has a constitutional dimension does not mean the voluntary waiver is structural error. It is not.

The *TriCoast* opinion correctly held that the trial court acted within it discretion in denying relief from waiver and, in exercising its discretion, it did not interfere with TriCoast's constitutional rights. Rather, the court followed the language and intent of section 631. The Court of Appeal opinion should be affirmed.

LEGAL ARGUMENT

I. A trial court does not abuse its discretion in denying relief from a jury trial waiver absent a showing of prejudice to the opposing party or the court.

A. Code of Civil Procedure section 631 does not require a showing of prejudice.

"[W]aiver of the right to jury trial in a civil cause is permitted only as prescribed by" section 631. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956 (*Grafton*).) In civil cases, a jury may be waived pursuant to subdivision (f) of section 631. That subdivision outlines six ways a party waives the right to trial by jury, including by "failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee." (§ 631, subd. (f)(5).) Section 631 goes on to provide that the trial court "may, in its discretion upon just terms, allow a trial by jury although there may have

been a waiver of a trial by jury." (*Id.*, subd. (g).) Note the absence of the word "prejudice" in subdivision (g).

TriCoast argues that a trial court, as a matter of law, abuses its discretion in denying relief from a jury trial waiver in the absence of demonstrated prejudice to the other party or the court. (OBOM 9–10.) But this requirement is not contained in the plain language of the statute or its legislative history.

1. The evolution of section 631.

"Section 631 was enacted in 1872, but it was not until 1933 that the section was amended to provide for relief from waiver at the discretion of the trial judge. (See Stats. 1933, ch. 744, § 104.)" (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 651 (*Byram*).) "[T]he purpose of section 631 of the Code of Civil Procedure is to grant the parties the right to waive a jury trial and not to impose conditions constituting an irrevocable waiver, and that *the trial court may use its discretion in determining whether under the circumstances a waiver should actually be implied*." (*Duran v. Pickwick Stages System* (1934) 140 Cal.App.103, 109 (*Duran*), emphasis added.)

If we examine the amendments to section 631 over the past 30 years, the changes in the statutory language as well as the legislative history demonstrate that the current version of section 631 was written to discourage last minute requests for jury trials and intended to give trial courts broad discretion in ruling on relief from jury waivers.

In 1988, Senate Bill No. 203 repealed and reenacted the then-existing version of section 631 (Stats. 1979, ch. 212, § 4, pp.

457–458), "revising the provisions for providing for waiver when a party fails to deposit with the clerk or judge jury fees or any mileage or transportation fees, as specified, and deleting provisions specifying a notice of a waiver to be given to all adverse parties by the clerk of a court." (Legis. Counsel's Dig., Sen. Bill No. 203 (1987–1988 Reg. Sess.) 4 Stats. 1988, Summary Dig., p. 6; see Stats. 1988, ch. 10, §§ 2–3, pp. 38–39.) As enacted, the 1988 statute stated that a jury may be waived "By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, or as provided by subdivision (b)." (Stats. 1988, ch. 10, § 3, p. 38.) Subdivision (b) of the 1988 statute provided: "In a superior court action if a jury is demanded by either party in the memorandum to set the cause for trial and the party, prior to trial, by announcement or by operation of law waives a trial by jury, then all adverse parties shall have five days following the receipt of notice of the waiver to file and serve a demand for a trial by jury and to deposit any advance jury fees which are then due." (*Ibid.*) Including former subdivision (b), the 1988 provided three subdivisions regarding how a jury trial may be reinstated after waiver including "The court may, in its discretion, upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury" (Stats. 1988, ch. 10, § 3, p. 39). Two of these former subdivisions, former subdivisions (b) and (c), were later removed (see Stats. 2002, ch. 806, § 15, p. 5146) and are no longer part of the current section 631.

In 2002, the Judicial Council sponsored amendments to section 631 to "reduce[ ] the risk of party 'gamesmanship' in the

jury fees deposit areas by requiring all parties demanding a jury to deposit advance jury fees at the same time." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 1.) To address concerns about "gamesmanship," the bill clarified "the ways in which a jury trial may be waived for failure to provide these advance deposits, in a civil action" and deleted the provisions for "an opposing party [to] reinstate [a] jury trial following waiver by the party who originally requested a jury trial." (*Ibid.*)

The Legislature explained that the 2002 amendments to section 631 were needed because:

> In its current form, this statute can result in gamesmanship over the deposit of fees thereby creating problems with respect to jury waiver. First, a party can presently rely on another party to deposit fees and, if that other party fails to do so, it may preserve its right to a jury trial by later depositing its own fees. As a result, a party sometimes engages in a game of wait-and-see. If no other party has deposited fees, only then will a party do so. In addition, a party may make an advance deposit of jury fees and then waive the jury on the first day of trial. The other party or parties may then be faced with paying the jury fees at the last minute or proceeding to trial without a jury after having prepared for a jury trial.
>
> According to the Judicial Council, the gamesmanship engaged in under the current statute can be disruptive. On the eve of trial, the court may not know whether a trial will be by a jury. To the extent that the parties themselves are unclear whether there will actually be a jury trial, this may

> affect their trial preparation. Furthermore, this uncertainty can result in calendar management problems, delays of trials, and pretrial litigation over whether a jury trial has been waived. This bill requires all parties demanding a jury to deposit jury fees at least 25 days before trial, thereby reducing or eliminating gamesmanship.

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027, *supra*, as amended Apr. 18, 2002, pp. 3–4.) Subdivision (b) of the 2002 statute provided: "Each party demanding a jury trial shall deposit advance jury fees with the clerk or judge. The total amount of the advance jury fees may not exceed one hundred fifty dollars ($150) for each party. The deposit shall be made at least 25 calendar days before the date initially set for trial, except that in unlawful detainer actions the fees shall be deposited at least five days before the date set for trial." (Stats. 2002, ch. 806, § 15, p. 5146.)

In 2012, section 631 was amended twice as part of the 2012 Budget Act. (Stats. 2012, ch. 41, § 3; Stats. 2012, ch. 342, § 1; see Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 1021 (2011–2012 Reg. Sess.) as amended June 25, 2012; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1481 (2011–2012 Reg. Sess.) as amended June 25, 2012.) The amendments substantially revised subdivision (b). The revised 2012 version, which reflects the current version of subdivision (b), provides: "At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars ($150), unless the fee has been paid by another party on the same side of

the case. The fee shall offset the costs to the state of providing juries in civil cases." (Stats. 2012, ch. 342, § 1.) The Legislature specified that: "Payment of the fee by a party on one side of the case *shall not relieve parties on the other side of the case from waiver pursuant to subdivision (f).*" (*Ibid.*, emphasis added.)

The legislative analysis for both bills reflects that the amendments to section 631 were made as part of changes to how court fees are collected. (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 1021, *supra*, as amended June 25, 2012, p. 1; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1481, *supra*, as amended June 25, 2012, p. 1.) The substantive amendments made by Assembly Bill No. 1481 were intended to "clarif[y] that at least one party demanding a jury on each side of a civil case shall pay [a] non-refundable fee of $150, and that all plaintiffs shall be considered one side of the case, and all other parties shall be considered the other side of the case." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1481 (2011–2012 Reg. Sess.) as amended Aug. 21, 2012, p. 1.) These "fees shall offset state costs for providing juries in civil cases." (Assem. Budget Com., Analysis of Assem. Bill No. 1481 (2011–2012 Reg. Sess.) as amended Aug. 21, 2012.)

TriCoast does not address the legislative history or amendments to subdivision (b) in its briefing. However, the history shows that the Legislature was trying to prevent parties from adopting a wait-and-see approach. Prior to 2002, former section 631 allowed parties to "pick up" a jury if the other party

waived a jury, even at the last minute. (See *March v. Pettis* (1977) 66 Cal.App.3d 473, 477 (*March*) ["Code of Civil Procedure section 631 . . . allows a party who has previously waived, to 'pick-up' the jury" (footnote omitted)].) If one party announced it intended to waive a jury trial, then the adverse party had five days to demand a jury trial and deposit the jury fees. (Former Code Civ. Proc., § 631, subd. (b), as amended by Stats. 2000, ch. 127, § 2, p. 1734; see *March*, at p. 477 [waiver by failure to demand a jury at trial setting could be withdrawn if a previous jury demand by an adverse party is subsequently waived].)

The 2002 amendments eliminated this language and stated that each party demanding a jury trial was required to deposit jury fees 25 days before trial. (Stats. 2002, ch. 806, § 15, p. 5146.) In 2012, the Legislature further clarified subdivision (b) by requiring that at least one party on each side of a civil case "shall pay a nonrefundable fee" unless the fee has been paid by another party on the same side of the case. (Stats. 2012, ch. 342, § 1.) The statute now specifically puts a party on notice of the consequences for failing to timely request a jury: "Payment of the fee by a party on one side of the case shall not relieve the parties on the other side of the case from waiver pursuant to subdivision (f)." (§ 631, subd. (b).)

One leading treatise has summarized these changes: "Abrogation of the 'pick-up' rule was designed to eliminate the 'gamesmanship' involved in the deposit of jury fees by requiring all parties demanding a jury to deposit advance jury fees at the same time." (Wegner, et al., Cal. Practice Guide: Civil Trials and

Evidence (The Rutter Group 2021) ¶ 2:215 [citing legislative history].)

Therefore, the former practice of allowing an opposing party to "pick up" a jury after the adverse party's waiver is no longer allowed. Instead, it is now left to the sound discretion of the trial court whether to allow relief from waiver in these circumstances. (§ 631, subd. (g).)

2. Neither the plain language nor the history of section 631 requires a showing of prejudice to the opposing party or the court.

a. Plain language.

In construing a statute, a court aims to determine the Legislature's intent first by " ' "examin[ing] the statutory language, giving it a plain and commonsense meaning." ' " (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616; accord, *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190 [when interpreting a statute, this Court looks to the text's plain meaning].) If the statutory language is clear, its ordinary meaning typically controls. (*Ibid.*) Courts follow the plain meaning of the statutory text because "the language of the statute itself is the most reliable guide to legislative intent." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 83.) This Court "construe[s] the words of a statute in context, and harmonize[s] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.)

Section 631 provides discretion to the trial court to grant relief from waiver. It says the court "*may*, in its discretion" allow a jury trial. (§ 631, subd. (g), emphasis added.) "The ordinary import of 'may' is a grant of discretion." (*In re Richard E.* (1978) 21 Cal.3d 349, 354, superseded by statute on another ground as stated in *In re Mario C.* (1990) 226 Cal.App.3d 599, 606.) TriCoast asks this Court to go beyond the plain meaning and read more into the statute. TriCoast asserts that section 631 requires a finding of prejudice to the court or the opposing party, yet the plain language of the statute clearly gives the trial court discretion to grant or deny relief from waiver, without any showing of prejudice. As the *TriCoast* opinion concludes: section 631 imposes no burden on the party opposing relief from waiver to demonstrate prejudice, "Rather, the plain language of the statute makes the granting of such relief within the trial court's discretion." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250; see *Grafton*, *supra*, 36 Cal.4th at p. 959 [in analyzing section 631, court looks "first to the words of the statute in an attempt to ascertain legislative intent"].)[2]

TriCoast cannot simply read a prejudice requirement into the statute. It is a "cardinal rule of statutory construction that

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[2] In a recent decision addressing waiver in the context of federal arbitration law, the United States Supreme Court stated: "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." (*Morgan v. Sundance, Inc.* (2022) 596 U.S. __ [142 S.Ct. 1708, 1713, 212 L.Ed.2d 753].)

courts must not add provisions to statutes." (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998; accord, *LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844, 861 [courts "are not empowered to insert language into a statute"]; Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted"].)

Put differently, "We will not speculate that the Legislature meant something other than what it said. Nor will we rewrite a statute to posit an unexpressed intent." (*Morton Engineering & Const., Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 716.) If the Legislature required a showing of prejudice, it would say so. Given the Legislature's concern with gamesmanship, it could have stated that the trial court may allow a trial by jury unless there is a showing of prejudice to the opposing party or the court. But it did not do so. Here, the provisions of the statute are "clear and unequivocal." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 243.) Where a party waives its right to a jury trial under section 631, the trial court is vested with discretion to grant or deny relief from waiver, but that discretion is not predicated on a showing of prejudice one way or another.

b. Legislative history.

Next, the Court may consider the legislative history as further evidence of the legislative intent in modifying section 631. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850 [court may

consider both the legislative history of the statute and the wider historical circumstances of its enactment in ascertaining legislative intent].) In amending former section 631, subdivision (b) (see Stats. 2002, ch. 806, § 15, p. 5146), the Legislature cautioned against a wait-and-see approach, noting that under the prior version a party could "rely on another party to deposit fees and, if that other party fails to do so, it may preserve its right to a jury trial by later depositing its own fees. As a result, a party sometimes engages in a game of wait-and-see." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027, *supra*, as amended Apr. 18, 2002, p. 3.) This "gamesmanship" under the prior version of the statute was "disruptive" and meant that even on the eve of trial, the court may not know whether a trial will be by a jury. (*Id.* at pp. 3–4.) The amended section was designed to reduce or eliminate gamesmanship while keeping intact the trial court's discretion to relieve a party from waiver where appropriate.

Here, TriCoast elected not to pay the jury fees in the four years leading up to trial and simply relied on the fact that Fonnegra had paid the fees. Under the former version of section 631, this strategy might have worked: when Fonnegra waived a jury trial, TriCoast attempted to "pick up" the jury by making an oral request to proceed with a jury trial and offering to post jury fees that day. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 243–244.) Fonnegra noted that TriCoast had never posted jury fees and the request was untimely, and moved to proceed with a bench trial. (*Id.* at p. 244.) The trial court agreed that the offer to post jury

fees was untimely under the current statute. (*Ibid.*) When TriCoast argued that it had a due process right to a jury trial, the trial court advised it that it could file a petition for writ of mandate with the Court of Appeal. (*Ibid.*) TriCoast made a voluntary and strategic decision not to do so. (*Ibid.*) The trial court proceeded with a bench trial immediately to avoid any witness scheduling issues. (*Ibid.*)

TriCoast, in essence, is trying to "pick up" the jury that had been properly waived by Fonnegra. The Legislature removed the former right to "pick up" a jury from the statute to prevent parties from adopting a wait-and-see attitude or engaging in gamesmanship. The Legislature eliminated the automatic ability to undo a jury waiver and imposed a procedure that left the decision to grant relief from waiver to the discretion of the trial court. A court cannot interpret a statute "to reinsert what the Legislature intentionally removed." (*People v. Soto* (2011) 51 Cal.4th 229, 245.) Moreover, " 'rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision.' " (*Ibid.*)

The legislative history detailed the desire to prevent parties from using a wait-and-see approach both to prevent gamesmanship and to ensure all fees are properly paid. There is no mention of requiring a showing of prejudice to the court or any party. A trial court is given discretion to grant relief from waiver when it deems relief appropriate. (§ 631, subd. (g).) As explained

in Section I.C, *post*, the trial court properly exercised its discretion to deny relief from waiver under section 631.

B. Demonstrating prejudice to the court or opposing party is simply one factor a trial court may (or may not) consider in exercising its discretion to grant relief from a jury trial waiver.

To support its argument, TriCoast looks to cases that discuss prejudice. TriCoast asserts that "the focus, and critical factor, remains potential prejudice to the other party or the court." (OBOM 47.) TriCoast relies primarily on *Mackovska*, *supra*, 40 Cal.App.5th 1, and the line of cases *Mackovska* cites, to argue that there must be prejudice to the opposing party or the court. (OBOM 45–47.) *Mackovska* contends that "[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*, at p. 10.) But each of the cases *Mackovska* cites involved a mistaken waiver of rights with no demonstrated prejudice to the opposing party.[3] (*Mackovska*, at

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[3] See *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*) [where Tesoro posted jury fees 25 days before the actual trial date, rather than the initial trial date, trial court properly exercised its discretion to grant relief from waiver based on an inadvertent mistake in relying on the local rules and appellants failed to demonstrate any prejudice from proceeding with a jury trial]; *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 811–812 [where plaintiff inadvertently failed to timely pay jury fees, the court should have granted waiver because the defense could not demonstrate prejudice where it raised only general arguments

pp. 10–11 [finding no prejudice where the defense had more than two months to prepare for a jury trial].) More importantly, all but one of the cases cited by *Mackovska* predate the 2002 and 2012 legislative changes to section 631, and the one case decided between 2002 and 2012 (*Tesoro*) did not discuss the legislative history to section 631. (See *Mackovska*, at pp. 10–11; *ante*, fn. 3.)

TriCoast argues that there is no distinction between intentional and unintentional waivers of a jury, citing *Duran, supra,* 140 Cal.App. at page 109. (RBOM 17.) *Duran* does not address this issue, and moreover, it involved a version of section 631 in effect in 1934 and addressed a situation where a court disregarded a waiver and conducted a jury trial. (*Duran*, at pp. 108–109.)

about preparing motions in limine, jury instructions, and exhibits]; *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 412 [plaintiff's failure to timely post jury fees was attributable to counsel's unfamiliarity with the local rules]; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 [due to defense counsel's "confusion" regarding the rules, he paid only $150 rather than $250 in jury fees but, because he sought a jury trial "at every conceivable stage of the proceedings," took prompt action upon receiving notice that the proper amount had not been paid, and "neither real party nor the court established that any prejudice would result by allowing a jury," the court should have granted relief from waiver]; see also *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 474–476 (*Cowlin*) [all evidence had been presented to a jury when court granted a jury trial waiver prior to closing arguments because the defendant rather than the plaintiff paid the jury fees; the court held that the trial court should have granted relief especially when there was no evidence the trial would be delayed or there was any potential injury to the defendant].

The other cases TriCoast cites are also factually and procedurally distinguishable and do not rely on the language of section 631. Each of the cases cited involve situations where the plaintiff requested a jury trial and failed to take some procedural step to properly pay the jury fees. These cases do not involve a situation where one party adopted a wait-and-see attitude and *knowingly* elected not to post jury fees or request a jury until the morning of trial. In each of the cases, the courts found no prejudice because there was sufficient time for the opposing party to prepare for trial.

Here, TriCoast does not assert that it inadvertently waived a jury trial. As the Court of Appeal concluded, "TriCoast's decision not to pay the jury fee was *intentional*, not the result of any misreading of the statute or court rules." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250, emphasis added.) Even if TriCoast relied on Fonnegra's request for a jury trial, Fonnegra was within his rights to elect to waive at any point in the litigation, and TriCoast ignored its responsibility to pay the statutorily required jury fee if it wanted a jury trial.

Moreover, what is missing from *Mackovska,* and the line of cases preceding it, is a close examination of section 631 and its legislative history. As discussed in Section A.2 above, the statute does not require a showing of prejudice, and the legislative history shows an affirmative intent to make relief from waiver more difficult in these situations. *TriCoast*, as well as the line of cases rejected by *Mackovska*, looked to a range of factors to determine if the trial court properly exercised its discretion. (See

TriCoast, *supra*, 74 Cal.App.5th at pp. 249–250.) The trial court may consider the possibility of "delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*); see *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363 (*McIntosh*) ["In exercising discretion, a trial court may consider delay in rescheduling the trial for jury, lack of funds, timeliness of the request and prejudice to all the litigants"].)

Thus, this Court should reject TriCoast's arguments that the Court of Appeal opinion here "muddles the law" and that this Court should adopt the reasoning from *Mackovska*. (OBOM 37, emphasis omitted.)

C. TriCoast does not challenge the trial court's actual exercise of discretion, as opposed to questioning the legal standard. In any event, the trial court's discretionary decision to refuse to grant TriCoast's request for relief from waiver was not an abuse of discretion.

In order for a reviewing court to grant relief, it must conclude that the trial court abused its discretion. The "trial court ruling will not be reversed in absence of an abuse of discretion." (*McIntosh, supra,* 151 Cal.App.3d at p. 363.) Discretion is abused only when the trial court's ruling " 'exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) " '[A]s long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such

action will not be . . . set aside.” ’ ” (*McIntosh*, at p. 363, quoting *Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.) Thus, a “court does not abuse its discretion where any reasonable factors supporting denial of relief can be found even if a reviewing court, as a question of first impression, might take a different view.” (*Gann, supra,* 231 Cal.App.3d at p. 1704; see *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 824 [courts recognize that “a trial court acts properly in denying relief and does not abuse its discretion where any reasonable factors supporting denial can be found”]; *March, supra,* 66 Cal.App.3d at p. 480 [same]; *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 387–388 (*Still*) [no abuse of discretion where defendant sought relief from waiver of jury trial on the morning of trial and it would have resulted in a continuance].)

The Court of Appeal concluded that there was no abuse of discretion here. (*TriCoast, supra*, 74 Cal.App.5th at p. 250.) The court noted that the record on appeal is “sparse” so it presumed the trial court’s denial of TriCoast’s waiver was correct. (*Ibid.*) The record shows TriCoast never requested a jury or paid the fees in the years leading up to trial. (*Id.* at pp. 243–244.) At the point that Fonnegra waived a jury, only then did TriCoast ask for a jury trial. TriCoast did not present evidence or argument that it had inadvertently waived a jury, so the trial court could properly conclude that TriCoast was playing a wait-and-see game and TriCoast sought to pick up a jury.

Additionally even if we accept TriCoast’s view that prejudice to the court or the opposing party is required, there was

no abuse of discretion here. When a party seeks relief from a waiver orally on the day of trial having never previously requested a jury, this should weigh in favor of a finding of prejudice to the court and the opposing party. The court may also consider timeliness of a request for relief from a jury trial waiver when exercising its discretion. (*TriCoast, supra*, 74 Cal.App.5th at pp. 248–249; *Still, supra*, 21 Cal.App.3d at pp. 387–388.) The fact that TriCoast had four years to request a jury trial and did not do so until the morning of trial weighs against the court's exercise of discretion.

"[R]elief 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.' " (*March, supra,* 66 Cal.App.3d at p. 480; accord, *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1177 (*Day*) ["It is well settled that a simple change of mind is not enough to justify relief from a jury waiver"].)

Here, TriCoast did not pay the jury fee in the years prior to trial and gambled that the defense would pay the fees. When the defense exercised its right to waive a jury trial, TriCoast then suddenly changed its mind and requested a jury trial. In this circumstance, the trial court was not required to exercise its discretion to grant relief from waiver.

For all these reasons, the Court of Appeal correctly concluded that the trial court did not abuse its discretion.

D. The trial court does not have to exercise its discretion in favor of granting relief from waiver.

TriCoast argues that the constitutional guarantee to a jury trial requires a trial court to exercise its discretion in favor of the right to a jury. (OBOM 15.) TriCoast would have this Court interpret section 631 to require a trial court to grant relief from waiver unless there is some overriding prejudice. But this approach is at odds with both the language and history of section 631. The cases TriCoast cites in its argument do not fully support its position. (See OBOM 44–46.) First, *Grafton* involved whether a predispute contractual agreement to waive a jury trial was authorized by statute, not a waiver pursuant to section 631. (*Grafton*, *supra*, 36 Cal.4th at p. 950.) This Court stated that "any ambiguity or doubt concerning the waiver provisions of section 631 must be 'resolved in favor of according to a litigant a jury trial.' " (*Id.* at p. 958.) Here, there is no ambiguity or doubt about whether the waiver provision applies. It does. The issue is whether the trial court was obligated to grant relief from the statutory waiver.

TriCoast also cites *March, supra,* 66 Cal.App.3d at page 480 and *Cowlin, supra*, 46 Cal.App.2d at page 476. (OBOM 44–45.) In *March*, the court explained that when " 'a doubt exists as to the propriety of granting relief . . . such doubt . . . should be resolved in favor of according a litigant a trial by jury.' " (*March,* at p. 480, quoting *Cowlin,* at p. 476.) "However, relief 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.' " (*Ibid.*, emphasis added; see *Day, supra*, 170 Cal.App.3d at p. 1177 [where a party makes "a tactical about-face," "It was not an abuse of discretion for the trial court to deny relief on that basis, alone"].)

Here, the court did not need to grant relief because TriCoast's request for a jury on the first day of trial appeared to be based on "the party's change of mind" and to be impermissible gamesmanship.

Additionally, TriCoast relies on cases with inadvertent or mistaken waivers. (OBOM 44–45, citing *Tesoro, supra*, 200 Cal.App.4th at p. 638 [attorney mistakenly relied on the payment date from the local rules rather than section 631 in paying jury fees] & *Byram, supra*, 74 Cal.App.3d at p. 652 [attorney inadvertently failed to pay jury fees the required 14 days before trial].)[4]

This case involves a *knowing* waiver where TriCoast elected to wait-and-see if it would have to pay the jury fees. The trial court had discretion to find that TriCoast's waiver was intentional and, further, had plenary discretion to deny relief from a knowing waiver based upon all of the factors discussed in *ante*, Section B.

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[4] TriCoast also cites *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1466 (evaluating claim that an arbitration agreement denied plaintiff her right to a jury trial), which did not involve section 631 or the statutory waiver of a jury. (OBOM 15, fn 2.)

E. This Court can resolve the matter without considering whether granting relief from a statutory waiver constitutes structural error.

This Court granted review on both issues raised before the Court of Appeal: (1) whether a party must show actual prejudice from denial of relief from waiver under section 631 to obtain reversal on appeal and (2) whether the trial court abuses its discretion by failing to grant relief from waiver where there is no prejudice to the opposing party or the court.

However, this Court can resolve this case by concluding there was no abuse of discretion by the trial court without reaching the structural error issue. Nonetheless, we recognize that this Court may seek to address both issues to resolve a long-standing division in the law as to whether a trial court's discretionary decision to deny relief from a statutory waiver is reversible per se as structural error. We address this issue in the next section.

II. The denial of relief from the statutory waiver of a jury trial is not structural error requiring automatic reversal.

A. A trial court's discretionary decision not to relieve a party of their voluntary waiver of a jury trial should be subject to harmless error review.

The California Constitution " 'prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial.' " (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 (*Monier*).) Narrow exceptions exist for structural error but a " 'strong presumption' exists *against* finding that an

error falls within the structural category, and 'it will be the rare case' where an error—even a 'constitutional violation'—'will not be subject to harmless error analysis.' " (*Ibid.*)

An error is reversible per se and satisfies the California Constitution's prejudicial error requirement only when it creates a structural defect in the trial mechanism that " 'defies evaluation for harmlessness.' " (*Monier, supra,* 3 Cal.5th at p. 1108.) "Such errors affect 'the framework within which the trial proceeds, rather than simply an error in the trial process itself,' thus affecting the entire conduct of the trial from beginning to end." (*Severson & Werson, P.C. v. Sepehry-Fard* (2019) 37 Cal.App.5th 938, 950.) "In other words, a structural error is one that, by its very nature 'implicates the fundamental fairness of judicial proceedings.' " (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 849.)

A trial court's discretionary decision to deny relief from a statutory waiver does not constitute structural error requiring automatic reversal.

Section 631 sets forth the grounds for waiver of a jury trial and explicitly provides that a trial court may, "in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." (§ 631, subd. (g).) The plain language and legislative history of the statute do not support the notion that it is a structural error if a court does not exercise its discretion to allow a jury trial after it has been waived pursuant to statute. The language and history of section 631 lead to the opposite conclusion. The trial court is granted discretion to

provide relief from waiver, and a reviewing court should evaluate the trial court's decision for an abuse of that discretion. TriCoast would require reversal in every case where a trial court denied relief from waiver absent evidence of gamesmanship. (See OBOM 21–24.)

The *TriCoast* opinion, relying on a different line of authority, reached the contrary—and correct—conclusion that a denial of relief from waiver is not structural error, there must be showing of actual prejudice to justify reversal. (*TriCoast, supra,* 74 Cal.App.5th at p. 247 [requiring a showing of actual prejudice on an appeal from denial of relief from a jury waiver under section 631]; see *McIntosh, supra,* 151 Cal.App.3d at p. 363 [" '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 [same]; see also *Gann, supra,* 231 Cal.App.3d at p. 1704 ["courts have held that prejudice will not be presumed from the fact that the trial was to the court rather than to the jury" but finding no abuse of discretion without requiring appellants to demonstrate prejudice from the court's denial of their motion].)

TriCoast contends the holding in the Court of Appeal opinion jeopardizes the constitutional right to a jury trial. (RBOM 7.) But *TriCoast* correctly noted that requiring a showing of prejudice does not deprive a party of the constitutional right to a jury trial and supports the public policy of conserving judicial

resources and avoiding duplicative litigation. (*TriCoast, supra*, 74 Cal.App.5th at p. 247.)

We do not dispute that the outright denial of a party's right to a jury trial in the first instance could amount to structural error. For example, if a trial court erroneously concluded that a cause of action is equitable, rather than legal, and that there is no right to a jury trial, that may well be reversible per se. (See *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 [" '[T]he jury trial is a matter of right in a civil action at law, but not in equity' "]; *ZF Micro Solutions, Inc. v. TAT Capital Partners, Ltd.* (Aug. 8, 2022, No. G060972) __ Cal.App.5th __ [2022 WL 4090879, at p. *5] [where trial court erroneously concluded that claim was equitable, not legal, entitling party to a jury trial, reversal for a new trial was required without discussion of prejudice].)

But as explained *post* in section II.B, the denial of a request for relief from a statutory waiver of a jury trial is not equivalent to the denial of a jury trial in the first instance. (See *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 18–19 [explaining that a court's decision to deny relief under section 631 is not equivalent to the denial of the constitutional right to a jury trial in the first instance].) The latter could constitute structural error, but not the former. Section 631 explicitly provides for the waiver of the right to a jury trial, and the discretionary decision of the trial court should be subject to traditional harmless error review.

Moreover, any purported difficulty in establishing prejudice in this situation does not justify categorizing the error as structural. For example, errors involving the denial of peremptory challenges to jurors are still subject to the prejudice requirement on appeal, even if that prejudice may be difficult to demonstrate. (*People v. Singh* (2015) 234 Cal.App.4th 1319, 1330–1331; see *Rivera v. Illinois* (2009) 556 U.S. 148, 157 [129 S.Ct. 1446, 173 L.Ed.2d 320] [noting the Court "has consistently held that there is no freestanding constitutional right to peremptory challenges," which are " 'creature[s] of statute' "].)

B. Discretionary relief from a statutory waiver of a jury trial is not the same as the wholesale denial of a jury trial in the first instance.

As the *TriCoast* opinion notes, there is a difference between the constitutional right to a jury trial and the statutory, discretionary denial of a request from waiver of that right. Both TriCoast's brief and the argument it relies on from *Mackovska* merge the two issues. "[T]he *Mackovska* court 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]. The two circumstances are not the same." (*TriCoast, supra,* 74 Cal.App.5th at p. 246; see *Amato v. Downs* (2022) 78 Cal.App.5th 435, 441, fn. 4 [recognizing *TriCoast* "involved an appeal challenging the denial of relief from jury waiver by one of the statutory means, failure to timely deposit jury fees, and not a

denial of the right to jury trial ' "in the first instance,' " . . . '[t]he two circumstances are not the same' "].)

A trial court's discretionary decision to deny relief from waiver where a party has statutorily waived the right to a jury trial by failing to pay the necessary jury fees does not infringe on the party's constitutional rights.

"The California Constitution vests the Legislature with the exclusive power to prescribe the rules under which parties may waive a jury trial (Cal. Const.[, a]rt. I, § 16). Pursuant to that authority, the Legislature has determined that trial by jury in a civil case may be waived *only* in the manner *designated by . . .§ 631[, subd.] (f).*" (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, ¶ 2:260.) Subdivision (g) of section 631 provides the trial court discretion, with no specific limitation, to deny relief from waiver.

TriCoast cites to cases that say the right to a jury trial must be zealously guarded and exercised in favor of preserving the right to a jury trial. (OBOM 41–45.) Amicus does not disagree with that contention. But TriCoast improperly construes the court's discretionary decision to grant relief from a jury trial waiver as a constitutional issue. It is not. It is simply a matter of applying a trial court's statutory discretion. Relying on *Mackovska*, TriCoast argues that the erroneous denial of relief from a jury trial waiver is the same as the wrongful denial of a " 'constitutional right to a jury trial.' " (OBOM 41–43, quoting *Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) However, the right at issue here may be "waived by the consent of the parties

expressed as prescribed by statute." (Cal. Const., art. I, § 16.) And there is no dispute that the right was waived here. (*TriCoast, supra*, 74 Cal.App.5th at p. 242; see § 631, subd. (f)(5) [a party "waives trial by jury" by "failing to timely pay the fee"].) The right may be restored by the court in its discretion. (§ 631, subd. (g).) So when statutory relief is denied, the court is "reviewing the discretionary denial of relief from the waiver, not the denial of the underlying constitutional right to a jury trial." (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1396.) So it is appropriate to engage in traditional harmless error analysis. (*Ibid.*)

In sum, "There is no constitutional right to relief from a jury waiver." (*TriCoast, supra*, 74 Cal.App.5th at p. 246.)

CONCLUSION

For the foregoing reasons, in addition to those set forth in Fonnegra's brief on the merits, this Court should affirm the Court of Appeal's opinion.

September 29, 2022

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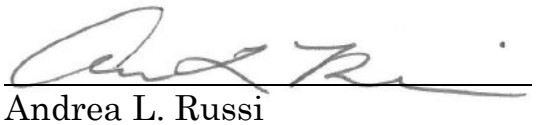

Andrea L. Russi

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TriCoast Builders, Inc. v. Nathaniel Fonnegra
Case No. S273368

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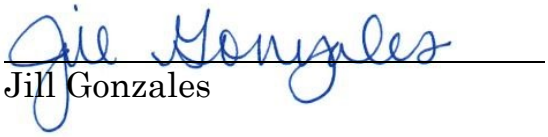

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Case No. S273368

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