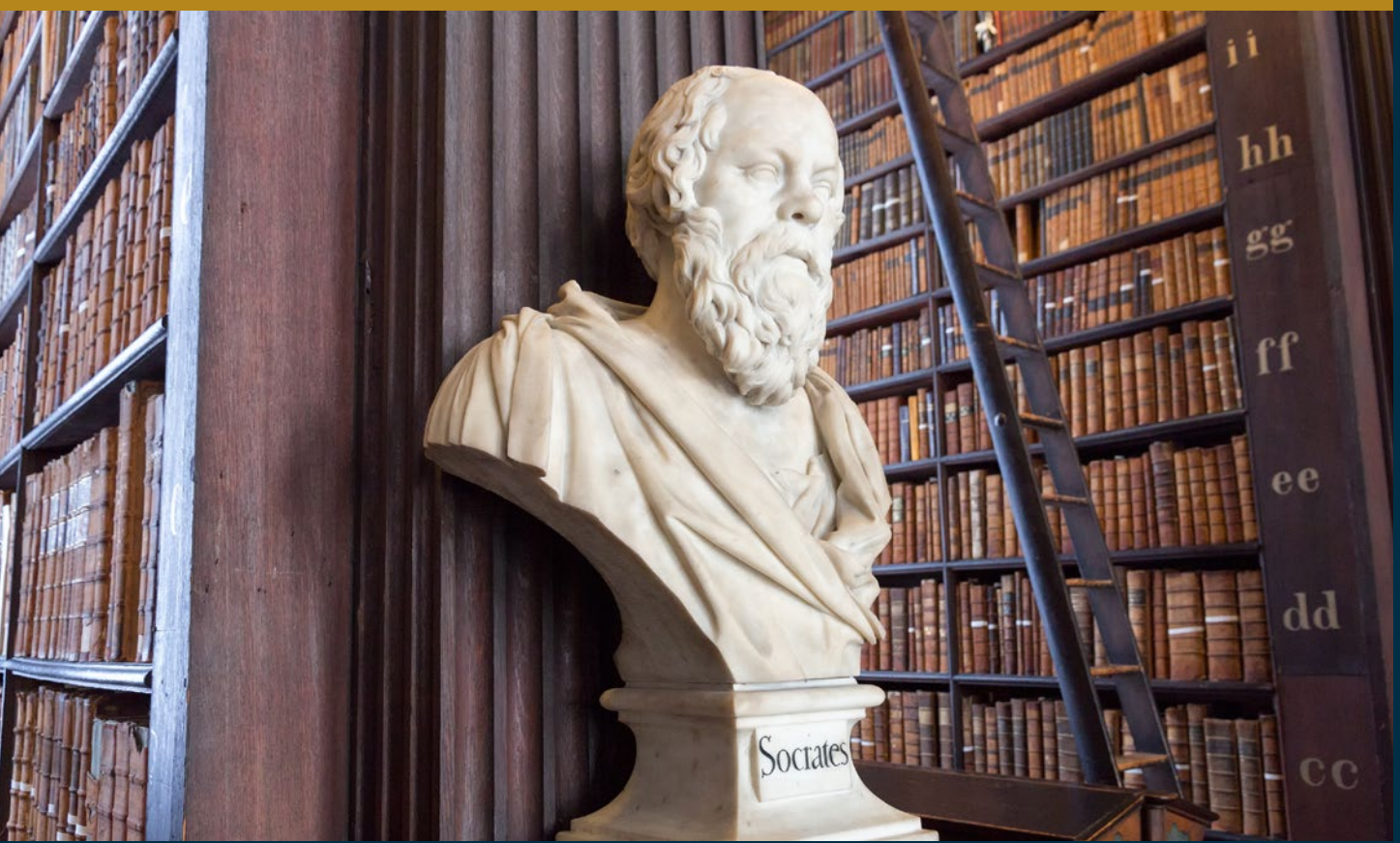
California LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

VOLUME 37 | ISSUE 2 AUGUST 2024



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THE SHRINKING SHELTER OF RELIEF FROM JURY TRIAL WAIVERS

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The constitutional right to a jury in California is enshrined in the state Constitution as an "inviolate right." (Cal. Const., art. I, § 16.) It is a "basic and fundamental part of our system of jurisprudence." (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.) Traditionally, courts have deemed the right "so important that it must be 'zealously guarded' … " (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.) Despite its prominence in our judicial system, the right to a jury trial can be easily lost. Civil litigants in California can waive the jury trial right in a number of ways, either intentionally or inadvertently, and often when it might seem unfair and contrary to a basic sense of justice. This article explores the statutory scheme governing jury trial waivers, available procedural remedies, the challenges for obtaining relief from waiver following the Supreme Court's 2024 decision in *TriCoast Builders, Inc. v. Fonnegra* (2024) 15 Cal.5th 766, and possible avenues for litigants to safeguard their jury trial right.

THE LEGISLATIVE PRONOUNCEMENT ON WAIVING A JURY TRIAL AND GETTING ONE BACK

The California Constitution accords every civil litigant, in the first instance, the right to a trial by jury. (Cal. Const., art. I, § 16.) The Legislature has codified this right in Code of Civil Procedure section 631, which states the right to a trial by jury as declared in our state's Constitution "shall be preserved to the parties inviolate." (Code Civ. Proc., § 631, subd. (a).) The same statute, however, provides for the waiver of the right to a jury in any of six enumerated ways. (*Id.*, subd. (f).)

The specified ways a jury can be waived, either intentionally or by mistake, are a mixture of tactical maneuvers and potentially disastrous pitfalls. Two of the enumerated methods are written and oral consent. (Code Civ. Proc., § 631, subd. (f)(2) & (3).) Thus, parties can affirmatively waive their right to a jury and proceed with a bench trial if, in their estimation, doing so would be advantageous. The other four causes of waiver, however, are omissions rather than affirmative acts. These are the failure to appear at trial, announce a jury is required, post a jury deposit, or post daily jury fees. (*Id.*, subd. (f)(1), (4), (5) & (6).) A party's failure to do any of these acts will effectuate a waiver of the right to a jury. Although sometimes such omissions might be deliberate, they also could occur through inadvertence and thus present a dangerous trap for the unwary.

When a right to a jury has been waived pursuant to section 631, a party can move, under subdivision (g), for relief from that waiver. This "relief-from-waiver" provision states that 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."

(Code Civ. Proc., § 631, subd. (g)) An "escape hatch," therefore, is available to parties who mistakenly waive their right to a jury, at least in theory. By its terms, however, this "relief-from-waiver" provision gives no guidance — beyond "just terms" — to inform a trial court of the factors it should consider when deciding whether to grant relief from waiver. And it does not distinguish between waivers resulting from affirmative acts versus omissions, or between intentional omissions versus those that are inadvertent. It simply vests the trial court with discretion to grant relief, or not.

THE OLD GUARDRAILS FROM THE CASE AUTHORITY THAT SAFEGUARDED THE RIGHT TO A JURY TRIAL

Despite the open-ended nature of the "relief-from-waiver" provision, the Supreme Court, for decades and decades, counseled that, to safeguard the constitutional right, doubts in construction should be resolved in favor of holding a jury trial. (See, e.g., *Grafton Partners*, *supra*, 36 Cal.4th at p. 956; *Loranger v. Nadeau* (1932) 215 Cal. 362, 368.) Appellate courts gave effect to this principal by requiring relief from a waiver, as well as characterizing the denial of it as an abuse of discretion, absent prejudice to the opposing party or the court itself. (See, e.g., *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 811; *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1703-1704; *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 602; *Boal v. Price Waterhouse & Co.* (1985) 165 Cal. App.3d 806, 809-810; *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 838-839; *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 825; *Byram*, *supra*, 74 Cal. App.3d at p. 654; *Cowlin v. Pringle* (1941) 46 Cal.App.2d 472, 476.)

Indeed, considerations of prejudice to the opposing party or the court were the analytical touchstone on requests for relief from a jury trial waiver. As described in a more contemporary decision, "'[w]here the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citation.] A trial court abuses its discretion as a matter of law when "relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver."'" (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638.) The importance of these guardrails was most recently articulated in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1, 10, when the appellate court explained trial courts "should grant a motion for relief of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citations.] When there is doubt about whether to grant relief from a jury trial waiver, the court must resolve that doubt in favor of the party seeking a jury trial." Thus, numerous appellate decisions emphasized that considerations of prejudice to the opposing party or the court were paramount, sought to define the outer limits of discretion to deny relief, and provided guidance for the trial courts.

Despite the guardrails defined by case authority, trial courts would not always follow them, and the denial of relief from a jury trial waiver became an oft-raised appellate issue. Generally, an appellant would present the issue after losing the ensuing bench trial. Such appeals, therefore, would stem from a final judgment, bringing up the bedrock appellate principle of harmless error. That principle, embedded in the Constitution, provides that "[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, perhaps more colloquially known as the harmless error rule, prohibits a reviewing court from setting aside a judgment due to trial court error unless it also finds prejudice to the complaining party. (See *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.) Typically, this requires an appellant to show "there is a reasonable probability that in the absence of the error he or she would have obtained a more favorable result." (*People v. Anzalone* (2013) 56 Cal.4th 545, 553.) As one court has stated, harmless error analysis essentially "require[s] 'a speculative inquiry into what might have occurred in an alternate universe.'" (*Severson & Werson, P.C. v. Sepehry-Fard* (2019) 37 Cal. App.5th 938, 951.)

The harmless error rule can present a substantial challenge for an appellant asserting the wrongful denial of relief from a jury trial waiver. How can an appellant demonstrate the absence of a jury was prejudicial to the outcome? Recognizing this conundrum, some appellate courts articulated that "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.) Courts attuned to this reality thus "recognize[d] how difficult, if

not impossible, it is to show prejudice" from the denial of a jury trial. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Accordingly, numerous appellate courts stated that the erroneous denial of relief from waiver of a jury trial is a miscarriage of justice and per se reversible without an affirmative showing of prejudice. (See, e.g., *Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839 ["'The denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial'"]; *Bishop*, *supra*, 101 Cal.App.3d at p. 825 [same]; see also *Mackovska*, *supra*, 40 Cal.App.5th at p. 17; *Boal*, *supra*, 165 Cal.App.3d at pp. 809-810; *Byram*, *supra*, 74 Cal.App.3d at p. 654; *Cowlin*, *supra*, 46 Cal.App.2d at pp. 476-477.)

These decisions employing the rule of per se reversal, and the rationale behind it, were conceptually aligned with the doctrine of structural error, even though they did not refer to it expressly. That doctrine, an exception to the harmless-error rule, essentially provides that some errors are reversible per se when their effects are immeasurable. (See, e.g., *Monier*, *supra*, 3 Cal.5th at p. 1108; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 261.)

Structural errors have been said to defy harmless error analysis because they affect the framework within which the trial proceeds, rather than simply being an error in the trial process itself. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394; *Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 849.) They "affect[] the entire conduct of the trial from beginning to end." (*Severson*, *supra*, 37 Cal.App.5th at pp. 950-951.) They thus prevent a reviewing court from "fairly determin[ing] how a trial would have been resolved if the grave error had not occurred." (*Anzalone*, *supra*, 56 Cal.4th at p. 554.) Accordingly, the quintessential character of a structural error is not the genesis or cause of the error, but a reviewing court's inability to evaluate its prejudicial effect. In this regard, the difficulty, if not impossibility, of demonstrating prejudice from the absence of a jury was recognized both when a jury had been denied in the first instance and after the denial of relief from a waiver. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) "Indeed, the consequence is the same in either instance: The court has wrongfully denied a party its constitutional right to a jury trial." (*Ibid.*)

Appellate decisions, however, did not uniformly apply a rule of automatic reversal. Some decisions required a showing of prejudice when a party, deprived of a jury, appealed from a final judgment without first seeking pretrial relief by way of a writ petition. (E.g., *Gann*, *supra*, 231 Cal.App.3d at p. 1704; *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363-364.) Most recently, a divided appellate panel relied on the absence of a writ petition as a reason to require a showing of prejudice on appeal from the denial of relief from a jury trial waiver. Given the split in the case law on the considerations for granting relief from waiver and the standard on appeal from the denial of such relief, the Supreme Court granted review of this decision and later affirmed the Court of Appeal's majority opinion. (*TriCoast*, *supra*, 15 Cal.5th 766, affg. *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal.App.5th 239.)

THE TRIAL COURT'S ELIMINATION OF GUARDRAILS IN *TRICOAST*: "WHEN FEES HAVEN'T BEEN PAID, THAT'S IT."

In the *TriCoast* decision, the Supreme Court addressed, and arguably reshaped, two facets of the prior jurisprudence on jury trial waivers: (1) the scope of a trial court's discretion in granting or denying relief from a waiver, and (2) the need on appeal to demonstrate prejudice from the denial of a jury. (*TriCoast*, *supra*, 15 Cal.5th at pp. 773-774.)

Before discussing the *TriCoast* opinion, a brief review of the facts will help illustrate the dangers that may befall parties who do not diligently preserve their right to a jury. In that case, the plaintiff waived a jury by omission: failing to demand a jury or post its fees. (*TriCoast*, *supra*, 15 Cal.5th at p. 775.) The plaintiff nonetheless prepared for a jury trial because the defendant had demanded one. (*Ibid.*) Despite four years of pretrial proceedings, all geared toward a jury trial, the defendant expressly waived the jury on the morning a jury trial was set to begin. (*Ibid.*)

The plaintiff objected that defendant's waiver on the morning of trial was "unfair," explained that it had prepared for a jury trial, and offered to post its fees that day. (*TriCoast*, *supra*, 15 Cal.5th at p. 775.) In response, the defendant did not suggest it would be prejudiced by a jury trial. (*Ibid.*) And the trial court, which had expected to hold a jury trial at the start of the day's proceedings and called the matter for a jury trial, did not suggest it would be prejudiced either. Nevertheless, the trial court denied the plaintiff's oral motion for relief on the basis that it was untimely. The trial court explained, "'[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.'" (*Ibid.*)

The trial court stated plaintiff could file a writ petition, even though it intended to commence trial that morning. (*TriCoast*, *supra*, 15 Cal.5th at p. 775.) The plaintiff did not file a writ petition, but proceeded to trial as directed, and the trial court ultimately ruled in favor of the defendant. (*Ibid*.) The trial court then denied the plaintiff's new trial motion, despite plaintiff's explanation that it had been disadvantaged because it "'tailor[ed] its opening statement, exhibits, witnesses, and presentation for a jury.'" (*Ibid*.)

THE SUPREME COURT'S DETERMINATION THAT TRIAL COURTS CAN DENY RELIEF FROM WAIVER FOR WHATEVER REASON MAY BE "JUST"

In addressing the scope of a trial court's discretion to grant or deny relief, the Supreme Court, held that the "open-ended grant of discretion" in section 631, subdivision (g), does not require courts to "narrow their focus to any single factor" but "should consider all factors relevant to whether granting relief ... would be 'just.'" (*TriCoast*, *supra*, 15 Cal.5th at p. 779.) Such factors may include the "timeliness of the request," a party's "willingness to comply" with the fee requirements, or the "reasons for seeking relief." (*Id*. at p. 783.) The court also observed that trial courts can consider if the request for relief "simply reflects a belated change of heart about trial tactics," which, ironically, appeared to motivate the defendant to waive the jury on the morning of trial, thus prompting the plaintiff, seemingly caught off-guard, to seek relief from its own waiver. (See *id*. at pp. 775, 780.) And it further noted courts can consider if a request for relief "is being used as a 'pretext to obtain continuances and thus trifle with justice ... '" (*Id*. at p. 780.) In light of these factors, which the court noted was not an "exhaustive list," it appears that trial courts can now deny relief on virtually any ground. (*Id*. at p. 783.) Although once constrained by the potential for prejudice to the opposing party or the court, trial courts now have latitude to deny relief simply because they might deem the "reasons supporting the request" for relief are not "just." (*Id*. at pp. 779-780.)

In attempting to fashion a workable "rule" to guide lower courts, the court stated that when a party "has timely given notice" of its desire for a jury, but then loses the right "because of technical noncompliance," the "lack of hardship to the other parties or the court is generally controlling, absent other factors that weigh against relief." (*TriCoast*, *supra*, 15 Cal.5th at p. 782.) Accordingly, "technical noncompliance" may be "forgive[n]" when a party "give[s] timely notice that a jury is demanded" and "fulfill[s] the core objective of [section 631.]" (*Id*. at p. 782.) The court thus appeared to distinguish between intentional and inadvertent waivers, even though the "relief-from-waiver" provision does not. (Code Civ. Proc., § 631, subd. (g).)

The court also took aim at prior decisions that counseled against such line drawing. Despite cases finding the denial of relief from an intentional waiver absent a showing of prejudice to the opposing party or court was an abuse of discretion, the court expressly acknowledged and disapproved those authorities. (*TriCoast*, *supra*, 15 Cal.5th at p. 781, fn. 6; see *Mackovska*, *supra*, 40 Cal.App.5th at p. 10; *Simmons*, *supra*, 123 Cal.App.3d at pp. 838-839; *Bishop*, *supra*, 101 Cal.App.3d at pp. 824-825.)

Although the court sought to distinguish between intentional and inadvertent waivers, its analysis illustrates the unpredictability that may plague attempts in the trial courts to make such distinctions when the record is unclear. For example, in *TriCoast*, the plaintiff's waiver was by omission — the failure to demand a jury or post fees — yet the opinion assumes that omission was necessarily intentional. (*TriCoast*, *supra*, 15 Cal.5th at p. 775.) The court stated the plaintiff "opted against" demanding a jury and later sought "relief from the consequences of that choice." (*Id*. at pp. 783, 790.) That statement appears to be an acceptance of the Court of Appeal's unexplained recitation that the "record indicates that [plaintiff's] decision not to pay the jury fee was intentional, not the result of any misreading of the statute or court rules." (*TriCoast Builders*, *Inc. v. Fonnegra*, *supra*, 74 Cal.App.5th at p. 250.) The plaintiff, however, maintained that it did not post fees because it believed it could rely on the defendant's jury deposit. (*Ibid*.) The Court of Appeal nevertheless chastised the plaintiff for "ignor[ing] the statutory requirement that [plaintiff], and not [defendant], timely pay the $150 jury fee," seemingly penalizing it for not understanding section 631. (*Ibid*.; see Code Civ. Proc., § 631, subd. (b) [one party "on each side" of a civil case must pay a jury deposit].) A waiver resulting from a misunderstanding of section 631 would appear, under the court's rubric, to be a "technical noncompliance" rather than a deliberate choice. (See *TriCoast*, *supra*, 15 Cal.5th at p. 782.) The court nevertheless concluded the intentional nature of the waiver was not in dispute. (*Id*. at pp. 777, 783.) The case, therefore, illustrates the opaqueness of such distinctions on a paper record, and the critical importance of clearly preserving a record for any potential appeal.

THE APPARENT REFORMULATION OF STRUCTURAL ERROR ANALYSIS

The Supreme Court's *TriCoast* decision also addressed the standard of review on appeal from a final judgment. (*TriCoast*, *supra*, 15 Cal.5th at pp. 785-791.) The court began by observing that denial of relief from a jury waiver can be challenged through both a pretrial writ petition and appeal from a final judgment. (*Id*. at pp. 785-786.) The former option, however, is generally favored for reasons of efficiency. (*Ibid*.) And, unlike writ petitions, an appeal from a final judgment also presents the question whether the appellant must confront the harmless error rule and establish not only error, but also prejudice. (*Id*. at p. 786.)

In answering the question whether prejudice must be shown, the court evaluated the denial of relief from a jury waiver under the "structural error" exception to the otherwise traditional harmless error analysis. (*TriCoast*, *supra*, 15 Cal.5th at pp. 786-788.) The court recognized that structural errors defy evaluation for harmlessness because "'it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred.'" (*Id*. at p. 787.) The court also acknowledged deprivation of a jury in the first instance, as opposed to denial of relief from a waiver, has been held per se reversible. (*Id*. at pp. 787-788.) It stated this was so because the "prejudice that results from the deprivation of the right is the sort that cannot be measured by conventional inquiry into the likely effect of the deprivation on trial outcomes." (*Ibid*.)

Although apparently recognizing the crux of the issue is whether the resulting prejudice can be measured, the court's analysis differed for denials of relief from a jury waiver. Despite acknowledging that "both roads ultimately lead to the same place, which is trial to a court rather than to a jury," the court stated the "constitutional interests at stake differ." (*TriCoast*, *supra*, 15 Cal.5th at p. 788.) In doing so, the court appeared to set aside the traditional hallmark of structural errors — whether the prejudicial effects can be measured — and instead focused on the genesis of the underlying error. In other words, the court seemed to suggest an unconstitutional denial of a jury prevents a court from measuring its effect on the ultimate outcome of a trial, but a reviewing court would not face the same challenge when the error does not violate the Constitution.

Harmless error analysis, however, "require[s] 'a speculative inquiry into what might have occurred in an alternate universe.'" (*Severson*, *supra*, 37 Cal. App.5th at p. 951.) By contrast, a "structural error requires per se reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred." (*Anzalone*, *supra*, 56 Cal.4th at p. 554.) Whether to deem an error structural should seemingly depend on whether the "effects are '"unmeasurable"' and '"def[y] analysis by 'harmless-error' standards."'" (*Sandquist*, *supra*, 1 Cal.5th at p. 261.) And constitutionality was not considered dispositive, at least not previously. (See *Anzalone*, *supra*, 56 Cal.4th at p. 554 ["it will be the rare case where a constitutional violation will not be subject to harmless error analysis"].)

As applied to the deprivation of a jury trial, the inquiry should seemingly involve untangling whether the absence of a jury affected the ultimate outcome. Distinguishing the denial of a jury in the first instance and denial of relief following a waiver, however, would seem to imply harmless-error analysis is unworkable when the error under review has a constitutional dimension, but can be employed when the error does not violate the Constitution, even if both errors would alter the trial process in the same way: a trial to the court rather than the jury. But it is not self-evident why, as a practical matter, a harmless error inquiry is more manageable when a jury is denied following a waiver, but somehow unfeasible when a jury is denied for unconstitutional reasons. The task of untangling how a trial held without a jury might have otherwise been resolved would not seem to depend, functionally, on why the jury was absent. Either way, the jury was not there. The court, however, did not attempt to answer this incongruity. (*TriCoast*, *supra*, 15 Cal.5th at pp. 786-791.)

Although the court declined to analyze the issue from a functional or practical perspective, it expressly disapproved of the functional analysis of *Mackovska*, *supra*, 40 Cal.App.5th 1. (*TriCoast*, *supra*, 15 Cal.5th at pp. 789, 791, fn. 10.) In that case, the appellate court explained that it is difficult, if not impossible, to demonstrate prejudice from the absence of a jury whether it is denied in the first instance, or only after the denial of relief from a waiver. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Accordingly, that court reasoned the wrongful denial of a jury, "however it occurred," is per se reversible because "the consequence is the same in either instance." (*Ibid*.) In *TriCoast*, the court, nevertheless, determined this functional reasoning "'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.'" (*TriCoast*, *supra*, 15 Cal.5th at p. 789.)

Furthermore, the court concluded that, when a party denied relief from waiver fails to seek writ review before trial, it is appropriate to require a showing of prejudice on appeal. (*TriCoast*, *supra*, 15 Cal.5th at p. 799.) Thus, "a litigant that might have been able to establish error on interlocutory writ review, and thus secure a writ compelling the trial court to conduct proceedings differently typically will not be able to secure relief on direct review of the court's judgment without demonstrating both error in the conduct of the proceedings and 'prejudice occasioned by the error.'" (*Id*. at p. 786.) The court, therefore, endorsed a more exacting standard of review when a party fails to bring a writ petition before trial.

Some observers might find this result harsh given the plaintiff's request for relief "simply could not have been made earlier than it was" because of the defendant's "11th-hour" waiver on the morning of trial. (*TriCoast*, *supra*, 15 Cal.5th at p. 784.) As has been observed, practically, "there [is] no time to file a petition for writ of mandate" on the "morning of the first day of trial." (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Nevertheless, the court rejected this notion, instead faulting the plaintiff for not asking the trial court for a continuance at that late stage. (*TriCoast*, *supra*, 15 Cal.5th at p. 790, fn. 8.) But the court's displeasure with plaintiff for failing to seek a continuance on the morning of trial also seems harsh given its statement that relief from waiver can be denied if "being used as a 'pretext to obtain continuances and thus trifle with justice …'" (*Id*. at p. 780.)

Finally, it is noteworthy, and unfortunate, that the court imposed a requirement to demonstrate prejudice in an appeal from a final judgment without providing guidance to most benefit appellate courts. The court deemed the "nature and scope of the necessary showing" required to establish "how the discretionary denial of relief from jury waiver caused actual prejudice" is "beyond [its] inquiry." (*TriCoast*, *supra*, 15 Cal.5th at pp. 789-790.) And it "express[ed] no view" about whether showing prejudice should be required if a party seeks but fails to obtain writ relief and must therefore resort to an appeal in any event. (*Id*. at p. 790, fn. 8.)

LIGHTSPEED WRIT PETITIONS OR MISSION IMPOSSIBLE ON APPEAL

Following the *TriCoast* decision, the state of jurisprudence on jury trial waivers can be summarized as follows: Trial courts, although seemingly still bound to the zealous defense of the right to a jury, no longer must weigh the interests of the opposing party or the court before denying a litigant relief from waiver. It is not clear what public policies are served by this liberalization of trial court discretion. But, without necessarily balancing a party's interest in having jury trial against those of either the opposing party or the court, trial courts seemingly will be able to more routinely deny relief from a jury waiver. This landscape will likely result in jury trials being denied more frequently, and greater involvement of the appellate courts in reviewing such orders.

As for appellate challenges, those made by extraordinary writ petition before trial will generally not collide with the doctrine of harmless error. Because such challenges precede a final judgment, the harmless error rule for reversal of a judgment will not apply. (See *TriCoast*, *supra*, 15 Cal.5th at pp. 785-786, 790.)

Appeals from a final judgment, however, will require an appellant to affirmatively demonstrate prejudice from proceeding with a trial with no jury. (*TriCoast*, *supra*, 15 Cal.5th at p. 790.) Failure to make this additional showing will render any trial court error irrelevant, even if clearly demonstrated. Thus, an abuse of discretion seemingly would not result in reversal, even if a trial court denies relief from waiver simply because, for example, it is concerned about the time needed to conduct voir dire or prepare jury instructions. This potential is illustrated by the court's observation in *TriCoast* that it was "unclear whether the trial court exercised its discretion in a manner consistent with the law" and that it could "only speculate whether the trial court had other, unstated reasons, for ruling as it did, and if so, what they might be." (*Id*. at pp. 783-784.) The potential for an abuse of discretion "[u]ltimately [was] unnecessary for [the Court] to decide" because the need to demonstrate prejudice meant "reversal [was] not warranted in any event." (*Ibid*.)

The reality, however, is that appellate courts have already recognized demonstrating prejudice from the deprivation of a jury is virtually impossible. And the court declined to explain how an appellant would, or could, successfully make such a showing. (*TriCoast*, *supra*, 15 Cal.5th at pp. 789-790.) Thus, parties who fail to seek writ relief — and perhaps even those who do but are unsuccessful — will be faced with an essentially impossible mission on appeal. For this reason, "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.) As a result, appellate courts should expect to receive writ petitions on this issue in greater numbers.

But, as a universal principle in the appellate world, writ petitions are no guarantee of relief. Extraordinary writ relief is "at the discretion of the reviewing court." (*TriCoast*, *supra*, 15 Cal.5th at p. 785.) Appellate courts are "normally reluctant" to grant such petitions. (*City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803.) Even decades ago, and perhaps in even greater numbers today with an increase in litigation, "[a]pproximately 90 percent of petitions seeking extraordinary relief are denied." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271.) And even demonstrated "[e]rror by the trial judge does not of itself ensure that a writ petition will be granted." (*Id*. at p. 1269.) Perhaps for these reasons, a decision disapproved by the court observed writ relief is "hardly adequate protection" for the basic and fundamental right to a jury trial. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 16.) Thus, a crucial lesson to be learned from the *TriCoast* decision is that orders denying relief from a jury waiver might now be virtually insulated from meaningful appellate review. Either the discretionary nature of writ relief or the impossible showing of prejudice required on appeal will doom most appellate challenges. Therefore, the necessity of preserving a jury demand and avoiding waiver cannot be overstated.

So, what should litigants and counsel do to avoid waiver and protect a party's right to a jury? First, demand a jury trial right away, ideally with your initial pleadings, but no later than "the time the cause is first set for trial." (See Code Civ. Proc., § 631, subd. (f)(4).) Second, pay the $150 deposit as soon as possible, but no later than the initial case management conference, although some minor exceptions to this deadline apply. (See *id*., subds. (b), (c), (f)(5).) And do not depend on the other side to pay the deposit; at least one party on each side of a case must pay it. (See *id*., subd. (b).) Third, make sure to deposit costs for the jury's fees and mileage on the second and each successive day of trial. (*Id*., subds. (e), (f)(6).) Fourth, although this should go without saying, do not fail to appear for trial. (See *id*., subd. (f)(1).) Finally, do not waive the jury prematurely, even if a jury trial is not desired. Keep track of an opposing party's waiver and, if a bench trial is desired, the option of affirmatively waiving the jury down the line is available. (See *id*., subd. (f)(2)-(3).)

Furthermore, if, despite best efforts, a jury is waived, immediate action is critical. Move for relief at the earliest possible time. Make a record and, if it is not obvious that the waiver was intentional, repeatedly inform and emphasize to the trial court the waiver was a mistake. Otherwise, the waiver may be wrongly characterized as intentional, and a request for relief may fall on deaf ears. And provide concrete examples of how you would have prepared differently for a bench trial to demonstrate that the denial of a jury trial will cause prejudice. If the trial court nevertheless denies relief, be prepared to file a writ petition without delay. Ask for a continuance, even if the trial court is unlikely to grant one. Also, having your appellate counsel on speed dial and starting on a writ petition even before it may become necessary might be wise.

One solution to this new landscape may be a legislative one. Some appellate challenges are considered exclusive "statutory writs," meaning they can be raised only through a writ petition. Examples include challenges to (1) an order denying a motion to quash service of process for lack of personal jurisdiction (Code Civ. Proc., § 418.10, subd. (c)); (2) a ruling on a motion to disqualify a judge (Code Civ. Proc., § 170.3, subd. (d)); (3) the grant or denial of a motion to expunge a lis pendens (Code Civ. Proc., § 405.39); and (4) orders compelling or refusing disclosure of public documents (Gov. Code, § 7923.500, subd. (a)). Although it is difficult to say for sure, express statutory authorization for challenging the denial of relief from waiver in this manner could alter the extraordinary nature of such petitions and increase their rate of success.

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