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

ANSWER TO AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

CONNETTE LAW OFFICE
Michael T. Connette [SBN 180609]
201 Santa Monica Boulevard
Suite 300
Santa Monica, California 91401-2224
(424) 777-8800
mike@connettelaw.com

BENEDON & SERLIN, LLP
Judith E. Posner [SBN 169559]
*Kian Tamaddoni [SBN 312624]
22708 Mariano Street
Woodland Hills, California 91367-6128
(818) 340-1950
judy@benedonserlin.com
kian@benedonserlin.com

Attorneys for Plaintiff and Appellant
TRICOAST BUILDERS, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

Legislative History

INTRODUCTION

Plaintiff and appellant TriCoast Builders, Inc. (TriCoast) sought review in this Court because the majority opinion in *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239 (*TriCoast*) disrupted settled law. The *TriCoast* majority did so with regard to Code of Civil Procedure section 631, on both the standard of review for an appeal challenging the denial of relief from a jury trial waiver, and the scope of the trial court's discretion in evaluating the propriety of relief under that statute.[1]

First, the *TriCoast* 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 for reversal of the judgment on appeal based on the improper denial of relief from a jury trial waiver. Second, the majority disregarded well-established law in holding a trial court can deny a party relief from its jury trial waiver absent a showing of prejudice to the opposing party or the court. The *TriCoast* majority opinion, if allowed to stand, would substantially erode the constitutional right to a jury trial. The case, therefore, calls on this Court to clarify both (1) the standard of review in a judgment appeal to preserve the right to meaningful appellate review of an order

---

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

denying relief from a jury trial waiver, and (2) the scope of the trial court's discretion under section 631.[2]

In support of defendant and respondent Nathaniel Fonnegra, and the *TriCoast* majority, the Association of Southern California Defense Counsel (ASCDC) argues the denial of relief from a jury trial waiver is not structural error such that demonstrating actual prejudice from the ensuing bench trial should be required on appeal. (ACB 34-40.) ASCDC also maintains the plain text of section 631 and its legislative history indicate prejudice to the opposing party or the court is just one factor the trial court may consider in exercising its discretion on a motion for relief from a jury trial waiver. (ACB 14-26.)

Despite the Court's grant of review of both issues, ASCDC contends the *TriCoast* majority opinion should stand on the

---

[2] ASCDC is wrong to fault TriCoast for not "seek[ing] 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[.]" (ACB 12, 29-31.) The exercise of trial court discretion is not a ground for review. (Cal. Rules of Court, rule 8.500(b).) Nevertheless, a trial court abuses its discretion "as a matter of law," as occurred here, by denying relief from a jury waiver absent a showing of prejudice. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*); *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 (*Wharton*).) Accordingly, TriCoast asked the Court "to clarify, as a matter of law, the analysis required of a trial court in evaluating a motion for relief from a jury trial waiver." (Reply to Ans. to Pet. for Rev., p. 10.)

ground that the trial court did not abuse its discretion, urging the Court not to decide the actual prejudice question. (ACB 34.) ASCDC, therefore, would have this Court overlook the "competing line[s] of cases" and "long-standing split of authority" on the standard of review. (ACB 10, 13.)

ASCDC's attempt to side-step the actual prejudice question improperly minimizes its importance to a party's jury trial right and overlooks the stark conflict in the law. Contrary to precedents of this Court and others, the *TriCoast* majority held that a party's decision to forego a writ petition before trial and raise the denial of relief from a jury trial waiver on a judgment appeal creates a requirement to demonstrate actual prejudice, even if that party preserved the record by objecting and requesting relief from waiver before trial. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 245.) By applying a stricter standard of review for appeals than writ proceedings, the *TriCoast* majority endorsed a dual-track system of review of orders denying relief from a jury trial waiver. This Court's resolution of the actual prejudice question thus is critical to preserve the right to challenge an order denying relief from a jury trial waiver in a judgment appeal, thereby "secur[ing] uniformity of decision [and] . . . settl[ing] an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

ASCDC also argues that, because "[t]he first step is to evaluate whether the trial court abused [its] discretion" there is

"no need for this Court to address the admittedly difficult structural error issue." (ACB 12.) TriCoast, however, did not "put[] the cart before the horse," as ASCDC suggests. (ACB 11.) Instead, as TriCoast explained, "[l]ogically, a reviewing court in a judgment appeal would reach an issue of actual prejudice only after determining the trial court had abused its discretion by denying relief from a jury trial waiver." (OBOM 51, fn. 7.) For this reason, TriCoast clarified that the "*TriCoast* majority reversed this analytical sequence, determining TriCoast was required to show actual prejudice before evaluating the question of abuse of discretion."[3] (*Ibid*.) Consequently, the cart was put before the horse by the majority opinion that ASCDC asks this Court to uphold.

Following this Court's grant of review of both questions of actual prejudice and the scope of the trial court's discretion, TriCoast briefed the two issues in the same sequence as the *TriCoast* majority and in accordance with this Court's order granting review. Disregarding that TriCoast has endeavored to clarify the analytical sequence of the issues, ASCDC decries that, "[u]nfortunately for this Court, the two issues have been addressed in the wrong order." (ACB 11.) Whether unfortunate, or not, any confusion lies with the *TriCoast* majority opinion.

---

[3] TriCoast made the same observation in seeking review. (See Reply to Ans. to Pet. for Rev., pp. 7-8, fn. 2.)

In any event, ASCDC's contentions in support of the *TriCoast* majority opinion have no merit. First, the denial of a jury trial is structural error because its effects cannot be measured against the traditional harmless-error standard. It thus is deemed prejudicial and must be reversed, absent any gamesmanship by the party seeking a jury trial. Second, appellate courts have repeatedly interpreted section 631 to hold a trial court abuses its discretion as a matter of law by denying relief from a jury trial waiver absent prejudice to the opposing party or the court. The legislative history does not reveal a contrary intent, and the Legislature, at least implicitly, has approved those judicial decisions.

At bottom, this Court should reject ASCDC arguments. They do not undermine TriCoast's showing that (1) the improper denial of relief from a jury trial waiver, absent evidence of gamesmanship, does not require actual prejudice to obtain reversal of a judgment on appeal, and (2) a trial court abuses its discretion by denying relief from a jury trial waiver without a showing of prejudice to the opposing party or the court.

LEGAL DISCUSSION

I. THE IMPROPER DENIAL OF RELIEF FROM A JURY TRIAL WAIVER IS STRUCTURAL ERROR REQUIRING REVERSAL.

A. A Showing of Actual Prejudice Is Not Required to Reverse a Judgment After the Improper Denial of Relief From a Jury Trial Waiver.

The improper denial of a jury trial results in a "'miscarriage of justice and requires a reversal of the judgment.' [Citation.]" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300.) As TriCoast has demonstrated, this principle applies when a trial court improperly denies relief from a jury trial waiver. (See OBOM 23-24; RBOM 9-10.) Thus, 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]; *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 838-839 (*Simmons*) ["'denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial'"]; *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 825 (*Bishop*) [same].)

More recently, the appellate court in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1

(*Mackovska*) affirmed the rule of per se reversal following the improper denial of relief from a jury trial waiver. That court held "appellants need not show actual prejudice resulting from a trial by the court rather than a jury." (*Id.* at p. 13.) This is so even "when a party seeks review of [an order denying relief from a jury waiver] on appeal from the judgment without having filed a petition for writ of mandate challenging the order[.]" (*Id.* at p. 4.) As *Mackovska* explained, the standard of review whether a party seeks review of an order denying relief from a jury trial waiver by writ proceeding or appeal is the same: "As 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. [Citation.] Instead, 'improper denial of jury trial is per se prejudicial.' [Citations.]" (*Id.* at p. 13.)

B. The *TriCoast* Majority's Actual Prejudice Requirement Creates an Unworkable Standard of Review.

In conflict with *Mackovska*'s explication of law, the *TriCoast* majority held that a "party who fails to seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice when challenging such an order after the trial has been concluded." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 245.) *Mackovska*, however, observed "how difficult, if not impossible, it is to show prejudice from the denial

of the constitutional right to a jury trial" and reasoned that "requiring an appellant challenging an order denying a motion for relief from a jury trial waiver to show actual prejudice would essentially leave discretionary mandate review as the only practical remedy . . . ." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.)

By imposing on appellants the impractical, if not impossible, burden of demonstrating actual prejudice from the improper denial of relief from a jury trial waiver, the *TriCoast* majority rendered review on a judgment appeal virtually meaningless. The *TriCoast* majority opinion thus flouts established case law holding the denial of relief from a jury trial waiver is reviewable by way of writ petition or appeal. (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1224 (*Monster*); *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.) Indeed, this Court's relatively recent decision discussing whether the denial of a jury trial is even reviewable by writ reinforces the propriety of a judgment appeal as a means to remedy the improper denial of a jury trial. (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 990-993.)

C. Contrary to ASCDC's Assertions, an Actual Prejudice Requirement Contravenes the Law on Structural Error.

ASCDC defends the *TriCoast* majority's errant decision by arguing the denial of relief from a jury trial waiver "is not structural error requiring automatic reversal." (ACB 34.) ASCDC's analysis is flawed and, in fact, highlights the reasons why denial of relief from a jury trial waiver is per se prejudicial.

Under the California Constitution, "[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) This miscarriage-of-justice requirement, which "generally 'prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial[,]'" applies to both constitutional and non-constitutional errors. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 (*Monier*).)

Notwithstanding the general prejudice requirement, this Court has repeatedly recognized that judicial errors rising to the level of a structural defect are reversible per se. For example, in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 579 (*Soule*), this Court concluded a structural error occurs in a civil trial when

there is some "'"structural [defect] in the . . . trial mechanism"' that defies evaluation for harmlessness." This Court explained in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 261 (*Sandquist*) that "some errors are reversible per se" when their "effects are "'unmeasurable"' and "'def[y] analysis by 'harmless-error' standards."' [Citations.]" Similarly, in *Monier*, this Court reiterated that, notwithstanding the general prejudice requirement, "an error is reversible per se when it constitutes 'a "'structural [defect] in the . . . trial mechanism"' that defies evaluation for harmlessness.' [Citations.]" (*Monier*, *supra*, 3 Cal.5th at p. 1108.)

"Structural errors require per se reversal 'because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred.' [Citation.]" (*Severson & Werson, P.C. v. Sepehry-Fard* (2019) 37 Cal.App.5th 938, 950-951 (*Severson*).) A structural error "defies analysis by a harmless-error standard" because it "'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself' . . . ." (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394; see also *Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 849 (*Diamond*).) Structural errors "affect[] the entire conduct of the trial from beginning to end." (*Severson*, at p. 950; see also *Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1527 (*Aulisio*).)

In contrast, mere trial errors are "mistake[s] that occur[] in presentation of the case . . . ." (*Soule*, *supra*, 8 Cal.4th at p. 579.)

In *Soule*, for example, this Court concluded rejection of jury instructions "explaining a 'central theory' of [appellant's] case" was not structural error because it could be "'"quantitatively assessed in . . . context . . . in order to determine whether its [commission] was [prejudicial or harmless]."' [Citation]." (*Id*. at pp. 573, 579.) Similarly, in *Diamond*, the trial court's exclusion of evidence of a pre-trial settlement was not structural error. (*Diamond*, *supra*, 239 Cal.App.4th at p. 849.) Thus, while a non-structural error can be quantitatively assessed in context of the trial as a whole, a structural error has effects that are "'"unmeasurable"' and "'def[y] analysis by 'harmless-error' standards.'" [Citations.]" (*Sandquist*, *supra*, 1 Cal.5th at p. 261.)

ASCDC contends the *TriCoast* majority correctly concluded that "denial of relief from waiver is not structural error." (ACB 36.) ASCDC is mistaken. The *TriCoast* majority did not discuss – let alone determine – whether denial of relief from waiver constitutes structural error. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 245-248.) Moreover, ASCDC's cursory analysis of structural error fails to justify the *TriCoast* majority's opinion. The erroneous denial of relief from a jury trial waiver is not a mere "mistake that occur[s] in the presentation of the case . . . ." (*Soule*, *supra*, 8 Cal.4th at p. 579.) Rather, the absence of a jury "affect[s] the entire conduct of the trial from beginning to end." (*Aulisio*, *supra*, 230 Cal.App.4th at p. 1527.) In fact, the improper denial of relief from waiver, and the ensuing deprivation of a jury

trial, is quintessential structural error because "its effects are "'unmeasurable'" and "'def[y] analysis by 'harmless-error' standards.'" [Citations.]" (*Sandquist*, *supra*, 1 Cal.5th at p. 261.)

Although the *Mackovska* court did not use the term structural error, it correctly observed that "courts 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.) In other words, "it is difficult to envision precisely how one shows prejudice from denial of a jury trial aside from that inherent in deprivation of a constitutional right[.]" (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*); see also *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 (*Byram*) [demonstrating prejudice from denial of a jury trial is "difficult" as well as "inefficient and time consuming"].)

Regrettably, the *TriCoast* majority disregarded its own acknowledgement that "such a showing [of prejudice] may be difficult[.]" (*TriCoast*, *supra*, 74 Cal.App.5th at p. 246.) Because it would be "nearly impossible for TriCoast to [demonstrate prejudice]," however, Justice Ashmann-Gerst, in dissent, sharply criticized the *TriCoast* majority for not even attempting to "explain what sort of prejudice could be shown." (*Id*. at p. 253, fn. 3 (dis. opn. of Ashmann-Gerst, J.).) And, just as the *TriCoast* majority failed to suggest how a litigant might demonstrate prejudice, ASCDC has similarly failed to offer any guidance.

Its brief contains nary a clue about how prejudice from the absence of a jury could be shown on appeal. (See ACB 34-40.) Thus, although ASCDC urges this Court to adopt the *TriCoast* majority's rule, both ASCDC and the *TriCoast* majority tacitly acknowledge such a rule would not protect the constitutional right to a jury trial.

D. Denial of Relief From a Jury Trial Waiver Defies Harmless-Error Analysis Just as Numerous Other Recognized Structural Errors.

ASCDC relies on a presumption against finding that a judicial error is structural, and claims structural errors are the rare exception to traditional harmless-error analysis. (ACB 34-35.) Whatever presumption may exist against finding structural error, the deprivation of a litigant's jury trial right directly exposes the limits of traditional harmless-error analysis and shares the cornerstone attribute of structural error.

The denial of a jury trial defies harmless-error analysis in the same way as other recognized structural errors. In the civil context, for example, structural errors include deprivation of a party's right to (1) a fair hearing, (2) a jury trial on a legal cause of action, and (3) the presentation of testimony and evidence. (*Conservatorship of Maria B.* (2013) 218 Cal.App.4th 514, 534 [surveying cases].) In the criminal context, structural errors include (1) improper denial of the right to separate counsel,

(2) counsel's conflict of interest, (3) ineffectual waiver of the right to a jury trial, and (4) discrimination in jury selection. (*Soule*, *supra*, 8 Cal.4th at p. 577 [surveying cases].)

The common thread in these civil and criminal examples is that structural error "'affect[s] "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 . . .' [Citation.]" (*Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123, 135 (*Kline*).) These errors cannot be ""'quantitatively assessed in . . . context . . . in order to determine whether its [commission] was [prejudicial or harmless].'" [Citation]." (*Soule*, *supra*, 8 Cal.4th at p. 579.) Such is the same for the improper denial of a jury trial, which results in a different trier of fact weighing the entirety of the evidence.

ASCDC "do[es] not dispute that the outright denial of a party's right to a jury trial in the first instance could amount to a structural error." (ACB 37.) ASCDC, however, claims that denial of relief from a jury trial waiver is not structural error because, according to ASCDC, it is not "equivalent to the denial of a jury trial in the first instance." (*Ibid*.) ASCDC's analysis is flawed.

TriCoast is not under any misconception that denial of a jury trial in the first instance is "equivalent" for all purposes to denial of relief from waiver. The reasons the denial of a jury trial defies harmless-error analysis, however, apply no matter when or how the right to a jury is denied. Whether denied in the first

instance or after a party seeks relief from waiver, the ensuing absence of a jury "affect[s] the entire conduct of the trial from beginning to end." (*Severson, supra*, 37 Cal.App.5th at p. 950; see also *Aulisio*, *supra*, 230 Cal.App.4th at p. 1527.) And, although a court's denial of a jury may occur for various reasons, the jury's absence – for any reason – inevitably affects the entirety of the proceedings. As *Mackovska* correctly observed, "the consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial." (40 Cal.App.5th at p. 16.) "The effects . . . are not susceptible to measurement" in either case, and "therefore defy analysis by harmless error standards." (*Kline*, *supra*, 79 Cal.App.5th at p. 135.) As a result, "'it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred.' [Citation.]" (*Severson*, at pp. 950-951.)

Furthermore, applying a harmless-error analysis would require evaluating how a jury, sitting as trier of fact, might have weighed the evidence at trial differently from the trial court. Such an analysis presents "'a speculative inquiry into what might have occurred in an alternate universe.' [Citations.]" (*Severson*, *supra*, 37 Cal.App.5th at p. 951). That alternate universe, however, is one in which the jury was actually present during the trial, i.e. the right to a jury was secured. Evaluating the prejudicial effects of a jury's absence – which would look to what might have happened if the jury were present – does not depend

on the reason for the jury's absence. Indeed, no special clairvoyance would aid an appellate court in applying a harmless-error analysis after a waiver, but elude it when a jury is denied in the first instance. Thus, no inherently logical relationship exists between the cause of the jury's absence and the difficulties, if not impossibilities, a reviewing court would face in a harmless-error analysis.

In short, ASCDC's support of the *TriCoast* majority's distinction between denial of a jury in the first instance and denial of relief from waiver is untethered to the doctrine of structural error.

E. Requiring Litigants to Seek Pre-Trial Writ Relief Is an Improper Solution to the Limits of Traditional Harmless-Error Analysis.

According to ASCDC, the *TriCoast* majority correctly concluded, under *Gann*, *supra*, 231 Cal.App.3d 1698, and *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357 (*McIntosh*), that actual prejudice must be shown on appeal because TriCoast did not pursue a writ before trial. (ACB 36.) The *Gann* and *McIntosh* courts' rejection of per se reversal, however, is contrary to this Court's authority.

The *Gann* court recognized the limits of traditional harmless-error analysis, conceding "it is difficult to envision precisely how one shows prejudice from denial of a jury trial aside

from that inherent in deprivation of a constitutional right[.]" (*Gann*, *supra*, 231 Cal.App.3d at p. 1704.) Nevertheless, *Gann* relied on an anti-gamesmanship principle and concluded "the seldom articulated reason for allowing the trial court's determination to stand is that a party should not be able to play 'Heads I win. Tails you lose' by waiting until after judgment to seek review of the denial of relief from jury waiver." (*Ibid*.) Based on a flawed interpretation of this coin-tossing metaphor, *Gann* said a "writ of mandate is the appropriate vehicle to secure a jury trial allegedly wrongfully withheld without the usual demonstration of prejudice or miscarriage of justice required to obtain a reversal after judgment." (*Ibid*.) Similarly, *McIntosh*, observing the appellant had not filed a petition for writ of mandate, imposed an actual prejudice requirement. (*McIntosh*, *supra*, 151 Cal.App.3d at pp. 363-364.)

Although *Gann* and *McIntosh* correctly identified gamesmanship as the analytical backdrop, their imposition of an actual prejudice requirement in the absence of a writ petition contradicts this Court's authority. As this Court has explained, a litigant "'play[s] "Heads I win, Tails you lose" with the trial court'" when it "proceed[s] to try the case before a judge *without objecting* to the absence of the jury[.]" (*Taylor v. Union Pac. R. Corp.* (1976) 16 Cal.3d 893, 900 (*Taylor*), italics added.) Thus, a litigant cannot remain silent and seek relief from a jury trial waiver for the first time on appeal after trying the case to the

court without success.[4] (*Mackovska*, *supra*, 40 Cal.App.5th at p. 15, citing *Taylor*, at pp. 900-901; cf. *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 511 (*Cadle*) [after denial of jury trial, "[party] may not simply sit by in silence, take his chances on a favorable judgment and then, after an adverse judgment, complain on appeal"].) By demanding a pre-trial writ petition to avoid an actual prejudice requirement on appeal, *Gann* and *McIntosh* conflict with this Court's more general focus on a party's silence in the face of a bench trial.[5]

---

[4] ASCDC's reliance on *Byram* (ACB 36) is misplaced. There the appellate court, in dicta, referenced the coin-tossing metaphor, but recognized litigants do not play ""Heads I win, Tails you lose" with the trial court"' if they "act[] promptly to secure a jury trial and the trial has not yet been held." (*Byram*, *supra*, 74 Cal.App.3d at p. 653.) ASCDC misses the nuances of *Byram*, which follow this Court's holding in *Taylor*.

[5] ASCDC also cites *Beasley* v. *Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1396 (*Beasley*), involving the trial court's erroneous submission of the case *to the jury*. (ACB 40) Although *Beasley* parroted *Gann* and *McIntosh*'s errant notion that the question of prejudice arises when a litigant "omit[s] to seek immediate writ review," it explained "none of these cases is really pertinent, as each involved the *denial* of a jury trial, whereas here we deal with the erroneous *submission* of an issue to the jury." (*Beasley,* at pp. 1396-1398.) Although "[t]he per se rule . . . is based on the fact that the erroneous denial of a jury trial implicates an *inviolate constitutional right*," the erroneous "submission of an issue to the jury is nothing more than a nonconstitutional procedural error." (*Id.* at p. 1396.) *Beasley*, therefore, is inapposite here.

ASCDC nevertheless contends a writ petition is required, asserting, without citation, that TriCoast made a "strategic decision" not to pursue writ relief. (ACB 25.) Strategy might have played into Fonnegra's waiver of the jury on the morning of the scheduled jury trial, a decision he made "over the weekend." (2 RT 1.) But ASCDC pretends TriCoast's objection to the jury's absence, oral motion for relief (2 RT 1-2; CT 162), and later appeal from the judgment comprised a shrewd tactical plan. Such course of action, however, was the only viable one for TriCoast given Fonnegra's last-minute waiver. It was "the morning of the first day of trial" and "[a]t that point there was no time to file a petition for writ of mandate." (*Mackovska*, *supra*, 40 Cal.App.5th at pp. 15-16.) TriCoast's pretrial objection and request for a jury demonstrate that 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, supra,* 144 Cal.App.4th at p. 511.)

Requiring an appellant to meet the "difficult, if not impossible," task of showing actual prejudice in a judgment appeal "would essentially leave discretionary mandate review as the only practical remedy[.]" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) This is "hardly adequate protection for a constitutional right that is such '"a basic and fundamental part of our system of jurisprudence [it] should be zealously guarded."' [Citations.]" (*Ibid*.)

For these reasons, *Mackovska* relied on this Court's reasoning 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." (*Mackovska*, *supra*, 40 Cal.App.5th 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.*) 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.) A litigant may "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.)

In short, ASCDC's defense of the *TriCoast* majority's actual prejudice requirement does not withstand scrutiny under this Court's authority or the practicalities of litigation.

II. RELIEF FROM A JURY TRIAL WAIVER MUST BE GRANTED ABSENT PREJUDICE TO THE OPPOSING PARTY OR THE COURT.

A. ASCDC's Myopic Statutory Reading Overlooks the Legislature's Acceptance of Judicial Decisions Requiring a Showing of Prejudice.

1. ASCDC's plain language argument contradicts established authority.

ASCDC contends that a requirement to grant relief from a jury trial waiver in the absence of prejudice to the opposing party or the court "is not contained in the plain language" of section 631, which "gives the trial court discretion to grant or deny relief from waiver, without any showing of prejudice." (ACB 15, 22.) ASCDC copies the *TriCoast* majority's statement that "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.) ASCDC weds its argument to the text of section 631, urging this Court to "[n]ote the absence of the word 'prejudice' in subdivision (g)" and conclude the lack of an express reference must mean the Legislature intended no prejudice requirement. (ACB 15, 23.) ASCDC is mistaken. Its textual argument is incorrect given the established body of case law interpreting

section 631 and the Legislature's evident acquiescence to those judicial decisions.

"'The denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial.' [Citation.]" (*Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; see also *Bishop*, *supra*, 101 Cal.App.3d at p. 825; *Byram*, *supra*, 74 Cal.App.3d at p. 654.) For this reason, "a motion to be relieved of a jury waiver should be granted *unless, and except*, where granting such a motion would work serious hardship to the objecting party." (*Boal*, *supra*, 165 Cal.App.3d at p. 809, italics added.)

In contradiction to this case law, the *TriCoast* majority erroneously relegated "[p]rejudice to the parties [a]s just one of several factors" open for consideration in the exercise of discretion on a motion for relief from a jury trial waiver. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) In so doing, the *TriCoast* majority misunderstood and misapplied *Gann*. *Gann* commented that "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.) *Gann* did not define reasonableness, but observed that "the trial court may consider delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." (*Ibid*.)

Notably, each of those factors bears directly on potential prejudice to the opposing party or the court.

Seizing on this imprecise language from *Gann*, the *TriCoast* majority stated that prejudice "is just one of several factors the trial court may consider. . . ." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) The *TriCoast* majority, however, ignored that *Gann* called for a prejudice analysis by recognizing 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*, *supra*, 231 Cal.App.3d at pp. 1703-1704, italics added.) *Gann* therefore linked the timing of the request for relief to a prejudice analysis. (*Id*. at pp. 1704-1705 [opposing parties "alleged prejudice" because "to grant relief within five days of trial would work a hardship in their trial preparation"].) Consequently, the factors listed in *Gann* are not isolated but rather part of the hallmark inquiry of prejudice.

Similarly, in *March v. Pettis* (1977) 66 Cal.App.3d 473, 477, 480 (*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.]" The *March* court found no abuse of discretion in the denial of relief due to

"disadvantage to the[] defendants." (*Id.* at p. 480.) Though not described as prejudice, *March* shows a wariness of tactics that disadvantage the opposing party or the court.

By contrast, here, Fonnegra did not show prejudice (2 RT 1-2), and the *TriCoast* majority disregarded that failing. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 249-250.) In fact, Fonnegra would not have been prejudiced by a jury trial because the parties had prepared for one and he announced his waiver on the morning the matter was called for a jury trial. (2 RT 1-2; CT 96, 161-162.) The *TriCoast* majority thus erred by relying merely on the timing of the request for relief from waiver on the day of trial, despite the absence of prejudice to Fonnegra, and disregarding Fonnegra's own waiver after the trial court had called the matter for a jury trial.

2. The statutory grant of discretion to the trial court is virtually unchanged.

Section 631 was first amended in 1933 to provide the trial court with discretion to grant relief from a jury trial waiver. (Stats. 1933, ch. 744, § 104, pp. 1875-1876; *Byram*, *supra*, 73 Cal.App.3d at p. 651.) After listing seven ways to waive a jury trial, the 1933 statute provided that "[t]he court may, in its discretion upon such terms as may be just, allow a trial by jury to be had although there has been a waiver of such a trial." (Stats. 1933, ch. 744, § 104, pp. 1875-1876.)

In 1988, the Legislature repealed and reenacted section 631. (Stats. 1988, ch. 10, §§ 2, 3, pp. 38-39.) Prior to the repeal, section 631 had been amended to contain the aforementioned grant of discretion in two places. (Stats. 1987, ch. 1493, § 1.5, pp. 5673-5674.) Under subdivision (4), a party could waive a jury trial by failing to request one. If one party failed to request a jury and, before trial, another party who had requested a jury later waived it, the clerk was to give 10 days' notice of that waiver, allowing the adverse parties five days to demand a jury. (*Ibid.*) This afforded an opportunity to "pick up" the jury before trial. (*Ibid.*) Further, "[r]egardless of anything contained in the foregoing to the contrary, the court may in its discretion, upon such terms as may be just, allow a trial by jury to be had, although there has been a waiver of such a trial." (*Ibid.*) Similarly, under subdivision (8), if a "party who has demanded trial by jury . . . waives such trial . . ." after trial has commenced, the other parties waive a jury trial by failing to immediately request one or pay the necessary fees. (*Ibid.*) And "[t]he court may, in its discretion upon such terms as may be just, allow a trial by jury to be had although there has been a waiver of such a trial." (*Ibid.*)

The Legislature altered section 631's structure when it repealed and reenacted the statute in 1988, but kept intact the grant of discretion to the trial court to hold a jury trial notwithstanding a waiver. (Stats. 1988, ch. 10, § 3, pp. 38-39.)

Under the 1988 version, the right to "pick up" the jury before trial and after notice of another party's waiver was in subdivision (b).[6] (*Ibid.*) And subdivision (c) provided that, after trial has commenced, a party waives a jury trial by failing to immediately request one or pay the necessary fees after another "party who has demanded trial by jury . . . waives such trial . . . ." (*Ibid.*)

The Legislature also consolidated the grant of discretion to the trial court in a single provision at the end of section 631, providing in subdivision (d), "[t]he 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, pp. 38-39.) Though slightly reworded, this language was substantively equivalent to the Legislature's 1933 initial grant of discretion to the trial court to hold a jury trial notwithstanding a waiver. (Stats. 1933, ch. 744, § 104, pp. 1875-1876.) The same provision is now in the current form of section 631 at subdivision (g). Thus, the Legislature has not changed the substance of the relief-from-waiver provision over the last century.

---

[6] Subdivision (b) included the five-day period in which adverse parties could demand a jury after receiving notice of another party's waiver, but eliminated the requirement for the clerk to give adverse parties 10 days' notice of that waiver. (Stats. 1988, ch. 10, § 3, pp. 38-39.)

3. The Legislature has accepted numerous judicial decisions requiring a showing of prejudice to deny relief from waiver.

ASCDC fails to appreciate the consistency of the relief-from-waiver provision, all while numerous courts over decades have held that "'[t]he denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial.' [Citations.]" (*Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; see also *Bishop*, *supra*, 101 Cal.App.3d at p. 825; *Byram*, *supra*, 74 Cal.App.3d at p. 654.) Likewise, "a motion to be relieved of a jury waiver should be granted *unless, and except*, where granting such a motion would work serious hardship to the objecting party." (*Boal*, *supra*, 165 Cal.App.3d at p. 809, italics added.)

Notably, *Boal, Simmons, Bishop*, and *Byram* were decided before the Legislature repealed and reenacted section 631 in 1988. "[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734; see also *Therolf v. Superior Court of Madera County* (2022) 80 Cal.App.5th 308, 335 [similar].) Likewise, "when the Legislature *reenacts* [a] statute without changing the

interpretation given to the statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1254, italics added.) In reenacting section 631, the Legislature replicated the grant of discretion with language equivalent to that used in 1933 (Stats. 1933, ch. 744, § 104, pp. 1875-1876), but did not disapprove the well-established requirement of prejudice to the opposing party or the court before denial of relief from a jury trial waiver. (Stats. 1988, ch. 10, § 3, pp. 38-39.)

Even after the Legislature reenacted section 631 in 1988, appellate courts affirmed the "'crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citation.] A trial court abuses its discretion as a matter of law when ". . . relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver. [Citations.]" [Citations.]' [Citation.]" (*Tesoro*, *supra*, 200 Cal.App.4th at p. 638; see also *Wharton*, *supra*, 231 Cal.App.3d at p. 104.) Indeed, "the trial court should grant a motion to be relieved of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citation.]" (*Gann*, *supra*, 231 Cal.App.3d at p. 1703; see also *Mackovska*, *supra*, 40 Cal.App.5th at p. 10.) These authorities, reflecting decades of case law, demonstrate that, despite ASCDC's quip that TriCoast

"relies primarily on *Mackovska*" (ACB 26), *Mackovska* is not an outlier. Instead, "it 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." (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810.)

Moreover, since reenacting section 631 in 1988, the Legislature has amended the statute numerous times, but has not disapproved the aforementioned authorities. (See Stats. 2000, ch. 127, § 2, at p. 1734; Stats. 2002, ch. 806, § 15, p. 5416; Stats. 2012, ch. 41, § 3, pp. 12-13; Stats. 2012, ch. 342, § 1, at pp. 2-3.) "[T]he Legislature is presumed to be aware of existing judicial interpretations when it amends a statute" and "if the Legislature intended to overrule the existing judicial interpretation . . . it would have done so explicitly." (*In re Joseph T., Jr.* (2008) 163 Cal.App.4th 787, 795-796.) Accordingly, ASCDC's observation that "all but one of the cases cited by *Mackovska* predate the 2002 and 2012 legislative changes to section 631" (ACB 27) serves only to demonstrate that the Legislature could have adopted the rule advanced by ASCDC, yet declined to do so.[7]

---

[7] In claiming TriCoast is "read[ing] a prejudice requirement into the statute" (ACB 22), ASCDC overlooks that appellate courts similarly have interpreted statutes in other contexts. For instance, appellate courts have relied on prejudice to other parties to deny statutory intervention even though the word prejudice does not appear in section 387. (See, e.g., *Crestwood*

4. ASCDC cannot discredit the prejudice requirement through obfuscation.

ASCDC attempts to further discredit *Mackovska* by claiming that "each of the cases" cited therein involved "no demonstrated prejudice to the opposing party."[8] (ACB 26.) ASCDC's discussion of the cases in *Mackovska* (see ACB 26-29) obscures rather than illuminates. That is because ASCDC omits *Boal*, *supra*, 165 Cal.App.3d 806, and hardly mentions *Gann*, *supra*, 231 Cal.App.3d 1698, which *Mackovska* explained show that "[t]he trial court should grant a motion for relief of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citations.]" (*Mackovska*, *supra*, 40 Cal.App.5th at p. 10.) ASCDC also fails to

---

Behavioral Health, Inc. v. Lacy (2021) 70 Cal.App.5th 560, 574; *Truck Ins. Exchange v. Superior Court* (*Transco Syndicate No. 1*) (1997) 60 Cal.App.4th 342, 351.) Similarly, numerous "factors . . . must be weighed by the court" on a motion to dismiss for absence of a convenient forum, even though such factors are not listed in section 410.30. (See, e.g., *Jagger v. Superior Court* (1979) 96 Cal.App.3d 579, 586; *International Harvester Company v. Superior Court* (1979) 95 Cal.App.3d 652, 656.)

[8] Far from being a reason to distinguish *Mackovska,* the absence of "demonstrated prejudice" to Fonnegra here is a critical parallel with *Mackovska* as well as the authorities cited by it. (*TriCoast*, *supra*, 74 Cal.App.5th at p. 254 (dis. opn. of Ashmann-Gerst, J.) ["Simply put, Fonnegra has not demonstrated any prejudice to him had a jury trial been held"].)

discuss *Simmons*, *supra*, 123 Cal.App.3d 833, and *Bishop*, *supra*, 101 Cal.App.3d 821, which *Mackovska* cited for the proposition that denial of a jury trial after waiver when no prejudice is shown to the opposing party or to the court is prejudicial. (*Mackovska*, at p. 13.)

ASCDC also states, without support, that the "other cases" TriCoast cites "do not involve a situation where one party . . . *knowingly* elected not to post jury fees or request a jury until the morning of trial." (ACB 28.) ASCDC asserts, absent citation, that "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." (ACB 33.) ASCDC cites only the *TriCoast* majority opinion to support its contention that TriCoast's waiver was part of a deliberate plan to have a jury trial without paying the fees. (See ACB 28.)

Not even the *TriCoast* majority opinion, however, supports ASCDC's argument. The *TriCoast* majority found TriCoast's waiver "was intentional, not the result of any misreading of the statute or court rules." (*TriCoast*, *supra*, 74 Cal.App.5th at p. 250.) This conclusion cannot be reconciled with TriCoast's explanation, as noted by the majority, that TriCoast "relied on Fonnegra's jury demand and posting of jury fees." (*Id.* at p. 248.) The *TriCoast* majority wrongly dismissed TriCoast's averment of a mistake, stating TriCoast's explanation that it was "duped into believing that a jury trial would occur . . . ignores the statutory

requirement that TriCoast, and not Fonnegra, timely pay the $150 jury fee." (*Id.* at p. 250.) The *TriCoast* majority, therefore, penalized TriCoast for unintentionally failing to make a necessary payment, while paradoxically deeming the waiver intentional. (*Ibid.*) Such penalty was improper.

In any event, this Court need not endorse an artificial distinction between deliberate and inadvertent waivers. According to ASCDC, TriCoast relies solely on *Duran v. Pickwick Stages System* (1934) 140 Cal.App. 103 (*Duran*) to show "there is no distinction between intentional and unintentional waivers of a jury[.]" (ACB 27.) TriCoast actually cited *Duran* for the proposition that the purpose of section 631 is to "grant the parties the right to waive a jury trial and not to impose conditions constituting an irrevocable waiver" (*Duran*, at p. 109; see RBOM 17), and ASCDC uses *Duran* for the same purpose (ACB 15). Regardless, ASCDC omits TriCoast's discussion of *Bishop*, *supra*, 101 Cal.App.3d 821. (See RBOM 16, 32.)

In *Bishop*, the appellants "filed an at-issue memorandum . . . in which they answered 'no' to the question of whether a jury trial was requested." (*Bishop*, *supra*, 101 Cal.App.3d at p. 823.) The respondent, however, requested a jury trial in his own filing. (*Ibid.*) Like Fonnegra, the respondent waived the jury on the day of trial. (*Ibid.*) Like TriCoast, the appellants "immediately requested" a jury trial, but the trial court declined and ultimately found for the respondent. (*Ibid.*)

The appellate court concluded the denial of relief was an abuse of discretion because "[t]he 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.) And, like Fonnegra, the "respondent failed to articulate any . . . prejudice" as "no reasonable justification for denial of the jury trial request appear[ed] from the record." (*Ibid*.) *Bishop*'s holding in the context of an express waiver, which did not occur here, underscores the lack of distinction between deliberate and inadvertent waivers. (*Id*. at pp. 824-825.) ASCDC's urging of such a distinction, but failure to address *Bishop* and its similar yet more extreme facts than those here, demonstrates the fallacy in its distinction.[9]

---

[9] ASCDC's distinction between advertent and inadvertent waivers also is contrary to the statutory structure. Under section 631, a jury trial "may only be waived" in one of six enumerated ways. (§ 631 subds. (a) & (f); *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956 (*Grafton Partners*) [waiver of jury 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

In sum, ASCDC's reliance on the absence of the word "prejudice" in section 631 ignores the case law long recognizing a prejudice requirement and the Legislature's implicit acceptance of the decades of opinions. Those authorities do not deny the trial court's discretion, but define its outer limits and guide the analysis, allowing for consideration of the factual peculiarities of a given case with the "crucial focus" on whether granting relief from waiver would prejudice the opposing party or the court. (*Tesoro*, *supra*, 200 Cal.App.4th at p. 638; *Wharton*, *supra*, 231 Cal.App.3d at p. 104.) Here, the *TriCoast* majority wrongly endorsed the trial court's failure to analyze – let alone decide – whether Fonnegra or the court would have suffered prejudice from granting relief to TriCoast. (2 RT 1-2; *TriCoast*, *supra*, 74 Cal.App.5th at pp. 248-250.)

---

consent, which by definition must be intentional. (*Id*. at subd. (f)(2) & (3).) Section 631 thus does not distinguish between inadvertent and intentional waivers.

B. Legislative History Does Not Indicate an Intent to Discourage or Prohibit Relief From a Jury Trial Waiver As Requested Here.

1. The Legislature addressed gamesmanship in the depositing of fees.

ASCDC next argues that section 631's legislative history supports the *TriCoast* majority opinion by reflecting the Legislature's "deliberate decision" to make it "more difficult for parties like TriCoast" to obtain relief from waiver. (ACB 13.) According to ASCDC, the Legislature's 2002 amendments to section 631 were "designed to reduce or eliminate gamesmanship" in the depositing of jury fees. (ACB 24.) ASCDC's reliance on the legislative history does not advance its position, but rather supports TriCoast's arguments.

Section 631, subdivision (g), provides "[t]he 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." The prior 1988 version of section 631 contained an identical provision, as well as a separate provision permitting parties to "pick-up" the jury before trial after an adverse party's waiver. (Former § 631, subds. (b) & (d); Stats. 1988, ch. 10, § 3, pp. 38-39.) That "pick up" provision granted litigants five days after notice of an adverse party's waiver to serve a jury trial demand and deposit any fees due, thereby "picking up" the jury. (*Ibid.*) Thus, the 1988 statute both

(1) gave the trial court the ability to grant relief from waiver "in its discretion upon just terms" and (2) separately afforded litigants an unfettered right to "pick up" the jury within five days after an adverse party's waiver. (*Ibid.*)

The Legislature found the pick-up provision "result[ed] in gamesmanship over the deposit of fees thereby creating problems with respect to jury waiver." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.) The Legislature's concern about gamesmanship was two-fold. "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." (*Ibid.*) Second, "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." (*Ibid.*)

In 2002, the Legislature made three substantive changes 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.) First, the Legislature "require[d] all parties demanding a jury to deposit jury fees at

least 25 days before trial, thereby reducing or eliminating gamesmanship" in the deposit of jury fees. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2; Stats. 2002, ch. 806, § 15, p. 5146.) Next, it eliminated the "pick-up" provision. (Stats. 2002, ch. 806, § 15, p. 5146.) Last, the Legislature added the current form of subdivision (a), memorializing the constitutional right to a jury trial "shall be preserved to the parties inviolate" and the right to a jury "may only be waived" in the six ways enumerated in section 631. (*Ibid*.) Through these amendments, the Legislature kept intact the trial court's discretion to grant relief from waiver.

In 2012, the Legislature again amended section 631 to require the $150 advance jury deposit be paid "on or before the initial case management conference" instead of 25 days before trial. (Former § 631, subd. (c); Stats. 2012, ch. 41, § 3, p. 12.) The Legislature also amended the statute to require at least one party on each side of a case, but not all parties, to pay the advance jury deposit. (Former § 631, subd. (b); Stats. 2012, ch. 342, § 1, p. 2.) Finally, the Legislature explained the $150 advance jury deposit is intended to "offset the costs to the state of providing juries in civil cases." (*Ibid*.) Again, the trial court's discretion to grant relief from waiver remained constant.

2. The Legislature did not intend to prevent relief from waiver absent prejudice to the opposing party or the court.

ASCDC contends the Legislature's 2002 amendments "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." (ACB 25.) This reflects, says ASCDC, a legislative desire to "prevent gamesmanship and to ensure all fees are properly paid." (*Ibid.*)

Even if ASCDC's general statements about the Legislature's intent in 2002 are correct, its conclusion that such intent impacts this case is faulty. Contrary to ASCDC's contention, the legislative history does not indicate the current version of section 631 was written "to avoid the last minute demand for a jury trial like the one made by TriCoast in this case." (ACB 13) The Legislature's elimination of a litigant's unfettered right to "pick up" the jury was accompanied by a concurrent decision not to alter the scope of the trial court's authority to relieve a party from its waiver "in its discretion upon just terms." (Stats. 2002, ch. 806, § 15, p. 5146; see § 631, subd. (g).) Thus, elimination of an absolute right to "pick up" the jury does not signal legislative disapproval of any and all requests for a jury made on the eve of trial. Rather, the Legislature intended trial courts to weigh such requests against any prejudice to the

opposing party or the court. In effect, the Legislature converted the unfettered right to "pick up" the jury before trial into one that is limited by considerations of prejudice to the opposing party or the court.

Moreover, even if the Legislature sought to reduce gamesmanship in the posting of fees, it did not suggest an intent to abandon the well-established principle 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.' [Citations.]" (*Mackovska, supra,* 40 Cal.App.5th at p. 10; see also *Gann*, *supra*, 231 Cal.App.3d at pp. 1703-1704; *Boal*, *supra,* 165 Cal.App.3d at p. 809.) Indeed, many of the Legislature's concerns with gamesmanship speak more to Fonnegra's conduct in waiving a jury on the morning of the scheduled jury trial rather than TriCoast's actions. Although the Legislature did not use the word prejudice, its concerns with gamesmanship relate to prejudice to the opposing party or court from a grant of relief from a jury trial waiver.

First, the Legislature sought to reduce the hardship on parties with respect to their trial preparation, noting that oftentimes "the parties themselves are unclear whether there will actually be a jury trial" and last-minute changes can adversely "affect their trial preparation." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.) That uncertainty occurred here.

In the two years leading up to trial, the trial court encouraged Fonnegra to waive the jury, but he was unwilling to do so.[10] (CT 161.) TriCoast thus prepared for a jury trial, tailoring its opening statements, exhibits, and witnesses for a jury trial. (*Ibid*.) 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." (*Ibid*.) For this reason, TriCoast was adversely affected by Fonnegra's last-minute decision to waive the jury and explained that it had "prepared for a jury trial." (2 RT 2; CT 161.)

Once TriCoast sought relief from waiver, the trial court should have considered the "timeliness of [TriCoast's] request and prejudice to the litigants." (*Gann*, *supra*, 231 Cal.App.3d at p. 1704; see also *McIntosh*, *supra*, 151 Cal.App.3d at p. 363; *March v. Pettis* (1977) 66 Cal.App.3d 473, 477, 480 (*March*).) Instead, the trial court dismissed TriCoast's request as untimely

---

[10] On TriCoast's motion for new trial, the trial court disputed that it had encouraged Fonnegra's waiver, maintaining it denied TriCoast's jury trial request because TriCoast had not posted the fees and ignoring TriCoast's immediate offer to do so before trial. (4 RT 605-605.) In any event, the numerous references to a jury trial in the trial court's docket demonstrate the parties and the court expected one for four years, because of Fonnegra's jury demand. (CT 4-20.) Even on the second day of trial, Fonnegra's counsel candidly stated "[t]his case was, for all intents and purposes, until Monday a jury trial." (3 RT 302.)

(2 RT 2; CT 162), which the *TriCoast* majority accepted on appeal. (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 248-249.) As a result, TriCoast was "faced with . . . proceeding to trial without a jury after having prepared for a jury trial[,]" a predicament the Legislature had tried to avoid. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.)

Second, the Legislature sought to reduce hardship on the trial court from last-minute changes to the trial plan and schedule. The Legislature observed that, even on the eve of trial, "the court may not know whether a trial will by a jury." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.) The consequent "uncertainty can result in calendar management problems, delays of trials, and pretrial litigation over whether a jury has been waived." (*Ibid*.) Given this legislative concern, "[i]n exercising its discretion, the trial court may consider delay in rescheduling jury trial . . . ." (*Gann*, *supra*, 231 Cal.App.3d at p. 1704; see also *McIntosh*, *supra*, 151 Cal.App.3d at p. 363; *March, supra,* 66 Cal.App.3d at p. 480.) But, although ASCDC claims the Legislature amended section 631 to "discourage last minute requests for jury trials" (ACB 15), here, Fonnegra's decision to waive the jury on the morning of trial – not TriCoast's request for relief – altered the trial plan at the final hour.

Indeed, Fonnegra – just as the matter was called for a jury trial – announced that he had decided to waive the jury "over the weekend." (2 RT 1.) As Justice Ashmann-Gerst explained in dissent, "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.'" (*TriCoast*, *supra*, 74 Cal.App.5th at p. 254 (dis. opn. of Ashmann-Gerst, J.).) "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." (*Ibid*.)

Third, the express purpose of the $150 advance jury deposit is to "offset the costs to the state of providing juries in civil cases." (§ 631, subd. (b).) Thus, "[i]n exercising its discretion, the trial court may consider . . . lack of funds." (*Gann*, *supra*, 231 Cal.App.3d at p. 1704; see also *McIntosh*, *supra*, 151 Cal.App.3d at p. 363; *March, supra,* 66 Cal.App.3d at p. 480.)

Here, TriCoast offered to post the fees immediately after Fonnegra waived the jury on the morning of trial. (2 RT 1; CT 162.) No risk, therefore, existed of prejudice to the court – or the state – from nonpayment. The trial court, however, rejected TriCoast's offer to post fees, stating "[w]hen the fees haven't been paid, and you haven't paid them, the party that did pay them has waived the jury trial, so that's it." (2 RT 2; see also 4 RT 604-605.)

But failure to pay the advance deposit should not be cause to penalize a party who is ready to rectify a missed payment unless some adverse consequence would befall the opposing party or court. Such a punitive rule has no place here given the constitutional right to a jury trial. (See *Grafton Partners*, *supra*, 36 Cal.4th at p. 956 ["right to trial by jury is so important that it must be 'zealously guarded'"]; *Monster*, *supra*, 12 Cal.App.5th at p. 1225 ["'jury as a fact-finding body occupies so firm and important a place in our system of jurisprudence that any interference with its function in this respect must be examined with the utmost care'"].)

Indeed, ASCDC ignores the record in suggesting TriCoast adopted a "wait-and-see approach" as to its deposit of jury fees. (ACB 19, 24-25.) It also fails to recognize the trial court's denial of relief to TriCoast allows the gamesmanship concerning to the Legislature to flourish at the expense of TriCoast's constitutional jury trial right. As Justice Ashmann-Gerst explained in dissent, "[u]p until the morning of trial, it appeared that the matter was going to proceed by jury. Thus, TriCoast expended considerable resources preparing for that jury trial. Only after the matter was called, did Fonnegra waive a jury and move to proceed by way of bench trial. And when the trial court indicated its inclination to grant Fonnegra's motion, TriCoast objected and offered to pay jury fees that day. Based on these facts, '[t]here is no suggestion in the record [that TriCoast] was playing games with [its] right to

a jury trial, and [Fonnegra] does not argue [that it] was.' [Citation.]" (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 254-255 (dis. opn. of Ashmann-Gerst, J.).) And, contrary to ASCDC's arguments, the legislative history of section 631 is devoid of "an affirmative intent to make relief from waiver more difficult in these situations." (ACB 28.)

At bottom, ASCDC's contention that TriCoast engaged in gamesmanship and took a "wait-and-see approach" is little more than a talismanic suggestion that TriCoast deliberately "gambled" with its right to a jury trial simply to save a $150 deposit. (ACB 31.) Such stingy games of "wait-and-see" might have been concerning when litigants had an "absolute right to 'pick up' the jury" under the prior version of section 631 (ACB 13), and "if no other party has deposited fees, only then will a party do so." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.) But no such concerns were at issue in this case under the current version of the statute.

Here, TriCoast prepared for a jury trial because, in the two years leading up to trial, the trial court encouraged Fonnegra to waive the jury, but he was not "willing to do so." (CT 161.) After "expend[ing] considerable resources preparing for that jury trial" (*TriCoast*, *supra*, 74 Cal.App.5th at pp. 254 (dis. opn. of Ashmann-Gerst, J.)), tailoring its opening statements, exhibits, and witnesses for a jury (CT 161), it would make no sense for

TriCoast to "gamble" the constitutional right to a jury only to save a mere $150. This reality belies ASCDC's hollow suggestion that TriCoast "gambled that the defense would pay the fees" or "suddenly changed its mind." (ACB 31.) Forcing TriCoast to "proceed[] to trial without a jury after having prepared for a jury trial" – as a result of Fonnegra's waiver at the final hour – was the opposite of the Legislature's intent. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3027 (2001–2002 Reg. Sess.) as amended Apr. 18, 2002, p. 2.) Contrary to ASCDC's urging, this Court should not sanction that result.

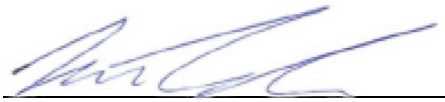
CONCLUSION

For the reasons stated in this brief and TriCoast's briefs on the merits, this Court should reverse the *TriCoast* majority's opinion that (1) actual prejudice must be demonstrated on appeal to obtain reversal of a judgment when challenging the denial of relief from a jury trial waiver; and (2) prejudice to the opposing party or court is merely one factor that courts may consider in deciding whether to grant relief from a jury trial waiver. This Court should direct the Court of Appeal to reverse the judgment and remand the matter to the trial court for a jury trial.

DATED: November 10, 2022

CONNETTE LAW OFFICE
Michael T. Connette

BENEDON & SERLIN, LLP
Judith E. Posner
Kian Tamaddoni



Kian Tamaddoni

Attorneys for Plaintiff and Appellant
TRICOAST BUILDERS, INC.

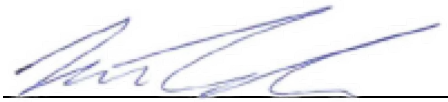
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rules 8.204 and 8.520, I certify that the total word count ofthis Answer to Amicus Curiae Brief of Association of Southern California Defense Counsel, excluding covers, table of contents, table of authorities, and certificate of compliance, is 10,717.

DATED: November 10, 2022

CONNETTE LAW OFFICE
Michael T. Connette

BENEDON & SERLIN, LLP
Judith E. Posner
Kian Tamaddoni



Kian Tamaddoni

Attorneys for Plaintiff and Appellant
TRICOAST BUILDERS, INC.

PROOF OF SERVICE
(C.C.P. § 1013a)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of eighteen (18) years and not a party to the within action. I am a resident of or employed in the county where the mailing took place. My business address is 22708 Mariano Street, Woodland Hills, California 91367-6128.

On November 10, 2022, I served the **ANSWER TO AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL,** by enclosing a true and correct copy thereof in a sealed envelope as follows:

[X] **BY FIRST-CLASS U.S. MAIL:** I enclosed the document in a sealed envelope/package addressed to each addressee listed below and placed it for mailing, following our ordinary business practices. I am readily familiar with the mailing practice of my place of employment in respect to the collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business with first-class postage fully prepaid.

The envelopes were addressed and mailed to all interested parties as follows:

Hon. Melvin D. Sandvig *Trial Court*
Los Angeles County Superior Court
North Valley District - Chatsworth
9425 Penfield Avenue, Department F47
Chatsworth, California 91311
(818) 407-2247

[X] PROOF OF SERVICE BY ELECTRONIC TRANSMISSION to Court of Appeal, California Supreme Court, using TrueFiling (https://www.truefiling.com). All interested parties listed below, registered with TrueFiling, will be electronically served through TrueFiling. Pursuant to California

Rules of Court, rule 8.204, bookmarks have been inserted which correspond to each: 1) topic heading in a brief, 2) section heading in a motion or original proceeding, and 3) exhibit page and a description of each exhibit in an appendix.

Andrea L. Russi [SBN 189543] Horvitz & Levy LLP 505 Sansome Street, Suite 375 San Francisco, California 94111-3175 (415) 462-5600 (tel) (844) 497-6592 (fax) arussi@horvitzlevy.com	*Counsel for Amicus Curiae Association of Southern California Defense Counsel*
Steven S. Fleischman [SBN 169990] Horvitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, California 91505-4681 (818) 995-0800 (tel) (844) 497-6592 (fax) sfleischman@horvitzlevy.com	*Counsel for Amicus Curiae Association of Southern California Defense Counsel*
Eric Bensamochan [SBN 255482] The Bensamochan Law Firm Inc. 9025 Wilshire Boulevard, Suite 215 Beverly Hills, California 90211-1825 (818) 574-5740 (tel) (818) 961-0138 (fax) eric@eblawfirm.us	*Counsel for Defendant and Respondent Nathaniel Fonnegra*
Michael T. Connette [SBN 180609] Connette Law Office 201 Santa Monica Boulevard Suite 300 Santa Monica, California 90401-2224 (424) 777-8800 (tel) (424) 777-8840 (fax) mike@connettelaw.com	*Co-Counsel for Plaintiff and Appellant TriCoast Builders, Inc.*
Clerk, California Court of Appeal Second Appellate District Ronald Reagan State Building 300 South Spring Street, Division Two 2nd Floor, North Tower Los Angeles, California 90013	*Appellate Court*

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

Executed on November 10, 2022, at Woodland Hills, California.

/s/ Tina Lara
Tina Lara

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TRICOAST BUILDERS v. FONNEGRA**
Case Number: **S273368**
Lower Court Case Number: **B303300**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kian@benedonserlin.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S273368_Answer to Amicus Curiae Brief of ASCDC_TriCoast Builders, Inc

Service Recipients:

Person Served	Email Address	Type	Date / Time
Judith Posner Benedon & Serlin, LLP 169559	judy@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Gerald Serlin Benedon & Serlin LLP 123421	gerald@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Eric Bensamochan Eric Bensamochan, Esq. 255482	eric@eblawfirm.us	e-Serve	11/10/2022 7:27:31 PM
Andrea Russi Horvitz & Levy LLP 189543	arussi@horvitzlevy.com	e-Serve	11/10/2022 7:27:31 PM
Kian Tamaddoni Benedon & Serlin, LLP 312624	kian@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Susan Donnelly Benedon & Serlin, LLP	admin@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Brandon White Benedon & Serlin, LLP	brandon@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Michael Connette Connette Law Office 180609	mike@connettelaw.com	e-Serve	11/10/2022 7:27:31 PM
Tina Lara Benedon & Serlin, LLP	accounts@benedonserlin.com	e-Serve	11/10/2022 7:27:31 PM
Steven Fleischman Horvitz & Levy LLP 169990	sfleischman@horvitzlevy.com	e-Serve	11/10/2022 7:27:31 PM
Jill Gonzales	jgonzales@horvitzlevy.com	e-Serve	11/10/2022 7:27:31 PM

Horvitz & Levy LLP			

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/10/2022

Date

/s/Tina Lara

Signature

Tamaddoni, Kian (312624)

Last Name, First Name (PNum)

Benedon & Serlin, LLP

Law Firm