

JAMESON v. DESTA

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Supreme Court of California

December 1, 2015

Reporter

2015 CA S. Ct. Briefs LEXIS 2627

BARRY S. JAMESON, PLAINTIFF AND PETITIONER, v. TADDESE DESTA, DEFENDANT AND RESPONDENT.

Type: Petition for Appeal

Prior History: After a Decision by the Court of Appeal for the Fourth District, Division One. Case No. D066793. Affirming a Judgment of the Superior Court of San Diego County. The Honorable Joel M. Pressman. Superior Court No. GIS9465.

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Title

Petition for Review

Text

In 2002, Barry Jameson-an indigent *pro se* plaintiff-sued Defendant Tadesse Desta for providing negligent medical treatment while Jameson was in prison. On three separate occasions over ten years, the San Diego County Superior Court dismissed Jameson's case. Each time, however, the Court of Appeal reversed. *Twelve years* after filing his complaint, Jameson was led to believe he had finally secured his right to bring his case to trial. But yet again, the superior court prevented his claims from reaching a jury. It granted Desta's oral motion for nonsuit based only upon Jameson's opening statement.

This time, however, the superior court's actions deprived Jameson of even effective recourse to a fourth trip to the Court of Appeal. A few days before the commencement of trial, the trial court issued a minute order informing Jameson that an official reporter would not be present for his trial, invoking the San Diego Superior Court's policy of categorically refusing to provide official reporter [*2] services for civil trials. Instead, under that policy, Mr. Jameson was required to secure and pay for the services of a private reporter *pro tempore*-services he clearly could not afford.

At the outset of his case, Jameson had been granted a fee waiver under [Government Code section 68631](#). Under recently enacted [Government Code section 68086](#), subdivision (b)-which requires that reporters' fees "shall be waived for a person who has been granted a fee waiver under [[Government Code section 68631](#)]"-he was entitled to an official reporter free of cost. But through its policy, the trial court rendered the benefit of section 68086, subdivision (b) nugatory. What the Legislature gave, the superior court took away.

The Court of Appeal affirmed. (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, Slip. Op. at 14-15 (*Opinion*).)¹ It compounded the superior court's error by holding that *Government Code section 68086*, subdivision (b) "does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case." (*Ibid.*) The court ruled that under such circumstances, every [*3] litigant, even an indigent one, must arrange and pay for the services of a private reporter *pro tempore*, under *California Rules of Court, rule 2.956*. (*Ibid.*) Because Mr. Jameson suffered the arbitrary misfortune of filing his action in a county that-through no fault of his own-categorically refuses to provide an official reporter for civil trials, the Court of Appeal held that he forfeited any appeal of the nonsuit for want of a proper reporter's transcript to provide a record on appeal. (*Id.* at 17-18.)

ISSUES PRESENTED FOR REVIEW

The issues presented for this Court's review are:

1. Jameson has been granted a fee waiver under *Government Code section 68631*. Did the Court of Appeal err by permitting the trial court's policy to never provide official reporters in civil trials to absolve the court of its obligation under Government [*4] Code Code § 68086 subdivision (b) to waive reporter's fees for fee waiver litigants?
2. Legislatively established policy and longstanding precedent from this Court requires courts to exercise their discretion in a manner that protects the rights of indigent litigants with colorable claims to access the courts to redress their grievances. Did the Superior Court abuse that discretion by adopting a court reporter policy that has the practical effect of categorically denying all indigent litigants access to court reporters, and thus their practical ability to make a record for appeal?

THE IMPORTANCE OF THE ISSUES

This case presents a legal question of profound importance to the administration of justice in California. (*See Cal. Rules of Court, rule 8.500(b)(1)*.) Each year, thousands of indigent litigants seek civil redress in California's courts. Already, the odds are stacked against them: unable to afford a lawyer, they face represented litigants and often complex and burdensome court rules alone.

In 2013, the Legislature amended the statutes governing court reporter fees to require that court reporters' fees "shall be waived for a person who has been granted a fee waiver [*5] under Section 68631" consistent with long-standing California law designed to ensure "access to the courts without regard to [a person's] economic means." (*Gov't Code, § 68086*, subd. (b) (hereinafter section 68086(b); *Gov't Code § 68630*)). The Court of Appeal's decision in this case, however, rendered that statute almost a nullity-holding that it requires waiver of the reporter's fee *only if there is already an official reporter present*. (*Opinion* at 14-15).

That ruling arbitrarily imperils the right of appeal for a huge swath of indigent litigants and presents an exceptionally significant issue for this Court's review. Moreover, by preventing fee-waiver litigants from effectively appealing adverse rulings for no reason other than their inability to pay a court reporter's appearance fee, the Court of Appeal's decision runs afoul of longstanding precedent of this Court obligating the courts of this state to exercise their discretion in favor of protecting access to the courts by indigent persons. Only the intervention of this Court can prevent the Court of Appeal's published decision from becoming an insurmountable obstacle for poor and imprisoned litigants to access the [*6] appellate process.

This Court should grant review.

STATEMENT OF THE CASE

I. Jameson's Thirteen-Year Odyssey through the Courts.

Jameson has been nothing if not tenacious. In 2002, he sued Desta, a prison doctor, in San Diego Superior Court, alleging negligent medical treatment for Hepatitis C while Mr. Jameson was incarcerated. (*Opinion* at 4.) The operative counts of

¹ The opinion of the Court of Appeal, District Four, Division One, is appended to this Petition as Exhibit A. (*See Cal. Rules of Court, rule 8.500(b)(4)*.)

his complaint litigated by the parties allege breach of fiduciary duty through lack of informed consent as well as professional negligence. (*Id.* at pp. 4-5.)

Over the next thirteen years, Jameson's case followed a circuitous but regular pattern. The superior court would find some reason to dismiss his case, only to be reversed by the Court of Appeal.

In 2005, the superior court dismissed Jameson's complaint for lack of diligent service, despite that three years earlier, Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Jameson v. Desta (July 2, 2007, D047284), 2007 WL 1885104* at *6 opn. mod. July 26, 2007 [nonpub. opn.] (*Jameson I.*)) The Court of Appeal reversed in an unpublished opinion. [*7] (*Id.* at p. 9.)

On remand, the superior court again dismissed when Jameson-still incarcerated-failed to appear at a telephonic case management conference, despite evidence that his nonappearance resulted from prison officials denying him access to the telephone. The Court of Appeal again reversed, holding that the superior court had abused its discretion by denying Jameson of "meaningful access to the courts." (*Jameson v. Desta (2009) 179 Cal.App.4th 672, 684 (Jameson II.)*)

On further remand, the superior court granted summary judgment in favor of Desta, finding that Jameson had not raised triable issues related to causation. Yet again, the Court of Appeal reversed. (*Jameson v. Desta (2013) 215 Cal.App.4th 1144 (Jameson III.)*) On the merits, it ruled that Desta had not met his initial burden on Jameson's implied consent claim and that Jameson had sufficiently raised triable issues as to causation on his negligence claim. (*Id.* at pp. 1164-74.) The Court of Appeal further determined that the trial court improperly permitted Desta's lawyer to take an *ex parte* deposition of Jameson's medical expert, over Jameson's objections. [*8] (*Id.* at pp. 1174-76.) The court noted that the trial judge's statements in overruling Jameson's objections were "entirely inconsistent with [the] mandate" "that an indigent incarcerated litigant has a right to prosecute a bona fide civil action on his own behalf and to be afforded meaningful access to the courts in doing so, and that the trial courts are to ensure that this right is protected." (*Id.* at p. 1176.) The court was sufficiently concerned by the superior court's comments that it found it necessary to "remind the trial court of its obligation to 'ensure indigent prisoner litigants are afforded meaningful access to the courts'["] (*Id.* at p. 1149.)

Finally, with the case before it a fourth time, the superior court set the matter for jury trial on April 21, 2014. (See RA 232.) A minute order reflecting a hearing on April 18, 2014-with Jameson appearing by telephone-states that the court notified the parties that "the Court no longer provides a court reporter and that the parties have to provide their own court reporters for trial."² (*Ibid.*) After trial was continued twice to address pending motions (RA 250-51, 252-53) [*9] a civil jury trial commenced on April 28, 2014. (RA 254.)

After a one-hour-long jury selection process, Jameson, *pro se* and appearing via telephone from prison, gave his opening statement. (RA 257.) No court reporter, official or otherwise, was present to transcribe the proceedings.³ After he gave his own opening statement, Desta moved for nonsuit. (RA 257, *see Opinion* at 6.) The superior court granted the motion, dismissing the case for a fourth time, ruling that "Jameson did not establish causation in his opening statement," (RA 257, *see Opinion* at 16), in significant tension with the appellate court's most recent ruling in *Jameson III.* (*Cf. Jameson III, supra, 215 Cal.App.4th at p. 1168* [holding that "Jameson raised a triable issue of fact with respect to both the standard of care and causation."].) Judgment was entered on July 31, 2014. (RA [*10] 259-60.)

II. The San Diego Superior Court's "No Official Reporters" Policy.

"At a hearing 10 days prior to the commencement of the jury trial, the trial court informed the parties that 'the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial.'" (*Opinion* at

² The hearing itself was not reported. (RA 231.) This is the record's only reference that the superior court would not be providing a reporter.

³ Mr. Jameson's *pro se* opening brief to the Court of Appeal asserted that at the beginning of trial, Defendant indicated that he would not be having the trial reported. (Jameson's Appellant's Br. at p. 42.) Jameson's brief stated that he orally objected to the court's refusal to provide a reporter at that time, but that his objections were overruled. (*Ibid.*) The trial court's minute order does not reflect any objection or ruling on it (RA 256-257) and without a transcript, there is no way to know what was said.

11 [quoting RA 232].) ⁴ Indeed, since 2013, as a matter of official court policy, the San Diego Superior Court has not provided official court reporters [*11] in civil, family, or probate matters, including all civil trials. (See S.D. Super. Ct. Form ADM-317, *Policy Regarding Normal Availability and Unavailability of Official Court Reporters*.) ⁵ The policy affords no exceptions for indigent litigants, even when they have qualified for a fee waiver and no other way to pay for a record. (See S.D. Super. Ct. Form ADM-315, *Official Reporter Pro Tempore Policy* at 2.) ⁶ It specifically states: "In cases where the court no longer provides court reporters, indigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver. *Fee waivers apply only to fees charged by the court. They do not apply to court reporter fees and costs in cases where the court is not providing the court reporter.* Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services." (*Ibid*, [emphasis added].) By outsourcing all civil trial reporting to private reporters, the court has rendered it effectively *impossible* for an indigent civil litigant to create a trial record, fee waiver or not.

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San Diego's policy is not unusual. Millions of Californians face similar no-official-reporter policies. Among the counties that, like San Diego, do not provide official reporters for most civil proceedings are Los Angeles, San Francisco, Alameda, Fresno, Kern, and Ventura. (See Reed Smith LLP, *Survey of Court Reporter Policies* (2014).) ⁷ On the other hand, had they filed in Santa Clara, San Mateo, or Orange Counties, the court would provide a reporter, at least for trial. (*Ibid*.)

Or if they lived in other states, they might at least be entitled to an official electronic recording. (See generally National Center for State Courts (2013) *Making the Record: Utilizing Digital [*13] Electronic Recording* at p. 7 [noting that some states rely almost exclusively on electronic recording, while others use it in at least some cases where official reporters are unavailable].) ⁸ But California law prohibits the use of electronic recordings in lieu of live transcripts in unlimited civil cases, even as a last resort when no reporter is available. (See [California Court Reporters Assn. v. Judicial Council of California \(1995\) 39 Cal.App.4th 15, 33](#) (CCRA) [invalidating former Cal. Rules of Court, rules 33(e), 891, 892, and 980.3, which permitted electronic recording of trial court proceedings, as inconsistent with statute]). And if there were federal jurisdiction, a federal court would provide *in forma pauperis* litigants with a transcript upon certification that the appeal was not frivolous and the transcript was necessary for appeal. (See [28 U.S.C. §§ 753\(f\) & 1915\(c\)](#).)

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But Jameson-like indigent San Diegans, Angelenos, San Franciscans, Fresnans, and many more Californians-was out of luck. Incarcerated and indigent, he could not afford to pay for the services of a private reporter *pro tempore*, the only permissible way under the trial court's policy for him to make an adequate record for appeal.

III. The Published Opinion of the Court of Appeal.

Jameson timely appealed the judgment of nonsuit, as well as several other orders of the trial court. (AA 1207-09.) On the nonsuit, Jameson argued that the trial court erred in ruling that based on his opening statement, he could never establish causation. (*Opinion* at 17-18.) Jameson's arguments included several claims of error related to the trial court's decision, such as its refusal to permit Jameson to admit his own expert's testimony by deposition, its refusal to permit Jameson to establish causation by relying on Desta's expert or the doctrine of *res ipsa loquitur*, and various issues regarding the trial court's approved jury instructions. (*Ibid*.)

The Court of Appeal, however, declined to reach the merits of these arguments, finding that "none of [them are] cognizable in the [*15] absence of a reporter's transcript." (*Id. at 18.*) Citing an earlier case, the court explained that "a[n] appellant

⁴ The hearing occurred on April 18, 2014, which was only three days before the scheduled onset of the trial. (See RA 232.) As noted, after two continuances, jury selection began on April 28, 2014, which was ten days after the trial court's admonishment about the lack of official reporters.

⁵ Attached as Ex. B, per Rule of Court, rule 8.500(e)(1)(C).

⁶ Attached as Ex. C, per Rule of Court, rule 8.500(e)(1)(C).

⁷ Available at http://www.reedsmith.com/files/uploads/alert-attachmentsZalert14228_attach.pdf

⁸ Available at [http://www.ncsc.org/Services-and-Experts/Court-reengineering/\[Tilde\]/media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx](http://www.ncsc.org/Services-and-Experts/Court-reengineering/[Tilde]/media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx)

who fails to provide a reporter's transcript on appeal is precluded 'from raising any evidentiary issues on appeal.'" (*Opinion* at 17 [quoting [Hodges v. Mark \(1996\) 49 Cal.App.4th 651, 657](#)].) "Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (*Ibid.*) As "the record on appeal does not contain a reporter's transcript[,] Jameson is therefore precluded from obtaining a reversal of the trial court's ruling granting Desta's motion for nonsuit." (*Id.* at p. 18.)

As to why he lacked the record he needed to preserve his appeal, Jameson argued: (1) that the trial court erred by "waiting until trial started to disallow a court reporter"-depriving him of an opportunity to make a record on the issue-and (2) that [Code of Civil Procedure section 269\(a\)\(1\)](#) and section 68086(b)-which requires that a court reporter's fee "shall be waived for a person who has been granted a fee waiver under Section [*16] 68631"-required the court to provide him with an official reporter free of charge. (Jameson's Appellant's Br. at 43.)

The Court of Appeal rejected these arguments. On the timing, the court found that the admonition reflected in the court's April 18, 2014 minute order was adequate, particularly because Jameson's brief had not specifically argued that the trial court did not properly follow Rule of Court, rule 2.956, which addresses the court's obligation to provide notice of the unavailability of official reporters. (*Opinion* at 14 & n.10.) And as to Jameson's right to a free reporter, the court held that section 68086(b) applies only to a waiver of fees for official reporters. (*Id.* at p. 14.) According to the court, it does not, however, require a free reporter when the superior court does not provide official reporters, and instead requires parties to secure the services of private reporters *pro tempore*. (*Id.* at p. 15.) Relying on Rule of Court, rule 2.956(c) and the superior court's official policy, the court held that "it is a 'party's responsibility to pay the reporter's fee' where an official court reporter is not provided by the court," even when that party is an [*17] indigent litigant who has been granted a fee waiver. (*Ibid.*)⁹

Rejecting Jameson's other arguments, the Court of Appeal affirmed the judgment in full in an unpublished opinion issued on October 14, 2015. (*Id.* at p. 21.) On October 20, 2015, the acting presiding justice on the panel ordered the opinion certified for publication. (*Id.* at p. 22.)¹⁰ The court's decision became final on November 19, 2015. ([Cal. Rules of Court, rule 8.264\(b\)\(3\)](#).) This petition is timely. ([Cal. Rules of Court, rule 8.500\(e\)\(1\)](#).)

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REASONS FOR GRANTING REVIEW

The Court of Appeal's published opinion in this case sanctions a categorical "no official reporters" policy that effectively precludes indigent litigants like Jameson from appealing adverse judgments arising from their civil trials. Moreover, the decision is contrary to the express Legislative policy of this state, the statutory authority permitting waiver of reporters' appearance fees for indigent litigants, and nearly a century of precedent from this Court and the Court of Appeal requiring California's courts to exercise their discretion with utmost solicitude for the rights of indigent persons and prisoners to access the courts, including appellate courts, to redress their grievances.

Review in this case is thus merited. The Court's intervention is necessary, both to secure the uniformity of decisional law regarding the rights of access to civil appeals and because the case presents an issue of profound importance that has heretofore been unresolved by this Court. ([Cal. Rules of Court, rule 8.500\(b\)\(1\)](#).)

I. Unless This Court Grants Review, Indigent Civil Litigants Will Lose the Right to Meaningfully Appeal Adverse Judgments in Civil [*19] Trials.

The Court of Appeal's key holding is that [Government Code section 68086\(b\)](#) "does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court." (*Opinion* at 14-15.)

⁹ Neither rule 2.956 nor the superior court's policies were expressly addressed in Desta's appellate briefing. (*See* Desta's Respondent's Br. at p. 50-53; *cf.* [People v. Alice \(2007\) 41 Cal.4th 668, 671](#).)

¹⁰ Because he believed it to be futile, Mr. Jameson did not request rehearing in the Court of Appeal. (*Accord* [Cal. Rules of Court, rule 8.504\(b\)\(3\)](#).)

When that ruling is combined with the Superior Court's policy of *never* providing official reporters for civil trials, and the settled rule that the lack of a reporter's transcript precludes appellate review of most civil trial decisions,¹¹ the upshot is that indigent civil litigants in San Diego effectively forfeit any right to appeal an adverse judgment rendered after a civil trial.

And that result would not be limited to San Diego. Among the counties that, like San Diego, either never or rarely provide official reporters for civil trial proceedings, are Los Angeles, San Francisco, Alameda, Fresno, Kern, and Ventura. [*20] (See Reed Smith LLP, *supra*, *Survey of Court Reporter Policies*.) If these litigants lived in Santa Clara, San Mateo, or Orange Counties, they would have reporters, at least for trial. (*Id.*) But in most of the State's largest cities—where indigent Californians are most likely to live—the Court of Appeal's decision means that if they are too poor to pay reporters' fees, they are too poor to appeal. In short, the Court of Appeal's published decision locks the doors of the appellate courts of this state to indigent Californians.

II. The Court of Appeal's Decision Conflicts with California's Strong Policy of Ensuring Equal Access to Justice for Indigent and Imprisoned Civil Litigants.

California law recognizes that poor and imprisoned litigants have a fundamental right to access the courts, including the appellate process. The Courts of this state are required to exercise their discretion in crafting their procedures to vindicate the right of access. Although the trial court in this case had means within its discretion to ensure that Jameson could have a reporter present at his trial to create a record for appeal, it took no steps to preserve Jameson's access to the [*21] appellate process. Indeed, it has essentially tied its own hands by enacting a court policy that makes it practically *impossible* for fee-waiver litigants to obtain court reporting services at their civil trials. In doing so, it has run afoul of the clear policies of this state and abused its discretion in denying Jameson access to the courts.

A. California State Law Requires Courts to Exercise Their Discretion in Favor of Ensuring Indigent Litigants' Rights of Access to Justice.

"Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all people enjoy this right." (California Commission on Access to Justice (October 2002) *The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California* Finding A, page 36; see also [Cruz v. Superior Court \(2004\) 120 Cal.App.4th 175, 179.](#)) In 2009, the California Legislature declared as the policy of this state, "[t]hat our legal system cannot provide 'equal justice under law' unless all persons have access to the courts without regard to their economic means." (*Gov't Code*, § 68630, subd. (a)). "California law and court [*22] procedures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees." (*Ibid.*) "Providing access to justice for self-represented litigants is a priority for California courts." ([Cal. Rules of Court, rule 10.960\(b\).](#))

Indeed, California law specifically affords prisoners "a statutory right to initiate civil actions." ([Jameson II, supra, 179 at p. 678](#) [citing [Penal Code, § 2601\(d\)](#)].) "In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action." (*Ibid.*, [quoting [Wantuch v. Davis \(1995\) 32 Cal.App.4th 786, 792](#) (*Wantuch*)].)

These policies have a proud lineage in the decisions of this Court. Nearly a century ago, the Court held that California courts had the inherent equitable power to recognize the right of an indigent person to litigate *in forma pauperis* and bring actions without paying filing fees. ([Martin v. Superior Court \(1917\) 176 Cal. 289, 296](#) (*Martin*); see also [Baltayan v. Estate of Getemyan \(2001\) 90 Cal.App.4th 1427, 1436](#) [*23] (*Baltayan*) (cone. opn. of Johnson, J.). ["Nearly 85 years ago, in *Martin v. Superior Court*, the California Supreme Court proclaimed poverty could not be allowed to deny anyone access to this state's courts" (footnote omitted)].) Through the next seventy years, the Court extended that right in various respects.

Two years after *Martin*, the court held that an indigent could obtain a waiver of statutorily mandated jury fees, even though the statute afforded no express exception. ([Majors v. Superior Court \(1919\) 181 Cal. 270, 274](#) (*Majors*)). Later decisions

¹¹ See generally [Foust v. San Jose Const. Co., Inc. \(2011\) 198 Cal.App.4th 181, 186](#) [collecting cases].

followed suit for other fees. (*Conover v. Hall* (1974) 11 Cal.3d 842, 851 [power to waive statutorily required undertaking to obtain preliminary injunction]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*) [power to waive appellate filing fees]).¹²

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Ferguson is most closely on point. There, the question presented was the “inherent power of an appellate court to waive its own filing fees to accommodate indigent civil litigants[.]” (*Ferguson, supra*, 4 Cal.3d at p. 654.) The Court determined that California courts possess such authority. In reaching that conclusion, the court relied on both the fact that common law courts historically “possessed and exercised the power to permit indigents to appeal in forma pauperis,” and *Martin’s* reasoning that statutes generally permitting the collection of fees should not be read to divest courts of the power to permit parties to proceed *in forma pauperis*. (Id. at pp. 654-56.) *Ferguson* did not, however, reach the issue of whether an *in forma pauperis* litigant had the right to obtain a free transcript on appeal. (Id. at pp. 653-54; see also *Jara, supra*, 21 Cal.3d at p. 184 [recognizing that *Ferguson* did not reach the issue].) The court did, however, express some skepticism about the accuracy of historical analysis from a 1930 Court of Appeal decision that declined to grant a writ ordering a trial court to afford [*25] a free transcript to an indigent plaintiff. (*Ferguson*, at pp. 653-54. [“Although [*Rucker v. Superior Court* (1930) 104 Cal.App. 683] without citation of authority, questioned whether at common law the right to sue in forma pauperis extended to appeals or writs of error, several English cases prior to 1850 (when the common law was incorporated into our jurisprudence) had expressly recognized such a right.”].)¹³

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On several occasions, the Court has also acted to protect the rights of indigent persons to obtain *in forma pauperis* status in the face of challenges to their indigency. (-See *Earls v. Superior Court* (1971) 6 Cal.3d 109, 117; *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165 (*Isrin*).) In particular, these cases rejected rules that have “the practical effect of restricting an indigent’s access to the courts because of his poverty[.]” (*Isrin, supra*, 63 Cal.2d at 165.). Such rules “contravene[] the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis.” (*Ibid.*)

And with respect to prisoner litigants, the Court has held and subsequently reaffirmed—that “as a matter of due process and equal protection under both the federal and California Constitutions an indigent prisoner who is a defendant in a bona fide legal action threatening his interests is entitled to access to the courts to be heard in his defense.” (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 200 (*Yarbrough*) [quotation omitted]; [*27] see also *Payne v. Superior Court* (1976) 17 Cal.3d 908, 924 (*Payne*). Because access is a fundamental right, “[t]he state has the burden of demonstrating a compelling state interest to justify the infringement.” (*Payne, supra*, 17 Cal.3d at p. 919.)¹⁴

Ultimately, the Court determined that only a compelling interest may justify denial of a prisoner’s right of access to the courts. (See *id.* at pp. 919-22 [rejecting various interests such as safety and rehabilitation as non-compelling]; see also *Earls, supra*, (1971) 6 Cal. 3d at pp. 113-14 [“[T]he broad policy of discouraging [*28] frivolous litigation and providing

¹² Cf. *Jara v. Mun. Court* (1978) 21 Cal.3d 181, 186 [4-3 decision holding that small claims courts were not required to provide interpretive services because other resources were available to protect their ability to participate in the small claims process].

¹³ *Rucker* and its progeny (see *City of Rohnert Park v. Superior Court* (1983) 146 Cal.App.3d 420, 427 [collecting cases]) have no bearing on Jameson’s appeal in this case because Jameson’s appeal addresses only the issue of the *court reporter’s appearance fee*, not the actual costs of preparing an appellate transcript. “[C]ourt reporter fees are entirely different expense than transcription fees and must be paid whether parties order transcripts or not[.]” 7 Witkin, California Procedure (2015 online ed.) Judgment, § 135, p. 670 [citing *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 58].)

The state maintains a Transcript Reimbursement fund to assist indigent appellants in paying transcript fees. (See *Bus. & Prof. Code, § 8030.6*.) That fund, however, compensates for *transcript preparation fees*, not the *court reporter appearance fees* at issue in this case. (*Ibid.*) Under the Court of Appeal’s reasoning, Jameson will never be able to apply for Transcript Reimbursement because he was financially unable to secure the attendance of a reporter in the first place.

¹⁴ *I.e.*, the right of court access for prisoners is a matter of strict scrutiny. (See generally *In re Marriage Cases* (2008) 43 Cal.4th 757, 784 [explaining standard]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 (*Serrano*) [classification by wealth, when used as the basis of denying fundamental interests, subject to strict scrutiny].)

financial support for the judiciary does not justify depriving indigents of access to the courts[.]”). Trial courts are thus required to exercise their discretion in as informed a manner as possible to effectuate the prisoner’s right of access to the courts. (*Yarborough, supra, 39 Cal. 3d at p. 207.*) At least in some cases where an imprisoned litigant is the defendant in civil litigation, that may require the appointment of counsel. (*Ibid.*)

Yarborough is essentially the Court’s last word on these issues.¹⁵ But in the ensuing years, a number of Court of Appeal cases have examined the line of cases running from *Martin* to *Yarborough*, applying them in novel contexts. These cases generally stand for the proposition that trial courts must exercise their discretion in favor of preserving the rights of indigent and imprisoned litigants to access the courts.¹⁶

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Wantuch, supra, 32 Cal.App.4th 876, is particularly instructive. There, an indigent prisoner had sued his defense attorney for malpractice in his criminal case. (*Id. at p. 790.*) He requested appointment of counsel, but was denied. (*Id. at p. 791.*) A year into “actively participating] in the prosecution of the action,” plaintiff failed to appear at a status conference. (*Ibid.*) His case was dismissed for lack of diligent prosecution, and an \$ 82,000 judgment was entered against him on the defendant’s cross-claim. (*Ibid.*)

The Court of Appeal recognized that the case fundamentally implicated the right of prisoners to access the courts. (*Id. at p. 792.*) It began its analysis by explaining that this Court had previously held in *Yarborough* and *Payne* that an “indigent prisoner who is a *defendant* in a bona fide civil action threatening his or her personal or property interests has a federal and state constitutional right, as a matter of due process and equal protection, of meaningful access to the courts in order to present a defense. (*Ibid.*) For similarly situated *plaintiffs*, the court explained [*31] that the *statutory* right to initiate actions currently codified in *Penal Code section 2601*, subdivision (d)¹⁷ was of similar dimension, and carried with it “a right of meaningful access to the courts to prosecute the action.” (*Ibid.*)¹⁸ It followed that “[a] prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party

¹⁵ On several occasions, the Court, in other contexts, has more recently referenced the right of access to the courts by indigent litigants. (See *Silverbrand v. Cnty. of Los Angeles*, (2009) 46 Cal.4th 106, 121 (*Silverbrand*) [extending prison mailbox rule to civil cases]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1353 (*Elkins*) [invalidating local rule requiring direct testimony in family law cases to be provided by declaration].)

¹⁶ See *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 436 [requiring implied indigent-litigant exception to *Code Civ. Proc., § 1030*’s requirement that out-of-state plaintiff post costs bond]; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1485 (*Apollo*) [trial court abused its discretion in granting summary judgment without ensuring prisoner plaintiff rights of access were vindicated]; *Jameson II, supra, 179 Cal.App.4th at p. 864* [trial court abused its discretion in dismissing Jameson’s case due to nonappearance on telephonic hearing that was not prisoner’s fault]; *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 642 (*Hoversten*) [trial court abused its discretion by failing to consider means by which imprisoned father could meaningfully participate in hearing concerning visitation rights]; *Wantuch, supra, 32 Cal.App.4th at p. 794* [similar facts as *Jameson II*]; see also *Garcia v. Santana* (2009) 174 Cal.App.4th 464 (opn. of Zelon, J., for the court, joined by Woods, J., cone, in judgment) [relying on right of access cases in holding that trial court could exercise its discretion to give a zero dollar attorney fee award against an indigent litigant]; *Baltayan, supra, 90 Cal.App.4th at 1436* (cone. opn. of Johnson, J.) [same holding as *Alshafie*].

¹⁷ At the time, the relevant provision was codified at subdivision (e). (See *Wantuch, supra, 32 Cal.App.4th at p. 792 fn.3.*)

¹⁸ The full extent of an indigent and imprisoned plaintiff’s *constitutional* rights to access the appeals process has never been fully explored in California. (See *Ferguson, supra, 4 Cal.3d at p. 657 fn. 6* [declining to reach equal protection and due process questions].) Given the long-recognized fundamentality of the right of access to the courts, (see generally *In re Allison* (1967) 66 Cal.2d 282, 288) and this Court’s recognition that wealth is a suspect classification when it comes to access to fundamental rights, (see *Serrano, supra, 5 Cal.3d at 597*) there can be little doubt that there are substantial state constitutional interests at play. And given the sheer arbitrariness of effectively limiting access to the appellate process based on an appellant’s poverty and the county in which he filed his complaint, the superior court’s policy raises substantial federal equal protection and due process concerns as well. (See *Lindsey v. Normet* (1972) 405 U.S. 56, 77 [“When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.”]; *Adsani v. Miller* (2d Cir. 1998) 139 F.3d 67, 77 [“[Principles of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants.”].) Although Jameson’s appeal is likely resolvable on narrower nonconstitutional grounds, the fact that denial of his right to access implicates serious constitutional questions is cause enough to construe his statutory and common law rights broadly, and any infringements on them as

to a bona fide civil action threatening his or her personal or property interests." (*Ibid.*) "Meaningful access to the courts is the 'keystone' of an indigent prisoner's right to defend against and prosecute bona fide civil actions." (*Ibid.*)

[*32]

If those two criteria-indigency and a bona fide action-are met, courts are obligated to ensure that meaningful access is preserved. (*Ibid.*) "A prisoner does not have the right to any particular remedy." (*Id.* at p. 793.) Relying on the analysis in *Yarbrough*, however, the court held that a trial court must take all of the appropriate facts into account and fashion an "appropriate remedy to secure access in the exercise of its sound discretion." (*Id.* at pp. 793-94.)

As the Court of Appeal would later explain in *Apollo* "[g]enerally, a trial court has discretion to choose among [various] remedies in safeguarding a prisoner litigant's right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests. (*Apollo, supra, 167 Cal.App.4th at pp. 1483-84* [citing *Yarbrough, supra, 39 Cal.3d at pp. 200-201* and *Wantuch, supra, 32 Cal.App.4th at pp. 793-794*].) But "a trial court does *not have discretion to choose no remedy* in cases where the prisoner's civil action is bona fide and his or her access to the courts is being impeded." (*Id.* at p. 1484; *see also* [*33] *Jameson II, supra, 179 Cal.App.4th at p. 683* [quoting language].)

* * *

Choosing no remedy is precisely what occurred in Jameson's case. The court was faced with claims from an indigent prisoner. The claims were sufficiently bona fide to merit three prior reversals on appeal, including the reversal of a summary judgment on the *identical issue on which the trial court granted defendant's nonsuit.* (*Jameson III, supra, 215 Cal.App.4th at p. 1164.*) But the trial court in this case did *nothing at all* to ensure that Jameson had meaningful access to the appellate process following the fourth dismissal of his case. It instead relied on its policy of *never* providing official reporters in civil trials to deny him any effective access at all.

B. State Law Afforded the Trial Court in This Case Ample Discretion to Protect Jameson's Right to Access the Civil Appeal Process.

It did not have to happen this way. Nothing in the state law addressing the compensation of court reporters prohibited the superior court from having Jameson's trial reported with an appearance fee waiver.

"For more than a century, state law has provided that the official record [*34] of superior court proceedings be taken down in shorthand." (*CCRA, supra, 39 Cal.App.4th at p. 18.*) "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings." (*Code Civil Proc., § 273(a).*) The Code of Civil Procedure sets out California's strong policy that every case should be transcribed in order to preserve a record of proceedings:

An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer, in the following cases: (1) In a civil case, on the order of the court or at the request of a party ...

(*Code Civ. Proc., § 269(a).*)

"[S]ection 269 *requires* that superior court proceedings be taken down by an official shorthand reporter if a request is made. [*35] " (*CCRA, supra, 39 Cal.App.4th at p. 27* [emphasis original].) The mandatory nature of the provision was made clear in *CCRA*, which held that state law prohibits using electronic recording in lieu of a court reporter in unlimited civil cases. (*CCRA, supra, (1995) 39 Cal.App.4th 33-34* (invalidating Rule of Court that would have authorized electronic recordings narrowly as possible. (See *Elkins, supra, 41 Cal.4th at 1357* [explaining that the rule of avoiding constitutional questions "directs that if reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions." (quotation omitted)].).

as records of proceedings, as inconsistent with [Code Civ. Proc., § 269](#) and other statutes].). Thus, in this State, absent legislative reform, the only way a superior court can fulfil its duties under section 269(a) is to ensure that reporters, either full-time or pro tempore, are available upon request.

"The Government Code also addresses matters pertaining to official reporting of superior court proceedings. The fees and costs of an official reporter are set forth [in section 68086]." ([CCRA, supra, 39 Cal.App.4th at p. 28](#); see also 7 Witkin, California Procedure (2015 online ed.) Judgment, § 135, p. 670 [summarizing reporting fees].) Interestingly, while section 68086 anticipates the parties incurring fees for both official reporters and reporter's pro tempore [*36], the statute says nothing about when the court may permissibly decline to provide an official reporter. Subdivision (a) of section 68086 addresses the calculation and allocation of appearance fees for official court reporters. ([Gov't Code, § 68086](#), subd. (a).) Subdivision (b) states that "[t]he fee shall be waived for a person who has been granted a fee waiver under Section 68631." (*Id.*, subd. (b); see also [Cal. Rule of Court, rule 3.55\(7\)](#) [fee waiver includes waiver of "Reporter's fees for attendance at hearings and trials, if the reporter is provided by the court"].) Subdivision (c) provides that official reporter costs are recoverable as costs by a prevailing party. ([Gov't Code, § 68086](#), subd. (c).) And subdivision (d) empowers the judicial council to adopt rules to ensure "(1) That parties are given adequate and timely notice of the availability of an official court reporter[;] (2) That if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefor recoverable as provided in subdivision (c)[; and] (3) That if the services of an official pro [*37] tempore reporter are utilized pursuant to paragraph (2), no other charge shall be made to the parties. (*Id.*, subd. (d).)

Rule of Court, rule 2.956 carries out the instructions of section 68086(d). ([Cal. Rule of Court, rule 2.956\(a\)](#)).¹⁹ Like section 68086, it does not actually dictate when or in what circumstances superior courts should or should not make official reporters available in civil matters. Instead, the rule is addressed only to the methods by which the courts must give notice of the unavailability of official reporters and the steps parties may take if they are unavailable. (*Id.*, subs. (a)-(d).)

[*38]

In particular, the rule requires only that trial courts adopt and post local policies "enumerating the departments in which the services of official court reporters are normally available, and the departments in which the services of official court reporters are not normally available during regular court hours. If the services of official court reporters are normally available in a department only for certain types of matters, those matters must be identified in the policy." (Cal. Rules of Court, rule 9.256(b)(1).) The policy must be published, either in a local newspaper, by sending it to parties, or by local rule. (*Id.*, subd. (b)(2).)

When all courtrooms do not normally "have the services of official court reporters available for civil trials, the court must require that each party file a statement before the trial date indicating whether the party requests the presence of an official court reporter." (*Id.*, subd. (b)(3).) "If a party requests the presence of an official court reporter and it appears that none will be available, the clerk must notify the party of that fact as soon as possible before the trial." (*Ibid.*)²⁰ For non-trial matters, the unavailability of [*39] an official reporter needs only to "be noted on the court's official calendar." (*Id.*, subd. (b)(4).)

And when an official reporter is not available for a civil trial or hearing, "a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter." (*Id.*, subd. (c).) "It is that party's responsibility to pay the

¹⁹ The text of the rule is out of date. Subdivision (a) states that the "rule is adopted solely to effectuate the statutory mandate of [Government Code sections 68086\(a\)-\(b\)](#) and must be applied so as to give effect to these sections." ([Cal. Rules of Court, rule 2.956\(a\)](#).) The rule was adopted in 1994 and last amended in 2007, before the 2013 bill that enacted the current version of section 68086, including adding the language in subdivision (b) regarding fee waivers. (See Stats. 2013, ch. 454 § 1.) The reference to "sections 68086(a)-(b)" refers to the version of the statute in place in 2007, in which subdivisions (a) and (b) contain requirements that are similar in all pertinent respects to subdivisions (a) and (d) in the current version of the statute. (See [Gov't Code, § 68086](#) (2007).) In its current version, the rule may be in conflict with section 68086(b), in that it does not account for waiver of reporters' fees. It does not appear, however, that the Court needs to resolve that issue in this case.

²⁰ As noted, *ante* at note 3, the record does not reflect that the trial court complied with this notice requirement having given only an oral indication (reflected only in a terse minute order) three days before the scheduled beginning of trial. (RA 231.) The court did not solicit a statement from Jameson regarding whether he demanded an official reporter, as required under Rule of Court, rule 2.956(b)(3).

reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law." (*Ibid.*) In cases where a party provides a reporter and pays his or her attendance fee, the parties will [*40] not be charged the ordinary official reporter's fee in section 68086, subd. (a). (*Id.*, subd. (d).)

In sum, these two key provisions-section 68086 and Rule 2.956-are entirely silent regarding when and how trial courts may decline to provide an official reporter, whose fee is waivable for indigent litigants under section 68086(b). Nor do any of the other myriad statutes governing court reporters address this issue. (*See Gov't Code, §§ 69941, 70043, 70044, 70048* [addressing appointment and compensation of official reporters and reporters *pro tempore*, including specifically in San Diego County].) It is thus clear that these laws vest the superior courts of California with substantial discretion in deciding the circumstances in which an official reporter will be provided in a civil action.

But discretion must not be abused. As the prior section explained, a trial court abuses its discretion when it fails to act to protect indigent litigants' rights of access to the courts. That is particularly the case given section 68086(b)'s requirement that reporter fees shall be waived for indigent litigants.

C. Local Court Rules and Policies That Cabin the State-Granted Discretion [*41] of Superior Courts to Protect the Rights of Indigent Litigants Are Invalid.

In addition to section 68086 and Rule 2.956, the Court of Appeal also relied upon the San Diego Superior Court's official "no official reporters for civil trials" policy. (*Opinion* at 15.) But given the superior court's discretion to determine when to provide official reporters, the court's policy is irreconcilable with settled state law requiring trial courts to exercise their discretion in favor of ensuring the right of indigent litigants to access the courts.

"A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law." (*Elkins, supra, 41 Cal.4th at p. 1351.*)²¹ "Reviewing courts have not hesitated to strike down local court rules or policies on the ground they are inconsistent with statute, with California Rules of Court promulgated by the Judicial Council, or with case law or constitutional law." (*Ibid.*) Moreover, court rules cannot be used to completely frustrate the purpose of higher authorities, such as by sanctioning [*42] loopholes that would render state-imposed requirements meaningless. (*In re Robin M. (1978) 21 Cal.3d 337, 347.*) And when a trial court is permitted by statute to broadly exercise its discretion and account for a full range of factors in rendering a decision, a court rule that purports to cabin that discretion is invalid. (*People v. Hall (1994) 8 Cal.4th 950, 963; see also Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal.App.4th 152, 168; Cortez v. Bootsma (1994) 27 Cal.App.4th 935, 938; cf. Cruz v. Ayromloo (2007) 155 Cal.App.4th 1270, 1275* [local rule purporting to limit trial court's discretion recognized as valid because it contained a savings clause permitting deviation from the rule if "otherwise determined by the court"].)

The superior court's [*43] rule cannot stand under these standards. By categorically refusing to provide official reporters in civil trials-*specifically including trials for indigent litigants with fee waivers* (*see* Ex. B, at 2)-the policy renders section 68086(b) meaningless. Worse, it constitutes an abdication of the trial court's discretion to take necessary measures to ensure that the fundamental and statutory rights of indigent and prisoner litigants like Jameson to access the courts are meaningfully preserved. The superior court has effectively determined to "choose no remedy" as a collective body. (*Accord Apollo, supra, 167 Cal.App.4th at pp. 1483-84.*) In the face of overwhelming authority, the policy cannot be permitted to stand.

This Court has repeatedly rejected the proposition that deprivations of indigents' access to the courts can be justified by the budgetary concerns that animate the superior court's policy. (*Earls, supra, 6 Cal.3d at pp. 113-14; Ferguson, supra, 4 Cal.3d at p. 657.*) As the Court more recently observed in *Elkins*, "[a] common theme in the appellate decisions invalidating local rules, and one that also appears in the [*44] present case, is that a local court has advanced the goals of efficiency and conservation of judicial resources by adopting procedures that deviated from those established by statute, thereby impairing the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding." (*Elkins, supra, 41 Cal.4th at p. 1353.*)

²¹ Superior Court policies are afforded the same treatment as local rules. (*See Wisniewski v. Clary (1975) 46 Cal.App.3d 499, 504.*)

The Court has not hesitated to strike down court rules and policies far less chilling of the right to access to the courts than the superior court's policy here. (See *id. at p. 1354*, [striking local rule requiring direct testimony to be presented by declaration in family law cases as inconsistent with the evidence code and unnecessarily burdensome on often unrepresented family court litigants]; *People v. Pena (2004) 32 Cal.4th 389, 403* [striking appellate court's practice of soliciting waivers of oral argument by suggesting to the parties that the panel had already made its decision and that argument would be unhelpful as inconsistent with the right to oral argument on appeal].) Under the circumstances, the superior [*45] court's policy of refusing to provide official reporters in civil trials is invalid to the extent it denies indigent litigants access to the courts.

CONCLUSION

Because the question presented in this appeal is exceptionally important to the rights of poor and imprisoned Californians to effectively vindicate their rights and because the trial court's decision and its policy are anathema to the venerable rules in this state that put a thumb on the scale of the right to access, the Court should grant review.

Dated: November 30, 2015

Respectfully Submitted,

KIRKLAND & ELLIS LLP

By: /s/ [Signature]

Michael J. Shipley

Attorney for Barry Jameson

CERTIFICATE OF WORD COUNT

I, Michael Shipley, hereby certify that in accordance with *California Rules of Court 8.504(d)*, I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief* including footnotes, is 8,333 words

Dated: November 30, 2015

/s/ [Signature]

Michael Shipley

KIRKLAND & ELLIS LLP

PROOF OF SERVICE

I, Amy D. Palafox, am employed in the County of Los Angeles, State of California. I am over the age [*46] of 18 and not a party to the within action. My business address is Kirkland & Ellis LLP, 333 South Hope St., 29th Floor, Los Angeles, California 90071.

On November 30, 2015, I served the documents listed below on the interested parties in this action as follows:

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

Executed on November 30, 2015, at Los Angeles, California.

/s/ [Signature]

Amy D. Palafox

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